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Real Property - Liens - Husband's Contract for Improvements on Land Owned Jointly with Wife

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REAL PROPERTY — LIENS — HUSBAND'S CONTRACT FOR IMPROVEMENTS ON LAND OWNED JOINTLY WITH WIFE — A husband alone contracted for the construction of a house on property owned jointly with his wife. The wife inspected the progress of the work, took part in directing it, and later occupied the house. In an equity proceeding by the contractor to establish and enforce a mechanic's and materialman's lien on the premises for the balance due under the contract, the trial court rendered a decree for the contractor. On appeal, *held*, reversed. Since there was no showing that the husband contracted as an agent of the wife, and the evidence does not support a finding that she ratified his acts, the wife's interest cannot be subjected to a lien or sold to satisfy a judgment rendered against the husband on the contract. *Elder v. Stewart*, 114 So. 2d 263 (Ala. 1959).

Where property is held by a husband and wife in joint tenancy or by the entireties, the husband, in the absence of a statute to the contrary,¹ cannot subject the estate to a mechanic's lien without the consent of his wife.² Proof of the husband's agency for the wife will satisfy the consent requirement, however, and several states having statutes expressly covering this problem provide for a presumption of agency where the wife fails to give notice in the manner provided of her objection to the improvements.³ In other jurisdictions the statutes do not deal expressly with the husband-and-wife situation, but it is included under broader agency provisions. Statutes of this latter type often provide that unless notice of non-assent to the improvements is given, the interest of a noncontracting owner who has knowledge of the improvements will be subject to the lien on a presumption either of agency⁴ or ratification.⁵ Such "implied consent" provisions have been criticized as unfair to the noncontracting owner because an actual objection which is not expressed in the limited and formal manner required

¹ ILL. REV. STAT. ch. 82, §3 (1959); KAN. GEN. STAT. ANN. §60-1401 (1949) (estate subject to lien on the contract of either spouse). Where land is held as community property, and statutes give the husband management and control thereof, he may bind the estate by his contract. *Brick & Tile, Inc. v. Parker*, 143 Tex. 383, 186 S.W.2d 66 (1945). Compare R.I. GEN. LAWS ANN. §34-23-1 (1956) (written consent of wife necessary for lien to attach); MICH. COMP. LAWS §570.2 (1948) (no lien unless both spouses sign the contract). See *Burman v. Ewald*, 192 Mich. 293, 158 N.W. 853 (1916).

² *Roper v. Clanton*, 258 S.W.2d 283 (Mo. App. 1953); *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947); *Katauskas v. Lonstein*, 266 Mass. 29, 164 N.E. 810 (1929).

³ FLA. STAT. §84.12 (1959); N.J. STAT. ANN. §2A:44-69 (1952); 32 N.Y. LIEN LAWS §3; OHIO REV. CODE ANN. §1311.10 (Baldwin 1958); TENN. CODE ANN. §64-1103 (1955). See also WYO. STAT. ANN. §29-3 (1957). The agency created is limited to the consent issue, and does not impose personal liability upon the wife. *Meadows Southern Const. Co. v. Pezzaniti*, 108 So.2d 499 (Fla. App. 1959). See also BLANC, N.Y. MECHANICS' LIENS ¶23a (Winard ed. 1949). Except in Ohio and Wyoming, the notice of objection must be written, and either given to the contractor or filed with the county clerk.

⁴ ALASKA COMP. LAWS ANN. §26-1-4 (1949); CAL. CIV. PROC. CODE §1183.1; COLO. REV. STAT. ANN. §86-3-5 (1953); ME. REV. STAT. ANN. ch. 178, §35 (1954); MINN. STAT. §514.06 (1957); NEV. REV. STAT. §108.140 (1959); N.M. STAT. ANN. §61-2-10 (1953); ORE. REV. STAT. §87.030 (1953); S.C. CODE §45-253 (1952); S.D. CODE §39.0706 (1939). See Comment, 68 YALE L.J. 138, 157-159 (1958) for statute comparison.

⁵ PA. STAT. ANN. tit. 49, §23 (1930).

by the statutes is insufficient to overcome the presumption of agency; thus an owner may be deprived of his property without his consent.⁶ It is indeed difficult to understand why it would be less fair to require the contractor to suffer the consequences of his failure to examine the record, unless such a requirement would unduly impede the improvement of real property. The statute in the principal case⁷ and those found in a majority of jurisdictions do not afford the contractor the benefit of a presumption. This type of statute does not permit a lien upon an owner's interest unless the materials or labor are furnished upon his contract, consent, or instance.⁸ The burden is upon the lien claimant to show the wife's consent to her husband's contract.⁹ In the absence of her express contract or consent, the theory most widely employed to establish a lien is that of implied agency, although an occasional court speaks of ratification¹⁰ or estoppel.¹¹

There is no certain standard of conduct from which an inference of agency may be drawn, and the holdings have not been as consistent as one might wish. The fact of the marital relation alone does not justify an inference that the contracting husband was acting as his wife's agent.¹² Likewise, evidence showing merely that the wife was living on the premises at the time of the contract,¹³ or that she passively acquiesced in the improvements,¹⁴ will not support such a result. It has been suggested that a mere "wifely interest" in the husband's affairs does not demonstrate her consent to the contract,¹⁵ and even that the same conclusion will follow where the wife leaves such affairs generally to the husband, approving whatever he might do.¹⁶ On the other hand, extensive activity and participation by the wife will usually indicate an implied agency, and her execution of a trust deed to obtain funds with which to discharge the contractor's claims

⁶ Myhre, *Fiction, Fallacy and Facts in Relation to "Implied Consent" Provisions of Certain Mechanics' Lien Statutes*, 32 MINN. L. REV. 559 (1948). Notice must usually be personally served or posted. For a discussion of questions of due process, see *Chears Floor & Screen Co. v. Gidden*, 159 Miss. 288, 131 So. 426 (1930). But maximum security for contractors might be justified in view of the dangers of unjust enrichment and fraudulent collusion. See *Wilson v. Logue*, 131 Ind. 191, 30 N.E. 1079 (1892). See also *Notes*, 50 MICH. L. REV. 482 (1952), 29 COLUM. L. REV. 996 (1929).

⁷ ALA. CODE tit. 33, §37 (1940).

⁸ *E.g.*, *ibid.* (contract); CONN. GEN. STAT. REV. §49-33 (1958) (agreement or consent); GA. CODE ANN. §67-2001 (1957) (employment); IDAHO CODE ANN. §45-501 (Supp. 1959) (instance).

⁹ Compare *Barry v. Barry*, *supra* note 2, with *Fischer v. Meiroff*, 192 Wis. 482, 213 N.W. 283 (1927).

¹⁰ *E.g.*, *Taggart v. Kem*, 22 Ind. App. 271, 53 N.E. 651 (1899); principal case at 265-266.

¹¹ See *Bell Bros. & Co. v. Arnold*, 17 Tenn. App. 493, 68 S.W.2d 958 (1933). However, estoppel should not apply unless the builder relied upon the wife's conduct in entering into the contract.

¹² *General Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E.2d 828 (1954); *Blenard v. Blenard*, 185 Md. 548, 45 A.2d 335 (1946).

¹³ *Koehring v. Bowman*, 137 N.E. 767 (Ind. App. 1923), *rev'd on other grounds*, 194 Ind. 433, 142 N.E. 117 (1924).

¹⁴ See *R. D. Kurtz, Inc. v. Field*, 223 Mo. App. 270, 14 S.W.2d 9 (1929).

¹⁵ *E. C. Robinson Lumber Co. v. Lowrey*, 276 S.W.2d 636 (Mo. App. 1955).

¹⁶ *William Penn Supply Corp. v. Watterson*, 218 Md. 291, 146 A.2d 420 (1958).

has been held important in reaching such a result.¹⁷ Between these extremes lies a wide range of conduct concerning which there is apparent conflict in authority. While some courts require the evidence of agency to be "strong and persuasive,"¹⁸ due to the nature of the estate involved,¹⁹ others have permitted the inference upon relatively slight evidence.²⁰ Although in the principal case acts of the wife were enumerated which in other jurisdictions might be sufficient to permit an implication of agency, the court stated flatly that no such relationship was shown.²¹ The court further held the doctrine of ratification inapplicable, since it did not appear that the wife had knowledge of all the material facts, or that the husband entered into a contract as her avowed agent.²² This is undoubtedly a correct view, for a wife cannot ratify an act of her husband which he did not purport to do on her behalf,²³ and a contract ostensibly and actually made by a person solely on his own behalf cannot be appropriated by another through "ratification."²⁴ The result reached in the principal case might seem unduly lenient toward the wife when viewed in the light of a policy which seeks to provide substantial security to mechanics and materialmen. Yet it was not inconsistent with the applicable statute, and if greater protection for contractors is deemed necessary, the initiative should rest with the legislature.

Judd L. Bacon, S.Ed.

¹⁷ Wittichen v. Miller, 179 Tenn. 352, 166 S.W.2d 612 (1942); Magidson v. Stern, 235 Mo. App. 1039, 148 S.W.2d 144 (1941). See Taggart v. Kem, *supra* note 10. But the mere execution of a trust deed, standing alone, would probably not be sufficient to prove agency. See E. C. Robinson Lumber Co. v. Lowrey, *supra* note 15. Nor is it sufficient if the wife is unaware of the items to which the funds are to apply. R. D. Kurtz, Inc. v. Field, *supra* note 14.

¹⁸ Compare Wilson v. Fower, 236 Mo. App. 532, 155 S.W.2d 502 (1941) (evidence that wife knew of plumbing installation, approved the work, selected colors and suggested location of bathroom fixtures held insufficient as a matter of law) with E. C. Robinson Lumber Co. v. Lowrey, *supra* note 15 (a lien on the premises held justified where wife helped select materials, was present while work was in progress, gave instructions to the builders, and joined in a deed of trust).

¹⁹ See Wilson v. Fower, *supra* note 18.

²⁰ In Wilson v. Logue, *supra* note 6, an agency was found to exist where the wife knew of the contract, was present when the materials were delivered and used, and failed to object.

²¹ Principal case at 265.

²² *Id.* at 265-266.

²³ Cyclone Fence Co. v. McAviney, 121 Conn. 656, 186 Atl. 635 (1936). See General Air Conditioning Co. v. Douglass, *supra* note 12; Gould v. Maine Farmers' Mut. Fire Ins. Co., 114 Me. 416, 96 Atl. 732 (1916).

²⁴ See MECHEM, AGENCY §§377, 386-387, 390 (2d ed. 1914). Actual authority must also have been present in order to hold an undisclosed principal. *Id.* §1764.