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Note and Comment

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NOTE AND COMMENT

NECESSITY OF VALID CONTRACT TO SUPPORT ESCROW.—In *Foulkes* v. *Sengstacken,* (Ore. 1917) 163 Pac. 311, it is said that "A pure escrow presupposes the existence of a valid contract with sufficient parties, a proper subject matter, and a consideration. There must be an actual contract of sale on the one side and of purchase on the other, and until there is such a contract, the instrument executed by the supposed grantor, though in form a deed, is neither a deed nor an escrow." Accordingly it was held that performance of conditions by a grantee after the grantor had withdrawn the instrument from the custodian was ineffective to accomplish a conveyance. In its decision the court follows *Davis* v. *Brigham,* 56 Ore. 41, 107 Pac. 961, Ann. Cas. 1912B 1340, where the same doctrine, though probably not necessary to the decision, was laid down.

There has come to be considerable authority in the way of text-book statements, dicta by courts, and a few actual decisions, for the above proposition: 16 CYC. 562; 11 AM. & ENG. ENCY. LAW, (2nd ed.), 335; 1 DEVLIN, DEEDS, §313; *Stanton* v. *Miller,* 58 N. Y. 192, (1874); *Hoig* v. *Adrian College,* 83 Ill. 267, (1876); *Nichols* v. *Opperman,* 6 Wash. 618, (1893), (but see *Manning* v. *Foster,* 49 Wash. 541, 96 Pac. 233; *King* v. *Upper,* 57 Wash. 130. 106 Pac. 612, 1135, 31 L. R. A. N. S. 606); *Fitch* v. *Bunch,* 30 Cal. 208, (1866); *Miller* v. *Sears,* 91 Cal. 282, (1891); *Holland* v. *McCarthy,* 160 Pac. 1069, (1916); *Campbell* v. *Thomas,* 42 Wis. 437, (1877); *Clark* v. *Campbell,* 23 Ut.

569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716, (1901). See also *Anderson* v. *Messenger*, 158 Fed. 250, 85 C. C. A. 468, (1907); *Brown* v. *Allbright*, 110 Ark. 394, 161 S. W. 1036, Ann. Cas. 1915D (1913). This doctrine seems to have received the approval of Professor BIGELOW, of the University of Chicago Law School, 26 HARV. L. REV. 565.

A very effective and seemingly complete answer to the doctrine of the principal case has been made by Professor H. T. TIFFANY, in 14 COL. L. REV. 389, 399. He there says: "The view referred to has no considerations of policy or convenience in its favor, and its necessary result is considerably to detract from the practical utility of the doctrine of conditional delivery. One objection to such a view would seem to lie in the fact that the doctrine of conditional delivery is not peculiar to conveyances of land, but is recognized also in connection with contracts under seal and also bills and notes. If there can be no conditional delivery of a conveyance in the absence of a contract of sale, that is, a contract to execute a conveyance, it would seem a reasonable inference that there can be no conditional delivery of a contract under seal or a promissory note unless there is a contract to execute such an instrument. There is no more reason for requiring an auxiliary contract in the one case than in the others. Yet it has never been suggested, so far as the writer knows, that there can be a conditional delivery of a contract under seal or a promissory note only when there is a legally valid contract to execute the contract or note. Another consideration adverse to the view referred to lies in the fact that, while the doctrine of delivery in escrow was recognized at least as early as the first half of the fifteenth century (see Y. B. 13 HEN. IV, 8; Y. B. 8 HEN. VI, 26; Y. B. 10 HEN. VI, 25), a purely executory contract, not under seal, was not then enforceable either in the common law courts, or, it appears, in chancery. That being the case, the requirements of an extraneous contract in order to make the delivery in escrow effective would, in the fifteenth or sixteenth centuries, have necessitated a contract under seal, and it seems hardly probable that such a delivery of an obligation or conveyance under seal was always accompanied by another obligation under seal calling for its execution. The subject of delivery in escrow is treated with considerable fulness in at least two of the earlier books (PERKINS, CONVEYANCING, §§138-144; SHEPPARD'S TOUCHSTONE, 58, 59), and there is not the slightest suggestion in either as to the necessity of such an auxiliary contract. It is, to say the least, somewhat extraordinary that an integral element in a doctrine dating from the commencement of the fifteenth century should have remained to be discovered by a California court in the latter half of the nineteenth."

An agreement for the sale and conveyance of property, the consummation of the transaction to be postponed until payment of the purchase price or performance of some condition, is usually worked out in one of two ways: a binding, enforceable contract calling for the execution of a proper conveyance is entered into, or the conveyance is prepared at once, fully executed by the grantor with the exception of a complete delivery, and deposited with a third party in escrow to be fully operative upon the happening of the event specified. In the first, upon performance by the vendee and refusal

by the vendor, an action on the contract, normally, in the case of land, at least, for specific performance, is the remedy, and in such case it is of course vitally important that there be shown a binding contract. In the second, title passes *ipso facto* upon the performance by the purchaser, and the handing of the deed over to him is for tha purpose unnecessary. It is submitted that in such cases it is not material that there is no *enforceable* agreement, and to hold, as in the principal case, that such agreement is necessary is to confuse the above two methods of accomplishing such a business transaction. Nor is such contract necessary to prevent the grantor from withdrawing his deed from the depositary, for by hypothesis the deed has been *delivered* by the maker to a third party, as to such transaction not the representative of the grantor, *to be delivered* to the grantee therein upon the happening of the event. As to the maker, such deed is a completed legal act. The very nature of an escrow therefore is such, it is submitted, that so long as the grantee has still the privilege of performing, the custodian may very properly, even must, say to the grantor upon demand for the instrument that he cannot comply.

In *Farley* v. *Palmer*, 70 Oh. St. 223, (1870), although the case might well have been disposed of on another ground, there is a very nice instance of the working out of the correct doctrine. Palmer and wife had contracted to sell and convey her land to Farley, and a deed signed, etc., by Palmer and wife had been executed and deposited in escrow to await the payment of the purchase price. Upon refusal by Farley to perform, Palmer and wife sued Farley to compel him to pay the price. He defended on the ground that since Mrs. Palmer as a married woman was not bound by the contract he could not be compelled to perform. The court, however, rejected this contention, holding that Mrs. Palmer *had already performed,* that she had no power to revoke the deed, and that upon performance by Farley the title would have vested in him *ipso facto* without further delivery. R. W. A.

LIMITATIONS UPON THE USE, AFTER SALE, OF PATENTED ARTICLES.—In the case of *Motion Picture Patents Co.* v. *Universal Film Co.*, 37 Sup. Ct. 416, the Supreme Court has just rendered a decision which reverses the much discussed case of *Henry* v. *Dick Co.*, 224 U. S. 1. The opinion was by a divided court, however, as three of the justices dissented, and Justice McREYNOLDS "concurred in the result" only. It can, therefore, hardly be said to settle the ultimate rule as in contradiction to that followed in *Henry* v. *Dick Co.*, and discussion of the case is of something more than mere academic value.

The facts were that the plaintiff was owner of a patent covering a necessary part of the mechanism on moving picture projecting machines. This particular device was of such efficiency as to be in general use, to the practical exclusion of all substitutes. The plaintiff granted a license to manufacture and sell these parts, the licensee agreeing that it would not sell them except under agreement with each vendee, for himself and his assigns, that they should be used only with a certain type of film. This licensee sold a machine

to an exhibition company which, in turn, transferred it to the defendant, the Prague Amusement Company. There was no privity of contract between this defendant and the plaintiff, but the defendant took the machine with notice of the restriction. The defendant, the Universal Film Manufacturing Company, supplied films to the Prague Company for use on the machine, having itself been notified of the restriction. The question raised was whether the restriction upon the use of the machine was enforcible against one not a party to the agreement, but who had notice of it.

The restriction is, in appearance, one upon the full and free enjoyment of a corporeal chattel, placed there by an erstwhile owner who has parted with the title. The obvious inquiry is whether limitations upon the perfect ownership of personal property are enforcible in the courts.

It may be said at the outset that in this particular respect the Patent Statute does not affect the inquiry. It provides nothing in respect to the ownership of property nor its transfer, except in the indirect way to be referred to later. All it does is to create a new form of incorporeal property, namely, the legal right in a patentee to exclude others from enjoyment of his invention. The invention itself is not corporeal, it is a concept of means to an end. It is the "ownership" of this concept which the Patent Statute creates.

Whether restrictions upon the enjoyment of personal property are enforcible at common law is undecided. Negative restrictions upon the complete enjoyment of real property may be so created as to be enforcible at law, or, as in England, in equity, against subsequent owners acquiring the property with notice. TIFFANY, REAL PROP., §349. The reason given by one court, (*Parker* v. *Nightingale,* 6 Allen 341, 83 Am. Dec. 632), is simply that "restrictions and limitations which may be put on property by means of such stipulations, derive their validity from the right which every owner of the fee has to dispose of his estate, either absolutely or by a qualified grant, or to regulate the manner in which it shall be used and occupied." Restrictions as to the type of use of real estate are common. *Blakemore* v. *Stanley,* 159 Mass. 6; *Keening* v. *Ayling,* 126 Mass. 494.

The fundamental reason for allowing them is of course merely one of public policy, and its expression, as formulated by the court quoted from, applies to personal property as pertinently as it does to real estate. But that it does not in fact extend to personal property is indicated in occasional dicta. A writer in 28 LAW QUARTERLY REVIEW, 73, says, "In the case of chattels generally, any restriction as to their use can only be imposed by means of a contractual relation between a vendor and his purchaser, and will extend no further than the contractual relation extends." He cites no authority, however, and the present writer can find none except in respect to restrictions upon the re-sale price. Although these particular restrictions are held unenforcible, that does not necessarily indicate a difference between other restrictions on personalty and those on realty, because restrictions upon the alienation of real property are also held in disfavor by the courts. GRAY, RESTRAINTS ON ALIENATION. In some of the cases holding price restrictions unenforcible there are intimations that all restrictions come under the

same rule. Thus the court in *John D. Park & Sons* v. *Hartman*, 153 Fed. 24, 39, in passing upon the validity of a system of contracts restricting re-sale price, says, "It is also a general rule of the common law that a contract restricting the use or controlling sub-sales can not be annexed to a chattel so as to follow the article and obligate the sub-purchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel." See also, *Taddy* v. *Sterious*, [1904], 1 Ch. Div., 354; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373. A few other cases indicate, by analogy, a difference in respect to restrictions upon realty and personalty in holding that although express warranties run with the ownership of the former they do not follow that of the latter. *Smith* v. *Williams*, 117 Ga. 782; *Prater* v. *Campbell*, 110 Ky. 23.

This uncertain state of the common law certainly permits a decision that restrictions upon its use can not be made to follow the ownership of a chattel. The decision in the *Motion Picture Patents* case is therefore perfectly sound, *if* one considers the restriction in that case as one sought to be imposed by the plaintiff upon the use of the projecting machine.

But was this restriction, after all, created by the plaintiff or any other owner of the chattel? Did the plaintiff not, rather, *release*, to a limited extent, a restriction upon the defendant's use of the chattel, which was actually imposed by the Patent Statute? Ownership of a chattel, however untrammelled by agreement it may be, does not *ipso facto* connote and carry with it an unrestricted right to use the chattel. By virtue of the Patent Statute, the owner is precluded from using it at all, if its use happens to constitute enjoyment of a patented invention. Even though the owner may have created the chattel himself, he is absolutely restrained from its use under such circumstances. The patentee of an invention may refuse permission to any or all owners of chattels, which embody his invention, to use them, however their ownership may have been come by. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405.

The writer can think of no reason why, if a patentee in his own discretion can forbid or permit an owner to use his property, he may not grant a modified permission, and limit the extent of the authorized use. It is at least the logical postulate that if the right to use, regardless of ownership, depends upon permission, wholly at the patentee's discretion, he may grant the right of use to such greater or less exent as his discretion dictates. When a patentee himself sells a tangible thing embodying his invention, the presumption is that he gives with it all the usual rights of ownership unrestricted by his own patent monopoly. But when in selling the thing he delimits the right of user by express stipulation, there is no room for any such presumption.

This has been the holding of practically all the cases prior to the principal one, although it must be confessed that reasons given have not always been either definite or consistent. The courts have upheld limitations which allowed invasion of the monopoly in a specified respect only (*Pope Mfg. Co.* v. *Gormully*, 144 U. S. 248), or for specified purposes only (*Gamewell Fire-alarm Telegraph Co.* v. *Brooklyn*, 14 Fed. 255), or which gave the right to use a particular machine on condition that no other machines of the same

kind be used (*United States* v. *Winslow*, 227 U. S. 202), or to use the device only at the licensee's place of business (*Rubber Co.* v. *Goodyear*, 9 Wall. 788), or to use on condition that the product of the device should not be sold below a certain price (*Bement* v. *National Harrow Co.*, 186 U. S. 70), or to use for a limited time only (*Mitchell* v. *Hawley*, 16 Wall. 544). Permission to use only with certain films, seems to be an absolute analogy. It has been held, also, that one who voluntarily or otherwise pays full damages for having unauthorizedly made, used or sold a chattel embodying a patented invention does not thereby acquire any right to continued use or enjoyment of the chattel, nor is his vendee thereof in any better position. *Birdsell* v. *Shaliol*, 112 U. S. 485. And this is despite the fact that the one so precluded from enjoyment is in all other respects the "owner" of the particular thing.

These restrictions have been enforced as though they were unreleased restrictions of the patent law, and not as limitations originally imposed by one individual upon another. This is the ground on which the decision was expressly based, in the English case of *Incandescent Gas Light Co.* v. *Cantelo*, 12 Rep. Pat. Cas. 262. "The patentee," said that court, "has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using them or dealing in them at all, he has the right to do the lesser thing, that is to say, to impose his own conditions." In accord are, *British Mutoscope & Biograph Co.* v. *Homer*, [1901], 1 Ch. Div. 671; *National Phonograph Co.* v. *Menck*, [1911], A. C. 336. All of this authority is completely in accord with the holding of *Henry* v. *Dick Co.*, which cites still other precedents.

When one recognizes the restriction of use in the *Motion Picture Patents* case for what it really is, namely, a limited release of a *statutory* restriction, and is not misled by its mere form of expression, the decision in the case is clearly in conflict with both logic and precedent. The court admits itself to have been influenced by a feeling that the restriction, if sustained, "would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes." The fault however, if any, is with the Patent Statute which imposed the restriction, rather than with the patentee who relieved the public, at least to some extent, from its rigorous and absolute prohibitions. J. B. W.

DUE PROCESS OF LAW AND THE REGULATION OF HOURS OF LABOR.—§2 of Chapter 102, Oregon Laws of 1913, provides: "No person shall be employed in any mill, factory, or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employes when engaged in making necessary repairs, or in cases of emergency, where life or property is in immiment danger; provided, however, employes may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage." The plaintiff in error was found guilty of causing one of his employes to work for thirteen hours in one day, the employe not being within the excepted conditions and not being paid the rate prescribed for overtime. The United

States Supreme Court upheld the conviction, holding that the statute is consonant with the Fourteenth Amendment. *Bunting* v. *Oregon*, 37 Sup. Ct. 435.

The plaintiff in error's conviction had been upheld by the Supreme Court of Oregon. *Bunting* v. *Oregon*, 71 Ore. 259. The appeal raised two questions: "(1) Is the law a wage law, or an hour of service law? And (2) if the latter, has it equality of operation?" The contention of plaintiff in error was that this was a law regulating wages, the argument being as follows: The employer is prohibited from working the employe more than thirteen hours a day, and thus in respect to thirteen hours it may be said to be a regulation of the hours of labor; but where the employe works more than ten hours a day, the employer must pay him at the rate of one and a half times the market price for such overtime. The wrong complained of is the failure of plaintiff in error to pay for such overtime at the increased rate provided for by statute; if the conviction of plaintiff in error is affirmed, it will result in compelling employers to pay one and one-half times the market rate for labor above ten hours per day. The majority of the court, however, considered that the statement in §1 of the statute, to the effect that the purpose was to guard the health of the laborer, must be respected. The explanation of the state court as to the higher rate of compensation for overtime was adopted: "Apparently the provisions permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime." Therefore, the court did not find it necessary to determine what its decision would be if it had been of the opinion that this was in fact a regulation of wages. The opinion in the *Adamson Law* case (*Wilson* v. *New*, 37 Sup. Ct. 298), is not referred to, nor are such leading cases as *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. 383; *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. 539, 3 Ann. Cas. 1133; *Muller* v. *Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. 324, 13 Ann. Cas. 957. This failure to cite cases, however, is in line with the realization that each case involving the regulation of labor must be decided on facts and figures, not on theories and precedents. Each case is a new problem. Yet it is evident that the court is no longer willing to stand by its opinion in the *Lochner* case, where the prohibition was against employment in bakeries for more than ten hours a day. A new modus operandi for determining the constitutionality of such statutes has been adopted. No longer is the question of whether or not the trade is so unhealthy as to necessitate the regulation of its hours weighed in the scale of "common understanding" as in the *Lochner* case; but, beginning with *Muller* v. *Oregon*, counsel have seen the wisdom of furnishing the court with scientific data and opinions by experts upon the question as to the proper number of working hours in various industries. Mr. LOUIS D. BRANDEIS in the preparation of the *Muller* case made a radical step in the art of advocacy when he refrained from citing numerous decided cases as precedents for his contentions, but rather quoted from the reports of over ninety committees, bureaus of statistics, commissioners of hygiene, etc., to the effect that long hours were

injurious to the health of employes. The decisions in those cases argued on this basis speak loudly for the effectiveness and wisdom of this method of advocacy. In *People* v. *Schweinler Press*, 214 N. Y. 395, 410, 108 N. E. 639, overruling *People* v. *Williams*, 189 N. Y. 131, 81 N. E. 778, the court states that when the previous case was decided it did not have the benefit of scientific data on the subject, and now that it has before it the result of research as to the proper hours for labor, it is prepared to reach an opposite conclusion from that expressed in the prior case. Is it too much to say that the *Lochner* case would have been differently decided had the court been properly presented with scientific data bearing on the unhealthfulness of more than ten hours labor per day in bakeries?

As the court regarded the law as one regulating the hours of service and not wages, it had no difficulty in disposing of the second ground of appeal, i. e., that the law violates the "equal protection" clause of the fourteenth amendment in that it makes the employer in a mill, factory, or manufacturing establishment pay more for labor than other employers are required to pay. But the court having reached the determination that the effect of the law was not to regulate wages, an argument based on that assumption must fall along with its premise. Regarding the law as a regulation of hours of labor, there is sufficient basis for the classification adopted by the legislature.

It is worthy to note that the Chief Justice, Justice VAN DEVANTER and Justice MCREYNOLDS dissented. As no dissenting opinion was published, the reviewer refrains from attempting to state the exact grounds of their dissent. Justice BRANDEIS, having been interested in the preparation of brief for the defendant in error, took no part in the consideration or the decision. The brief filed by the defendant in error is voluminous and exhaustive, apparently all the scientific data and opinion on the question of the disadvantages of long hours of labor having been set forth. See also 18 YALE L. JOURNAL 454; 29 HARV. L. REV. 353; 15 MICH L. REV. 259. W. L. O.

THE MATERIALMAN'S LIEN AND THE TITLE OF THE TRUSTEE IN BANKRUPTCY.—§47a(2) of the BANKRUPTCY ACT as amended in 1910, gives the trustee the rights of lien creditors over property in the custody of or coming into the custody of the bankruptcy court, and of judgment creditors holding an execution duly returned unsatisfied over property not in the court's custody. Despite this section, the New York Court of Appeals decided in the recent case of *Gates* v. *Stevens Construction Co.*, 115 N. E. 22, that a materialman who had furnished materials to a bankrupt prior to the filing of the petition and adjudication, and who had filed notice of his lien after such adjudication but within the statutory period is entitled to his lien, and that the trustee in bankruptcy, in taking title to moneys due to the bankrupt, takes title subject to the materialman's lien.

In New York and in most, if not all, of the states, the materialman, by filing notice within the statutory time, perfects his equitable lien, which begins in inchoate form when the first material is furnished. A general assignee for the benefit of creditors, having no greater right than the assignor

himself, takes subject to the materialman's lien, filed subsequent to the assignment but within the statutory period. *John P. Kane Co.* v. *Kinney,* 174 N. Y. 69, 66 N. E. 619. The trustee in bankruptcy, prior to the 1910 amendment of §47a(2), had no greater rights under §70, as against the materialman, to money due the bankrupt, than had the bankrupt himself. *Crane Co.* v. *Pneumatic Signal Co.,* 94 App. Div. 53, 56, 87 N. Y. Supp. 917, 919; *York Mfg. Co.* v. *Cassell,* 201 U. S. 344. The materialman's lien is not obtained through legal proceedings, and hence cannot be set aside by the trustee under §67f. REMINGTON, (2nd Ed.), §1155.

The court in the instant case assumes in its decision that the money payable to the bankrupt and subject to the materialman's lien was not in the actual custody of the bankruptcy court, but that there was a mere right to recover the money, and—following the majority decision in *Hildreth Granite Co.* v. *City of Watervliet,* 161 App. Div. 420, 146 N. Y. Supp. 495—that this right is not intended to be covered by the first provision of the amendment of §47a(2), but comes explicitly within the second provision, under which the trustee has only such a claim as is possessed by a creditor with execution returned unsatisfied, namely, a right by the commencement of an action to establish an equitable lien.

In *York Mfg. Co.* v. *Cassell,* supra, decided in 1906, it was held that a vendor under a conditional contract of sale, which under the Ohio law was void as against creditors and purchasers in good faith because not filed, but good as between the parties thereto, could hold the property against a trustee in bankruptcy, as the latter was in no better position than the bankrupt at the time of adjudication. The primary intention of the 1910 amendment of §47a(2) was to do away with the effect of this decision by enabling the trustee to avoid secret and unrecorded liens.

The question involved in the instant case is whether the amendment exceeds the primary intent, and gives the trustee a lien which will prevail over that of the materialman, which at the time of adjudication had not been perfected. Two of the five judges in the *Hildreth Granite Co.* case, supra, dissented on the ground that the words "all property in the custody of or coming into the custody of the bankruptcy court" are not limited to property which has been brought into the actual physical possession of the trustee. By the adjudication all the property of every name and nature representing a money value goes to the trustee, who is a mere officer or instrument of the court, and such property is in the custody of the court, "at least so far as it is within the jurisdiction of the court and not in the custody of some other court," and hence that the trustee, before the materialman's lien was filed, had a creditor's lien within the meaning of the first provision of §47a(2) and should prevail over the materialman, whose lien was not filed till after adjudication.

The judge who delivered the majority opinion in the *Hildreth Granite Co.* case cites no authority and gives no argument in support of his position, but contents himself with an expression of his belief. The dissenting opinion, in addition to the argument just preceding, relies on the statement from *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 191, that an "adjudication

follows as a matter of course, and brings the bankrupt's property into the custody of the court for distribution among his creditors." Both the argument and authority relied on in the dissenting opinion seem sound, putting a debt on the same footing as property brought into the actual physical possession of the trustee, that is, it brings them within the operation of the first provision of §47a(2).

§67 of the original act subrogated the trustee to a lien in fact acquired by the creditor by legal or equitable proceedings within the four months' period. The class of cases, unprovided for by the original act, and intended to be reached by the 1910 amendment, was that in which no creditors had acquired liens by legal or equitable proceedings, and to vest in the trustee, for the interest of the creditors, the potential right of creditors with such liens. *In re Bazemore,* 189 Fed. 236, 26 A. B. R. 494; *In re Calhoun Supply Co.,* 189 Fed. 537, 26 A. B. R. 529. Chapter 33, §5, of the Consolidated Laws of New York (1909), the statute governing the principal case, gives to those furnishing state or municipal corporations with labor or materials for public improvements a lien upon the "moneys of the state or such corporations applicable to the construction of such improvement."

If it be assumed that the dissenting opinion in the *Hildreth Granite Co.* case is correct and that debts are on the same footing as tangible property in the trustee's physical possession, the question then arises whether the creditor's lien possessed by the trustee should prevail over the materialman's lien perfected after adjudication. Had the lien been perfected prior to the accrual of the trustee's lien, even though within the four months' period, it would have come within the exception of clause (d) of §70, which provides that "liens given or accepted in good faith and not in contemplation of or in fraud of this act, and for a present consideration, which have been recorded according to law if recording thereof is necessary in order to impart notice, shall not be affected by this act." *Moreau Lumber Co.* v. *Johnson,* 29 N. D. 113, 150 N. W. 563; REMINGTON, §1155.

But even though a creditor's lien is superior to the materialman's unperfected lien, every reason exists for protecting the latter where the lien is not filed till after adjudication—if within the statutory period—as well as where it is filed before adjudication. The theory is that the newness of the work gives notice for ninety days, after which recording is necessary as a reminder of the rights of the materialman. In the language of the majority opinion in *Hildreth Granite Co.* v. *Watervliet,* a contrary interpretation "would require a materialman, in order to protect his rights, to file a new lien immediately after each load of material furnished, lest the contractor might file a petition in bankruptcy and defeat his rights." S. D. F.