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## Contracts

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thereunder to a warehouseman to produce records of the names of persons storing goods in the warehouse and the quantities of the goods was held not to be an unreasonable search under state and federal constitutions.<sup>27</sup>

OLIVER SCHROEDER, JR.

## CONTRACTS

### EXISTENCE OF CONTRACT FOR PURPOSE OF OBTAINING MECHANICS' LIEN

Ohio Revised Code section 1311.02 requires the existence of a contract, express or implied, for materials furnished for construction, in order for a mechanics' lien to arise. In *Gebhart v. United States*<sup>1</sup> the Ohio Supreme Court determined that the transaction involved was a contract implied in fact, though it superficially resembled an open account between the builder and the materialman, because the supplier had invoiced each delivery of material to a specific house (of the two being built), and had listed each house on its books as a separate job.

It is interesting that the case is sharply critical<sup>2</sup> of the often quoted language, "Mechanics' lien statutes create rights in derogation of the common law and should therefore be strictly construed as to the question whether a lien attaches, but their procedural and remedial provisions should be liberally construed, after the lien has been created."<sup>3</sup> The court felt that there would be difficulty in determining *when* the lien was actually created and what remained to be construed liberally thereafter. The court then reiterated the statutory rule of liberal construction,<sup>4</sup> stating that if strict construction were to be the criterion it should apply "to protect the right of the lienholder rather than to limit it."<sup>5</sup>

### IMPOSSIBILITY OF PERFORMANCE

In *Marshall v. Smith*<sup>6</sup> the court discussed the factors to be considered in granting relief because of supervening impossibility of lawful performance. Plaintiff executed a lease by the terms of which he was to use the premises "in the operation of a tavern business and for no other purpose."<sup>7</sup> Upon the township being voted dry and withdrawal of plaintiff's liquor permit, defendant notified plaintiff of his willingness that the premises be used for any lawful purpose.

In the declaratory judgment action the court held that in a case involving a lease solely for the transaction of the liquor business the fact

27. *Merchandise Warehouse Co. v. Bowers*, 173 N.E.2d 728 (Ohio C.P. 1960).