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MECHANICS' LIEN ON PERSONAL PROPERTY.

(*Continued from p.* 185, *ante.*)

V. PRIORITY.—SUBROGATION.—It is a universal rule, that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to some subsequent claimant: *Rankin* v. *Scott*, 12 Wheat. 177.

A receiver is a person appointed for the preservation of the fund or property *pendente lite*, and for its ultimate disposal according to the rights and priorities of the parties; and the appointment of a receiver ordinarily gives no advantage or priority to the person at whose request the appointment is made, over the parties in interest: *Ellis* v. *Boston, &c., Railway Co.*, 107 Mass. 1; his possession is subject to all valid and existing liens upon the property at the time of his appointment, and does not divest a lien previously acquired in good faith: *Gere* v. *Dibble*, 17 How. Pr. 31; *In re N. A. Gutta Percha Co.*, Id. 549; *Denniston* v. *Chicago, &c., Railway Co.*, 4 Biss. 414. The rule in regard to the priority of equities is that he who has the prior equity in point of time has the prior right, and therefore a party resisting an equity in order to maintain his defence, must protect himself either under an older equity, or he must have purchased the legal title *bona fide*, without notice, for a valuable consideration which must have been paid.

The holder of a subsequent lien upon mortgaged chattels has

the same right to protect his interest in the property as if the prior lien be of any other nature, and may pay off the mortgage. An execution-creditor, upon the payment of a chattel mortgage which is a prior encumbrance upon the chattel on which his execution has been levied, is entitled to be subrogated to the rights of the mortgage; and he has the right to demand and receive an assignment of the mortgage, and the right to redeem from such mortgage attaches as soon as a lien is acquired by the levy of the execution, it is not postponed till after sale on the execution: *Lucking* v. *Wesson*, 25 Mich. 443.

VI. DURATION.—The right to hold property by lien lasts until the debt so secured is paid. The mechanics' lien on personal property is simply a security for the payment of a debt. Statutes of limitations being statutes of repose, suspend the remedy, but do not cancel the debt; and, therefore, when the security for a debt is a lien on property, either personal or real, the lien is not impaired in consequence of the debt being barred by the Statute of Limitations: *Higgins* v. *Scott*, 2 B. & Ad. 413; *Belknap* v. *Gleason*, 11 Conn. 160; *Thayer* v. *Munn*, 19 Pick. 538; *Spears* v. *Hartly*, 3 Esp. 81; *Crain* v. *Paine*, 4 Cush. 486; *Joy* v. *Adams*, 26 Me. 330.

VII. ENFORCEMENT.—At common law, a sale of the property to satisfy the debt secured by the lien, can be made only by the consent of the owner; if consent cannot be obtained, resort must be had to a court of equity: *Fox* v. *McGregor*, 11 Barb. 41. It is obvious that in many cases where the care of the property must be at the expense of the lien claimant, such remedy may be inadequate. To cure such defect, the modern tendency is to increase the efficiency of statute remedies, so as to make them adequate for securing those rights which the law means to give. If, however, the remedy given by statute is inadequate to secure the rights given by a lien, resort must be had to proceedings in equity: *Cairo & Vincennes Railway Co.* v. *Fackney*, 78 Ill. 116.

The proper action to be brought against one who has wrongfully taken and retains possession of personal property, is that of tort: *Matter of Hicks*, 20 Mich. 280; *Moses* v. *Arnold*, 43 Iowa 187; *Watson* v. *Stever*, 25 Mich. 386. But if one has taken possession of property and sold or disposed of it, and received money or

money's worth therefor, the owner is not compellable to treat him as a wrongdoer, but may affirm the sale as made in his behalf, and demand, in an action of assumpsit, the benefit of the transaction. Damages for a trespass are not in general recoverable in assumpsit; and in the case of taking personal property, it is generally held essential that a sale by the defendant should be shown: *Stearns* v. *Dillingham*, 22 Vt. 626; *Smith* v. *Smith*, 43 N. H. 536; *Pearsoll* v. *Chapin*, 44 Penn. St. 9; *Glass Co.* v. *Wolcott*, 2 Allen 227; *Emerson* v. *McNamara*, 41 Me. 565. And whenever trespass, trover or replevin will not lie, case can be sustained wherever there has been a *wrong done* by the defendant and a resulting injury to the plaintiff: *Low* v. *Martin*, 18 Ill. 290; *Upton* v. *Vail*, 6 Johns. 181; *Griffin* v. *Farwell*, 20 Vt. 151; *Ashby* v. *White*, Ld. Raym. 938; *Pasley* v. *Freeman*, 3 Term R. 63; *Sheldon* v. *Fairfax*, 21 Vt. 102; *Langridge* v. *Levy*, 2 M. & W. 519; *Weatherford* v. *Fishback*, 3 Scam. 170; *Bond* v. *Hilton*, Bushee (N. C.) 308; *Googins* v. *Gilmore*, 47 Me. 9. Property which is taken out of the operation of a chattel mortgage by a fraudulent contrivance of the mortgagor, is to all intents and purposes, wrongfully converted. The mortgagee loses it as effectually as if it had been destroyed or stolen: *Fenn* v. *Bittleston*, 8 Eng. L. & Eq. 483; *Forbes* v. *Parker*, 16 Pick. 462; *Manning* v. *Monaghan*, 23 N. Y. 539.

That a mortgagee of personal property may sue for an injury to his reversionary interest, see *Googins* v. *Gilmore*, 47 Me. 9; *Ayers* v. *Bartlett*, 9 Pick. 156.

VIII. WAIVER.—As the right of the lien-holder is merely that of retaining possession of the property, the legal title to which is in the general owner, any act not consistent with the right of possession by the lien-claimant, or title of the owner, is considered as a waiver of the lien: *Black* v. *Bogert*, 65 N. Y. 601; *McFarland* v. *Wheeler*, 26 Wend. 467; *Grinnell* v. *Cook*, 3 Hill 485; *Gurr* v. *Cuthbert*, 12 L. J., Ex. 309; *Bean* v. *Bolton*, 3 Phila. R. 87; *Pickett* v. *Bullock*, 52 N. H. 354; *Kitteridge* v. *Freeman*, 48 Vt. 62. Therefore, a voluntary surrender of the possession of the property subject to the lien, or a delivery to a third person, not procured by fraud: *Fouch* v. *Wilson*, 60 Ind. 64; or any other act inconsistent with the lien-claimant's possession, is a waiver: *Hall* v. *Tuttle*, 8 Wend. 374; *Waterston* v. *Getchell*, 5 Greenl.

435; *Spartali* v. *Benecke*, 10 Com. B. 212; 19 L. J., C. P., 293. A lien-claimant, by parting with his dominion over the property so as to put it beyond his power to surrender it on demand to the general owner, on payment or tender of the debt, loses all right of lien thereto: *Ruggles* v. *Walker*, 34 Vt. 470. An express contract that a lien shall be retained to a specified extent is equivalent to a waiver to any greater extent: *Brown* v. *Gilman*, 4 Wheat. 255.

If one who has a lien on property for labor performed on it, delivers it to the owner or his agent without insisting on holding it as security, the lien is waived: *Ruggles* v. *Walker*, 34 Vt. 468; *Brackett* v. *Hayden*, 3 Shepley 347; and the owner of the property may sustain trespass for a subsequent taking of the property by a stranger: *Bailey* v. *Quint*, 22 Vt. 474. A voluntary abandonment of the possession is a waiver: *King* v. *Indian Orchard, &c.*, 11 Cush. 231. The delivery of possession necessary to divest a lien is such a delivery as would be sufficient under the Statute of Frauds to transfer the title. Delivery of part of the property subject to the lien does not impair the lien on the balance for the whole amount due: *Ruggles* v. *Walker*, 34 Vt. 468; *Palmer* v. *Tucker*, 45 Me. 316; *Partridge* v. *Trustees, &c.*, 5 N. H. 286.

A voluntary surrender of the possession with intent, express or implied, is necessary to constitute a waiver. A delivery procured by fraud does not destroy the right: *Walcott* v. *Keith*, 2 Fost. 196; and if possession be regained without the doing of legal wrong, the lien will be in force: *Johnson* v. *The McDonough*, 1 Gilpin 101. A party who has relinquished a prior lien through fraud practised on him, may rescind the agreement for relinquishment, and retake the property by virtue of his prior lien: *Lynch* v. *Tibbitts*, 24 Barb. 51. Delivery of property by the lien-holder, and payment of the debt by the owner, are concurrent acts, and neither party is bound to perform his part of the contract unless the other is ready to perform the correlative act: *Frothingham* v. *Jenkins*, 1 Cal. 42; *Bigelow* v. *Heaton*, 4 Denio 496. To destroy a lien, the surrender of the possession of the property must be voluntary; but it may be sold on execution subject to the lien, and it seems the lien-holder may be required to permit its exposure for sale in that manner; and if the lien-claimant voluntarily surrenders the property to the officer who has the execution against the owner, the officer may remove and sell

the same, but not to the prejudice of the lien: *Glassner* v. *Wheaton*, 2 E. D. Smith 352.

When possession of the property is demanded by the owner or other person lawfully entitled to it, the party who claims the possession by virtue of his lien should state its nature and amount: *Heine* v. *Anderson*, 2 Duer 318; for if a ground of retention different from that of the lien, and inconsistent therewith, is taken, the lien ceases to exist: *Hanna* v. *Phelps*, 7 Ind. 21; and the owner of the property may sue the lien-claimant and recover without having first tendered to him the amount of the debt: *Saltus* v. *Everett*, 20 Wend. 267.

IX. Discharge or Determination.—The payment of the debt, or performance of any obligation secured by the lien, will discharge it. A tender of the amount secured by the lien is equivalent to payment as to all things which are incidental to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. The debt still remains, but the lien is gone absolutely and for ever: *Kortright* v. *Cady*, 21 N. Y. 366, and cases cited; *Chick* v. *Willetts*, 2 Kan. 385; *Caruthers* v. *Humphreys*, 12 Mich. 270; *Ladue* v. *D. & M. Railway Co.*, 13 Mich. 393; *Ketchum* v. *Crippen*, 37 Cal. 223; and this rule applies to a lien created by an execution: *Tiffany* v. *St. John*, 65 N. Y. 314.

A valid tender is a formal offer to perform that which is due from the party making the offer. In *Moynahan* v. *Moore*, 9 Mich. 9, it was decided that a tender of the amount due, on condition that the property be delivered up, is not a conditional, but a valid, tender. The facts were that the plaintiff employed the defendant to repair a carriage, and the defendant retained the carriage, under a mechanic's lien, for the amount due him for making such repairs. To obtain possession of the property, the plaintiff tendered, as the jury found, sufficient to discharge the lien. On the facts thus presented the court says, "This tender necessarily operated to release the property, and the plaintiff was entitled to immediate possession of it. That such would be the effect of an unconditional tender is not doubted; but, as the tender in this case was made upon condition that the carriage should be delivered up, it is thought that it has not such effect. A tender made to procure the possession of property can hardly be called

conditional because it is accompanied by a demand for the property. But it does not appear that any objection was made to the tender by the defendant, except for insufficiency—he demanding more than the sum offered; and, as the jury find that sufficient was tendered, the tender was good, even were the strictest rule to prevail, upon the established principle that the objection made at the time of tender precludes all others; and if that be not well grounded, the tender will be held good." The tender being sufficient, the lien was lost, and the owner was held entitled to maintain an action of replevin for his property without payment of the tender into court; the court saying upon this point, "Were this an action by the defendant to recover compensation for the repairs, the want of the money in court would render the tender nugatory, as the effect of tender in such cases is to stay interest and relieve from costs, and therefore the party making the tender must always have the money within reach of his creditor. But in this case the tender having once operated to discharge the lien, it is gone forever, and nothing could revive it. The reasons which require the money to be brought into court do not apply in such a case. By refusing to receive the money tendered, the defendant lost his lien, and can only rely upon the personal liability of the plaintiff.

A lien may be lost by releasing property upon the mere request of a third party who promises to pay the debt for which the property is held, although such promise is not binding, because it is collateral and within the Statute of Frauds, which requires such an undertaking to be evidenced by writing: *Mallory* v. *Gillett*, 21 N. Y. 412; *Corkins* v. *Collins*, 16 Mich. 478. A lien may be lost by negligence: *Hanna* v. *Holton*, 78 Penn. St. 334; and a lien is discharged, the performance of which has been fraudulently prevented by the lien-claimant: *Carey* v. *Brown*, 92 U. S. 171.

X. Who may sue for Injury.—Either the general owner or the party who holds the property under the lien, may maintain an action in respect to it against a wrongdoer: *Green* v. *Clarke*, 12 N. Y. 343; *Edwards* v. *Frank*, 40 Mich. 616; the latter by virtue of his right of possession: *Wingard* v. *Banning*, 39 Cal. 546; the former by reason of his ownership: *Crouch* v. *Railway Co.*, 2 Car. & K. 801. If property in the possession of the lienor is destroyed without his fault he may recover the debt: *Russell* v. *Koehler*, 66 Ill. 459. When property to which a party has, by

statute, a lien, but not the right of possession, is destroyed or so changed by a stranger that the lienor cannot enforce his lien, he may maintain an action on the case against the wrongdoer: *Hussey, Adm'r*, v. *Peebles*, 53 Ala. 432.

XI. WHO MAY BE SUED FOR INJURY.—Upon tender of payment by the owner, the lien ceases: *Tiffany* v. *St. John*, 65 N. Y. 314; *Moynahan* v. *Moore*, 9 Mich. 9; and if the party holding under the lien refuses to return the property, the owner may recover the possession, or sue for a conversion: *Stearns* v. *Marsh*, 4 Denio 227. The owner may maintain a joint action against both the bailee and his agent, or a separate action against either, for an injury caused by the negligence of the agent: *Phelps* v. *Wait*, 30 N. Y. 78; and a recovery either by the owner or the bailee is a bar to another action by other parties: *Baird* v. *Daly*, 57 N. Y. 236. If the owner refuses to perform his part of the contract, he may be sued and the property retained as collateral security until the debt shall be recovered: *Jones* v. *Conde*, 6 Johns. Ch. 77; *Payne* v. *Harrell*, 40 Miss. 498; *Gerrard* v. *Moody*, 48 Ga. 96. A suit may be maintained against a party through whose negligence a lien has been lost: *Hanna* v. *Holton*, 78 Penn. St. 334; *Halpin* v. *Hall*, 42 Wis. 176.

XII. DAMAGES RECOVERABLE.—When suit is brought by the owner for conversion, against a defendant who has a lien on the property to secure a debt, the amount of the lien should be deducted from the value of the property: *Chamberlain* v. *Shaw*, 18 Pick. 283; *Outcalt* v. *Durling*, 25 N. J. L. 443; *Neiler* v. *Kelley*, 69 Penn. St. 403. But when the plaintiff has a lien, and is responsible to a third party, or if the defendant is not entitled to the balance of the value of the property subject to the lien, the plaintiff is entitled to recover the whole value: *Chamberlain* v. *Shaw*, 18 Pick. 278; *Adams* v. *O'Connor*, 100 Mass. 515; *Davidson* v. *Gunsolly*, 1 Mich. 388.

If the plaintiff has only a lien on the property, and the defendant is the owner subject only to the lien, the plaintiff can recover only the amount of his claim: *White* v. *Webb*, 15 Conn. 302; *Brownell* v. *Hawkins*, 4 Barb. 491; but against a stranger, if he had possession or the legal title for the purposes of his lien, he can recover full value of the property: *Adams* v. *O'Connor*, 100 Mass. 515; *White* v. *Webb*, 15 Conn. 302.

In an action of replevin, whatever damages have been actually sustained, may be recovered: *Gibbs* v. *Cruickshank*, Law Rep., 8 C. P. 454, 460. Therefore, where the property in controversy has a usable value, the value of the use of the property during its wrongful detention is a proper item: *Yandle* v. *Kingsbury*, 17 Kan. 195; *Allen* v. *Fox*, 51 N. Y. 567; *Butler* v. *Mehrling*, 15 Ill. 488; *Williams* v. *Phelps*, 16 Wis. 80; and in some cases, deterioration of the property from injury, neglect or other causes: *Washington Ins. Co.* v. *Webster*, 62 Me. 341, must be considered; also, oppression and vexation may be regarded: *Herdic* v. *Young*, 55 Penn. St. 176; *Cable* v. *Dakin*, 20 Wend. 172; see *Stevens* v. *Tuttle*, 104 Mass. 328, 335. In an action of replevin, the plaintiff continues to be the absolute owner of the property, if he was the owner previously, and he cannot elect in such action to take the value of the property instead of the property: *Wilson* v. *Fuller*, 9 Kan. 176. In an action of trover, the plaintiff elects to consider the property taken, if the property is still in existence, as having become the property of the defendant, and he himself is the owner of nothing but the mere value of the property, which value he seeks to recover, with legal rate of interest thereon: Id. The plaintiff must have the legal title to the property in question, and must show possession or the right to immediate possession. It is not enough that he shows an equitable title, such as a right to redeem, or a reversionary interest: *Ring* v. *Neale*, 114 Mass. 111.

When property is sold by a lien-holder contrary to the terms of the contract by which the lien was created, the measure of damages is the market value of the property at the time it was sold: *Belden* v. *Perkins*, 78 Ill. 449. When an action is brought against the lien-holder for the value of the property sold, he may recoup the amount of the debt secured by the lien: *Belden* v. *Perkins*, *supra*. And see *James* v. *Rogers*, 15 Mass. 389; *Stearns* v. *Marsh*, 4 Denio 227; *Platt* v. *Brand*, 26 Mich. 175. And the same rule applies where suit is brought against the purchaser: *Belden* v. *Perkins*, *supra*, and a defendant may recoup the amount of damage occasioned by the negligence of the bailee: *Sargent* v. *Slack*, 47 Vt. 674.

JOSEPH H. VANCE.

Ann Arbor, Mich.