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MECHANICS' LIEN WAIVERS AND THE REQUIREMENT OF CONSIDERATION

ROBERT KRATOVIL AND HARRY Q. ROHDE*

RULE THAT A MECHANIC'S LIEN CLAIM WAIVER MUST BE SUPPORTED BY CONSIDERATION.

THE general rule that the digests lay down is that the waiver of a mechanic's lien claim must be supported by consideration.[1] Examination of the decisions reveals that the rule is well supported by the authorities.[2] Surprisingly, however, the decisions seem to be totally devoid of any reasoning indicating why the presence of consideration is indispensable to the validity of a mechanic's lien waiver.[3]

[1] 36 AM. JUR. *Mechanics' Liens* § 200 (1941); 57 C.J.S. *Mechanics' Liens* § 223 (1948).

[2] Plunkett v. Winchester, 98 Ark. 160, 135 S.W. 860 (1911); Kelley v. Johnson, 251 Ill. 135, 95 N.E. 1068 (1911); McCorkle v. Lawson & Co., 259 S.W.2d 27 (Ky. 1953); Taylor v. Fuller, 162 Ky. 568, 172 S.W. 959 (1915); Colvin Lumber & Coal Co. v. J. & G. Corp., 260 Minn. 46, 109 N.W.2d 425 (1961); Home Supply Co. v. Ostrom, 164 Minn. 99, 204 N.W. 647 (1925); Abbott v. Nash, 35 Minn. 452, 29 N.W. 65 (1886); Giammarine v. J. W. Caldewey Constr. Co., 72 S.W.2d 159 (Mo. App. 1934); Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co. 101 N.E.2d 408 (C.P., Hamilton County, Ohio 1950); Eason Oil Co. v. M. A. Swatek & Co., 169 Okla. 170, 36 P.2d 504 (1934); Brimwood Homes, Inc. v. Knudsen Builders Supply Co., 385 P.2d 982 (Utah 1963).

[3] In Abbott v. Nash, *supra* note 2, all the court said was: "The writing which is claimed to waive or release plaintiff's lien right does not appear to be supported by

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The assumption seems warranted that the courts feel that they are applying some general principle of contract law. Thus, in *Kelley v. Johnson*,[4] the court said:

> Clearly, if a lien can be waived in the original contract, it can be subsequently waived, for a valuable consideration, as between the original parties. The right to modify a contract as between the original parties, so long as there are no intervening rights, involves the exercise of the same power as does execution of the original contract.

One immediately encounters, in consequence, two questions the courts have left unanswered, namely: (1) Does the waiver of a mechanic's lien call into play principles of contract law relating to consideration, or are we dealing, rather, with the voluntary extinguishment of a property right? (2) Even if considerations of contract law are relevant, is the waiver of a right, as distinguished from the formation of a valid contract, such a transaction as requires a consideration under the modern law of contracts, especially as it has been up-dated by the Uniform Commercial Code?

Important policy factors require that subcontractors and materialmen be bound by their waivers regardless of the presence or absence of consideration.[5] When a mortgage banker undertakes to disburse the proceeds of a construction loan, he must, of course, take steps to safeguard the priority of his mortgage lien against mechanics' liens that may arise during the course of construction. If he proceeds with due care he will disburse the funds in various stages as the building goes up. On big jobs disbursements are often made monthly during the year, often longer, so that construction goes forward. As each disbursement is made, the general contractor will demand lien waivers

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any consideration, and is therefore ineffectual." The same court twice followed the general rule without offering any other reason than the precedent of the *Abbott* case. See Home Supply Co. v. Ostrom, *supra* note 2, and Colvin Lumber and Coal Co. v. J. & G. Corp., *supra* note 2. Many courts have given no reason at all for following the general rule except the authority of *Cyc.*, *C.J.*, and *C.J.S.* In Giammarine v. J. W. Caldewey Constr. Co., *supra* note 2, and in Eason Oil Co. v. M. A. Swatek & Co., *supra* note 2, for example, two courts followed the general rule solely on the authority of 40 C.J. *Mechanics' Liens* 314 (1926). In Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co., *supra* note 2, an Ohio court refused to follow an Ohio precedent, giving as its only reason that it preferred the rule set forth in *C.J.S.*

[4] *Supra* note 2. See also A. J. Yawger & Co. v. Joseph, 184 Ind. 228, 108 N.E. 774 (1915).

[5] It has been said that the mechanic's lien laws constitute one of the principal impediments to individual home ownership in this country. Stalling, *The Need for Special, Simplified Mechanics' Lien Acts Applicable to Home Construction*, 5 LAW & CONTEMP. PROB. 592 (1938).

from each subcontractor and materialman he pays. Moreover, in some states he will demand from each subcontractor (plumber, electrician, and so on) an affidavit as to possible "sub-subcontractors" with whom the subcontractor has dealt. This last requirement is intended to elicit the possible presence of unpaid material suppliers, from whom the mortgage banker must also solicit waivers.[6] The resulting bundle of documents is apt to be formidable. One such file, taken by the writers at random, contained 166 documents. The burden of preparing this mass of papers is a heavy one. It entails substantial costs and expenses that are reflected in the contract price quoted for the job. How does the requirement of consideration for lien waivers affect this situation?

In the first place, the general contractor, traditionally undercapitalized, often lacks the funds to make the periodic payments to subcontractors. So as a progress payment is due, the general contractor goes to the subcontractors and solicits their lien waivers, often giving them post-dated checks in payment. The lien waivers recite payment of full consideration. Actually no payment has been made. *After* he has received disbursement from the mortgage lender, the general contractor has funds, deposits them in the bank, and the post-dated checks will clear. If, however, the general contractor diverts the funds received to another account that is more pressing, the checks will be dishonored, and the subcontractors who have given lien waivers reciting receipt of payment will nevertheless file mechanics' lien claims and seek to foreclose. Counsel must be retained to defend these suits. Sometimes the defense succeeds, sometimes it fails. If it fails, often as not it does so because the court finds that the waiver was given without actual receipt of consideration and must therefore be held void. This is an experience altogether too commonplace. Almost every mortgage banker has had such an experience.[7]

[6] D'Antonio Plumbing & Heating Co. v. Strollo, 172 N.E.2d 484 (Ohio App. 1959). Most of the litigation involves subcontractors rather than general contractors and a good deal of it involves material suppliers.

[7] That mortgagees suffer losses because of Mechanics's Liens is attested to by the extensive annotation in 80 *A.L.R.*2d 179 (1961). Many cases discussed therein reveal that the mechanic's lien claimant has often contended successfully for priority of lien. Dishonored checks are commonplace in such situations. *E.g.*, Eason Oil Co v. M. A. Swatek & Co., 169 Okla. 170, 36 P.2d 504 (1934). Where the mortgagee has successfully contended for priority, the loss has often fallen on the mortgagor, who through some technical non-compliance with the rigid requirements of the mechanic's lien law has been compelled to pay to the subcontractor a bill he has already paid in good faith to the general contractor.

Even if he is willing to run the risks involved in making disbursement to the general contractor in reliance on lien waivers instead of making disbursement directly to the subcontractors, the mortgage banker must exercise special care in scrutinizing this mass of documents, for under the usual rules of inquiry-notice any statement in any document indicating that the subcontractors remain unpaid may invalidate the entire mass of documents.[8]

To avoid the risk and trouble this situation tends to create, many mortgage bankers insist on disbursing directly to the subcontractors. That way they can be certain that the subcontractors actually receive payment and that consideration is given for each lien waiver presented. When one considers the number of subcontractors involved in any substantial construction job, one can readily understand how much clerical help and floor space the mortgage banker must devote to this pointless ceremony. To what purpose? The subcontractor, an adult person of sound mind, has said, "I have waived my lien." Why should a court say such a waiver is valid only if paid for? Not one case of all those examined has offered one word of explanation. All that one finds is banal reiteration of the statement that consideration is necessary.

THE MECHANIC'S LIEN CLAIM AS A PROPERTY RIGHT— EXTINGUISHMENT WITHOUT CONSIDERATION

While it has occasionally been said that consensual liens are contract rights,[9] this view is manifestly inapplicable to mechanics' liens. They are purely the creature of statute.[10] True the general contractor

[8] Knowledge of a fact gives constructive notice of all material facts which further inquiry suggested by the fact would have disclosed. One learning of a fact is chargeable with notice of all that he would have learned if he had pursued his inquiry to the full extent to which it led. Guerin v. Sunburst Oil & Gas Co., 68 Mont. 365, 218 Pac. 949 (1923). Lien waivers often contain crude and cryptic notations such as "Not to be used until funds are available for payment." Such statements may well put the mortgage lender on notice that the lien waivers are in fact not supported by consideration. This may well destroy the defense of estoppel, which has occasionally been invoked to protect the mortgage lender where consideration has been lacking. 65 A.L.R. 282, 317 (1930). The notion has occasionally been entertained that consideration is present because of the detriment suffered by the landowner or mortgagee in making payment to the general contractor. McLellan v. Mamernick, 118 N.W.2d 791 (Minn. 1962). This is a plausible theory but ignores the basic proposition that consideration has no place at all in the solution of the problem.

[9] Peck v. Jenness, 48 U.S. (7 How.) 611, 619 (1849).

[10] 36 AM. JUR. *Mechanics' Liens* § 123 (1941); 4 AMERICAN LAW OF PROPERTY § 16.106F (Casner ed. 1952); 57 C.J.S. *Mechanics' Liens* § 1 (1948); 5 TIFFANY, REAL PROPERTY § 1575 (3rd ed. 1939).

has his in personam contract rights against the landowner, and the subcontractor has his in personam contract rights against the general contractor, but the lien itself is a property right in a specific tract of land.[11] The mechanic's lien claimant is universally required to file some notice of his claim[12] which is usually filed in the land records.[13] The mechanic's lien has all the earmarks of a property right in land.

The mortgage lien provides a useful analogy for scrutiny of the mechanics' lien. Like a mortgage, a mechanic's lien is a security interest in land and therefore a property right.[14] True, the mechanic's lien owes its existence to a statute while a mortgage lien is created by the voluntary act of the parties, but, apart from this difference, and particularly in states that follow the lien theory of mortgages,[15] they are quite similar in many respects. They are enforced in many states through identical judicial foreclosure proceedings, and in many states an identical period of redemption follows the foreclosure sale.[16] Jurisdiction over defendants who cannot be served personally is obtained by publication[17] as in proceedings in rem or quasi in rem. Where a superior lien is foreclosed, a junior mechanic's lien claimant must be made a party because he has an interest in the property.[18] The conclusion is inescapable that, like a mortgage lien, the mechanic's lien is truly a property right.

Since the lien is a property right, it is interesting to speculate as

[11] Armstrong v. U.S., 364 U.S. 40 (1960); Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d 844 (1963).

[12] 36 AM. JUR. *Mechanics' Liens* § 123 (1941); 57 C.J.S. *Mechanics' Liens* § 131 (1948); 5 TIFFANY, REAL PROPERTY § 1579 (3rd ed. 1939).

[13] 57 C.J.S. *Mechanics' Liens* § 138 (1948).

[14] In Re Pennsylvania Cent. Brewing Co., 135 F.2d 60, 63 (3rd Cir. 1943); In Re Pennsylvania Brewing Co., 114 F.2d 1010, 1013 (3rd Cir. 1940); Britton v. Western Iowa Co., 9 F.2d 488, 490 (8th Cir. 1925); In Re Lexington Appliance Co., 185 F. Supp. 235, 238 (D. Md. 1960); Hogan v. Bleeker, 29 Ill. 2d 181, 193 N.E.2d 844 (1963); Hollingsworth v. Dow, 36 Mass. (19 Pick.) 228, 230 (1837); People v. Sheriff, 275 App. Div. 444, 90 N.Y.S. 2d 848, 850 (1949); Young v. J. A. Young Mach. & Supply Co., 203 Okla. 595, 224 P.2d 971, 973–74 (1950); National Cash Register Co. v. Stockyards Cash Market, 100 Okla. 150, 228 Pac. 778, 780 (1924); Creosoted Wood Block Paving Co. v. McKay, 211 S.W. 822, 823 (Tex. Civ. App. 1919); 73 C.J.S. *Property* § 1, at 139–40 (1951).

[15] See OSBORNE, MORTGAGES, 31 (1951).

[16] 57 C.J.S. *Mechanics' Liens* § 263 (1948); 5 TIFFANY, REAL PROPERTY § 1579 (3rd ed. 1939).

[17] 57 C.J.S. *Mechanics' Liens* § 287 (1948).

[18] 36 AM. JUR. *Mechanics' Liens* § 250 (1941); 57 C.J.S. *Mechanics' Liens* § 284 (1948).

to the propriety of applying the doctrine of consideration in considering the validity of waivers of mechanics' liens. If the mechanic's lien is a property right, only a brief glance at history is needed to assure us that its kindred in the family of real property rights, with their ancient feudal antecedents rooted in England's agricultural past, were created and extinguished for hundreds of years before the comparatively modern doctrine of consideration gained acceptance in the comparatively modern law of contracts. Contract law developed as England grew into a trading and manufacturing country and then had need for a law of contracts. Obviously property rights had been created and extinguished by deeds, grants, mortgages, leases and releases for hundreds of years without benefit of recourse to notions of consideration and the same is true today.[19]

Turning again to the analogous mortgage lien, we find that it is sometimes said that a mortgage requires consideration.[20] This, of course, is nonsense, for mortgages were well understood long before anyone heard of consideration.[21] A mortgage cannot exist without a *debt.* But to say that a mortgage cannot exist without a debt is far from saying that *consideration* is required for the creation of a valid mortgage. If *A* borrows $10,000 from *B* on an unsecured note in 1962, *A* can give a mortgage to *B* in 1963 as security for the note without a shred of consideration entering into the mortgage transaction.[22] In short, a mortgage need not be supported by consideration and the well-considered authorities so state.[23]

Since these formidable documents, deeds and mortgages, need not be supported by consideration, the rights they create can also be ex-

[19] A deed conveying fee simple title may be given without consideration. 16 AM. JUR. *Deeds* § 57 (1938); 3 AMERICAN LAW OF PROPERTY § 12.43 (Casner ed. 1952); 26 C.J.S. *Deeds* § 16 (1956); 2 PATTON, TITLES § 340 (2d ed. 1957); 6 POWELL, REAL PROPERTY § 893 (1958); 4 TIFFANY, REAL PROPERTY § 984 (3rd ed. 1939). Easement grants do not require consideration. 28 C.J.S. *Easements* § 24. A life estate may be given away. 1 TIFFANY, REAL PROPERTY, § 59 (3rd ed. 1939). No consideration is required for the creation of future interests in land. 4 SIMES & SMITH, FUTURE INTERESTS § 1866 (2d ed. 1956). In fact, in the majority of instances, future interests are created by donative conveyances. 3 RESTATEMENT, PROPERTY § 241, comment d (1940).

[20] See 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939) for some cases so holding.

[21] *Ibid.*

[22] 36 AM. JUR. *Mortgages* § 106 (1941); 59 C.J.S. *Mortgages* § 91 (1949); 3 POWELL, REAL PROPERTY § 444 (1952); 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939).

[23] AMERICAN LAW OF PROPERTY § 16.67 (Casner ed. 1952); 59 C.J.S. *Mortgages* § 87 (1949); 1 GLENN, MORTGAGES § 5.6 (1943); OSBORNE, MORTGAGES § 107 (1951); 5 TIFFANY, REAL PROPERTY § 1401 (3rd ed. 1939).

tinguished without the benefit of consideration. If *A* makes a gift of land to *B*, it is certainly an elementary proposition that *B* can make a deed of gift of the same land to *A*. And if *A* has given *B* a mortgage to secure *A*'s antecedent debt, *B* can make a gift of the mortgage and note to *A*, and the mortgage will be destroyed by merger.[24] Gifts of choses in action are universally recognized.[25] And it is perfectly obvious that, under the doctrine of executed gifts, a gift of a mortgage by the mortgagee to the mortgagor is of unquestioned validity.[26]

In the termination of property rights, it has never been thought that consideration is necessary. The authorities tell us that a contingent remainder may be released to the owner of the estate in possession or remainder,[27] a condition in a deed may be released,[28] a life estate may be released to the remainderman or reversioner,[29] and an easement may be extinguished by a release thereof.[30] Never has it been suggested that any of these transactions require consideration. One seeks in vain for authority that a vested remainder, contingent remainder, life estate, right of entry, possibility of reverter, or leasehold estate can be created or extinguished only if consideration is present. In short, the doctrine of consideration rarely intrudes into the solution of questions of property law, and historically, this is entirely as it should be.

We must now ask ourselves why, in legal theory, a consideration must exist for the valid extinguishment of a property right such as a mechanic's lien. To ask the question is to answer it. If the fee title to the land can pass or a mortgage lien be created or extinguished

[24] OSBORNE, MORTGAGES 759 (1951).

[25] Delivery by the creditor to the debtor of an executed satisfaction of an indebtedness constitutes a good gift of the chose in action. BROWN, PERSONAL PROPERTY 206 (2d ed. 1955). A good illustration is the rule that no consideration is necessary to support an agreement reducing rent where the reduced rent has been accepted and rent receipts have been given. 32 AM. JUR. *Landlord and Tenant* §§ 153, 439 (1941); 52 C.J.S. *Landlord and Tenant* § 503 (1947); 1A CORBIN, CONTRACTS (1963) § 184.

[26] 37 AM. JUR. *Mortgages* § 1216 (1941); 5 TIFFANY, REAL PROPERTY § 1454 (3rd ed. 1939).

[27] 2 TIFFANY, REAL PROPERTY § 341 (3rd ed. 1939).

[28] 26 C.J.S. *Deeds* § 158 (1956); 1 TIFFANY, REAL PROPERTY § 204 (3rd ed. 1939).

[29] 1 AMERICAN LAW OF PROPERTY § 2.17 (Casner ed. 1952); 1 TIFFANY, REAL PROPERTY § 59 (3rd ed. 1939).

[30] 17 AM. JUR. *Easements* § 160 (1938); 2 AMERICAN LAW OF PROPERTY § 8.95 (Casner ed. 1952); 28 C.J.S. *Easements* § 61 (1941); 3 TIFFANY, REAL PROPERTY § 824 (3rd ed. 1939).

without consideration, then a mechanic's lien, which is certainly of no greater dignity, ought to be subject to the same rules. Since a mechanic's lien is a security interest, a property right in land, it is governed by rules of property law, not contract law, and no logical reason exists why the doctrine of consideration should be invoked.

All this is not to suggest the impropriety of superimposing contract theory upon property law. To the contrary, when this is done upon reflection and with the deliberate purpose of freeing property law from ancient fetters and introducing some practical contract considerations, this is a highly desirable evolutionary process that is taking place today. For example, where a tenant under a lease abandons the premises, the ancient property learning teaches us that since he is vested with his estate for years until its termination, the landlord may continue to collect rent for the balance of the term.[31] The better modern cases borrow from contract theory and teach us that the landlord has a duty to mitigate damages.[32] But this is far from saying that *all* contract law is applicable to *all* property law. Obviously an eclectic approach is indicated, so that those contract doctrines that promote justice can be incorporated into the body of property law and those that do not are not so incorporated. We thus have a workable formula for determining whether the doctrine of consideration should be applied to a voluntary waiver or release of property rights. Is justice promoted when this is done?

Whatever validity remains in the requirement of consideration where one is considering the formation of a legally enforceable contract, it is certainly relevant to inquire by what right this notion intrudes into questions of the validity of the release of a statutory lien, particularly the lien of a subcontractor who has no contractual relation whatever with the landowner. Conceptually the requirement is completely indefensible. One is therefore driven to probe into the unspoken policy factors that lie beneath the assertion that mechanics' lien waivers must be supported by consideration. It seems almost certain that the unspoken theory holds to the view that the mortgage lender is better able to bear the loss, and, indeed, can recoup his

[31] 32 AM. JUR. *Landlord and Tenant* § 517 (1941); 1 AMERICAN LAW OF PROPERTY § 3.99 (Casner ed. 1952); 52 C.J.S. *Landlord and Tenant* § 497 (1947); 3 TIFFANY, REAL PROPERTY § 902 (3rd ed. 1939).

[32] 32 AM. JUR. *Landlord and Tenant* § 519 (1941); 1 AMERICAN LAW OF PROPERTY § 3.99 (Casner ed. 1952); 52 C.J.S. *Landlord and Tenant* § 498 (1947); 3 TIFFANY, REAL PROPERTY § 902 (3rd ed. 1939).

loss by charging more interest on future loans, while the plumber, electrician, or mason is not so fortunately situated. The fallacy of this line of reasoning is obvious. The mortgage interest rate is made in the market place, and the misfortunes of particular mortgage lenders have no impact upon it. Moreover, the ends of justice are not served by reaching into the pockets of the mortgage lender. One who furnishes lienable work or material but is not paid has a clear and simple statutory remedy, namely, to file his mechanic's lien claim immediately. When instead of doing so, he chooses to give the general contractor a lien waiver, his motives require inspection. Many general contractors work with the same crew of subcontractors on job after job. When the general contractor solicits a lien waiver from an unpaid subcontractor so that he can draw down the mortgage money, the subcontractor makes a clear and deliberate decision when he complies with the request. He has decided to trust the general contractor, knowing that if he does not do so, some other subcontractor may replace him on the next job. When the general contractor, under pressure from earlier and more impatient creditors, diverts the loan proceeds to other channels, the trusting subcontractor is disappointed and files his notice of lien. What claim does he have upon the chancellor's conscience? An adult person of sound mind has made a deliberate decision with full awareness of its implications.[33] To rescue him from the consequences of his bad judgment at the expense of a mortgage lender who has no part in his folly seems to the authors a far cry from justice.

THE REQUIREMENT OF CONSIDERATION VIEWED IN THE CONTEXT OF CONTRACT LAW

Even were it to be conceded (improperly, as the authors feel) that mechanics' liens can find some appropriate niche in the area of contract law, a brief glance at the doctrine of consideration in the perspective of history certainly seems in order. One must also inquire into the credentials and current status of the doctrine, into

[33] Pittsburgh Plate Glass Co. v. Art Center Apartments, 253 Mich, 501, 235 N.W. 234 (1931). In some parts of the country, for example, in Virginia, where the mechanic's lien law is unfavorable to mortgage lenders, it is customary for the general contractor to procure a waiver of mechanic's lien signed by all the subcontractors before any construction has begun. Nothing could more eloquently attest the confidence these subcontractors repose in the general contractor. These subcontractors would certainly be surprised to learn that many courts view this act of faith as an empty gesture.

its applicability to waiver, and into the impact of the Uniform Commercial Code upon the problem.

The doctrine of consideration had its origin long after England had emerged from feudalism. The word "consideration," when used in connection with the law of contract, had not acquired a technical meaning in the earlier half of the sixteenth century.[34] It was not until the latter half of that century that pleaders began using the word "consideration" to introduce the facts upon which they relied to make promises enforceable by assumpsit.[35] The very existence of the requirement of consideration in contract formation was in doubt until relatively modern times. As recently as 1765, Lord Mansfield, in *Pillans v. Van Mierop*,[36] propounded the view that consideration was only of evidentiary value and that therefore, if an agreement were in writing, whether under seal or not, consideration was unnecessary. A few years later, in 1778, *Pillans v. Van Mierop* was overruled in *Rann v. Hughes*.[37] Although the existence, in contract formation, of the requirement of consideration could not be questioned after *Rann v. Hughes*, the nature of this doctrine was not finally settled until the mid-nineteenth century. Lord Mansfield identified the doctrine of consideration with moral obligation.[38] The view that a merely moral obligation was a sufficient consideration grew and flourished.[39] It was an accepted view until authoritatively rejected in *Eastwood v. Kenyon*[40] in 1840. And since the first mechanic's lien law was enacted in 1791,[41] it is evident that the earliest

[34] 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 5 (1926).

[35] *Id.* at 6.

[36] 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765).

[37] 7 Term Rep. 350n4 Poro. Parl. Case 27, 191 Eng. Rep. 1014 (H.L. 1778). See Lorenzen *Causa and Consideration In The Law of Contracts*, 28 YALE L.J. 621, 636–37 (1919). It is not without significance that *Rann* v. *Hughes* caused not a ripple in mortgage circles. The firming up of the notion of consideration in contract law must have completely escaped the notice of the mortgage bankers, probably because they did not dream it had any application to their business.

[38] Hawkes v. Saunders, 1 Cowp. 289, 98 Eng. Rep. 1091 (1782). Although Lord Kenyon overruled the actual decision in *Hawkes v. Saunders* in Deeks v. Strutt, 5 Term Rep. 690, 101 Eng. Rep. 384 (K.B. 1794), he did not deny the sufficiency of a moral obligation to support a promise.

[39] 8 HOLDSWORTH, *op. cit. supra.* note 1, at 30.

[40] 11 A. & E. 438, 52 Rvsd. Rep. 400 (1840).

[41] 4 AMERICAN LAW OF PROPERTY § 16.106F (Casner ed. 1952).

mechanics' lien waivers were executed before the doctrine of consideration had become crystallized.

There is good reason to believe that changes in the doctrine of consideration will continue to evolve. This doctrine was built up in the process of determining what promises should be enforced, and it is still building.[42] Such developments as the statutory abolition of the seal in many jurisdictions may well cause courts to revise their views as to what promises should be enforced. At common law, a contract right could be created or released by an instrument under seal without any consideration.[43] Now, many states have altered the common law of sealed instruments by legislation.[44] Such changes have created a gap in the law of contracts which previously provided a means by which, without consideration, an intentionally voluntary promise could be made binding or by which a contract right could be voluntarily extinguished.[45] Efforts to fill the gap have proven largely unsuccessful.[46] It is significant, however, that in some states in which the seal has been abolished, by statute, supplementary legislation has already been enacted providing that a written release shall be effective without consideration and that a promise in writing shall be enforceable in the absence of affirmative proof that there was no consideration for it.[47] In view of both the gap created by the statutory abolition of the seal and of the legislation already enacted in an attempt to fill that gap, it would seem reasonable to expect more such supplementary legislation in the future. It is also reasonable to expect that as the need becomes more apparent courts will also attempt to fill the gap.

Although the notion that the presence of consideration is necessary to the validity of a contract has been vigorously attacked, es-

42 1 CORBIN, CONTRACTS § 122, at 377–78 (1963).

43 10. *Id.* § 252; 1 WILLISTON, CONTRACTS § 219 (3rd ed. 1957).

44 1 CORBIN, *op. cit. supra* note 10, § 254; 1 WILLISTON, *op. cit. supra* note 11, § 219A. Learned Hand viewed this development as unfortunate. James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

45 1 WILLISTON, *op. cit. supra* note 11, § 219.

46 *Id.* § 219.

47 1 CORBIN, *op. cit. supra* note 10, § 254. For examples of such legislation, see CAL. CIV. CODE § 1541, and comment thereon in 12 HASTINGS L.J. 377 (1961); MICH. STAT. ANN. § 26.978(1); N.Y. REAL PROPERTY LAW § 279(1). Also see the MODEL WRITTEN OBLIGATIONS ACT as adopted in Pennsylvania.

pecially in modern times,[48] this is not the place to embark upon any prolonged discussion of this controversy. One may concede that some case can be made for such a requirement where the court is to be called upon and set in motion for the enforcement of the rights created by contract. However, where a party to a valid contract, by his deliberate and voluntary act relinquishes a right or rights created by the contract, there is much less reason for insisting upon the presence of consideration.[49] It is difficult to comprehend why a party who is sui juris cannot voluntarily surrender a contract right without being paid, when he is at complete liberty under the law of gifts to give away uncounted millions in value of property without being paid one cent.

Principles of contract law do not require that all waivers be supported by consideration.[50] Consensual rights can sometimes be waived without consideration. For example, the right to declare a forfeiture of an installment contract for the sale of land is purely a right created by the contract, as distinguished from the right of rescission, which does not depend upon any provision in the contract.[51] If the purchaser defaults in payment, thereby giving the vendor the right to exercise his right of forfeiture, but thereafter offers payment which the vendor accepts, the contract right of forfeiture is thereby waived.[52]

[48] Contracts were enforced at common law long before the doctrine of consideration was invented. 1 CORBIN, *op. cit. supra* note 10, § 252. Modern students of the doctrine of consideration have suggested that contracts should now be enforced even though they are not supported by consideration. Thus Markby states that it is impossible to apply the doctrine of consideration as a test of legal liability with consistency and justice. MARKBY, ELEMENTS OF LAW 315 (6th ed. 1905). Salmond suggests that no ill results would occur if the doctrine of consideration were abolished. SALMOND, JURISPRUDENCE 374 (Manning 8th ed. 1930). Holdsworth concurs in Lord Mansfield's view that consideration should be treated simply as a piece of evidence. 8 HOLDSWORTH, *op. cit. supra* note 34, at 47. Lorenzen contends that the doctrine of consideration can only be explained historically and that there is no rational reason for it. Lorenzen, *Causa and Consideration in the Law of Contracts,* 28 YALE L.J. 621 (1919). Llewellyn characterizes consideration as a "vast, sprawling field with parts of its roots hopelessly intertangled with other roots from other phases of our law." Llewellyn, *Common Law Reform of Consideration: Are There Measures?* 41 COLUM. L. REV. 863 (1941).

[49] Fuller, *Consideration and Form,* 41 COLUM. L. REV. 799, 820 (1941).

[50] According to Corbin, "In particular, if the question is asked whether a 'waiver' can be legally effective if it is not accompanied by a 'consideration' it cannot be answered without knowing what it is that is being 'waived' and what is the mode in which the 'waiver' is being attempted." CORBIN, *op. cit. supra* note 42, § 752.

[51] Realty Securities Corp. v. Johnson, 93 Fla. 46, 111 So. 532 (1927).

[52] Annot., 107 A.L.R. 345 (1937).

This doctrine is universally accepted. Every court in this country has held, in this context, that a contract right can be waived without payment of a penny of consideration. If consensual rights can be waived without consideration, then contract theory ought not preclude the waiver of a statutory right, such as a mechanic's lien claim, without consideration.

Furthermore, the Uniform Commercial Code illustrates that the requirement of consideration for a waiver is dying. Thus, section 1-107 "makes consideration unnecessary to the effective renunciation or waiver of rights or claims arising out of an alleged breach of a commercial contract where such renunciation is in writing and signed and delivered by the aggrieved party."[53] Thus a court which follows the view that a mechanic's lien partakes somewhat of a contract right could reach the conclusion that a waiver thereof does not require consideration, basing its conclusion on the policy expressed in the Uniform Commercial Code. The reference to breach in the Code is inapplicable to lien waivers because the subcontractor's waiver runs in favor of a party (mortgagee or landowner) with whom he has no contract and because lien waivers do not relate to breach of contract.

Courts following the sounder view that a mechanic's lien claim is a property right rather than a contract right can also use the policy expressed in the Uniform Commercial Code as an additional reason for correctly concluding that a waiver of lien does not require consideration. While the express provisions of the Code have only limited application to real property there are strong indications that the thinking found in the Code will spread far beyond its strict confines. As early as 1951, the Court of Appeals for the Third Circuit in the case of *Fairbanks Morse & Co. v. Consolidated Fisheries Co.*[54] drew upon a rule of law stated in the Code and said in a footnote, "we think provisions of the Uniform Commercial Code which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Re-

[53] UNIFORM COMMERCIAL CODE § 1-107 (Official Draft 1962). The Code makes other important modifications in the doctrine of consideration. Thus, section 2-205 "is intended to modify the former rule which required that 'firm offers' be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings." *Id.* § 2-205, comment 1. See also, *id.* § 2-209.

[54] 190 F.2d 817, 822 (3rd Cir. 1951).

statements. It, like the Restatements, has the stamp of approval of a large body of American scholarship." This point of view was approved in *Budget Plan, Inc. v. Savoy*[55] *decided* before the Code became effective in Massachusetts when the court cited and relied on section 2-403 of the Code and said: "Under which, if it were applicable, the result which we reach would seem to be required. In *Universal C.I.T. Credit Corp. v. Guaranty Bank and Trust Co.*[56] decided by Judge Wyzanski in the United States District Court for the District of Massachusetts on May 2, 1958, before the Code became effective, the court cited section 4-403 of the Code in support of the customer's right to stop payment under the present Massachusetts law and said: "And reference to this Code is appropriate because the Massachusetts court regards it less as novel enactment than as largely a restatement and clarification of existing law which has the approval of American scholars. . . ."

In other words, if we accept the Code as a comprehensive, modern view of what is customary, just, and practical in business transactions, it would be unfair to deny dealers in real estate the benefits of this view. Moreover, in cases arising prior to the effective date of the Code the courts may well choose to apply the wisdom the Code affords.[57]

CONCLUSION

From both the standpoint of policy and concept, it is plain that the requirement of consideration is inapplicable to mechanics' lien waivers. From the standpoint of policy, it is clear that construction lending would be facilitated by abolition of the rule that a mechanic's lien waiver must be supported by consideration. It is also apparent that the cause of justice would be promoted by the abolition of this rule because the benefit that would accrue to the property owner and construction lender would not be accompanied by any real detriment or hardship to subcontractors, who are, after all, in the best possible position to determine which general contractors can be trusted. Indeed, material suppliers are considered the best source of credit information

[55] 336 Mass. 322, 145 N.E.2d 710 (1957).

[56] 161 F. Supp. 790 (D.C. Mass. 1958). The court cited Budget Plan, Inc. v. Savoy, *supra* note 29, and Malcolm, *The Uniform Commercial Code: Review, Assessment, Prospect*, 15 BUS. LAW. 348, 360 (1959).

[57] See, for example, Schroeder v. Benz, 9 Ill. 2d 589, 138 N.E.2d 496 (1956), where the court applied the policy of a statute that was enacted after the occurrence of the transaction in question.

on general contractors. From the standpoint of concept, the better view is that a mechanic's lien claim is a property right, and since property rights can be extinguished without consideration, it is plain that the requirement of consideration is inapplicable to mechanic's lien waivers. Even if a mechanic's lien claim is to be regarded as a contract right, there is no conceptual barrier to the abolition of the rule that a mechanic's lien waiver must be supported by consideration. Principles of contract law do not require that all waivers be supported by consideration. Finally, a court confronted with a precedent based on the rule that a mechanic's lien waiver must be supported by consideration could use the policy of the Uniform Commercial Code to rid the books of this precedent. It could do so whether it regarded a mechanic's lien claim as a property right or as a contract right. It would be justified in doing so not only because of the respect which the policy of the Code commands, but also because the ever increasing volume of construction lending necessitates a modern rule that serves the ends of justice and that is sound from the standpoint of policy and concept.