

who had an execution in the sheriff's hands against the owner, which, at the commencement of the action, was subsequent to the plaintiff's lien. This order adding him as a party Rogers applied to set aside, on the ground that inasmuch as he had not been made a party to the action within the ninety days, the plaintiff's lien had, under sec. 23, ceased to exist as against him. Ferguson, J., dismissed the application with costs. The learned judge bases his judgment, as we understand it, on the ground that under sec. 29, a lienholder may enforce his claim in the High Court "according to the ordinary procedure of that court," and that, as the ordinary procedure of that court in suits to enforce liens on lands is to add subsequent incumbrancers as parties in the Master's office-- that, therefore, in suits to enforce liens, it is proper to add subsequent incumbrancers in the Master's office. We are not sure that this chain of reasoning is altogether perfect. It appears to be faulty in failing to take into account, that in ordinary suits to enforce liens on lands, the time limit for bringing the action is much longer than that allowed for prosecuting mechanics' liens, and that, therefore, the question whether parties added in the Master's office are added in due time does not often arise. If it could be alleged that according "to the ordinary procedure" to enforce liens, an incumbrancer, as against whom the plaintiff's right is barred by the Statute of Limitations, may nevertheless be added as a party in the Master's office, provided the action was commenced against the original defendants before the statute had run out, then we think the reasoning of the learned judge would be satisfactory. But as we think it is quite clearly established by the cases that, "according to the ordinary procedure" of the court, an action is not to be deemed to be commenced against a party added in the Master's office until the order is made adding him, it appears to us to be open to doubt whether an action to enforce a mechanics' lien can be said to be duly instituted, as against a party who is not added until after the time limited by the Mechanics' Lien Act for bringing the action has expired. The Act requires "proceedings to be instituted to realize the claim," and the court has virtually said it is sufficient that the proceedings are instituted within the prescribed time as against some of the parties interested; as against parties interested as subsequent incumbrancers, the proceedings may be instituted after the lapse of the prescribed time. This appears to us to be introducing into the statute a provision which it does not contain. In Mr. Holmsted's recent work on the Mechanics' Lien Act, the point is discussed by the author, and we see that he inclines to the opinion that the action ought to be commenced against all parties within the prescribed time. We understand that an appeal has been lodged against the decision of Ferguson, J., and we presume the point will be settled by the Court of Appeal ere long. In the meantime, solicitors will have to consider whether or not it would be the safer practice to add all parties interested (other than lienholders of the same class) as original defendants. In any case, the lienholder is at present in an unfortunate dilemma--if he does add subsequent incumbrancers as original defendants, and the decision of Ferguson, J., is upheld, he may be mulcted in the extra costs thus occasioned; and if he does not add them, and the decision of Ferguson, J., is reversed, he runs the risk of