

# Liens--Section 36-b of Lien Law--Held Inapplicable to Foreign Realty (Allied Thermal Corp. v. James Talcott Inc., 3 N.Y.2d 302 (1957))

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1957) "Liens--Section 36-b of Lien Law--Held Inapplicable to Foreign Realty (Allied Thermal Corp. v. James Talcott Inc., 3 N.Y.2d 302 (1957))," *St. John's Law Review*: Vol. 32 : No. 1 , Article 18.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol32/iss1/18>

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LIENS—SECTION 36-B OF LIEN LAW—HELD INAPPLICABLE TO FOREIGN REALTY.—Plaintiff supplied material to a subcontractor for the improvement of real property located in *Pennsylvania*. Action was brought to compel the subcontractor's factor to account for funds which plaintiff claimed took the character of a trust under Section 36-b of the New York Lien Law. The relevant contracts were made, and the funds were received and diverted in New York, by residents of this state. The Court of Appeals, affirming a dismissal of the complaint, held that Section 36-b of the Lien Law does not apply to funds given for improvements of foreign realty. *Allied Thermal Corp. v. James Talcott Inc.*, 3 N.Y.2d 302, 144 N.E.2d 66 (1957).

Section 36-b is one of a group of sections of the Lien Law by which the trust fund remedy is provided. In 1929, Section 36 was enacted<sup>1</sup> making it a misdemeanor for the owner of a building to divert funds advanced on the building. In 1930, violation of this section became a larceny,<sup>2</sup> and Sections 36-a and 36-b were added, making it a larceny for contractors and subcontractors respectively to divert funds advanced to them for the improvement of realty.<sup>3</sup> In 1942, Sections 36, 36-a and 36-b were amended to provide a civil remedy for the violation of each of the sections.<sup>4</sup> A party seeking the statutory remedy must bring an action to enforce the trust impressed on these funds.<sup>5</sup> The defendant may be required to post security if it appears that the funds are likely to be dissipated before judgment.<sup>6</sup> These amendments were proposed to supplement the mechanic's lien,<sup>7</sup> to clarify and strengthen the trust fund provisions and to provide a civil remedy for their enforcement.<sup>8</sup>

The jurisdictional question presented by Section 36-b to the Court was novel. Earlier cases, however, presented analogous problems. In *Mallory Assoc. v. Barving Realty*,<sup>9</sup> the court there said that the

ceiving State; (f) if he considers it necessary, to have the services of a competent interpreter; and (g) to communicate with a representative of the Government of the sending State and, when the rules of court permit, to have such a representative present at his trial."

Recent legislation also provides that American soldiers subject to trial in a foreign country may obtain from the United States, free counsel fees, court costs, bail, and other incidental expenses. 70 STAT. 630, 50 U.S.C. § 751 (Supp. IV, 1956). Prior to this enactment it was the policy of the Department of Defense to provide such counsel fees, to a more limited extent, as part of their determination to protect the rights of American personnel subject to criminal trial by a foreign country. AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL AND COMPARATIVE LAW 85-86 (1956-57).

<sup>1</sup> Laws of N.Y. 1929, c. 515.

<sup>2</sup> Laws of N.Y. 1930, c. 859.

<sup>3</sup> *Ibid.*

<sup>4</sup> Laws of N.Y. 1942, c. 808.

<sup>5</sup> N.Y. LIEN LAW § 71 (Supp. 1957).

<sup>6</sup> *Id.* § 72.

<sup>7</sup> 1942 LEG. DOC. No. 65, REPORT, N.Y. LAW REVISION COMMISSION 283.

<sup>8</sup> Laws of N.Y. 1942, c. 808 n.\*.

<sup>9</sup> 300 N.Y. 297, 90 N.E.2d 468 (1949).

money deposited for the rental of real property shall have the character of a trust under Section 233 of the New York Real Property Law, regardless of the property's situs.<sup>10</sup> The lease was a personal covenant between the parties, creating rights in personam. "It is not concerned with the creation or transfer of an interest in real property . . . [but] relates solely to the rights and liabilities of the parties as a matter of contractual obligation."<sup>11</sup> In *Ridgefield Supply Co. v. Rosen*<sup>12</sup> the court applied Section 36-a of the New York Lien Law even though the realty concerned was outside of New York. In so holding the court said:

It is the fund and not the property that is the source of jurisdiction under this statute. Wherever the property may be located, if the contractor receives and misapplies the funds in this State, the statutory provisions enacted for all entitled to receive such funds from him come into play.<sup>13</sup>

In the instant case, however, the majority felt that lien laws traditionally do not extend beyond the enacting state's borders. Since the trust fund provisions are part of the Lien Law, they conclude that they are limited to the general jurisdiction of the Lien Law, that is, New York State. On the other hand, the dissent applied the *Ridgefield* case and said that the *res* is the fund and not the realty. Therefore, there is no jurisdictional question involved since "no doubt . . . the Legislature has the power to impress with a trust, funds paid and diverted in this State regardless of where the realty is located."<sup>14</sup>

The majority opinion in the instant case did not follow the only previous persuasive authority.<sup>15</sup> It is submitted that the dissenting opinion follows more closely the intent of the legislature.<sup>16</sup> The majority opinion excludes from the purview of Section 36-b the domestic improvers of foreign realty. This applies to the criminal as well as the civil side of the statute.<sup>17</sup> It deprives the individual dealing with domestic improvers of foreign realty of the supplementary aid intended by the legislature. Since he is precluded from a mechanic's lien in New York, he is restricted to foreign remedies, although the

<sup>10</sup> *Mallory Assoc. v. Barving Realty*, 300 N.Y. 297, 302, 90 N.E.2d 468, 471 (1949).

<sup>11</sup> *Id.* at 301, 90 N.E.2d at 471.

<sup>12</sup> 1 M.2d 675, 147 N.Y.S.2d 337 (Sup. Ct. 1955).

<sup>13</sup> *Ridgefield Supply Co. v. Rosen*, 1 M.2d 675, 678-79, 147 N.Y.S.2d 337, 340 (Sup. Ct. 1955).

<sup>14</sup> *Allied Thermal Corp. v. James Talcott Inc.*, 3 N.Y.2d 302, 306, 144 N.E.2d 66, 68 (1957) (dissenting opinion) (comma added).

<sup>15</sup> *Ridgefield Supply Co. v. Rosen*, note 13 *supra*.

<sup>16</sup> Laws of N.Y. 1942, c. 808 n.\*. "Its purpose [amendment of §§ 36, 36-a, and 36-b] is to clarify and strengthen the trust fund provisions of the Lien Law, and to provide a civil remedy for the enforcement of the trusts created therein." *Ibid.*

<sup>17</sup> *People v. American Home Construction Co.*, WESTCHESTER L.J., Sept. 11, 1957, p. 4, col. 2 (Westchester County Ct.).

fund is here. It is, therefore, suggested that a statute be enacted to extend the trust fund benefits to those who deposit money in New York for the improvement of foreign realty.



LIQUOR LICENSE REFUND—PRIORITY OF JUDGMENT CREDITOR'S LIEN OVER EQUITABLE ASSIGNMENT.—Bedford Bar and Grill received a loan from appellant bank for renewal of its liquor license. The bank received as security an assignment of any refund that might become due from surrender of the license, under Section 127(1) of the New York Alcoholic Beverage Control Law.<sup>1</sup> Upon default, the bank filed the assignment with the State Comptroller and then Bedford surrendered the license. Subsequently, the City of New York docketed a warrant for taxes due against Bedford<sup>2</sup> and then, in supplementary proceedings,<sup>3</sup> obtained a judgment creditor's lien on the refund. The Court of Appeals held the bank's assignment to be subordinate to the lien of the City. *City of New York v. Bedford Bar and Grill*, 2 N.Y.2d 429, 141 N.E.2d 575 (1957).

Assignments of choses in action have long been recognized in equity.<sup>4</sup> In New York, even if the property assigned did not exist *in praesenti*, but had only a potential existence, the assignor was still bound.<sup>5</sup> When the property did come into *esse*, the equitable title to it would mature, and vest in the assignee.<sup>6</sup> Hence his rights were enforced even against a creditor who had obtained a judgment after

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<sup>1</sup>"If a person holding a license to traffic in alcoholic beverages . . . shall voluntarily . . . cease to [do so] . . . during the term for which the license fee is paid, such person may surrender such license to the liquor authority for cancellation and refund . . ." N.Y. ALCO. BEV. CONTROL LAW § 127(1).

<sup>2</sup>" . . . [T]he chief fiscal officer may issue a warrant . . . for the payment of the amount [of taxes due] . . . . [After it is docketed] the sheriff shall . . . proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record . . ." N.Y. GEN. CITY LAW § 24-a (§ 10(b)).

<sup>3</sup>"The attorney for the judgment creditor may at any time within two years from the date of such judgment, issue a subpoena directed to a third party . . . where such attorney has reason to believe that such third party has property of the judgment debtor exceeding ten dollars . . . requiring the attendance of such third party for examination . . . whether or not such . . . money . . . appears to belong to or to be due to a person or corporation other than the judgment debtor." N.Y. CIV. PRAC. ACT § 779(2).

<sup>4</sup>See *Stover v. Eycleshimer*, 3 Keyes 620 (N.Y. 1867); *Meechett v. Bradshaw*, Nels 22, 21 Eng. Rep. 779 (Ch. 1633); *Earl of Suffolk v. Greenville*, 2 Freem. 146, 22 Eng. Rep. 1119 (Ch. 1631).

<sup>5</sup>See *Fairbanks v. Sargent*, 117 N.Y. 320, 22 N.E. 1039 (1889).

<sup>6</sup>*Stover v. Eycleshimer*, 46 Bar. 84 (N.Y. 1865), *aff'd*, 3 Keyes 620 (N.Y. 1867).