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Creditors' Rights and Security Transactions -- 1960 Tennessee Survey

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CREDITORS' RIGHTS AND SECURITY TRANSACTIONS—1960 TENNESSEE SURVEY

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I. MECHANIC'S LIENS

Two cases involving mechanic's liens were decided during the period under survey. *Rowland v. Lowe*[1] presented the question of the validity of a materialmen's lien against the owner of land subject to a contract of sale which required the purchaser to erect improvements on the land. In order to protect the vendor's lien, which was to be retained in the deed, the contract provided:

> The purchaser obligates himself to pay all sums for labor and materials in the construction of the improvements on said lot, and in no event shall there be any lien on the lot of ground herein contracted to be sold, in favor of any laborer or furnisher of material to such construction.[2]

The purchaser entered into contracts for the construction of the improvements, which were completed. The purchaser defaulted both on the contract of purchase and on the contracts for improvements. Unpaid laborers and materialmen sued for enforcement of liens on the property. A chancery court decision in favor of the lien holder was affirmed.

The general rule is that a vendor's lien has priority over mechanic's liens,[3] but a recognized exception exists where the vendor has by contract imposed on the purchaser a duty to make improvements.[4] Several decisions, including two Tennessee cases, are cited in the opinion in support of the exception.[5] This result is bottomed upon two legal doctrines, estoppel and agency; both are referred to in the opinion in the instant case. Support for estoppel was found in the fact that the vendor inspected construction of the improvements

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1. 326 S.W.2d 681 (Tenn. App. M.S. 1959).
2. *Id.* at 683.
3. 10 THOMPSON, REAL PROPERTY § 5224 (repl. vol. 1957).
4. *Ibid.*
5. Lee v. Gibson, 104 Tenn. 698, 58 S.W. 330 (1900); Ragon v. Howard, 97 Tenn. 334, 37 S.W. 136 (1896).

almost daily and talked to the workmen regularly, but made no mention of his vendor's lien nor of the fact that his contract provided for no liability on his part for the labor or material.

With respect to the clause in the contract prohibiting mechanic's liens on the land, the opinion cites a New York decision to the effect that "such a stipulation in the contract amounted to an attempt to circumvent the statute and defeat the rights given by it to persons furnishing labor and materials and that the Courts would not enforce same against the furnishers of labor and material."[6]

A decision worthy of careful scrutiny is that in *Knoxville Structural Steel Co. v. Jones*.[7] In this case the materialman attempted to enforce a lien against the owner although he had no contract with the owner. Under the statute,[8] liens of this class continue for ninety days after notice to the owner. The chancellor dismissed the bill for enforcement of the lien on the ground that, while an attachment was duly issued within the ninety day period, it was not levied until after expiration of the period. The chancellor further held that complainant could not claim the benefit of a general lienor's proceeding in which there was a timely issuance and levy of an attachment because it never sought to enforce its lien in that proceeding. Both rulings were affirmed on appeal.

With respect to the first point, the court relied on an earlier decision, *Ragon v. Howard*,[9] holding that a lien must be enforced by levy of the attachment as well as its issue within the statutory period during which the lien continues. Some difficulty was presented by the decision in an earlier case, *Reed v. Fuller*.[10] In that case the lien claimant attached the wrong property. After the ninety day period had run, the claimant amended his bill to correctly describe the property, but the chancellor ruled that the lien was lost through lapse of time. In holding for the claimant the court of appeals held that where, during the ninety day period, other lien claimants under a general lienor's bill had properly attached and levied on the property, the property was in the control of the court and subject to claimant's lien even though he had not caused proper attachment and levy within the statutory period. In the instant case, claimant also claimed the benefit of a timely attachment under a general lienor's bill. Claimant did not file under the general bill, but the two cases were consolidated. In denying claimant the benefit of the timely attachment, and distinguishing *Reed v. Fuller*, the court pointed out that in that case claimant filed under the general lienor's bill. As to the consolidation

6. 326 S.W.2d 687, citing Miller v. Mead, 127 N.Y.544, 28 N.E. 387 (1891).
7. 330 S.W.2d 559 (Tenn. App. E.S. 1959).
8. TENN. CODE ANN. § 64-1115 (1956).
9. 97 Tenn. 334, 37 S.W. 136 (1896).
10. 16 Tenn. App. 47, 65 S.W.2d 841 (E.S. 1932).

of claimant's bill with the general lienor's bill in the instant case, which came after the ninety day period had elapsed, the opinion simply states: "The order of consolidation can not be given retroactive effect to save rights already lost."[11] If the running of the ninety day period caused the loss of the lien so that complainant could not have the benefit of the attachment under the general bill, why did it not have the same effect in *Reed v. Fuller*?

II. Automobile Liens

The decision in *Personal Loan & Finance Co. v. Guardian Discount Co.*[12] clarifies the meaning of code section 59-327,[13] which provides that constructive notice of liens or encumbrances on automobiles shall date from the time of "receipt and filing" by the Department of Finance and Taxation of requests for notations of such encumbrances. Plaintiff claimed a prior lien on an automobile by virtue of a chattel mortgage thereon dated February 12. Defendant claimed the automobile under an execution issued and levied on February 20. Plaintiff mailed the chattel mortgage and request for registration on February 14. The mortgage bore two notations, both conceded to have been placed thereon by the department.

> The first notation bore no signature and was as follows:
> 'Feb-17-58 338478 8 00 -1- 1.00'
> The second notation was as follows:
> 'Received for record
> 1958 Feb.24 PM1 14
> /s/Grace W. Casey
> Supervisor of Lien
> Div of Motor Vehicles
> Tenn Dept of Fin & Tax'[14]

In reversing the trial court and the court of appeals, and holding that constructive notice dated from the 17th, the supreme court held that the legislature intended the notice to date from mere notation of receipt, and not from the time the matter was actually written up by the Department of Finance and Taxation.

III. Bankruptcy

A bankruptcy case, *Allender v. Southeast Tractor & Equipment Co.*,[15] ruled upon an interesting evidence question. An involuntary petition in bankruptcy was filed alleging as an act of bankruptcy a preferential transfer by the return of parts and equipment to de-

11. 330 S.W.2d at 562.
12. 332 S.W.2d 504 (Tenn. 1960).
13. Tenn. Code Ann. § 59-327 (1955).
14. 332 S.W.2d 505.
15. 178 F. Supp. 413 (M.D. Tenn. 1959).

fendant by the debtor. Debtor was adjudged a bankrupt, and the order of adjudication contained a finding that the debtor was insolvent on the date of the alleged preference. Later the trustee in bankruptcy brought an action against defendant to recover the value of the returned parts and equipment, alleging the return to be a voidable preferential transfer.

In order to recover, the trustee had the burden of proving that on the date of the return the debtor was insolvent. As evidence on this issue, the trustee offered a certified copy of the order of adjudication. Defendant objected to this evidence, and the objection was sustained.

In a case involving almost identical facts, *Gratiot County State Bank v. Johnson*,[16] the Supreme Court of the United States held that the adjudication was not *conclusive* evidence of insolvency, adding that: "We have no occasion to consider whether the record introduced was admissible merely as evidence of insolvency."[17]

In the instant case, squarely presenting the issue not ruled on in *Gratiot*, the court nonetheless relied upon the Supreme Court decision as a basis for denying admissibility. The opinion states that: "the reasons which argue against treating the adjudication res judicata equally support the proposition that it should not be admissible as evidence,"[18] quoting from an italicizing a portion of the opinion in the *Gratiot* case as follows: "Unless he [a creditor] exercises the right to become a party, he remains a stranger to the litigation and, as such, *unaffected by the decision of even essential subsidiary issues.*"[19]

IV. Power To Reopen Judicial Sales

Richards v. Richards[20] presented the question of reopening bidding and conducting resales of property because of higher bids. In an insolvency proceeding, on petition of the administratrix, real estate owned by the deceased was ordered sold. After the first sale the bid was advanced by the chancellor ordering that the property be resold. At the second sale the highest bid was $14,000.00. Before confirmation of the clerk and master's report a petition was filed by one not a party, offering $16,000.00 and praying that the second sale be set aside. The chancellor dismissed the petition and the complainant and the guardian ad litem of minor children appealed. In a short opinion upholding the chancellor the supreme court indicated that approval of sales is within the discretion of the chancellor, and that in the absence of a showing of fraud or extraordinary circumstances, negligence of bidders should not be rewarded by reopening the bidding.

16. 249 U.S. 246 (1919).
17. *Id.* at 249.
18. 178 F. Supp. 417.
19. *Ibid.*
20. 325 S.W.2d 247 (Tenn. 1959).