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The Common Law Specific Lien

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THE COMMON LAW SPECIFIC LIEN.

The specific or particular common law lien, as it is sometimes called, may be defined as the right to retain the property of another for some particular claim or charge upon the incidental property detained.[1]

The specific lien was derived from the civil law and is founded on justice and equity; it has always been favored by the courts. Best, J., in *Jacobs* v. *Latour*, says, "The doctrine of the lien is so just as between debtor and creditor that it cannot be too much favored,"[2] and Lord Kenyon in *Kirkham* v. *Shawcross*, says, "It has been the wish of the courts in all cases and at all times to carry the lien of the common law as far as possible."[3]

It was first given to that class of persons who by the nature of their business were compelled by law to receive the goods without freedom to discriminate. The next step forward was where the courts gave to the bailee a lien who by skill and labor improved the intrinsic value of the article bailed to him. Before *Chase* v. *Westmore*,[4] no lien was given for work done under a special agreement, but now it is immaterial whether the price is fixed or not.[5] In *Jackson* v. *Cummings*,[6] the idea that there had to be intrinsic improvement in order to create a lien finally exploded.

The specific common law lien may arise in one of the following ways: implications of law, usage or custom, and by contract. The following classes, with a certain limitation, have been given the specific common law lien: common carriers, innkeepers, sellers, finders for reward, landlord under the process of distraint, and every bailee for hire who by his skill and labor has imparted an additional value to the article bailed to him.

The common carrier is perhaps the first great class of persons to be given a specific common law lien. In 1702 Holt, C. J.,

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[1] *Houghton* v. *Matthews*, 3 B. & P. 485, 127 English Reprint 263 (1870).

[2] 5 Bingh. 132, 130 English Reprint 1010 (1828).

[3] 6 Term Reports 17, 101 English Reprint 410 (1794).

[4] 5 Maule & Selu. 180, 105 English Reprint 1016 (1816).

[5] Kent Com. 635, *Blake* v. *Nicholsom*, 3 Maule & Selu., 168, 105 English Reprint 573 (1814).

[6] 5 M. & W. 342, 151 English Reprint 145 (1839).

laid down the rule that the common carrier could retain the goods until he was paid for the charges of carriage.[7] The principal reason for giving the common carrier a lien is because of the liability imposed upon him by law to carry safely. The courts of both England and America have consistently followed the rule laid down in *Skinner* v. *Upshaw*.[8]

The special lien of the carrier covers all the goods he carries under any one consignment,[9] and in the absence of a special agreement he is not bound to deliver the goods until the charges have been paid. It attaches to each and every part of the goods carried and a delivery of part does not defeat the lien on the other for the whole amount.[10] The lien extends to freight advanced to other carriers if the goods have passed over more than one route, but it does not extend to former freight unpaid, nor to overcharges, nor to acts performed entirely outside the carriage contract.[11] The lien also extends to the baggage of the passenger for the amount of his fare.[12]

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[7] *Skinner* v. *Upshaw*, 2 Lord Rym 752, 92 English Reprint 3 (1702).

[8] *Skinner* v. *Upshaw*, *supra*.

[9] *Hale* v. *Barett*, 26 Illinois, 195. (1861).

[10] 52 Kentucky 191.

New Haven & Northampton Company v. *Campbell*, 128 Mass. 104 (1880). The delivery, by a common carrier to a consignee, of a part of goods transported by the former, without payment of freight and advances does not discharge the lien of the carrier upon the remainder for the whole amount of charges, unless it was the intention of the parties to do so; and this is a question of fact for the jury.

[11] *Bissel* v. *Price*, 16 Illinois 408 (1885). In holding that the carrier would recover for freight advanced, says he must see that the previous charges are reasonable before he is authorized to pay them; for it is not every charge, which every extortioner, through whose hands goods in transit may see fit to impose upon, that he is authorized to pay, and thus fix upon the owner a certain liability to that extent.

Briggs v. *Boston & Towell R. Co.*, 6 Allen (Mass.) 246 (1863). The carrier acts as the forwarding agent of the owner (in the absence of special instructions) of the goods in giving directions for their carriage over succeeding lines and the succeeding carrier has a lien even in case of mistake in direction for freight earned by him and for charges advanced to others. *Steamboat Virginia* v. *Kraft*, 25 Mo. 75 (1857).

Where the carrier pays to the shipper charges, which the consignee owes to the shipper, but not in connection with the goods, the carrier can not recover charges of the consignee. *Hingston* v. *Wendt*, 1 Q. B. D. 367 (1876). A ship having gone ashore the captain put H in possession authorizing him as his agent to do what was for benefit of all concerned. Saved the cargo. Held he had a lien as agent's owner, general average, one to whom bills of lading are handed has a right to bind owner.

[12] *Wolf* v. *Summers*, 2 Comp. 631, 170 English Reprint 1275 (1811). Master of a ship held to have a lien on a truck filled with wearing apparel and a writing desk for the passage money of the passenger. But

As to whether the carrier has a lien for demurrage is a question not fully settled. Text writers state [13] and English courts hold that [14] the carrier does not have a lien for demurrage. Some of the American courts have followed the English rule,[15] but the weight of authority is otherwise and the general rule seems to be that independently of contract the carrier has a lien for demurrage.[16]

The innkeeper was given a specific common law lien because he was compelled by law to receive all comers and be responsible for their safety and baggage.[17] The courts in early decisions maintained the idea that the innkeeper would have a lien on the person of his guest and could detain him and strip him of his clothes, but this idea has been totally discarded and they now hold that the lien does not extend to the person or clothes of the guest for that would amount virtually to imprisonment.[18] The lien of the innkeeper extends only to the goods and property of his guest which are received on the faith of the innkeeping relation.[19]

There seems to be no reason, aside from public policy, which can be advanced as to why the warehouseman was given a specific common law lien. In *Stenman* v. *Wilkins*,[20] the court advances as a reason for giving the lien the theory that he adds additional value in practically the same way as the carrier. One

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the carrier or agents are not justified in forcefully taking the baggage or parcel from the passenger and if they use such means they will be guilty of assault and battery. *Bransden* v. *Boston & Albany R. Co.*, 104 Mass. 117 (1870).

[13] Hale on Bailments, pp. 346-347.

[14] *Birley* v. *Gladstone*, 3 Maule & S. 205, 105 English Reprint 587 (1814).

[15] *Nicollette Lumber Co.* v. *Peoples Coal Co.*, 213 Pa. 379, 62 Atl. 1060 (1906).

[16] *Miller* v. *Ga. R. R. & Banking Co.*, 88 Ga. 563, 155 S. E. 316 (1891); *Ky. Wagon Mfg. Co.* v. *Ohio & Miss. Ry. Co.*, 98 Ky. 151 (1895); *Norfolk & W. R. Co.* v. *Adams*, Va. 18 S. E. 673 (1884) Code; *Darlington* v. *Mo. Pac. Ry. Co.*, 99 Mo. App. 1, 72 S. W. 122 (1902); *New Orleans & N. E. R. Co.* v. *George & Co.*, 82 Miss. 710, 35 Sou. 193 (1903). Where demurrage is due on several cars it need not be enforced against each separately, but only enough be detained to satisfy the charge on all.

[17] *Thompson* v. *Lacey*, 3 B. & Ald. 283, 106 English Reprint 667 (1820).

[18] *Sunbolf* v. *Alford*, 3 M. & W. 248, 150 English Reprint 1153 (1838). Can not forcefully take off the clothes of the guest and detain him. *Swan* v. *Bournes*, 47 Iowa 501. Innkeeper given a lien on coat of guest which was part of his ordinary wearing apparel.

[19] Schouler on Bailments, Secs. 326-328.

[20] 7 W. & S. (Pa.) 466 (1844).

adds value by delivering at a different place and the other at a different time. On the same principle that the carrier is given a lien the warehouseman should also have one, but this is fallacious reasoning for the carrier is not given a lien because of added value but because of his liability. The warehouseman is under no special liability, and he does not add specific value, but whether there is a sufficient reason or not to give him the lien, by the great weight of authority he is given one.[21]

If the goods are received under one contract and part are delivered without payment of charges, the warehouseman may hold the balance for charges upon all the goods.[22] In *Devereaux* v. *Fleming*[23] the question arose as to whether the warehouseman would have a claim for charges while he was enforcing his lien. The court said, "In a case like the present when the contract is for storage and for delivery on payment of charges, the right to hold the goods under the original contract does not cease until those charges are paid, released or tendered. This seems to be the law in this case. As no tender or offer to pay has been made the warehouse charges still go on."

The seller has a lien for purchase money and altho retention of possession of the property until payment is essential to the existence of the lien, yet the court in *Buskirk Bros.* v. *Peck*[24] held, that possession may be either constructive or actual, and where goods are counted out and set apart for the purchaser, but not actually delivered into his possession, the title passes and there is sufficient delivery to execute the contract, yet the seller has a lien for the purchase money. The doctrine was referred to and approved in *Wiggain* v. *Mankin*.[25]

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[21] *Scott* v. *Jester*, 3 Ark. 437; *Low* v. *Martin*, 18 Ill. 286; *Stoddard* v. *Crocker*, 100 Me. 450, 62 Atl. 241 (1905); *Low* v. *Martin*, 18 Ill. 286 (1857). Does not know anything about the owner and holds himself out as a publican so to speak, ready to accomodate all to extent of his liability.

[22] *Baker* v. *Brown*, 138 Mass. 340 (1885); *Devereaux* v. *Fleming*, 53 Fed. 401 (1892). 1. (b) Lien attached to any part of the goods for the general balance due under any one contract. The phrase "under one transaction" as used in reference to the specific common law lien does not mean at the same time but pursuant to one contract. Case distinguished from *Somes* v. *Shipping Co.*, 8 H. L. Cas. 338. Test was if all under one contract.

[23] *Devereaux* v. *Fleming*, *supra*.

[24] 57 W. Va. 306, 50 S. E. 432 (1905).

[25] 65 W. Va. 219, 63 S. E. 1091 (1909).

The landlord has a specific common law lien under the process of distress, and while there are very few adjudged cases on this particular phase of the lien, yet it seems that when the point has arisen the courts have uniformly allowed the landlord a lien on the chattels of the tenant under this process. The lien does not arise or exist until the goods of the tenant are seized and levied upon.[26] No lien existed before the statute of 8 Anne C. 14. Before that time the landlord had only the right to distrain. Lord Mansfield, speaking of this particular type of lien in *Williams* v. *Leper*,[27] says that goods remaining on the premises to which the landlord has the right of entry is equivalent to a pledge in his possession.

A finder of a chattel for which a definite reward is offered has a lien thereon for the reward.[28] This lien arises, not from the contract which only gives one the right to the reward, but arises by the implication of law working through the contract relation and gives the finder the right to retain the chattel until the reward offered is paid. Unless there is a definite reward offered, the finder is given no lien.[29] The finder of property on land is a bailee thereof without reward.[30] The owner, however, is liable for necessary expenses of preservation.[31] In such cases, while no lien is given, the courts have held that property which has been lost or stolen, when found, raises an implied promise on the part of the owner to pay for its finding and preservation.[32]

The greatest extension of the specific common law lien has been in the field of bailees for hire who by their labor and skill

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[26] 61 Ill. A. 552. (2) Taylor's, Landlord and Tenant, Sec. 575. Rent is a lien upon the tenant's goods so long as they remain upon the demised premises, and, at common law the right was gone the moment they were removed from the premises, for the landlord had parted with his lien, possession . . . necessary to existence of lien. *Powell* v. *Daily*, 61 Ill. App. 552 (1895). Held that the common law doctrine of landlords' lien did not apply in state.

[27] 3 Burr. (1886) 97 English Reprint 1152 (1766).

[28] *Wentworth* v. *Day*, 3 Met. (Mass.) 352 (1841).

[29] *Wilson* v. *Guyton*, 8 Gill, (Md.) 213 (1849).

[30] 6 N. H. 213, 3 Iowa 88. *Cory* v. *Tittle*, 6 N. H. 213 (1833). One who finds the horse of another in his field has a right to turn the beast into the highway and although she stray away he is not responsible. *Dougherty* v. *Posegate*, 3 Iowa 88 (1856). Finder of money is required to use only slight care and is liable for gross negligence only. If A finds B's money and knows it is B's he is bound to make restitution of the same without compensation.

[31] *Chase* v. *Corcoran*, 106 Mass. 286 (1871).

[32] 4 Dana (Ky.) 193 (1836).

have added value to the chattel bailed to them. The general rule, which is laid down to cover such cases, is that every bailee for hire who by his labor and skill has imparted an additional value to the article bailed to him has a lien for his reasonable charges. While this rule is not infallible it may be accepted as fairly accurate. It has been suggested that there are two exceptions to this rule, namely, livery stable keepers and agisters. By the great weight of authority neither of them was given a common law lien. However, this rule has been questioned [33] and in one state the agister is given a common law lien.[34]

While there seems to have been no satisfactory reason advanced as to why they are not given a lien, the explanations advanced are, that no additional value is added, and uninterrupted possession is not possible. Clearly, there are cases where possession might be continuous and uninterrupted, and it seems reasonable that a fat ox is worth more than a thin one, yet if we apply the test of skill we may find that the bailee is lacking in that one particular essential.

In *Bevan* v. *Waters,* [35] it was held that the trainer of a race horse had a lien for his training service. The reason given is that the bailee by his labor and skill has added additional value to the horse by bringing it into condition to run in the races. In *Scarf* v. *Morgan* [36] the owner of a stallion was allowed a lien on the mare for the price of the leap. The reason given that the mare being in foal would increase her value. In *Nevan* v. *Roupe* [37] it was held that Roupe had a lien on the oats he had threshed for the price of the threshing. In *McMeekin* v. *Worchester* [38] it was held that one who took window sash to get glass put in and glazed had a lien for the price of glazing and fitting the glass.

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[33] *Kelsey* v. *Layme,* 28 Kan. 157 (1882). See also *Lord* v. *Jones,* 24 Me. 439; *Harris* v. *Woodruff,* 124 Mass. 205.

[34] *Hoover* v. *Epler,* 52 Pa. St. 522 (1866).

[35] Moo. & Mal. 235.

[36] 4 Mees. & Welsb. 270, 150 English Reprint 1430 (1828). (2) Lien exists when there is an increased value added provided there is nothing in the contract inconsistent with its (liens) existence, such lien exists equally whether there is an agreement to pay a stipulated price for the labor and skill or an implied contract to pay a reasonable price. (4) *Mathias* v. *Sellers,* 86 Pa. 486 (1878). The lien is not waived by a special agreement merely for a payment of a fixed sum for the labor.

[37] 8 Iowa 207 (1859).

[38] 99 Iowa 243, 68 N. W. 680 (1896).

In the case of *Judson* v. *Etheridge*,[39] Bolland, B., speaking of the specific common law lien, said, "The doctrine might be extended to a breaker who takes a young horse to be broken, on the ground that it makes a different animal of it and improves it by the application of labor and skill."

In *Hanna* v. *Phelps*,[40] where 2,100 hogsheads were delivered to a lard renderer, it was held that the lard renderer had a lien on the lard for the price of his services. A harness maker who took harness to clean and oil has a lien for the price of his services.[41] One who takes tobacco of another to manufacture into cigars has a lien on the cigars for the price of the manufacturing.[42] In the same way a cobbler for repairing a shoe, a jeweler for setting a ring, a clock-maker for fixing a watch has a lien on the repaired article for the price of the repairs.

Only a few of the many cases where a bailee for hire acquires a lien can be enumerated in the scope of this paper, but we may attempt to lay down some rules to determine when the lien will be given. In the first place a common law lien attaches exclusively to personal property.[43] It extends only to the debt created about a specific chattel. And it must be a bailment in which it is generally understood that the bailee has a right to compensation for his services.

The right to demand compensation is, as a rule, understood to carry with it the right to compel compensation by a specific lien.[44] The lien does not extend to the servant of the bailee, for the possession of the servant is the possession of the master,[45] nor does it extend to a sub-contractor,[46] because there is no privity of relationship between the owner and the sub-contractor. The general rule is that the article must be enhanced in value.[47]

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[39] See *Jackson* v. *Cummins*, *supra*.
[40] 63 Am. Dec. 410 (1855).
[41] *Wilson* v. *Martin*, 40 N. H. 88, (1860).
[42] (4) *Mathews* v. *Sellers*, 86 Pa. St. 486 (1878). The lien is not waived by a special agreement merely for a payment of a fixed sum for the labor.
[43] *Openham* v. *Esdaile*, 2 Y. and J. 493, 148 English Reprint 1013 (1828).
[44] Schouler on Bailments, 2nd ed., Sec. 122.
[45] *White* v. *Smith*, 23 Fla. 160, 15 V. Room 105 (1882), 43 Am. Rep. 347.
[46] *Meyers* v. *Bratespiece*, 174 Pa. 118, 34 Atl. 551 (1896).
[47] *Hanna* v. *Phelps*, *supra*.

Possession is an essential element to the existence of the specific common law lien and the general rule is that the loss of possession is the loss of the lien. The possession must be rightfully obtained with the knowledge and consent of the owner either express or implied.[48] While there are few adjudged cases on this particular point yet the rule seems to be well settled and sound that improvement of personal property by the bailee with the knowledge of the bailer's ownership and either with or without the latter's consent or knowledge, or with mere knowledge under the circumstances so that no consent or liability can be implied creates no liability on the part of the owner to pay for the services.[49]

As to just what possession is necessary for the retention of the lien is a question that is in controversy. Some courts hold that constructive possession alone is all that is necessary.[50] In the case of *Keystone Mfg. Co.* v. *Close*,[51] where a manufacturer of lumber delivered the lumber to the servant of the owner to be put on stick in the mill yard, it was held that such delivery was not sufficient to divest the company of their lien on the lumber for the price of sawing. The court in deciding this case said, "We cannot bring ourselves to believe that the company intended that the lumber should go out of their possession or waive or relinquish their lien. We cannot bring ourselves to the conclusion that such was the contract or its legal effect." This case again brought up the question as to whether a bailee when he performs the services on the land of the owner has sufficient possession to maintain his lien. In *Bank of Montreal* v. *J. E. Potts Salt and Lumber Co.*[52] one who manufactured salt at the owner's salt lot under an agreement that he was to furnish barrels, nails, etc., to pay for all needed repairs and deliver the salt to the dock and be responsible for the same was held to have a lien on the salt on the dock. In *Roberts* v. *Bank of Ontario*[53] one who was employed to manufacture brick by the owner of the brickyard, possession of the lot in the lien-claimant for the purpose of the contract, was held to have a lien on the

[48] *Baughman Auto Co.* v. *Emmanuel*, 137 Ga. 354, 73 S. E. 511 (1912).
[49] 69 Me. 425; 174 Pa. 119; 19 Pick. 228; *Baughman Auto Co., supra.*
[50] 81 W. Va. 205, 94 S. E. 132, 3 A. L. R. 857 (1917).
[51] 81 W. Va. 205, 94 S. E. 132, 3 A. L. R. 857 (1917).
[52] 91 Mich. 342, 51 N. W. 890 (1892).
[53] 21 Ontario App. Reps. 629.

brick which he had manufactured. It seems to be assumed in *Oakes* v. *Moore*[54] that one who cuts timber on the land of another has a lien on the timber for his services, but if he delivers the timber to be sawed his right of lien is relinquished. While the authorities are not in accord, yet the weight of authority and the better rule seems to be that if the bailee has a right to be on the premises of the owner for the purpose of improvement of the article of bailment he has sufficient ownership to maintain the lien.

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[54] 24 Me. 214 (1844).