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Assignment of Mechanics' Liens

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NOTES

ASSIGNMENT OF MECHANICS' LIENS

The Code of Civil Procedure designates those who are entitled to a mechanics' lien,[1] and specifies how the notice of claim of lien should be filed.[2] A lien correctly filed by one authorized to do so is assignable[3] and will accompany the debt it secures as an incident of that debt.[4] An inchoate (unfiled) lien receives a different treatment from the courts. It is well settled, though not unquestioned,[5] that such a lien is not assignable.[6] It is the purpose of this note to explore the foundation for this distinction between perfected and inchoate liens and to consider the feasibility of eliminating this distinction.

The Leading Case

The first California case on the question of the assignability of an inchoate mechanics' lien was *Mills v. LaVerne Land Co.*[7] The court claimed that the weight of authority was that the personal element of the lien prevented an assignment.[8] As authority the court cited cases from Iowa,[9] Michigan,[10] New York,[11] Washington,[12] and Wisconsin.[13] If the strength of *Mills* was made to rely on the law in those jurisdictions today, it would be weak.

The decision cited from Wisconsin did not support the result in *Mills*.[14] Subsequently both the Iowa[15] and Michigan[16] courts declared the inchoate right to a mechanics' lien assignable. Neither court made any mention of the personal element in their overruling opinions. The present Washington code[17] explicitly

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1 CAL. CODE CIV. PROC. § 1180.

2 CAL. CODE CIV. PROC. § 1193.1(j).

3 Rauer v. Fay, 110 Cal. 361, 42 Pac. 902 (1895); Duncan v. Hawn, 104 Cal. 10, 37 Pac. 626 (1894).

4 Union Supply Co. v. Morriss, 220 Cal. 331, 30 P.2d 394 (1934); Mitchell v. Shoreridge Oil Co., 24 Cal. App. 2d 382, 75 P.2d 110 (1938).

5 See McClung v. Paradise Gold Mining Co., 164 Cal. 517, 129 Pac. 774 (1913).

6 McCrea v. Johnson, 104 Cal. 224, 37 Pac. 902 (1894); Mills v. LaVerne Land Co., 97 Cal. 254, 32 Pac. 169 (1893); Burr v. Peppers Cotton Lumber Co., 91 Cal. App. 268, 266 Pac. 1025 (1928).

7 97 Cal. 254, 32 Pac. 169 (1893).

8 *Contra*, Smoot v. Checketts, 41 Utah 211, 125 Pac. 412 (1912).

9 Brown v. Smith, 55 Iowa 31, 7 N.W. 401 (1880) (no reference to personal element).

10 Fitzgerald v. Trustees, 1 Mich. N.P. 243 (1870).

11 Rollin v. Cross, 45 N.Y. 766 (1871) (no attempt to define personal element or explain its origin).

12 Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070 (1891).

13 Caldwell v. Lawrence, 10 Wis. 331 (1860).

14 *Ibid.* This case dealt with an assignment of a perfected lien, and denied the assignee's right to enforce it in his own name. This has never been the California position. See Mitchell v. Shoreridge Oil Co., 24 Cal. App. 2d 382, 75 P.2d 110 (1938).

15 Peatman v. Centerville Light Co., 105 Iowa 1, 74 N.W. 689 (1898).

16 McAllister v. Des Rochers, 132 Mich. 381, 93 N.W. 887 (1903).

17 WASH. REV. CODE § 60.04.080 (1961).

permits the assignment of a mechanics' lien or the *right* to a lien. The New York code[18] allows the assignment of a filed lien only. There has never been a similar statutory limitation in this State.

The case law and statutes of other jurisdictions are of no more value in refuting *Mills* than they were in supporting it. Mechanics' lien laws have no root or counterpart in common law,[19] but depend entirely upon legislation for their existence.[20] Statutes vary greatly between states, and no decision can be strong precedent unless considered in the light of the law in that state. But the comparison is of value to demonstrate the present approach towards the problem in jurisdictions that at one time were in accord with the California rule.

The *Mills* court made no attempt to define the personal element of a mechanics' lien. Perhaps it had in mind the idea expressed in later opinions[21] that the entire purpose of mechanics' lien laws is to secure payment for the laborer or materialman. Whatever the personal element is, in California it has never prevented one other than a laborer or materialman from enforcing a mechanics' lien.[22] It seems likely that the court related the personal element to the statutory requirements for filing the lien.[23] Though the Code of Civil Procedure section 1187 which was analyzed in *Mills* has since been repealed[24] and replaced,[25] the phraseology has been substantially retained so that the court's reasoning remains valid when applied to the new section. The requirement still exists that the claim be signed or verified by the *claimant* or someone on his behalf[26] and include a description of the work done or material furnished *by him* and the name of the person by whom *he* was employed or to whom *he* furnished material. The court reasoned that since the assignee himself is neither employed nor a supplier, he is unable to file a claim describing his own contribution to the improvement upon which the lien is sought. This inability to literally comply with the statute prevents perfection of the right to a mechanics' lien by an assignee.

It is evident that the courts have not erred in following the rule of the *Mills* case. The result is patently correct in view of our Code of Civil Procedure. But, by accepting the case in its entirety, they have perpetuated the idea of a personal element which somehow prevents assignment of an inchoate lien. This is a fiction which has never been explained or justified.

Recommendation

No law should be changed for the sake of change alone, nor should a new law be recommended without attention being paid to the constitutional ramifications.

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[18] N.Y. LIEN LAW § 14.

[19] 3 POWELL, REAL PROPERTY § 483 (1952).

[20] Spinney v. Griffith, 98 Cal. 149, 32 Pac. 974 (1893); Stanislaus Lumber Co. v. Pike, 51 Cal. App. 2d 54, 124 P.2d 190 (1942); Holm v. Bramwell, 20 Cal. App. 2d 332, 67 P.2d 114 (1937).

[21] Nolte v. Smith, 189 Cal. App. 2d 140, 11 Cal. Rptr. 261 (1961); Bay Lumber Co. v. Pickering, 120 Cal. App. 163, 7 P.2d 371 (1932).

[22] Miltimore v. Nofziger Bros. Lumber Co., 150 Cal. 790, 90 Pac. 114 (1907).

[23] After considering whether allowing assignment of a laborer's lien was desirable, the court said in conclusion, "At all events, a court can neither make nor amend a statute." 97 Cal. at 257, 32 Pac. at 170.

[24] Cal. Stat. 1951, ch. 1159, § 4, at 2958.

[25] CAL. CODE CIV. PROC. § 1193.1(j).

[26] See Parke & Lacy Co. v. Inter Nos Oil Co., 147 Cal. 490, 82 Pac. 51 (1905) (agent); Jones v. Kruse, 138 Cal. 613, 72 Pac. 146 (1903) (attorney).