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PROPERTY-MECHANICS' LIEN-VALIDITY AGAINST NON-CONTRACTING CO-OWNER

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PROPERTY—MECHANICS' LIEN—VALIDITY AGAINST NON-CONTRACTING CO-OWNER—*A* and *B* were tenants in common of a tract of land. Plaintiff contracted with *A* to build a house thereon, *B* not being a party. Plaintiff sued *A* and *B* to enforce a mechanics' lien for money due on the contract, and was successful against both in the lower court. On appeal, *held*, reversed. Only *A*, who contracted to have the house built, was subject to a mechanics' lien. *Dente v. Bullis*, (Md. 1950) 76 A. (2d) 158.

The theory underlying statutes giving mechanics' liens to those who by their labor and materials add additional value to property is that the owner, having received the benefit, should pay for it. These persons receive security under the statutes, the property being in effect pledged for their benefit.[1] These statutes[2] are not designed to protect volunteers; the lien is based only upon an agreement, express or implied, with the owner of an interest in the property which binds him to pay for the materials or services furnished.[3] The decision of the principal case[4] appears correct, since there was no contract with the co-owner and no indication that he consented to the improvement. One tenant in common can contract so as to bind his own interest but has no authority to bind his cotenant's interest unless the latter consents to or ratifies the contract.[5] Mere knowledge that his co-owner is improving the property will not subject his interest to a mechanics' lien.[6] Since the title to the improvements vests in all the tenants in common in the same proportion that they hold title to the property as unimproved, the non-contracting owner gets the advantage of the increase in value. It might, therefore, seem desirable to find an agency in the contracting co-owner

[1] B. & F. Concrete Co. v. Colton Realty Corp., 17 N.Y.S. (2d) 593 (1939). See 8 UNIV. CIN. L. REV. 210 (1934); 29 VA. L. REV. 121 (1942).

[2] Formerly statutes conferring mechanics' liens were strictly construed, on the theory that they derogated from the common law. Today they are generally construed more liberally, being viewed as remedial. Godfrey Lumber Co. v. Kline, 167 Mich. 629, 133 N.W. 528 (1911); Hoffman Lumber Co. v. Gibson, 276 Pa. 79, 119 A. 741 (1923). See 74 CENTRAL L.J. 123 (1912). But Illinois construes strictly when the question of fulfillment of requirements upon which the claimants' rights depend is involved, even though the statute calls for a liberal construction. Rasmussen v. Harper, 287 Ill. App. 404, 5 N.E. (2d) 257 (1936).

[3] Sergeant v. Denby, 87 Va. 206, 12 S.E. 402 (1890); Stubbs v. Capital Paint & Glass Co., 160 Miss. 832, 131 S. 806 (1931); De Mund Lumber Co. v. Franke, 40 Ariz. 461, 14 P. (2d) 256 (1932); Courtney v. Luce, 101 Ind. App. 622, 200 N.E. 501 (1936); Caldwell v. Overall, 186 Okla. 615, 99 P. (2d) 496 (1940); PHILLIPS, MECHANICS' LIENS 113, 162 (1874). But see Colp v. First Baptist Church of Murphysboro, 341 Ill. 73, 173 N.E. 67 (1930); Rasmussen v. Harper, supra note 2.

It is generally expressly provided in the statute that contract or consent is necessary before a mechanics' lien will arise. See Ky. Rev. Stat. (1948) §376.010; Wis. Stat. (1949) §289.01(4); Ill. Stat. (Smith-Hurd 1935) c. 82, §1.

[4] Defendant's non-liability in the principal case was based largely on Md. Ann. Code (1939) art. 63, §11, which provides that if the contract for furnishing work or materials is made with any person other than the owner of the land or his agent, the supplier is not entitled to a lien unless notice in writing is given to the owner of intention to claim a lien.

[5] 57 C.J.S. 567 (1948). At common law neither the husband nor the wife acting separately could create a lien upon an estate by the entireties. Le Roy v. Reynolds, 141 Fla. 586, 193 S. 843 (1940).

[6] Boutte & Courrege v. Derokay, (La. App. 1936) 168 S. 39.

by ratification, or an implied contract, so that a mechanics' lien would be imposed upon the cotenant who is obtaining a benefit without bearing any burden. But, though generally no direct action lies to compel the co-owner to contribute his proportionate share of the cost,[7] the contracting co-owner who has acted in good faith may secure, in an equity action for partition or accounting, the amount by which the improvement enhanced the value of the property.[8] Also, while it is true that the security is given by law without reference to the intent of the parties, the materielman deals only with one co-owner and likely does not expect security in addition to that person's interest in the property. A result contrary to that of the principal case might impose a mechanics' lien on the non-contracting co-owner for construction that to him is unwanted and undesirable.

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[7] Ferris v. Montgomery Land & Improvement Co., 94 Ala. 557, 10 S. 607 (1891); Cooper v. Brown, 143 Iowa 482, 122 N.W. 144 (1909); Hogan v. McMahon, 115 Md. 195, 80 A. 695 (1911); Miller v. Prater, 267 Ky. 11, 100 S.W. (2d) 842 (1937). See 14 AM. JUR. 116 (1938).

[8] Where feasible the court will give the benefit to the erecting tenant by allotting him that portion of the land on which the improvements are situated. Where this is impracticable, the other cotenants may be required to pay him their proportionate share of the enhancement of value resulting from such improvement. Bowers v. Rightsell, 173 Ark. 788, 294 S.W. 21 (1927); Indra v. Wiggins, 238 Iowa 728, 28 N.W. (2d) 485 (1947); 68 C.J.S. 220 (1950). The reason for allowing compensation is that the value of the land is enhanced, cotenants are not injured in any way, and they should not be permitted to take advantage of improvements of the common property to which they have contributed nothing. See 1 A.L.R. 1189 (1919). Query, whether the lienor, after foreclosing and succeeding to the cotenant's interest, can secure the value of the improvement in an equity proceeding for partition or accounting.