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LIENS.

Legislative enactment and judicial exposition have both combined, of late years, to give the law of liens increased importance. By the former, its remedies have been much extended; by the latter, its provisions have received a more liberal construction. It has, of course, undergone many changes, so that some observations upon it may not be unacceptable.[1]

Liens are primarily divided into general and specific: the lattter are favored by the Courts; the former are regarded with jealousy.[2] A specific lien is one given by law, by custom or by statute, and attaches only to specific property for the unpaid price, carriage thereof, work and labor done, materials furnished, or the like.[3] A general lien is the right to detain goods, not only for charges due

[1] The space allotted to the present remarks does not permit an extended examination of this subject. Much of the obscurity and confusion which prevails in regard to it might be cleared up by a careful review of the cases and statutes in which the word is sometimes used in a technical, sometimes in a popular sense. The loose manner of using the word, and the confusion attendant thereon, are well noticed by Vice-Chancellor Wigram, Green *vs.* Briggs, 6 Hare 400.

[2] 4 Carr & Payne, 152, Bleadon *vs.* Hancock, 7 East 224.

[3] 3 Hill 491; Grinnell *vs.* Cook, 2 Watts & Serg. 395.

upon the articles themselves, but for a general balance of accounts relating to other transactions of the same character. It is given only by usage, which must be proved by numerous and ancient instances, by an express agreement between the parties, (when it partakes of the nature of a pawn or pledge,) or by a continuous mode of dealing with such an understanding—and in the absence of clear evidence to establish the general lien, the claim will be restricted to the specific lien, if any, existing in the case[1]

Liens are further divided into, 1. at Common law: 2. in Equity: 3. in Admiralty: 4. by Statute; with their several incidents. The last division would seem, in most of its details, to be properly included under the first three: nevertheless, the principles, which have been applied to the exposition of this class of statutes, are sufficiently numerous and important, to make it desirable to collect them under a distinctive head.

Lien at common law is a qualified right, to constitute which there must be, 1. possession of the property by the claimant; 2. title to it in another; 3. an unsatisfied claim or demand upon it by the possessor.[2] Whether charges, not incurred by the owner or his authorized agent, but by some one claiming, though tortuously, to be the rightful owner, will give a lien—is a question, the discussion of which will be waived for the present.[3] Possession by the lienman is an incident, peculiar to this class of liens;[4] and is owing to the principles in which the doctrine of liens had its origin, viz: that a party, who was compelled to receive the goods of another, should be entitled to retain them for his indemnity.[5] But, in Equity, a creditor may obtain rights over property or securities, neither actually in his possession, nor vested in him, for the purpose

[1] 6 East. 519; Rushforth *vs.* Hadfield, 7 East. 224, McIntyre *vs.* Carver, 2 W. & S. 395. 6 Term 14, Kirkman *vs.* Shawcross.

[2] 6 East. 27, note, Lickbarrow *vs.* Mason; 2 Watts & Sergeant 395, McIntyre *vs.* Carver, 13 Q. B. 680, (66 E. C. L.) Forth *vs.* Simpson.

[3] Ld. Ray 867; Yorke *vs.* Greenaugh.

[4] 2 Story R. 143, Exparte John S. Foster; 1 Peters 386, 441, 442, Conard *vs.* Atlantic Insurance Co.; 2 Watts & S. 395, McIntyre *vs.* Carver.

[5] Lord Ray. 852; Skinner *vs.* Upshaw, Lord Ray, 868, Yorke *vs.* Greenaugh; 2 Watts & Serg. 395, supra.

of enforcing his claim.[1] There are also rights in Equity, equivalent to liens, which exist only in Equity, and of which Equity only takes cognizance.[2] There must be however in fact, the same incidents, except possession, necessary to constitute a lien at law.[3] In Admiralty, an appreciation of the thing itself is, in general, the substratum of the lien, either by service, by materials, or otherwise. Like the lien in Equity, possession is not requisite.[4] A Statute lien is, of course, governed by the law which gives it.

The distinction between a lien at law and in Equity or Admiralty, is well shown by examining the right of stoppage *in transitu*. At common law, the vendor of goods not paid for and not delivered, could retain them against the vendee, the payment of the price being held a condition precedent.[5] This was the vendor's *lien*. But, as it often happened, that, after the vendor parted with the goods, the vendee proved unable to pay for them, the Courts of Equity held,[6] that if the vendor could seize them *in transitu*, and before they had actually come to the hands of the vendee, he (the vendor) could reclaim them. This being a remedial proceeding, it was adopted, and has been much favored by the Courts of law.[7] But there is this material distinction. The vendor's *lien* continues only so long as the goods are in his possession. The right of stoppage *in transitu* begins after the possession has been parted with, whilst the goods are in the hands of some middle man; and when exercised, avails only to restore the original lien of the vendor.[8]

A lien, as we have seen, arises only by law, custom, or statute.

[1] 2 Spence 796. [2] 2 Merivale 403; Gladstone *vs.* Birley, 4 Hare 193; 4 Comstock 169, Haverly *vs.* Becker.

[3] The doctrine of equitable lien not adopted in Pennsylvania, 3 Barr 72, Hepburn *vs.* Snyder.

[4] 2 Story 143, Exparte John S. Foster; 2 Woodbury & Minot 48, The Sloop Louisa.

[5] 6 East 27, note, Lickbarrow *vs.* Mason; 1 Harris 146, Bowen *vs.* Burk.

[6] 2 Vernon 203, Wiseman *vs.* Vanderprut. 2 Harris 48, Hays *vs.* Mouille.

[7] Smith's Merc. Law 589, (Am. Ed.) 2 Harris 48, Hays *vs.* Mouille.

[8] 2 Kent 541, 16 Pickering 475, Stanton *vs.* Eager.

When a lien is created by agreement, it becomes 1, a mortgage, where the legal estate passes; or 2, a pawn or pledge, where merely possession is given, a contract which obtains only as to personalty.[1] Of course, the agreement can enlarge, or limit, or otherwise modify the lien at the will of the parties; but usually, a mortgage creates an absolute estate in the land or chattel, subject to the equity of redemption;[2] whilst a pawnee has but a special property in the goods, to detain them for his security, and must restore them on the payment of his debt.[3] On the other hand, a mortgagee cannot, in default of payment, sell without process of law; but a pawnee, after notice, can.[4]

Lien has been so often spoken of as preventing circuity of action,[5] that it has been sometimes confounded with set-off. It may be well therefore to notice the leading points of difference.

[1] Comyn's Dig. *Mortgage A.* Co. Litt. 205, a, Salk. 522. Mr. Cross in his treatise on the law of lien, p. 71, restricts the signification of Mortgage to "the right acquired by the creditor upon the immovables which are appropriated to him by his debtor;" and cites *Domat lib.* 3, *tit.* 1, *sec.* 1. But, although, Domat says, (art. 1, *cit. supra,*) "le mot d'hypotheque signifie proprement le droit acquis au créancier sur les immeubles, &c.," yet he says it is a distinction peculiar to France—"une difference importante entre notre usage et le Droit Romain." The Roman law was, it would seem, like our own in the use of the two words. In the Digest (L. 20 T. 1. De Pignoribus et Hypothecis—2 Pothier's 4to. Ed. Pandects 238,) it is said—Pignus proprie rei mobilis constitui (GAIUS.) *Et in hoc distant Pignus et Hypotheca;* Proprie Pignus dicimus quod ad creditorem transit; Hypothecam, quum non transit, nec possessio ad creditorem. (Ulpian) *Quanquam etinm et Hypotheca appellatur aliquando Pignus; cum eamdem ac Pignus creditori actionem tribuat.* Hinc MARCIANUS, Inter Pignus autem et Hypothecam, tantum nominis sonus differt.

Mortgage of a chattel may be made without deed; 11th Eng. L. & Eq. Rep. 584, Flory *vs.* Denny.

[2] 1 Peters 441, Conard *vs.* Insurance Co. 1 Harris 406, Fluck *vs.* Replogle.

[3] Comstock 443, 447, Wilson *vs.* Little. A transfer of the legal title, which was necessary to effect the change of possession to certain shares of stock, and made only for that purpose, held *not* to destroy the character of the transaction as a *pledge*, so as to convert it into a *mortgage.* See also Comyn, *ut supra*, Salk. 522, 523. 2 Harris 208, Houser *vs.* Kemp.

[4] 9 Mod. 278, Lockwood *vs.* Ewer, 1 P. Wms. 261. Tucker *vs.* Wilson.

[5] 2 Kent, 634.

Set-off, unlike lien, was unknown to the common law.[1] "Natural equity says, that cross demands shall compensate each other, by deducting the less sum from the greater, and that the difference is the only sum that can be justly due."[2] This principle was fully recognized and enforced in the civil law, as compensation.

But however strong the "natural equity" of the right, the English judges found no authority in the common law for extending its benefits to parties, and for that purpose various statutes were required to be passed.[3] In England, therefore, it is a purely statutable right. In this State, it has been long known not only by reason of the Defalcation Act of 1705,[4] but because our Courts have adopted the doctrine of equitable set-off, and applied it to common law proceedings.[5] But even here, the non-existence of the right at law has not been questioned. Again set-off is pleadable only in actions ex contractu,[6] whilst lien is a good defence in replevin, case, trespass, or other actions for tort.[7]

Whether when a lien and a right of set-off co-exist, the one may be pleaded in answer to the other has been denied.[8] But in *Gable* v. *Parry*,[9] the Supreme Court of Pennsylvania held, that on a sci. fa. upon a mechanic's lien against owner and contractor, the defendants may offer as a set-off, a debt due by the plaintiff to the contractor.[10]

[1] 5 S. & R. 121, Gogel *vs.* Jacoby. [2] Lord Mansfield, 4 Burr. 22, 20, 1 Bl. 651, Green *vs.* Farmer.

[3] 4 & 5 Anne c. 17—5 Geo. 1 c. 11.—2 Geo. 2 c. 22. 5 Geo. 2 c. 30. 8 Geo. 2 c. 24—6 Geo. 4 c. 16. [4] Dunlop, 45.

[5] 5 S. & R. 121, Gogel *vs.* Jacoby, 8 S. & R. 88, Waln's Assignees *vs.* Bank N. A.

[6] 4 S. & R. 257, Heck *vs.* Skinner.

[7] Lord Raymond, 4 Term 511, Japsford *vs.* Fletcher.

[8] Pinnock *vs.* Harrison, 3 Mee. & Welsby, 532.

[9] 1 Harris, 181.

[10] It is proposed to continue the discussion of this subject in future numbers.