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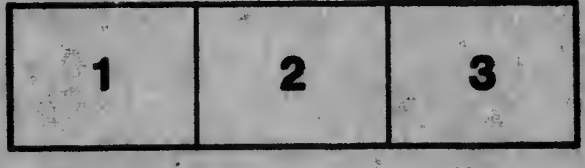

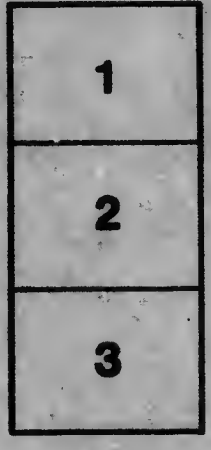

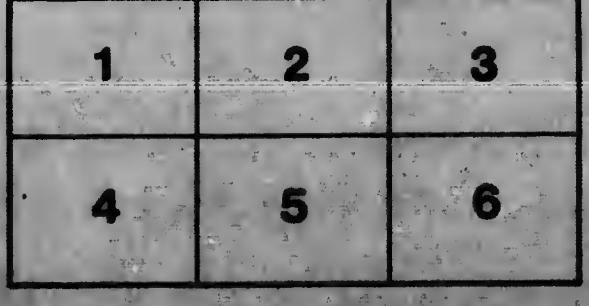

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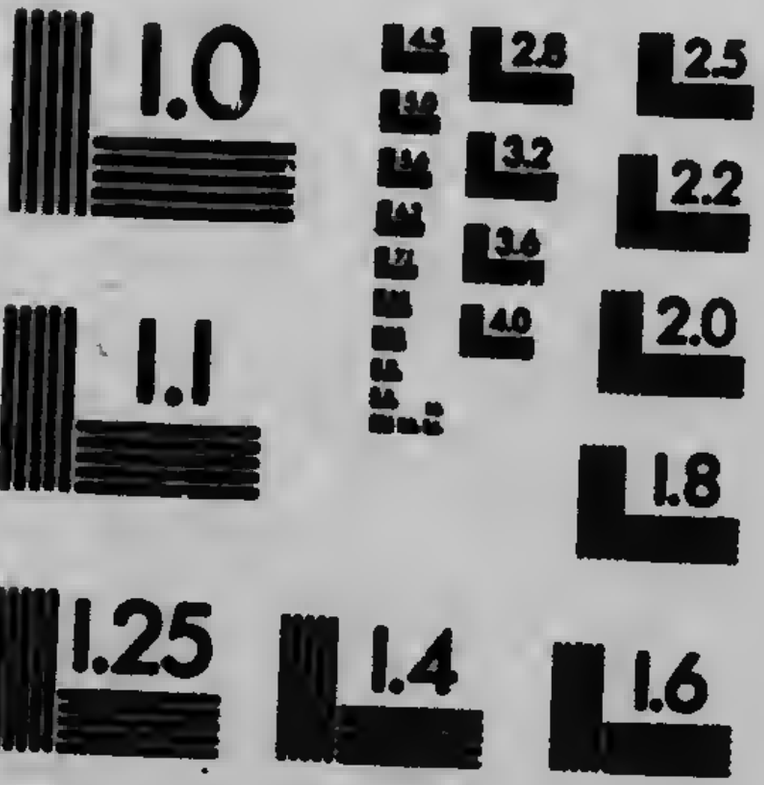

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MECHANICS' LIEN LAWS IN CANADA

WITH THE ACTS OF ALBERTA, BRITISH COLUMBIA, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA, ONTARIO, AND SASKATCHEWAN, RELATING THERETO, AND ANNOTATIONS AND FORMS OF PROCEEDINGS THEREUNDER

AND ALSO THE ARTICLES OF THE QUEBEC CIVIL CODE DEALING WITH MECHANICS' LIENS, AND A DIGEST OF CASES IN CONNECTION THEREWITH.

BY

WILLIAM BERNARD WALLACE, LL.B.

EDITOR OF "DECISIONS OF SUPREME COURT OF NOVA SCOTIA HITHERTO UNREPORTED" (40 N.S.R.); INGPEN ON EXECUTORS AND ADMINISTRATORS, CANADIAN NOTES, ETC., ETC.

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PREFACE

The Mechanics' Lien legislation enacted in the various Provinces in Canada is published in this volume, with the exception of the Mechanics' Lien Act of Prince Edward Island, which Act, with amendments, may be found in Chapter 8 of the Prince Edward Island Acts of 1879, Chapter 11, 1881, and Chapter 11, 1892. There are no reported decisions under this Act, but the Act itself is similar to the earlier Ontario legislation.

The framers of Mechanics' Lien legislation in attempting to do justice to workmen and to the suppliers of building materials, while at the same time avoiding injustice to the owners of property, have grappled with a difficult problem. Legislation which may have the effect of charging one man's land with another's man's debt must be worded with very great care, if injustice is to be avoided. Since the last consolidation of the Ontario Mechanics' and Wage-earners' Lien Act, however, it would seem that this statutory remedy, in Ontario, at all events, is as fair and just to all parties interested as any legislation of this character can be, although like all other human laws it may occasionally fail to secure complete justice.

A large number of new decisions, Canadian and American, are published in this volume. As to these decisions, it must be pointed out, that as the legislation varies in different Provinces, or States, the decisions cannot be attentively studied without closely examining the provisions of the Mechanics' Lien Act existing in the particular jurisdiction where the question arose.

A doctrine that should be favorably regarded, in the construction of a Mechanics' Lien Act, is that when a statute already in force in one jurisdiction is enacted in another, the judicial construc-

tions placed upon the statute in the first jurisdiction are received in the second jurisdiction as in effect part of the statute. (a)

The Canadian Bar Association is doing excellent work in endeavoring to secure uniformity of legislation throughout the various Provinces in relation to many important subjects, but uniformity of judicial decision would seem to be as desirable as uniformity of legislation.

Halifax, N.S., W. B. W.
October, 1920.

(a) *Commonwealth* v. *Hartnett*, 3 Gray (Mass.) 450.

PREFACE TO SECOND EDITION

Since the first edition of this book important amendments have been made to various Mechanics' Lien Acts in Canada and many valuable judicial decisions relating to this legislation have been given. These statutory amendments and decisions will be found noted in this volume. A selection has also been made from recent decisions of American courts interpreting provisions of similar legislation in the United States. The writer adheres to his view, expressed in the earlier Preface, concerning the value of such American decisions.

It is difficult to group the cases on this subject according to any logical scheme of classification. The various Mechanics' Lien Acts differ in their terms, and, in some instances, amendments seem to result in inconsistent provisions in the same Act. But there is apparent in recent judicial decisions in various Provinces a growing tendency towards uniformity, in gratifying contrast to the labyrinth of former conflicting decisions. Any seeming conflict in some recent decisions is probably traceable to the varying provincial statutory provisions.

In a recent case in Alberta,* Beck, J., stated that where a statutory provision is adopted from another jurisdiction, after having been in force there for a long period of time, he would be disposed to follow the judicial decisions of that jurisdiction upon its interpretation, unless there were very strong reasons for a contrary view. The general adoption of such a commendable attitude would greatly aid in securing uniformity in the practical operation of this beneficial legislation.

In this edition Canadian decisions down to December, 1912, have been noted as far as practicable.

W. B. W.

Halifax, January, 1913.

* *Ward* v. *Serrell* (1910), 3 Alta. L. R., at p. 141.

PREFACE TO FIRST EDITION

The decisions upon the Mechanics' Lien Acts existing in various Provinces in Canada and the amendments to the Statutes dealing with this subject have been so numerous of recent years, and the subject itself has become so extensive as to warrant the publication of a new treatise. While fully sensible of imperfections in the execution of this work, it is, nevertheless, hoped that it may prove useful to the profession.

There are some variations in the Statutes of the different Provinces on this subject, but very few of them are substantial, and the main sections of the various Statutes are so nearly alike as to make the decisions in one Province of value to the practitioners in the other Provinces. Moreover, it is thought that judicial interpretations of similar sections in the Statutes existing in various States in the adjoining Republic will be useful to the practitioners in Canada. Statutes in New York, Massachusetts, Pennsylvania and other States of the Union, on this subject use, with very little variation, the phrases of the sections used in the Mechanics' Lien Acts existing in various Provinces in Canada, and it is felt that, as there are certain principles common to the jurisprudence of both countries, the decisions that have expounded the Statutes which have been enacted in various States of the Union will aid either directly, or by analogy, in the construction of similar Acts passed by our Provincial Legislatures.

Bramwell, B., in *Osborn* v. *Gillett*, (1873) L. R. 8 Exch. 92, said, in speaking of United States decisions on another branch of the law:—

"The American authorities are not binding on us indeed, but are entitled to respect as the opinion of professors of English law and entitled to respect according to the positions of those professors and the reason they give for their opinions."

The late Mr. Justice Thompson, of Nova Scotia, in one case referred to the value of United States decisions and quoted

approvingly what Chief Justice Cockburn said in *Scaramanga* v. *Stamp*, L. R. 5 C. P. D. 303: "Although the decisions of the American courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law, a law, except so far as altered by statutory enactment, derived from a common source with our own, entitle their decisions to the utmost respect and confidence on our part." Such observations must apply with special force to decisions of United States courts construing Statutes which the Provincial Legislatures in Canada have utilized in framing their own Mechanics' Lien Acts.

Times have greatly changed since the Court of Queen's Bench of Upper Canada, under the presidency of Chief Justice Draper, actually declined to make a note of any United States case cited on any question of law.

As the Mechanics' Lien Act of Ontario, the parent Statute, is, in its main provisions, similar to the legislation on the same subject in Manitoba, British Columbia, Nova Scotia, New Brunswick, Alberta and Saskatchewan, and the largest amount of judicial interpretation has been given to the Ontario Statute, it has been deemed best to group, under appropriate sections of that Statute, all the decisions given in Canada that have been obtainable and to publish the Mechanics' Lien Acts of the other Provinces with merely the essential notes and cross-references. The Articles of the Civil Code of Quebec dealing with the same subject are also published, with decisions of the courts of Quebec relating to them.

The writer must acknowledge his obligations to Mr. A. A. Mackay, B.A., LL.B., Law Clerk of the Nova Scotia Assembly, whose valuable services have greatly improved the volume.

In the selection of cases illustrating the Quebec law valuable aid has been given by Mr. H. J. Kavanagh, K.C., of the Quebec Bar.

September, 1905. W. B. W.

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THE LAW

OF

MECHANICS' LIENS IN CANADA

CHAPTER I.

HISTORICAL.

The Development of the Lien upon Realty.

A common law lien, in its primary sense, has been judicially defined to be "a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." *Hammonds* v. *Barclay*, (1802) 2 East 227, 235. "It is neither a *jus in re* nor *jus ad rem*." *Dempsey* v. *Carson*, (1862) 11 U. C. C. P. 462, *per* Draper, C.J. This right to so retain the property, upon which he had performed labor and thereby added to its value, only applied to personal property. At common law a mechanic had no lien upon a building for labor done upon it and could not retain possession of realty upon which he had performed labor. Even at so early a period as the year 1835 this question was discussed in an Ontario case (*Johnson* v. *Crew*, 5 U. C. Q. B. (O.S.) 200), where a builder, having performed work on a house, withheld possession and insisted that his claim must first be paid. It was decided in that case that the builder had no lien, and that no action would lie for his claim until the absolute delivery of the house. Robinson, C.J., said: "On general principles and in ordinary cases a builder has no lien on the house which he has built or repaired,—

it would be most inconvenient that he should have. The ground on which it stands is inseparable from the house and such a lien would exclude the owner from his own freehold." Macaulay, J., said: "Contractors for such work must rely on the personal liability of their employer under the contract, in an express security guaranteed by substantive agreement. No lien results in law in their favor by reason of the expenditure of their toil and material on the estate and for the benefit of the owner."

It is true that a contractor may have a right to hold materials as an unpaid vendor until they are paid for, when such materials brought on the land of the employer have not been affixed to the freehold, and the property in them has not passed to the employer by the terms of the contract (*Bellamy* v. *Davey*, [1891] 3 Ch. 540), but when the materials have been affixed to the freehold, a contractor, in the absence of a statute, has no lien on them, or on the work constructed with them. They then form part of the freehold. Halsbury's Laws of England, vol. 3, p. 264.

It required a statute, therefore, to create this lien and it was not until the year 1873 that this right was created in Ontario, which was the first Province in Canada to enact a Mechanics' Lien Law. 36 Vict. ch. 27.

Origin of the Law.

Ontario, doubtless, adopted the system of Mechanics' Liens from the statutes prevailing in many of the States of the neighboring Republic. Such a system is unknown to the law of England. The actual cause which led to the introduction of the system in the United States is not known. Phillips, in his treatise on Mechanics' Liens (3rd ed., sec. 6) states that it has been supposed that in Pennsylvania, which was one of the first States to establish the system, it owed its existence to the analogous provisions contained in the Act of the commonwealth of 1784 relating to persons employed in building and repairing vessels, and others seem inclined to trace its origin exclusively to the necessity, in a young

and growing country, of fostering mechanical and industrial pursuits, and the manifest equity of dedicating primarily buildings and the land upon which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. But is it not probable that the origin of the system is traceable to the circumstance that many of the new settlers in that country were mechanics, who came from continental countries where laws existed based on the civil law, which has so deeply influenced the jurisprudence of the civilized world, and that these workmen, having had the beneficial experience of the civil law provisions which protected the contractor and mechanic and clearly defined and regulated their interests, would naturally press for the like privilege to be given them in their adopted country? The civil code of Louisiana is directly traceable to this source and in regard to mechanics and laborers is practically a re-enactment of the provisions of the civil law. The enactment by the British Parliament of the famous "Quebec Act" of 1774, which extended the limits of the Province southward to the Ohio and westward to the Mississippi, restored the civil law to the people living within that extensive territory, and it is probable that the provisions of that law protecting mechanics, were familiar to many workmen who afterwards became residents of adjoining States and who would quickly join in the movement for the securing of a statutory law with similar provisions for their protection. The old French law gave a lien to workmen over all other creditors, upon the equitable principle that they who had furnished materials, and had worked for the common benefit of all the creditors, should therefore be first paid. Pothier Procédure Civile, partie 4, ch. 2, sec. 3, sub-sec. 5.

Moreover there were many thousands of Dutch settlers not only in New York, but along the Delaware and in Maryland and Pennsylvania (Pennsylvania Archives, vol. 1, Hazard), and those settlers and their relatives and friends who followed them to their new homes had lived under the civil law in Holland, and the

mechanics among them would naturally agitate to secure an enactment giving them similar protection in their adopted country.

It is not unlikely, therefore, that the provisions of the civil law constituted the foundation for the system of Mechanics' Liens now prevailing on this continent.

In the United States, the first statute creating such a lien was enacted by the General Assembly of Maryland in 1791. This was followed by a measure passed by the Legislature of Pennsylvania in 1803. In 1819 the Legislature of Massachusetts passed a Mechanics' Lien Act which was adopted in Maine in 1821. As illustrating the meagre and incomplete provisions of these early statutes, it is worthy of note that the Massachusetts Act gave a lien only to one who had made a written contract with the owner, and the first Pennsylvania Act made the lien apply only for debts contracted by the owner of the property in connection with work done or materials furnished for the building, and the contractor himself was not entitled to any lien under the Act. The primary purpose of the latter statute was not to secure the contractor but the mechanics and dealers who were liable to lose through him. The whole statute consisted only of two sections and was contained in about thirty lines.

Initial Difficulties.

The legislative germ introduced in Ontario in 1873 gave little promise of long life or future development. It was an exasperation to the owners of real estate, and in many cases was a disappointment to persons claiming a lien. It was publicly stigmatised as being of profit to no one save the lawyers, and it was suspected of being the offspring of the wanton wooing of the workingman's vote. The Act was vigorously condemned in the press by suitors who had invoked it unsuccessfully.

Looking back to that period, it is not surprising that the new Act was unpopular. It was good, so far as it went, but it did not go far enough, and there was the inevitable accompaniment of

ambiguity in respect to some of its terms. It existed only in favor of the direct contractor with the owner, and there was a perilous perplexity and haziness about the scope of the word "owner," who was, as one judge expressed it, "environed with great perils." Sub-contractors disliked the statute because it did not give them the right to a lien on the land and left them unprotected from fraud. They were entitled to have their claims paid out of any money due by the owner to the contractor, but that privilege was speedily discovered in many cases to be illusory and valueless, inasmuch as by the time the owner received from them the necessary notice of their claims there was nothing due by him to the contractor and therefore nothing to pay to the sub-contractors. This defect was remedied in 1874 (37 Vict. ch. 20). After further amendments to the law and the decision in a leading case (*Bank of Montreal* v. *Haffner*, (1884) 10 O. A. R. 592), there was a clearer understanding of the scope of the word "owner." In 1877 there was a consolidation of the Acts (R. S. O. (1877) ch. 120). For some years there was contention between lien-holders and other incumbrancers for priority, (see *Douglas* v. *Chamberlain*, (1878) 25 Gr. 289: *Richards* v. *Chamberlain*, (1878) 25 Gr. 402, 24 Gr. 209), and there appeared to be general dissatisfaction with the statute. An editorial appeared in 1876 in the sedate columns of a law journal (12 C. L. J. 300), vehemently demanding the repeal of the Act, and describing it as, "that most absurd and hurtful of all illogical legislation." In the following year another editorial appeared in the same journal, which, after referring to a particular case (13 C. L. J. 9), as a specific instance of the unsatisfactory character of the Act, denounced the whole measure as unjust, absurd and unintelligible.

It should be noted that the decision in the case which provoked this violent attack upon the Act was reversed on appeal.

Important Amendments.

When, by further amendments to the Act, the legislature sought to protect the sub-contractors and material men by giving each of them a lien, the law was often misunderstood by the sub-contractors and material men, who in many instances suffered loss because they failed to realize the importance of the doctrine enunciated by Mr. Justice Proudfoot, when he said: "The American statutes, so far as I have been able to refer to them, contain no definitions of the term owner, but the courts have construed it to be the correlative of contractor, and to mean the person who employs the contractor, and for whom the work is done under the contract. Our statute seems to have framed the definition in accordance with this course of decision." *Bank of Montreal* v. *Haffner*, (1881) 29 Gr. 319. The contractor and material men, however, felt that it was unreasonable that anything more should be required to be shown by them to secure their claims than to prove the ownership of an interest in the land and the doing of the work benefiting the owner of that interest. Moreover, wage-earners were dissatisfied with the Act because there was no adequate protection for them against the dishonesty of contractors. In order to afford ample protection to wage-earners, amendments to the Act were made in 1882 (45 Vict. ch. 15), and further amendments in 1884 (47 Vict. ch. 18), and in 1887 (50 Vict. ch. 20). By these later amendments a better status was given to the lien for wages; all agreements made for the purpose of preventing the attaching of mechanics' liens were declared void, except as between the actual parties to such agreements, and the procedure for enforcing and discharging liens was improved. The next consolidation was in 1887 (R. S. O. (1887) ch. 126), and further amendments were made in 1889, one amendment (52 Vict. ch. 37), directing a special procedure for the enforcement of the lien, and the later amendment (52 Vict. ch. 38), making a change in the percentage required to be retained by an owner. In

1893 by an amending Act the procedure for the enforcement of the lien was further improved. Notwithstanding all these amendments, the Act was in such a condition until 1896, that the courts were often forced to allow gross injustice to be done by reason of technical slips, and the remedy intended by the Act was often burked by matters of form and not of substance. (See observations of Riddell, J., in *Barrington* v. *Martin*, (1908) 16 O. L. R. 635.) In that year the legislature made a clean sweep of the old Acts, and recast the whole statute. (59 Vict. ch. 35.) There was a subsequent consolidation in 1897 (R. S. O. (1897) ch. 157), and a revision again in 1910, after additional amendments in intervening years. The latest consolidation was in 1914 (R. S. O. (1914) ch. 140). Since then practically no important change has been made in the Act.

For some time there had been contention in regard to the construction of the word "completion" of the work, but finally in the case of *Neill* v. *Carroll*, affirmed on re-hearing (see *Summers* v. *Beard*, 24 O. R. 641), it was apparently established that "completion" meant substantial completion, and that the subsequent supplying of trifling imperfections would not have the effect of prolonging the time for the registration of the lien or for bringing the action to enforce the lien. But this decision has not been followed in later cases. (See cases cited in Chapter "Computing the Statutory Time," *post*).

When the right to a lien was extended to sub-contractors it proved, in many instances, an expensive and useless right because there was no machinery accompanying it which would enable sub-contractors to ascertain speedily the amount due by the owner to the contractor. Eventually a provision was adopted for the further protection of sub-contractors, which provision is now embodied in the present Act. Another defect in the statute, which impaired its value to sub-contractors, arose from the fact that a contractor could by his agreement deprive all sub-contractors under him of the right of lien, and it was not until 1884 (47 Vict. ch. 18), that the defect was remedied.

It was, of course, very difficult to anticipate and provide for the innumerable questions which ultimately arose concerning the scope and meaning of the terms of a statute of this novel nature. The ambiguity of some of its sections was the subject of occasional comment by the courts. Even at so late a period as 1885 Chancellor Boyd, in one case, expressed regret that he could not exempt the plaintiff from costs "incurred in endeavoring to discover the true meaning of the mechanics' lien law." *Graham* v. *Williams*, (1885) 8 O. R. 478.

Instructive comments on the growth and development of the legislation on this subject are to be found in the judgment of Magee, J.A., in *Rice-Lewis & Son* v. *Harvey*, (1913) 9 D. L. R. at p. 118, and in the judgment of Riddell, J., in *Eadie-Douglas* v. *Hitch & Co.*, 9 D. L. R. 239.

The experiences of Manitoba, British Columbia, Nova Scotia, New Brunswick, Alberta and Saskatchewan were not so troublesome, as by the time enactments on this subject had been passed by their legislatures, the path had been made fairly smooth.

Contrasting the meagre, inadequate and inequitable provisions of the Ontario Act of 1873 with the comprehensive and just provisions of the present Act, based as it is on a due regard to the rights of all parties, great progress may fairly be claimed along a somewhat thorny and troublesome path, where conflicting rights compelled the legislator to proceed cautiously lest the honest endeavor to do full justice to one class might involve injustice to another class. There has been a slow but steady widening of the remedy, so that, while the remedy itself has been made more effective, it has also been extended so as to include new classes of persons equally entitled to invoke it, and the law itself in the various provinces of Canada is gradually becoming uniform and well settled. It is not claimed that even to-day the legislation on this subject has anticipated and effectively dealt with all possible contingencies and is complete and perfect. "The statute, construe it as we may, presents anomalies and incongruities with which

it is very difficult to deal." *Jackson* v. *Egan* (1911) 200 N. Y. 500, *per* Cullen, C.J.. New legislation, doubtless, will be necessary from time to time to meet new conditions and to cope with the ingenuity of those desirous of evading the provisions of the Act, but when the difficulties of the subject are considered, it must be conceded that the Mechanics' Lien Acts as they exist to-day in this country, are distinctly beneficial and just measures. It was feared by some persons that the Acts would be oppressive to the owners of real estate, but it is now universally recognized that these measures are not more onerous than necessity and justice demand in order to protect those who do the work and furnish the materials by which the realty is benefited.

The value of a statute of this kind cannot be measured by the frequency with which its provisions are invoked. The mere fact that it is on the statute book constitutes in itself a wholesome, salutary and far-reaching influence in preventing attempts to defraud which might otherwise be successfully undertaken. An adequate idea of the value of the Mechanics' Lien Acts could only be afforded by their absolute repeal, as it would then be found that those classes now protected by the law, from the fraud, injustice, misfortune or improvidence of others in connection with building contracts, would have the strongest reasons for demanding the re-enactment of these statutes.

CHAPTER II.

Nature and Scope of the Lien.

A right which requires a statute to create it, and also statutory words to determine the precise length of its life, can be truly called a creature of the statute. There are other liens created by statute, but a mechanics' lien upon realty differs in several respects from any of them. The statutory law which bears the closest resemblance to it is that which relates to an incumbrance affixed to the realty for taxes due to a municipality.

While the general principle of this legislation is that the land which receives the benefit shall bear the burden (*Scratch* v. *Anderson*, (1909) 11 Alta. R. 55), yet the application of that principle is necessarily restricted by the terms and conditions of the statutory enactment creating the lien.

The object of this legislation is to insure by a cheap and expeditious method the payment for work and materials out of property upon which the work has been done, or for which materials have been provided. The person who has supplied labor and materials is enabled to establish a lien and thus acquire authority to sell the property so as to realize his claim therefor. "The substance of the enactment is the sale." (*Crawford* v. *Tilden*, 14 O. L. R. 577, *per* Meredith, J. A.; *Scratch* v. *Anderson*, (1911) 16 W. L. R. 145.). The aim of this remedial legislation is to secure payment, so far as is just and practicable, to those whose work or materials, supplied to the owner in the manner provided for in the enactment, tend to enhance the value of the property of the owner. The scope and effect of this legislation have been widened by amendments. In the various Provinces of Canada the trend of this remedial legislation has been in the direction of extending the right of lien; but this statutory remedy, when expressed to be given for "services" in "erecting" a building is not

broad enough to include a lawyer's charges for drawing contracts in relation to the building or his charges for legal advice as to questions arising out of the construction or repair of the building. An architect, however, or an assistant architect, would be entitled to a lien for his "work" and "services" in the drawing of plans used in the erection of the building and the superintendence and the direction of the construction of the building. Superintending the building is "service upon" the building. The architect who draws plans used for a building "actually does work upon it as if he had carried a hod." (*Arnoldi* v. *Gouin*, 22 Gr. 314; *Read* v. *Whitney* (1919), 48 D. L. R. at p. 309; *Tripp* v. *Clark*, 14 D. L. R. 918, 18 B. C. R. 216). But the travelling expenses of an assistant architect could not be treated as "service upon . . . a building." *Read* v. *Whitney*, *supra*. There is no lien under the British Columbia Mechanics Lien Act, R. S. B. C. 1911, ch. 154, in respect to the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor. *British Columbia Granitoid Co.* v. *Dominion Shipbuilding Co.* (B.C.), (1918) 2 W. W. R. 919.

A mechanics' lien although created by operation of law is dependent upon contract, express or implied. It being considered that a person who by his labor or material enhances the value of realty belonging to others has a special right to compensation and, therefore, should have a preferred claim on such realty, the object of a Mechanics' Lien is to secure to him a priority of payment of the value of the work done, or materials furnished, by giving him a lien which attaches to the land and the structure.

This lien arises by virtue of the employment and the doing of the work or furnishing the materials (*McNamara* v. *Kirkland*, (1891) 18 O. A. R. 276), and is given as a security only for labor done or materials furnished to be used in connection with the construction, repair or improvement of the structure. *Robock* v. *Peters* (1900) 13 Man. L. R. 139.

The death of a lienholder or the dissolution of the co-partnership of a firm of lienholders cannot affect the continuance of a lien.

One purpose of the Act is to secure to wage-earners priority over all claimants not having a superior equity, so that wage-earners who became entitled to a lien as the work went on would not lose their lien through any subsequent default of the contractor. To wage-earners the owner may be made liable for more than what is payable to the contractor, but with this exception the charge created by the statute is a charge upon money to become payable to the contractor and when by reason of the contractor's default, the money never becomes payable, those claiming under him to have this statutory charge upon the fund created by the Act, if and when payable, have no greater right than he himself had, and their lien fails. *Farrell* v. *Gallagher*, (1911) 18 O. W. R. 446, 23 O. L. R. 130; *McManus* v. *Rothschild*, 25 O. L. R. 138; *Cole* v. *Pearson*, (1908) 12 O. W. R. 111.

A provision requiring an owner to create a fund by deducting twenty per cent. from any payment to be made by him in respect of a contract, for the protection of those who supplied materials to the contractor, does not apply to a contract under which nothing was payable by the owner to the contractor,—as where during the progress of the work the owner had paid the contractor more than the value of the work done and the work as a whole was never completed. *Burton* v. *Hookworth*, (1919) 48 D. L. R. 339.

The special provision for priority of wage-earners introduced into the Mechanics' Lien Act, whereby it is declared that as against wage-earners the percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default, nor to the payment of damages for non-completion, does not affect the other provisions of the Act regarding mechanics' liens generally; and it is not to be implied from such prohibition that the owner may in cases other than for wages so apply the statutory percentage towards the cost of completion as against the liens of materialmen or sub-contractors in the event of the contractors' default. *Rice Lewis & Son, Ltd.* v. *Harvey et al.* (1913) 9 D. L. R. 114.

The fact that the owner did not retain from his contract any of the percentage of the value of the work as required by the Mechanics' Lien Act for the protection of sub-contractors and wage-earners, does not make him liable for sub-contractors' claims as to which no lien was filed or notice of claim given the owner until after the expiry of thirty days following the abandonment of the work by the principal contractor, the statutory obligation to retain the percentage being limited to thirty days after completion or abandonment of the contract with the owner. (*Brooks* v. *Mundy* (1914) 16 D. L. R. 119). The statutory percentage which the Act requires an owner to retain constitutes a fund of which the owner is a trustee, and where a contractor abandons his work the materialmen and other lienholders can resort to this fund. Where, therefore, under a contract it was provided that eighty per cent. of the value of the work done was to be paid, on progress certificates, by the owner to the contractor, the owner was held liable to other lienholders to the extent of twenty per cent. on such payments, and, if any additional sum became payable by the owner to the contractor, twenty per cent. of such sum would be available to lienholders. *Russell* v. *French*, 28 O. R. 215; *Rice Lewis & Son* v. *Harvey*, (1913) 9 D. L. R. 114. The views expressed in *Farrell* v. *Gallagher*, 23 O. L. R. 130, and *McManus* v. *Rothschild*, 25 O. L. R. 138, must be governed by the decision in *Rice Lewis & Son* v. *Harvey*, *supra*.

The lien itself is an interest in land (*Stewart* v. *Gesner*, (1881) 29 Gr. 329), and attaches to equitable as well as legal estates or interests in land. *Reggin* v. *Manes*, 22 O. R. 443; *Montjoy* v. *Howard School Dist. Corp.*, 10 W. L. R. 282. "A trustee having power to improve and repair the property can usually by his contract subject it to a mechanics' lien." *Springer* v. *Kroeschell*, 161 Ill. 358. It will attach to the estate of a lessee. (*Garing* v. *Hunt*, 27 O. R. 149), but subject to all the conditions of the lease (*Williams* v. *Vanderbilt*, 145 Ill. 238), but the lessee's contract cannot, as a rule, affect any other interest, unless the lessor consented

to the making of the improvements. *Garing* v. *Hunt, supra; Graham* v. *Williams,* 8 O. R. 478, 9 O. R. 458. See *Marshall Brick Co.* v. *Twining,* 28 D. L. R. 464; *Scratch* v. *Anderson,* (1911) 16 W. L. R. 145. It attaches only to realty, and does not create an estate in the realty itself but is, in effect, a statutory charge upon the estate or interest of the "owner," as defined by the Act (*Garing* v. *Hunt, supra; Graham* v. *Williams,* 8 O. R. 478, 9 O. R. 458), and its registration makes subsequent transfers or incumbrances of the land affected by the charge subordinate to the rights of the lien holder. It arises as soon as work is done or materials furnished, and is subject to be increased or decreased in amount from time to time, as further work is done or materials furnished to be used, on the one hand, or payments made to the lien holder, on the other hand. Although the lien arises as soon as the work is commenced, or the materials have been placed or furnished, yet it actually takes its rank with other interests and incumbrances not solely according to the date at which it came into existence, but, in so far as the work or materials have increased the value of the land, in priority to other interests and incumbrances, though the latter be prior in point of time. *Galvin-Watson Lumber Co.* v. *McKinnon,* (1911) 4 Sask. L. R. 68, 16 W. L. R. 310.

The lien may be registered when commencing, or during the progress of the work, but an action thereon cannot be commenced before completion of the contract. *Curtis* v. *Richardson,* (1909) 18 Man. L. R. 519.

The lien upon registration takes effect from the commencement of the work, or from the placing of the materials, as against purchasers, etc., under instruments registered or unregistered. *Robock* v. *Peters,* (1900) 14 Man. L. R. 139. As between owner and contractor, the lien may exist from the time of the commencement of the work, yet if the latter desires to preserve his position and establish a priority over subsequent purchasers or mortgagees, he must register his lien. *McVean* v. *Tifflin,* (1885)

13 O. A. R. 4. See *Dominion Radiator Co.* v. *Payne*, (1917) 11 Alta. R. at p. 537. The office of the statement registered, so far as respects the lien, is not to create it but to preserve it, and maintain it against subsequent purchasers and protect the latter from the risk of taking without notice any land affected by a lien. The purpose of registration of claims for liens is to give public notice of the existence and nature and amount of the claims and of the persons by and against whom they are claimed, and of the property subject to them, so that persons interested in the property or intending to acquire any interest in it may receive reasonable notice of the character of the claims attaching to the property. Such information as answers this purpose should be held sufficient. *Bickerton* v. *Dakin*, (1891) 20 O. R. 702; *Fulp* v. *Power Co.*, (1911) 157 N. C. 156. The owner has the right to know from the account filed, the amount which has become a charge upon his property in order that by payment or tender he may discharge the property of this encumbrance. If, therefore, a claim for lien is wilfully and fraudulently made for an excessive sum, the lien will be defeated. *Marsh* v. *Mick*, (1911) 159 Ill. App. 399.

When the work is done or the materials are furnished, the lien, having attached as the work is being done, relates back to the time when the work was begun, or the materials were commenced to be furnished, and takes priority over incumbrances not recorded at that time. *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, (1905) 5 O. W. R. 161, 41 C. L. J. 260.

The lien for materials arises on the materials being furnished for the "owner" or contractor or a sub-contractor, and attaches only to the erection, building or property in respect of which they were furnished, and of the lands occupied thereby or enjoyed therewith, or upon which the materials are placed or furnished to be used. The policy of this legislation is to prevent an owner from obtaining the benefit of the labor and materials of others without compensation, but it is not intended to compel an owner to pay his contractor's indebtedness for that which does not go into or

benefit his property. *Brooke-Sanford Co.* v. *Theodore Telier Co.*, 22 O. L. R. 176.

A mechanics' lien is a charge upon the whole realty, although the labor done or materials furnished may have only been connected with part of it. This is aptly illustrated by a Massachusetts case (*Beatty* v. *Parker*, (1886) 141 Mass. 533) in which it was decided that a drain pipe extending from the cellar of a house in a city, through the cellar wall, yard and street into a sewer, and included in the contract for building the house, which was fitted for the use of the city water, is a part of the house and that a lien may be maintained for the laying of this drain, it being immaterial that the fee of the street is not in the owner of the house. In a later case it was held that a lien might exist for grading a lot, as, if the grading were reasonably necessary to the proper construction and occupation of the house, it fairly could be considered as part of the erection of the house. *Reid* v. *Berry*, (1901) 178 Mass. 260. In fact, any improvements which although outside of a building are necessary for its proper use, and are on the lot of land, may be the subject of a lien on the land and building. Thus, a lien may be claimed against the whole realty for the drilling of an artesian well (*Rolewitch* v. *Harrington*, (1906) 6 L. R. A. 550); constructing a reservoir (*Brush Elec. Co.* v. *Warwick Electric Co.*, 6 Ohio Dec. 459); pipes in a cold storage plant (*Steger* v. *Arctic Ref. Co.*, 11 L. R. A. 580); a gas machine (*Pennsyl. Globe Co.* v. *Gill*, 1 Pa. Dis. R. 538); electric light (*Badger Lumber Co.* v. *Marion Water Supply & Power Co.*, 15 L. R. A. 652); brewery appliances (*Watts Campbell* v. *Yuengling* (1890) 125 N. Y. 3). A person furnishing lead to connect a house with pipes in the street may have a lien on the house. *Ferry* v. *Rothbaum*, (1911) 155 Mo. App. 331. Mechanics' Lien Acts in Canada give a lien upon the building ". . . and the lands occupied thereby and enjoyed therewith," and this phrase has been liberally construed. Where a lien on a mine was claimed, and it appeared that none of the work done and none of the materials were furnished

on mining locations Nos. 128 and 129, but these were "enjoyed" with No. 258 on which the work was done, it was held that the former sections were, therefore, subject to the lien. *Davis* v. *Crown Point Mining Company*, (1901) 3 O. L. R. 69. These words are not necessarily restricted to the particular lot upon which the building is situated, but may include other lots intended for use with the house. *Clarke* v. *Moore* (1908) 1 Alta. L. R. 49. Where a statute permitted the lien to attach to such curtilage as is reasonably needed for the general purposes for which the structure is erected, a lien on a hotel and sanitarium was held to extend to a lot separated from that containing the building by other property, but containing a mineral spring which is intended as part of the sanitarium property. (See *Wirsing* v. *Penn Hotel and Sanitarium Co.*, (1909) 226 Pa. 234, where previous cases are reviewed.) Where the buildings are upon farms, the lien, as a general rule, will include the extra tract that is used as one farm. *Cowan* v. *Griffith*, 103 Cal. 224. The tendency of legislation is to widen, and of the courts to construe liberally, the provisions dealing with the extent and scope of a lien. *Ontario Lime Assocn.* v. *Grimwood*, (1910) 22 O. L. R. 17. Such terms as "work" and "materials," for instance, have been most liberally construed.

The question of the extent of land included in the lien depends largely upon the facts at the time the contract was made. *La Forgee* v. *Colby*, 69 Ill. App. 443; *Baker* v. *Waldron*, 92 Me. 17; *Collins* v. *Patch*, 156 Mass. 317; *O'Brien* v. *Fraser and Gallagher*, (1918) 41 D. L. R. 328; *Polson* v. *Thomson* (1916) 29 D. L. R. 395; *Fairclough* v. *Smith* (1901) 13 Man. L. R. 509; *Builders Supply Co.* v. *Huddlestone* (1915) 25 Man. L. R. 718. As to the area of land subject to the lien, Fuller, C.J., in a leading American case, said: "The truth is that what area of land is subject to a lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall or a fence, would not be the same as that required for or appertaining to an irrigation system,

but the principle of determination is the same." *Springer Land Assn.* v. *Ford,* (1897) 168 U. S. 513.

Where there are no visible divisions the entire tract is considered as the lot of land covered by the lien (*St. Louis Nat. Stock Yards* v. *O'Reilly,* 85 Ill. 546; *Orr* v. *Fuller,* 172 Mass. 597), but in Pennsylvania it has been held that if the work is done on a structure which is on a separate and remote lot, a lien cannot be enforced against a building on another lot, although the structure on which the work was done serves the other building as well as other properties. *Cowan* v. *Penn. Plate Glass Co.,* 184 Pa. 16.

All of a block of houses on one tract erected under one contract will be covered by a single lien. *Brabazon* v. *Allen,* 41 Conn. 361; *Worthley* v. *Emerson,* 116 Mass. 374; see *Maryland Brick Co.* v. *Spelman,* 76 Ind. 337, (17 L. R. A. 599). The defendant bought one of two adjoining pieces of land and took a fifty years' lease of the other. He erected an exterior fence, built a continuous dock for coal along the entire river front of both lots and used the whole tract as a coal yard, and it was held that a lien under a single contract covered both lots as a single lien. *Marston* v. *Kenyon,* 44 Conn. 349. Old material used under the contract in the new building may be subject to a lien. (*Whitford* v. *Newell,* 84 Mass. 424), and the amount paid by a contractor agreeing to erect a new building for removing an old building on the site is a proper claim. *Pratt* v. *Nakdimen,* (1912) 138 S. W. 974), but no lien arises for merely tearing down a building or part thereof (*Thompson-Starrett Co.* v. *Brooklyn Heights R. C.,* 111 App. Div. (N.Y.) 358) unless the work of tearing down was a necessary preliminary to the making of subsequent improvements.

Where it is intended to use the whole of the land with the buildings on which the work was done, all the land will be subject to the lien (*Lindsay* v. *Gunning,* 58 Conn. 296), where the whole farm of 300 acres was held to be "the land on which" the buildings stand.

The estate or interest, large or small, of the "owner" is bound by the lien (*McCarty* v. *Carter,* 49 Ill. 53, 95 Am. Dec. 572), and

where the equitable title afterwards merges into the legal, the lien will attach to the legal title. Where a person has a valid lien on a lot and building and subsequently becomes owner of the land on which the building was then standing, whatever interest he could claim in the property under his lien merges in his title as owner. *Galvin Watson Lum. Co.* v. *McKinnon,* (1911) 16 W. L. R. 310. Once a lien attaches no subsequent conveyance can affect it prejudicially. *Salem* v. *Lane,* 189 Ill. 593.

As to the operation of the lien itself, Boyd, C., in delivering judgment in a leading Ontario case (*King* v. *Alford,* (1885) 10 O. R. 647), said: "There is nothing in the scope of the Act as to liens to indicate that it was intended to be operative to a greater extent than as giving a statutory lien issuing in process of execution, of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution." In another part of his judgment in that case, the learned Chancellor points out that a mechanics' lien is not analogous to a vendor's lien, and Ferguson, J., in the same case states fully the distinction between a mechanics' lien and a vendor's lien.

The lien upon a mine is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine. *Law* v. *Mumford,* 14 B. C. R. 233.

Such terms as "building" (6 Cyc. 115); "wharf" (*Collins* v. *Drew* (1876) 67 N. Y. 149; *Ellis* v. *Cory* (1902) K. B. 38; see also *Haddock* v. *Humphrey,* (1900) 1 K. B. 609; *Kenny* v. *Harrison,* (1902) 2 K. B. 168; "curtilage" (12 Cyc. 1021) occurring in a statute have been given a wide and liberal interpretation.

Work on an excavation or foundation will give a lien, even though no building is subsequently erected (*Baker* v. *Waldron,* 92 Me. 17; *Sommerville* v. *Walker,* 168 Mass. 388), but unless the statute expressly provides there is no lien for the breaking of land for the purposes of cultivation. *Brown* v. *Wyman,* 41 Am. Rep. 117. To create a lien it is not essential that the contract should contemplate that the lien claimant should be paid in money. *Dowdney* v. *McCullom,* 59 N. Y. 367.

The lien extends only to the property upon or in respect of which the work is performed or the materials furnished to be used, and the lands occupied thereby or enjoyed therewith, and this being so, it follows that though the work is done under one contract and for the same owner, no lien is created upon the property for work done or materials furnished upon another distinct property (*Currier* v. *Friedrick*, (1875) 22 Gr. 243; *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249; *Barr & Anderson* v. *Percy & Co.*, (1912) 21 W. L. R. 237; *Oldfield* v. *Barbour*, (1888) 12 P. R. 544; *Larkins* v. *Blakeman*, 42 Conn. 292; *Rice* v. *Nantasket Co.*, (1870) 140 Mass. 256), but a joint lien may be had upon a number of structures built or repaired under a single contract, and thus connected in construction and ownership. In reality they are to be considered as one building or structure. Thus, semi-detached houses, or houses erected in a row, would be treated as one building (*Ontario Lime Assn.* v. *Grimwood* (1910) 22 O. L. R. 17; *Capper* v. *Gillespie*, 11 W. L. R. 310; *Windfall Nat. Gas. Co.* v. *Roe*, (1908) 42 Ind. App. 228; *O'Brien* v. *Fraser & Gallagher*, (1918) 41 D. L. R. 328.

But the Act does not authorize the registration of one lien for one lump sum against the lands of different owners, although the work may have been done or the materials furnished under one contract for the building of houses on the lands of the different owners, unless, perhaps, in a case where the lien claimant did not know and had no means of ascertaining before filing his lien, that the lands were owned by different persons. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718.

If the amount for which the lien is claimed can be apportioned between two or more properties, or if separate prices are fixed, it would seem from some decisions that a separate lien may be claimed on each property for the amount due in respect to it. *Booth* v. *Booth*, (1902) 3 O. L. R. 294; *Shaw* v. *Thompson*, (1870) 105 Mass. 345; but see *Fairclough* v. *Smith*, (1901) 13 Man. L. R. 509; *Rathburn* v. *Hayford*, (1862) 87 Mass. 406. But the pro-

visions of the various Mechanics' Lien Acts in Canada, although allowing any number of lienholders to be joined in one suit, do not enable a lienholder to consolidate liens against several different buildings. Each individual building must bear the burden of its own construction. *O'Brien* v. *Fraser & Gallagher,* (1918) 41 D. L. R. 328.

The lien may attach against several pieces of property as one individual claim; the fact that houses are subsequently divided between different owners cannot impair the lien, which becomes effective from the time of the commencement of the work. *Polson* v. *Thomson,* (1916) 29 D. L. R. 395. This case is distinguished from *Fairclough* v. *Smith,* (1901) 13 Man. L. R. 509, as in the latter case the lots in question were severally vested in two different owners.

Where a contractor has several contracts with different persons for the erection of distinct buildings, a person who supplies materials to the contractor can only have a lien upon each owner's house for the amount due to him for material that had gone into that particular house. The onus is upon him to make his claim upon each house severally and he cannot join all the houses and all the owners in one proceeding and make one lump claim against them jointly. But where an owner enters into an entire contract for the supply of material to be used upon several buildings the nature of the contract shifts the onus and the lien claimant can ask to have his lien follow the form of the contract, and that it be for an entire sum upon all the buildings, and, in such case, if an owner desires to invoke the statute to the extent of having a lien upon any building confined to the value of the material going into that building the onus is upon him to shew the facts. *Dunn* v. *McCallum,* (1907) 14 O. L. R. 249; *Ontario Lime Association* v. *Grimwood,* (1910) 22 O. L. R. 17; see also *Builders Supply Co.* v. *Huddlestone,* (1915) 25 Man. L. R. 718. But where a definite labour account has been kept against each of two separate buildings in different parts of a city, a workman cannot lump the two accounts together and claim against both buildings for its total.

O'Brien v. *Fraser & Gallagher*, (1918) 41 D. L. R. 328. Where the materials were sold on the representation of the buyer that they were to be used by him in a particular building, but were actually used in the construction of another, the supplier had a lien on the building in which they were actually used. *Taggard* v. *Buckmore*, 42 Me. 77.

In an action by a husband against a wife to enforce a lien (*Booth* v. *Booth*, (1902) 3 O. L. R. 294), it appeared that defendant's wife and plaintiff's mother each owned a dwelling, both dwellings being in one building which was damaged by fire. Plaintiff contracted to repair both for a lump sum—the amount of insurance. Meredith, C.J., in this case said: "It was contended that as the agreement was made between the husband on the one part and his wife and mother on the other part for the performance of the whole work necessary to be done on both buildings for one entire price, the Act, R. S. O. (1897) ch. 153, gives no lien upon the land of either for the price of the work and material or any part of them. . . . It is unnecessary to express an opinion as to whether the respondent would have been entitled to a lien under the Act on both the lands of his wife and his mother for the whole of the agreed price, for the only claim which is made is a lien on the lands of the wife for the price of the work done on her part of the building and for the materials furnished in respect to it. It was, however, contended that the effect of the bargain, it having been for the whole work at one price and not separate prices in respect to each building, is that even such a lien as is claimed was not created. I am unable to agree with this view. Had it been impossible to distinguish between the work done and the materials furnished on the wife's building and those for the building of the mother, there possibly might have been a difficulty in the respondent's way, but I see no reason why, if it be practicable to do this, and *a fortiori* where, as appears to have been done in this case, a separate account had been kept, the lien may not attach to the land of each owner for the price of the work performed and materials furnished on

his part of the building. . . . Though the price for the work and materials was a lump sum, and included what was to be paid for that which he contracted to do in respect to his mother's building, I see no reason why for the purposes of the Act the price may not be apportioned between the two buildings according to the amount of the work performed and the materials in respect of it."

Though the decisions are conflicting, in the United States a lien would be upheld in the majority of the States in cases where separate buildings are erected upon the same lot or contiguous lots, for the same owner under an entire contract. If the buildings are on separate lots, though erected under an entire contract with one owner, the lien is only for the work done or materials furnished on each particular lot. No lien arises if the lots on which the buildings are erected are owned by different persons, though erected under one contract. *Rathbun* v. *Hayford,* (1862) 87 Mass. 406; *Childs* v. *Anderson,* (1880) 128 Mass. 108; see *Stoltze* v. *Hurd,* (1910) 30 L. R. A. 1219. If, however, different owners join in the contract for the erection of one building on contiguous lots, a lien may be claimed against the whole property. *Miller* v. *Sheppard,* 50 Minn. 268; *Menzel* v. *Tubbs,* 51 Minn. 364; *J. A. Treat Lumber Co.* v. *Warner,* 60 Wis. 183. No lien can be claimed where the work is done or the materials furnished partly upon land owned by the person for whom the work or materials is done or furnished and partly upon land of a stranger. *Stevens* v. *Lincoln,* (1874) 114 Mass. 476; *McGuinness* v. *Boyle,* (1878) 123 Mass. 570; see *Lee* v. *Hill,* 11 W. L. R. 611, unless the amount due in respect to the part owned by the person for whom the work was done can be shown. *Batchelder* v. *Hutchinson* (1894) 161 Mass. 462.

Where a definite labor account has been kept against each of two separate buildings in different parts of the city, a workman cannot lump the two accounts together and claim against both buildings for his total. *O'Brien* v. *Fraser & Gallagher* (1918) 41 D. L. R. 324.

There are some American decisions to the effect that a lien attaches on the land of both owners where a joint contract is made with them for the work to be performed on both lots which are owned separately. *Deegan* v. *Kilpatrick,* (1900) 54 N. Y. App. Div. 374, 66 N. Y. Supp. 628; *Miller* v. *Schmitt,* (1901) 67 N. Y. Supp. 1077, and *Miexell* v. *Guest,* (1895) 40 Pac. Rep. 1070.

In a leading Massachusetts case (*Forbes* v. *Mosquito Fleet Yacht Club,* (1900) 175 Mass. 432), it was held that a mechanics' lien may be enforced upon a building erected by the lessee under a lease of the land for a term of years which requires the erection of the building and which prevents the building from becoming a part of the realty, and upon the lessee's estate for years in the land, for labor performed on the buildings by employees of the contractor with the lessee. In delivering the judgment of the Court in this case, Barker, J., said that it was intended by the Legislature to give a lien upon buildings the owner of which had no estate or interest in the land upon which the building was erected, and that the lien might extend to a building erected upon land although the building was personal property. The learned judge continues as follows: "The contrary opinion expressed in *Hayes* v. *Fessenden,* 106 Mass. 223, 231, and in *Stevens* v. *Lincoln,* 114 Mass. 476, 478, was not necessary to the decision of either of those cases and therefore is not binding as an authoritative construction of the statute. In neither of those cases was the building personal property. In the former it was put upon the land by one who had merely a written agreement with the owners of the land for its purchase, and the lien was denied for the sufficient reason that a person holding such an agreement merely could not charge the building with a lien, because he was not the owner of the building, under the authority of *Poor* v. *Oakman,* 104 Mass. 309. So in *Stevens* v. *Lincoln,* where a lien was denied because by mistake a school house had been built partly upon lands of the town and partly upon lands of third persons, and it was not shown how much of the work was done on the respondent's land.

There was no ground for contending that the building was personal property. So much of it as stood on lands of other persons than the respondent was the real estate of those persons, and so much of it as stood on the respondent's land was the respondent's real estate; and the ground upon which the exceptions were sustained was that it could not be shown how much of the work was done upon the building on the respondent's land. In the present case the lease of the respondent required the erection of the building and so was a consent to its erection on the part of the owner of the land, and as the lease also gave to the respondent an estate for years in the land, this made the respondent the owner of the building within the meaning of Pub. Sts. ch. 191, sec. 1, for the term of years at least."

But where a building is by mistake erected upon the wrong property, no lien can be claimed; thus where materials were furnished to be used in the erection of a building upon lot 3, but which was, by mistake, erected upon lot 4 and afterwards removed to lot 2, the materialman was not entitled to a lien upon lot 2. *Lingren* v. *Nilsen,* 52 N. W. 915, 50 Minn. 448.

Where a carpenter was to furnish the plant, etc., necessary for the carrying out of the contract, which was to become the property of the owner if the contract was not fulfilled, it was held that the value of the plant so furnished should not be included in the amount on which the owner was required to retain the percentage, though the contractor had failed to complete the contract and the plant had become the property of the owner. *Birkett* v. *Brewder,* (1902) 1 O. W. R. 62.

Where defendant leased premises to a company and the company agreed to erect buildings and plant to the value of $100,000, which were to become the property of the defendant, it was held that the lien only attached to the company's interest. *Webb* v. *Gage,* (1902) 1 O. W. R. 327.

Where a lien on a mine was claimed, and it appeared that none of the work was done and none of the materials were fur-

nished on mining locations Nos. 128 and 129, but these were "enjoyed" with No. 258 on which the work was done, it was held that the former sections were therefore subject to the lien. *Davis* v. *Crown Point Mining Co.*, 3 O. L. R. 69; see also remarks of Fuller, C.J., in *Springer Land Association* v. *Ford*, (1897) 168, U. S. 513, upon the principle of determination of the extent of land covered by a lien.

A lien upon a building also attaches upon so much of the adjoining land as is necessary for the use and enjoyment of the building for the purpose for which it was erected. *Clarke* v. *Moore*, (1908) 8 W. L. R. 405; *Nelson* v. *Campbell*, 28 Pa. St. 156; *Bank of Charleston* v. *Curtiss*, 18 Conn. 342. The extent of land covered depends on the circumstances of each case; thus a distinction is drawn between property in the country and property in the city, a larger area being allowed in the former case.

In construing the Manitoba Act, a decision in that Province held that the expression "lienholder" means a person having a lien which was valid at the time of commencing his action, so that when, in an action commenced by a lien claimant, it is decided that he had no valid lien and no action was commenced within the statutory time by any other person claiming a lien on the same property, all the liens upon it must fail. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718. The case of *Re Sear & Woods*, 23 O. R. 474, which was followed in this case, on one point, is given a new interpretation in *Baines* v. *Curley*, *post*, and the word "lienholder" is given a plain meaning by this recent decision of an Ontario Court, which holds that "lienholder," as used in a corresponding provision of the Ontario Act, includes a person who files a claim but fails to establish it at the trial, and that a lien duly registered but upon which no action has been brought, within the stipulated time, may be enforced in an action brought within that time by the plaintiff who failed. *Baines* v. *Curley*, (1916) 33 D. L. R. 309.

Where the lien cannot be enforced against the property of a railway company, no valid lien which justifies the plaintiff to

proceed to judgment under the section of the Act dealing with personal judgments can be established. *Johnson & Carey Co.* v. *Canadian Northern R. Co.*, (1918) 47 D. L. R. 75. But in another case where the plaintiff failed to establish a lien, the Referee gave him a personal judgment and the Appellate Division dismissed an appeal from the Referee's decision. See *Kendler* v. *Bernstock*, (1915) 22 D. L. R. 475, 33 O. L. R. 351. In that case, however, there was property which could be legally charged with the statutory lien, and this condition also applies to the case of *Baines* v. *Curley*.

If all the work is done, or all the materials are furnished, under one entire continuing contract, although at different times, a lien claim filed within the statutory period after the last item was done or furnished is sufficient as to all the items. In order that the contract may be a continuing one within this rule, it is not necessary that all the work or materials should be ordered at one time, that the amount or nature of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon. A mere general agreement to furnish labor or materials for a particular building or improvement is sufficient if complied with. *Whitlock* v. *Loney* (Sask.), 38 D. L. R. 52, (1917) 3 W. W. R. 971.

The question whether the enforcing of this lien is a proceeding *in rem* or *in personam* has been much discussed and conflicting views have been expressed. In a Newfoundland case (*Lynch* v. *Trainor*, (1893) 13 C. L. T. 426, Newfoundland L. R. (1884-1896) 744, an action to enforce a claim for wages under a Mechanics' Lien Act, it was held that such a proceeding was an action *in rem* and not *in personam*. The Newfoundland Act is almost a complete transcript of the Ontario Act. In a Massachusetts case (*Howard* v. *Robinson*, 5 Cush. 121), Shaw, C.J., referring to this question said:—

"The course directed by statute is conformable in part to proceedings *in rem*, and partly to those *in personam*, but the object being to charge the estate with a lien, an encumbrance wholly

independent of the personal remedies which a contracting party may have, the course of proceedings must be considered as most nearly resembling a proceeding *in rem*."

It may now be considered as well settled that the action is one *in rem*. *Washburn* v. *Burns*, 34 N. J. L. 18; *Simmonson* v. *Citizens' State Bank*, 105 Iowa 264.

The view expressed by Boisot will be generally accepted as an accurate statement on this point: "If when we say proceeding *in rem* we mean a proceeding which is not against any person, but is directly against a thing whose state and condition are to be determined, and which results in a judgment equally binding on all persons, although not made parties to the proceedings, then a suit to foreclose a mechanics' lien cannot be said to be a proceeding *in rem*. But, if we use the term proceeding *in rem* in a larger and more general sense, as applied to actions between parties, where the direct object is to reach and dispose of property owned by them or of some interest therein, then a suit to foreclose mechanics' lien is a proceeding *in rem*. It is perhaps, however, more accurate to say that suits to foreclose mechanics' lien are suits in the nature of proceedings *in rem* in which the object is to determine the status of certain property, but which affect only those persons who are parties or privies." Boisot, Mechanics' Liens, sec. 511.

For the purposes of the legislation, liens are divided into two classes: (1) Liens for which a claim is not registered; and (2) Liens for which a claim is registered. A lien is given by an early section of the Act and exists independently of the registration of a claim. Before registration there are two courses open to a lienor: (a) He may omit to register a claim, in which case his lien will either lapse or be enforced by action at his own instance or that of others; or (b) he may register a claim, in which case his lien will lapse on the expiration of ninety days, or he must bring an action within a certain time or some one else must, and thus the lienor who registers a claim must be taken to have abandoned all

relief but what he can obtain under the provisions embodied in section 24 of the Ontario Mechanics' Lien Act, or the similar section in the Mechanics' Lien Act of any other Province. *Eadie-Douglas* v. *Hitch & Co.*, (1912) 27 O. L. R. 261. By section 24 of the Ontario Act, it is provided that "Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of 90 days . . . unless in the meantime an action is commenced to realize or in which the claim may be realized under the provisions of this Act." The words "in the meantime" do not mean "between the time of registering the claim and the expiry of the time limited"; but any proceeding taken during the existence of the lien (at all events) is taken "in the meantime" if taken before the expiration of the period mentioned in section 24.

The effect of a special provision in some Mechanics' Lien Acts (see section 32, Mechanics' Lien Act, Alberta), is to make the giving of notice in writing to the owner a condition of the mechanic's or materialman's lien attaching so as to make the owner liable, just as other sections make registration and the institution of an action within defined periods conditions of its preservation. *City of Calgary* v. *Dominion Radiator Co.*, (1917) 40 D. L. R. 65.

A decree enforcing a mechanics' lien is a conclusive determination of the rights of the parties, but it does not conclude persons who are neither parties nor privies. *Bank of Montreal* v. *Haffner*, (1884) 10 O. A. R. 599.

Where lands are out of the jurisdiction the court cannot affect them otherwise than by proceeding *in personam* and cannot therefore enforce a mechanics' lien by sale of land out of the jurisdiction. *Chadwick* v. *Hunter*, 1 Man. R. 363.

A person who claims the benefit of a mechanics' lien must show affirmatively that he is in one of the classes of persons that the statute intends to secure, and also that his claim is one of the kind that the statute secures. He must, therefore, be in one of the following classes of persons:—

(1) Those whose claims are by virtue of an agreement with the owner of the land and building or by reason of work done or materials furnished with his consent, *i.e.*, original contractors and others having the statutory claim by consent of the owner;

(2) Those having a claim of the statutory description without any such agreement or direct consent, *i.e.*, all sub-contractors (and persons whose claims are by virtue of a contract with any such sub-contractor, and who thereby come within the statutory definition of the term "sub-contractor");

(3) All laborers and wage-earners.

This statutory remedy is cumulative, and does not affect any other remedy which the claimant might invoke. Where a contractor has a claim against an owner of land larger than the value of the land and wishes to prove his claim in an action independently of Mechanics' Lien proceedings, he may do so. *Dick* v. *Standard Underground Cable Co.*, (1912) 23 O. W. R. 96. The work or service need not be performed on the site of the building, but must be directly connected with the repairs or construction of it. *Davis* v. *Crown Point M. Co.*, (1901), 3 O. L. R. 69; *Bradshaw* v. *Saucerman*, (1912) 4 D. L. R. 476. A person employed to sharpen picks to get out stone to build a lime kiln might have a lien on the quarry, but would have no lien on the lime kiln. *Allan* v. *Harrison*, (1908) 9 W. L. R. 198.

The rights of lien claimants are confined to the provisions of the statute creating such rights. Sub-contractors for the supplying of materials and doing the painting for a lump sum do not come within the meaning of the words "laborer or person placing or furnishing material." *Rosio & Jones* v. *Beach & Turner*, (1913) 23 W. L. R. 174, 406, 9 D. L. R. 416. *Fuller* v. *Turner & Beach*, (1913) 23 W. L. R. 170. A person who has delivered material to be used in the construction and improvement of a place, although the place of delivery is upon the land, is not a person who has done work or service *upon* the premises. *Vannatta* v. *Uplands, Limited*, (1913) 25 W. L. R. 85. And the whole burden of the procedure

rests upon the claimant who institutes the process. *O'Brien* v. *Fraser & Gallagher*, (1918) 41 D. L. R. 328. But the above statement would not apply to the provision of the Act which requires substantial compliance only with certain sections and declares that no lien shall be invalidated by reason of failure to comply with those sections unless the owner, contractor or mortgagee is prejudiced thereby. In such cases the onus on the question of prejudice is on the party objecting to the registered claim. *Robock* v. *Peters*, 12 Man. L. R. 139; *Polson* v. *Thompson*, (1916) 29 D. L. R. 395. As an illustration of how the onus may shift, see *Ontario Lime Assn.* v. *Greenwood*, 22 O. L. R. 17, *per* Middleton, J.

When any part of a claim has matured an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial.

The lien claimant must bring himself within the terms of the statute, which cannot be extended to cases not fairly within its general scope and purpose. *Troy Public Works Co.* v. *City of Yonkers*, (1911) 145 App. Div. (N.Y.) 527. Money advanced for the purpose of purchasing material or paying for labor which labor and material were intended to come within the lien law will not entitle the person advancing the money to a lien. *Godefroy* v. *Caldwell*, 56 Am. Dec. 360. As was said by Sprague, C., in an Ontario case (*Crone* v. *Struthers*, (1875) 22 Gr. 248; see also *Mushlitt* v. *Silverman*, (1872) 50 N. Y. 360: "The lien of the plaintiff is the creature of the statute and must be limited by its provisions." Sometimes Mechanics' Lien Acts are loosely referred to as giving absolutely a lien to contractors, sub-contractors, material men and laborers. Such a statement is calculated to mislead. The statute gives only an inchoate right of lien. "The statute does not give a lien, but only a potential right of creating it." *Edmonds* v. *Tiernan*, (1892) 21 S. C. R. *per* Strong, J., at p. 407.

As to procedure, any person claiming a lien can commence the action; he is required to serve all persons whose claims of lien are

of record; when that is done, these persons are as much parties to the action for all purposes as though they had been parties in the beginning. *Baines* v. *Curley*, (1917) 33 D. L. R. 309. "Lienholder" means a person having a valid lien. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718. Although the burden of the procedure rests upon the claimant who institutes the process, the onus may shift, (*Dunn* v. *McCallum*, 14 O. L. R. 249) as where an owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, which must be peculiarly within his own knowledge. *Ontario Lime Assn.* v. *Grimwood*, 22 O. L. R. 17. If in such a case the facts cannot be ascertained, "less violence will be done to the statute by construing it as indicated, than by rendering it nugatory in many instances in which the legislature apparently intended a lien to exist." *Ontario Lime Assn.* v. *Grimwood*, *supra*, *per* Middleton, J. But under ordinary conditions the burden of proof is on the lien claimant. *Donnelly* v. *Butler*, (1913) 216 Mass. 41, although the onus rests on the owner in an action by a sub-contractor of shewing that nothing is due from the owner to the principal contractor. *Brown* v. *Allen*, (1913) 13 D. L. R. 350.

CHAPTER III.

Construction of Mechanics' Lien Acts.

Mechanics' liens upon realty being in derogation of the common law and depending for their existence wholly upon statutes, the courts throughout Canada have given a strict construction to the provisions of Mechanics' Lien Acts, so far as they create the right to a lien, but the courts adopt a liberal construction of the provisions which deal with the enforcement of the lien. These provisions being remedial should be liberally construed, but, so far as the terms creating the right to a lien are concerned, the language of such statutes is strictly construed against the person claiming the lien. Such a lien should be fully enforced when the claimant has brought himself within the provisions of the statute, but its terms should not be extended to cases falling within the reason, but not provided for by the language of the statute. The courts cannot extend the statute to meet meritorious cases unprovided for by the statute. A compliance with the provisions creating the right is essential before the lien can attach. The statute itself gives only an inchoate right of lien, and although the trend of amendments to this legislation has been in the direction of extending the potential right of creating the lien, and the courts in Canada will construe such legislation as remedial, yet these courts cannot extend it to meet cases not within its scope, however meritorious such cases may be. The existence of the lien itself and its extent depend upon the provisions of the particular Mechanics' Lien Act, and, therefore, legislation in other Acts (such as The Land Titles Act, Alberta), cannot be considered as neutralizing or modifying the limitation upon the extent of the lien which the Mechanics' Lien Act in question explicitly imposes. *City of Calgary* v. *Dominion Radiator Co.*, (1917) 40 D. L. R. 65.

The filing of the lien is a simple and reasonable requirement and can be done in a plain and obvious way, and a lien claimant has no just ground of complaint if this portion of the statute is strictly construed. This lien is just what the statute makes it, and the courts cannot enlarge or lessen it. Being the creature of the statute it must be limited by the provisions of the statute (*Crone* v. *Struthers*, (1875) 22 Gr. 248; *Edmonds* v. *Tiernan*, (1892) 21 S. C. R. 407; *Robock* v. *Peters*, (1900) 13 Man. L. R. 139; *Haggerty* v. *Grant*, (1895) 2 B.C.R. 176; *Smith* v. *McIntosh*, (1896) 3 B. C. R. 26, 28; *Webb* v. *Gage*, (1902), 1 O. W. R. 327; *Rafuse* v. *Hunter*, 12 B. C. R. 126), and courts are powerless to change the conditions upon which the lien depends.

As Strong, J., said, in his decision in a case appealed under the British Columbia Mechanics' Lien Act: "It is quite clear that when a statute gives a privilege in favor of a creditor, the creditor must bring himself strictly within its terms, and there is nothing in the statute in question here which provides that if a lien has once been abandoned it is to be considered as being abandoned merely for a time. If we should hold that it was to be so considered we should be adding a clause to the Act." *Edmonds* v. *Tiernan*, (1892) 21 S. C. R. 407.

In another case, where the Manitoba Act was being construed, Killam, C.J., said: "But these liens are wholly of statutory creation, and in derogation of ordinary rights. They can be given only such effect as the statute clearly warrants. While the whole statute must be read together, and one clause may assist in the construction of another, I cannot find in the other clauses such an indication of an entire intention as should reject the natural interpretation of the language in section 4, sub-section (2). That clause seems to me to be the one which deals specifically with the relative priority of liens and mortgages made after commencement of work or furnishing materials, and must govern upon that point." *Robock* v. *Peters*, (1900) 13 Man. L. R. 139.

In a British Columbia case, Begbie, C.J., said: "The same statute which gives the inchoate right of lien, either for work or

materials, declares that it shall absolutely cease unless an affidavit be filed within thirty-one days, stating the enumerated particulars, one of which is the address of the owner. That affidavit constitutes the lien (section 9 of 1888, section 8 of 1891) and in order to acquire a right of this very unusual nature, the statute must be strictly followed." At page 177 of the same report the Chief Justice further says: "These statutes do not confer ordinary rights. They must be followed and construed at least as strictly as the statutes regulating conditional bills of sale." *Haggerty* v. *Grant*, (1895) 2 B. C. R. 176.

In a later case in the same province, Martin, J., said: "However unfortunate it is that the laborers have lost or will lose most of their wages, it would be still more unfortunate if, when they pursue a statutory remedy which imposes a heavy penalty upon persons who do not even employ them, the statute should be strained to add to the existing burden of responsibility already borne by such third persons." *Wake* v. *C. P. L. Co.*, (1901) 8 B. C. R. at p. 360. See also observations of Irving, J., in *Leroy* v. *Smith*, (1900) B. C. R., at p. 298, and of Maclennan, J.A., in *Gearing* v. *Robinson*, (1900) 27 O. A. R. 364, and, as to the general rule, *Archibald* v. *Hubley*, 18 Can. S. C. R. 116.

In an Ontario case, Meredith, C.J., said: "In some of the American States a construction more favorable to the contractor has been given to the Mechanics' Lien Acts, the provisions of which were somewhat like those of our Act, which are in question here, though not identical with them, but we are, of course, bound to follow the decisions of the Court of Appeal of this province in preference to those decisions." *Webb* v. *Gage*, (1902) 1 O. W. R. 327.

In the Province of Quebec, where, although there is no Mechanics' Lien Act, provisions of the civil law, similar in many respects, exist, it has been held that a strict compliance with such provisions is necessary to create a lien. *La Banque d'Hochelaga* v. *Stevenson*, 9 Que. Q. B., [1900] A. C. 600. In a recent

case before the Quebec Court of Review (*Emard* v. *Gauthier*, (1916) 29 D. L. R., at p. 319), Mr. Justice Charbonneau said, "We cannot, under the pretext of defining the intentions of the legislature and to better the law, suppress a formal provision which remains on the statute even if it was evident that it was by mere forgetfulness that this provision was not made to disappear."

The only Canadian judgment which is apparently not in complete harmony with the principle of applying strict construction to the sections creating the lien is a judgment by Mr. Justice Ferguson, in an Ontario case. It was contended that the registration of the lien was not good because the name of the person who was the owner at the time was not mentioned in it, the former owner having without the knowledge of the claimant sold and conveyed the property before the completion of the work. Ferguson, J., after quoting from the decision in the case of *Jones* v. *Shawhan*, (1842) 4 Watts & Serg. 262, and stating that the statute under which that decision was given was somewhat different from the Ontario statute he was then construing, said: "Yet I am of opinion that the reasoning of the case to which I have referred applies, especially when I look at the date of the conveyance to Pousette and the allegations of the plaintiff that he did not know anything about it, and I am of opinion that this alleged defect is not fatal, although it has been said that the statute relative to mechanics' lien being in derogation of the common law, should be strictly complied with." *Makins* v. *Robinson*, (1884) 6 O. R. 1. But in the Pennsylvania case quoted by Ferguson, J., it is important to note that Gibson, C.J., stated in his judgment that the Pennsylvania statute, "expressly requires no more than the name of the reputed owner, and it might be sufficient to file it (*i.e.*, the claim) against the past or present one."

In 1903 the Supreme Court of Michigan, in a case (*Waters* v. *Johnson*, 96 N. W. 504) which involved the construction of a statute similar in its terms to that construed in *Jones* v. *Shawhan*, *supra*, dissented from the construction given in that

case, and held that a lien claim which named a person who had conveyed the property before the filing of the claim was insufficient, and that the claimant could only be relieved from such mistake on proof of facts showing that the error was justly chargeable to the grantee of the property so as to estop him from taking advantage of the error.

Where an owner may be compelled to pay twice by the statute such legislation is highly penal and it is but just to construe it strictly against such a result. Recent decisions in other American courts generally adopt the view that Mechanics' Lien Acts must be strictly construed with reference to all requirements upon which the right to a lien depends. *Turnes* v. *Brenckle*, 249 Ill. 394. As the mechanics' lien law is contrary to the course of the common law, any ambiguity must be resolved against the party seeking to enforce a lien under it. *Builders' Material Co.* v. *Johnson*, 158 Ill. App. 413. Provisions which require an owner to pay a debt which he did not contract or which he may have already paid to the contractor should be construed strictly against the claimant. *McNab & Harlin Mfg. Co.* v. *Paterson Bldg. Co.*, (1907) 72 N. J. Eq. 929.

But as to the provisions dealing with the enforcement of the lien, the legislation in some of the provinces of Canada now requires only a substantial compliance. *Mallett* v. *Kovar*, 14 W. L. R. 327; *Flack* v. *Jeffrey*, 10 Man. L. R. 514; *Polson* v. *Thomson*, (1916) 29 D. L. R. 395; *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17, and the prevailing opinion is that while claimants must bring themselves strictly within the wording of the statute which provides for the creating of the lien, yet when a lien attaches, the provisions of the law upon the subject being remedial, a liberal construction will be put upon the statute for the purpose of accomplishing its objects. *Nobbs* v. *C. P. R.*, (1913) 6 W. W. R. 759; *Coughlan* v. *National Construction Co.*, (1909) 14 B. C. R. 339; *Polson* v. *Thomson*, (1916) 26 Man. L. R. 410; 29 D. L. R. 395; *Lays* v. *Hurley*, (1913) 215 Mass. 582.

It may now be considered as well settled law that the sections creating the right to a lien cannot be extended beyond the plain sense of their words, although the same rule will not be followed when other sections of the Act, dealing with the enforcement of the lien, are the subject of construction. There is, indeed, no rule of construction applicable uniformly to every provision of such an Act. So far as the provisions which create the right to a lien are concerned, a rule of construction as stated by an eminent authority might be appropriately invoked:—

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to strict construction." Maxwell on Statutes, 3rd ed., 399. But when the other provisions of a Mechanics' Lien Act, dealing with the enforcement of the lien, are the subject of construction, a tendency to give these sections a broad and benign interpretation is justifiably shown by the courts in the various Provinces of Canada, and there appears a disposition to follow the advice of Lord Mansfield, given in connection with another branch of the law, but quoted approvingly by a Pennsylvania court, in respect to the construction of Mechanics' Lien Acts, to "avoid entangling the right in a net of form."

In one Ontario case, Meredith, J., stated a canon of construction which will probably be followed in the various courts in Canada. Referring to the mechanics' lien laws, he said: "These essentially remedial Acts are to be given such fair, large and liberal construction and interpretation as will best ensure the attainment of those objects. Effect should not be given to technical objections founded upon matters which in no way have prejudiced or could prejudice any one. . . . It was never intended that the benefits of the Acts should be frittered away by requiring the skill of a special pleader to secure them." *Bickerton* v. *Dakin*, (1891) 20 O. R. 702; see also observations of Boyd, C., in *Crerar* v. *C. P. R. Co.*, (1903) 5 O. L. R. 383, 2 O. L. R. 107.

In the case in question, the owner had purchased, with notice

of all the facts, and invoked purely technical grounds in seeking to have the property declared to be unaffected by a claim of lien.

In another Ontario case (*Craig* v. *Cromwell*, (1900) 27 O. A. R. 587), Osler, J.A., in referring to the question of sufficiency of the notice in writing required by section 11, sub-section 2, said:—

"It may be that if the notice were to be read as pleadings, civil and criminal, were read fifty years ago, fatal defects might be picked out in it. But it is not intended to be the subject of subtle criticisms and trifling objections."

In a Manitoba case, Killam, C.J., after quoting section 17 of the Manitoba Mechanics' Lien Act, said:—

"This latter clause appears divisible into two parts. First, only substantial compliance with sections 15 and 16 is required, and, secondly, no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some party is prejudiced, provided there is registration of a claim. I think that the onus on the question of prejudice is upon the party objecting to the registered claim. The defect is not to invalidate the lien, unless in the opinion of the judge there is prejudice to some one. That is, the judge must positively form the opinion, for which purpose he must have some evidence either direct or arising out of the circumstances and the nature of the defect. In the present case there is nothing to suggest that any of the parties interested saw the registered statement of claim or knew its contents or was in any way affected by the error." *Robock* v. *Peters*, (1900) 13 Man. L. R. 139.

An observation made by Chancellor Boyd points to an additional principle which might be adopted in the construction of Mechanics' Lien Acts. That eminent judge said: "If you give a very latitudinarian interpretation to the definition of 'owner,' it is possible to read such a case as this into the Act, but I am against giving such a meaning to the words when the result is to charge one man's land for another man's debt." See *Graham* v. *Williams*, (1885) 8 O. R. 478. Boisot, after referring to the difficulty of

harmonizing the conflicting decisions in various States, and pointing out the distinction between the "remedial" sections of a Mechanics' Lien Act and the other portions, propounds a rule which is in line with the observation of Boyd, C.: "It follows, then, that those provisions of the Mechanics' Lien Statutes which make a man's property liable for his debts are remedial, and should be liberally construed; while those provisions that make his property liable in a case where he is not personally liable, create a new right in derogation of the common law, and should be strictly construed."

In a later Ontario case (*Gearing* v. *Robinson*, (1900) 27 O. A. R. 364), Maclennan, J.A., adopts a similar attitude in construing the statute, and says: "This may seem a very strict and literal construction of the Act, but, if it is, as I think it is, the plain meaning of the language of the legislature, we must so construe it, and I do not think we ought to change 'and' into 'or,' or strain the language in order to charge one man's land with another man's debt."

It is but just to require that an intention to create such a charge should be plainly and unmistakeably expressed in the statute, in language which excludes any other interpretation, but after the lien has actually attached, the better opinion seems to favor the view that the other provisions of the statute should receive a liberal construction. The object of a Mechanics' Lien Act is to secure and make available as far as possible to those best entitled to it the money which the owners have contracted to pay and for which they have received value. This legislation was not passed for the purpose of making owners pay for things not contracted for by them and of which they have not had the benefit (*Brooks Sanford Co.* v. *Theodore Telier Construction Co.*, (1910) 22 O. L. R. 176), but where a lien is created by the statute it should be construed, if possible, so as to make the lien co-extensive with the benefit, and to avoid defeating the spirit of the statute by a too literal adherence to its letter. *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17.

In delivering the judgment of the Manitoba Court of Appeal in a recent case (*Polson* v. *Thomson* (1916) 29 D. L. R. 395), Cameron, J.A., said: "We were urged to give the statute a strict construction, particularly in view of the position of the defendant, a mortgagee, whose security may be impaired by priority being given to an indebtedness to which he was not a party, and with which he had nothing to do. But he might have protected himself, as to advances actually made, by prompt registration. In any event, the authorities now seem to indicate that it is for the courts to work out, as best they can, the problems arising under the Act by giving effect to its spirit rather than its letter, and it is undeniably the intention of the statute to afford protection to the men who supply labor and materials." Courts will not favor a construction which would render a Mechanics' Lien Act nugatory in many instances in which the legislature apparently intended a lien to exist. *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17. It would be intolerable if persons honestly entitled to receive money should be deprived of all chance of asserting their rights, by reason of some petty—or even some grave slip—in practice; and especially so in the administration of an Act which is so clearly intended to enable the poor man to procure his wages, and the supplier of materials to receive pay for his materials in a cheap, simple and expeditious manner." *Barrington* v. *Martin*, (1908) 16 O. L. R. 635, at 640, *per* Riddell, J.

In view of the foregoing statements, it appears plain that courts in Canada, once the lien is acquired, will give a liberal construction to provisions dealing with procedure and will not be disposed to permit mistakes of procedure to defeat the lien or to nullify the purposes of the legislation.

As to questions of practice and procedure under Mechanics' Lien Acts, an eminent Ontario judge said:

"The purpose of the statute is to prevent multiplicity of actions for small claims, in which the costs would be enormously out of proportion to and in excess of the sums claimed; and these

provisions, and the whole purpose of the Act, and the proceedings of and in the action, are so widely different from the ordinary creditor's action that the rules which are applicable to such latter actions cannot be held to govern the peculiar statutory remedy of these lien holders." *McPherson* v. *Gedge*, (1883) 4 O. R. 246.

It seems now to be recognized by the courts in the various provinces of Canada that the practice under the Mechanics' Lien Acts is *sui generis*, and is not to be governed by the established practice respecting class actions. See observations of Masten, J., in *Baines* v. *Curley*, (1916) 33 D. L. R. 309.

There are conflicting decisions throughout the United States in the construction of Mechanics' Lien Acts, but decisions of Massachusetts and New York courts accord substantially with the principles of construction adopted by courts in Canada. "Although when a lien attaches, the provisions of law upon the subject being remedial, a liberal construction will be put upon the statute for the purpose of accomplishing its objects, yet this applies only to liens which have attached. Upon the question whether a lien attaches, a different rule of construction obtains. Liens are in derogation of the common law; they may create an interest in land by parol, and that interest may be a secret interest. The court is not authorized to extend the law beyond the causes specifically provided for. It cannot say that the statute by implication includes labor not within its terms." *Trask* v. *Searle* (1876) 121 Mass. 329, *per* Lord, J.: The statute is remedial and intended to protect those who lawfully enhanced the value of land by the expenditure upon it of material or labor. *Shaughnessy* v. *Isenberg*, (1912) 213 Mass. 159, 162; *Thurston* v. *Blunt*, (1914) 216 Mass. 264. The rule in New York has been stated to be that the Act should not be strictly construed except as to the provisions by which the property of a third person may be incumbered. *Hubbell* v. *Schreyer*, 14 Abb. Pr. (N.S.) 284. In a leading case in New York, the question of construction of the New York Lien Act was discussed. That Act requires the notice of lien to state

when the first item of work was done, and the notice of lien in that case failed to make any such statement, although it complied with the other provisions of the statute. Section 22 of that Act expressly declares that the statute is to be construed liberally. Cullen, J., in delivering the judgment of the court, said: "But under the most liberal rule of construction we cannot find anything in the notice that even attempts to state when the first item of work was done, or anything from which that time might be inferred. It is true that the particular advantage or object of requiring this fact to be stated is not readily apparent, but the statute has expressly required it. Errors in the notice may be disregarded, and it is not necessary that the precise verbiage of the law should be followed. But the provision of the statute that the law shall be construed liberally does not authorize the courts to entirely dispense with what the statute says the notice shall contain. We are, therefore, constrained to hold the notice of lien insufficient." *Mahley* v. *The German Bank*, (1903) 174 N. Y. App. 499.

An important New York case serves to illustrate the liberal construction of the New York statute respecting mechanics' liens. The chapter under which the plaintiff undertook to acquire a lien provided that "at any time before the whole work to be performed by the contractor for the city is completed or accepted by the city, and within thirty days after the same is so completed or accepted, any claimant may file notice stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, etc." The verification was by an agent of the claimant, stating "that he is the agent of the claimant . . . mentioned in the foregoing claim, and that the statements therein contained are true to his own knowledge or information and belief." Haight, J., said: "It appears to us that this statute should receive a liberal construction. Indeed, the general lien law of the State provides that it shall be construed liberally, etc. A very large proportion of the business of the country is carried on by agents, whose principals may have but a slight knowledge of the details of

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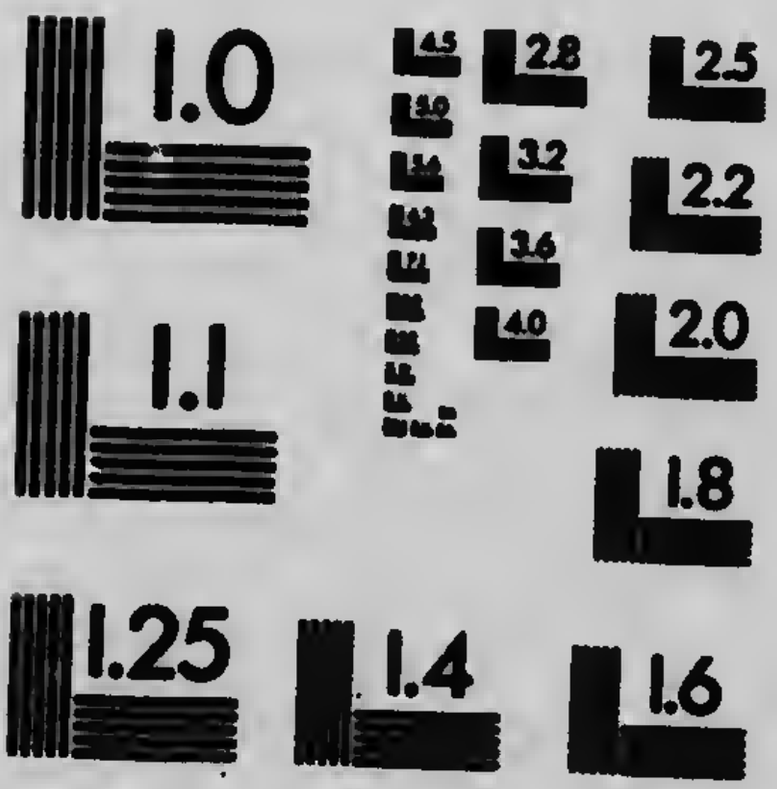

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the work and who may be absent in other parts of the world. Agents are generally recognized as possessing the powers of their principals in the transaction of their business and in the preservation of their properties and rights. In construing the Act in question we think the act of the agent should be deemed to be that of the principal, and that it was so contemplated by the legislature." *McDonald* v. *Mayor, etc., of New York,* (1902) N. Y. App. 409.

"Adherence to the terms of the statute is indispensable, but the rule must not be pushed into such niceties as serve but to perplex and embarrass a remedy intended to be simple and summary, without in fact adding anything to the security of the parties having an interest in the building sought to be encumbered. Certainty to a common intent has, therefore, always been held to suffice." *Waters* v. *Goldberg,* (1908) 124 App. Div. N. Y. 511.

The Massachusetts Supreme Court has declared its view on this question of construction in an instructive case. The facts were that under an entire contract to construct and install in the respondent's buildings a fire extinguishing system of a specified kind for a stated price, a sworn statement was filed in the Registry of Deeds while the work was going on and about ten days before it was completed. It was held that such a statement filed before the work was done or the debt was due did not fulfil the requirements of the Act. Under section 1 of the Act in question it is only "a person to whom a debt is due" who can file a statement and establish a lien. By section 6 he is authorized to file his statement within thirty days after he ceased to labor on or furnish labor or materials for the building or structure. Section 7 relieves the claimant from any injurious effect of an inaccuracy in stating "the amount due for labor or materials" unless he has "wilfully and knowingly claimed more than is due to him."

Knowlton, C.J., said: "We are of opinion that these various provisions of the statute do not authorize the filing of a statement except where work and labor has been done under such circumstances as to create a debt which is due, and which is payable then

or at some future time. This is the construction which has been put upon similar statutes by the courts. The cases which seem to hold differently are all, or nearly all, under statutes which require the filing within a stated time after an event, the happening of which has no important relation to any of the facts to be embodied in the certificate or statement." *General Fire Extinguisher Co.* v. *Chaplin,* (1903) 183 Mass. 376.

The judgment concludes by using precisely the same words which were used in a Massachusetts case more than twenty years previously: "A lien of this kind can be preserved and enforced only by a strict compliance with the requirements of the statute. There are no equities to be invoked in aid of it." *Gale* v. *Blaikie,* 129 Mass. 206. The Supreme Court of the United States has said: "Although mechanics' liens are the creation of statute, the legislation, being remedial, should be so construed as to effectuate its object." *Springer Land Association* v. *Ford,* (1897) 168 U. S. 513. The reason stated by the United States Circuit Court of Appeals, Missouri, for a liberal construction of statutes which gave liens to laborers and materialmen, is that such men cannot recover back their labor or material, and the improvements on which they are placed are ordinarily enhanced by their value. *Hooven* v. *Featherstone,* (1901) 49 C. C. A. 229.

The view expressed by the Supreme Court of Illinois on this question is that the right to a mechanics' lien is a cumulative remedy existing by statute in derogation of the common law, and statutes granting such right must be strictly construed. *Harvey & Mose Plumbing Co.* v. *Wallace,* (1901) 99 Ill. App. 212, affirmed; *McPugh Co.* v. *Wallace,* 198 Ill. 422. And to enforce a lien there must be a substantial compliance with the requirements of the lien law. *Dunham* v. *Woodworth,* 158 Ill. App. 486. See *Godfrey Lum. Co.* v. *Kline,* (1911) 167 Mich. 629. Remedial provisions should be construed liberally and unless a variance is palpable and material it will not be deemed fatal. *Stepina* v. *Conklin Lumber Co.,* (1907) 134 Ill. App. 173.

In Maine the courts favor a liberal construction of the statute. *Shaw* v. *Young*, 87 Me. 271; *Westcott* v. *Bunker*, 83 Me. 499; *Durling* v. *Gould*, 83 Me. 134.

"We must not be hypercritical when scanning the species of lien and estimating its sufficiency," etc. *Calhoun* v. *Mahar*, 14 Pa. 56, 58, quoted approvingly in *Wilson* v. *Canevin*, (1910) 226 Pa. 362. But a provision that the lien law shall be construed liberally to secure the beneficial interests and purposes thereof does not authorize the court to dispense entirely with what the statute says a notice shall contain. *Bradley* v. *Huber Co.*, (1911) 146 App. Div. (N. Y.) 630.

The policy of the law does not favor forfeitures, and a provision in a Mechanics' Lien Act which invalidates the entire claim if the "bill of particulars" shall "wilfully or fraudulently" misstate any of the matters directed to be included therein, is to be construed strictly. *Buchanan* v. *Einstein*, (1914) 87 N. J. L. 307.

In the Interpretation Acts of various provinces of Canada there is a provision which enacts that every chapter of the Revised Statutes shall be deemed remedial and shall be construed liberally, unless such construction is inconsistent with the intent and object of the particular Act. But this is a general rule of construction and is necessarily subordinate to particular cases.

Retrospective and Repealing Acts.

The question whether a Mechanics' Lien Act is to be construed retrospectively so as to apply to past contracts depends primarily upon the precise language of the Act.

The Interpretation Acts of the various provinces often have an important bearing on the construction of the Mechanics' Lien Acts. An illustration of the application of the Interpretation Act is afforded by an Ontario case. *Walker* v. *Walton*, 1 O. A. R. (Ont.) 579. The plaintiff registered a lien under the Mechanics' Lien Act of 1873, on the 14th of August, 1874, for the price of machinery furnished on the 12th of the same month. The price was pay-

able in instalments, the last of which fell due on the 4th of May, 1875. A bill to enforce the lien was filed on the 7th of July, 1875, being within the 90 days from the expiry of the period of credit prescribed by section 4 of the Mechanics' Lien Act of 1873. Section 14 of the Mechanics' Lien Act of 1874, which came into force on the 21st December, 1875, enacted that "every lien shall absolutely cease to exist at the expiration of thirty days after the work shall have been completed or the machinery furnished, unless in the meantime proceedings shall have been taken to realize the claim under this Act," and section 20 repealed all Acts inconsistent therewith. Held, reversing the decree in the preceding case, that even if the Act of 1874 repealed the Act of 1873, the plaintiff's lien was saved by subsection 4 of section 7 of the Interpretation Act, which provides that the "repeal of an Act at any time shall not affect any act done or any right or rights of action, existing, accruing, accrued or established . . . before the time when such repeal shall take effect."

The repeal of a mechanics' lien law during the progress of the work for which a lien is claimed does not cut off the lien claimant's right for the work already done, where the repealing statute re-enacts and continues the lien law, with some changes in matters of procedure only. *Bear Lake & R. W. W. & I. Co.* v. *Garland,* (1896) 164 U. S. 1.

A Mechanics' Lien Act by one section repealed previous Mechanics' Lien Acts and as it enacted no lien for materials, no such lien existed. *Albion I. Works* v. *A. O. U. W.,* (1895) 5 B. C. R. 122, note.

Where a statute is passed changing a law it is generally construed to apply to the facts coming into existence after the passing of the statute. See *Irwin* v. *Benyon,* 4 Man. L. R. 10; *Moore* v. *Protestant Dist.,* 5 Man. L. R. 49; *See* v. *Kolodny* (1917) 227 Mass. 446.

Mechanics' lien laws are not construed to have any retrospective effect unless such construction is clearly and unmistakeably

required by the words of the Act. *Irwin* v. *Benyon*, 4 Man. L. R. 10; *Horn Mfg. Co.* v. *Steelman*, 215 Pa. 187; *Howard* v. *American Boiler Co.*, 68 Ill. App. 566; *French* v. *Hussey*, (1893) 159 Mass. 206; *Pierce* v. *Cabot*, 159 Mass. 202; *Benton* v. *Wickwire*, (1873) 54 N. Y. 229.

Where a later Act does not expressly repeal the former one, and they are not so inconsistent that they cannot stand together, the two Acts are construed together as if parts of a single statute. *Gilson* v. *Emery*, (1858) 11 Gray (Mass.) 430; *Collins* v. *Drew*, (1876) 67 N. Y. 149.

A lien may be acquired under a statute passed before the work was done or materials furnished, and although the contract therefor was made before such enactment. *Donahy* v. *Clapp*, 12 Cush. (Mass.) 440; see *Bourgette* v. *Williams*, 73 Mich. 208, 216.

As a general rule, the law in force at the time the work was done or materials furnished, governs (*Eidendrath Co.* v. *Gebhardt*, 222 Ill. 113); but the law in force at the time the lien is perfected will control proceedings in enforcing the lien. *Kendall* v. *Fader*, 190 Ill. 294.

Where a Mechanics' Lien Act repealed all Acts inconsistent with it, but was to apply only to contracts thereafter to be made, contracts previously made may be governed by the former Act (*Connor* v. *Lewis*, 16 Me. 268; see *Turney* v. *Saunders*, 5 Ill. 527), but a provision in a Mechanics' Lien Act which is manifestly inconsistent with an antecedent law must prevail. *Shilling* v. *Templeton*, 66 Ind. 586; *Heckman* v. *Pinkney*, 81 N. Y. 211. Where a notice of lien was filed and proceedings commenced prior to a law which declared that "liens shall in all cases cease after one year, unless by order of court, the lien is continued," the statute was not construed retrospectively and it was held that the lien continued after the expiration of the year. *Fitzpatrick* v. *Boylan*, 57 N. Y. 433.

If under a mechanics' lien law, materials had been furnished to the owner of the property, the right of lien becomes a vested

one, and the repeal of the law will not destroy such a lien. *Holcom* v. *Boynton*, 151 Ill. 294; *Boynton* v. *Holcom*, 49 Ill. App. 503.

The remedy of a repealing statute will be applied to previously vested liens if such a remedy is adequate, but if the former law is repealed, and no adequate remedy provided by the repealing law, the court will enforce vested liens according to the remedy of the repealed law. Subject to this exception, the rights of the parties are fixed by the law in force when the contract was made, but such rights are to be established and enforced by the law existing at the time when the suit was brought. Phillips, sec. 29; *Goodbub* v. *Estate of Horning*, 127 Ind. 182, 192. A lien which attached before the enactment of a statute making absolute the inchoate interests of married women is not affected by that legislation, though the foreclosure and sale are subsequent thereto. *Buser* v. *Shepard*, 107 Ind. 418, 419.

In concluding this chapter it may be observed that the trend of judicial decisions is in the direction of liberal construction of this legislation, but the real difficulty experienced by the courts is, while endeavoring to apply a liberal construction to various provisions of this legislation, to avoid, at the same time, a construction that would compel an owner to pay twice for the same thing.

CHAPTER IV.

Property which may be Subject to Lien.

In ascertaining the character and extent of property which may be subject to a lien, it is necessary first to examine the provisions of the Mechanics' Lien Acts which define the scope of the lien.

Some of the Mechanics' Lien Acts in Canada expressly include municipal corporations as within the definition of "owner." Where municipal corporations are not expressly included in such definition, there are conflicting decisions upon the question whether a right to a lien arises in a case where the work has been done on a public building, such as a schoolhouse, which is not liable to sale in execution. Holmested, at p. 30, refers to a decision of Proudfoot, J., in *Robb* v. *Woodstock School Board*, in which the right of lien was denied because such buildings are not liable to sale in execution. In Manitoba it has been held that a public school building was not exempt from the operation of the mechanics' lien law. *Moore* v. *Protestant School District of Bradley*, (1897), 5 Man. L. R. 49, distinguishing *Scott* v. *Burgess*, (1859) 19 U. C. Q. B. 28. The American cases cited in the Manitoba case all adopt the view that public schoolhouses are exempt, and subsequent American decisions uphold that view. See *City of Salem* v. *Lane*, (1900) 90 Ill. App. 560, affirmed (1901) 6 N. E. 37, which decides that the property of a municipal corporation cannot be sold to satisfy a mechanics' lien.

In another Manitoba case (*McArthur* v. *Dewar*, 3 Man. L. R. 72), the test question was stated to be whether such property is liable to sale under execution. In Saskatchewan it has been decided that a schoolhouse may be the subject of a lien. *Lee* v. *Broley*, (1909) 11 W. L. R. 38, 2 Sask. L. R. 288.

All the later cases in the other Provinces of Canada hold that

public school buildings and the lands upon which they are erected are not exempt from the operation of the Mechanics' lien law. *Benson* v. *Smith & Son*, (1917) 31 D. L. R. 416; *Hazel* v. *Lund* (B.C.) 25 D. L. R. 204; *Connely* v. *Havelock School Trustees*, (1912) (N.B.) 9 D. L. R. 875; *General Contracting Co.* v. *City of Ottawa*, 16 O. W. R. 479. The Ontario Mechanics' Lien Act and other provincial Acts with corresponding provisions were not meant to be applicable to private property only; nor to such property only as is exigible under ordinary writs of execution. But in the absence of express statutory provision it would seem, according to some decisions, that the property held by a municipal corporation for public purposes is not subject to a mechanics' lien. *Lessard* v. *Revere*, (1898) 171 Mass. 294; *Staples* v. *Somerville*, (1900) 176 Mass. 237-242.

The ground of decision in the Massachusetts cases is that the buildings are held for a public use, and that it is against public policy in the absence of express provision to the contrary, that the *instrumentalities for carrying on the government* should be the subject of seizure and sale for debt. See also *Young* v. *Inhabitants of Falmouth*, (1903) 183 Mass. 80, and *Goss* v. *Greenleaf*, (1904) 98 Me. 436, which cases hold that a building erected as a public library is exempt from the operation of a mechanics' lien law, the grounds of public policy which exempt such property from seizure on execution being equally applicable in respect of mechanics' liens.

In the absence of express statutory enactment, the same principles have been held to apply to any building erected exclusively for public purposes. Under an Act to simplify the procedure for enforcing mechanics' lien (53 Vict. ch. 137, Ont.) an application was made by a sub-contractor to determine whether the plaintiff was entitled to a lien on a building known as "The House of Refuge," and the lands used and enjoyed therewith. This property was vested in the corporation of Hamilton, which erected the building "for public, beneficial and charitable purposes," and the Master

held that the said house and lands were, therefore, of such a character as not to be liable to sale under execution, and consequently no lien attached (*Guest* v. *Hahnan,* (1895) 15 C. L. T. 61).

The general principles which should apply in considering this question whether a statute creates a mechanics' lien against property held by a municipal corporation are discussed with much ability in a New York case (*Leonard* v. *City of Brooklyn,* (1887) 71 N. Y. 498), which held that no lien was enforceable against the property.

It should be stated, however, that the Lien Act construed in that case, after providing for instituting and prosecuting the lien action, contains this further provision: "That such action shall be governed and the judgment thereon enforced in the same manner as upon issues joined and judgments rendered in all other civil actions aforesaid." It was a natural conclusion, therefore, that the lien claimant was in no better position than an ordinary creditor against the municipal corporation. The judgment is referred to here because it states in the strongest form the reasons against creating a lien upon municipal property or recognizing it as created by implication, and in those provinces of Canada such as Nova Scotia, the Lien Acts of which contain no express reference to municipal corporations, the judgment would be of interest, particularly the concluding portion of it, which says: "To make such a material alteration the law should be plain, explicit and clear, and there is no ground for holding that it was the intention of the law makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect." Land set apart by a city for the erection there n of a building for educational purposes by the trustees of a private charitable trust cannot be bound by a mechanics' lien for labor or material furnished to the building erected thereon. *Taylor Lumber Co.* v. *Carnegie Institute,* (1909) 225 Pa. 486.

But in a case decided by the Supreme Court of New Bruns-

wick (*Connely* v. *Havelock School Trustees*, (1912) 9 D. L. R. 875), Chief Justice Barker said: "The Mechanics' Lien Act was passed in the interest of workmen and contractors so as to afford them some security by way of a lien on the buildings which had been created by their labor. If the principle is worth anything, it is equally valuable in the case of a school building paid for by an assessment of the inhabitants of a school district as in the case of an individual taxpayer erecting a building for his private purposes."

In all probability future legislation in provinces not having a provision similar to the Ontario enactment, will adopt such a provision in the interests of the workmen and contractors and thus deal justly and finally with this question.

A church, not being public property, is not exempt from the operation of a mechanics' lien law. *Dewing* v. *Wilbraham Society*, (1859) 13 Gray 414; *Peabody* v. *Lynn Society*, (1863) 5 Allen Mass.) 540. In Pennsylvania it has been decided that a burial ground is not subject to a lien (*Beam* v. *Methodist Episcopal Church*, 3 Clark (Pa.) 343). Lands of a municipality actually required for its use such as fire halls and police stations may be exempt on the grounds of public policy and public convenience, although some classes of municipal property may be within the provisions of the lien law. *General Contracting Co.* v. *Ottawa*, (1909) 14 O. W. R. 749, 16 O. W. R. 479, 1 O. W. N. 911.

Mechanics' Lien Acts in Canada, specifically give a lien against a "wharf." Such terms as "wharf" or "building" are liberally construed. A statute giving a lien on wharves "and other structures connected therewith" extends to all structures on or connected with a wharf. *Collins* v. *Drew*, (1876) 67 N. Y. 149. The word "wharf" as used in two statutes in England, was held to include a floating structure carrying cranes for loading and unloading vessels, and which was moored in the River Thames, 500 feet from the shore, by chains fastened to piles driven in the bed of the river. There was no connection with the shore except by

boats. *Ellis* v. *Cory*, [1902] 1 K. B. 38. See also *Haddock* v. *Humphrey*, [1900] 1 K. B. 609; *Kenny* v. *Harrison*, [1902] 2 K. B. 168. A workman is entitled to a lien for work upon the part of a sewer extending below watermark into the ocean. *Baker* v. *Uplands* (1913), 24 W. L. R. 768.

A minor cannot subject his property to a lien unless, after majority, he ratifies the contract. *Alvey* v. *Reed*, 115 Ind. 148; *McCarty* v. *Carter*, 49 Ill. 53.

A wife's inchoate right of dower is not subject to a mechanics' lien. *Gove* v. *Cather*, 23 Ill. 634; *Bishop* v. *Boyle*, 9 Ind. 169, 68 Am. Dec. 615.

Roads laid out by private persons cannot be regarded as public highways before dedication. *Vannatta* v. *Uplands Ltd.*, (1913) 25 W. L. R. 85.

Railways.

In dealing with the question whether a railway in any province of Canada is subject to mechanics' liens, two classes of railways must be considered:—

(*a*) Railways constructed and in operation under provincial legislation and not declared by the Parliament of Canada to be for the general advantage of Canada;

(*b*) Railways between two or more provinces or extending beyond the limits of a province, and railways declared by Act of the Parliament of Canada to be for the general advantage of Canada.

Railways in class (*a*) are under the legislative jurisdiction of the provincial legislature, and it is doubtful whether existing legislation in Ontario or other provinces is sufficiently plain and explicit to subject such railways to mechanics' liens.

Under a former Ontario Mechanics' Lien Act it had been held that the lands of a railway company were exempt from the operation of that Act, the ground of the decision being that it was against public policy that railways being essential to the public

use and convenience should be liable to be cut in pieces and sold under legal process. *King* v. *Alford*, (1885) 9 O. R. 643; *Breeze* v. *Midland Railway Co.*, (1879) 26 Gr. 225.

Section 6 of the present Act, however, includes "any . . . railway." Moreover, sec. 2, sub-sec. (*c*) includes "any . . . railway company" as within the definition of "owner," and sec. 17 (3) provides for the sufficiency of the description of lands where a lien is registered against the lands of a railway company. Nevertheless, it having been judicially declared in construing the former Ontario Act that railways were exempt from the operation of that Act on grounds of public policy, any subsequent legislative intent to reverse that policy should be plainly and unmistakeably expressed. The grounds of the decision in *King* v. *Alford*, 9 O. R. 643, are just as strong now as before the amendments to the Mechanics' Lien Act were made, and if possible such a construction would be given to these amendments as would prevent the operation of a railway from being interrupted. It may well be argued that these changes only extend the mechanics' lien to property of the railway company not necessary to the operation of the railway and that the lien can only be enforced against such property. It is to be noted also that the former Act used the word "person" in the definition of owner, and the word "person" under the Interpretation Act included corporations. R. S. O. 1887, ch. 1, sec. 8, sub-sec. 13.

It might also be urged that the term "railways" could be construed as applicable only to street railways or other railways operated exclusively within the registration division.

It is questionable, therefore, whether the changes in the Act have affected materially the law as stated in *King* v. *Alford, supra*. In another case (*Good* v. *Toronto, H. & B. Railway Co.*, (1889) 26 O. A. R. 133, the lien was upheld, but this point was not raised.

Boyd, C., referring to the amendment, has said: "But the machinery supplied by the Act does not provide for working out a sale of the entire undertaking. The remedy seem to be

restricted to that part of the railway where the work was done, and if the right of relief to the wage-earner in respect of his lien was analogous to that enjoyed by a vendor of land in right of the lien for the price, relief might be given and worked out by the court under the provisions of the Provincial Act.

"But we are precluded by the decision in *King* v. *Alford* from holding that the mechanics' lien is of the legal character with a vendor's lien. It was there held that the mechanics' lien was operative as a statutory lien arising in process of execution of efficiency equal to, but not greater than, that possessed by ordinary writs of execution. Under a writ of execution against lands the sheriff can only sell what is in his bailiwick and this limited process is not applicable to a sale of a line of railroad running through many counties of the province." *Crawford* v. *Tilden*, (1906) 13 O. L. R. 173.

And after dealing with the question of the competence of a province to put the burden upon the lands and property of a federal railway undertaking, he thus refers again to the legislative attempt to apply the lien law to a provincial railway undertaking: "I foresee, besides, great difficulty in working out the provisions of the Mechanics' Lien Act as applied even to Ontario railways under the existing law, which forbids the disposal of a railway piecemeal. To make the local law effective it would appear to be requisite to provide for a sale of the particular part of the land benefited by the work in respect of which a lien is given. The Act as it stands at present can only be worked out by attributing the lien to all the line of railway lands and selling the whole as an entire thing while yet the lien is registered only in the county where the work had been done." *Crawford* v. *Tilden*, (1906) 13 O. L. R. 175.

To apply a Mechanics' Lien Act to a railway which does not lie wholly within a registration division, would seem to be unjust and inexpedient under the existing Mechanics' Lien Acts in Canada, in view of property rights which should be safe-guarded, and for

the preservation of which provisions were enacted and made part of these Acts. To construe any Mechanics' Lien Act in its present form as giving a workman a right of lien upon railway property outside the boundaries of the registration division where the lien claimant's work was done and his lien registered, would jeopardize and might seriously injure the legal rights of others, and it is but reasonable to declare that legislation which would involve such a result should be strictly construed against the lien claimant.

Dealing to some extent with this point, and referring to the contention that the lien extended beyond the registration division and covered the portion of the property lying in an adjoining county, Mr. Justice Meredith has said:—

"It was said that the lien might be applied to the whole of the road in order that relief might be given to the appellant; but that was not the appellant's claim in, nor the judgment at the trial of the action. Nor can I think that the enactment relied upon would warrant it. Under the 17th section, the lien is to be registered in the registry office of the registry division . . . in which the land is situated. It is hardly likely that the legislature intended to give a workman employed upon a railway in the county of Huron a lien upon it in the county of Glengarry, for instance, with all the difficulties such a right would create, and the manifest injustice it might do to others having better rights in that distant county." *Crawford* v. *Tilden*, (1907) 14 O. L. R. 577.

Railways in class (*b*) are under the legislative jurisdiction of the Parliament of Canada, and it may be generally stated that the provincial legislation affecting such a railway is *ultra vires*. *C. P. R. Co.* v. *Notre Dame de Bonsecours*, (1899) A. C. 367; *Madden* v. *Nelson & Fort Sheppard R. Co.*, (1889) A. C. 626; *Grand Trunk R. Co.* v. *Therrien*, (1900) 30 S. C. R. 485; *The King* v. *C. P. R. Co.*, (1905) 9 Can. C. C. 328. The power of the provinces to legislate in respect to property and civil rights is

subject to the power of the Parliament of Canada to legislate in respect to such railways; that power of the Parliament of Canada extends to property and civil rights as applied to railways within its legislative jurisdiction. *Vogel* v. *Grand Trunk R. Co.*, (1884) 10 O. A. R. 102, 11 S. C. R. 612. As the mode of enforcing a mechanics' lien is by sale of the property, it seems that such a remedy against a Dominion railway could not be given by a provincial statute. See *Larsen* v. *Nelson & Fort Sheppard R. Co.*, (1895) 4 B. C. R. 151.

Since the foregoing paragraph appeared in the first edition of this treatise, the question has been before the Ontario courts for consideration and it has been decided that a mechanics' lien cannot be enforced against a railway company incorporated under a federal Act and declared thereby to be a company incorporated for the general advantage of Canada. *Crawford* v. *Tilden*, (1907) 14 O. L. R. 572.

Dealing with the important question of the constitutionality of the enactment, Meredith, J., at page 576 of that case, said: "But reliance was placed, and mainly, if not entirely, placed, upon provincial legislation, which, in plain terms, has given the appellant a right of sale such as he seeks, even against a railway under the exclusive power of Parliament, but with this saving clause, 'in so far as the Legislature of this province has authority or jurisdiction in regard thereto.' The creation of a right such as the appellant alleges, and the enforcement of it in the manner sought, are matters which come within the meaning of 'property and civil rights in the province,' subjects which are within the exclusive legislative power of the provincial legislature; but an enactment, under such general power which encroaches upon the exercised power of Parliament in respect of any particular subject coming under its exclusive jurisdiction, cannot prevail; and the enactment in question distinctly does that; the principle before referred to, and the cases decided upon it, show that any exercise of private rights which would extinguish, or substantially impair,

the public rights and interest in the railway, as a railway, is in direct conflict with the federal legislation providing for the building and maintenance of the road. The legislation which gave the power to sell this railway piece-meal, was, therefore, *ultra vires*, or to speak more accurately, such legislation is rendered inapplicable to the railway in question by the restricting clause which I have quoted."

This decision has since been followed in Ontario and Alberta, it being held by Appellate Courts in these Provinces that a lien claimed under a Mechanics' Lien Act cannot exist or be enforced against the property of a Dominion railway company. (*Johnson & Carey Co.* v. *Canadian Northern R. W. Co.*, (1918) 44 O. L. R. 533; *Stiffel* v. *Corwin & Can. Pac. Ry. Co.*, (1911) 1 W. W. R. 339).

In view of these recent decisions, this question of the unconstitutionality of the provisions dealing with railways subject to federal jurisdiction may be considered as settled. But it would seem that additional provincial legislation is necessary before it can be determined with certainty whether railway property of class (*a*) outside the registration division where the lien claimant's work was done and his lien filed is subject to such lien.

Married Women's Property.

As a married woman has now full power to hold and dispose of her real estate and to make contracts her property may be subject to mechanics' liens.

In the absence of statutory provision to the contrary, such as section 5 of the Ontario Mechanics' Lien Act, the separate property of a married woman only becomes subject to a mechanics' lien by virtue of a contract made by her or under her authority, express or implied. The marital relation alone is not sufficient to establish the authority of the husband to contract on behalf of his wife. A husband has no original or inherent power to act as his wife's agent. *Beck* v. *Duncan*, (1913) 12 D. L. R. 762; *Campbell*

v. *Jacobson*, 145 Ill. 389; *Bauer* v. *Long*, 147 Mich. 35; *Lippman* v. *Low*, 69 App. Div. (N.Y.) 24. Ordinarily there is no presumption that the husband is acting as the agent of the wife, the question of agency being one of fact to be determined from all the circumstances of the case. *Wagner* v. *Jefferson*, (1876) 37 U. C. Q. B. 551; *Jones* v. *Walker*, 83 N. Y. 612; *Kincaid* v. *Reid*, (1884) 7 O. R. 12. As to evidence of agency of husband, see *Gerry* v. *Howe*, 130 Mass. 374; *Wheaton* v. *Trimble*, 145 Mass. 345; *Richards* v. *John Spry Co.*, 69 Ill. 238; *Frohlich* v. *Carroll*, 127 Mich. 561; *Interstate Bldg. Assoc.* v. *Ayers*, 71 Ill. App. 529; *Bevan* v. *Thackera*, 143 Pa. 182; *Job* v. *Hunter*, 165 Pa. 5. Knowledge by the wife that the work was being done on her property, and silent acquiescence, would not be sufficient to make her property subject to the lien. *West* v. *Sinclair*, (1892) 23 C. L. J. 199, 12 C. L. T. 44; *Sandford* v. *Pollock*, 105 N. Y. 450. But the Ontario Act now contains an express provision dealing with this question. See *post*. The burden is on the contractor or materialman to show that the contract was made or the materials supplied with the wife's authority. *Little* v. *Vredenburgh*, 16 Ill. App. 189. Where a husband and wife were guilty of collusion to defeat lien claimants against the wife's land for materials furnished at the husband's instance, the fact that the statement of lien mentioned the husband as owner and that a copy of the statement was served on him alone will not prevent a lien from attaching. *Frohlick* v. *Carroll*, 127 Mich. 561. In the absence of knowledge of or participation in a fraudulent intent on the part of the husband to improve his wife's property at the expense of his creditors, the wife's property is not liable for such improvements. A husband, without her authority, cannot create a lien against her separate estate even for necessary repairs to the property. *Dearie* v. *Martin*, 78 Penn. 55; *Steinman* v. *Henderson*, 94 Penn. 313. But in Illinois it has been held that if one who is ignorant of the wife's interest, contracts with the husband to build on the wife's land, and the wife knowing this, fails to disclose her interest or stop the

work, she is estopped from setting up her rights against the lien. *Bruck* v. *Bowermaster,* 36 Ill. App. 510; *Paulsen* v. *Manske,* 126 Ill. 72.

In the Ontario Mechanics' Lien Act (see Ontario Mechanics' Lien Act, sec. 5), in order to protect contractors and others dealing with the husband, when the property is the wife's separate estate, a section has been inserted which, in effect, provides that instead of the claimant being compelled to prove the husband's authorization by the wife, he is now *conclusively presumed* to be acting as the agent of his wife, unless the claimant has actual notice to the contrary. Under this provision a married woman will not be permitted to show that her husband was not authorized by her to make the contract unless she can also show that the contractor has actual notice of the absence of such authority. A person contracting with the husband without actual notice that the husband was not authorized to make the contract, may assert a mechanics' lien upon the interest of the wife in the property subject to the lien, as well as upon the interest of the husband.

The contract, however, is the contract of the wife; hence, where the husband makes one contract for repairs to two houses, one belonging to his wife and the other to himself, a lien cannot be claimed against both properties for an amount due in respect to both houses without apportioning the same. *Fairclough* v. *Smith,* (1901) 13 Man. L. R. 509.

A husband may assert a lien upon the property of his wife for work or for materials performed or supplied by him. *Booth* v. *Booth,* (1902) 3 O. L. R. 294.

Where a conveyance of land was made to a husband and wife each of the grantees is an "owner" and may by contract subject his or her estate to a lien for improvements on the land, though the other does not join in the contract (*Independence Sash, Door & Lumber Co.* v. *Bradfield,* (1911) 134 S. W. 118), but under a contract of the husband alone, a mechanics' lien will not

attach to the estate of the wife under such conveyance. *Washburn* v. *Burns*, 34 N. J. L. 18.

If the authority of the husband is shown, the lien will not fail because the husband has exceeded his authority as to the amount of expenditure. *Jones* v. *Pothast*, 72 Ind. 158.

In the absence of express enactment to the contrary, something more than mere knowledge that her husband is making the improvement, is required to create a lien against the wife's property. *Healey Ice Mach. Co.* v. *Green*, (1910) 181 Fed. 890. In Illinois it has been held that if with knowledge of the contract, and the delivery of materials thereunder, a wife makes no protest against the acts of her husband, a lien may be enforced against her property with respect to which such contract has been made and such materials delivered. *McDonald* v. *Mark*, (1909) 147 Ill. App. 434. The conduct of the wife may constitute a recognition of the husband's authority. *Prendergast* v. *McNally*, 76 Ill. App. 385; *Bevan* v. *Thackera*, 143 Pa. 182. Where a wife knew, soon after the excavation was begun, that her husband was constructing a building on a lot owned by her, and that shortly afterwards she executed a mortgage of the premises, and turned the money over to her husband to use in the building, such facts were considered to show consent on her part. *Lentz* v. *Emmerman*, 119 Wis. 492. If one who is ignorant of the wife's interest, contracts with the husband to build on the wife's land and the wife acquiesces, she may be estopped from setting up her rights against the lien. *McCarthy* v. *Caldwell*, 43 Minn. 442. See also *Anderson* v. *Armstead*, 69 Ill. 453; *Greenleaf* v. *Beebe*, 80 Ill. 522. Where a husband with his wife's permission purchased lumber to construct a greenhouse on her land and she denied any agency on the part of the husband, but there was evidence of declaration made by her that she was constructing it, a finding that her property was subject to the lien therefor will not be disturbed. *Colt* v. *Lawrenceburg Lumber Co.*, (1909) 44 Ind. App. 122. A husband may have his wife's authority by

estoppel. Where a wife has by words or conduct held out her husband or enabled her husband to hold himself out as having authority to act on her behalf she is bound as regards third parties by the acts of her husband to the same extent as she would have been bound if her husband had in fact had the authority which he was held out to have.

But her land will not be subject to a lien unless she authorizes her husband, or authority is conferred on him by estoppel.

Mere occupation of a wife with her husband of the building erected, does not show ratification on her part. *Rust & Owen Lumber Co.* v. *Holt,* 60 Neb. 80.

A husband who, as owner, enters into a contract with a builder, cannot subsequently claim that he was acting solely for his wife. *Sidney* v. *Morgan,* 16 W. L. R. 123.

As to questions concerning capacity to contract, a person furnishing labor or material should first ascertain whether the owner of the realty is under such a disability as would avoid the contract. *Alvey* v. *Reed,* 115 Ind. 148. Where the husband and wife own the property as tenants in common, any notice in writing to the owner required by the statute to be served is ineffectual if served upon the husband alone. *Webber Lumber Co.* v. *Erickson,* (1913) 216 Mass. 81.

Various facts from which the husband's agency may be inferred are considered in an exhaustive note by Mr. C. B. Labatt in Vol. 52, D. L. R. at p. 213.

Fixtures.

As the statutory lien is primarily intended to affect realty, a question of importance which often arises is whether materials which have been furnished have become structurally and permanently a part of the realty. Under a Mechancis' Lien Act the lien created for materials furnished is not upon the specific materials furnished, but upon the building and land to which these materials become so attached as to be a part of the realty.

The question whether materials so furnished constitute "fixtures" is a question of law and fact. A large number of citations are mentioned by Armour, C.J., in *Argles* v. *McMath*, (1895) 26 O. R. 224, affirmed, 23 O. A. R. 44. See also the judgment of Sedgewick, J., in *Warner* v. *Don*, (1896) 26 S. C. R. 388; *Stack* v. *T. Eaton Co.*, (1902) 4 O. L. R. 335; *Garing* v. *Hunt*, (1895) 27 O. R. 149; *Goldie, McCulloch Co.* v. *Hewson*, (1901) 35 N. B. R. 349; *Scottish-American Investment Co.* v. *Sexton*, (1894) 26 O. R. 77; *Canadian Bank of Commerce* v. *Lewis*, (1907) 12 B. C. R. 398; *Seeley* v. *Caldwell*, (1908) 18 O. L. R. 472; *Imperial Brewers Ltd.* v. *Gelin*, (1908) 18 Man. L. R. 284. Electric light fixtures and an electric light sign on the outside of the building, put up by the tenant, were considered not to have become part of the realty, but to be chattels removable by the tenant. *Rohls & Co.* v. *MacLean*, (1913) 25 W. L. R. 358; 13 D. L. R. 519.

It is the general rule that furnaces, ranges and heaters with their necessary attachments, annexed to a dwelling as permanent parts of it in the course of its construction for purposes of sale or rent, which fixtures are regarded by builders generally as essential parts of that class of houses, entitle the materialmen to a lien therefor. A portable furnace and portable cooking stove resting on a cemented floor and attached to the realty only by pipes running to the chimney flues are fixtures where they were installed by the owner of the house with the intention of making them a part of it, and the vendor of such heating apparatus is entitled to a mechanics' lien therefor as against a mortgagee of the realty. *Erdman* v. *Moore*, (1896) 58 N. J. L. 445; *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, (1910) 184 Fed. 199. There can be a mechanics' lien for only such work as constitutes a permanent improvement to the building, or for articles furnished which might be considered permanent fixtures. The *Fehr Construction Co.* v. *Postl*, (1915) 189 Ill. App. 519. Intention is really the dominating test. *Dominion Trust Co.* v. *Mutual Life Assce. Co.*, (1918) 26 B. C. R. 237, 43 D. L. R. 184. The position of the

rival claimants is also an important consideration. See *Kokomo Investment Co.* v. *Dominion Harvester Co.*, (1918) 43 D. L. R, at p. 205 (Alta.).

In determining whether materials have become fixtures the test is whether it was intended that the materials furnished should form part of the realty, and whether there is, in fact, structural connection with the building. *E. R. Darlington Lumber Company* v. *Burton*, (1910) 156 Ill. App. 82. "Ordinarily there must exist some sort of annexation of the machine or machinery in order to make it part of the realty; not necessarily physical annexation, but an actual or constructive annexation that shews adaptability, purpose and intention to permanently use the article in connection with the freehold." Bronson on Fixtures, p. 249. The rule in Illinois for determining what constitutes a fixture is, 1st, Real or constructive annexation of the thing in question, to the realty. 2nd, Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected, and 3rd, the intention of the party making the annexation to make it a permanent accession to the freehold,—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation and purpose or use for which the annexation has been made. *Schmeling* v. *Rockford Am. Co.*, (1910) 154 Ill. App. 308. A recent and instructive Canadian case deals with this difficult question as to what constitutes "fixtures." See *Royal Bank of Canada* v. *Coughlan*, (1920) 2 W. W. R. 356.

When is a chattel so affixed to the structure as to be part of it and, therefore, to subject it to the lien upon realty? The test question as applied by the Massachusetts Courts is,—What would pass as between vendor and vendee? *Scannell* v. *Hub Brewing Co.*, (1901) 118 Mass. 288. Asbestos and magnesia covering placed around steam piping and in a distillery, intended

as a permanent covering for the metal, may be found to be furnished in the erection of a building, within the meaning of a Mechanics' Lien Act. "Although it was possible to remove it, the removal would greatly injure it, and it was procured to be retained as long as the pipes remained." *Angier* v. *Bay State*, (1901) 178 Mass. 163, *per* Knowlton, J. Mirror frames annexed to a house at the time it is built, and fitted into gaps left for that purpose in the walls, are fixtures for which a mechanics' lien may be maintained. *Ward* v. *Kilpatrick*, (1881) 85 N. Y. 417. See also *Union Stove Works* v. *Klingman*, 20 App. Div. 449, affirmed, (1900).

It was held, in *Scannell* v. *Hub Brewing Co.*, (1901) 118 Mass. 288, that a mechanics' lien upon realty may be established for labor performed in making in an entire contract for a round sum the apparatus and appliances for a brewery, to be inserted in the building and connected together by pipes, although part of the labor was performed in the lien claimant's shop in another city, and the final connecting of the various appliances by pipes in the brewery may have been done by persons other than the lien claimant. Holmes, C.J., in referring to the question whether the labor furnished was performed in the erection of a building, said: "They were built up in the building and could not be got at except by taking them to pieces, which would seem from the testimony of the respondent's witnesses, to be commercially impracticable. If any object was more movable than the others, it none the less was an integral part of one original whole, which, as a whole, was a building and real estate."

Gas and electrical fixtures furnished to the owner of a house but not permanently annexed to the building are not treated as an "improvement" upon the realty which would subject the realty to a lien. As a tenant would be entitled to remove them and as they would not pass as between vendor and vendee or mortgagor and mortgagee they cannot be said to be furnished for the permanent improvement of the realty. *Campbell* v. *John Taylor Co.*, 62

N. J. Eq. 30; *Hanson* v. *News Pub. Co.*, 97 Me. 99; *Caldwell* v. *Glasier*, (1910) 138 App. Div. N. Y. 826. But double cases with shelves, a platform, lockers, etc., in a building designed for a public library, fastened to the rooms by nails, screws, etc., and without which equipment the building could not be used for library purposes are an "improvement" protected by a lien: *Rierser* v. *Commeau*, 129 App. Div. (N.Y.) 490, 198 N. Y. 560.

If the owner of the fee in a lease authorizes the making of improvements, the fee is subject to a lien in so far as the improvements are permanent in character and inure to the benefit of the owner, but in so far as such improvements are temporary and subject to removal by the lessee a lien should not be awarded as against the fee. *Turner* v. *Wentworth*, (1876) 119 Mass. 459. For cases dealing with the rights of sellers of fixtures as against holders of mechanics' liens, see British Ruling Cases, vol. 1, pp. 6, 673 and 98.

One who furnishes and installs second-hand machinery in a vacant building which the owner purchased for the express purpose of equipping as a factory for his own use, is entitled to a mechanics' lien, even though no extensive alteration was made for its instalment and it was merely fastened to joists by screws so as to be removable without injury to the building. *Griffin* v. *Ernst*, (1908) 124 App. Div. (N.Y.) 289. Where a chattel mortgage is given on personal property, which afterwards becomes a permanent part of the real estate, a mechancis' lien attaching to the real estate will have priority over the chattel mortgage. *Currier* v. *Cummings*, 40 N. J. Eq. 145.

In the absence of express stipulation to the contrary a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises provided they are removed before the mortgagee takes possession. *Credit Foncier Franco Canadien* v. *Lindsay-Walker Company*, (1919) 2 W. W. R. 385.

If fixtures are subsequently severed the lien continues on the

land itself. *Chicago Smokeless Gas Fuel Co.* v. *Lyman*, 62 Ill. App. 538.

Where the title to furnaces sold is retained by a vendor until the payment of the price, the rights of such parties, in Ontario, are governed by section 9 of the Conditional Sales Act, R. S. O. 1914, c. 136, and such vendor cannot rank as a lienholder under the provisions of the Mechanics' and Wage-earners' Lien Act. *Hill* v. *Storey*, 25 D. L. R. 247, 34 O. L. R. 489. But, in the absence of special legislation affecting the question, one who erects a fire sprinkler system under an agreement whereby the equipment is merely leased to the owner of the premises with a right to purchase, reserving the title and ownership thereto until paid in the lessor, is not precluded from claiming the statutory mechanics' lien against the premises of which the erection has been made part. *U. S. Construction Co.* v. *Rat Portage Lumber Co.*, 25 Man. L. R. 793.

A lien claimed by a partnership stands in no different position from any other lien by reason of "the owner" being a member of the partnership. *Ross* v. *Gorman*, 1 Alta. L. R. 516, 9 W. L. R. 319.

CHAPTER V.

Who may Acquire a Lien.

The underlying principle of Mechanics' Lien Acts in Canada is that persons who benefit realty by furnishing for it labor, service or materials should be entitled to a preferred claim upon the realty. Priority is given to the claims of such persons not because they are "mechanics," but because of the character of the work done, the service performed, or the materials supplied. The lien claimant must of course bring himself within the provisions of the statute creating the lien, but the tendency of the legislation on this subject is to include all who by furnishing work, service or materials are justly entitled to be so secured, and therefore the statute is not exclusively for the benefit of mechanics but is expressly extended to "any person" who thus furnishes work, service or materials.

It is immaterial where the work was done, so long as it is done under the contract in the erection of the building and its result goes into the building. The work of the contractor and of the sub-contractor, the supplies of the materialman, and the labor of the wage-earner, the services of the superintendent of construction and of the architect are all essential to the erection of the structure, and contribute to its increased value, and each of these classes therefore should be entitled to a lien on the structure.

The word "work" used in Mechanics' Lien Acts in Canada, is, at least, as broad in its meaning as the word "labor" which is used in the Massachusetts Act, under which it was held that superintendence is labor though it involves little physical effort. *Mitchell* v. *Packard*, (1897) 168 Mass. 467. Under the Alberta Act it has been held that a superintendent of construction is entitled to a lien. *Scratch* v. *Anderson*, (1911) 16 W. L. R. 145.

Ontario and the other Lien Acts in Canada use also the word

"service," which is even more comprehensive than "work." But legal or other services rendered in acquiring rights of way do not constitute services within the meaning of a lien law. *Richmond & Irvine Construction Co.* v. *Richmond Ry. Co.*, (1895) 31 U. S. App. 704, 34 L. R. A. 625.

An old decision in Ontario (*Arnoldi* v. *Gouin*, (1876) 22 Grant 314) held that an architect is entitled to a lien for drawing plans and specifications and superintending the erection of a building. In that case no distinction was raised by counsel between the right to charge for superintendence and the right to charge for drawing the plans. An architect's right to a lien for drawing plans and specifications has been denied in several American courts. In a Massachusetts case (*Mitchell* v. *Packard* (1897) 168 Mass. 467), the court held that while a lien could be maintained by an architect for labor performed by him in the supervision of the erection of a building, he was not entitled to a lien for the preparation of plans and specifications therefor.

Similar decisions have been given by courts in Pennsylvania, Missouri, Kentucky and Maine. In New York, apparently the only cases upon the question are where the architect acted in both capacities, although in deciding that he is entitled to a lien he is sometimes referred to as a supervisory architect. See *Stryker* v. *Cassidy*, (1879) 76 N. Y. 50. Under the British Columbia Mechanics' Lien Act (R. S. B. C., 1911, ch. 154) there is no lien in respect of the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor. *British Columbia Granitoid Co.* v. *Dominion Shipbuilding Co.*, (1918) 2 W. W. R. 919. In some American cases stress seems to be laid upon the circumstance that the work of drawing plans and preparing specifications is essentially professional work, and therefore not within the scope of a mechanics' lien statute. But a great deal depends upon the precise words of the statute, and the lien Acts existing in Canada seem broad enough in their terms to include "work" or "service" rendered by an architect

in drawing the plans for the building. The preparation of the plans and specifications appears to be regarded under some American decisions as merely preliminary to the construction of a building and in effect to be too remote to be treated as work used in the erection of the building. The wording of the Mechanics' Lien Acts in Massachusetts and in various other States undoubtedly warrants such a view, but the lien Acts existing in Canada are much wider in their scope. Under them a lien is given not only for "work" but for "service" and such work or service may be not only "upon" but "in respect of" a building, etc., so that the Acts are broad enough to not only cover the manual labor of the workman, but the professional services of the architect. The services rendered by an architect in drawing the plans and preparing the specifications are not any more remote than the services of the blacksmith who sharpens the tools which other workmen use in a mine, and under a decision in Ontario a blacksmith was held entitled to a lien for such work. See *Davis* v. *Crown Point M. Co.*, (1901) 3 O. L. R. 69; *Bradshaw* v. *Saucerman*, (1912) 4 D. L. R. 476; *Brunswick Balke Collender Co.* v. *Racette*, (1916) 49 Que. S. C. 50.

The words of the Ontario Act, section 6, which give a lien to "any person who performs any work or service upon or in respect of . . . the . . . erecting . . of any . . . building . . . for any owner, contractor or sub-contractor . . . a lien for the price of such work, service or materials upon the . . . building . . . and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed," are wide enough to include the architect who was employed by the owner, in regard to his work and services, as well upon the plans and specifications upon which the building was erected as for his work and services in superintending and directing the actual construction of it in accordance with them.

The work of an architect, particularly in regard to large structures, is generally necessary and advantageous work done in erect-

ing the structure. Notwithstanding a decision to the contrary in relation to a similar provision in the British Columbia Act, *Fripp* v. *Clark*, (1913) 14 D. L. R. 918 (B.C.), it would seem that an architect is entitled to a lien for such services which are performed in "erecting" the building. *Read* v. *Whitney*, (1919) 48 D. L. R. 309. As to assignment of his claim by the architect, see *Sickler* v. *Spencer*, (1911) 17 B. C. R. 41, 19 W. L. R. 557. The claim of an under-architect, or assistant architect, would stand in a different position, and if he be entitled to a lien, it would be on another ground. His work would be performed for the architect, a person who from the wording of the Act would be entitled to be considered a "contractor," which word in the Act includes a person employed by or contracting with the owner "for the doing of work or service . . . for any of the purposes mentioned in this Act."

It has been held that where a statute gave a lien for "work or labor upon . . . a building," the services of an architect in the preparation of plans and in superintendence were within the statute. *Hughes* v. *Torgerson*, (1892) 16 L. R. A. 600; *Mutual Ins. Co.* v. *Rowland*, (1875) 26 N. J. Eq. 389. It seems reasonable to conclude that within the meaning of Mechanics' Lien Acts in Canada superintendence is "work." *Scratch* v. *Anderson*, 33 D. L. R. 620; 11 Alta. L. R. 55, (1917) 1 W. W. R. 1340. "The work of superintendence is as much service upon a building as carrying bricks to the bricklayers. *Read* v. *Whitney*, (1919) 48 D. L. R. 309. But there would be no lien for plans and specifications prepared but not used, or for solicitors' costs for drawing contracts respecting the building, or advising as to legal points arising out of it.

As to the actual ownership of the plans and specifications, it has been decided in England that the plans and specifications are not the property of the architect, but belong to the owner of the building. *Gibbon* v. *Pease* (1905) 1 K. B. 810. But the architect has a lien on them and need not deliver them until he is paid.

Hughes v. *Lenney*, (1839) 5 M. & W. 183. See chapter, Liens on Personalty, *post*.

Where a claimant from the nature of the property cannot have a lien, he cannot have his personal claim tried by the special tribunal provided for trials of cases of liens. *Johnson & Carey Co.* v. *C. N. R. W. Co.*, (1918) 44 O. L. R. 538.

Lien of Contractor.

To entitle the contractor to a lien there must be something in the nature of direct dealing between the contractor and the person whose estate is sought to be charged. *Eddy Co.* v. *Chamberlain and Landry*, 37 D. L. R. 711 (N.B.). The foundation of the right to a mechanics' lien is a valid contract with the "owner" of the lot of land to be improved or with his agent. Although the lien is not created by the contract of the parties but by the statute, nevertheless something in the nature of direct dealing between the contractor and the "owner" is essential. *Rittenhouse* v. *Warren Co.*, (1914) 264 Ill. 619. The special provisions of the particular Lien Act must, however, govern. In an action to enforce a lien under the British Columbia Mechanics' Lien Act in a case where the owner of the property did not contract for the work or improvements it is incumbent upon the lien claimant to shew that the owner had knowledge of such work or improvements. *Baker & Ellicott* v. *Williams*, (1916) 23 B. C. R. 124. But it has been held in proceedings under the New Brunswick Act that to create a lien against the interest of an "owner," for work done and materials furnished with his "privity and consent," there must be something in the nature of a direct dealing between the contractor and the owner or person whose estate is to be charged,—when the latter merely has knowledge that the work is being done or materials furnished, and silently assents thereto, and benefits thereby, a lien is not thereby created against his interest. *Eddy Co.* v. *Chamberlain and Landry*, (1917) 37 D. L. R. 711 (N.B.).

Mere knowledge of the owner that the work is being done or materials are being furnished will not suffice to create a lien against his interest. *Isitt* v. *Merritt Collieries,* (1920) 1 W. W. R. 879. The contractor to succeed must have been employed by some one having an interest in the land. The person with whom the contract was made must be an "owner." *Gearing* v. *Robinson,* (1900) 27 O. A. R. 364. See *Webb* v. *Gage,* (1902) 1 O. W. R. 327; *Flack* v. *Jeffrey,* (1895) 10 Man. L. R. 514; *Blight* v. *Ray,* (1893) 23 O. R. 415; *Graham* v. *Williams,* (1884) 8 O. R. 478; 9 O. R. 458; *Garing* v. *Hunt,* (1895) 27 O. R. 149; *Bickerton* v. *Dakin,* 20 O. R. 192, 695. The owners of four lots executed an agreement to sell them to one Irving, who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances the vendors were to execute a deed of the lots. Irving gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when Irving became insolvent, and the vendors under the terms of their agreement gave notice of forfeiture and took possession of the property. Prior to this, liens had been filed for labor and materials supplied and the lienholders brought action for enforcement thereof against the vendors. It was held that the vendors were not "owners" of the property, and therefore were not liable to pay for the labor and materials supplied for the building of the houses by Irving. *Marshall Brick Co.* v. *York Farmers Colonization Co.,* (1916) 54 Can. S. C. R. 569. Anglin, J., in this case, expressed the opinion that to make the vendors "owners" because the work was done with their privity and consent, a direct dealing between them and the materialmen was requisite.

Priority of registration must prevail, in the absence of actual notice. *Cook* v. *Koldoffsy,* 28 D. L. R. 346, 35 O. L. R. 555. Mere knowledge that building was going on upon the land does not amount to actual notice. *Sterling Lumber Co.* v. *Jones,* (1916)

29 D. L. R. 288. In this case a purchaser of an unfinished building, whose deed was registered prior to the registration of any mechanics' liens without actual notice thereof, thereby acquired a priority and took the property free of the liens. The purchaser cannot be deemed an owner within the meaning of the provision in the Mechanics' Lien Act which depends upon privity, consent or benefit, in order to charge the land with the liens. See also *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D. L. R. 533, *Orr* v. *Robertson*, 23 D. L. R. ?.

An explicit statement in the contract that he will assert no lien (*Brydon* v. *Lutes*, 9 Man. L. R. 463), or that the building shall be delivered from liens, or that all persons shall be paid by cheque of the contractor, will bind the contractor. *Ritchie* v. *Grundy*, 7 Man. L. R. 532. It is not essential to the attaching of a lien that the labor for which a lien is claimed should be performed at the site of the building upon which the lien is claimed. *Daley* v. *Legate*, 169 Mass. 257; *Munroe* v. *Clark*, (1911) 107 Me. 134. The work may be done in another city than that where the building is erected, the real question being whether the work done was intended for and went into the structure and was such as to be within the contemplation of the contracting parties. *Scannell* v. *Hub Brewing Co.*, (1901) 178 Mass. 288. In this case part of the labor upon the apparatus for a brewery situate in Boston was performed in the lien claimant's shop in Lowell, and the final connecting of the various appliances by pipes in the brewery may have been done by persons other than the lien claimant, nevertheless the lien was held to exist. Holmes, C.J., bases the judgment of the court on this point on the ground that the labor at Lowell was contemplated by the contract. But where the work was merely sawing and planing lumber in the lien claimant's mill at the request of one who was erecting the buildings, there being no agreement that the lumber should be appropriated to said buildings, no lien attached to the buildings although the lumber was used upon them. *Bennet* v. *Shackford*, (1865) 11 Allen (Mass.) 444.

The contractor is not entitled to a lien merely because he has performed work or service; such work or service must be performed under a contract. If, therefore, a contractor is wrongfully dismissed or is wrongfully prevented by the owner from fully performing his contract he has no lien for damages caused thereby, although he has a right of action for such damages. In like manner, if the contract is rescinded, the contractor cannot claim a lien for work done afterwards, nor can he recover unless he shews that the person with whom he made the contract had some interest in the land. *Beveridge* v. *Hawes*, (1903) 2 O. W. R. 619; *Gearing* v. *Robinson*, (1900) 27 O. A. R. 364; *Webb* v. *Gage*, (1902) 1 O. W. R. 337; *Stevens* v. *Lincoln*, (1874) 114 Mass. 476. If a contract provides that no payment shall be due until the work has been satisfactorily completed, a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract. *Royal Electric Co.* v. *City of Three Rivers*, (1894) 23 Can. S. C. R. 289), but where after a portion of the work is done the contract is abandoned by consent (*Powers* v. *Hogan*, 12 Daly (N. Y.) 444, or where the owner orders the contractor to stop work on the building and the contractor agrees to do so, there is no abandonment or discontinuance of the work as these words are used in a Mechanics' Lien Act. (*Abhari* v. *Grassie*, (1914) 262 Ill. 636. Where the contract is improperly terminated by the owner (*Fuller* v. *Beach*, (1912) 21 W. L. R. (B.C.)), the lien may be enforced upon a *quantum meruit*. Where a tender for the erection of a building is made and accepted to deceive the other tenderers, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a *quantum meruit*. *Degagne* v. *Chave*, (1895) 2 Terr. L. R. 210.

In the event of the failure of the owner to comply with his part of the contract the statute does not give a contractor a lien for the whole amount of his contract, nor for the entire amount of his damages against the owner because of a breach of the con-

tract, but simply for the value of what has been done. *Marsh* v. *Mick*, (1911) 159 Ill. App. 399. The completion of a building contract is a condition precedent to the contractor's right to recover, unless the contract provides otherwise, or unless there has been a waiver of such condition by the other party, or an interference preventing the completion of the contract. *Dixon* v. *Ross*, (1912) 1 D. L. R. 17. See *Elford* v. *Thompson*, (1912) 1 D. L. R. 1. Any substantial variation from the contract must be waived or assented to by the "owner" as otherwise the contract must be adhered to. *Clayton* v. *McConnell*, (1877) 14 O. R. 608, 15 O. A. R. 560. In this case the owner said to the contractor, "If you won't go on with your work, go away," and it was held that this did not amount to a rescinding of the building agreement.

The onus is on the plaintiff to show that the non-performance of an essential term of an entire contract was not due to his own default and if he fails to discharge that onus he cannot recover any part of his claim. *Vigers* v. *Cook*, (1919) 88 L. J. K. B. 1132.

The lien of a contractor attaches when he has completed his contract, but if the contract provides for *interim* payments, a lien attaches when each payment becomes due to the extent of the amount thereof. *Braden* v. *Brown*, (1917) 24 B. C. R. 374.

The contractor cannot recover unless he complies with any term of the contract which is made a condition precedent to payment, such as the procuring of an engineer's, architect's or surveyor's certificate. *Starr* v. *The Queen*, (1887) 1 Ex. C. R. 301; *The Queen* v. *Starr*, (1889) 17 Can. S. C. R. 579; *Murray* v. *The Queen*, (1896) 26 Can. S. C. R. 203; *Goodwin* v. *The Queen*, (1897) 28 Can. S. C. R. 273; *Sorette* v. *N. S. Development Co.*, (1889) 31 N. S. R. 427; *Leroy* v. *Smith*, (1900) 8 B. C. R. 293. See *Wallace Bell Co.* v. *Moose Jaw*, 3 D. L. R. 273, 4 D. L. R. 438 (Sask.). See also annotations to *Chambers* v. *Goldthorpe*, 4 Brit. R. C. 833.

As to engineers exceeding their powers in determining certain points in dispute, see *Peters* v. *Quebec Harbor Commrs.* (1891) 19

Can. S. C. R. 685. See also *Watts* v. *McLeay*, (1911) 19 W. L. R. 916 (Alta.); *Alslip* v. *Robinson*, (1911) 18 W. L. R. 39; *Merriam* v. *Public Parks Board of Portage la Prairie*, (1911) 18 W. L. R. 151, affirmed, (1912) 20 W. L. R. 608 (Man.); *Donaldson* v. *Collins*, (1912) 21 W. L. R. 56 (Sask.).

The contractor is bound in the absence of fraud or undue influence or mistake, by the certificate of the engineer or architect, and cannot dispute the same. *Canty* v. *Clarke*, (1879) 44 U. C. R. 505; see *Robins* v. *Goddard*, (1905) 1 K. B. 294; *Smith* v. *Gordon*, (1880) 30 U. C. C. P. 553; *Guelph Paving Co.* v. *Town of Brockville*, (1905) 5 O. W. R. 626. As to effect of undue influence of architect, see *Alberta Building Co.* v. *Calgary*, (1911) 16 W. L. R. 448. A provision that an architect's certificate shall not be set aside for any suggestion of fraud is not void as contrary to public policy. *Tullis* v. *Jackson*, (1892) 67 L. T. 840. But the rule that a contractor is bound by the terms of a contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as and believed by the contractor to be the engineer of a *third person*. *Good* v. *Toronto, H. & B. Ry.*, (1899) 26 O. A. R. 133, affirmed, 30 S. C. R. 114, *sub. nom. Dominion Construction Co.* v. *Good*. As to effect of non-disclosure of family relationship and financial connections between the superintendent of work, who was to furnish the certificate, and the defendant, see *Ludlam* v. *Wilson*, (1901) 37 C. L. J. 819. As to conflict between interest and duty, see *Law* v. *City of Toronto*, (1919) 47 O. L. R. 251. An arbitrator should not be allowed to act if he necessarily occupy at once the position of judge and witness. *Bristol Corporation* v. *Aird*, (1913) A. C. 241; *Hickman & Co.* v. *Roberts*, (1913) A. C. 229.

There are several decisions by Massachusetts courts (see *Butterfield* v. *Byron*, (1891) 153 Mass. 517; *Angus* v. *Scully*, (1900) 176 Mass. 357), which hold that where performance of the contract was prevented by destruction of the subject-matter, a contractor may

recover for partial performance, but Canadian and English decisions are opposed to this view of the law. The Canadian law is aptly illustrated by an Ontario case which deals fully with the question. *King et al.* v. *Low et al.*, (1901) 3 O. L. R. 234, following *Appleby* v. *Meyers*, (1867) L. R. 2 C. P. 651. For legal effect of accident to subject-matter, see *Laine* v. *The Queen*, (1896) 5 Ex. C. R. 103. As to default in building contract by the owner, see *Wells* v. *Army & Navy C. S.*, (1902) 86 L. T. 764. As to question of right of removal of plant and dismissal of contractor, see *Ashfield* v. *Edgell*, (1891) 21 O. R. 195.

The defendant, who had taken a contract for the erection of a dwelling house for a fixed sum, accepted the plaintiff's tender to do the plumbing and tinsmithing for $500, but before the completion of the plaintiff's contract, though after they had done work up to $488, the building was destroyed by fire, not happening by the fault of the plaintiffs, defendants, or the owner. The defendants had received two sums amounting to $1,500 on account of their contract, but they denied that any portion of it was for work done by the plaintiffs. In an action by the plaintiffs to recover the $488, on a *quantum meruit*, it was held that where the contract is to do work for a specific sum, there can be no recovery until the work is completed, or unless the failure to complete is caused by the defendant's fault, and this applies as well to original as to sub-contractors, and as the plaintiffs admitted the non-completion by suing on a *quantum meruit*, and there was nothing to show any default on the defendant's part, there could be no recovery. A different phase of this question as to the effect of the destruction of the subject-matter is dealt with by the decision in *Ontario L. & P. Co.* v. *Baxter & Galloway Co.*, (1903) 5 O. L. R. 419. Where a person entered into an agreement to build a cofferdam, and there was no sustaining substratum, an action would not lie for the work and labor performed in attempting to complete the contract. Where the plans furnished to the plaintiff represented the existence of a sufficient substratum, which did not in fact exist, and his labor was thus rendered useless,

he could only recover for the work done before that fact was discovered. In this case the distinction between a warranty and a representation, and between a representation inducing a contract and a representation forming part of a contract is discussed. *Hill* v. *Fraser*, (1858) 2 Thom. (Nova Scotia) 294. See also *Thorn* v. *Mayor of London*, (1874) L. R. 9 Ex. 163; L. R. 10 Ex. 112; *McKenna* v. *McNamee*, (1887) 14 O. A. R. 339, 15 Can. S. C. R. 311.

Although Canadian Courts do not absolutely adopt the doctrine of "substantial performance" which is generally favored by American Courts, yet where it appears that the repairs called for by the contract were substantially done, though there might have been a variation from the contract in some particulars, or an unimportant part of the contract remained unfinished, the contractor would be treated by Canadian Courts as entitled to recover the price agreed upon in the contract, subject to deductions for whatever expenditure was found necessary to make the work correspond with the specifications. In such a case the failure to do everything called for in the specifications would not put an end to the contract or prevent the contractor from making any claim upon it. The contractor can recover the contract price less so much as it is found ought to be allowed in respect of the items which are defectively done or not done at all. He may enforce a lien for the contract price, less the cost of completing the contract. *Taylor Hardware Co.* v. *Hunt*, 39 O. L. R. 85; 35 D. L. R. 584. See also 36 D. L. R. 383; *Dakin* v. *Lee*, (1916) 1 K. B. 566.

If, however, the work omitted is substantial in value and extent and there has been no waiver of performance in respect thereto, unless it appears that the work was omitted through oversight or excusable neglect, the contractor, even under an American law, would not be entitled to recover anything. *North American W. P. Co.* v. *Jackson Const. Co.*, (1915) 167 N. Y. App. Div. 779. In this case it appeared that the contractor had omitted work valued at about 14 per cent. of the entire contract price, and there had

been no waiver of performance and no finding of good faith on the part of the contractor. But trifling omissions in the performance of the contract will not defeat a lien. *Glacius* v. *Black*, (1872) 50 N. Y. 145. On the other hand the contractor cannot recover in the action if an important item of his contract is absolutely omitted. *Simpson* v. *Rubeck* (1911) 21 O. W. R. 260. See *Watts* v. *McLeag*, (1911) 19 W. L. R. 916; *Merriam* v. *Public Parks Board*, (1911) 18 W. L. R. 151, affirmed, (1912) 20 W. L. R. 603; *McDonald* v. *Symons*, 15 W. L. R. 218.

It would seem that the rule in the case of building contracts is somewhat similar to that in the case of specific performance, which is that such non-essential and trivial defects on the side of one party as can be compensated for will not excuse the other party to the contract. See Halsbury's Laws of England, vol. 3, p. 387. In every case it must be a matter of degree. The omission of a lock on a door in a large mansion, or the omission to put some zinc on a roof might not amount to non-completion (*Lowther* v. *Heaver*, (1899) 41 Ch. D. 248, 262), while omission to put down the floor in a house would certainly do so. See *Williams* v. *Fitzmaurice*, (1858) 3 H. & N. 844. The omission to erect a verandah required by the contract was considered as sufficiently substantial to preclude recovery of the contract price and prevent the enforcement of a lien. *Simpson* v. *Rubeck*, (1911) 21 O. W. R. 260.

In Ontario it has been held that where there is a contract to do specified work for a fixed sum with a proviso for payment of proportionate amounts equal to 80 per cent. of this fixed sum as the work is done, and the balance of 20 per cent. in thirty days after completion, the completion is a condition precedent to the right of the plaintiff to enforce payment of the balance of the contract price. *Sherlock* v. *Powell*, (1899) 26 O. A. R. 407. The headnote in this case is somewhat misleading. The right to recover instalments of the price was not dealt with. See comment of Hodgins, J.A., in *Deldo* v. *Gough-Sellers Investments, Ltd.*, (1915) 25 D. L. R. at p. 605. See *Black* v. *Wiebe*, (1905) 15 Man. L. R. 2[illegible], 1 W. L. R.

75. As to oral alterations of terms and *quantum meruit*, see *Barry* v. *Ross*, (1891) 19 Can. S. C. R. 360.

Where no time for performance is fixed in the contract, the law implies that it is to be performed within a reasonable time.

The lien may be acquired by a corporation or a partnership. A lien claimed by a partnership stands in no different position from any other lien by reason of the "owner" being a member of the partnership. *Ross* v. *Gorman*, (1908) 1 Alta. L. R. 516. The death of the contractor or the dissolution of the partnership cannot affect the lien of the contractor.

In building contracts the law is now on a just basis, the rule of exact or literal performance having been somewhat relaxed in recent years. But where omissions or deviations from the terms of the contract are so substantial that an allowance out of the contract price would not give the owner essentially what he contracted for there can be no recovery. Where the defects pervade the whole work and are very substantial, and where some if not many of them are wilful and intentional departures or omissions from the contract, the contractor cannot recover. *Smith* v. *Ruggiero*, 52 App. Div. (N.Y.) 382, affirmed 173 N. Y. 614. But where a detail is not a matter going to the essence of the contract, an exact compliance with it not being a condition precedent,—for instance, the omission of tie-rods in a cement floor, the contractor can recover. *Gillis* v. *Cobe*, 177 Mass. 584. The rule of damages by which to measure the loss, as stated in an important American case, is the reasonable cost of remedying the defects which can be practically remedied so as to make the structure exactly conform to the agreement, and the difference between the value of the structure so completed and one like the building agreed upon. *Fuller* v. *Heintz*, (1909) 137 Wis. 169. If the defects may easily be remedied without a reconstruction of any special part of the building, the builder may recover the contract price less what it will cost to make his work comply with the contract.

In cases where an unimportant part of the work remains unfinished, one who contracts to supply material or do work on a

building is entitled to enforce a lien for the contract price less the cost of completing the contract. *Taylor Hardware Co.* v. *Hunt*, (1917) 35 D. L. R. 584, *Adams* v. *McGreevy*, 17 Man. L. R. 115, 6 W. L. R. 188. But where the entire contract for work and labor has not been substantially performed, or where the contractor, although the contract has been substantially carried out, refuses to complete it, he is not entitled to recover anything. *Yakowchuk* v. *Crawford*, (1917) 3 W. W. R. 479. But a building contract for $2,850 cannot be said to have been substantially performed where, after buildings contracted for were completed, the builder neglected to put in lateral sewers and water connections, which the owner afterwards caused to be put in at the expense of $180. *Hollester* v. *Mott*, (1892) 132 N. Y. 18. The work as done being worth one-seventh less than it would have been had it been done in compliance with the terms of the contract, there is no substantial performance of the contract, so as to entitle the contractor to recover. *Mitchell* v. *Williams*, 80 App. Div. (N.Y.) 527. See also *Mitchell* v. *Dunmore Realty Co.*, 126 App. Div. (N.Y.) 829.

Where there has been substantial but not absolute performance of a building contract, the contractor may, in certain cases, recover the contract price, less such deductions as the other party is entitled to insist upon because of negligence or bad workmanship in respect of some items of the work. *Canadian Western Foundry & Supply Co.* v. *Hoover*, (1917) 3 W. W. R. 594; *Watts* v. *McLeay*, 19 W. L. R. 916. As to entire contract and provision for "liquidated damages," see *St. Catherine Improvement Co.* v. *Rutherford*, (1914) 31 O. L. R. 574; *McManus* v. *Rothschild*, (1911) 25 O. L. R. 138. The authorities on the question of penalty or liquidated damages are reviewed in the latter case. The fact that, in an entire contract, some item of the work has been done negligently or inefficiently or improperly does not prevent the builder from recovering in an action, but, in such case, the builder would be entitled to recover the contract price less so much as is found ought to be allowed in respect of the items of defective work. *Dakin* v. *Lee*, (1916) 1 K. B.

566; *Taylor Hardware Co.* v. *Hunt,* (1917) 35 D. L. R. 584; *Adams* v. *McGreevy,* 17 Man. L. R. 115, 6 W. L. R. 188.

Even where builders enter into a contract to carry out a large number of alterations and repairs to a house in accordance with specifications for a lump sum, and it is established in evidence that the concrete used to underpin a wall was not in accordance with the specifications either as to quality or quantity, and, secondly, that certain rolled steel joists supplied had not been bolted at the top in accordance with specifications, and, thirdly, solid columns, four inches in diameter had been supplied in place of hollow columns five inches in diameter, it was nevertheless held that the builders were entitled to recover the lump sum subject to deduction of the amount necessary to make the work correspond with that contracted to be done. The defects and omissions in the work amounted only to a negligent performance of the contract, and not to an abandonment of or failure to complete the contract. *Dakin* v. *Lee,* (1916) 1 K. B. 566.

The damages suffered by an owner owing to non-completion, while not available to him as a set-off against claims for wages, nor to diminish the statutory percentage required to be retained by him, may be and sometimes must be gone into before the judge or officer trying a case under the Act. To ascertain the sum justly due from the owner to the contractor necessitates an inquiry, where a case is made for it, as to the value of the work done and the damages suffered,—to be set off or deducted for work undone or improperly done or for delay; and in a case where such an inquiry is proper the result may be stated in the judgment. *Milton Pressed Brick Co.* v. *Whalley,* (1918) 42 O. L. R. 369. As to delay in performance, which delay owing to unavoidable cause, did not amount to breach, see *Henry Hope & Sons* v. *Canada Foundry Co.,* (1917) 40 O. L. R. 338.

Partial Performance.

In building contracts the question of completion is one of fact, and while ordinarily, in order to claim a lien, the contractor must

show that he has performed his contract, yet, a contractor may recover for partial or inexact performance of the contract in some cases, as where the defect in the building was known before the completion of the work and the defendant allowed the work to go on, minimizing the defect, and after completion promised to pay and made no complaint until after the registration of the lien (*Holtby* v. *French*, (1902) 1 O. W. R. 821), where a strict compliance was waived by the owner (*Heckman* v. *Pinkney*, (1880) 81 N. Y. 211), or where the completion was dispensed with by agreement (*Moore* v. *Erickson*, (1893) 158 Mass. 71; *Connoly* v. *Sullivan*, (1899) 173 Mass. 1), where the deviation in the contract arose in respect to a matter not a condition precedent to recover (*Lucas* v. *Goodwin*, (1837) 3 Bing. N. C. 737), or where the owner refused to pay an instalment of the contract price, or to furnish the necessary materials as agreed. *Thomas* v. *Stewart*, (1892) 132 N. Y. 580; *Wright* v. *Rensens*, (1892) 133 N. Y. 298; *Carew* v. *Stubbs*, (1892) 155 Mass. 549; *Hunter* v. *Walter*, 12 N. Y. Supp. 60, affirmed, (1891) 128 N. Y. 668. A contractor may recover without the architect's certificate where the contractor is prevented from obtaining the certificate by the wrongful act of the "owner." *Smith* v. *Gordon*, (1880) 30 U. C. C. P. 553. Failure by the owner to supply material which the contract provides he shall supply discharges a penal clause. *Degagne* v. *Châve*, (1895) 2 Terr L. R. 210. Insolvency of the owner which prevents performance is a valid excuse for non-performance. *Henderson* v. *Sturgis*, 1 Daly (N.Y.) 336.

There are several decisions by Massachusetts courts (*Butterfield* v. *Byron*, (1891) 153 Mass. 517; *Angus* v. *Scully*, (1900) 176 Mass. 357 which hold that where performance of the contract was prevented by destruction of the subject-matter a contractor may recover for partial performance, but Canadian and English decisions are opposed to this view of the law. The Canadian law on this point is to be found in an Ontario case already referred to. *King et al* v. *Low et al.*, (1901) 3 O. L. R. 234. As to responsi-

bility of contractor where foundation walls collapse, see *Grace* v. *Osler*, (1911) 16 W. L. R. 627, 19 W. L. R. 109, 326. If an owner employs a competent architect to design a building, the owner would ordinarily not be liable to employes of a contractor injured by the collapse of the building during its construction. *Burke* v. *Ireland*, 26 N. Y. App. Div. 487.

Mere possession or user by the owner of the building upon which the work was done is not a sufficient acceptance of an incomplete or imperfect performance of the contract so as to entitle the contractor to recover. *Brydon* v. *Lutz*, (1891) 9 Man. L. R. 64; *Gearing* v. *Nordheimer*, (1876) 40 U. C. Q. B. 21; *Sumpter* v. *Hedges*, (1898) 1 Q. B. 673; *Oldershaw* v. *Garner*, (1876) 38 U. C. Q. B. 21; *Wood* v. *Stringer*, (1890) 20 O. R. 148; *Keen* v. *Keen*, (1902) 1 K. B. 55. See also *Hart* v. *Porthgain Harbor*, (1903) 1 Ch. 690; *Foster* v. *Hastings Corporation*, (1903) 87 L. T. 736; *Leroy* v. *Smith*, (1900) 8 B. C. R. 293; *Watts* v. *McLeay*, (1911) 19 W. L. R. 916 (Alta.); *Donaldson* v. *Collins*, (1912) 21 W. L. R. 56 (Sask.).

In a Manitoba case (*McArthur* v. *Dewar*, (1885) 3 Man. L. R. 72; see also judgment of Perdue, J., in *Black* v. *Wiebe*, (1905) 15 Man. L. R. 260), Killam, J., said: "The owner of the land has not an option of giving up the benefit received, the portion of the building erected has become a part of his land and is not severable therefrom, and the mere retention of the erection upon the lands and the use of it with the other portion of the lands cannot give rise to an implied contract to pay for the work done." In an Ontario case (*Wood* v. *Stringer*, (1890) 20 O. R. 148), it was contended that certain pews were accepted and used by the church, but Boyd, C., on this point said: "However, the church had to be occupied, and I do not think this should operate as an acceptance of this bad work." Acceptance of a building by the owner as completed, operates as waiver of the requirements that the contractor shall procure the architect's certificate. *Smith* v. *Alker*, (1886) 102 N. Y. 87. As to the effect

of taking possession and making payment on account, see *Lawrence* v. *Village of Lucknow*, (1887) 13 O. R. 421, in which *Munro* v. *Butt* (1858) 8 E. & B. 738, is distinguished.

Time might be of the essence of a contract even without any express stipulation, if it appears that such was the intention. *Oldfield* v. *Dickson*, (1889) 18 O. R. 188. Non-performance of one contract does not affect the claimant's rights to a lien under another contract which has been performed, though both relate to the same premises. *Hunter* v. *Walter*, 12 N. Y. Supp. 60, affirmed, (1891) 128 N. Y. 668. A contractor may not show that materials used in construction are preferable to those required by the contract. *Shultze* v. *Goodstein*, (1904) 180 N. Y. 248. But much would depend upon the actual facts in the particular case. Although the subsequent acts of the parties to a contract are not admissible as evidence to vary its terms they may prevent one of the parties from insisting upon the strict performance of the original agreement. *Bruner* v. *Moore*, (1904) 1 Ch. 305. Under a contract to execute certain work, where there was a wrongful seizure of the work by the defendants, the plaintiff was held entitled to determine the contract. *Lodder* v. *Slowey*, (1904) A. C. 442.

If under a contract which makes the right of the contractors to receive payment dependent upon the certificate of an engineer who is also the sole arbitrator of all disputes, the engineer unjustifiably delays the issue of the certificate and acts in a shifting and vacillating, though not fraudulent manner, and probably causes heavy loss to the contractors by mistakes, the certificate cannot be set aside in the absence of collusion. *Walkley et al.* v. *City of Victoria*, (1900) 7 B. C. R. 481. An architect, in such cases, occupies the position of an arbitrator, and is therefore not liable to an action by the owner for negligence in the exercise of such functions. *Chambers* v. *Goldthorpe*, 70 L. J. K. B. 482, (1901) 1 K. B. 624. Possible bias does not disqualify an engineer whose certificate is required under the contract. *Farquhar* v. *City of Hamilton*, (1892) 20 O. A. R. 86. As to power of architect, under special agreement,

to dismiss contractor or any workman, see *Smith* v. *Gordon*, (1880) 30 U. C. C. P. 553.

Under a contract which empowers an owner to take possession and complete the work when the work is not being proceeded with at a rate to ensure its completion by a stipulated date, an owner is not bound to exercise his right as soon as he has reason to suspect that the work will not be completed at the date mentioned, but without waiving his right may delay action until the fact becomes established beyond all doubt. *Milliken* v. *City of Halifax*, (1889) 21 N. S. R. 418.

Where under a building contract work was to be completed by "Nov. 31st" under penalty of damages, this date was construed to mean Nov. 30th. *M'Bean* v. *Kinnear*, (1892) 23 O. R. 313. As to the rights of parties where in a contract between a builder and an owner a date was fixed for the completion of the building and delay occurred by default of sub-contractors,—see *Mitchell* v. *Guildford Union*, (1903) 1 L. G. R. 857, 68 J. P. 84. As to the failure to complete building contract and faulty construction of the work, see *Bender* v. *Carrier*, (1877) 15 Can. S. C. R. 19.

If the contract provides for the certificate of an architect and no architect is appointed the provision is inoperative, *Degagne* v. *Chave*, (1895) 2 Terr. L. R. 210. Where a building contract stipulates that the architect's certificate shall be conclusive evidence of the builder's right to final judgment, and the certificate is produced and not impeached, there is no ground for refusing enforcement of the lien. *Snaith* v. *Smith*, 25 N. Y. Supp. 513. As to final and conclusive character of architect's certificate, see *Brown* v. *Bannatyne School Section*, (1912) 22 Man. L. R. 260; *Hamilton* v. *Vineberg*, (1912) 4 D. L. R. 827.

If the architect is by the terms of the contract made arbitrator, his decision cannot be dispensed with unless it is withheld unreasonably or in bad faith. *Thomas* v. *Fleury*, 26 N. Y. 26; *Davidson* v. *Provost*, 35 Ill. App. 126. See *Law* v. *City of Toronto*, (1919) 47 O. L. R. 251, as to bias. The written contract controls the specifications. *Grace* v. *Osler*, (1911) 16 W. L. R. 627,

19 W. L. R. 109, 326 (Man.). *Caldwell* v. *Schmulbach*, 175 Fed. 429. The plaintiff, a builder, contracted to erect a building in Vancouver for the defendants, the contract providing that no extras would be allowed unless their value was agreed upon and endorsed on the contract. On the instructions of S. who intended to occupy the building for the purpose of a bottling company of which he was a member the plaintiff made alterations and additions, but no endorsement was made on the contract. It was held that such endorsement was a condition precedent to plaintiff's right to recover. *McKinnon* v. *Pabst Brewing Co.*, (1900) 8 B. C. R. 265. See also *Wood* v. *Stringer*, (1890) 20 O. R. 148.

If the contractor is dismissed and the owner verbally employs a sub-contractor to finish the building, this new contract need not be in writing, and the sub-contractor, after the new contract, is entitled to a mechanics' lien as contractor. The conditions of such old contract would not be applicable to the new contract, and the non-production of an architect's certificate required by the contract of the dismissed contractor as a condition precedent, would not preclude the sub-contractor from recovering under the oral agreement, provided the work was so done as to morally entitle him to such certificate. *Guest* v. *Hunter*, (1882) 3 C. L. T. 33, distinguishing *Bond* v. *Treahey*, (1876) 37 U. C. Q. B. 360; *Petrie* v. *Hunter*, (1882) 2 O. R. 233, 10 O. A. R. 127; *King* v. *Low*, (1901) 3 O. L. R. 234. Where a person by a contract takes upon himself the responsibility that certain events shall take place or pay damages if from any cause he is prevented from carrying out the contract, the fact that the contract becomes impossible of performance does not excuse such party for non-performance of the contract. *Ashmore* v. *Cox*, (1899) 1 Q. B. 436. See *Thorne* v. *Mayor of London*, (1874) L. R. 9 Ex. 163, L. R. 10 Ex. 112.

In *Boyce* v. *Huxtable*, (unreported, Nova Scotia), an action by a contractor against the owner of the property who employed him to make extensive repairs, the defendant sought to set off a payment made by him to a sub-contractor of the plaintiff. It appeared that

the sub-contractor came to the office of the defendant and informed him that the sub-contract had been completed 29 days before this interview, but that he had received no payment from the plaintiff, and intended placing a lien on defendant's property for the amount of his claim, $420. In order to avoid having this lien placed upon his property and thereby injuring his business, defendant notified the plaintiff of his intention to pay this debt, and hearing nothing from plaintiff, the defendant subsequently paid this amount to the sub-contractor. Wallace, Co.J., held that while it is ordinarily no defence or set off in an action of contract that the defendant has paid to a creditor of the plaintiff the amount which defendant owed the plaintiff, yet, in Mechanics' Lien proceedings the owner of the property is not bound to wait and allow his property to be charged with an enforceable lien which might injure his credit, or otherwise embarrass him, but may pay this enforceable claim which the contractor should have paid, and may set off such payment in a suit or lien proceedings instituted by the contractor. Where the debt was justly due by the plaintiff and was enforceable by lien proceedings against the defendant's property, and where the defendant was notified by the lien claimant that he was about to start proceedings against this property, defendant is justified in paying the claim, after notifying plaintiff of his intention to do so, and receiving no reply from the plaintiff. In such an exceptional case it is reasonable to imply a request from the plaintiff to pay this pressing and enforceable debt.

There appears to be no report of any similar Mechanics' Lien case, involving the same question, but a similar request has been implied in cases of a like nature. See *Exall* v. *Partridge*, 8 T. R. 308; *Hale* v. *Huse*, 10 Gray, (Mass.) 99; *Nichols* v. *Bucknam*, 117 Mass. 488; *Hitchcock* v. *Lancto*, (1879) 127 Mass. 514; *Doe* v. *Monson*, 33 Me. 430.

In an action to enforce a lien a contractor joined the architect as a defendant and claimed damages against him for fraudulently withholding a certificate. It was held that the architect should be struck out as defendant. The claim would be good as against

the owner, but as against the architect the plaintiff must pursue his ordinary remedy. *Bagshaw* v. *Johnson,* (1901) 3 O. L. R. 58, followed by Magee, J., in *Dunn* v. *McCallum,* (1907) 14 O. L. R. 249.

Immoral contracts being against public policy as encouraging immorality, courts will not aid in enforcing a mechanics' lien for a contractor who knew that the additions which he made to a property were for the purpose of increasing the defendant's immoral trade. *Miller* v. *Moore,* (1911) 17 W. L. R. 548 (Alta.).

A contractor agreed to erect a house with the exception of the plumbing and certain other work which the owner agreed to do. The contractor, after performing work which entitled him to payment of the first instalment of his contract price, notified the owner that he was unable to complete his contract because the plumbing had not been done, and demanded payment of the first instalment. It was held that the contractor was entitled to treat the owner as having repudiated the contract, and could take the necessary steps to recover for what he had done under it, and also on his part to put an end to it. *Sidney* v. *Morgan,* 16 B. C. R. 18, 16 W. L. R. 123. Where a contract for a heating plant provided that the contractor should do certain work upon or before a certain date and should not be required to do any more work after that date on said job until the payment of $1,000, and the payment of the balance was satisfactorily secured, it was held the terms were sufficient to authorize the allowance of a lien for the $1,000. *Roulet* v. *Hogan,* 203 Ill. 525. It has been held that in the absence of express stipulation the materials of old buildings on the site belong to the contractor. See *Morgan* v. *Steevens,* (1879) 6 Abb. (N.Y.) New Cases, 356.

It is no objection to the claim of a sub-contractor that the principal contractor as a corporation had no power to contract under its charter. *General Fire Extinguisher Co.* v. *Magee Carpet Works,* 199 Pa. 647.

In an important Massachusetts case, *Friedman* v. *County of Hampden,* (1910) 204 Mass. 494, in connection with a claim aris-

ing from construction of public works, certain principles determining the validity of liens under a Mechanics' Lien Act were applied, and it was held that certain charges of a sub-contractor for removal of loam and putting up fence and employment of watchman, in connection with work of excavation and grading, constituted items of the cost of the material and labor which finally went into the building for which he could have a lien under a Mechanics' Lien Act. But a sub-contractor who performed the work of furnishing, putting up and removing radiators for the drying of plaster put in by another sub-contractor had no such lien.

Anyone who contracts directly with the owner, though it be only to furnish materials, is a "contractor." *Jackson* v. *Egan,* (1911) 200 N. Y. 496.

The lien of the materialman is dealt with in a subsequent chapter.

A mechanics' lien is restricted to the value of the labour performed and materials furnished, and any claim for damages for breach of a contract in refusing to allow the contractor to perform the work is not within the provisions of the statute and must be enforced in an ordinary action for damages. *Midtown Contracting Co.* v. *Goldsticker* (1914), 165 N. Y. App. Division 264. On the other hand, damages for delay in performance cannot be set off against a lienholder. *Smith* v. *Bernhardt,* 2 Sask. L. R. 315.

CHAPTER VI.

Liens of Sub-Contractors and Wage-Earners.

A sub-contractor is defined by the Mechanics' Lien Acts, generally, as a person not contracting with or employed directly by the owner or his agent, but contracting with or employed by a contractor, or under him by another sub-contractor.

No privity of contract is necessary between the sub-contractor, the materialman, and the workman on the one hand, and the owner on the other. The statute gives a direct lien to persons who do the work or furnish materials under contract with the contractor, and the owner cannot deprive them of this lien. *Anly* v. *Holy Trinity Church*, (1885) 2 Man. L. R. 248; *McArthur* v. *Dewar*, 3 Man. L. R. 72; *Union* v. *Porter*, 8 W. L. R. 423; 9 W. L. R. 325; *Gorman* v. *Henderson*, (1908) 8 W. L. R. 422 (Alta.); *McAulay* v. *Powell*, (1908) 7 W. L. R. 443 (Alta.); *Miller* v. *Calumet Lumber Co.*, (1903) 111 Ill. App. 651. If a payment in land is to be made to the contractor, the court will secure the sub-contractors' right. *Anderson* v. *Huff*, (1892) 49 N. J. Eq. 349. Where part of the contract price was to be paid in lots the sub-contractors doing the work and proving a lien were held to be entitled to have such lots sold and the proceeds of such sale applied in payment of their claims. *Head* v. *Coffin*, (1910) 13 W. L. R. 663.

While the sub-contractor's lien can exist only upon the basis of the contract between the owner and the original contractor, it is, nevertheless, a direct lien, and is not entirely dependent upon the contractor's lien, which may, however, affect its extent.

Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payments to the contractor as the work progresses, to the extent of the value of work done, a sub-contractor who has not been paid is entitled, as against the owner, to a lien for the amount due him,

to the extent of twenty per cent. of such payments. *Russell* v. *French*, 28 O. R. 215; *Carroll* v. *McVicar*, (1905) 15 Man. L. R. 379, 2 W. L. R. 25. In the latter case the plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the statutory time, but it was held that in such circumstances a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient.

The lien of a contractor or sub-contractor attaches when he has completed his contract, or, if the contract provides for interim payments on account, a lien attaches when each payment becomes due to the extent of the amount thereof. Where a sub-contractor undertakes to do a certain work and supply materials for a lump sum, without any stipulation as to payment before completion, his lien attaches only on completion of his work, and if there be no money then due from the owner to the contractor, the sub-contractor's lien fails. *Brader* v. *Brown*, (1917) 24 B. C. R. 374; *Fuller* v. *Turner and Beech*, (1913) 18 B. C. R. 69. There is a provision in the Acts of Alberta, British Columbia and Saskatchewan declaring that save as in the Act set out, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. It was formerly held by the Supreme Court of Alberta that when the lien attached by the furnishing of material or the doing of work, the amount at that time unpaid, which then, or later, the owner might legally be required to pay, is the limit of the amount for which the lien-holder may have recourse against the owner, but that, so far as that amount is concerned and to the extent of the sum owing to the lien-holder, no subsequent payment to the contractor will relieve the owner. *Ross Bros.* v. *Gorman*, (1908) Alta L. R. 516. *Travis* v. *Breckenridge Land, Lumber & Coal Co.*, (1910) 43 Can. S. C. R. 59. See note relating to this case, 9 D. L. R. 110, which note states that this case in no way overrules or weakens

the authority of the other cases cited, as the lien was disallowed by the Supreme Court of Canada on the express finding that there was no "sum owing and payable to the contractor by the owner at the time when delivery of the materials was made by the plaintiffs." The Court of Appeal in British Columbia, however, in the case of *Fuller* v. *Turner*, (1913) 18 B. C. R. 69, and *LePage McKenney & Co.* v. *Pinner & McLellan*, (1915) 21 B. C. R. 81, have not followed the earlier British Columbia and Alberta cases. In *Fuller* v. *Turner*, B. contracted to build a house for T. A lien claimant, F., was a sub-contractor for the plastering. The contracts included both labor and material and were for lump sums. B.'s contract was for $8,500, and after payment of $6,100, T. under a provision in the contract took it over from B., who had assigned for the benefit of his creditors, and completed it at a cost of more than $2,400. At the time the contract was taken over, B. had almost completed his contract, and it was held that as there was no amount due T. to B. when he took over the contract, the limitation in section 8 of the Act applied and the lien failed.

The rights of sub-contractors and materialmen are measured by the amount "justly due" by the owner to the contractor, and the owner is not liable to these claimants for a greater sum than is payable to the contractor. *Smith* v. *Bernhart*, (1909) 11 W. L. R. 623 (Sask.). If, for instance, at the time of the abandonment by a contractor of his building contract there is by the terms of it nothing payable to him by the owner, a sub-contractor, whether for work or materials, can have no lien upon the property for money due him by the contractor. *Wilks* v. *Ledue*, (1917) 27 Man. L. R. 79, 30 D. L. R. 792, 35 W. L. R. 4. The onus of proof is on the owner to show that nothing is due to the contractor. *Brown* v. *Allan*, (1913) 25 W. L. R. 128.

A mechanic's lien filed by a sub-contractor is not to attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor; consequently, if the latter's contract with the owner does not entitle him to a further payment until completion, the lien of the sub-contractor who has completed

his sub-contract cannot be made effective until completion of the entire work of the principal contractor, but the Court may, on the trial of the lien action, direct that such lien shall remain in force, so that it may attach in respect of further sums that may thereafter become due by the owner to the principal contractor, reserving leave to the owner to apply to discharge the lien. *Colling* v. *Stimson & Buckley*, (1913) 10 D. L. R. 597 (Alta.). A sub-contractor completing a building, where the contractor had been dismissed, is entitled to a lien as contractor, and not as sub-contractor, and his contract being a new one, the conditions of the old contract would not be applicable. *Guest* v. *Hunter*, (1882) 3 C. L. T. 33; *Petrie* v. *Hunter*, (1882) 2 O. R. 233, 10 O. A. R. 127. See *Smith* v. *Lange*, 91 App. Div. (N.Y.) 192; *Moore* v. *Duggan*, (1901) 179 Mass. 153.

As has been already stated, the rights of lien-holders are measured by the amount "justly owing" by the owner to the contractor, and where an agreement provides payment by instalments with the right to retain an amount as a drawback on the completion of the work, the lien accrues for the full amount of any instalment payable, subject to the owner's right of deduction in the event of the non-completion of the whole contract. *Deldo* v. *Gough-Sellers Investments, Ltd.*, (1915) 25 D. L. R. 602. A sub-contractor cannot acquire a lien on a claim for damages. *Mayer* v. *Mutchler*, 50 N. J. L. 162; and on the other hand, damages for delay in the contractor's performance cannot be set off against a sub-contractor. *Bernhardt* v. *Fry*, (1909) 2 Sask. L. R. 315.

The provision requiring the owner to create a fund by deducting twenty per cent. from any payment to be made by him in respect of a contract entitles a sub-contractor to a lien on the statutory percentage in priority to any right of set off the owner may have by reason of the default of the contractor in the performance of his contract.

To establish a lien a sub-contractor must shew a substantial performance of his contract with the contractor unless such performance is waived or prevented by the contractor or owner. A

sub-contractor is not bound to a strict compliance with the terms of the principal contract. *Mallett* v. *Kovar*, (1910) 14 W. L. R. 327 (Alta.). But where the original contract contains a clause requiring production of an architect's certificate before payment becomes due, the sub-contractor is not required to show that this term of the contractor's contract has been complied with. *Lundy* v. *Henderson*, (1908) 9 W. L. R. 327. In an action by a sub-contractor to enforce his lien, the contractor and any sub-contractor through whom the plaintiff claims must be made parties to the action as well as the owner. *Dunn* v. *Holbrook*, (1900) 7 B. C. R. 503. In connection with work done for defendant bank, sub-contractors supplied work and material to D. and G., other sub-contractors, who failed to pay them, and a lien was registered on the property of defendant bank. D. and G. had been already paid in full by the contractor with the bank, but the bank held money due the contractor on the contract. It was held that the funds due the contractor in the hands of the bank were liable. *Wood & McBeth* v. *Bank of Montreal*, (1901) 40 N. S. R. 317. In England, where there is no mechanics' lien legislation, a recent case arose where an unsuccessful claim was made by a sub-contractor of a lien on the whole of moneys payable by a building owner to the head contractor for the amount of his debt. See *Pritchett Co.* v. *Currie*, (1916) 2 Ch. 515.

Where the amount required to complete the work over and above the contract price far exceeds the amount retained the lien-holders, other than wage-earners, have no claim upon the amount. *Peart* v. *Phillips*, (1915) 31 W. L. R. 956 (Sask.); *Travis* v. *Breckenridge*, 43 Can. S. C. R. 59, as summarized in *Peart* v. *Phillips*, *supra*. In England, under ordinary contract law, a sub-contractor was held to be entitled to sue the building owner where the sub-contractor was a specialist for the supply of door handles and door fittings, as, in the circumstances, the fact that the goods supplied had been used by the builders raised an implied promise by them to pay for the goods. *Ramsden* v. *Chessum*, (1914) 110 L.

T. 274. Where a contract with the owner is sufficient to create a mechanic's lien, it may well be implied that the owner, through the agency of the contractor, assents to the sub-contractor's lien by the employment of labour and procuring materials to carry out the contract.

Payments made by the owner to the contractor after the lien-holders' claim has attached, of moneys not due according to the contract, should not be protected as payments made *bona fide* without notice. *Ringland* v. *Edwards*, (1911) 19 W. L. R. 219. Where sub-contractors claimed a lien as against the owner for work done under the contractor, and it appeared that these sub-contractors had by giving the contractor receipts for money which he had received from the owners to pay these sub-contractors, and had not paid them, led the owner to believe that they had been paid, and he thereupon made other payments to the contractor in excess of the work which he did or procured to be done upon the building and the owner completed the building when the contractor abandoned it, it was held that these sub-contractors were not entitled to enforce a lien against the owner's land, though they had not been paid in full.

Where a contractor for a building abandons his contract without paying a sub-contractor, and the owner of the property, solely with the object of procuring the completion of the building, promises the sub-contractor that in consideration of such completion, he will pay him the debt due from the contractor as well as for the finishing work, such contract can be enforced even if it be oral. *Conrad* v. *Kaplau*, 24 Man. L. R. 368.

The Statutory Percentage.

Statutory provisions dealing with a fund to be created by the owner, out of which persons claiming a lien under a contract not made directly with the owner may be paid, have been introduced into Mechanics' Lien Acts in Canada, for the protection of sub-contractors and others. By these provisions a lien is given to sub-contractors and labourers independent of the primary contract.

This fund is to be created by the owner deducting a specific statutory percentage from any payments to be made by him in respect of the contract. The Act requires the owner to retain this percentage for the benefit of others who are putting their labour and materials into his building.

This statutory fund arises from and consists of sums deducted from "payments to be made." It cannot exist unless there are payments made or to be made from which the deductions are made which constitute the fund to be charged. The charge is not upon money to become payable, but upon money which has actually become payable, a payment which is to be made and is directed to be retained. *Rice Lewis & Son, Ltd.* v. *Harvey,* (1913) 9 D. L. R. per Magee, J.A., at p. 123. So far as the claims of sub-contractors and materialmen upon this statutory fund are concerned, in cases where by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had and their lien fails because for them, no fund came into existence. *Russell* v. *French,* 28 O. R. 215; *Farrell* v. *Gallagher,* (1911) 23 O. L. R. 130.

The owner is required to retain the statutory percentage whether he has notice of the sub-contract or not, and he pays it to the contractor at his own peril, if there be a sub-contractor in existence who is prejudiced by the payment. *Dominion Radiation Co.* v. *Cann,* (1904) 37 N. S. R. 327.

The property owner is entitled under the Mechanics' Lien Act in Ontario and several other Provinces of Canada, to deduct from the sums for which he is liable to his contractor on progress certificates while the work is going on, twenty per cent. thereof (or fifteen per cent. where the contract price exceeds $15,000) for the protection of persons entitled to liens as sub-contractors; and the owner is not entitled as against the sub-contractor to apply such percentage to answer the cost of completing the work on the contractor's default. *Rice Lewis & Son, Ltd.* v. *Harvey et al.,* (1913) 9 D. L. R. 114.

The fact that the owner did not retain from his contract any of the percentage of the value of the work as required by the Mechanics' Lien Act (Ont.) for the protection of sub-contractors and wage-earners, does not make him liable for sub-contractors' claims as to which no lien was filed or notice of claim given the owner until after the expiry of thirty days following the abandonment of the work by the principal contractor, the statutory obligation to retain the percentage being limited to thirty days after completion or abandonment of the contract with the owner. *Brooks* v. *Mundy*, (1914) 16 D. L. R. 119.

The provision requiring the owner to create a fund by deducting a specific percentage from any payment to be made by him in respect of his contract entitles a sub-contractor to a lien on the statutory percentage in priority to any right of set off the owner may have against the contractor by reason of his default in the performance of his contract. The statute gives a statutory right in this fund to the sub-contractor, and no subsequent accruing rights of the owner can prejudice or affect that statutory right. The statutory amount of payment which the owner may retain by virtue of section 11 (i) of the Mechanics' Lien Act R. S. Sask. c. 150, forms a fund available for the lien holders only, to which the owners cannot resort as security against or to make good any loss occasioned by the non-completion of the contract. *Peart Bros. Hardware Co.* v. *Battell*, 23 D. L. R. 193 (1913); 9 S. L. R. 305.

With the exception of the special provision in the case of wage earners, the Mechanics' Lien Act does not make the owner liable for any greater sum than he has contracted to pay. If there be no contract to pay except on completion of the work by the contractor, and the contractor does not fulfil his contract to the extent required by the modern interpretation of the rule as to entire contracts, nothing is payable. See *H. Dakin & Co.* v. *Lee*, (1916) 1 K. B. 566. But where the case can be brought within this modern interpretation of the rule as to entire contracts, and upon the taking of accounts upon the footing there recognized there is a bal-

ance due the contractor, the owner must retain the statutory percentage of this sum for the protection of possible lien holders. *Burton* v. *Hookwith*, (1919) 48 D. L. R. 339.

The special provision for priority of wage-earners whereby it is declared that as against wage-earners the percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default, nor to the payment of damages for non-completion does not affect the other provisions of the Act regarding Mechanics' Liens generally; and it is not to be implied from such prohibition that the owner may in cases other than for wages so apply the statutory percentage towards the cost of completion as against the liens of sub-contractors or materialmen in the event of the contractor's default. *Rice Lewis & Son, Ltd.* v. *Harvey*, (1913) 9 D. L. R. 114.

When the statutory fund comes into existence, the property owner is, as regards lien-holders holding claims against the principal contractor, a trustee of the twenty per cent. of payments which become due to the latter under the contract during the progress of the work; and the owner will be liable for such percentage so far as may be required to satisfy the unpaid lien claims, although by his contract he was to pay and did pay the contractor only 80 per cent. of the value of the work as certified by progress certificates of the architect, where the contractor afterwards abandoned the work and the 20 per cent. retained of the value so certified by the architect was insufficient to pay the cost of completing the contract. *Rice Lewis & Son, Ltd.* v. *Harvey et al.*, (1913) 9 D. L. R. 114. As to the percentage fund protecting sub-contractors, see Annotation, 16 D. L. R. 121.

The provision requiring the owner to deduct 20 per cent. from any payment to be made by him in respect of the contract, when applied to a contract providing for payment of 80 per cent. of the progress certificates, makes it necessary for him to deduct 20 per cent of the 80 per cent. The amount so deducted forms a fund

for the lien-holders and thereafter it is available for them only, and not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract. *Peart* v. *Phillips* (1915) 31 W. L. R. 956 (Sask.).

The obligation of the owner to retain a statutory percentage of the value of the work and materials is limited to the period of thirty days after the completion or abandonment of the contract by the contractor with whom the owner has contracted, and where such contractor had abandoned the work uncompleted and the owner had to pay more than the balance of the contract price to finish it, a sub-contractor filing his claim more than thirty days after the principal contractor's abandonment, although within thirty days of his own last work on the building, has no lien, if nothing then remained due the principal contractor. *Brooks* v. *Mundy*, (1914) 16 D. L. R. 119 (Ont.). In Manitoba it has been decided that under a Mechanics' Lien Act enabling claims for liens by contractors or sub-contractors to be registered within thirty days after the completion of "the contract," a sub-contractor is to register his lien within thirty days after the completion of his contract with the principal or superior contractor. *Merrick* v. *Campbell*, (1914) 17 D. L. R. 415.

Lien of the Wage-Earner.

The provisions in the Mechanics' Lien Acts in the various Provinces of Canada, aiming to protect the claims of workmen, are substantially alike. In some of these Acts special clauses have been introduced declaring that as against wage-earners the statutory percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default nor to the payment of damages for non-completion. These clauses, indeed, may be sufficiently broad to afford protection also to sub-contractors under similar conditions. *Rice Lewis & Son, Ltd.* v. *Harvey*, (1913) 9 D. L. R. 114. But the primary purpose of the legislation is to safeguard the

claims of the wage-earners, and, therefore, provisions dealing with the liens of wage-earners are given a liberal construction. A workman is entitled to a lien upon the part of a sewer, extending below water mark into the ocean, upon which he worked. *Baker* v. *Uplands*, (1913) 24 W. L. R. 768 (B.C.).

On the other hand statutory requirements cannot be entirely ignored and although a workman under a contract engaged in the repair of a building for the owner is entitled to a lien on the building for his unpaid wages to the extent of the twenty per cent. of the payments made that the owner should have held back from the contractor, *Carrol* v. *McVicar*, (1905) 15 Man. L. R. 379, yet a workman cannot avail himself of a personal remedy given by a special provision contained in some of the Acts against the proprietor for the full amount of his claim, in cases where a pay list is not kept and the proprietor neglects to see that the workmen are paid. *Phelan* v. *Franklin*, 15 Man. L. R. 520. A workman at a rate per hour is not a workman employed "by the day." *Dunn* v. *Sedziak*, 17 Man. L. R. 484, 7 W. L. R. 56

The lien of the wage-earner being created by the statute is, of course, limited by the special provisions creating it and determining its scope and extent. It may be entirely dependent upon the nature of the work done or the material furnished by the employer of the wage-earner, and the relation that work or material bears to the property ultimately benefited by such work or materials. This question is dealt with in the next chapter, "The Lien of the Materialman." In every case the wording of the particular enactment must govern. A section in one Act gave a lien to whoever labors . . . in erecting . . . any building thereon by virtue of a contract with or by the consent of the owner has a lien thereon. A person contracted to furnish completed articles, like cut and fitted stones for a building to be erected, and was to have no part in the erection of the building, and it was held that, under this Act, his employees had no lien on the building for their labor in preparing and completing the articles. *Monroe* v. *Clark*, (1910) 107 Me. 134.

A workman for the materialman is not entitled to a lien. *Allen* v. *Harrison*, 9 W. L. R. 198. As to the status of workmen for a sub-contractor, see *McDonald* v. *Dominion Iron & Steel Co.*, 40 N. S. R. 465. Where a materialman contracts to deliver material in a manufactured form, the contract is for materials only, and a lien cannot be had for labor performed in manufacturing the materials as a claim for labor. *Tracey* v. *Wetherell*, (1896) 165 Mass. 113. The employees of one who contracts to furnish completed articles for a building, where their employer is to have no part in the erection of the building can have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed in the erection of the building. See *Webster* v. *Real Estate Improvement Co.*, (1886) 140 Mass. 526.

In the case of a contract not finished and abandoned by the contractor, the method of computation in ascertaining the amount upon which the percentage provided by the Ontario and similar Mechanics Liens Acts is payable to wage-earners, is that the value of the work done and materials furnished is to be calculated upon the basis of the price to be paid for the whole contract. *Cole* v. *Pearson*, (1908) 17 O. L. R. 46. See *Farrell* v. *Gallagher*, (1911) 18 O. W. R. 446; 23 O. L. R. 130.

Although at the time of the abandonment by a contractor of his building contract there is, by the terms of it, nothing payable to him by the owner, a wage-earner may, nevertheless, have a lien upon the percentage held back by the owner, and a right to preferential payment. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72.

See next chapter, "The Lien of the Materialman."

CHAPTER VII.

The Lien of the Materialman.

The main purpose of a Mechanics' Lien Act usually is to secure a priority or preference to those who add value to specific realty by their labor or by material furnished. If the Act itself does not create a lien for material no such lien exists. The word "materials" includes every kind of movable property.

The claimant must bring himself wholly within the terms of the statute giving the right to a lien. For instance, in accordance with the wording of the Ontario, Manitoba, and similar Mechanics' Lien Acts, it is not enough that the materials are furnished to be used upon or in the building,—the lien attaches only in virtue of materials furnished to be used in the making, constructing, erecting, fitting, altering, improving, or repairing the erection or building, and the significance of the term "furnishes any material to be used" is that unless the material is furnished by the materialman for the purpose of being used in the building or other work, or on the land on which the structure is situated, it cannot be the subject of a lien, even though used. *Brooks-Sanford Co.* v. *Theodore Telier Cons. Co.*, (1910) 22 O. L. R. 176; *Sprague* v. *Besant*, (1885) 3 Man. L. R. 519.

Material furnished for the construction of a house on a specified lot cannot be the basis of a lien if used in building a house on another lot, (*Bennet* v. *Shackford*, 11 Allen (Mass.) 444; *Bohem* v. *Seabury*, 141 Penn. 594, *Burns* v. *Lane*, 23 Ill. App. 504), but Mechanics' Lien Acts in Canada include work done upon the appurtenances to the building, and the terms of these Acts are so broad that it would probably be held that a lien would attach to the building and the land enjoyed therewith for the construction of a sidewalk in the street adjoining the lot, where such sidewalk would be necessary for the use of the premises. See *Kenny* v.

Afgar, (1883) 93 N.Y. 539; *Moran* v. *Chase*, (1873) 52 N.Y. 346. A materialman is not entitled to register as one individual claim, a lien for the amount due for materials supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts, with the contractor for the erection of houses on their respective parcels; nor do the owners have such interest in one another's land as "owners" so as to charge the other's land for materials furnished at the owner's request or for his benefit. *Security Lumber Co.* v. *Plested*, (1916) 27 D. L. R. 441; *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249.

To create a lien on the property of the owner in favor of the materialman, there must be a request of the owner and a supplying of the materials in pursuance thereof, either upon the owner's credit or on his behalf, or with his privity or consent, or for his direct benefit. *Slattery* v. *Lillis*, (1905) 10 O. L. R: 697.

Del credere agents supplying materials have such an interest in the goods as entitles them to a mechanics' lien as materialmen, and one claim of lien can be filed in respect of all goods supplied though from different principals. *Gorman* v. *Archibald*, 1 Alta. L. R. 524; *Currier* v. *Friedrich*, (1875) 22 Gr. 243. A foreign unregistered company may file and be entitled to a lien for materials. *Wortman* v. *Frid-Lewis Co.*, (1915) 33 W. L. R. 119 (Alta.).

The building for which the materials are to be used should be identified with reasonable sufficiency, but in Manitoba it has been held that a materialman is not bound to show that his materials were used in the building; delivery upon the ground for the purpose of being used is sufficient. *McArthur* v. *Dewar*, (1885) 3 Man. L. R. 72, provided, however, that they were supplied for the purpose of being used in the particular building for which the lien is claimed, or in the construction of any one of several buildings for which the materials were supplied. An order for goods followed by the statement: "We have secured contract for hotel which requires above goods," was held sufficient identification of

the building to give the person who furnished the goods a lien. *Dominion Radiator Co.* v. *Cann*, (1904) 37 N. S. R. 237. In Ontario it has been held sufficient that the material be furnished on the credit of the building for use therein, it being immaterial as between owner and furnisher whether the material is used or not (*Larkin* v. *Larkin*, 32 O. R. 80), although where articles are furnished to a contractor for an experimental purpose, and are not incorporated in the building, the furnisher is not entitled to a lien. *Brooks-Sanford Co.* v. *Theodore Telier Co.*, (1910) 22 O. L. R. 176. Where no statutory definition is given, the scope of the word "material" is fully discussed in *Troy Public Works* v. *City of Yonkers*, (1911) 145 App. Div. (N.Y.) 527. *Sprague* v. *Besant*, (1885) 3 Man. L. R. 519. Some American and Canadian courts hold that there must be an understanding that the materials furnished are for a building, though the particular building need not be designated or described. See *Polson* v. *Thomson*, (1916) 29 D. L. R. 399.

Some of the Acts might imply that to give a lien to the person furnishing the material he must have supplied it for the purpose of being used in the particular building upon which he claims to have the lien. But a reasonable construction of such Acts would justify the view that where material is sold for the particular purpose of being used in the construction of certain houses and was delivered on any part of the land to be covered by these houses or to be enjoyed therewith, the statutory lien for materials so supplied arises without the necessity of showing that the material was actually used in the erection of a particular building. *Sprague* v. *Besant*, (1885) 3 Man. L. R. 519; *Rittenhouse & Embree Co.* v. *Brown*, (1912) 254 Ill. 549. It would seem unreasonable to so construe the Act as to deprive a materialman of a lien who furnishes material to be used in the erection of several buildings, unless he can shew in relation to the building against which he seeks to enforce his lien that the particular materials in that building were furnished by him for that one particular building. *Polson* v. *Thomson*, (1916) 29 D. L. R. 395, 399.

In this case Cameron, J.A., says,—"I do not gather that it was intended to be laid down in *Sprague* v. *Besant* that a materialman furnishing materials to be used in the erection of several buildings could not have a lien against any one of them unless he could shew that the particular materials in that building were furnished for that one particular building."

As the lien does not in any event, commence until the supplier "places or furnishes" the materials, no lien is created for materials to be supplied under contract not to the owner, but to a contractor, by a sub-contractor, until the materials have reached the owner's property. *Kalbfleisch* v. *Harley*, (1915) 34 O. L. R. 268; *Ludlam-Ainslee Lumber Co.* v. *Fallis*, (1908) 19 O. L. R. 419. *Smith Co.* v. *Sissiboo Pulp & Paper Co.*, (1903) 36 N. S. R. 348; affirmed, (1904) 35 S. C. R. 93.

In considering more fully a materialman's right to a lien an important distinction should be noted between his rights where he furnishes materials to contractors and, on the other hand, where he furnishes materials to an owner for use in or upon a building. It is right that the owner's land should be subject to a lien for materials furnished him to be used in the erection or improvement of the building whether these materials are actually used or not, and it is also right that his land should be subject to a lien for materials furnished to a contractor or sub-contractor to be used in the erection or improvement of a building, when these materials are actually used, and when the lien is limited in the amount to the sum justly owing by the owner to the contractor, but it would not be just to give the person furnishing materials which were not incorporated in the building, or placed upon the land to be affected, so as to increase, at least in contemplation of law, the value of the land, a right to payment out of the property of others which had increased the value of the realty, or a right against an owner who had not bought these materials, and whose land was not even indirectly benefited by them. Accordingly, in an Ontario case (*Brooks-Sanford Co.* v. *Theodore Telier Construction Co.*, (1910)

22 O. L. R. 176), it has been held that a person furnishing articles to a contractor for an experimental use in regard to the work on the building is not entitled to a mechanics' lien for such articles where they are not incorporated in the building, and that a person who sells tools to a contractor for use on a building has no lien against the property for such articles. In a previous Ontario case (*Larkin* v. *Larkin*, (1900) 32 O. R. 80), it had been decided that under certain circumstances a lien might be claimed for materials furnished which were not incorporated in the building, but the later case has sometimes been relied upon as deciding that to entitle the materialman to a lien the materials must have been used in construction of the building. The basis of that decision, however, was that articles intended to be used only for the purpose of making an experiment, and not intended for use in the building, would not be within the statute as materials furnished to be used in the construction of the building.

It has been held in Saskatchewan and in Maine that it is not necessary in order to entitle a materialman to a lien to show that the materials were actually used upon the building, the test question being whether the materials were furnished with the intent and expectation that they were going into the building. *Montjoy* v. *Heward School District Corporation*, 10 W. L. R. 282; *Mehan* v. *Thompson*, 71 Me. 492; see also Mc*Arthur* v. *Dewar*, 3 Man. L. R. 72, where, however, the question is only touched upon, although the decision holds that the materialman need not shew that the material entered into the building. There are conflicting decisions in the American courts. See 19 Am. & Eng. Ann. Cas. 588; *Witham* v. *Wing*, (1912) 108 Me. 364.

The weight of American opinion would seem to favor the view that a sub-contractor is not entitled to a lien for materials sold to a contractor where the materials are not actually placed in the building or upon the land upon which the contractor is erecting the building. But according to some American decisions a materialman must ordinarily show that his materials were furnished for and were actually used in the erection of the building

against which the lien is claimed. *Potter Mfg. Co.* v. *Meyer*, (1909) 171 Ind. 513. A reason suggested for such a view is that to give a lien for all the material sold for the purpose of going into the building, irrespective of the actual use of it for that purpose, might have the effect of creating a lien to the full value of the building, and the land on which it stands, in favor of parties whose property did not in fact go into the building, and thus the persons who had in fact erected the building would be deprived of any advantage from the liens given them. See *Chapin* v. *Persse*, 30 Conn. 472. But in the Mechanics' Lien Acts in Canada there is a clause which limits the owner's responsibility to the amount payable to his contractor. It would seem that the view that the materials must be actually incorporated in the building to establish the lien must lead to confusion and frequent injustice in respect of the claims of materialmen. At all events, under the Mechanics' Lien Acts in Canada, it is not essential to the enforcement of the lien that the material placed on the land shall be actually used in the building.

The seeming conflict in the decisions on this question is often traceable to the varying statutory provisions. The precise phraseology of the provisions creating the lien for materials must determine the question whether the actual use of the materials is essential to the lien. Where the lien is given by the statute for the construction or improvement of a building or "for, or in the erection of a building," the actual use of the articles furnished is not essential to the lien of the materialman, but where the lien is given for furnishing materials "used" or "to be used" in a building or in an "improvement" the weight of recent American opinion seems inclined to the view that the use of the materials is a prerequisite to the enforcement of the lien. *Pittsburg Plate Glass Co.* v. *Leary*, 31 L. R. A. 746; see particularly cases cited at page 758. The realty will be liable to a lien if it is the fault of the owner that the materials were not used. *Salem* v. *Lane & Bodley Co.*, 189 Ill. 593; *Morris County Bank* v. *Rockaway Mfg. Co.*, 14 N. J. Eq. 189.

When materials are furnished to be used upon the land and are placed upon the land they may be considered for the purposes of a lien as if they were incorporated in the structure in course of erection. The lien for materials so "placed" commences when the materials are placed, but, as against an owner, such a lien cannot arise until the materials have reached his property. *Smith Co.* v. *The Sissiboo Pulp & Paper Co.*, (1903) 36 N. S. R. 348, 35 Can. S. C. R. 93; *Kalbfleish* v. *Hurley*, (1915) 34 O. L. R. 268, 25 D. L. R. 469.

Recent decisions in Canada have placed the law on this question on a satisfactory and just basis, and it is plain from these decisions that if the material be delivered for the purpose of being used in the building and is placed upon the land in question, it is within the statute, and its actual use in the construction of the building is not essential to the creation and enforcement of the lien. It is not the actual use of the material in the building that gives the furnisher a lien, but the furnishing under a contract for that use, and the placing of the material on the land.

The lien of the materialman is upon the land and structure which it is intended to benefit. In the case of materials supplied the lien is given, by the words generally used in the Mechanics' Lien Acts in Canada, upon the land "upon which such materials are placed or furnished." Where these quoted words, or similar words, are used the general statutory lien upon the land, and the special one in the nature of a vendor's lien upon the material itself, depend upon the placing of the material in question upon the land to be affected. Proximity to the land is not enough; the material must be on it, so that in fact or in contemplation of law the value of the land itself is enhanced by its presence. *Milton Pressed Brick Co.* v. *Whalley*, (1918) 42 D. L. R. 394; *Kalbfleish* v. *Hurley*, (1915) 34 O. L. R. 268; 25 D. L. R. 469; *Ludiam-Ainslee Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 419. In *Brookfield* v. *Hopgood*, (1919) unreported, where materials for use in repairing a shop were placed on an adjacent street, it being impracticable to place the materials on the sidewalk or within the

building, Wallace, Co.J., decided that to have a lien arise in respect of materials furnished for use in a building, the materials must be placed on the land, and that the word "upon" in the section of the Nova Scotia Act, which section is similar to section 6 of the Ontario Act, could not be strained to mean "adjacent to" or "near" the land, so as to give a lien upon land in a case where materials were not placed on the land but were left in the adjacent street, and did not come under the control of the "owner." There would seem to be an obvious line of demarcation between materials which are merely appropriated to a contract by the parties thereto or are delivered to the "owner" or contractor, but do not reach the land to be affected, and on the other hand, materials which are actually placed upon the land to be charged.

There are some decisions in conflict with this view. In a case in Alberta, *Canadian Equipment Co.* v. *Bell*, (1913) 11 D. L. R. 820, where the materials were not placed on the lands to be affected because there was no room thereon, but they were delivered on ground in the immediate vicinity thereof, Scott, J., decided that that delivery was, in effect, a delivery upon the land in question. In a later case, in the same Province (*Trussed Concrete Steel Co.* v. *Taylor Engineering Co.*, (1919) 46 D. L. R. 663), the material was brought upon the land adjoining, which had been acquired by one of the defendants expressly for the storage of the materials intended for use in the building. It was contended that the claimant was not within the provision of the Act which only applied "when any material is brought upon any land to be used in connection with such land." Walsh, J., followed the decision of Scott, J., in the earlier case. The wording of the Alberta section is not identical with the Ontario or Nova Scotia enactments, but in any event, it is obvious that in the decisions of the Ontario and Nova Scotia courts the principles of construction applied to this provision of the Act differ from those applied by the Alberta Courts.

In a recent decision of the Appellate Division of the Ontario Supreme Court, Hodgins, J.A., referred to the difficulties in the way of any other method of establishing a lien than the appli-

cation of the doctrine that the materials must be placed upon the land in order to establish the lien. "If a contractor for half a dozen different houses buys steel or concrete by wholesale and stores it in the yard, it is in one sense delivered to be used in certain buildings. A car of lumber for a particular building may be bought in Buffalo f.o.b. there. It is intended to use it in a building and on certain land. Yet it would be impossible to give the wholesaler or the lumber merchant a lien upon the land merely because there was in his mind and that of the contractor an intention to devote the material in whole or in part to the erection of a building or buildings upon certain specified land." *Milton Pressed Brick Co.* v. *Whalley*, (1918) 42 D. L. R. 39[illegible]

The weight of authority tends to show that before a lien for materials can arise the materials must be furnished and placed upon the land upon which the lien is claimed. Where material is furnished the lien in respect thereof is limited to such material as is placed upon the land to which the lien attaches. In an Ontario case (*Ludlam-Ainslee Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 425) Clute, J., after dwelling upon the significance of section 16 of the Ontario Act, whereby it is in effect provided that the lien having attached to the land because of the material furnished and being upon the land, the creditors of the person who furnishes the same have no right to pursue the property there to satisfy their claims, points out that a great mischief would follow a construction of the Act which would give to a materialman a lien as soon as he delivers the material to the contractor, no matter whether it be placed upon the land or not. If the lien attaches to the land as soon as the delivery takes place by the sub-contractor to his contractor, it would follow that what would practically be a mortgage upon land might be created by goods being delivered to the contractor at a distance, or even in a foreign country. It seems absurd to say that there can be a lien upon land where the material for which the lien is created has never become incorporated with the land or been placed thereon.

A distinction should be noted between the question whether there can be a lien for materials furnished but never used, and the question whether materials furnished and consumed in the process of the work but not entering into and becoming part of the structure are "materials" within Mechanics' Lien Acts. Whatever difference of opinion may exist as to the former class of cases, the prevailing view is that in the latter class of cases the materialman is entitled to a lien, as such materials are used up in the performance of the work on the structure and survive in tangible results in the building itself. The distinction is clearly expressed in a New York case:—

"The argument that dynamite is not a material but a part of the contractor's plant which like picks or shovels or mechanical appliances are used in the performance of work but are not considered materials furnished, within the purview of the statute, seems to us inherently unsound. A steam shovel, an engine and boiler, picks, shovels, crow-bars and the like are tools and appliances which while used in the doing of the work survive its performance, and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work and are thereafter invisible except as they survive in tangible results. We think that explosives when used as substitutes for other recognized 'materials' are covered by the same principle. They enter into and form part of the permanent structure quite as much as the earth, rails, ties, culverts and bridges that we can see and feel." *Schaghticoke Powder Co.* v. *Greenwick, etc., Railroad,* (1905) 183 N. Y. 306, quoted approvingly in *Sampson Co.* v. *Commonwealth,* (1909) 202 Mass., at p. 335.

It would seem that an accurate and comprehensive statement of the law on this question is that a person furnishing "materials" is one who supplies towards the making of a structure matter which may become a part thereof, or which is expended in the labor incident to the erection thereof. *Troy Public Works Co.* v. *City of Yonkers,* (1911) 145 App. Div. (N.Y.) 527.

A very broad and justifiable interpretation is now given to the phrase "one who furnishes material in the erection of a building" or any similar statutory words in a Mechanics' Lien Act. Under one Act giving a lien to one who furnishes material in the erection of a building or for the improvement of real estate it has been held that a person furnishing lumber for the forms in which to mould the concrete for a building is entitled to a lien, although the lumber is destroyed in the use, and becomes no part of the building. *Avery and Sons* v. *Woodruff*, (1911) 144 Ky. 227, 36 L. R. A. 866; *Chicago Lumber Co.* v. *Douglas*, 44 L. R. A. 843; *Barker Lumber Co.* v. *Marathon*, 146 Wis. 12. See also *Moritz* v. *Lewis Construction Co.*, (1914) 51 L. R. A. 1040. But the lien was denied in *Builders Material Co.* v. *Johnson*, 158 Ill. App. 441. But if the lumber is only depreciated in value, and is taken away by the contractor to be used again for his own purposes, no lien exists for it. *Rittenhouse & Embree Co.* v. *Brown*, (1912) 254 Ill. 549; *Hines Lumber Co.* v. *O'Heron*, (1913) 183 Ill. App. 391. While the use of machines which wear out in the use does not give a right to a lien for their value as materials, yet the use of machines controlled by workmen rendering their labor on a structure more effective than if performed with their hands alone does not defeat a claim for labor in the operation of the machines. *Geo. H. Sampson Co.* v. *Commonwealth*, (1909) 202 Mass. 326.

So, fuses used to explode dynamite are "materials." The sticks of dynamite could not be exploded without the use of the fuses, and in the process of such work both are entirely destroyed. Gunpowder and all explosives necessarily consumed in the use are considered as "materials," and within the meaning of the statute. *Dupont De Nemours Powder Co.* v. *Culgin-Pace Construction Co.*, (1910) 206 Mass. 585; *George A. Sampson Co.* v. *Commonwealth*, 202 Mass. 326. Explosives used in the breaking up of earth are "materials" used in the improvement of real property. *Schaghticke Power Co.* v. *Greenwick and Johnsonville Ry. Co.*, (1905) 2 L. R. A. 288. The test question is whether the materials were

necessary to the work of erection under the contract, and were consumed in the making of the improvememnts. *Hercules Powder Co.* v. *Knoxville*, (1904) 67 L. R. A. 487. As a general rule articles furnished for use merely as tools and appliances in carrying on the work of construction are not "materials" for which a Mechanics' Lien may be claimed. *Brooks-Sanford Co.* v. *Hampden County*, 204 Mass. 494; *Evans* v. *Lower*, 67 N. J. Eq. 232; *Builders Material Co.* v. *Johnson*, 158 Ill. App. 411; *Ward* v. *Yarnelle*, 173 Ind. 535.

In a leading American case (*Baker & Stewart Lumber Co.* v. *Marathon Paper Mills Co.*, 146 Wis. 12), materials used in a cofferdam constructed specially to make possible the building of the dam contracted to be built, and which were, in effect, destroyed by their use in the cofferdam or subsequent use, were held to be lawful subjects of a mechanics' lien. The court, in that case, used the following words which were quoted with approval in an important New York case, (*Shultz* v. *Quereau Co.*, (1914) 210 N.Y. 257) "It is certainly true that this doctrine must be carefully guarded or it might be carried to extreme and fanciful lengths. Thus it might be argued that upon the same principle coal that is used in portable engines, oil that is used in the lubrication of building machinery, and even food which is eaten by labourers, are all consumed in the construction of the building and hence are lienable materials. But all these things seem quite plainly distinguishable. They are at least one step further removed from the actual work of construction. They have neither physical contact nor immediate connection with the structure at any time. They are used only to facilitate and make possible the operation of tools, machinery or men, which in their turn act upon the structure. No lien accrues for such materials." Raw material furnished for the manufacture of plaster blocks and tile to be used by one having a contract for the fire-proofing work on a building may form the subject of mechanics' lien thereon. *Hume* v. *Seattle Dock Co.*, (1914) 50 L. R. A. 153. Coal consumed in

generating steam in boilers of machinery used in construction of an improvement is not material furnished for which a lien can be established; *Shultz* v. *Quereau,* (1914) 210 N. Y. 257; *Sampson Co.* v. *Commonwealth,* (1909) 202 Mass. 326; but dynamite used in breaking up frozen earth required by a construction contract to be excavated so that it could be handled by means of a steam shovel, is lienable material furnished for the improvement of real property. *Schaghticoke Powder Co.* v. *G. & J. Ry. Co.,* (1905) 183 N. Y. 306.

The line of demarcation between materials which ordinarily enter into or are used in the construction of a building, and, on the other hand, the machinery that may be used for the manufacture of the materials themselves is rather narrow, but it is obvious that the tools used by a mechanic in building a house cannot be regarded as materials furnished in the construction of the house. *Brooks-Sanford Co.* v. *Theodore Tellier Co.,* (1910) 22 O. L. R. 176; *Friedman* v. *Hampden County,* (1910) 204 Mass. 494. A person who fashions structural steel at his factory and supplies it to a principal contractor for use in the erection of a building, taking no part in the actual construction thereof, is a "materialman" only, and not a "sub-contractor." *Coughlan* v. *Carver,* (1914) 29 W. L. R. 791 (B.C.). Under the British Columbia Act a "sub-contractor" is not required to give the statutory notice necessary in the case of a "materialman." Nor can the machinery used in the manufacture, for instance, of the hydro-stone blocks and ultimately used in the construction of the building be treated as part of the materials used in the structure. Such things are to be regarded merely as the plant of the contractor.

The wording of the particular enactment, and the purpose for which the article is used or supplied, are the important factors in determining whether the article is lienable material. A claimant who supplies to a contractor coal which is used for generating steam for the purposes partly of running an engine which operates a hoist in which the materials used in the construction of the

building are elevated, and partly for heating the building for the purposes of drying the plaster during the construction work, is entitled to a lien for the value of the coal supplied. *Wortman* v. *Fried-Lewis*, (1915) 33 W. L. R. 119.

If the materials are prepared and actually placed in the building, the fact that the materials were subsequently removed by the owner's direction, upon change of the building plans, will not affect the lien for these materials (*Fletcher Crowell Co.* v. *Chevalier*, (1911) 108 Me. 435), and it has been held that old materials used in a new building may be subject to a lien. *Whitford* v. *Newell*, 84 Mass. 424, 36 L. R. A. 871. If after an old building is partially repaired it is torn down and a new one erected in its stead, the lien claimant can claim a lien on the new building for materials furnished for and used in the old building which were afterwards used in the new building. *Nichols* v. *Culver*, 51 Conn. 177.

If materials have been prepared or furnished as ordered and the owner rejects them or neglects to accept them or diverts them to other uses a lien will be established. The plaintiff, a sub-contractor, who installed a furnace in a building was held to have strictly complied with his contract with the principal contractor and to be entitled to enforce his lien though the furnace which he installed was rejected by the owners. *Mallettt and Kevar*, 14 W. L. R. 327; *Salem* v. *Lane, etc., Co.*, 189 Ill. 593; *Sears* v. *Wise*, 52 App. (N.Y.) 118; *Chicago Artesian Wells Co.* v. *Covey*, 60 Ill. 73; *Morris Co. Bank* v. *Rockaway*, 14 N. J. Eq. 198. But a materialman has no relief against the land, under the Ontario Act, or similar Acts, in a case where the building was never completed by the contractor and the building contract provided that time was of the essence of the contract and stated a specified sum for every day beyond a stated period that the owner was denied the full possession of the premises. *McManus* v. *Rothschild*, 25 O. L. R. 138. Where a materialman contracts to deliver material in a manufactured form the contract is for materials only, and a lien

cannot be had for labor performed in manufacturing the materials as a claim for labor. *Tracey* v. *Wetherell*, (1896) 165 Mass. 113; *Donaher* v. *Boston*, (1879) 126 Mass. 309.

There is no lien if the debt ceases to be for materials, or is furnished on general account, and not for a specific building. *Brooks-Sanford* v. *Theodore Telier Con. Co.*, (1910) 22 O. L. R. 176. A. began to erect a building for X. but abandoned the work, and B. agreed with X. to complete it, to pay all outstanding bills, X. agreeing to pay a round sum for the whole work, including that already done by A. It was held that B. could maintain no lien for materials which he had furnished to A. for that debt was merged in the round sum to be paid by A. *Whitney* v. *Joslin*, (1871) 108 Mass.103. See *Hatch* v. *Colman*, (1857) 29 Barb. (N.Y.) 201, Furnishing wood blocks for floor of a bridge over railway tracks, after other blocks have been rejected as not conforming to contract, was held a furnishing of material within the lien law of New York. *In re Abbott Gamble Co.*, (1912) 195 Fed. 465.

Where part of a claim is for materials and part for labor and the claim is so mixed, the contract being entire, that they cannot be determined respectively, there is no lien for either. *Gogin* v *Walsh*, (1878) 124 Mass. 516. See *Weller* v. *Shupe*, (1897) 6 B. C. R. 58; *Smith* v. *Sissiboo Pulp and Paper Co.*, (1903) 36 N. S. R. 348, (1904) 35 S. C. R. 93. Where the property owner joins with the contractor in giving the order for material to be supplied in the erection of the building and it is charged to their joint account, the owner may be held liable for the full price in a mechanics' lien action brought against them both to enforce payment, although only a lesser sum be due by him to the contractor.

A materialman is not entitled to register as one individual claim, a lien for the amount due for materials supplied by him to a contractor, against all the lands jointly of the owners of different parcels of land who have made separate contracts with the contractor for the erection of houses on their respective parcels. *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249. In this case the owners

of separate parcels of land made separate contracts with a contractor for the erection of houses on their respective parcels, and materials were furnished by a materialman to the contractor which were used by him in the erection of the houses, and it was held that the Act did not empower the materialman to register a lien for the total amount against all the land jointly. See *Booth* v. *Booth*, 3 O. L. R. 294, *Barr* v. *Percy*, (1912) 21 W. L. R. 236 (B.C). A lien for furnishing new material and replacing it in a bridge cannot be claimed by a sub-contractor whose employees by negligence had made the new work and material necessary. *Richmond and Irvine Construction Co.* v. *Richmond Ry. Co.*, (1895) 31 U. S. App. 704.

A lienholder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials exclusively supplied by him bears to the whole cost of the building, and not for any part of the increase brought about otherwise. In computing this proportionate amount, no regard should be taken to amounts paid the lienholder on account before the action was brought. *Security Lumber Co.* v. *Duplat et al.*, (1916) 29 D. L. R. 460 (Sask.).

Disbursements, such as money advanced to pay freight on material furnished for use in a structure may, although no agreement was made in advance to make the payment, be regarded as part of the purchase price of the materials furnished (*Barker and Steward Lumber Co.* v. *Marathon Paper Mill Co.*, 36 L. R. A. 875), but where a materialman furnished money to a building contractor to purchase certain material which the materialman did not have, he could not claim a lien for the amount so furnished (*Evans* v. *Lower*, (1904) 58 Atl. Rep. 294; *Goddefroy* v. *Caldwell*, 56 Am. Dec. 360), nor will "supplies" include food for men and teams while at work. *Carson and Co.* v. *Shelton*, (1908) 15 L. R. A. 509. A person furnishing lead to connect a house with

pipes in the street may have a lien on the house. *Feeny* v. *Rothboum*, (1911) 155 Mo. App. 331. In a claim for materials supplied the work of installation is properly included as part of the cost of the materials *in situ*. *McNab, Harlin Mfg. Co.* v. *Paterson Big. Co.*, (1907) 72 N. J. Eq. 929.

A claim for lien against several buildings or lots not adjoining or adjacent, on which the work was done and materials were furnished under one entire contract, cannot be enforced at all, where there is nothing in the claim from which it can be ascertained how the amount claimed for work and materials is to be apportioned among the several buildings. *Schmidt* v. *Anderson*, (1912) 253 Ill. 29. Where the claimant furnishes materials partly for sidewalk and partly for other purposes, and part of the material was used for sidewalks, but the claimant failed to show what portion went for sidewalks, the claim was held wholly bad, since it could not be determined which portion of it was valid. *Bradley Co.* v. *Gaghan*, 208 Pa. 511. Although the claim must show whether it is for work or materials (*Norton Construction Co.* v. *Unique Construction Co.*, 121 App. Div. (N.Y.) 585), yet where the contract is entire, a statement of the contract price and the total amount of materials furnished is sufficient. *Westcott* v. *Bunker*, 83 Me. 499; *Brown* v. *Myers*, 145 Pa. 17. If a person who furnishes material for the improvement of real property further agrees with the owner to use that particular material in the erection of any structure upon the lands, he ceases to be a materialman and becomes a contractor. *Jackson* v. *Egan*, (1910) 138 App. Div. (N.Y.) 505.

A provision requiring an owner to create a fund by deducting twenty per cent. from any payment to be made by him in respect of a contract for the protection of those who supplied materials to the contractor, does not apply to a contract under which nothing was payable by the owner to the contractor,—as where during the progress of the work the owner had paid the contractor more than the value of the work done and the work as a whole was never com-

pleted; under such circumstances the claims of the materialmen are not enforceable against the owner. *Burton* v. *Hookwith*, (1919) 48 D. L. R. 339.

A statement in somewhat indefinite form may be held sufficient. A statement that the work performed and materials furnished were "plumbing, tinning, furnaces and ranges, as per contract to the amount of $2,560, and additional labor to the sum of $77, making in all $2,637, upon account of which there has been paid $850, and leaving a balance due therefor for $1,787," was held sufficient. *Clarke* v. *Heylman*, 80 App. Div. (N.Y.), 572.

Materials not actually used or delivered to a contractor are not "furnished" for the purpose of creating a sub-contractor's lien, although they are worthless for any other purpose and were prepared for the contractor under a contract which he broke by refusing to accept them. *Richmond and Irvine Construction Co.* v. *Richmond Ry. Co.*, (1895) 31 U. S. App. 704, 34 L. R. A. 625.

Whether the transaction was really materials furnished for a building or merely a sale of a chattel is mainly a question of fact. If it be shown that such chattels are so attached as to become a permanent part of the structure, and it had been contemplated by the parties that they should be furnished, a lien may be enforced by furnishing them. See cases cited in Chapter IV., *ante*, dealing with "Fixtures."

Articles rented for use in the construction of the works are not materials within the meaning of the statute, and the person who rents such articles is not entitled to a lien for unpaid rental. *Troy Public Works Co.* v. *City of Yonkers*, (1911) 145 App. Div. (N.Y.) 527. A workman for a materialman is not entitled to a lien. *Allen* v. *Harrison*, (1908) 9 W. L. R. 198.

To create the lien the sale of the materials must be with reference to the improvement of the land or building. *Chapin* v. *Persse*, 30 Conn. 461. As to facts which would constitute separate sales of materials so as to require separate registrations, see *Stephens Paint Co.* v. *Cottingham*, (1916) 10 W. W. R. 627; *Chadwick* v. *Hunter*, 1 Man. L. R. 39.

The lien will cover only materials furnished by a lien claimant and not materials procured by him as the agent for the owner and on the credit of the owner, although afterwards paid for by the lien claimant. *Kerby* v. *Daly*, 45 N. Y. 84. It is a question of fact whether the materials were furnished on the credit of the building (*Hommell* v. *Lewis*, 104 Penn. 465), and the placing of the materials in the building in itself would justify a finding that they were furnished to be used in the building (*Power* v. *McCord*, 36 Ill. 214; *Martin* v. *Eversall*, 36 Ill. 222), but the fact that the materials are charged to the contractor alone is not *prima facie* evidence that his credit was relied on to the exclusion of the credit of the building. *Hommell* v. *Lewis*, 104 Penn. 465. Entries of charges for materials are strong evidence to show to whom they were sold, but are not conclusive. *Presbyterian Church* v. *Allison*, 10 Penn. 413. *Phillips*, s. 124.

There is a conflict in the decisions in relation to the question whether the lien given for labor and materials furnished in respect to any structure or land includes hauling the materials there, but the generally accepted view is that a mechanics' lien claim may be maintained for the transportation and delivery of materials as for labor performed, for the erection and construction of a building. *McClain* v. *Hutton*, 131 Cal. 132. A lien is usually allowed for transportation of the materials to be used in the construction of the building, 27 Cyc. 44; *Fowler* v. *Pompelly*, (1903) 76 S. W. 173; *Hill* v. *Newman*, (1861) 80 Am. Dec. 473. Teamsters and laborers who hauled away the dirt that remained after filling up trenches for a heating plant as well as those who dug the trenches, are entitled to a lien. *Wells* v. *Christian*, 165 Ind. 662.

In a recent New Jersey case (*Davis* v. *Mial*, (1914) 86 N. J. L. 167) Chancellor Walker, in delivering the judgment of the Court of Appeal, said, "The only openly antagonistic decision that I have found is *Webster* v. *Real Estate Improvements Co.*, 140 Mass. 526. I cannot adopt the reasoning used in that case. It is against the great weight of authority. The reasons upon which it rests would oust a hod-carrier and an architect out of a lien." Under the

Alberta Act it has been decided that the lien would include hauling, (*Mylusyhk* v. *N. W. Brass Co.*, 14 D. L. R. 486) but in a decision under the British Columbia Act, a lien for haulage of materials to the land where they were to be used was denied. *Vannatta* v. *Uplands*, (1913) 12 D. L. R. 669. But one who furnishes a contractor with horses and wagons and drivers for use on premises he is improving is entitled to a lien for their hire. *Vannatta* v. *Uplands*, *supra*. A claim for hauling materials to the building sites to be paid for in a lump sum, the haulage being done by persons hired by the claimant, and the price including the services of his horses and equipment, the claimant having the right to select the mode of doing the work, is not a claim for wages, but a claim as a sub-contractor. *Stafford* v. *McKay*, (1919) 2 W. W. R. 280 (Sask.).

The materialman is entitled to include in his lien the charge for conveying building materials to the land where they are to be used, as that charge should be considered part of the costs of the material.

The time for filing a lien for materials furnished to a contractor cannot be computed from the date of the last item in the claimant's account unless such item was the subject of a lien. *Brooks-Sanford Co.* v. *Theodore Telier Co.*, (1910) 22 O. L. R. 176. A claimant who has supplied material to be used in the erection of a building under a contract by which the materials were to be supplied from time to time and has filed a lien, which at the request of the owner he has subsequently discharged, taking instead an order upon certain moneys, which order was not paid, cannot upon supplying further material under his contract and within the statutory period, file a lien for the total amount of his claim. *Wortman* v. *Frid-Lewis*, (1915) 33 W. L. R. 119 (Alta.).

If a plaintiff claims to retain a mechanics' lien by means of material supplied and work done after the completion of a building, and after the architect has given the final certificate, it is incumbent on him to prove clearly that the material was supplied and the work done in pursuance of and as a part of his original agreement (*Lawrence* v. *Landsberg*, 14 W. L. R. 477), and the question whether the material is supplied in good faith for the purpose of com-

pleting a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial Judge, and his decision on such fact should govern. *Sayward* v. *Dunsmuir*, 11 B. C. R. 375.

Material furnished after the work is completed will not keep a lien alive so as to prejudice others. *Renney* v. *Dempster*, (1911) 19 O. W. R. 644. See *Limoges* v. *Scratch*, 44 Can. S. C. R. 86. Claimants who have done work as sub-contractors under a contract cannot for lien purposes dissolve the contract into its original component parts and claim to rank as materialmen in respect of the value of material covered by their sub-contracts, and claim that they are only relegated to the status of sub-contractors with respect to the balance of their claims. *Wortman* v. *Frid-Lewis Co.*, (1915) 33 W. L. R. 119 (Alta.).

A materialman who without knowledge of the owner furnishes a tenant at will with materials for a house, knowing that the tenant is not the owner, can have no lien on the porperty. *Proctor* v. *Towe*, 115 Ill. 138.

If the materials are furnished under a contract for the construction of a building for a person who at the time of making the contract has not the title to the land on which the building is to be built, but who afterwards acquires it, the lien extends as well to the labor and materials furnished before the deed was delivered as to those furnished afterwards. *Libbey* v. *Tilden*, (1906) 192 Mass. 195. In Massachusetts it has also been held that no lien for materials can be established against the owner of real estate if the materials were furnished under a contract which was made with the person from whom he purchased the property before it was conveyed to him, and no notice was given to him of an intention to claim a lien, although a part of the materials were furnished after he acquired the title. *Martin* v. *Stewart*, (1910) 204 Mass. 122.

A materialman is not entitled to register, as one individual claim, a lien for the amount due for materials supplied by him to a contractor, against all the lands jointly of the owners of different parcels of land who have made separate contracts with the contractor for the erection of houses on their respective parcels.

Dunn v. *McCallum*, (1907) 14 O. L. R. 249; *Security Lumber Co.* v. *Plested*, (1916) 27 D. L. R. 441; 34 W. L. R. 352, 9 Sask. L. R. 183. But where one owner enters into an entire contract for the supply of material to be used in several buildings, the materialman can ask to have his lien follow the form of the contract, and that it be for an entire sum upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to shew the facts, and if the facts cannot be ascertained less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the legislature apparently intended a lien to exist. *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17. The Massachusetts decisions uniformly hold that where claimants have performed labor upon several buildings situated upon the same lot under an entire contract for an entire price, a lien is created upon the whole lot and all the buildings, the conclusion being that the parties by their contract have connected the several buildings and treated them as one estate. *Wall* v. *Robinson*, (1874) 115 Mass. 429.

When can materials be said to be "used" within the meaning of this legislation? It would seem to be sufficient to raise a presumption that the materials were actually used to show that they were furnished to be used in the building and were delivered to the builder. It would be unjust to require a materialman to prove conclusively that every article furnished by him was incorporated in the building. It is not necessary that the materials should be delivered at or near the building, so long as they are placed anywhere upon the land to be affected by the lien. In one American case it was held that the materials might be delivered at some other accessible place agreed upon, and convenient for use by the contractor or owner. *A. E. Shortill Co.* v. *Aetna Indemnity Co.*, 124 N. W. 613. But this would not be accepted as a correct construction of similar provisions in the Mechanics' Lien Acts in Canada.

It is a question of fact whether the materials were furnished on the credit of the building.

Proof that the materials were delivered at or near the building site, at a place designated by the contracting party, and that the building was thereafter completed with materials of the description of those furnished, is *prima facie* evidence that the materials so delivered were used in its construction. *Central Lumber Co.* v. *Braddock Land, etc., Co.*, (1907) 34 Ark. 560. Under the Alberta Act it has been decided that one who delivers materials for use in a building under course of construction by a contractor is not, after the latter's default, and the taking over of the work by the property owner, entitled to a mechanics' lien for such of the materials as were subsequently worked into the building by the latter. Unless there was a balance payable by the owner to the contractor the claimant's only remedy was by a personal judgment against the property owner. *Canadian Equipment Co.* v. *Bell*, (1913) 11 D. L. R. 820.

The question has arisen as to the rights of parties in relation to materials which are the subject of conditional sale whereby the property does not pass till payment, and also in the case of articles supplied but on which the vendor is given a lien until the article is affixed to the realty. In some of the Provinces legislation such as the Conditional Sales Act (R. S. O. 1914, c. 136) exists. It has been decided in Ontario that where the claimants of a lien upon land for materials supplied for the erection of a building, under a Mechanics' Lien Act, insist upon the terms of a conditional sale contract whereby they have a lien upon the materials until payment, they cannot rank as lienholders and compete with others who have no right as against the materials. *Hill* v. *Storey*, (1915) 34 O. L. R. 489.

Where the materialman has contracted to supply all of a certain class of supplies required in the construction of a particular building, as mentioned in the specifications, and he supplies not only the goods which were so mentioned but further materials which were

contemplated by his contract as extras or additions, for the amount of which the fixed price was subject to increase, the lien for the entire bill is not lost by the lapse of the statutory period for filing liens between the last delivery of that portion of the goods, the class and quantities of which were shown in the specifications, and the later delivery of the extras; the lien in such cases is in time if filed within the statutory period following the last delivery of extras. *Flett* v. *World Construction*, (1914) 15 D. L. R. 628 (B.C.).

A mechanics' lien will attach for all materials supplied in the erection of a building although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor. *Whitlock* v. *Loney*, 10 Sask. L. R. 377, (1917) 3 W. W. R. 971, 38 D. L. R. 52. Where the property owner joins with the contractor in giving the order for material to be supplied in the erection of the building and it is charged to their joint account the owner may be held liable for the full price, although only a lesser sum is due by him to the contractor. *Rogers Lumber Co.* v. *Gray*, 10 D. L. R. 698 (Sask.).

CHAPTER VIII.

The "Owner" and his "Interest."

The person who is sought to be held responsible for the payment of the claim must be an "owner" of the property within the meaning of that term as used in the Mechanics' Lien Act under which the proceedings are taken. The lien attaches to the estate or interest of such owner in the realty upon which or in respect of which the work or service is performed or the materials placed or furnished. A lien cannot be sustained unless the "owner" has an estate or interest in the land to which this lien would attach. *Litton* v. *Gunther*, 12 O. W. R. 1122; *Atkinson Co.* v. *Shields Construction Co.*, (1909) 76 N. J. L. 751. Actual possession under a grant from the Crown coupled with a statutory right to register the grant, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanics' lien may attach. *Dorrell* v. *Campbell*, 23 B. C. R. 560, (1917) 1 W. W. R. 500, 32 D. L. R. 44. See also *MacDonald* v. *Hartley*, (1918) 3 W. W. R. 910 (B.C.), which decides that a squatter on Crown land who accepts work and materials applied to the erection of a building thereon, holds himself out to be the "owner" of the land and will be regarded as having an "interest" in the land.

To be entitled to a lien, the lien claimant must have been employed to do the work or furnish the materials by some one having either an interest in the land or an interest in a contract made with the owner. The person with whom the contract was made must be an "owner" or else some relation of the parties must have existed which would give a right of lien. *Gearing* v. *Robinson*, (1900) 27 O. A. R. 364; *Webb* v. *Gage*, (1902) 1 O. W. R. 327; *Flack* v. *Jeffrey*, (1895) 10 Man. 514; *Blight* v. *Ray*, (1893) 23 O. R. 415; *Graham* v. *Williams*, (1884) 8 O. R. 478, 9 O. R.

458. See also *Garing* v. *Hunt*, (1895) 27 O. R. 149; *Fairclough* v. *Smith*, (1901) 13 Man. 509; *Baker* v. *Williams*, (1916) 23 B. C. R. 124.

"Owner" is a variable term, (*Prentice* v. *Brown*, (1914) 17 D. L. R. 36 (Alta.) but the following definition in the Ontario Mechanics' Lien Act is substantially the same as in the other provincial Acts,—

"'Owner' shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done or materials are placed or furnished, at whose request and (i.) upon whose credit, or (ii.) on whose behalf, or (iii.) with whose privity and consent, or (iv.) for whose direct benefit work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished." R. S. O. c. 140, s. 2 (c). Under the Alberta Mechanics' Lien Act, R. S. A. 1906, c. 21, s. 11, a mechanics' lien may be acquired on demised premises for making alterations therein under contract with the lessee, where the landlord with knowledge that the work was in progress, failed to give notice of non-responsibility. Under that section the right to a lien on demised premises for making alterations therein under a contract with the lessee is not limited to such alterations as are beneficial to and which increase the landlord's interest in the property. *Peters, Rohls* v. *McLean*, (1913) 13 D. L. R. 519.

No precise general rule can be laid down declaring what constitutes "request" or "privity and consent" of the owner. Some confusion may have arisen because, in some instances, in deciding a particular case upon its own facts, attempts were made to state a general rule, which rule as therein stated was too broad for general application. In dealing with this question each case must be determined by its own facts, and while there may be special cir-

cumstances in a case which would justify implying a "request," no mere consent to the work, or mere knowledge that the work is being done and non-interference can constitute "request" or "privity and consent." These words "privity and consent" involve something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged. *Graham* v. *Williams*, 8 O. R. 478, 9 O. R. 458, *Gearing* v. *Robinson*, 27 O. A. R. at p. 371; *Marshall Brick Co.* v. *York Farmers Colonization Co.*, (1917) 36 D. L. R. at p. 427, per Anglin, J.; *Marshall Brick Co.* v. *Irving*, 28 D. L. R. 464, 35 O. L. R. 542; *Eddy Company, Limited* v. *Chamberlain*, (1917) 45 N. B. R. 261. Although some Mechanics' Lien Acts contain a provision (see R. S. O. c. 140, s. 14, (2)) declaring that an unpaid vendor who has not conveyed shall be deemed a mortgagee, yet he may also be regarded as an "owner" if he fulfils the requirements prescribed by the statutory definition of "owner," but mere consent to the work or mere knowledge that the work is being done will not make a mortgagee liable as "owner"

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner" so as to subject the land to Mechanics' lien for work done and materials furnished under contracts with the purchaser, but such vendor is deemed a "mortgagee" for the purpose of giving priority to the liens upon the increased selling value of the land caused by the improvements. *Marshall Brick Co.* v. *Irving*, 28 D. L. R. 464, 35 O. L. R. 542; *Marshall Brick Co.* v. *York Farmers Colonisation Co.*, (1917) 36 D. L. R. 420.

To render the interest of an owner liable, the building, etc., must have been at his request, express or implied. A "request" within the meaning of the statute may be implied from a variety of circumstances. The defendant T., having a lease of land, sublet it to the defendant H., the latter agreeing to build upon the land according to plans to be approved by T., and H. entered into a contract with the plaintiff to build accordingly. It was held that

the taking from H. of an agreement to build was a "request" from T. and that the interest of T. as owner was subject to the lien of the plaintiff under the Act. *Orr* v. *Robertson*, (1915) 34 O. L. R. 147. It has been held, however, that a defendant, B., the purchaser from the defendant S. of land upon which S. was erecting houses, is not personally liable as "owner" for work done and materials supplied by a company in and for the building of the houses,—some of the work having been done and some of the materials having been supplied after B. took possession, but the company having had no communication, direct or indirect, with him in regard to work or material. It could not be said that what the company did was done at B.'s request, express or implied, or upon his credit, or on his behalf, or with his privity or consent, or for his direct benefit. *Cut-Rate Plate Glass Co.* v. *Solodinski*, (1915) 34 O. L. R. 604.

It may happen that the work turns out to the advantage of the owner, but this circumstance would not necessarily establish the fact that the work was for his "direct benefit."

A person is not an "owner" so as to make his land liable to a lien for materials supplied under a contract with the tenant, for the purpose of adding to or improving a hotel upon the land in the possession of the tenant with an option to purchase, unless there is something in the nature of a direct dealing between the owner and the person furnishing the materials. *Eddy Company Limited* v. *Chamberlain*, (1917) 45 N. B. R. 261. The owners of four lots executed an agreement to sell them to one Irving who was to make a cash deposit and undertake to build four houses on the lots, the vendors to advance $6,400 for building purposes. On completion of the houses and on receipt of the balance of price and amount of advances the vendors were to execute a deed of the lots. Irving gave contracts for the building which was partly completed, and $3,400 was advanced by the vendors when Irving became insolvent, and the vendors, under the terms of their agreement, gave notice of forfeiture and took possession of the property. Prior to

this liens had been filed for labor and materials supplied and the lien holders brought action for enforcement thereof against the vendors. It was held that the vendors were not "owners" of the property and therefore were not liable to pay for the labor and materials supplied for the building of the houses of Irving. *Marshall Brick Co.* v. *York Farmers Colonization Co.*, (1917) 54 Can. S. C. R. 569.

Under the Mechanics' Lien Act in Manitoba it has been held that the Act does not authorize the registration of one lien for one lump sum against the lands of different owners, although the work may have been done or the materials furnished under one contract for the building of houses on the lands of the different owners, unless, perhaps, in a case where the lien claimant did not know and had no means of ascertaining before filing his lien, that the lands were owned by different persons. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718.

A purchaser of an unfinished building whose deed is registered prior to the registration of any mechanics' liens without actual notice thereof thereby acquires a priority (see Registry Act, R. S. O. 1914, c. 124) and takes the property free of the liens. Mere knowledge that building was going on upon the land does not amount to actual notice; nor can the purchaser be deemed an "owner" within the meaning of the provision of the Mechanics' Lien Act which depends upon privity, consent or benefit, in order to charge the land with the liens. Priority of registration in the absence of actual notice must prevail. *Sterling Lumber Co.* v. *Jones*, (1916) 29 D. L. R. 288; *Cook* v. *Koldoffsky*, (1915) 28 D. L. R. 346, 35 O. L. R. 555; *Marshall Brick Co.* v. *Irving*, 28 D. L. R. 464, 35 O. L. R. 542.

A contractor's offer to build a pair of semi-detached houses on two adjoining lots, owned by different persons, naming separate terms for each house, but addressed to both owners together, implies a distinct acceptance by each of them, and the acceptance by one does not create a joint contract binding on both as subjecting

both lots to a mechanics' lien for materials furnished for both houses; nor can the interest of the accepting owner be charged for materials furnished on the adjoining lot not at "his request or for his direct benefit." *Compeigne* v. *Carver*, (1915) 27 D. L. R. 76. But if two persons each owning in severalty one or two adjoining lots enter into a joint contract for work to be done on both lots under an agreement treating both lots as one, a mechanics' lien may be filed on both parcels. *Deegan* v. *Kilpatrick*, 54 N. Y. App. Div. 374. The distinction between the former and the latter case is that the contractor in the former case undertook to proceed as on two separate contracts whereas in the latter case there was a joint contract. A lien which appears to be for work done, at the instance of other persons, without indicating that the work was done for the "owner" of the property to be charged, is incurably defective, and the owner's subsequent undertaking to assume such lien is not binding on him. *Northern Plumbing & Heating Co.* v. *Greene*, (1916) 27 D. L. R. 410 (Sask.).

To create a lien on the property of the owner in favor of the materialman, there must be a request of the owner and a supplying of the materials in pursuance thereof, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. *Slattery* v. *Lillis*, (1905) 10 O. L. R. 677, *Blight* v. *Ray*, (1893) 25 O. R. 415; *Eddy Company, Limited*, v. *Chamberlain*, (1917) 45 N. B. R. 261. If, in addition to the request, one or other of these alternative conditions exist the lien is created. *Slattery* v. *Lillis*, *supra*; *Sterling Lumber Co.* v. *Jones*, (1916) 29 D. L. R. 288. A materialman is not entitled to register as one individual claim, a lien for the amount due for materials supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts with the contractor for the erection of houses on their respective parcels; nor do they have such interest in one another's land as "owners" so as to charge the other's land for materials furnished at the owner's request or for his benefit. *Security Lumber Co.* v.

Plested, (1916) 27 D. L. R. 441, 9 Sask. L. R. 183, 34 W. L. R. 352.

The vendor and vendee cannot prejudice the rights of a lien claimant by secret agreement. *Malmgren* v. *Phinney*, 50 Minn. 457, 18 L. R. A. 753; *Henderson* v. *Connolly*, 123 Ill. 98; *Garlan* v. *Van Rensselaer*, 71 Hun. (N.Y.) 2. Where a vendee agrees with a vendor to erect certain buildings this makes the vendee an "owner," and the entire interest may be bound by him. *Borden* v. *Mercer*, 163 Mass. 7; *McCue* v. *Whitwell*, 156 Mass. 205; *Young* v. *Wilson*, 44 N. J. L. 157; *Schmalz* v. *Mead*, 125 (N.Y.) 188, even where the vendee forfeited his contract. *Henderson* v. *Connolly*, *supra*.

A surrender to the vendor by a purchaser in possession under an executory agreement will not defeat the lien. *Hoffstrom* v. *Stanley*, 14 Man. L. R. 227. Under the Alberta Mechanics' Lien Act, c. 21, s. 11, Statutes of 1906, owner will include "leaseholder" when read with the interpretation clause, s. 2, s.-s. 4, extending the term owner to a person having any estate or interest, legal or equitable, in the land. *Prentice* v. *Brown*, (1914) 17 D. L. R. 36 (Alta.).

In some American courts it has been held that where the building is by the terms of the lease to become the property of the lessor, this will be sufficient ground for charging his estate with the amounts owing to the lienholders. *Williams* v. *Vanderbilt*, (1893) 145 Ill. 238; *Showalter* v. *Loundes*, 2 Am. & Eng. Ann. Cas. 1096.

The interest, large or small, of the contracting "owner" will be covered by the lien, and if, afterwards, that estate or interest becomes less, the lien can still be claimed against the estate or interest the owner had at the time the lien attached. *Bank of Montreal* v. *Haffner*, (1884) 10 O. A. R. 573; *Keffer* v. *Miller*, (1890) 10 C. L. T. 90; *In re Empire Brewing and Malting Co.*, (1902) 9 B. C. R. 557. The word "interest" is the broadest term applicable to claims in or upon real estate, in its ordinary

signification among men of all classes. It is broad enough to include any right, title or estate in or a lien upon real estate. *Ormsby* v. *Attman*, 85 Fed. 492, 29 C. C. A. 295. A squatter on Crown land who accepts work and materials applied to the erection of a building thereon, holds himself out to be the "owner" of the land and will be regarded as having an "interest" in the land. *Macdonald* v. *Hartley*, (1918) 3 W. W. R. 910 (B.C.). An estate in remainder is a legal estate and will support an action under the Mechanics' Lien Act. *Davis* v. *Mial*, (1914) 86 N. J. L. 167.

In the case of a lessee, while the lien may be enforced against the interest of a lessee, some Mechanics' Lien Acts require the consent of the lessor, in writing, signed by him upon the claim of lien before the fee simple can be charged..

As a general rule the lien only attaches upon the estate or interest of the owner at the time the work or service is performed, or the materials furnished. If, however, an owner having an equitable estate, subjects that estate to a mechanics' lien and afterwards acquires the fee simple or other larger estate, such larger estate will be subject to the lien. The owner may be estopped from setting up the subsequent purchase in answer to the claim of the lien holder. *Wolfe* v. *Oxbard*, 152 Pa. 623; *McGraw* v. *Godfrey*, 56 N. Y. 610. Where labor and materials are furnished under a contract for the construction of a building for a person who at the time of making the contract has not the title to the land on which the building is to be built, but who afterwards acquires it, the lien extends as well to the labor and materials furnished before the deed was delivered as to those furnished afterwards. *Libbey* v. *Tilden*, (1906) 192 Mass. 175. The most frequent instance of an equitable estate becoming chargeable is that of a purchaser under a contract, which has not been fully completed, the purchaser not having acquired the legal title. Even then, if upon the completion of the contract the vendor takes a mortgage for the purchase money, it becomes a prior mortgage under the Act, and the vendor's interest in the property is only chargeable to the extent pre-

scribed in the Act. See s. 14, s.-s. 3 of Ontario Act, and corresponding provisions in other provincial Acts. It is probable that though the contract is never carried out, the lienholder may assert his lien upon the increase in value, against the vendor as if the relationship had been that of mortgagor and mortgagee.

As a general rule it is only the interest of the purchaser that is affected by the lien. In a case under the Manitoba Act (*British Columbia Timber and Trading Co.* v. *Leberry*, (1902) 22 C. L. T. 273) the defendant bought lands from one T., for $1,200 and paid $50 on account, balance to be payable immediately. The defendant took possession and erected a building and made improvements. Plaintiff supplied materials and claimed a lien against defendant and Townsend, and it was held that the lien only extended to the equitable interest of defendant, and that the claim against Townsend should be dismissed. The same principle has been applied generally in other cases. In *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227, the defendant agreed to purchase land from D. & McC. The price was to be paid August 15th, 1901, and in default D. & McC. could either cancel the agreement, in which event any payments made became forfeited, or could re-sell and recover any deficiency from defendant. No part of the purchase money was paid, but defendant made improvements on the land, work upon which went on after August 15th, with the knowledge and concurrence of D. & McC. Plaintiff was employed by defendant as carpenter and claimed a lien. Killam, J., held that, having granted an extension, D. & McC. could not cancel the agreement without notice, and, therefore, the agreement was still subsisting when plaintiff did the work. The parties must be regarded as mortgagor and mortgagee, and plaintiff was entitled to a lien, subject to the charge of D. & McC. for unpaid purchase money and interest. So, the holder of a working option on a mineral claim was held to have an estate or interest against which a lien might be enforced and the interest of the person giving the option to purchase was not chargeable unless he had brought himself within the

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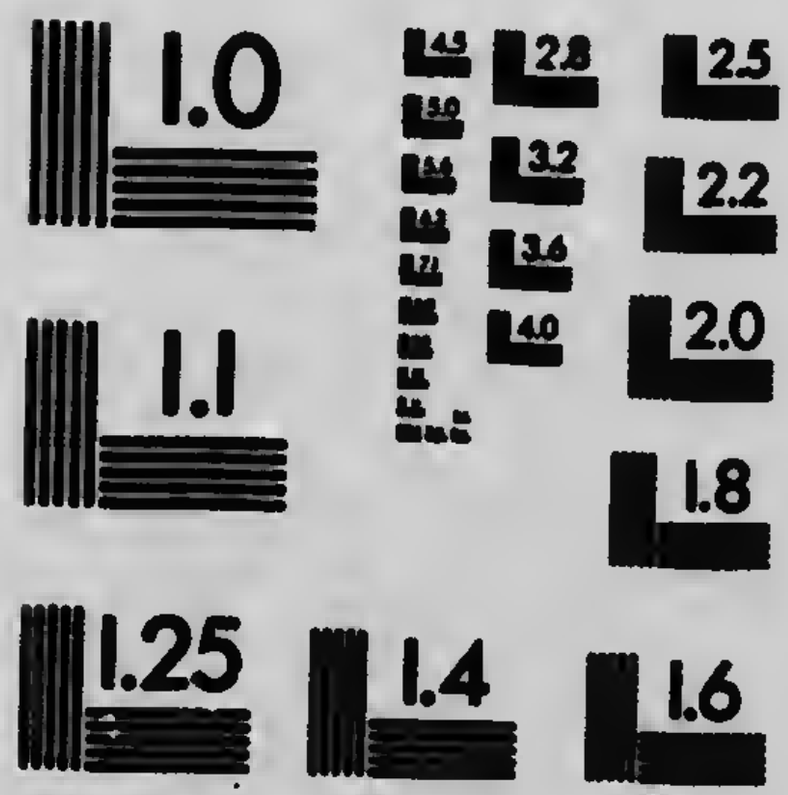

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provisions of the Act. *Anderson* v. *Godsall,* (1900) 7 B. C. R. 404. In Saskatchewan it has been held that where the defendant held the land under an agreement to purchase he had an interest or estate on which the lien would attach. *Mountjoy* v. *Heward School District Corporation,* 10 W. L. R. 282.

A person in actual possession of land has a title thereto as against all the world except the true owner, and has a sufficient interest to come within the meaning of "owner." *Blight* v. *Ray,* 23 O. R. 415; *Reggin* v. *Manes,* 52 O. R. 443, but in order to amount to an interest which would support a lien, the actual possession or interest must exist at the time the materials were ordered. *Galvin Walston Lumber Company* v. *McKinnon,* (1911) 16 W. L. R. 310. A lien can attach to any equitable title or interest or to any other interest which can be conveyed. *Montandon* v. *Deas,* 48 Am. Dec. 84; *Tracy* v. *Rogers,* 69 Ill. 662; *Franklin Sav. Bank* v. *Taylor,* 131 Ill. 386. A person cannot by a wrongful act, such as trespassing, constitute himself an "owner." If a person without any authority from the then owner erects a building upon a lot of land and subsequently becomes owner of the lot on which the building is standing, any interest which might have been claimed by him in the property under a lien previously asserted by him merges in his title as owner. *Galvin Walston Lumber Company* v. *McKinnon, supra.* Where a conveyance of land was made to a husband and wife, each of the grantees is an "owner" under the Mechanics' Lien Act, and may by contract subject his or her estate to a lien for improvements on the land, though the other does not join in the contract (*Independence Sash Co.* v. *Bradford,* (1911) 134 S. W. 118); but a statute vesting in the holder of a special timber license all rights of property in all trees, timber and lumber cut within the limits of the license during the term thereof, was construed as not giving any estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse* v. *Hunter,* 12 B. C. R. 126. Under the Manitoba Act a claim of lien cannot be "realized" unless the person who is the

registered owner of the land at the time of the commencement of the action is made a party to it, or unless there is some other a tion pending to which such owner is a party, in which the claim may be "realized." *Abramovitch* v. *Vrondressi,* (1913) 24 W. L. R. 439, 11 D. L. R. 352.

A vendee in possession is an "owner" (*Beck* v. *Catholic University of America,* 62 App. Div. (N. Y.) 599; *Courtemanche* v. *Blackstone Valley Co.,* (1898) 170 Mass. 50; *Anderson* v. *Berg,* 174 Mass. 404), and, indeed, a mere possessory interest or even constructive possession, may sometimes suffice to create a lien (*Christie* v. *Mead,* 8 C. L. T. 312; *Prutzman* v. *Bushong,* 83 Pa. 526), although, sometimes, possession is not sufficient. *Fletcher* v. *Stedman,* 159 Mass. 124; *Tracy* v. *Rogers,* 69 Ill. 662. A mortgagor is an owner until after decree of foreclosure. *Davis* v. *Connecticut Mut. Life Ins. Co.,* 84 Ill. 508. A mechanics' lien filed against the possessory interest of an entrant to Crown lands does not follow on the title if the Crown grant issues to another person. *In re The Land Titles Act,* (1919) 1 W. W. R. 628 (Sask.). Upon the registration of a grant from the Crown where a mechanics' lien is filed against the interest in the land of a person other than the grantee, the lien should be followed on the title unless the grant shows on its face that it is a homestead grant. *In re The Land Titles Act,* (1919) 2 W. W. R. 39 (Sask.).

It has been held that a partner may bind a partnership. *Christian* v. *Illinois Malleable Iron Co.,* 92 Ill. App. 320.

A trustee may be an "owner." *Springer* v. *Kroeschell,* 161 Ill. 358; *Weaver* v. *Sheeler,* 124 Pa. 473. A contract for necessary repairs made with trustee to whom the land has been conveyed in trust "to secure and pay over the profits above and beyond all necessary expenses," will support a mechanics' lien (*Chatham* v. *Rowland,* 92 N. C. 340), but a contract with the trustee, who is only authorized to collect rents, for large and expensive improvements in excess of necessary repairs, would not entitle the contractor to a lien. *Herbert* v. *Herbert,* 57 How. Prac. (N.Y.) 33.

A trustee who is authorized to build may encumber the estate with a mechanics' lien. *Taylor* v. *Goldsorf*, 74 Ill. 254.

A mechanics' lien attaches to the leasehold interest and to buildings erected by one tenant and sold to another, who has acquired a lease of the same interest, and this, notwithstanding the removal of the buildings, at the end of the term, is expressly required by the lease. *Zabriski* v. *Greater America Exposition Company*, (1903) 62 L. R. A. 369. The question whether a lien can be created by a trustee against a trust estate depends upon the terms of the trust. But property held in trust is not subject to a mechanics' lien where the trust deed has been duly recorded and prohibits the creating of a lien. *Franklin S. Bank* v. *Taylor*, (1890) 131 Ill. 376. An agreement between vendor and vendee that the vendee shall erect certain buildings may make the vendee an "owner." *Paulsen* v. *Manske*, 126 Ill. 72; *Borden* v. *Mercer*, 163 Mass. 7. The vendor and vendee cannot, by secret agreement, prejudice the rights of the lien claimant. *Henderson* v. *Connolly*, 123 Ill. 98; *Malmgren* v. *Phinney*, 50 Minn. 457; 18 L. R. A. 753. A purchaser under a deed held in escrow may subject his interest to a lien. *Chicago Lumber Co.* v. *Dillon*, 13 Colo. App. 196. A mechanics' lien cannot be acquired (under section 11 of the Alberta Mechanics' Lien Act) on demised premises for building or placing therein at the request of the tenant chattels or trade fixtures which he may remove at the expiry of his term. *Peters, Rohls & Co.* v. *McLean*, (1913) 13 D. L. R. 519.

CHAPTER IX.

Essentials to Bind an "Owner."

To ascertain the rights and liabilities of an "owner" where it is sought to charge his interest in the particular lot of land with a lien, two important provisions of the Mechanics' Lien Act must be considered and read together,—viz.—the section creating the lien and the section defining the meaning of the term "owner."

These two sections in the Ontario Act correspond substantially with other Mechanics' Lien Acts in Canada, and one section provides that:—

> Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing . . . any erection, building, . . . for the owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building . . . and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used. R. S. O. 1914, c. 140, s. 2 (c).

The other section defining owner is as follows:—

> "Owner" shall extend to any person, body corporate or politic, including a municipal corporation, and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done or materials are placed or furnished, at whose request, and (i) upon whose credit, or (ii) on whose behalf, or (iii) with whose privity and consent, or (iv) for whose direct benefit work or service is performed, or materials are placed or furnished, and all persons

claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished. R. S. O. 1914, c. 140, s. 2 (c).

And there is also a later section, R. S. O. 1914, c. 140, s. 8, which provides that the lien shall attach upon the estate or interest of the owner in the property mentioned in the earlier section.

In order to create a mechanics' lien against any interest in land certain things are made essential by the foregoing or similar sections. It is plain that the work must be performed, or the materials supplied for an owner, and also at his request and upon his credit or on his behalf or with his privity or consent or for his direct benefit.

Although the fact that work is done on the erection of a building or that materials are furnished, will not necessarily give to any one the right to a lien against the realty, yet, on the other hand, to create a lien a Mechanics' Act does not require a contract between the person performing the work or furnishing the materials and the "owner" of the property.

To bind the "owner," however, and create a lien against his interest, something more than his mere knowledge or mere consent to the work being done, is necessary; there must be a request by him, either express or by implication from circumstances, and the work must be done or the materials furnished in pursuance of that request. *Slattery* v. *Lillis*, (1908) 10 O. L. R. 697; *Gearing* v. *Robinson*, (1900) 27 O. A. R. 364; *Marshall Brick Co.* v. *Irving* v. *York Farmers Colonization Co.*, (1917) 54 Can. S. C. R. 569; *Eddy Company, Limited* v. *Chamberlain*, (1917) 45 N. B. R. 261; *Isitt* v. *Merritt Collieries*, (1920) 1 W. W. R. 879.

The sections of a Mechanics' Lien Act defining the meaning of the term "owner" must be read in connection with the section creating the lien, and if this be done it will appear that the following essentials must exist in order to create the lien,—

(1) A request by the "owner."

(2) Work done or materials furnished in pursuance of that request.

(3) The work must be done or the materials furnished either

(*a*) upon the owner's credit, or

(*b*) on his behalf, or

(*c*) with his privity or consent, or

(*d*) for his direct benefit.

Any one of the alternative conditions mentioned in (3) will suffice if joined with the essentials specified in (1) and (2).

The expression "upon the credit of the owner" has a broad meaning and does not necessarily mean only upon his credit in the sense that a personal obligation was created on his part to the person who supplied the materials. *Slattery* v. *Lillis*, (1905) 10 O. L. R. 697.

An owner's request may be implied. An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase price on the completion of the undertaking, is such a request in writing as gives a mechanics' lien arising from the erection of the works general application. See section 6, Mechanics' Lien Act, B. C. 1916, c. 154. And therefore the lien is not restricted to the increase in value of the premises by reason of such works. *British Columbia Granitoid, etc., Company, Ltd.* v. *Dominion Shipbuilding, Engineering and Dry Dock Co.*, (1918) 2 W. W. R. 919.

The owner may subject his interest to a mechanics' lien for repairs made by a tenant, provided that the owner's consent is clearly established. *Garing* v. *Hunt*, (1895) 27 O. R. 149. This, of course, would not apply where there is a statutory provision to the contrary. See Ontario Mechanics' Lien Act. The Alberta Act, c. 21, Acts of 1906, contains a section (11) which provides that: "Every building or other improvement . . . constructed

upon any lands with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner . . ." unless notice shall have been given of repudiation of responsibility. Under this section it was held that no lien would attach to bind the owner of land, for work performed in mining coal under a lease, at the request of the lessee, not of the owner or for his benefit. Work of mining coal is not work in respect of a building or other improvement. It was not improving the land but depreciating it: *Wester* v. *Jago*, (1917) 33 D. L. R. 617. Under this same important section, where a building was constructed with the knowledge of the owner who gave no notice disclaiming responsibility, the same result followed as if the building had been constructed at the owner's request. *Scratch* v. *Anderson*, (1908) 33 D. L. R. 620; *Limoges* v. *Scratch*, (1910) 44 Can. S. C. R. 86.

In dealing with the question as to what constitutes "request" or "privity and consent" of the owner, each case must be determined by its own facts. A "request" may be implied from special circumstances, (*Orr* v. *Robertson*, (1915) 34 O. L. R. 147; *Cut Rate Plate Glass Co.* v. *Solodinski*, (1915) 34 O. L. R. 604) but the provisions of the Mechanics' Lien Acts in Canada do not warrant the view that mere consent to the work or mere knowledge that the work is being done and non-interference will constitute "request" or "privity and consent." The words "privity and consent" involve something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged. *Graham* v. *Williams*, 8 O. R. 478, 9 O. R. 458; *Gearing* v. *Robinson*, (1900) 27 O. A. R. at p. 371; *Marshall Brick Co.* v. *York Farmers Colonization Co.*, (1917) 36 D. L. R. at p. 427, per Anglin, J.; *Marshall Brick Co.* v. *Irving*, 28 D. L. R. 464; 35 O. L. R. 542; *Eddy Company, Limited* v. *Chamberlain*, (1917) 45 N. B. R. 261; *Slattery* v. *Lillis*, (1905) 10 O. L. R. 697; *Webb* v. *Gage*, 1 O. W. R. 327. The onus of proof of consent is upon the person claiming a lien against the owner of the

property. *Marshall Brick Co.* v. *Irving,* (1916) 35 O. L. R. 542. "Privity" must mean knowledge and acquiescence. *Marshall Brick Co.* v. *Irving,* supra. An express request of the owner is not necessary; it may be implied from the circumstances. *Fortin* v. *Pound,* (1905) 1 W. L. R. 333. Consent may be implied. *Vickery* v. *Richardson,* 189 Mass. 53; *Steeves* v. *Sinclair,* 171 N. Y. 676; *Fischer* v. *Jordan,* 169 N. Y. 615; *Gilmour* v. *Colcord,* 96 App. Div. (N.Y.) 358.

But mere failure to object on the part of the lessor to improvements by his lessee should not subject the interest of the lessor to a lien. *Graham* v. *Williams,* 8 O. R. 478, 9 O. R. 458.

To bind the owner's interest there must be the request, the furnishing of the materials, or the doing of the work, in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent, or for his direct benefit. If in addition to the request one or other of these alternative conditions exist, the lien is created. *Slattery* v. *Lillis,* (1908) 10 O. L. R. 697.

A contract with the authorized agent of the owner is sufficient to create a lien against the property. *Interstate Building Assoc.* v. *Ayers,* 177 Ill. 9; *Mammoth Min. Co.* v. *Salt Lake Foundry,* 151 U. S. 447. Where the improvement of the premises is the joint enterprise of the owner of the premises and the lessee, a provision in the lease to the effect that the lessor's interest shall not be subject to mechanics' liens for labor or material furnished for the improvement is void. *Boyer* v. *Keller,* (1913) 258 Ill. 106.

A lease with a building covenant by the lessee and knowledge of the work by the owner amounts to "consent" of the owner to the building, and creates a lien against his estate.

The consent must be shown, and whether it appears in any given case will depend wholly upon the facts of that case. *Shaw* v. *Young,* 87 Me. 271.

A mere general consent or requirement on the part of a landlord that the lessee may or shall at his own expense make altera-

tions and repairs to premises, does not constitute consent. The cases in which such a consent has been implied are cases in which the owner has done some affirmative act respecting the particular improvement from which his knowledge and consent may properly be inferred. *Ætna Elevator Co.* v. *Deeves,* (1908) 125 App. Div. (N.Y.) 842. While consent must be something more than mere acquiescence in the act of a tenant, who for his own convenience makes temporary erections and additions which he has a right to remove during his tenancy, yet if the owner of the building has knowledge that certain repairs are necessary and makes no provision for them, but is present when they are being made by his tenant, and gives no notice that he will not be responsible therefor, his consent may be inferred from his conduct considered in connection with all the circumstances of the case. *York* v. *Mathis,* (1907) 103 Me. 67.

In construing Acts which make the consent of the owner sufficient to bind his interest in the property, and in determining the question of consent much may depend on the nature of the work done, consent may be inferred for ordinary preservative repairs when it would not be inferred for alterations, remodellings, additions, or even more expensive repairs. *Shaw* v. *Young,* 87 Me. 271. A lien will be enforced against the owner for repairs made by his lessee where the lease provides that the lessee should make such improvements and that the same should become the property of the lessor at the expiration of the lease. *Henry* v. *Miller,* (1908) 145 Ill. App. 628.

The consent of the owner or of any person having authority from or rightfully acting for such owner is consent to the performance of the work or to the furnishing of the materials, not to the creating of a debt for such labor or materials. *Brown* v. *Haddock,* (1908) 199 Mass. 480; *Vickery* v. *Richardson,* 189 Mass. 53. The owner by giving a lease in which lessee covenants to keep all the machinery in good working order at his own costs, "consents" to work done under contract with lessee for the purpose of putting

and keeping the machinery in working order. *Tinsley* v. *Smith* (1909) 115 App. Div. 708, 104 N. Y. 581. As to provisions in a lease which constitute "consent," see *New York Elevator Supply Co.* v. *Brewer*, 74 App. Div. (N.Y.) 400; *Jones* v. *Menke*, 168 N. Y. 61; *Meistrell* v. *Baldwin*, (1911) 144 N. Y. App. Div. 660.

Where, by virtue of a special provision of a Mechanics' Lien Act, "consent" is sufficient to bind an "owner," express consent of the owner is not necessary. Consent may be inferred from facts which indicate at least a willingness on the part of the owner to have the improvements made, or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed. The omission of the owner to object to improvements made upon his premises by a tenant, when the owner has knowledge of the circumstances under which they are being made is an important fact bearing upon the question of consent. *National Wall Paper Co.* v. *Sire*, 163 N. Y. 122, 131. Consent to the making of small repairs to an elevator cannot be implied under a clause in a lease whereby the lessee agreed to keep the premises in good repair, and where nothing appears from which it may be inferred that the landlord knew of or anticipated them. *Ætna Elev. Co.* v. *Deeves*, (1908) 125 App. Div. (N.Y.) 842. As to facts showing "consent," see *Courtemanche* v. *Blackstone Valley St. R. Co.*, 170 Mass. 50; *Paulsen* v. *Manske*, 126 Ill. 72. Consent may follow from the owner's conduct when accompanied with knowledge of the circumstances under which the work is being done. *Gannow* v. *Shepard*, 156 Mass. 355; *Vickery* v. *Richardson*, (1905) 189 Mass. 53; *York* v. *Mathias*, 103 Me. 67; *Anderson* v. *Berg*, 174 Mass. 404; *Steeves* v. *Sinclair*, 171 N. Y. 676.

An owner who has power to choose whether or not his property shall be improved, and who executes a lease requiring the tenant to make substantial improvements, consents to the improvements within the law. *McNulty Bros.* v. *Offerman*, 126 N. Y. S. 755, 141 App. Div. 730. But a lease and contract to convey is not the

"consent" required by the statute to subject the lessor's title to a lien for building, though the erection of buildings was contemplated by both parties, being necessary to the utilization of the lease. *Currier* v. *Cummings*, 40 N. J. Eq. 145. As to power of lessee or vendee to subject owner's interest to lien, see *Belnap* v. *Condon*, (1908) 23 L. R. A. and cases therein reviewed. When a contractor performs work under a contract with the tenant and relies also upon the consent of the owner, he is not justified in abandoning the work because the tenant refused to pay or is otherwise guilty of a breach of the contract, unless he was actually prevented from completing. In order to hold the owner on the theory that he consented to the work, the contract must be substantially performed. *Mitchell* v. *Dunsmore Realty Co.*, (1908) 126 App. Div. (N.Y.) 829.

If "consent" be made sufficient by the terms of the Act to bind an owner, then an owner of the fee of leased land who consents that the lessee shall make improvements which shall remain upon the property for the benefit of the lessor at the expiration of the lease, there being no restriction as to the extent of such improvements, subjects his interest to mechanics' liens for labor and materials furnished for the improvements and cannot be heard to say that the cost is excessive or the improvements undesirable. *Haas Electric & Mfg. Co.* v. *The Springfield Amusement Park Co.*, (1908) 236 Ill. 452. Under certain circumstances, where a contractor employs necessary workmen the consent of the owner to the work done may be implied so as to entitle such workmen to a lien. *Monaghan* v. *Goddard*, 173 Mass. 468. If a third party does the work by consent of all parties, he may be considered as entitled to the rights of the persons whose places he has taken. *Moore* v. *Ericksen*, 158 Mass. 71; *Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211; *Murphy* v. *Watertown*, 112 App. Div. (N.Y.) 670.

Where a contract between the lessor and the lessee provides for certain improvements, the interest of the lessor cannot be sub-

jected to a mechanics' lien for other improvements in the absence of any evidence showing that he authorized or consented to the additional work. *Bermingham* v. *Gill*, (1911) 164 Ill. App. 536.

The mere fact that one tenant in common has notice that repairs are being made on the property by a purchaser under executory contract does not establish consent to a change of the contract of sale so as to authorize the purchaser to establish mechanics' liens against his interest in the property. *Roxbury Painting Co.* v. *Nuter*, 123 N. E. 391.

CHAPTER X.

How Lien May be Waived or Defeated.

In the absence of special statutory provision, the doctrine of waiver would apply to mechanics' liens and a mechanic could waive his right to a lien in like manner as he might waive any other statutory privilege.

Mechanics' Lien Acts in Canada not only provide that a lien upon realty may be waived as between the immediate parties by agreement in writing, but also contain a provision that a person who does any kind of manual labor cannot, even by written agreement, waive his right to a lien. This latter provision in intended to protect those who do the manual labor, and its application is limited to that class.

Even where such a provision does not exist, the waiver to be effective must be clear and unmistakable. *Concord Apartment House Co.* v. *O'Brien,* 128 Ill. App. 433, affirmed, 228 Ill. 476.

The right to a lien is waived where the parties have submitted the matters to arbitration and the arbitrators have made an award. *N. Y. L. Co.* v. *Schneider,* 15 Daly 15; but it had been held otherwise where there is a revocation of the agreement to submit by the lien claimant. *Paulsen* v. *Manske,* (1888) 126 Ill. 72. The right to a mechanics' lien may be waived by a contractor for a sufficient consideration during the pendency of the work. *Kelly* v. *Johnson,* (1911) 251 Ill. Rep. 135, 36 L. R. A. 573.

There is no waiver of a lien upon a certain lot where a form of waiver as to that lot had been signed without consideration and by mistake, there being no intention to waive, and the claimant not knowing at the time of signing that he was to do work on that particular lot. The principle of estoppel would not apply in such a case. *Palfrey* v. *Brown,* (1915) 31 W. L. R. 535.

The right to acquire a mechanics' lien will not be waived by

the extension of credit unless the time of payment is extended beyond the time within which an action must be commenced to enforce the lien. *Landsberg & Co.* v. *Hein Construction Co.*, (1909) 135 App. Div. (N.Y.) 819. The cases cited in this volume, (chap. xii, *post*) dealing with liens on personalty have practically no application where the subject-matter is realty, the nature and terms of the statutory provision respecting realty negativing such application.

A claimant who has supplied material to be used in the erection of a building under a contract by which the materials were to be supplied from time to time and has filed a lien, which at the request of the owner he has subsequently discharged, taking instead an order upon certain moneys, which order was not paid, cannot, upon supplying further material under his contract and within the statutory period, file a lien for the toal amount of his claim. *Wortman* v. *Frid-Lewis Co.*, (1915) 33 W. L. R. 119 (Alta.).

It is for the defendant to show that the lienholder has waived his lien. *McCabe* v. *McRae*, (1871) 58 Me. 99. A lien may be waived for a special purpose, and if so, the courts will confine it to the purpose intended, but a general waiver of lien must be enforced as made by the parties. *Turnes* v. *Brenckle*, (1911) 249 Ill. 394; *Weiss* v. *Silverman*, 58 Can. S. C. R. 363.

Any person interested in the premises is entitled to rely on waiver of lien which is addressed "to whom it may concern." *Bowers* v. *Jarrell*, (1919) 210 Ill. App. 256.

Does the fact that the supplier of materials for improvements on land retains the title to the materials until they are paid for deprive him of the right to a mechanics' lien?

The weight of authority justifies the conclusion that the retention of title is not inconsistent with the statutory lien and that either remedy can be invoked. American decisions incline to this view that, although the title to the article supplied is reserved to the furnisher of it until payment is made, this fact does not amount to a waiver of the right to a mechanics' lien. While a contract of this kind may be in form of a lease, it is in substance an

agreement for sale and a lien upon the article supplied, as security for the purchase price, whereas the Mechanics' Lien Act creates a lien not only upon the article supplied but upon the real estate upon which it was placed. "The former was a lien by contract, the latter by statute; and neither is destructive of the other." *United States Construction Co.* v. *The Rat Portage Lumber Co.*, (1915) 25 Man. L. R. 793; *Hoover* v. *Featherstone*, 111 Fed. at p. 95. See also *Chicago and Alton R. R. Co.* v. *Union Rolling Mills Co.*, 109 U. S. at p. 720; *Salt Lake Hardware Co.* v. *Chainman Mining Co.*, 128 Fed. 509.

But while the retention of title is not inconsistent with the statutory right to a mechanics' lien, if a lien claimant invokes the provisions of the Mechanics' Lien Act to enforce his claim for the materials furnished for and erected in a building, the view seems justifiable that he should be taken to have thereby elected to make them a part of the building and realty against which he claims the lien and to be thereafter estopped from claiming that the materials are his property and that he has a right to remove them. *See United States Construction Company* v. *The Rat Portage Lumber Company, Limited*, (1915) 25 Man. L. R. at p. 797. Where both remedies are statutory a plaintiff who resorts to one of these remedies, (under the Woodmen's Lien Act) cannot obtain another judgment under the Mechanics' Lien Act for the same claim. *Wake* v. *C. P. L. Co.*, (1901) 8 B. C. R. 358. Articles sold under a lien agreement, whereby the vendor retains the ownership and possession until paid, affixed permanently to the floor of the building, with the vendor's knowledge and consent, become part of the realty. A purchaser of realty is not bound to search for liens against goods which under the law have become part of the realty. *Berlin Interior Hardware Co.* v. *Colonial I. and L. Co.*, 38 D. L. R. 463, 11 Sask. L. R. 46, (1918) 1 W. W. R. 378.

It would seem also that the effect of the special provision contained in the Mechanics' Lien Acts in Canada (R. S. O. c. 140, s. 6) declaring that "Unless he signs an express agreement to the

contrary, any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making . . . of any erection . . . shall . . . have a lien" must prevent a waiver of the statute by the lien claimant except by an "express agreement." As this statutory provision declares that only a signed express agreement can prevent a lien claimant from asserting a lien, it must follow that an estoppel in pais cannot prevent such lien. *Anderson* v. *Fort William Commercial Chambers Ltd.*, (1915) 25 D. L. R. 319; *United States Construction Co.* v. *The Rat Portage Lumber Co., Limited*, (1915) 25 Man. L. R. 793. "It would emasculate this section to hold that an estoppel in pais would do what the section declares only a signed agreement can do." *Anderson* v. *Fort William Commercial Chambers Ltd., supra*, per Riddell, J.

Under the Manitoba Mechanics' Lien Act it has been held that where a building contract provides for a time of payment later than the time within which a lien can be filed, the lien is waived. *Ritchie* v. *Grundy*, (1890) 7 Man. L.R. 532; see *Scheid* v. *Rapp*, 121 Pa. 593. But if, by the contract, a promissory note or other security for the price of the work is to be given within the time for enforcing a mechanics' lien, the implied agreement to waive the lien is conditional upon the giving of the note or other security. *Ritchie* v. *Grundy, supra*.

A materialman's waiver of lien, under seal, given to the contractor and presented to the owner's agent, is supported by sufficient consideration where it is given to enable the contractor to get money belonging to the owner from such agent which the agent pays to such contractor. *P. A. Lord Lumber Co.* v. *Callahan*, (1913) 181 Ill. App. 323.

A builder may waive his right to a lien remedy but, where the terms of the alleged waiver are ambiguous, the doubt should be resolved against the waiver, as it should be presumed that one has not disabled himself from the use of so valuable a statutory privilege. Hence it would seem that an agreement in a building

contract not to permit or suffer a mechanics' lien to be filed or remain on the property is not a waiver of the contractor's statutory right to file a lien on his own behalf. *Kertscher & Co.* v. *Green,* (1910) 124 N. Y. S. 461; (1911) 127 N. Y. S. 127; *Davis* v. *La Crosse Hospital,* 121 Wis. 579. One who furnishes a defaulting contractor with building materials under a guarantee of payment from the property owner is not entitled to a mechanics' lien against the property unless there is a balance payable by the owner to the contractor; his remedy is by a personal judgment against the property owner. *Canadian Equipment & Supply Co., Ltd.* v. *Bell & Schiesel,* (1913) 11 D. L. R. 820, 24 W. L. R. 415 (Alta.).

A clause that the "lessee" shall permit no mechanics' liens to attach to the "premises," is construed as merely a covenant on the part of the lessee that he would discharge such liens, and such clause would not prevent a lien from attaching as between the owner and the party otherwise entitled thereto. *Carey-Lombard Lumber Co.* v. *Jones,* (1901) 187 Ill. 203.

A claimant who files a claim for lien does not thereby waive any other right he may have against his debtor in respect to the claim. *Dunn* v. *Stokerm,* (1855) 43 N. J. Eq. 401. Nor does he waive his lien by bringing an action at law for his debt and attaching the real estate against which he is seeking to enforce his lien. *Angier* v. *Bay State Company,* (1901) 178 Mass. 163. As to stipulation constituting express waiver, see *Stoneback* v. *Waters,* (1901) 198 Pa. 459; *Pinning* v. *Skipper,* 71 Md. 347.

Where a contractor agreed to build a house for a price named, one-half to be paid when the shingles and clapboards were on, and the other half when the house was finished, it was held that this contract did not stipulate for a credit, inconsistent with the enforcement of the lien, and could not be considered as a waiver of it.

A waiver does not result, as a matter of law, merely from the fact that the owner, when ordering materials, agreed to give and afterwards did give the materialman a mortgage on other land "as additional security." The question whether the mortgage was

intended to be in lieu of a lien is a question of fact for the trial court. *Halstead and Harmount Co.* v. *Arick*, (1904) 76 Conn. 382.

A provision in a contract postponing the final payment until 32 days after the work was entirely completed, and requiring payment only on sufficient evidence that all claims upon the building for work or materials were discharged, is not inconsistent with the existence of a right on the part of the contractor to secure the payment of his dues by claiming a lien. *Poirier* v. *Desmond*, (1900) 177 Mass. 201.

Although in Manitoba it has been held that a lien claimant who takes a promissory note for the amount of his claim and discounts it thereby forfeits his right to a lien (*Arbuthnot & Co.* v. *Winnipeg Mfg. Co.*, 16 Man. L. R. 401) there is authority for the view that a lien claimant does not waive his lien by taking and negotiating the owner's promissory note from the contractor. *Coughlin* v. *National Construction Co.*, 14 B. C. R. 339; *Gorman* v. *Archibald*, 1 Alta. R. 524; *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49; *Makins* v. *Robinson*, 6 Ont. 1; *Kendall* v. *Fader*, 199 Ill. 294; *Breckenridge* v. *Short*, 2 Alta. L. R. 71. In a decision by a Saskatchewan court (*Swanson* v. *Mollison* (1907) 6 W. L. R. 678, Stuart, J., questions the soundness of the view expressed in the Manitoba judgment, and says: "In Wallace on Mechanics' Liens, 1st ed. (1905) p. 150, there is the following note to the similar clause in the Ontario statute, 'After the note has been negotiated, the debt then becomes due to a third party, and the original creditor becomes guarantor of the payment of the debt. While the note is in the hands of the third party, no proceedings can be taken to enforce the lien. If the lien claimant pays the note, and is the holder of the note at the time he begins proceedings, the fact of his having negotiated the note will not take away his lien.' This paragraph seems to me to contain a much more reasonable principle than that contained in the Manitoba case." Rockel on Mechanics' Liens, (1909) also supports this view, in

these words: "Some few courts have held that the taking of a note operates as a payment of the debt and waives the lien. But the great weight of authority now is that the taking of a note is neither a waiver of the lien nor a payment of the debt unless it is expressly agreed that it shall have that effect or there is a manifest intention that it shall so operate." The decision in the Manitoba case, however, follows a decision of the Supreme Court of Canada (*Edmonds* v. *Tiernan*, (1892) 21 Can. S. C. R. 406), which dealt with a case under the British Columbia Mechanics' Lien Act, and held that the plaintiff who had taken a note for the amount of his claim, which he had negotiated, had thereby lost his lien, notwithstanding that the note had been dishonoured and taken up by him. Referring to this latter decision, Stuart, J., in an Alberta case says: "I find myself quite unable to tell from the reasons given, what was the ground on which the judgment was based. The last sentence is: 'Had the note not been negotiated by the appellant, different considerations might have prevailed,'—which would seem to indicate that it was considered that the mere giving of the note might not have been deemed a waiver or extinguishment of the lien, though the reasons given do not make clear what difference the negotiation makes." Stuart, J., also quotes the following passage from Phillips on Mechanics' Liens, "It has been argued, that although the acceptance of negotiable paper is not a waiver of the lien, yet a negotiation of it operates as an extinguishment. This argument has not been generally assented to. On the contrary, it has been almost universally held that the negotiation produces no other effect than to suspend the right of the mechanic to sue until the instrument is returned to him unpaid." Various Mechanics' Lien Acts in Canada now contain a special provision which declares that the taking or the discounting or negotiation of any promissory note shall not waive or prejudice any lien created by the Act.

The lien is not waived by the acceptance of drafts by the debtor (*Bradford Neill & Mahnke Const. Co.*, (1897) 76 Ill. App.

488), or by the taking of collateral security unless the parties so intended. *Bryant* v. *Grady*, 98 Me. 389; *McLean* v. *Wiley*, (1899) 176 Mass. 233; *Frith* v. *Rehfeldt*, (1909) 130 App. Div. (N.Y.) 326, affirmed 164 N.Y. 588; *Sorg* v. *Crandall*, (1907) 129 Ill. App. 255; affirmed *Lowden* v. *Sorg*, 233 Ill. 79.

The general rule in the United States is that a note is not such a payment as will extinguish the lien unless it was so agreed. See *Pollock Bros.* v. *Niall-Herin Co.*, (1911) 35 L. R. A. 13, and particularly cases cited at page 93 of that report. See also *Moore* v. *Jacobs*, 190 Mass., (1906) 424. The intention to waive the right to a lien by the taking of a note must be clearly established. *Paddock* v. *Stout*, (1888) 121 Ill. 571. Unless the note is paid it will not waive the right to a lien. *Goble* v. *Gale*, 41 Am. Dec. 219. The giving by the claimant, of a receipt "in full" for the owner's or the contractor's note will not discharge the lien, unless a clear intention is shown. *Smalley* v. *Ashland Brown-Stone Co.*, (1897) 114 Mich. 104.

The fact that promissory notes have been accepted in payment, is not a waiver of the right of the sub-contractor to file a lien where the time of payment is not extended beyond the time within which an action must be commenced to enforce the lien. *Landsberg & Co.* v. *Hein Construction Co.*, (1909) 135 App. Div. (N.Y.) 879.

Special provisions in Mechanics' Lien Acts in Canada dealing with the taking of collateral security, must be followed.

The doctrine of estoppel is frequently invoked in connection with proceedings under the Mechanics' Lien Acts.

If, as is probable, the mechancis' lien should be considered as a charge or mortgage created upon his interest or estate by the "owner," the principle applied in the case of a mortgagor who acquires the legal estate after the making of the mortgage, would be applicable; the mortgagor is said to be estopped from denying his title.

The application of the principle of estoppel in such cases should, however, not be relied upon to too great an extent. The lien is purely statutory and is limited by the words of the stat-

ute. It extends only to the estate or interest of the "owner," that is, of the person who makes the contract, and it may well be argued that only the estate or interest at the time of the making of the contract is bound by the lien. In Ontario, under the Mechanics' Lien Act, it has been held that an estoppel in pais from claiming such lien cannot arise, and such right can only be waived by a signed agreement. *Anderson* v. *Fort William Commercial Chambers*, 25 D. L. R. 319, 34 O. L. R. 567.

Fraud, misrepresentation or concealment will estop the owner of the fee from setting up his title in answer to the claims of the mechanic. He cannot take advantage of his own wrong to gain improvements on his property. So, where a purchaser takes a conveyance to his wife in order to defeat a lien, or purchases a property formerly owned by him and subject to a mechanics' lien, at a tax sale, the lien would be upheld. *Hooker* v. *McGlone*, 42 Conn. 95; *Schwartz* v. *Saunders*, 46 Ill. 18.

The conduct of a mortgagee may enable the principle of estoppel to be applied to him. If in a suit to establish a mechanics' lien as against a mortgagee from A., it appeared that A. had only an instantaneous seisin of the land on which the lien was claimed, yet it also appeared that A. falsely represented to the lien claimant that he was the owner of the land and thereby induced the lien claimant to enter into the contract under which his lien was claimed and the mortgagee, when he took his mortgage, knew of the lien claimant's claim of lien and also of the false representation and inducement, whether the mortgagee as well as A would not be estopped from denying A.'s ownership of the land, quære. *Sprague* v. *Brown*, (1901) 178 Mass. 597; *Ready* v. *Pinkham*, (1902) 181 Mass. 351.

The doctrine of estoppel is frequently invoked to prevent a lienholder from enforcing his lien against innocent third persons whom he has misled. This doctrine would apply if a lienholder purposely suppresses the fact that he is entitled to a lien and thereby induces another to act to that other's injury upon the belief that the lienholder has no such right. Estoppel would also

or makes a similar misrepresentation so that the subsequent enforcement of a lien on his part would be a fraud upon innocent third persons. *McGraw* v. *Bayard*, 96 Ill. 146; *Hinchley* v. *Greany*, 118 Mass. 595; *Howard* v. *Tucker*, 1 B. & Ad. 712.

If a person is induced to purchase property upon the representation of another that he has no lien thereon, such other is subsequently estopped from asserting a lien to the detriment of the person who has made such purchase. *Heskins* v. *Hesley*, (1909) 152 Ill. App. 141.

Mechanics' Lien Acts in some of the Provinces of Canada require the written consent of the owner of the land before his interest can be made subject to liens filed for improvements made at the instance of the lessee, but under other Mechanics' Lien Acts in Canada, if an owner of the land allows, without protest or notice, such improvements to be made by the lessee, the interest of such owner becomes subject to the liens filed. *Limoges* v. *Scratch*, (1910) 44 S. C. R. 86.

If the true owner has so acted as to mislead a purchaser into the belief that the person dealing with the property had authority to do so, a good title is acquired by personal estoppel against the owner. *Simmons* v. *London*, (1892) A. C. 215. See *Maple City Oil & Gas Co.* v. *Charlton & Ridgetown Fuel Supply Co.*, (1912) 22 O. W. R. 882. In Indiana it has been decided that an owner may not stand by without objection and see another in good faith improve and enhance the value of his property and retain these benefits without paying for them. *Lengelsen* v. *McGregor*, 162 Ind. 258. A special provision in the Alberta Mechanics' Lien Act protects such claimants.

If the true owner of property stands by and permits another to deal with it as owner, he will be estopped as against a purchaser for value. Estoppel does not require for its operation that the purchaser shall have acquired the legal estate; a change of his position on the faith of the misrepresentation is all that is essential. Ewart on Estoppel, 140, 263. Having been silent as to his apply where a lienholder wrongly represents that he has been paid

alleged rights when he ought to have spoken, he should not be heard to speak when he ought to be silent. *Morgan* v. *Railroad*, (1877) 96 U. S. 720. But if he is not obliged to speak his silence may not work an estoppel. *Billings Co.* v. *Brand*, 187 Mass. 417; *Bruce Lumber Co.* v. *Hoos*, 67 Mo. App. 264. As to the conclusiveness of a judgment, as between the plaintiff and one not a party nor privy, but who voluntarily conducted the defence, see *Ludy* v. *Larsen*, (1911) 78 N. J. Eq. 237.

In Alberta it has been held that on the trial of a mechanics' lien action involving materials supplied to a building contractor, a receipt of the materialman for a fictitious payment intended to assist the contractor in obtaining an advance from the owners will not necessarily be charged against the materialman (*Howlett* v. *Doran*, (1913) 11 D. L. R. 372 (Alta.), but in British Columbia a person who supplies materials and during the course of construction gives a receipt for payments which he had never received is estopped from claiming such amount against the owner under mechanics' lien proceedings. *Coughlan* v. *National Construction Co.*, 14 B. C. R. 339.

In Alberta, a firm of sub-contractors claimed a lien for work done as against the owner, but it appeared that they had given the contractor receipts for money which he had received from the owner to pay them and had not paid them, the sub-contractors thereby leaving the owner to believe that they had been paid. In that belief, the owner made other payments to the contractor in excess of the work he did upon the building, and also made payments to another sub-contractor and lienholder. In the circumstances, these sub-contractors were not entitled to enforce a lien against the owner's land though they had not been paid in full for the work done and materials furnished by them. *Ringland* v. *Edwards*, 19 W. L. R. 219.

A principal, who knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the

existence in fact of the pretended authority, cannot afterwards against such third persons, dispute its existence. If an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting bona fide. *Sayward* v. *Dunsmuir*, 11 B. C. R. 375.

A husband who as owner enters into a contract with a builder cannot subsequently claim that he was acting solely as agent for his wife. *Sidney* v. *Morgan*, 16 W. L. R. 123 (B.C.). See other cases cited under "Married Women's Property, *ante*.

If the true owner stands by while another is making a contract and encourages the builder to perform the same, his conduct will operate as an estoppel. *Bastrup* v. *Prendergast*, 179 Ill. 553. Conspiracy or deceit in preventing the attaching or enforcement of a lien would be sufficient to justify an action at law. *Ellenwood* v. *Burgess*, 114 Mass. 534, 539. See also *Kilburn* v. *Rice*, 151 Mass. 442.

If the owner holds a person out as having authority he will not be permitted subsequently to assert the contrary. *Hough* v. *Collins*, 70 Ill. App. 661.

Whether authority has been conferred on an agent is a question of fact, and such authority may be inferred from the acts of recognition by the principal. *Sayward* v. *Dunsmuir*, (1904) 11 B. C. R. 375. There may be authority by estoppel. If A. has by words of conduct held out B., or enabled B., to hold himself out as having the authority of the former to act for him, A. is bound as regards third parties by the acts of B., to the same extent as A. would have been bound if B. had in fact had the authority which he was held out as having.

Any act or neglect of the lien claimant which induces a person to rely upon the non-existence of the lien, may defeat the lien by estoppel. Thus, where the holder of a mechanics' lien stated at a

sale that there was no incumbrance on the estate and advised a party to buy it, who, relying on the statement, became the purchaser, the lienholder cannot set up his lien. *Hinchley* v. *Greany*, (1875) 118 Mass. 595; *Fowler* v. *Parsons*, (1887) 143 Mass. 401. See also cases cited in vol. 20, Am. & Eng. Ency. of Law, 2nd ed. at p. 497. A mechanics' lien can be enforced against the owner of a lot who knowingly suffers a verbal sale of it through an agent to a person and the erection of a building thereon by the purchaser pursuant to such sale. *West* v. *Pullen*, (1900) 98 Ill. App. 620. See on this question of estoppel, *Sprague* v. *Brown*, (1901) 178 Mass. 220; *Saunders* v. *Bennett*, (1893) 160 Mass. 48; and *Angel* v. *Joy*, (1911) 1 K. B. 666. It is not necessary to an equitable estoppel that the party should design to mislead. On the general principle of estoppel, see *Citizens Bank of Louisiana* v. *First National Bank of New Orleans*, (1873) L. R. 6 H. L. 352, 360, 361; *Chadwick* v. *Manning*, (1896) A. C. 231; *George Whitechurch Ltd.* v. *Cavanagh*, (1902) A. C. 117.

By guaranteeing the performance of a building contract a subcontractor estops himself from claiming a lien upon the building which was abandoned by the contractor and constructed by the owner (*Frohlich* v. *Ashton*, (1900) 164 Mich. 132) but there is no estoppel generally unless, without it, a wrong will result from the action of the party against whom the estoppel is sought. *Hughes* v. *McCashland*, (1906) 122 Ill. App. 365; *Badger Lumber Co.* v. *Mulheback*, 190 Mo. App. 646. Where it appears that the defendant, a construction company, before the suit, cancelled the contract, deprived the plaintiff company of the power to complete the contract, and at the same time denied all liability either by reason of services rendered thereunder, or by reason of the cancellation thereof, the defendant company is estopped to claim that the plaintiff company has lost its right to a lien or to a first lien, by agreeing to accept part of its compensation in defendant's bonds,—whether or not any lienor other than the plaintiff may raise such objection. *Wetzel, etc., R. Co.* v. *Tennis Bros. Co.*, (1906) 145

Fed. 458. A person who places or furnishes any materials to be used in the making of any building does not lose the right of lien given him by the Mechanics' Lien Act by stipulating in the contract under which the materials were furnished that they were only leased to the owner of the building, and that the right of property in them shall remain in the vendor until payment of the purchase money in full, and that he shall have the right at his option to remove the materials at any time, provided that the contract is in substance an agreement of sale of the material; *United States Construction Company* v. *The Rat Portage Lumber Co., Ltd.* (1915) 25 Man. L. R. 793; nor will a claimant who had made a similar agreement, be estopped if, having first invoked proceedings under the Mechanics' Lien Act he abandoned those proceedings and sought relief under the agreement by which he was to have the right to remove the article in default of payment. W. & Co. having a contract to build an elevator, etc., for the defendants, purchased an engine and other machinery from plaintiffs on the terms that the ownership was not to pass until payment, which was to be cash on delivery, and that in case of default plaintiffs were to be at liberty to remove the machinery. Plaintiffs first took proceedings under the Mechanics' Lien Act to realize the amount of their claim, but abandoned them. In the present suit the plaintiffs asked that the defendants might be ordered to deliver up the machinery and to permit plaintiffs to remove it. Held, that plaintiffs were entitled to relief and were not estopped by having commenced proceedings under the Mechanics' Lien Act, as they had not gone on to judgment. *Vulcan Iron Co.* v. *Rapid City Co.*, (1894) 9 Man. L. R. 577 and 586. In this case *Priestly* v. *Fernie*, 3 H. & C. 977 is distinguished, the parties there having gone to judgment.

In the absence of special legislation, if a person ignorant of the wife's interest contracts with the husband to build on the wife's land and the wife acquiesces she is estopped from setting up her rights against the lien. *McCarthy* v. *Caldwell*, 43 Minn. 442. See

Greenleaf v. *Beebe,* 80 Ill. 552; *Bevan* v. *Thackera,* 143 Penn. 182 But there is no presumption that a husband is his wife's agent. *Gillies* v. *Gibson,* (1907) 7 W. L. R. 245.

A materialman who files a lien is not estopped by the fact that without bad faith he claimed more than was due him. *Frohlich* v. *Ashton,* (1909) 159 Mich. 265; *Gould* v. *McCormick,* (1913) 75 Wash. 61. The lien will not be defeated unless the excessive claim were made in bad faith. *Schmulbach* v. *Caldwell,* (1912) 196 Fed. 16; *Vaughan* v. *Ford,* (1910) 162 Mich. 37; *Romanik* v. *Raporport,* (1912) 148 App. Div. (N.Y.) 688; *West Side Lumber and Shingle Co.* v. *Herald,* (1913) 64 Ore. 210. But where a claimant has filed a sworn statement fixing the date when he ceased work, he is estopped thereby, and cannot by a subsequent statement, fixing a later date, extend the time for claiming a lien. *Canton Roll Co.* v. *Rolling Mills Co.,* (1907) 155 Fed. 321. A reduction in the amount of the claim will not render the lien void. *Montjoy* v. *Heward School District,* (1909) 10 W. L. R. 282. Where a defect in the claim of lien was caused by a statement made to the claimant by the owner and the contractor the owner and contractor are estopped from setting up the defect. *Brown* v. *Welch,* 5 Hun. (N.Y.) 582.

Where the mistake in claiming an excessive amount is an honest one, the lien is not lost (*Pioneer Mining Co.* v. *Delamotte,* (1911) 185 Fed. 752), but a statement of lien grossly in excess of the amount actually due is not such "a just and true statement of account of the demand due" as is required by these words of the statute. *Griff* v. *Clark,* (1909) 155 Mich. 611. Where an overstatement of the amount due and sought to be recovered is made intentionally and with a design to defraud the entire lien must fail. *Christian* v. *Allee,* 104 Ill. App. 177; *Marsh* v. *Mich,* 159 Ill. App. 399; *Walls* v. *Ducharme,* 162 Mass. 432; *Burrell* v. *Way,* (1894) 176 Mass. 164; *Hecla Iron Works* v. *Hall,* 115 App. Div. (N.Y.) 126; *Williams* v. *Daiker,* 63 App. Div. (N.Y.) 614. In this case the claim embraced more materials than had been used,

and this fact was known to the claimant. If the claimant knowingly files a claim for a larger amount than is due it is void. *Hubbbard* v. *Brown*, 90 Mass. 590; *Aeschlimann* v. *Presbyterian Hospital*, 165 N. Y. 296; *New Jersey Steel & Iron Co.* v. *Robinson*, 85 App. Div. (N.Y.) 512. A mistaken statement that a mechanics' lien has been paid does not estop the lien claimant from subsequently enforcing it against one who bought the property in reliance on the statement, if it was made to him without any knowledge that he had any interest in the matter or any intention to buy the property. *Kirchman* v. *Standard Coal Co.*, (1901) 52 L. R. A. 318.

As a general rule the lien only attaches upon the estate or interest of the owner at the time the work or service is performed or the materials furnished. If, however, an owner having an equitable estate subjects that estate to a mechanics' lien and afterwards acquires the fee simple or other larger estate, such larger estate will be subject to the lien. The owner may be estopped from setting up the subsequent purchase in answer to the claim of the lienholder. *Coleman* v. *Goodnow*, 36 Minn. 9, 29 N. W. 338.

As to homestead exemption laws, it is a sound doctrine that whatever liberality should be given the construction of such laws, they ought not to be so construed as to give the debtor the power by his own acts to deprive others of rights previously obtained in his property. One who has contracted for the improvement of his property cannot after the work is completed defeat the right to a lien for the work done by marrying and claiming the property as a homestead free from such right of lien. *Evans* v. *Jensen*, L. R. A. 1918 B.

Does a lien claimant who in addition to instituting lien proceedings brings an ordinary action claiming a personal judgment thereby forfeit his rights to the statutory remedy? In lien proceedings under the Alberta Mechanics Lien Act, (*Pomerleau* v. *Thompson*, (1914) 16 D. L. R. 192) which contains provisions constituting the money owing to a contractor for getting out

timber and logs, a specific fund, on which the workmen and laborers have a lien for wages, Beck, J., held that an employee of the contractor for getting out logs who has obtained personal judgment against the contractor does not thereby forfeit his equitable right to be paid out of this fund, and such right may be enforced in garnishment proceedings. It is pointed out in the judgment that in the case of an ordinary mechanics' lien the lien claimant may undoubtedly bring his action claiming both a personal judgment as against his employer and a lien as against the owner of the property. Why may he not do so in separate actions? Beck, J., suggests reasons why the lien claimant should not be considered as waiving his claim to a lien merely because he has also proceeded by ordinary action. The amount realizable by way of lien might be insufficient to pay his claim. A judgment against his employer might be nugatory unless very speedily obtained. The employer is liable to have judgment against him for the whole indebtedness. His ultimate liability may eventually be reduced or extinguished by realization of the amount by force of the lien. *Pomerleau* v. *Thompson,* (1914) 16 D. L. R. at p. 146.

The certificate of an architect in a dispute between the building owner and the builder is no estoppel in an action by the building owner against the architect for negligence. *Badgley* v. *Dickson,* (1886) 13 O. A. R. 494; *Rogers* v. *James,* (1891) 8 Times L. R. 67.

In the absence of express enactment a plaintiff who resorts to one statutory remedy cannot obtain another judgment under the Mechanics' Lien Act for the same claim. *Wake* v. *C. P. L. Co.,* (1901) 8 B. C. R. 358.

A common law lien against personalty may be lost by estoppel where its assertion would operate as a fraud on innocent parties. *Howard* v. *Tucker,* (1831) 1 B. & Ad. 712. Assertion of payment will operate as estoppel as against those who have acted on it. *Pooley* v. *Budd,* (1851) 7 E. L. & Eq. 229; *Woodley* v. *Coventry,* (1863) 32 L. J. Ex. 185. See also cases cited in Chapter "Mechanics' Liens on Personal Property," *post.*

CHAPTER XI.

Priorities.

The statutory right to a mechanics' lien would be of little value if it did not involve the subordinat' ı to it of subsequent incumbrances or conveyances of the property. No rights subsequently accruing can affect the mechanics' lien once it attaches (*American Mortgage Co.* v. *Merrick,* (1907) 120 App. Div.. (N.Y.) 150; *Carew* v. *Stubbs,* 155 Mass. 549; or any part of it, *Collins* v. *Patch,* 156 Mass. 317, and, on the other hand, no prior rights can be displaced by it. *Robock* v. *Peters,* (1909) 13 Man. L. R. 124; *Kievell* v. *Murray,* 2 Man. L. R. 129. When a conveyance is recorded prior to the commencement of the work or the placing of the materials the mechanic cannot have priority for his claim. He cannot acquire any greater interest than that which the owner possesses. An incumbrance so recorded has priority to the extent of its security and it cannot be affected injuriously by acts of the person creating the incumbrance.

In dealing with any question concerning priorities under the Mechanics' Lien Acts in Canada, the words of the enactment in the jurisdiction where the land to be affected lies must be carefully examined, as, on this subject, there is some variance between the Acts in the different Provinces of Canada. In the present chapter the provisions of the Mechanics' and Wage Earners Lien Act of Ontario will be specially considered, although enactments in other jurisdictions will be referred to. One provision of the Ontario Act gives a lien priority over mortgages upon the increase in selling value of land by reason of work or service done thereon or materials supplied. This provision is as follows,—

> "Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and

the selling value of the land is increased by the work or service or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge." R. S. O. 1914, c. 140, s. 8 (3).

Another provision of the same Act gives priority to a lien which has been registered or of which written notice has been given to the mortgagee upon the land itself, including the buildings and erections thereon, over all subsequent advances under a mortgage. This latter provision is as follows,—

(1) "The lien shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed amongst them pro rata according to their several classes and rights." R. S. O. 1914, c. 140, s. 14.

Under this section the lien has priority over mortgage advances made after the lienholder has notified the mortgagee in writing of his lien or has registered it, and in the latter case the lienholder is deemed a purchaser *pro tanto*.

Actual notice not in writing is not sufficient to give a lien the priority over mortgages provided under this section. *Cook* v. *Koldoffsky,* (1916) 28 D. L. R. 346, 35 O. L. R. 555.

These provisions are not necessarily in conflict. "The true principle is to treat section 8 as confined to those mortgages and charges which existed before work began, by reason of which increased selling value may arise, and section 14 as dealing with priorities among competing claims, all arising after work has commenced, and upon land and buildings together." *Cook* v. *Koldoffsky, supra.*

The priority of an unpaid vendor is not forfeited by the substitution of a mortgage for the unpaid amount. "Prior" mortgages or charges mean those mortgages or charges which existed upon the land or those interests before the work began, because by section 6 the lien attaches then, and it may then be at once registered. R. S. O. ch. 140, s. 22; *Kennedy* v. *Haddow,* (1890) 19 O. R. 240; *Cook* v. *Belshaw,* (1893) 23 O. R. 545. The lien given as against the prior mortgagee or chargee is not, however, given upon the land, but upon the value which has been produced by way of increase, over that which the land itself previously had, by the subsequent doing of the work or the placing of the materials; and this value is not that which represents the actual value or cost of the work, etc., in itself, but the amount which it adds to the selling value. *Cook* v. *Koldoffsky, supra.* The selling value is not necessarily increased by work done subsequently. *Kennedy* v. *Haddow,* 19 O. R. 240.

The priority of the "charge" on the land does not depend on registration, but upon its existence as a charge before the lien arose. *Cook* v. *Belshaw,* (1893) 23 O. R. 545; *Marshall Brick Co.* v. *York Farmers Colonization Co.,* (1917) 36 D. L. R. at p. 427. Under a provision already referred to, R. S. O. c. 140, s. 14 (1), the mortgage or charge is to be regarded as a "prior mortgage" only in respect of payments or advances made before notice in writing or registration of the lien. To the extent to which the selling value

of the property has been increased by the work or services performed or the materials furnished by the lien claimants, the mortgagee's interest as such prior mortgagee is subject to the plaintiff's lien. See s. 8 (3) R. S. O. c. 140; *Patrick* v. *Walbourne*, (1896) 27 O. R. at pp. 225-6; *Marshall Brick Co.* v. *York Farmers Colonization Co.*, (1917) 36 D. L. R. at p. 427.

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner," so as to subject the land to mechanics' liens for work done or materials furnished under contracts with the purchaser; but by virtue of sec. 14 (2) of the Act such vendor is deemed a "mortgagee" for the purpose of giving priority to the liens upon the increased selling value of the land caused by the improvements. *Marshall Brick Co.* v. *Irving*, 28 D. L. R. 464, 35 O. L. R. 542, affirmed, *sub nom. Marshall Brick Co.* v. *York Farmers Colonization Co.*, (1917) 36 D. L. R. 420, 54 Can. S. C. R. 569.

A vendor of land to whom a portion of the purchase price is due is to be treated as if mortgagee, so far as the Mechanics' Lien Act is applicable, despite the fact that the land has been conveyed to the purchaser, and mortgaged by him; a duly registered reconveyance to the vendor in payment of the unpaid purchase money, the vendor assuming the existing mortgage, has priority to any unregistered lien under the Mechanics' Lien Act of which the vendor had no actual notice. *Charters* v. *McCracken*, (1916) 29 D. L. R. 756, 36 O. L. R. 260. Where a mortgage has been duly registered, advances made thereunder after mechanics' liens on the mortgaged property have arisen, but before their registration, take precedence of the liens. A mortgage having been held to have priority over liens, both upon the land and the improvements, a lienholder cannot take away that priority by showing that the work and materials increased the selling value of the property. *Warwick* v. *Sheppard*, (1917) 35 D. L. R. 98, 39 O. L. R. 99.

A purchaser of an unfinished building whose deed is registered prior to the registration of any mechanics' liens without actual

notice thereof thereby acquires a priority by virtue of the Registry Act, (R. S. O. 1914, c. 124) and takes the property free of the liens. *Sterling Lumber Co.* v. *Jones,* (1916) 29 D. L. R. 288, 36 O. L. R. 153.

While each lienholder is entitled to claim upon the enhanced value arising by reason of his work and materials, each lien must stand on its own footing. No mechanic has a right to priority in respect to another mechanic's work. His own right is based on his proportionate contribution to the increased value of the property. *Security Lumber Co.* v. *Duplat,* (1916) 29 D. L. R. 460, Sask.; *Bank of Montreal* v. *Hafner,* (1883) 3 O. R. 183; *Broughton* v. *Smallpiece,* (1878) 25 Gr. 290; *Cook* v. *Koldoffsky,* 28 D. L. R. 346, 35 O. L. R. 555. Under the Saskatchewan Act, it has been held that a lienholder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials supplied by him exclusively bears to the whole cost of the building, and not for any part of the increase brought about otherwise. In computing this proportionate amount no regard should be taken to amounts paid the lienholder on account before the action was brought. *Security Lumber Co.* v. *Duplat,* (1916) 29 D. L. R. 460, 9 Sask. L. R. 318, 34 W. L. R. 1131.

The claim of a mortgagee in respect of advances made subsequently to the commencement of the work done by lienholders is postponed to the rights of the lienholders. The mortgagee as a subsequent incumbrancee might have been entitled to be given an opportunity in the lien action to redeem the lienholders had it applied for registration at once, but having neglected to do so until after the sale of the land in question, any such right has been lost. *National Mortgage Co.* v. *Rolston,* (1917) 59 Can. S. C. R. 219.

The plain purpose of this legislation in dealing with the question of increased value of the property is to take from the mortgagee the benefit which at common law he was entitled to, of the

work and materials which after the making of the mortgage had been employed in the improvement of the property and which had not been paid for by the mortgagor, and to leave his security otherwise unimpaired. The lienholder is, therefore, given a security in priority to the mortgage on the increased value, and the mortgagee still retains his priority over the lienholder as to all that his security embraces, except that increased value. *Patrick* v. *Walbourne*, (1896) 27 O. R. 221. Depreciation in value of the property has the effect of wiping out the security of the lienholders before it affects the security of the prior mortgagee. *Northern Trusts Co.* v. *Battell*, (1916) 29 D. L. R. 515, 9 Sask. L. R. 103, 33 W. L. R. 738.

In the absence of evidence that the selling value of the land incumbered by a mortgage has increased by the work or materials, no lien attaches upon such increased value, in priority to the interest of a mortgagee; nor will it warrant a sale of the mortgage to satisfy the statutory lien, even though subject to a first charge in favor of the mortgagee for advances made prior to the registration of the lien. *Cut-Rate Plate Glass Co.* v. *Solodinski*, (1915) 25 D. L. R. 533, 34 O. L. R. 604.

As under the Ontario Act the lienholder is only given priority over the mortgagee to the extent of any increased value given to the property by any work or service, or the furnishing or placing of the materials, this would seem to place the onus upon the lienholder of attacking the position of the mortgagee and showing that there was such increased value added to the property, but under the Manitoba Act it is expressly provided that the prior mortgagee has priority over a lien only to the extent of the actual value of such land at the time the improvements were commenced. It has been decided that where under a Mechanics' Lien Act, prior encumbrancers have priority over the mechanics' liens only to the extent of the actual value of the premises at the time the improvements are made, and the lienholders have priority as to the increase in value effected by the improvements, the rights of the

latter cannot be worked out in an action for the foreclosure of a vendor's lien or mortgage, but can only be given effect to in an action brought to enforce their liens. *Dure* v. *Roed*, 34 D. L. R. 38, 27 Man. L. R. 417, (1917) 1 W. W. R. 1395. Accordingly, when under the Manitoba Act such a mortgagee appears at the trial pursuant to notice and seeks to prove his claim under his prior mortgage, it may well be that the onus will be thrown upon him of showing what the actual value of the land was, because that is the limit placed by the statute upon his priority. *Dominion Lumber and Fuel Co.* v. *Paskov*, (1919) 1 W. W. R. 657; *Dure* v. *Roed*, 27 Man. L. R. 417, (1917) 1 W. W. R. 1395. The "increased selling value," within the meaning of the Mechanics' Lien Act, which results from the erection of a building, is the difference between the value of the land without the building and the amount for which both land and building may be sold. Where the property has a potential value, such as that which arises from its possibilities as a future industrial site, the "increased selling value" cannot be ascertained without a sale. A lienholder under the Mechanics' Lien Act has a right to pay off the unpaid purchase money under an agreement for sale to the same extent as he would have had if the vendor's claims were that of a mortgagee. *Whitlock* v. *Loney*, (Sask.), 38 D. L. R. 52, (1917) 3 W. W. R. 971, 10 S. L. R. 377.

Where, as in Ontario, there is in the Mechanics' Lien Act a definite provision dealing with mortgages, whether registered or unregistered, and providing that payments or advances under them may be defeated by a registered or unregistered lien in one of two ways, such a provision overrides any other right accruing from or arising out of the Registry Act, which deals solely with priorities as between instruments. *Cook* v. *Koldoffsky*, (1916) 28 D. L. R. 346, 35 O. L. R. 555.

The fact that the Mechanics' and Wage-earners Lien Act merely confers the status of a purchaser *pro tanto* upon a registered lienholder, and excludes the Registry Act in other respects,

indicates that where there is a specific provision in the former Act it must be read as exclusive of any other provision of the Registry Act. *Cook* v. *Koldoffsky, supra.* "There is a provision in the Land Titles Act which declares a mechanics' lien when registered to be an encumbrance on the lands. But the existence of the lien itself and its extent depend upon the provisions of the Mechanics' Lien Act. The two statutes must be read together, and registration under the Land Titles Act cannot be taken to create an encumbrance where there is no valid lien under the Mechanics' Lien Act, or to neutralize or modify the limitation upon its extent which the Mechanics Lien Act explicitly imposes." *City of Calgary* v. *Dominion Radiator Co.*, (1917) 40 D. L. R. 75, per Anglin, J.

Under the Alberta Act it has been held that where progressive payments under the contract of the principal contractor are made contingent upon advances being made to the owner by the mortgagee, the Court may, on the trial of a mechanics' lien action brought by a sub-contractor who had completed his sub-contract, direct that his lien remain in force, so that it may attach in respect of any such further advances which may in future be made by the mortgagee, reserving leave to the owner and the mortgagee to apply for the discharge of the lien. *Colling* v. *Stimson & Buckley*, (1913) 10 D. L. R. 597 (Alta.). The provision in the Saskatchewan Mechanics' Lien Act that the failure to file a lien or to commence action thereon within the statutory period shall not defeat the lien except as against liens registered by intervening parties meanwhile, does not create a priority in favor of intervening liens for work not performed and materials not furnished. *St. Pierre* v. *Rekert*, (1915) 23 D. L. R. 592, 8 Sask. L. R. 416, 31 W. L. R. 909.

In determining the value of a parcel of land upon which stands a portion of a house which has been, by mistake, built partly upon the parcel in question and partly upon an adjoining lot owned by another person, for the purpose of adjudicating upon the respective rights of a mortgagee and a lienholder, no regard can be had

to the fact that such other person, if applied to, would have consented to the removal of the house off his lot, and the priority of a mortgage on the lot in question over the lien of a workman subsequently arising, for the cost of removing the house so as to place it wholly on the parcel in question, is limited to the actual value of such parcel with the part of the house upon it at the time he began the work, which value must be ascertained without reference to the subsequent removal. *Jack* v. *McKissock*, (1917) 27 Man. L. R. 548. But the Ontario Act affords a different test.

Under the British Columbia Act (R. S. B. C. 1911, c. 154, s. 9), the value of the property before the lien attached is to be taken for the purpose of fixing the upset price for which the lienholder would have priority over a mortgagee as against the increase in value of the mortgaged premises by reason of the work and improvements, the latter, however, must be limited only to the extent to which the specific contract enhances the selling value, and not for work or improvements by others under independent contracts; if no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption. *Champion* v. *The World*, (1916) 27 D. L. R. 506, 22 B. C. R. 596, 34 W. L. R. 317. The provisions of this Act do not give relief to lienholders as against prior mortgagees, unless, from the proceedings at the trial, the increase in the value of the mortgaged premises can be ascertained. Lienholders for work consisting entirely of the taking out of ore from a mine, cannot, except when it is strictly development work, enforce their liens as against a prior mortgagee. *Anderson et al.* v. *Kootenay Gold Mines, et al.*, (1916) 18 B. C. R. 643.

A lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced. *Robock* v. *Peters*, (1909) 13 Man. L. R. 124. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor who then conveyed the land in fee to the defen-

dant owner, and having thus secured the title to the property claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money, but, having had actual notice of one of the liens and constructive notice of the other before making this payment, he could not have priority over either lienholder for such advance. *Robock* v. *Peters, supra.*

An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase price, on the completion of said undertaking, is such a request in writing as gives a mechanic's lien arising from the erection of said works general application under section 6 of the British Columbia Act, 1916, c. 154, and therefore the lien is not restricted to the increase in value of the premises by reason of such works. *British Columbia Granitoid Co.* v. *Dominion Shipbuilding Co.* (B.C.), (1918) 2 W. W. R. 919.

Where an incumbrance is duly recorded, delay in recording an assignment of it cannot affect the assignee's priority. *Zehner* v. *Johnston,* 22 Ind. App. 452. If the incumbrance or conveyance is not recorded until the mechanics' lien has attached, the lien has priority, but, in the absence of legislation to the contrary, a mortgage recorded before the work is commenced to secure future advances which are made to pay for work or materials, takes priority over mechanics' liens. *Robock* v. *Peters,* (1909) 13 Man. L. R. 124; *Cook* v. *Belshaw,* (1903) 23 O. R. 545. A mortgage made in good faith will not lose its priority, because of an omission of some technical matter in its execution, although such advances are not made until after the work commences. *Payne* v. *Wilson,* 74 N. Y. 348. As to questions of priority arising as against rival incumbrancers who may have been misled by error of registrar, see *Gorman* v. *Archibald,* 1 Alta. L. R. 524.

The limitation of the priority of mechanics' liens over mortgages declared by the Alberta Mechanics' Lien Act to the amount

whereby the premises have been increased in value by the work, does not apply where no money was advanced by the mortgagee until after the commencement of the work for which the lien is claimed. Under this Act a mechanics' lien attaches to the interest which is vested in the owner at the time the work is commenced or to any interest which he may acquire during the progress of the work; and the lien will take priority over a mortgage upon which no money was advanced until after the commencement of the work, although the mortgage had been registered before that time. *Colling* v. *Stimson*, 10 D. L. R. 597, 6 Alta. L. R. 71.

Lienholders under the British Columbia Mechanics' Lien Act are entitled to a priority over an unregistered charge or transfer of which they had no knowledge, actual or constructive. *National Mortgage Co.* v. *Rolston*, (1916) 32 D. L. R. 81, 35 W. L. R. 494, 23 B. C. R. 384, (1917) 1 W. W. R. 494, affirmed by Supreme Court of Canada, (1917) 2 W. W. R. 1144.

It is not essential to the preservation of a lien against a prior mortgagee, (under s. 8 (3) R. S. O. 1914, c. 140) that it shall be stated in the registered claim that it is against the mortgagee, inclusively or otherwise. *Whaley* v. *Linnebank*, (1916) 29 D. L. R. 51, 36 O. L. R. 361.

The mechanic asserting his lien must show that he is entitled to priority before the same can be allowed. *Davis* v. *Alford*, 94 U.S. 545. A mortgage of the real estate of the defendant company was given by the directors to S., one of its directors, to secure him and his co-directors against their endorsements on the notes of the company, which had been made to raise money for the purposes of the company. This mortgage was recorded prior to the registration of a mechanics' lien. It was held that the mortgage was valid and that its prior registration must prevail over the lien of the mechanic. *McDonald* v. *Consolidated Gold Lake Co.*, (1902) 40 N. S. R. 364.

A mere instantaneous seisin is insufficient to sustain the lien. See *Owen* v. *Lynch*, (1876) 2 R. & C. (Nova Scotia) 406. Where

a purchaser under an agreement creates a lien upon his interest, and afterwards receives a deed and immediately executes a mortgage to the vendor for the whole or part of the purchase money, such mortgage takes priority to the lien except, perhaps, as to the increased value. *Ettridge* v. *Bassett,* (1884) 136 Mass. 314; *Saunders* v. *Bennet,* (1893) 160 Mass. 48; *Clark* v. *Butler,* (1880) 32 N. J. Eq. 664. See also Ontario Mechanics and Wage Earners Act, which contains a provision for the case where the conveyance has not been taken. Whether a seisin is instantaneous must depend upon all the facts and circumstances of the case. See *Sprague* v. *Brown,* (1901) 178 Mass. 220; *Osborne* v. *Barnes,* (1901) 179 Mass. 597; *Ready* v. *Pinkham,* (1902) 181 Mass. 351. See also chapter entitled, "The Owner and His Interest," *ante.*

In Massachusetts, on a petition to establish a mechanics' lien, as in the case of dower, a mortgagee can take advantage of the doctrine of instantaneous seisin only where the mortgage was made to secure the purchase money, or some part of it. *Libbey* v. *Tilden,* (1906) 192 Mass. 175.

Although the lien arises as soon as the work is commenced, or the materials have been placed or furnished, yet it actually takes its rank with other interests and incumbrances not solely according to the date at which it came into existence, but, in so far as the work or materials have increased the value of the land, in priority to other interests and incumbrances, though the latter be prior in point of time. A mortgagee or vendor of land under an executory contract for sale cannot do anything to prejudice the vested statutory right of the lienholder to a lien upon the property to the extent to which its value has been increased by the work of the lienholder. *High River Trading Co.* v. *Anderson,* (1909) 10 W. L. R. 127.

But the mere fact that materials had been furnished and placed upon the land by a lien claimant does not prove that the selling value of the property had been thereby increased. The onus of proving that the selling value of the land has been increased by

the materials furnished is on the lien claimant, and unless it be shewn that the increased value of the land was due to the furnishing and placing of the material the claim of the materialman will not be given priority as against the mortgage. *Independent Lumber Co.* v. *Bocz*, (1911) 16 W. L. R. 316 (Sask.); *Kennedy* v. *Haddow*, 19 Ont. R. 240; *Richards* v. *Chamberlain*, 25 Grant, 402; *McVean* v. *Tiffin*, 13 O. A. R. 4; *Reinhart* v. *Shutt*, 15 O. R. 325. See *Robock* v. *Peters*, (1909) 13 Man. L. R. 124.

In Saskatchewan it has been decided that a mortgage, equitable or legal, has priority over a lien if registered before the lien, and a mortgagee is entitled to priority for all moneys advanced by him on the security of an equitable mortgage before the registration of a lien for materials, regardless of the fact that some of the material had been delivered and a lien accrued in respect thereof before some of the advances were made. *Independent Lumber Co.* v. *Bocz*, (1911) 16 W. L. R. 316 (Sask.). See *Robock* v. *Peters*, (1909) 13 Man. L. R. 124, *West* v. *Sinclair*, 12 C.L.T. 44, 23 C.L.J. 119. "Notice cannot affect the question of priority. Where a lienholder has not registered his lien the mortgagee need not hesitate to advance money legitimately under his mortgage, because possibly the lienholder might thereafter register his lien." *Independent Lumber Co.* v. *Bocz*, (1911) 16 W. L. R. 316 (Sask.). See *Robock* v. *Peters*, (1909) 13 Man. L. R. 124; *West* v. *Sinclair*, 12 C. L. T. 44, 23 C. L. J. 119.

The right to priority is dependent on statutory provisions, but, in the absence of such provisions the fact that the holder of the incumbrance knew that improvements were being placed on the incumbered property would not oblige him to give notice disclaiming responsibility. *Independent Lumber Co.* v. *Bocz*, 4 Sask. L. R. 103, 16 W. L. R. 316, *Interstate Building & Loan Association* v. *Ayers*, 177 Ill. 9. The mechanic should inform himself concerning existing recorded incumbrances. In the absence of express statutory provision any improvement placed upon incumbered land would be subject to the existing incumbrance. But Mechanics' Lien Acts

in Canada provide that mechanics' liens for work done or materials furnished for incumbered realty shall take priority over the incumbrance to the extent of the increased value so given to the property.

When, after the lien has attached to several distinct buildings constructed under an entire contract, the owner has sold one or more, the equities which then arise between the owners of the several buildings may be worked out upon the principles applied where part of a property subject to a mortgage is sold and the mortgagee seeks to enforce his remedy against both parcels. *Ontario Lime Association* v. *Grimwood,* 22 O. L. R. 17.

A mortgage subsequent in point of time takes priority over an unregistered lien. *Cook* v. *Belshaw,* (1893) 23 O. R. 545. A mortgagee for future advances is also protected to the extent of all advances made before registry of the lien and before he had actual notice of the lien. Under the Saskatchewan Lien Act, in construing a provision similar to one in the Ontario Act, it has been held that notice of an unregistered lien will not affect the question of priority of the mortgagee for future advances. *Independent Lumber Co.* v. *Bocz,* (1911) 16 W. L. R. 316. It has also been held that a mortgage subsequent to a lien but given for the purpose of paying off a prior incumbrance will be protected to the extent of such prior incumbrances. *Locke* v. *Locke,* (1898) 32 C. L. J. 332. In Massachusetts, under a similar provision, it has been held that a mortgagee, under a mortgage given to pay off existing mortgages, even to himself, acquires no rights under them. *Batchelder* v. *Hutchinson,* (1894) 161 Mass. 462; *Easton* v. *Brown,* (1898) 170 Mass. 311. See *Colonial Investment & Loan Co.* v. *McCrimmon,* (1905) 5 O. W. R. 315.

A lienholder if he wishes to preserve his lien as against subsequent purchasers and mortgagees, who registered their conveyances, must register his lien (*McVean* v. *Tiffin,* 13 O. A. R. 1; *Reinhart* v. *Shutt,* (1888) 15 O. R. 325; *Wanty* v. *Robins,* (1888) 15 O. R. 474), but the subsequent purchaser or mortgagee who registers his

conveyance does not gain priority if at the time of the payment of his purchase money and registering his conveyance he had actual notice and knowledge of the prior claim of the lienholder. *Rose* v. *Peterkin*, 13 S. C. R. 677.

If one contemplates the purchase of certain land and having agreed in writing with the owner of the land to build a house on it makes an oral contract with a mechanic to construct the cellar of the house, and the mechanic proceeds to dig the cellar with the knowledge and consent of the owner of the land, and if shortly thereafter the owner sells and conveys the land to the contemplated purchaser who employed the mechanic, and takes a mortgage back, the mechanic can enforce a lien upon the property for the labor and materials furnished by him in constructing the cellar which will be good against the mortgage. *McCormack* v. *Rutland*, (1906) 191 Mass. 424.

A lien to be prior to a mortgage must be registered before the mortgage, in the absence of statutory enactment to the contrary. *Reinhart* v. *Shutt*, 15 O. R. 325. Where the mortgagees take their mortgage on the security of a house which was being erected by certain contractors the mortgagees were held not entitled to priority over the contractor's lien. *Aslip* v. *Robinson*, (1911) 18 W. L. R. 39 (Man.).

A mortgage given to secure future advances to be paid as the building progresses is a prior lien for claims for materials used in the construction of the building for the full amount advanced. *Cook* v. *Belshaw*, 23 Ont. R. 545; *Robock* v. *Peters*, (1909) 13 Man. R. 124; *Reed* v. *Rochford*, 62 N. J. Eq. 186; *Lipman* v. *Jackson*, 128 N. Y. 58. But such mortgage to take priority must be recorded before the lien right has attached. *Young* v. *Haight*, 69 N. J. L. 453.

If the mortgage is given before the time that the law provides that the lien right shall attach to the property it takes priority over the right of the mechanic. *Robock* v. *Peters*, *supra*; *Kievell* v. *Murray*, 2 Man. R. 209.

A bank with whom an owner of land has made an agreement in the nature of a mortgage as to advances of money for the construction of buildings on the land, by the terms of which the bank cannot be compelled to make advances, cannot lessen the value of the equity of redemption as to holders of mechanics' liens upon the land by making payments to the owner after it learns of the existence of the liens. *Gray* v. *McLellan*, (1913) 214 Mass. 92.

A liquidator represents no higher claim than that of the insolvent company; therefore, liens registered within the statutory time for materials supplied and for work done, prior to the service of a petition to wind up the company, are to be paid in priority to ordinary creditors. *Re Clinton Thresher Co.*, (1910) 15 O. W. R. 318.

In a proceeding to enforce a mechanics' lien for labor and materials furnished in the construction of a building, where the evidence shows that the contract between the contractor and the builder was entered into prior to the acquisition of title to the property by the builder, and that subsequently the builder acquired title to the property and at the same time executed a mortgage thereon, but that such mortgage was executed to obtain money for the construction of the building and not to pay the purchase money, the mechanics' lien of the contractor will be held to be prior to the lien of the mortgage, notwithstanding the doctrine of instantaneous seizin, as the deed to the builder and the mortgage by the builder were separate transactions consummated at one time, and not merely component parts of one transaction. *Libbey* v. *Tilden*, 192 Mass. 175. See Am. & Eng. Ann. Cas., vol. 7, p. 617. If the earliest item of a mechanics' lien is a date subsequent to the date of an attachment, the attachment has priority over the mechanics' lien, under the Maine Mechanics' Lien Act. *First Nat. Bank of Salem* v. *Redman*, 57 Maine 505. But an attachment or execution, to have priority, must be levied on the property before the right to a mechanics' lien attaches.

If a judgment becomes a lien during the period within which a mechanic can perfect his right it will not take priority of the

mechanics' lien. *In re Bitner's Estate,* 196 Pa. 90. Though a mechanic's lien was subject to a prior mortgage on the land, upon the release of a part of the land from the mortgage, the lien was left in full force on such part. *Davidson* v. *Stewart,* (1909) 200 Mass. 393. Where a chattel mortgage is given on personal property which afterwards becomes a fixture and a part of the real estate, a mechanics' lien attaching to the real estate will have priority over the chattel mortgage. *Currier* v. *Cummings,* 40 N. J. Eq. 145.

Where a building was commenced before the execution of a mortgage, valid lien claims have priority over the mortgage. *Federal Trust Co.* v. *Guigues,* (1909) 76 N. J. Eq. 495. A conveyance of the property made after the right to liens has attached is made subject to these liens. *American Mortgage Co.* v. *Merrick Const. Co.,* 120 App. Div. N. Y. 150.

The fact that the building is by the terms of the lease to become the property of the lessor is ground for charging his estate with the amounts owing to lienholders. *High River Trading Co.* v. *Anderson,* (1909) 10 W. L. R. 126.

As Mechanics' Lien Acts in Canada fix the time when the lien attaches, the question of priority between a recorded incumbrance and a mehcanics' lien is not a difficult one. The onus is on the mechanics to show priority. *Davis* v. *Alford,* 94 U. S. 545. If the contract between the vendor and vendee required the erection of the building, the mechanics' lien will be given priority. Rockel, s. 163; *Henderson* v. *Connelly,* 123 Ill. 98.

Where a mortgage is given simultaneously with a deed for the property to secure the unpaid purchase price, such mortgage is prior to a mechanics' lien for work or materials furnished under a contract with a vendee in possession prior to the execution of the mortgage. *Osborne* v. *Barnes,* 179 Mass. 597. Where a building was commenced before the execution of a mortgage on the property, lien claims have priority over the mortgage. *Federal Trust Co.* v. *Guigues,* (1909) 76 N. J. Eq. 495. The claims of wage-

earners are given priority to a limited extent over all other lien claimants. Other lien claimants who register their claims within the statutory period share equally. The statute determines the priority of liens, and the legislation in force at the time the obligation becomes fixed must control.

The right to dower or curtesy, if existing at the time the lien attaches, takes priority over a mechanics' lien for work done or materials placed upon property under contract with the person owning the fee. *Gove* v. *Cather*, 23 Ill. 585; 76 Am. Dec. 711; *Mark* v. *Murphy*, 76 Ind. 535; *Buser* v. *Shepard*, 107 Ind. 417.

By statutory provision taxes are entitled to payment prior to a mechanics' lien.

The appointment of a receiver does not divest the property of prior existing liens, but affects them only in the manner and time of their enforcement. While the property is in the possession of the receiver the right to enforce the lien is suspended, because the property is in the custody and control of the Court. *Randall* v. *Wagner Glass Co.*, (1910) 47 Ind. App. 439; Beach on Receivers, 2nd ed., 194.

In a case under the Manitoba Act (*In re Empire Brewing & Malting Co.*, (1891) 8 Man. L. R. 424), proceedings had been taken to enforce a mechanics' lien after a winding-up order had been made. On an application to stay the proceedings it was held by Taylor, C.J., that the lien was not created by the taking of proceedings, but prior to that time, and prior to the winding-up, and that the proceedings could not be stayed. In another case, under the British Columbia Act (*Re Ibex Mining and Development Co.*, (1902) 9 B. C. R. 557), mechanics' liens had been filed against the property of a company, and judgment recovered in respect to them in the County Court. On the same day as the judgment, a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order authorizing him to give a first charge on the property of the company in order to raise money to take out certain Crown grants of property to which the company was

entitled. The lienholders had no notice of the application and did not appear on the hearing. They did not appeal from the order, but applied for leave to enforce their judgment in priority to the charge created by the liquidator under the order of court. Held, that the order made on the application of the liquidator was made without jurisdiction, and the lienholders were not bound by it.

Mechanics' Lien Acts in Canada give a lien to the mechanic on mortgaged land where the selling value of the land is increased by the work or service. This lien attaches upon such increased value in priority to the mortgage or other charge. Unless the selling value of the property had been increased the lien has no priority over the mortgage. *Kennedy* v. *Haddow*, (1890) 10 O. R. 240. See *Cole* v. *Pearson*, 17 O. L. R. 46; *Farrel* v. *Gallagher*, (1911) 23 O. L. R. 130, and cases cited under sections 8 and 15 of the Ontario Act, *post*. See particularly *Patrick* v. *Walbourne*, (1896) 27 O. R. 221; *Cut-Rate Plate Glass Co.* v. *Solodinski*, (1915) 25 D. L. R. 533, 34 O. L. R. 604.

A covenant in the plaintiff's mortgage, entitling them to pay "liens, taxes, rates, charges or encumbrances" affecting the mortgaged lands and adding them to the mortgage debt, did not entitle them as against defendants, subsequent mortgagees, to add to their mortgage debt amounts used to pay off mechanics' liens of later date than the registration of defendants' mortgage. *Great West Permanent Loan Co.* v. *National Mortgage Co.*, (1919) 1 W. W. R. 788 (B.C.).

As to rights of execution creditors, where land is sold to satisfy a mechanics' lien, see *Beaver Lumber Co.* v. *Quebec Bank*, 11 Sask. L. R. 320, (1918) 2 W. W. R. 1052.

CHAPTER XII.

Computing the Statutory Time.

The performance of the work or the supplying of the materials gives merely a right to acquire a lien; the statute prescribes the steps necessary to perfect it.

The function of the statement required to be filed in the registry of deeds within a certain time after the person claiming the lien has ceased to labor or to furnish labor and materials is merely to preserve the right to lien already in existence, which otherwise would expire. *Devine* v. *Clark,* (1908) 198 Mass. 56.

The time limited for the registration of claims for liens does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder. If the last work upon which the lien claimant relies as giving a new date from which the statute begins to run against his lien is something which the owner could have insisted upon before accepting the whole work as a completed contract, it will be sufficient to fix the date from which to reckon the statutory period. *Day* v. *Crown Grain Co.,* (1907) 39 Can. S. C. R. 258.

The time for registering the lien should be calculated from the date when the work under the contract was completed or the materials furnished and placed.

Even if there be only some touching-up work to do, and whether much or little, if it be a part of the work necessary under the contract, the statutory time is to be calculated from the completion of such work. *Fuller* v. *Beach,* (1912) 21 W. L. R. 391 (B.C.).

The time for filing the lien is to be reckoned from the date of performance of the latest work under the contract, regardless of acceptance or occupation by the owner. *Milliken Bros.* v. *City of*

New York, (1911) 201 N. Y. 65; *St. Louis N. Stock Yards* v. *O'Reilly*, 85 Ill. 546.

The doing of work or supplying of materials even of a trivial character, should be taken into consideration in determining the date from which the statutory time should be calculated if the work was done or materials supplied, in good faith, to complete the contract, and not colorably to revive the lien. *Sayward* v. *Dunsmuir*, 11 B. C. R.375; *Steinman* v. *Zosuck*, 4 W. L. R. 575; *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49, 8 W. L. R. 405; *Brynjolfson* v. *Oddson*, 32 D. L. R. 270, 27 Man. L. R. 390, (1917) 1 W. W. R. 1000.

"Within the thirty days plaintiff's workmen returned and put in two lights of glass in a dining room window. This was done without the knowledge of defendant and might be regarded as unimportant work, but the essential factor or test is that the work done was done in pursuance of and to complete the contract. It is contended that this later small piece of work was done in "bad faith," but even if bad faith would affect the matter, I cannot find that there was bad faith. The work was done in fulfilment of the contract and the delay was due to the non-arrival of the glass. The statutory period should be computed from the day when the omitted work was done by the plaintiff's workmen." *Boyce* v. *Huxtable*, (1919) unreported, per Wallace, Co.J. (N.S.).

Where any additional work essential to the completion of the contract is required to be done the statutory time is calculated from the date when the additional work is done. *Benson* v. *Smith*, (1916) 31 D. L. R. 416. If the agreement between the contractor and the materialman is that the latter is to furnish all material for the building without any specific quantity being designated and such material is delivered to the contractor from time to time, the time for filing a claim begins to run from the last delivery. *Smalley* v. *Gearing*, (1899) 121 Mich. 190. The fact that the last article supplied is trifling in value or was supplied much later than the bulk is of no importance. "Material sup-

plied later than the bulk is none the less material supplied within the meaning of the Act." *Hurst* v. *Morris*, (1914) 32 O. L. R. 346, per Riddell, J. An amendment to the Act, R. S. O. 1914, c. 140, s. 22 (2), provides that a claim for a lien for materials supplied may be filed within thirty days after the furnishing or placing of the last material so furnished or placed, and no difference is made between a large and a small amount, so that any difficulty as to this question is removed, so far as the law in Ontario is concerned. By this amendment it is now immaterial whether the material is furnished under one contract or more; and the right is independent of the completion of the work. *Hurst* v. *Morris*, *supra*.

The calculation of the time is affected by the question whether it is necessary to test the work or machinery in order to certify that the contract has been completed. *Day* v. *Crown Grain Co.*, (1907) 39 S. C. R. 258; *Jeffersonville Water Supply Co.* v. *Riter*, 138 Ind. 170. But where the material last furnished is for a temporary or experimental purpose only, the lien claimant would not be justified in computing the statutory period from the date of the furnishing of this material. Plaintiffs had contracted to supply the hardware for use in the construction of a building, and the last delivery upon which they relied for preservation of their lien—the registry of the claim of lien being within thirty days of that delivery, but more than thirty days after the last previous delivery of materials—was of certain bolts, of trifling value and used for a temporary or experimental purpose only, it was held that these articles were not furnished in such manner as to enable the plaintiffs to claim a lien for their price upon the land of the owners, and so the whole claim failed. *Brooks-Sanford Co.* v. *Theodore Telier Construction Co.*, (1910) 22 O. L. R. 176.

In dealing with this question of the computation of the statutory period it is important to consider and construe reasonably the terms of the actual contract. A plumbing contract to furnish and install a hot air furnace for heating a house, including the neces-

sary pipes, registers and fittings, comprises the furnishing and installation of the incidental cold air registers as a material part thereof; and the time within which a mechanics' lien may be filed for such work is to be computed with reference to the installation of the cold air registers where that is the last work done under the contract, notwithstanding a delay of two months after the installation of the furnace itself and of the other incidental fittings. *Colling* v. *Stimson & Buckley*, (1913) 10 D. L. R. 597 (Alta.).

And where sub-contractors acting in good faith consider that their work is completed, but upon a test additional work is found necessary, which additional work is done as soon as practicable, this additional work being substantial, and not being done to remedy slight defects, the time for registering their lien can be computed from the completion of this additional work. *Whimster* v. *Crow's Nest Pass Coal Co.*, (1910) 13 W. L. R. 621. On the other hand, where the work consists of different jobs all in one line of business, but ordered at different times, a mechanic is not required to file a lien after completing each piece of work. It is sufficient if he files his lien after he has completed all of his work. *Carroll* v. *McVicar*, (1905) 15 Man. L. R. 379. Where a contract is made for materials to be delivered from time to time as required in the repairs of buildings, and the material is furnished as orders are received, each order is not an independent contract. *Premier Steel Co.* v. *McElwaine Richards Co.*, (1895) 144 Ind. 614.

Special considerations may apply in relation to the question as to what constitutes completion of the contract.—Under a contract made with the railway company for the erection of a building, the work was to be done to the entire satisfaction of certain architects. The plaintiffs, who were sub-contractors for a part of the building, ceased work on May 20th, under the belief that their contract was completed, and their secretary-treasurer, on June 8th, made an affidavit stating such to be the fact, with a view of having a lien registered, which was done on June 24th. The architects, however, were not satisfied and required further work to be done, and

this was accordingly done in June, and again in August, and it was not until August 4th that the architects were satisfied and accepted the work. It was held that the architects being the persons to determine when the work was completed, it was not completed until they had signified their approval, and, therefore, the lien was registered in time. *Vokes Hardware Co.* v. *Grand Trunk R. Co.*, (1906) 12 O. L. R. 344.

If there are separate contracts the notice for each must be within the time limit of each, but this, of course, would not apply if the job were one continuous contract. *Morris* v. *Tharle*, (1894) 24 O. R. 159; *Hooven, etc., Co.* v. *John Featherstone's Sons*, 111 Fed. 81. The general principle applicable to a running account will ordinarily be applied to cases of materials supplied by a lien claimant. When one item is connected with another in the sense of a running account and the dealing is intended to be continuous, so that one item if not paid shall be united with another and form one entire demand, the time for filing a lien runs from the date of the things last supplied. *Morris* v. *Tharle*, *supra*.

But where a plumber agreed in a single written document to instal plumbing and heating apparatus in each of two houses situated on two adjoining lots, for the sum of $620 for each house, it was held that the contract contained two severable or divisible promises, one in respect to each house. The work in connection with the house on lot No. 30 was completed on July 29th, 1908, and that in connection with the house on lot No. 29 on June 15th, 1909; the sewer connections from both houses were joined in a line between the two lots. A lien filed against both lots on February 1st, 1909, in respect of the whole contract price for the two houses was too late to preserve the lien against lot 30. *A. Lee Co.* v. *Hill*, 2 Alta. R. 368.

If the claimant has delayed completion, in order to give the owner time to arrange for payment, by arrangement with the owner, and work is then done to keep the lien alive, the owner hav-

ing accepted the benefit of the delay and the work being necessary, the date of completion of such work will be taken as the date upon which the claimant has ceased to work. *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49.

Parties cannot by afterthought and subterfuge extend the statutory time for filing a statement of lien so as to prejudice others. *Renney* v. *Dempster*, (1911) 19 O. W. R. 644; *Badger Lumber Co.* v. *Parker*, (1911) 35 L. R. A. 901. See *Woodruff* v. *Hovey*, 91 Me. 116; *Miller* v. *Wilkinson*, 167 Mass. 136; *McLean* v. *Sanford*, 26 App. Div. (N.Y.) 603; *Stenerwald* v. *Gill*, 85 App. Div. (N.Y.) 605. As to right to different contracts to perform labor or furnish material for the purpose of extending time, see *Valley Lumber & Mfg. Co.* v. *Driessel*, (1907) 15 L. R. A. 299. It is incumbent on the lien claimant to prove clearly that the material was supplied and the work done in pursuance of and as a part of his contract. *Lawrence* v. *Landsberg*, (1910) 14 W. L. R. 477. The question whether labor and material furnished within the statutory period, but after the contract had been substantially completed, were in good faith and for the purpose of completing the contract or colorably to revive the lien, is a question of fact. *Turner* v. *Wentworth*, (1876) 119 Mass. 459. Plaintiff, a sub-contractor for plastering, had allowed the time for filing his lien to expire. Under the building contract the plasterer was to "fix up" after the other trades. He attempted, against the instructions of the defendant, the owner, to do some "fixing up," worked about four hours and then filed his lien. As he was really trying to manufacture a lien his action to enforce his lien failed. *Sheritt* v. *McCallum*, (1910) 12 W. L. R. 637.

A few decisions, in rejecting a plaintiff's claim as registered too late, seem to put too much emphasis on the fact that the last work in question was trivial work, but this fact, in itself, is not important. The very last repair or construction work done on any building generally is comparatively trifling, but the triviality of the work done, if done in accordance with the contract, cannot

affect the plaintiff's rights, nor, in the case of a materialman, can the small value of the last materials supplied make any difference. *Brynjolfson* v. *Oddson*, (1916) 32 D. L. R. 270, (Man.); *Hurst* v. *Morris*, (1914) 32 O. L. R. 346; *Merrick* v. *Campbell*, (1914) 17 D. L. R. 415, 24 Man. L. R. 446; *Foster* v. *Brocklebank*, (1915) 22 D. L. R. 38, (Alta.); *Swanson* v. *Mollison*, (1907) 6 W. L. R. 687 (Alta.). In considering this and kindred questions, an eminent judge has aptly said,—"It does not appear to me to affect the matter that the latest orders were at long intervals for small quantities of goods, after the bulk of the work had been done and the building occupied and used. These articles seem to have been *bona fide* required for small finishing jobs such as are usual in building operations, and which are frequently done after the owner is in occupation." *Robock* v. *Peters*, (1900) 13 Man. L. R. 124, per Killam, C.J., at p. 136.

"Even if the subsequent work was, as one witness stated, 'patching' or 'odds and ends,' and comparatively unimportant, it was none the less done in connection with the original contract. It often happens that on a big repair job the last work done is of a trivial nature, but if such work be done at the request of the owner and in accordance with the terms of the contract it is still done before 'completion' of the contract, within the meaning of the statute." *Falconver* v. *Hartlen* (Nova Scotia) unreported, per Wallace, County Court Judge.

The time for filing a claim for lien cannot be extended by sending new material to replace alleged defective material formerly delivered and used in the completed building, which new material was not suited for the purpose and was rejected. *Snitzler* v. *Filer*; 135 Ill. App. 61. After full delivery under a building contract, an agreement to extend the time for filing a claim for lien is ineffective.

The time for filing a lien for material furnished to a contractor cannot be computed from the date of the last item in the claimant's account unless such item was the subject of a lien. *Brooks-*

Sanford Co. v. *Theodore Telier Co.*, (1910) 22 O.L.R. 176; *Ludlam Ainslie Lumber Co.* v. *Follis*, (1909) 19 O.L.R. 419. If materials are furnished for several buildings under one contract the time will begin to run on either building from the last item furnished. *Premier Steel Co.* v. *McElwaine-Richard Co.*, 144 Ind. 614. A lien which does not cover all the items set forth in the claim because all are not within the time limit, will be good as to those which are within the time limit. *Steves* v. *Sinclair*, 171 N. Y. 676.

In dealing with the claim of the materialman the statutory time limit for registration is calculated from the date when the last material furnished by the claimant had been placed upon the land or used in the construction of the building.

Notice of a mechanic's lien is filed in time if filed within the statutory time for furnishing the last of several lots of material ordered and furnished at different times, where they are all supplied under one contract. *Randall* v. *Wagner Glass Co.*, (1910) 47 Ind. App. 439.

Where work or material is in good faith furnished at the request and with the knowledge of the owner to remedy defects in the original work this is sufficient to establish a new period from which the statutory time limit is to be computed, but where the work contracted for is completed according to contract, as the contractor believes, but he later discovers defects and voluntarily undertakes without authority from the owner after the time for completing the contract has expired, to remedy the trouble, it is generally held that such work would not extend the time for filing. See *Naucolas* v. *Hitaffer*, (1907) 12 L. R. A. 864. But ordinarily when materials are furnished after the work is completed, this will not keep the lien alive so as to prejudice others. See *Renney* v. *Dempster*, (1911) 19 O. W. R. 644; *Schaller Hoerr Co.* v. *Gentile*, (1910) 153 Ill. App. 458. Where, however, the Government Inspector orders changes, after supposed completion, the computation

may be made from the date when the changes were completed. *Winer* v. *Rosen*, (1918) 231 Mass. 418.

While there might be an interval of delay so great and unreasonable as to justify a Court in holding as a matter of law that a lien had been lost by reason of such great delay, yet if the sworn statement of a mechanic's lien is filed within the statutory time after the claimant has ceased to labor, and if the last item of labor were performed in good faith under the claimant's contract the lien is none the less valid because before the work named in the last items was done, no work had been done by the claimant for more than a month, and before the last work was done the houses on which the lien is claimed appeared to be completed, and were purchased by their present owner without knowledge of any lien. *Billings Co.* v. *Brand*, (1905) 187 Mass. 417.

The words "the last material" in a statute providing that "a claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished and placed," mean the last material furnished by the materialman under his contract, where there is a distinct contract; and where he furnishes materials outside of his contract, it has been held that the time for registering his claim for lien in respect of the material supplied under the contract begins to run from the time of the last delivery of material under the contract, without regard to the time of delivery of material outside of the contract. *Rathbone* v. *Michael*, (1909) 19 O. L. R. 428.

But the whole transaction in relation to the building contract between the owner and the contractor must be considered in determining the question of the date when the statutory period begins to run. Where the materialman has contracted to supply all of a certain class of supplies required in the construction of a particular building, as mentioned in the specifications, and he supplies not only the goods which were so mentioned, but further materials which were contemplated by his contract as extras or

additions, by the amount of which the fixed price was subject to increase, the lien for the entire bill is not lost by the lapse of the statutory period for filing liens between the last delivery of that portion of the goods, the class and quantities of which were shown in the specifications, and the later delivery of the extras; the lien in such case is in time if filed within the statutory period following the last delivery of extras. *Flett* v. *World Construction*, (1914) 15 D. L. R. 628. In such cases, although the initial arrangement is not a binding contract for the supply of any definite kind or quantities of materials or even of all, such as should be required, yet the whole transaction is so linked together as to constitute a single cause of action, and the time for registration or bringing an action runs from the supply of the last of the materials in respect of the whole bill. *Robock* v. *Peters*, (1900) 13 Man. L. R. 124; *Morris* v. *Tharle*, (1910) 24 O. R. 159.

The period of thirty days during which the owner is to retain twenty per cent. of the value from his contractor for the protection of other lienholders is to be computed from the completion or abandonment of the contract by the principal contractor, but the expiry of such period does not relieve the owner from his obligation to protect the interests of a sub-contractor of whose right to register a lien the owner has notice; and such obligation is enforceable by a sub-contractor who was enabled to file his lien more than thirty days after the abandonment of the work by the principal contractor by having been permitted by the owner thereafter to go on and complete the subcontract and who has filed his lien within thirty days of completing his own work. *Merrick* v. *Campbell*, (1914) 17 D. L. R. 415 (Man.).

The Mechanics' Lien Act requires effective proceedings to be commenced within a specified number of days from the date of the last work done. As to the question whether the Rules of the Court relating to vacation can apply to the Mechanics' Lien Act, it has been decided in Ontario that such rules cannot apply. Although the initial step in an action under a Mechanics' Lien Act

is called a statement of claim, it differs materially from the pleading of that name in an ordinary action. It is the first step in a proceeding to enforce a statutory remedy, and the Act requires this step to be taken within a fixed period. To extend that period by excluding vacations would be, in effect, to amend the Act and materially enlarge the time which must elapse before proceedings under it will be barred. *Canada Sand Lime Brick Co.* v. *Ottaway*, (1907) 10 O. W. R. 686.

In the computation of time within which proceedings must be instituted, the rule is that the first day is to be excluded and the last day included. *McLennan* v. *The City of Winnipeg*, (1882) 3 Man. L. R. 474. As to the law relating to the question "when the last day falls on Sunday," see Holmested, and also an article by Gorman, K.C., 48 C. L. J. 281. See also *Revelstoke, etc.* v. *Alberta B. Co.*, 9 Alta. L. R. 162.

In computing the statutory period in relation to filing a lien fractions of a day will not be counted.

"Day" means the twenty-four hours from midnight to midnight. *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49, 8 W. L. R. 405.

The time of the filing of the lien determines the legislation to be applied. *Montjoy* v. *Heward School Dist.* (1909) 10 W. L. R. 282 (Sask.).

A mechanics' lien will attach for all materials supplied in the erection of a building, although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor. *Whitlock* v. *Loney*, 10 Sask. L. R. 377, (1917) 3 W. W. R. 971, 38 D. L. R. 52. The lien is enforceable if registered within the statutory period from the last delivery of materials, even though the materials last delivered may never have been used in the construction of the building, if they were furnished for the purpose of being used therein. *Kalbfleisch* v. *Hurley*, 469, 34 O. L. R. 268.

CHAPTER XIII.

Damages.

The contractor is not entitled to a lien merely because he has performed work or service; such work or service must be performed under a definite contract, or something in the nature of a contract. If, therefore, a contractor is wrongfully prevented by the owner from fully performing his contract he has no lien for damages caused thereby, although he has a right of action for such damages.

The lien does not extend to unliquidated damages due to the contractor by the owner on account of the violation of the terms of the contract. Damages suffered by a contractor by reason of his being improperly deprived of his contract cannot be claimed in a proceeding under the Mechanics' Lien Act nor can such damages be a lien on the lands. *Seaman* v. *Canadian Stewart Co.*, 18 O. W. R. 56; *Hoyt* v. *Miner*, 7 Hill (N.Y.). As to measure of damages recoverable by owner under a counterclaim for certain material not furnished by a contractor, see *Woolfe* v. *Schaefer*, (1905) 103 App. Div. (N.Y.) 567.

The lien is restricted by the statute to the labor performed and materials furnished. Loss of profits or damages for breach of contract in refusing to allow the contractor to perform cannot be the subject of a lien. *O'Rielly* v. *Mahoney*, (1908) 123 App. Div. (N.Y.) 275.

The owner is not entitled to recover damages from the contractor for loss of the rental value of the property and for deterioration thereof which he claims resulted from failure to deliver certain articles. *Woolf* v. *Schaefer, supra.* If a building contract provides a sum as liquidated damages in the event of failure to complete work and give complete possession within stipulated time and the contractor fails to complete work within the time and the liquidated damages exceed the amount that would other-

wise be due the contractor, there is no sum "justly owing" or "payable" by the owner to the contractor, and a materialman cannot succeed in an action. *McManus* v. *Rothschild*, 25 O. L. R. 138; *Farrell* v. *Gallagher*, 23 O. L. R. 130.

The Mechanics' Lien Act is not broad enough to extend to the cost of preparing for work to be done upon a site, such as the assembling of the necessary tools and equipment, although such work has been frustrated without fault of the contractor. Any such loss must be treated as damages. *British Columbia Granitoid, etc. Co.* v. *Dominion Shipbuilding, Engineering and Dry Dock Co.*, (1918) 2 W. W. R. 919.

So long as only the rights of the owner and principal contractor are to be considered, damages resulting from the default of the contractor can always be set up as a defence (*Taylor* v. *Murphy*, 148 Pa. 337; *Heberleih* v. *Wendt*, 99 Ill. App. 506), except to the claim of the wage-earner. *Farrell* v. *Gallagher, supra; McManus* v. *Rothschild, supra.* The fact that materials were received at the building will not prevent an owner from claiming damages if they were defective. *Strawn* v. *Cogswell*, 28 Ill. 457. Consequential damages resulting from a breach of the contract will not give a lien, and if a contractor be wrongfully discharged the damages to which he would be entitled would be the amount coming to him on the footing of the contract if he had been allowed to complete the work. *Farrell* v. *Gallagher, supra.* See reference to this case in *Rice Lewis* v. *Harvey*, 9 D. L. R. 114. See also *Watrous* v. *Davies*, 35 Ill. App. 542; *Landyskowski* v. *Martyn*, 30 Mich. 575; *Thomas* v. *Stewart*, 132 (N.Y.) 580.

Where liquidated damages are specified in the event of the contract not being completed, the owner can retain such sum even as against sub-contractors (*McBean* v. *Kinnear*, 23 Ont. R. 313; *Julin* v. *Ristow Pottes Mfg. Co.*, 54 Ill. App. 460), but not as against wage-earners. *Farrell* v. *Gallagher, supra, McManus* v. *Rothschild, supra.* In a suit by a sub-contractor to enforce a lien against the owner of the building one American Court decided that the owner

may off-set any actual damages which he has sustained caused by the contractor's failure to complete the building in time, provided that the damages are such as may be said to have been in contemplation of the parties when the contract was made. *Fossett* v. *Rock Island Lumber Co.*, (1907) 14 L. R. A. 918. If the work is not completed owing to the default of the owner the contractor has a lien for the work performed. *Smith* v. *Norris*, 120 Mass. 58.

Deduction by way of damages was not allowed when there had been delay by the contractor, the lienholder not being the contractor and the onus being on the owner to show that contractor should not have been given an extension of time. *Lundy* v. *Henderson*, 9 W. L. R. 327.

If the owner rescinds the contract before any work is done no right to a lien will exist, the contractor's remedy being an action for breach of contract. *Horr* v. *Slairk*, 35 Ill. App. 140.

A sub-contractor cannot acquire a lien on a claim for unliquidated damages. *Mayer* v. *Mutchler*, 50 N. J. L. 162; *Miner* v. *Hoyt* v. *Hill* (N.Y.) 193. As to whether the sum mentioned in a building contract is a penalty or liquidated damages, see *McManus* v. *Rothschild*, (1911) 25 O. L. R. 138. See also *Farmers Advocate* v. *Master Builders Company*, (1917) 3 W. W. R. at p. 1100; *Dunlop* v. *New Garage*, (1915) A. C. 79. *Canadian General Electric Company* v. *Can. Rubber Co.*, 52 Can. S. C. R. 349; *Renner* v. *Rosen*, 45 D. L. R. 1. Where the contractor is entitled to a *quantum meruit*, a fair and reasonable sum to compensate him for the work undertaken and done, and for the responsibility involved in the doing of it, should be added to the actual cost of it to him. *Rohl* v. *Pfaffenroth*, (1915) 31 W. L. R. 197.

Loss of probable rentals from houses in course of construction, because of the contractor's delay in completing, can be allowed to the owner in abatement of the price only when a time has been specified for doing the work or after the owner is given notice to proceed with it. *Elford* v. *Thompson*, (1912) 1 D. L. R. 1, 19 W. L. R. 809.

Compensation for expense incurred by owner, where there was delay in completion of work, will be refused, unless sufficient excuse is shown by owner for incurring the expense. *Brown Construction Co.* v. *Bannatyne School District Corporation,* (1912) 21 W. L. R. 827 (Man.).

The ordering of extras does not necessarily put the parties at large and deprive the owner of his right to liquidated damages. See *Grace* v. *Osler,* (1911) 16 W. L. R. 627, 19 W. L. R. 109, 326.

The lien is restricted by the terms of the statute to the labor performed and materials furnished. Loss of profits or damages for breach of contract in refusing to allow the contractor to perform cannot be the subject of a lien. *O'Rielly* v. *Mahoney,* (1908) 123 App. Div. N.Y. 275. Damages suffered by a contractor by reason of his being improperly deprived of his contract cannot be claimed in a proceeding under the Mechanics' Lien Act, nor can such damages entitle a claimant to a lien on the land. *Seaman* v. *Canadian Stewart Co.,* 18 O. W. R. 56, 2 O. W. N. 576.

CHAPTER XIV.

Mechanics' Liens on Personal Property.

Their Nature and Scope.

There are two species of lien known to the common law, namely, particular liens and general liens. A particular lien attaches to property to secure a debt relating to that property.

Particular liens exist where persons have the right to retain goods in respect to labor or money expended upon them, and these liens are favored in law. *Houghton* v. *Matthews,* (1803) 3 B. & P. 485. "As between debtor and creditor, the doctrine of lien is so equitable that it cannot be favored too much." *Jacobs* v. *Latour,* (1828) 5 Bing. 132, per Best, C.J. All such specific liens being consistent with the principle of natural equity are favored by the law, which is construed liberally in such cases. *Scarfe* v. *Morgan,* (1838) 4 M. & W. 283, per Parke, B.

General liens attach to property to secure a general balance of account due from the owner to the possessor, whether in respect to that property or not. *Anglo-Italian Bank* v. *Davies,* L. R. 9 Ch. D. 289. General liens are founded on custom only, and are therefore to be taken strictly. *Houghton* v. *Matthews,* (1803) 3 B. & P. 494; *Bock* v. *Gorrissen,* (1860) 2 De G. F. & J. 443. The liens of bankers, factors, attorneys and wharfingers are general liens.

By the general custom of trade an artisan may have a lien for his general balance (*Saville* v. *Burchard,* (1801) 4 Esp. 53), but ordinarily a mechanic has no lien to secure a general balance due him (*Cumpston* v. *Haigh,* (1836) 2 Bing. N. C. 449; *Lilley* v. *Barnsley,* (1844) 1 C. & K. 344. See distinction between particular and general liens,—*Blackburn* v. *MacDonald,* 6 U. C. C. P. 380. A general lien can no doubt be made by contract, but it requires a clear contract. A recent instructive case on general

and particular liens is *Cassels & Co.* v. *Holden Wood Bleaching Co.*, (1914) 84 K. B. D. 834.

The lien exists whether a price be specified in the contract or not (*Chase* v. *Westmore*, 5 M. & S. 180; *Townsend* v. *Newell*, 14 Pick. 332), or whether the lien claimant does the work himself, or in his own shop, or employs an outside mechanic to do the work for him (*Webber* v. *Cogswell*, 2 R. & C. 47, 2 Can. S. C. R. 15), but a mere employee of the mechanic or contractor can have no lien on the chattel. *Hollingsworth* v. *Dow*, 19 Pick. 228; *Meyers* v. *Bratispiece*, 174 Pa. 119. A servant has no lien upon the personal property of his employer, because his possession is not in his own right but in the right of his employer. *Fitzgerald* v. *Elliott*, 162 Pa. 118. See *King* v. *Indian Orchard Co.*, 11 Cush. 231; *Shaw* v. *Kaler*, 106 Mass. 448; *State* v. *Goll*, 32 N. J. L. 285. A packer has a lien upon the goods packed for the work done. *Hayward* v. *Grand Trunk R. Co.*, 32 U. C. Q. B. 392.

It is one of the characteristics of the common law liens such as a mechanics' lien on a chattel as distinguished from liens created by contract or by statute, that the former over-ride all other rights in the property to which they attach and the latter are subordinate to all prior existing rights therein. *White* v. *Smith*, (1882) 44 N. J. L. 105. The work done must be based on a valid contract. There must be a legal obligation of the owner to pay. *LaRose* v. *Nichols*, (1918) 103 Atl. 390.

A mechanics' lien is a particular or specific lien which confers upon a mechanic who has bestowed labor, skill or expense upon or in respect of the chattel of another, the right to retain the chattel for his reasonable charges until they are satisfied. The work done must be authorized expressly or impliedly by the owner of the chattel. *Bleaden* v. *Hancock*, (1829) 4 C. & P. 152; *Hammonds* v. *Barclay*, (1802) 2 East 235; *Chase* v. *Westmore*, (1816) 5 M. & S. 180; *Bevan* v. *Waters*, Moo. and Malk. 236; *Franklin* v. *Hosier*, (1821) 4 B. & Ald. 341; *Bushfield* v. *Wheeler*, (1867) 14 Allen (Mass.) 139. As to authority implied from circumstances, see *White* v. *Smith*, (1882) 44 N. J. L. 105.

This lien extends to all labor and materials expended upon the chattel, and to all the goods included in the contract, although delivered to the mechanic in different parcels and at different times, so long as there is an entire contract. *Chase* v. *Westmore*, (1816) 5 M. & S. 180; *Blake* v. *Nicholson*, (1814) 3 M. & S. 167; *Saunderson* v. *Bell*, (1834) 2 Cr. & M. 304; *Morgan* v. *Congdon*, (1851) 4 N. Y. 552. This principle would not apply where there are distinct contracts (*Marks* v. *Lahee*, (1837) 3 Bing. N. C. 408), but where there is an entire contract for a certain sum to make or repair several articles, the lien rests on one or two articles in the possession of the lien claimant, not only for their proportionate part of repairing the whole, but for the amount due for labor on all the articles. *Hensel* v. *Noble*, 95 Penn. St. 345; *Blake* v. *Nicholson*, (1814) 3 M. & S. 167.

This lien has been extended so as to include all money expended in the preparation of the means of doing the work. *Conrow* v. *Little*, (1889) 115 N.Y. 387, 393; *Buxfield* v. *Wheeler*, (1867) 14 Allen (Mass.) 139. In one case the lien claimants were a printing firm and had only executed a small portion of work upon a large quantity of paper supplied them, when through the owner's default the completion of the work was prevented. Danforth, J., in delivering the judgment of the court, said, in referring to the lien of the claimants: "It attached the moment the paper came into the possession of the defendants for the purpose of having work done upon it, and remains good until discharged by payment, not only for labor literally expended upon the paper itself, as by printing, but for any act done or labor performed or money expended in the preparation of instrumentalities by which that labor was to be performed, as types, cuts, illustrations, electrotypes and other things of like nature and object." *Conrow* v. *Little*, *supra*. But see judgment of Harrison, C.J., in *Gurney* v. *MacKay*, (1875) 37 U. C. Q. B. at p. 336.

The lien extends only to the principal chattels placed in the mechanic's hands to be worked up and not to the accessorial

materials which may have been furnished by the employer and left upon the premises of the mechanic unused. *Cumpston* v. *Haigh*, (1836) 2 Sc. 684, 5 L. J. C. P. 99. An unliquidated claim will support a lien. *McFatridge* v. *Holstead*, 21 N. S. R. 325. A carriage builder who constructs a stationary top for a wagon and fastens the same with bolts and nuts, has a lien on the whole structure. *Hardisty* v. *Carnell*, (1899) 40 N. S. R. 214.

The lien law leaves the question of trade fixtures where it finds it. *Coddington* v. *Dry Dock Co.*, (1863) 31 N. J. L. 477. "Trade fixtures" are personalty and the security of the mechanic who constructs them is in the enforcement of his lien upon the chattel. *Carroll* v. *Shooting the Chutes Co.*, (1900) 85 Mo. App. 563; *Rohls* v. *McLean*, (1913) 25 W. L. R. 358.

The Mechanics' Lien Acts existing in various provinces in Canada contain provisions which deal with liens on personalty and are intended to give an effectual remedy for the enforcement of the lien. These provisions do not create the lien, as the lien always existed, not only under the civil law (*Belleau* v. *Pitou*, 13 Quebec L. R. 337), but also at common law (*Chase* v. *Westmore*, (1816) 5 M. & S. 180; *Ex p. Willoughby*, (1881) L. R. 16 Ch. D. 604. This lien attaches for the whole amount of indebtedness to any part of the goods remaining in possession of the lienor. *Blake* v. *Nicholson*, (1814) 3 M. & S. 167.

The Mechanics' Lien Acts give the additional right of sale to the lienholder. Under the common law the mechanic already had the right to retain the chattel in his possession until his claim was satisfied, but there was no efficient method of enforcing the lien, as he did not have the right to sell the chattel, there being in that respect a distinction between a mechanics' lien and an express pawn or pledge of goods by the owner, as collateral security for a loan of money, as the creditor might sell the pledge in the latter case. *Mulliner* v. *Florence*, (1878) L. R. 3 Q. B. D. 484; *Donald* v. *Suckling*, (1866) L. R. 1 Q. B. at p. 612; *Doane* v. *Russell*, (1855) 3 Gray, (Mass.) 382; *Folsom* v. *Barrett*, (1902) 180 Mass. 439.

Essentials of the Lien.

To establish the lien at common law there must be,—

(*a*) *A debt arising by implication of law out of a contract between the mechanic and the owner of the chattel* (*Hiscox* v. *Greenwood*, (1801) 4 Esp. 174), *by the performance of which the mechanic bestows labor, skill or expense upon the article. Sawyer* v. *Longford*, (1848) 2 C. & K. 697; *Chase* v. *Westmore*, (1816) 5 M. & S. 180; *Belleau* v. *Pitou*, 13 Que. L. R. 337; *Marks* v. *Lahee*, (1837) 3 Bing N. C. 408; *Jackson* v. *Cummins*, (1839) 5 M. & W. 342; *Scarfe* v. *Morgan*, (1838) 4 M. & W. 270.

Several of the cases seem to hold, and some of the legal writers on this subject apparently conclude, that it is essential to the maintenance of the lien that the labor and skill bestowed on the chattel should actually add value to it. But such a proposition, perhaps, should not be accepted as absolute and inflexible. An owner might employ a mechanic to alter a chattel, although the alteration required would not add value to the article and might in fact lessen its value except in the opinion of the owner. But if the work be performed according to an agreement with the owner, the lien claimant should not be deprived of a lien because in carrying out the instructions of the owner, and as result of doing so, the article was, perhaps, rendered less valuable than before. The rule, therefore, should possibly be stated in some such form as that the labor and skill of the mechanic must impart additional value to the chattel or be intended by the owner to have that effect. Section 51, *post*, which empowers the mechanic to sell the chattel recognizes his right to a lien where his work had been done on the thing "for the purpose of imparting an additional value to it."

The work on the chattel must be expressly or impliedly authorized by the owner of the chattel. *Hollis* v. *Claridge*, (1813) 4 Taunt. 807; *Castellain* v. *Thompson*, (1862) 13 C. B. N. S. 105; 32 L. J. C. P. 79; *Small* v. *Robinson*, (1879) 69 Me. 425, 31 Am. Rep. 299. While the work on the chattel must be done under

contract, the authority of the owner to do the work will be implied from circumstances which would not raise an implication of a contract by the owner to pay the charges to be enforced by a suit against him, as where a wife allowed her husband to use her wagon and he had necessary repairs made, it was held that the mechanic had a lien therefor. *White* v. *Smith*, (1882) 44 N. J. Law 105.

(*b*) *Continuous possession, either actual or constructive, in the lien claimant, is essential to the existence of the lien.* Such possession must have been acquired in due course of business or in some other lawful way, and must not be inconsistent with the terms of the contract under which the lien is claimed. A lien cannot be acquired by fraud, misrepresentation, violence or any unlawful act. *Leg* v. *Evans*, (1840) 6 M. & W. 36; *Taylor* v. *Robinson*, (1818) 2 Moore 730; *Ex p. Willoughby*, (1881) L. R. 16 Ch. D. 604; *McMillan* v. *Byers*, (1886) 3 Man. 861. The possession need not be absolutely exclusive but must be uninterrupted, as even a temporary voluntary relinquishment and subsequent resumption of it is an abandonment of the lien. *Hatton* v. *Car Maintenance Co.*, (1915) 1 Ch. 621; *Forth* v. *Simpson*, (1849) 13 Ad. & E. (N.S.) 680; *Hartley* v. *Hitchcock* (1816) 1 Stark. 408; *Jackson* v. *Cummins*, (1839) 5 M. & W. 342; *Dixon* v. *Dalby*, (1852) 11 U. C. Q. B. 79; *Rielly* v. *McIlmurray*, (1898) 29 O. R. 167; *McNeil* v. *Keleher*, (1865) 15 C. P. 470; *Milburn* v. *Milburn*, (1848) 4 U. C. Q. B. 179; *Webber* v. *Cogswell*, 2 R. & C. 47, 2 Can. S. C. R. 15.

Cases are sometimes cited as inconsistent with the proposition that continuous possession is essential to the maintenance of the lien, but a careful examination of the facts will show that they are not in conflict with this doctrine, but that in each case the chattels were during all the time in the constructive possession of the lien claimant. In one case (*Webber* v. *Cogswell*, *supra*) the mechanic at Halifax sent the chattel to Boston to have it repaired and it was held that the Halifax mechanic had a lien for the charge made by the Boston mechanic. Unless there is a stipulation or

implication to the contrary in the contract the lien claimant is not obliged to do the work himself, or to have it done upon his own premises, but may employ some one outside his premises, and in such a case, where the outside mechanic would be a sub-contractor, the outside mechanic would have no lien, there being no contractual relation between him and the owner and no implied consent to such a lien (*Hollingsworth* v. *Dow*, (1837) 19 Pick 228) and his possession being really in the right of his own employer. See *Whittle* v. *Phelps*, (1902) 181 Mass. 317.

(*c*) *The possession must be lawful.* Where one wrongfully obtains possession of chattels and delivers them to a third party, who bestows money, skill or materials thereon the latter would have no lien therefor as against the rightful owner (*Hartop* v. *Hoare*, (1743) 3 Atk. 43; *Bernal* v. *Pim*, (1835) 1 Gale 17, 20), and even where a person lawfully obtains possession of a chattel, as by gratuitous loan or bailment, and delivers the chattel to a third person who repairs it, the latter has no lien for the repairs. The right being inseparably coupled with possession, loss of possession involves loss of lien, which once lost does not re-attach on re-possession of the article, unless the loss of possession be involuntary. *McDonald* v. *Stirskey*, (1879) R. & C. 520, N.S.; *Canadian Gas Power* v. *Schofield*, (1910) 15 O. W. R. 847.

An involuntary surrender of possession does not defeat the lien. *Wilson* v. *Kymer*, 1 M. & S. 157; *Lane* v. *Old Colony R. R. Co.*, 14 Gray (Mass.) 148; *Lynch* v. *Tibbits*, (1857) 24 Barb. N. Y. 51. An agreement which is void from the beginning cannot give rise to a lien, but an agreement to do something which is illegal can give rise to the lien if the work is done. *Scarfe* v. *Morgan*, (1838) 4 M. & W. 270, 282. On the other hand, regaining possession without the consent of the owner, after voluntarily parting with the possession, will not revive the lien. *Hartley* v. *Hitchcock*, (1816) 1 Stark. 408; *Howes* v. *Ball*, (1827) 7 B. & C. 481.

Re-delivery to the owner cannot be recalled even if made by mistake (*Dicas* v. *Stockley*, (1836) 7 C. & P. 587; see *Bligh* v.

Davies, (1860) 28 Beav. 211), but if re-delivery is induced by fraud the lien revives if possession is recovered. *Bristol* v. *Wilsmore*, (1823) 1 B. & C. 514; *Hawes* v. *Crowe*, (1826) Ry. & M. 414.

Some of the earlier English cases and a few cases decided in the United States are sometimes cited by legal writers to sustain the proposition that possession in order to confer the right to a lien must be exclusive and unconditional. Such a proposition does not seem to be clearly sustained by the governing decisions on this question.

It is difficult to state what constitutes sufficient possession to secure the right to lien, but while exclusive possession is not strictly essential there must be such actual control and possession in the lien claimant as would be reasonable under the special circumstances of the case. This question of what constitutes sufficient possession to give the right of lien can best be answered by a comparison of two cases,—*King* v. *Indian Orchard Co.*, (1853) 11 Cush. (Mass.) 231; and *Roberts* v. *The Bank of Toronto*, (1894) 25 O. R. 194, 21 A. R. 629. In the former case it was decided that a manufacturer of bricks burnt on the land of another, but of which the manufacturer has no lease and no other interest than the right to enter and make the bricks, has no such possession of the bricks as to give him a lien thereon for his labor. In that case the court (*per* Bigelow, J.) said: "Upon the undisputed facts in this case it appears to us that the plaintiff fails to show any such possession of the property in question as will support the lien which he set up in order to maintain this action. In the first place he shows no right or interest in himself as owner, lessee, or tenant of the possession of the yard in which the bricks were made and burned.

"Upon these facts it is manifest that the plaintiff never had any exclusive and unconditional possession of the property. It was, at most, only a mixed possession with Stearns or rather a license to the plaintiff to enter upon and use the yard of Stearns

for the purpose of making and burning the brick. It is entirely clear that such a restricted and limited possession is insufficient to support a lien. It amounts to nothing more than the ordinary transaction of work done by one person in the manufacture or repair of articles for another upon the premises of the latter. The workman in such a case has to a certain extent possession of the property upon which his labor and services are expended, but it is a qualified and mixed possession which can form no valid basis for a lien."

It is apparent that in this case the claimant failed to make out his own actual possession, and moreover, that as an employee he could have no lien upon property of his employer. *State* v. *Goll*, (1867) 32 N. J. L. 285.

In the case of *Roberts* v. *Bank of Toronto*, the plaintiff was employed to manufacture bricks for another in a brickyard belonging to the latter, of which, however, the plaintiff held possession for the purpose of his contract, and remained and was in possession of the bricks at the time of their seizure by the sheriff under an execution against the owner of the brickyard, who immediately after such seizure made an assignment for the benefit of creditors. It was held that the plaintiff was entitled to a lien upon the bricks in priority to the execution and assignment for the benefit of creditors, and also in priority to the claim of the chattel mortgagee, though his mortgage covered brick in course of manufacture during its continuance.

On appeal it was contended that exclusive possession must be shown. The judgment, however, was confirmed, and Haggerty, C.J.O., in the course of his judgment, said: "The possession necessary to entitle him to his common law lien must be such a reasonable, clear and actual possession as the nature of the case will admit."

An examination of two other cases will throw further light on the question of sufficiency of possession. In *Shaw* v. *Kaler*, (1871) 106 Mass. 448, it was held that a mechanic constructing articles

of furniture, under a contract by which his employer furnished the materials and bench room, could maintain an action for the conversion of the articles against one who took them from his possession claiming under an alleged mortgage from the employer, of the existence of which there was no evidence. In this case the crucial fact was established that the articles were retained in the actual possession of the mechanic in the employer's workshop. In another case (*McLachlan* v. *Kennedy*, (1889) 21 N. S. R. 271), defendant wrote to plaintiff proposing an arrangement for quarrying and burning lime on plaintiff's land. Receiving no reply, he entered and burnt lime. The plaintiff afterwards ratified defendant's action and agreed to buy all the lime he burned and to supply the barrels. Plaintiff having refused to accept a lot of lime on the ground that it was not delivered within the time agreed on, the defendant shipped it to another party, and plaintiff then brought action for the conversion of his property, and it was held that the action could not be maintained, the defendant's lien on the lime being undischarged.

In a later case, in Ontario (*Hackett* v. *Coghill*, (1903) 2 O. W. R. 1077), Boyd, C., said: "Later cases show explicitly that one necessary ingredient of lien is that the person claiming it should have full possession, meaning thereby that the claimant must have exclusive and continuous possession, and if the things are moved from the place of repair it must be to a place where absolute and entire dominion over them can be retained, a thing which can rarely be done." See *More-le-Blanch* v. *Wilson*, L. R. 8 C. P. 227, at 238; *Ex p. Willoughby*, 16 Ch. D. 610, 612. In support of this proposition some English cases are cited by this eminent judge, and the case of *Somes* v. *British Empire Shipping Co.*, (1860) 8 H. L. C. 338, is distinguished. The facts in *Hackett* v. *Coghill*, as stated by the judge, were as follows: "The plaintiff's claim is in respect of repairs done upon their vessels when they were hauled out upon his ways in the harbor at Wiarton. After the work was done the vessels were respectively restored to the water and taken first to the dock belonging

to Castner and afterwards to the old dock erected by the town and which was in common and public use even after the erection of a new dock by the town about two years ago. While lying at the old dock the plaintiff put lock and chain upon the dredge and notified the owners, but before this he says that he tied up the vessels at this dock and claimed to be in possession of them. The evidence shows that the plaintiff had permission to use Castner's dock from the owner, and the old dock from the town authorities by verbal license for the purpose of his business in repairing vessels. The legal possession of the water lots on which the mooring existed at the time of the dispute as to possession which is now being litigated was vested in the Crown. It is further in evidence that the owners had a person in possession of the dredge for the purpose of looking after it and keeping the machinery in proper order and he was on the boat at the time it was chained up by the plaintiff." Upon this state of facts it was impossible to support the claim of the plaintiff to a lien and the decision against the plaintiff cannot be questioned. The general statement of law, however, in the case, as reported, that a claimant must have exclusive possession, seems at variance with some English judgments and at least one Canadian decision.

In one English case (*Crowfoot* v. *London Dock Co.*, (1834) 2 Cr. & M. 630), which is not cited in this Ontario case, but, like it, was in connection with the repair of a ship, Parke, B., said (at p. 655): "It is impossible to lay down any precise rule as to the sort of possession which is necessary in order to give validity to the lien. Each case must depend a good deal upon its own circumstances, and here the company had possession so far as the nature of the transaction would admit. Any more exclusive possession on their part would have defeated the whole object of the advances which it was the purpose of the lien to secure. It would be going too far to say that the law rendered such exclusive possession necessary; and the case which has been cited (*Manton* v. *Moore*, 7 T. R. 67), though not exactly on the same subject, is nevertheless fairly relied upon as showing that the law does not

require it. Though Streather has been permitted to use the engines and materials for a particular purpose, they remained on the defendant's premises and under their control." *Hackett* v. *Coghill* also omits any reference to the case of *Roberts* v. *Bank of Toronto*, (1894) 25 O. R. 194, 21 O. A. R. 629, where the Ontario Court on appeal did not uphold the contention that possession must be exclusive. The decision in *Hackett* v. *Coghill* was appealed to a Divisional Court, which upheld the trial judge's finding of fact. See 3 O. W. R. 827. See also *Keystone M. Co.* v. *Close*, (1917) 3 Am. L. R. 857; *Bank of Montreal* v. *Potts*, (1892) 91 Mich. 342. Abandonment of possession forfeits the lien. *Troop* v. *Hart*, 7 Can. S. C. R. 512; *Katzman* v. *Mannie*, (1919) 46 O. L. R. 121.

If possession is parted with the lien is gone in respect to third persons, although it was stipulated between the parties that the lien should continue notwithstanding the removal of the property. *McFarland* v. *Wheeler*, 26 Wend. N. Y. 467; *Oakes* v. *Moore*, (1844) 24 Me. 214. Whether possession has been parted with or not is a question of fact. *Bernal* v. *Pim*, (1835) 1 Gale 17. As to facts which would constitute insufficient possession, see *McKenzie* v. *Mattinson*, 40 N. S. R. 346.

(*d*) *The work must be work of skill.* The principle of a common law lien is not applied to every kind of labor done on a chattel but extends only to skilled workmen exercising a trade or art. The proprietor of a garage is not entitled to a lien on an automobile for keeping and caring for same in his garage, nor for supplies such as gasoline and oil furnished by him to the owner while the machine was being kept in the garage. *Rehm* v. *Viall*, (1914) 185 Ill. App. 425. But a workman who makes repairs to an automobile has thereon a right of retention, and in Quebec his claim for repairs constitutes a privileged debt which takes rank by preference on the proceeds of the sale of the vehicle. He has the right to cause a conservatory attachment to issue for the purpose of giving effect to his privilege. *Morin* v. *Garbi*, (1916) 50 Que. S. C. 273. A lien may be had for the repair of automobiles. *Gardner* v. *Le Fevre*, (1914) 180 Mich. 219; *Smith* v. *O'Brien*, (1905) 94

N. Y. Supp. 673, affirmed, 103 App. Div. (N.Y.) 596. It would not apply to an ordinary laborer for doing such work as cutting wood (*McMillan* v. *Byers*, (1886) 3 Man. L. R. 361), nor to an employee of a farmer in respect to a crop which the employee has harvested. *McDearmid* v. *Foster*, 12 Pac. Rep. 813. In ordinary cases the workman may accomplish the work through the medium of inferior agents and workmen, but if the work is a work of art and genius and the contract is founded upon the personal talent of the artist he impliedly undertakes to perform the work himself and may not entrust it to one less skilful. Addison on Contracts, 11th ed. p. 888; *Robson* v. *Drummond*, (1831) 2 B. & Ald. 308; *British Wagon Co.* v. *Lea*, (1880) 5 Q. B. D. 149.

To maintain a lien a mechanic must bring himself within all the foregoing equally essential conditions.

A person who agrees with the owner of an automobile to maintain the car, supply a chauffeur, and care for the machine, at a certain amount a week for his charges, has no lien, the car being merely maintained in the same condition, there being no improvements in it and the owner, under the agreement, being permitted to take it out of the other's possession at any time. *Hatton* v. *Car Maintenance Co.*, (1914) 30 Times L. R. 275, (1915) Ch. 621. As to periodical use of article by owner defeating lien, see also *Clarksburg Casket Co.* v. *Phares*, (1917) 3 Am. L. R. 660; *Smith* v. *O'Brien*, (1905) 103 App. Div. (N.Y.) 596.

By a hire-purchase agreement the plaintiff let a dog-cart to a person who in the course of time sent the cart to be repaired to the defendant, a coach-builder. The agreement contained a clause by which the hirer undertook "to keep and preserve the dog-cart from injury." Some instalments under the agreement being unpaid, the plaintiff sought to recover the cart, but the defendant claimed a lien upon it for the cost of the repairs, and it was held that, under the circumstances, the hirer had authority to send the cart to be repaired, and, therefore, that the defendant's lien was good, not only against the hirer, but also against the plaintiff. *Keene* v. *Thomas*, (1905) 1 K. B. 136.

Waiver or Loss of Lien.

The right to a lien may be lost or waived, expressly or by implication.

A lien does not exist where the contract between the parties or the circumstances are inconsistent with the notion that one was intended. *Ritchie* v. *Grundy*, (1891) 7 Man. L. R. 532. When possession is lost, the lien is lost. *Fiddes* v. *Henderson*, C. Mss. (N.B.). Conduct inconsistent with the existence or continuance of a lien will constitute a waiver of it. "It is neither a *jus in re* nor *jus ad rem* and it may be waived by any act or agreement between the parties by which the right is given up." *Dempsey* v. *Carson*, (1862) 11 U. C. C. P. 462, *per* Draper, C.J. Thus the lien will be waived by an agreement relating to the mode or time of payment, inconsistent with the right of lien. *Crawshay* v. *Homfray*, 4 B. & Ald. 50; *Fisher* v. *Smith*, (1878) 4 App. Cas. 12; *Rollins* v. *Bowman Cycle Co.*, (1904) 89 N. Y. S. 289, 96 App. Div. 365; but a sale of part of property does not involve loss of lien on the remainder. *Steeves* v. *Cowie*, (1903) 40 N. S. R. 401; a lien will be waived by claiming the ownership of the goods (*Boardman* v. *Sill*, (1808) 1 Camp. 410n.); claiming to hold them for a debt due from a third party (*Dirks* v. *Richards*, (1842) 4 M. & G. 574); refusing to deliver up the goods on the ground that they belong to a third person (*Andrews* v. *Wade* (Penn.), 6 Atl. Rep. 48); stipulating to receive other work in future (*Stickney* v. *Allen*, (1858) 10 Gray (Mass.) 352); making a binding agreement to restore possession (*The Wiles Laundering Co.* v. *Hahlo*, (1887) 105 N. Y. 234); agreeing to receive payment after delivery (*Lee* v. *Gould*, 47 Pa. St. 398); pawning the chattel (*Gallaher* v. *Cohen*, 1 Brown (Penn.) 43). Any agreement which is inconsistent with the lien claimant's right to retain the chattel until payment negatives his claim of lien at common law. *Canada Steel & Wire Co.* v. *Ferguson*, (1915) 21 D. L. R. 771. The defence of liens can only be pleaded when there has been no conver-

sion (*Neville* v. *Schofield*, 2 N.B.R. 435, 5 N.B.R. 124); a lien will be waived by setting up a claim which has no relation to the lien (*Weeks* v. *Goode*, (1859) 6 C. B. N. S. 367); destroying part of the goods (*Gurr* v. *Cuthbert*, (1843) 12 L. J. Exch. 309). See *Chew* v. *Traders Bank of Canada*, (1909) 19 O. L. R. 74; attempting to sell the chattel (*Vincent* v. *Conklin*, 1 E. D. Smith (N.Y.) 203; *Bean* v. *Bolton*, 3 Phila. (Pa.) 87); (see *Mulliner* v. *Florence*, (1878) 3 Q. B. D. 484); agreeing to do the work on credit (*Riatt* v. *Mitchell*, (1815) 4 Camp. 146); agreeing to do certain work to be performed during the year and to receive payment quarterly (*Stoddard* v. *Huntley*, (1831) 8 New Hampshire 441, 31 Am. Dec. 198; *Hatton* v. *Car Maintenance Co.*, (1914) 30 Times L. R. 275; alleging some independent ground without claiming a lien (*Folsom* v. *Barrett*, 180 Mass. 439; *Bowden* v. *Duggan*, 91 Maine 141). Agreeing to wait for payment until the owner has collected insurance money covering the accident which caused the damage will prevent the repairer from claiming a lien. *Lezenik* v. *Greenberg*, (1916) 157 N.Y. Supp. 1093. Taking particular security for the debt (*Hewison* v. *Guthrie*, (1836) 2 Bing. N.C. 759; *Pinnock* v. *Harrison*, (1838) 3 M. & W. 539; *Davies* v. *Bowsher*, (1794) 5 D. & E. 488; *Cowell* v. *Simpson*, (1809) 16 Ves. 275). See *Stevenson* v. *Blakelock*, (1813) 1 M. & S. 535; *Bathurst Lumber Co. and Nepisiquit Lumber Co.*, (1911) 11 E. L. R. 552. This last proposition, however, depends entirely upon the special circumstances of each case, as the taking of other security does not necessarily import an abandonment of the lien. It is a question of intention to be ascertained from the relation of the parties and the special circumstances. *Re Taylor*, (1891) 1 Ch. 590, 597; *Re Bowes*, (1886) 33 Ch. D. 586. The question to be determined is one of intention, viz., Was the security intended to be cumulative or substitutional? The presumption of intention will not be the same in all trades, Halsbury's Laws of England, 257. Lord Westbury in *In re Leith's Estate, Chambers* v. *Davidson*, (1886) L. R. 1 P. C. 296, 305, said: "But lien is not the result of an express con-

tract; it is given by implication of law. If therefore a mercantile relation which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien and limits their rights by the extent of the express contract they have made. *Expressum facit cessare tacitum.* If a consignee takes an express security, it includes general lien." The editor of Smith's Mercantile Law, 10th ed., p. 700, questions whether these words are not too wide. See *Wylde* v. *Radford,* (1864) 33 L. J. Ch. 51; *Davis* v. *Humphrey,* (1873) 112 Mass. 309, 315; *Angier* v. *Bay State Co.,* (1901) 178 Mass. 163; *Ritchie* v. *Grundy,* (1891) 7 Man. L. R. 532; *Fisher* v. *Smith,* (1878) 4 App. Cas. 1.

In an important English case (*Angus* v. *McLachlan,* (1883) L. R. 23 Ch. D., at 335), Kay, J., said: "It is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case or in the nature of the security which is inconsistent with the existence of the lien and which is destructive of it." In this case and some of the other cases previously cited on this point, the lien was not a mechanics' lien but the decisions upon the question of waiver would be equally applicable to mechanics' lien cases. See *Re Morris,* (1908) 1 K. B. 473, 477. A lien is not lost by deposit of the chattel with a third party on behalf of the lienor. *Levy* v. *Barnard,* (1818) 8 Taunt. 149. See *Reeves* v. *Capper,* (1838) 5 Bing N. C. 136.

The claim of lien cannot be supported where the particular transaction shows that there was no intention that there should be a lien, but some other security is looked to and relied on. *United States* v. *Barney,* 24 Fed. 1014.

An examination of all the English cases leads to the conclusion that this question of waiver of the lien is a question of fact, the cardinal point being whether the new security was intended to be cumulative or substitutionary, and to determine that point all the circumstances of the case must be weighed.

The United States law on this question was thus formerly stated: "The effect of taking security upon a lien is a matter upon which the courts have not agreed, the better opinion being that such an act is presumptive of a waiver of the lien but may be shown to have been given with other intention." 13 Am. & Eng. Ency. of Law, p. 622, 1st ed. But a later and more accurate statement of the law is to be found in the second edition of that work where the general rule is stated to be that the mere taking of other security for a debt secured by a lien does not constitute a waiver of the lien, and that to constitute a waiver an intention to waive the lien must appear from the circumstances of the case, or from the nature of the security taken. See vol. 19, p. 29, 2nd ed.

A person may lose his lien by misconduct. In such case the owner's right to possession revives. *Scott* v. *Newington*, (1833) M & Rob. 252. See *Jones* v. *Cliffe*, (1833) 1 C. & M. 540. A lien may also be lost where the lien claimant uses the article as his own. *Bruntnall* v. *Smith*, (1896) 166 Mass. 253. When the debt in respect to which the lien is claimed is satisfied the lien is lost. If for instance, a person releases the debt by executing a composition deed the lien is lost. *Cowper* v. *Green*, (1841) 7 M. & W. 633.

A release of part of the goods does not waive the lien upon the rest for the whole amount. *Morgan* v. *Congdon*, 4 N. Y. 552; *Wiles Laundering Co.* v. *Hahlo*, 105 N. Y. 234; *Barker* v. *Brown*, 138 Mass. 340.

Honestly claiming more than is due does not waive the lien, *Folsom* v. *Barrett*, 180 Mass. 439. See *Kerford* v. *Mondel*, 28 L. J. N. S. 303.

Attachment, Execution or Assignment.

There is some conflict in the decisions and opinions upon the question whether an attachment or levy on execution upon the property upon which the lien is claimed, in a suit brought by the lien claimant upon the lien claim, is a waiver of the lien. One American authority, *Lummus* (sec. 24), inclines to the view that

such an act is not a waiver of the lien, and he cites a case (*Lambert* v. *Nicklass*, (1898) 45 W. Va. 537) which decides that levying an attachment upon the property held under the lien does not waive the lien. There are conflicting decisions in Massachusetts on this question. *Townsend* v. *Newell*, (1833) 14 Pick. 332; cf. *Leg.* v. *Willard*, (1835) 17 Pick. (Mass.) 140. On the other hand, it has been decided in England that a person having a lien upon chattels loses it by having them levied on under an execution upon the lien debt. *Jacobs* v. *Latour*, (1828) 5 Bing. 130. Boisot, sec. 780, cites a Canadian case (*Lake* v. *Biggar* (1862) 11 U. C. C. P. 170) as an authority deciding "that an artisan's having a lien on a chattel would not prevent his seizing it under an execution for a debt which constituted the lien nor would his asserting such a right be inconsistent with his lien or a waiver of it," but a close examination of this case shows that the judgment of the County Court Judge on that point is not directly confirmed by the Appeal Court, which merely decides that there was no evidence of tender or of waiver of tender. Inasmuch as possession is essential to maintenance of a lien it is difficult to understand how a lien claimant can be considered as retaining possession when the chattel is *in custodia legis*. The decision in *Jacobs* v. *Latour* was based on that principle, that the lien claimant had parted with the possession of the chattel. The weight of authority favors the view that when a lien claimant issues an execution and the sheriff levies upon the chattel the lien is lost. It might be said that the lien claimant still has possession through his agent, the sheriff, but if so, he has so altered the nature of his possession as to destroy his lien. Possession must vest in the sheriff to enable him to sell the chattel, and when the lien claimant authorizes the levy he is deemed to have abandoned the possession by virtue of his lien. See also *Crowfoot* v. *London Dock Co.*, (1834) 2 Cr. & M. 637; *McMillan* v. *Byers*, (1886) 3 Man. L. R. 361; and *Re Coumbe, Cockburn and Campbell*, (1877) 24 Gr. 519, where a lienor was held to have waived his lien on lumber by procuring the lumber to be taken in execution at his own suit.

The interest of a lienholder is not attachable as personal property, as it is neither property nor a debt (*Yungmann* v. *Briesmann*, (1893) 67 L. T. 643; *Kittredge* v. *Sumner*, (1820) 11 Pick. (Mass.) 50; *Thames Iron Works* v. *Patent Derrick Co.*, (1860) 1 J. & H. 93); and for the same reason it cannot be assigned or transferred (*Daubigny* v. *Duval*, (1794) 5 T. R. 604), except in the case of a dissolution of a partnership where the firm was entitled to a lien. In such case one partner may assign his interest in the lien to the other who may enforce the same in the name of the firm. *Busfield* v. *Wheeler*, (1867) 14 Allen (Mass.) 139; *Holly* v. *Huggeford*, (1829) 8 Pick. (Mass.) 73. As to a sheriff's right to seize property covered by a lien, under an execution against the party claiming the lien, see *Young* v. *Lambert*, (1870) L. R. 3 P. C. 142; 39 L. J. P. C. 21.

On the same principle as that which applies to a levy under execution, a replevin destroys the lien acquired. *Braddyl* v. *Ball*, (1785) 1 Br. C. C. 427.

Tender and Discharge of Lien.

The lien is discharged by an unconditional tender of the amount due. *The Eider* v. *Norddeutscher Lloyd*, (1893) 62 L. J. P. 65; 69 L. T. 622; *Willis* v. *Sweet*, (1888) 20 N. S. R. 449; *Folsom* v. *Barrett*, 180 Mass. 439; *Davison* v. *Mulcahy*, 19 N. S. R. 209. In one case the owner, after tender of the amount due and its refusal by the mechanic, broke open the mechanic's shop to recover the chattel and the court held that he thereby committed trespass. *Davison* v. *Mulcahy*, *supra*. One having the right to the disposal of an automobile, left by another at a garage, cannot maintain replevin against the owner of the garage who has a lien for repairs and storage, without proof of prior payment of the proper charges, or tender and refusal, or such conduct on the part of the garage keeper as estops him to claim either that he has a lien or that the plaintiff has made no sufficient tender. *Doody* v. *Collins*, (1916) 223 Mass. 332. As to sufficient evidence of refusal of tender, see *Hartney* v. *Boulton*, (1914) 7 Sask. L. R. 97.

In an Ontario case where the mechanic agreed to accept part payment in cash and a cognovit for the balance, it was held that his lien was lost on payment of the cash agreed upon and tender of the cognovit. *Dempsey* v. *Carson*, (1862) 11 U. C. C. P. 462.

In *McBride* v. *Bailey*, (1857) 6 U. C. C. P. 523, previous cases on the subject of waiver of tender are fully reviewed.

The fact that a person was claiming to hold the goods for a certain tenable claim and for an untenable claim does not dispense with the necessity of tender of the amount of the tenable claim. *Llado* v. *Morgan*, 23 U. C. C. P. 517; *The Queen* v. *Hollingsworth*, (1899) 2 Can. Cr. Cas. 291. See *Nevils* v. *Schofield*, (1881) 21 N. B. R. 124. A tenable claim of lien cannot be set up in an action of trover where it was not made when the goods were demanded. *Llado* v. *Morgan*, 23 U. C. C. P. 517.

Where work was done under a contract for cash payment, an offer to endorse the amount of the bill on an acceptance of the mechanic is not such a tender as will terminate the lien. *Clarke* v. *Fell*, (1833) 2 L. J. K. B. (N.S.) 84.

Estoppel.

The lien may be lost by estoppel where its assertion would operate as a fraud on innocent parties, or where some one is induced by the act or neglect of the lienor to rely upon the non-existence of the lien. *Howard* v. *Tucker*, (1831) 1 B. & Ald. 712; *Moyes* v. *Kimball*, 92 Maine 231; *Fowler* v. *Parsons*, 143 Mass. 401. Assertion of payment will operate as estoppel as against those who have acted on it. *Pooley* v. *Budd*, (1851) 7 E. L. & Eq. 229; *Woodley* v. *Coventry*, (1863) 32 L. J. Ex. 185 pt. 1.

Any act or neglect of the lien claimant which induces a person to rely upon the non-existence of the lien, may defeat the lien by estoppel. *Fowler* v. *Parsons*, (1887) 143 Mass. 401; *Hinchley* v. *Greany*, (1875) 118 Mass. 595. See *Vulcan Iron Works Co.* v. *Rapid City Farmers E. Co.*, (1894) 9 Man. L. R. 577. Reasonable delay in accepting tender will not forfeit the lien. *Eckhard* v. *Donohoe*, 9 Daly (N.Y.) 214.

Even where the lien claimant demands a larger sum than is due for the lien, a tender of the sum actually due is necessary to discharge the lien. *Kendal* v. *Fitzgerald,* (1862) 21 U. C. Q. B. 585. If the owner of an article is willing to satisfy all charges incurred in respect of them, the article cannot be retained until payment of a general balance due to the person having the particular lien. *Jones* v. *Tarleton,* (1842) 9 M. & W. 67. Haggerty, J., in that case said: "Mr. Eccles' argument for the plaintiff is that by insisting on holding the goods, not only for the sum properly due, but for charges not legally demandable, the lien is waived and forfeited, without the necessity of any tender. I have hitherto understood the law to be that where the holder of goods having a clear lien, sets up not only that lien, but also another claim against the plaintiff, of an untenable character, the true owner should tender the proper amount due or an amount reasonably sufficient therefor, unless the defendant either expressly or by fair implication, gives the owner to understand that he dispenses with a tender or offer of any sum less than that which he advances as his claim." See also *Green* v. *Shewell,* (1838) 4 M. & W. 277.

In another case, *Allen* v. *Smith,* (1862) 12 C. B. N. S. 645, Willes, J., said: "If the defendant had been shown the lesser amount he might have been willing to have accepted it." See *Nevins* v. *Schofield,* (1881) 21 N. B. R. 124.

Referring to this question of waiver, in an English case (*White* v. *Gainer,* (1824) 2 Bing. 23), Best, C.J., said: "I agree in the law as laid down in *Boardman* v. *Sill,* but not in the application of it now proposed. In that case it was held that if a party, when goods are demanded of him, rests his refusal upon grounds other than that of lien, he cannot afterwards resort to his lien as a justification for retaining them. Therefore, if, even in this case, the defendant when applied to to deliver the goods had said, 'I bought them, they are my property,' I should have holden there was a waiver of his lien, but he said no such thing, but only,

'If I deliver them up I may as well give up every transaction of my life.'"

If the lien claimant is prevented by the owner from completing his work, the lien continues. *Lilley* v. *Barnsley*, 1 C. & K. 344. It also continues if the reason why the lienor ceased to work upon the chattel was that the owner failed to furnish materials therefor according to his agreement. *Busfield* v. *Wheeler*, (1867) 14 Allen (Mass.) 139.

Bringing suit on the claim secured by the lien and attaching other property of the debtor is no waiver of the lien. *Palmer* v. *Tucker*, 45 Me. 316; *Barnard* v. *Wheeler*, 24 Me. 412. As to delivery of goods by a person who has a lien thereon to another person so as to preserve his lien, see *McCombie* v. *Davies*, 7 East 5.

An agreement to waive an existing lien, where the lienor retains possession, is invalid unless supported by consideration. *Danforth* v. *Pratt*, 42 Maine 50; *Hollins* v. *Hubbard*, 165 N. Y. 534.

A set-off cannot be considered as destroying a lien unless it be so agreed upon between the parties. *Pinnock* v. *Harrison*, (1838) 3 M. & W. 532; *Clarke* v. *Fell*, (1833) 4 B. & Ad. 404; *Wegulin* v. *Cellier*, (1857) L. R. 6 H. L. 286. See *Roxburghe* v. *Cox*, (1881) 17 Ch. D. 520.

An unliquidated claim will not destroy a lien. *McFatridge* v. *Holstead*, (1889) 21 N. S. R. 325.

Delivery by the lien claimant to a third person, as depositary or bailee for safe custody, generally does not affect the lien (*McLachlan* v. *Kennedy*, (1889) 21 N. S. R. 271), particularly if such third person re-transfers the property to the lien claimant before the lien is sought to be enforced. *Milburn* v. *Milburn*, 4 U. C. Q. B. 179.

If a chattel is fraudulently or unlawfully taken out of possession of the lien claimant by the owner and the lien claimant without force retakes the chattel the lien revives. *Wallace* v. *Woodgate*, (1824) Ry. & M. 193. In this case the lien was that of a livery stable keeper but the same principle

would apply to a mechanics' lien. See also *Dicas* v. *Stockley* (1836) 7 C. and P. 587; *Wilson* v. *Kymer*, (1813) 1 M. & S. 157; *Re Carter*, (1885) 55 L. J. Ch. 230; *Bigelow* v. *Heaton*, 6 Hill. (N.Y.) 43. A lien is always forfeited by delivery but a delivery procured by fraud is not within the rule. *Pocock* v. *Novitz*, (1912) 21 W. L. R. 418 (Sask.); *Walcott* v. *Keith*, 22 N. H. 196.

The lienor may by legal proceedings recover the property even against the owner. *Sewell* v. *Nicholls*, 34 Maine 582; *Brewster* v. *Warner*, 136 Mass. 57.

A lien is not destroyed though the demand in respect of which it arises is barred by the Statute of Limitations. It is the remedy, not the debt itself, that is discharged by that statute. *Spears* v. *Hartley*, (1819) 3 Esp. 81; *Higgins* v. *Scott*, (1831) 2 B. & Ad. 413; *Re Broomhead*, (1847) 16 L. J. Q. B. 355; *Curwen* v. *Milburn*, (1889) 42 Ch. D. 424.

The taking of a negotiable instrument by way of security will not apparently discharge the lien if the instrument is dishonored before a claim is made to enforce the lien. *Stevenson* v. *Blakelock*, (1813) 1 M. & S. 535; *Bathurst Lumber Co.* v. *Nepisiquit Lumber Co.*, (1911) 11 E. L. R. 552. A repair man does not lose his lien because he made a reduction in the amount of his claim and the amount to which he was entitled was less than the reduced sum claimed. *Macomber* v. *Detroit Cadillac Motor Car Co.*, (1916) 173 App. Div. 724.

A lien which has accrued to a partnership for work done and money expended upon machinery is not lost by the dissolution of the firm and the assignment by one partner of his interest therein to the other, but in such case the partner to whom the claim of lien has been assigned may enforce the same in the name of the firm. *Busfield* v. *Wheeler*, (1867) 14 Allen (Mass.) 139.

A lien is not affected by the fact that the owner of the goods becomes bankrupt. *Robson* v. *Kemp*, (1803) 4 Esp. 233.

The party claiming a lien is bound to take reasonable care of the article. *Scarfe* v. *Morgan*, 4 M. & W. 270; *Great Western Ry.*

Co. v. *Crouch*, 3 H. & N. 183. Generally, a person having a lien on a chattel who keeps it for the purpose of enforcing his lien cannot make any claim against the owner for so keeping. *Somes* v. *British Empire Shipping Co.*, (1860) 8 H. L. Cas. 338.

A mere promise by the lien claimant, without consideration, to restore the chattel, is not a waiver of his lien. *Clarke* v. *Costello*, 29 N. Y. S. 937, (1894) 79 Hun. 588. An agreement to waive an existing lien is invalid, unless made with a valuable consideration. *Hollins* v. *Hubbard*, (1901) 165 N. Y. 534. As to right of lien claimant to retain article against owner, where a hire-purchase agreement is outstanding, the hirer having ordered the repairs, a term of the hire-purchase agreement being that the hirer should keep the article in good repair, see *Green* v. *All Motors, Ltd.*; (1917) 1 K. B. 625; *Keene* v. *Thomas*, (1905) 1 K. B. 136.

Rights of Owner.

The owner of chattels upon which a lien is claimed may inspect or show them as long as he does not interfere with the possession of the lien-holder. If a chattel is detained by a person under an invalid claim of lien, the owner is not obliged to bring replevin or similar action to test the validity of the lien. He may pay the amount under protest, obtain his property and then sue to recover back the money so paid. *Whitlock Co.* v. *Holway*, 92 Maine 414; *Somes* v. *B. E. S. Co.*, (1860) 8 H. L. Cas. 338. *Hunter* v. *Leake*, (1829) 7 L. J. K. B. (O.S.) 221; *Hughes* v. *Lenny*, (1839) 5 M. & W. 187; *Lord Brougham* v. *Cauvin*, (1868) 37 L. J. Ch. N. S. 691.

Where a contract provides for stipulated work at a lump sum and such work is not done but its equivalent or better work is effected, no claim for such substituted work can be sustained. *Forman* v. *The "Liddesdale,"* 69 L. J. P. C. 44; (1900) A. C. 190; 82 L. T. 331. The fact that the owner of the chattel thus repaired has sold it at a price enhanced by such unauthorized labor does

not amount to acquiescence on his part or acceptance of liability for the work done.

A lienor or bailee must take ordinary care of goods held under a lien. *Clarke* v. *Earnshaw*, (1818) Gow 30; *Angus* v. *McLachlan*, 23 Ch. D. 330; *Ultzen* v. *Nicholls*, (1894) 1 Q. B. 92; *Searle* v. *Laverich*, (1874) L. R. 9 Q. B. 122; *Halestrap* v. *Gregory*, (1895) 1 Q. B. 561; *Turner* v. *Stallibras*, (1898) 1 Q. B. 56. As to consideration for a promise to pay the amount of a void lien, see *Dunham* v. *Johnson*, 135 Mass. 310.

A lien claimant cannot add to the amount for which the lien exists, a charge for keeping the chattel until the debt is paid. Where such a charge is made and the owner of the chattel pays it under protest he may maintain an action for money had and received. *Somes* v. *Directors B. E. S. Co.*, (1860) 8 H. L. Cas. 338; *Bruce* v. *Eveson*, (1883) 1 Cababe & Ellis, 18; *Pease* v. *Johnson*, (1905) 1 W. L. R. 208. See *Carew* v. *Rutherford*, (1870) 106 Mass. 1; *Canada Steel & Wire Co.* v. *Ferguson*, (1915) 21 D. L. R. 771.

The goods of the Sovereign cannot be detained under a claim of lien. *Queen* v. *Fraser*, (1877) 2 R. & C. (Nova Scotia) 431.

A mechanic has no right to detain cloth for a debt due for dressing or dyeing other cloth for the same party. *Rose* v. *Hart*, 8 Taunt. 499; *Close* v. *Waterhouse*, (1805) 6 East 523, note; *Hensal* v. *Noble*, 95 Pa. 345; see also *Yearsley* v. *Gray*, 140 Pa. 238. The proprietor of a garage is not entitled to a lien on an automobile for keeping and caring for same in his garage. *Rehm* v. *Viall*, (1914) 185 Ill. App. 425.

A person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts. *Carey* v. *Brown*, (1875) 92 U. S. 171. The owner cannot obtain any part of the goods covered by the lien without paying the whole claim.

Rights of Third Persons.

Where the party entitled to a lien wrongfully parts with the goods the owner may recover them from the holder without tender-

ing what is due on the lien, for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods. Roscoe's N. P. Evidence (17th ed.) 974; *Scott* v. *Newington*, (1833) 1 M. & Rob. 252; *Jones* v. *Cliff*, (1833) 1 Cr. & M. 540.

A person who obtains possession of goods by fraud or misrepresentation cannot claim a lien upon them. *Madden* v. *Kempster*, (1807) 1 Camp. 12; *Lempriere* v. *Pasley*, (1788) 2 T. R. 485; *Simbolf* v. *Alford*, (1838) 3 M. & W. 248; *Walsh* v. *Provan*, (1853) 8 Ex. Rep. 843.

It has been held that a vendor's lien secured by a duly recorded chattel mortgage takes precedence of a mechanics' lien for repairs subsequently done at the purchaser's request. But, as a general rule, where the mortgagee of chattels leaves the property in possession of the mortgagor and the property is of a character that suggests use, and that repairs will be needed, and the mortgagor takes it to an artisan to be repaired, the common law lien will attach in favor of the artisan as against the mortgagee. Boisot, sec. 771. See *Hammond* v. *Danielson*, (1879) 126 Mass. 294; *Williams* v. *Allsop*, (1861) 10 C. B. (N.S.) 417; *Scott* v. *De La Hunt*, 5 Lans. (N.Y.) 372; *Drummond Carriage Co.* v. *Mills*, (1898) 40 L. R. A. 761; *Halifax Shipyards* v. *The Ship Westerian*, (1919) 19 Can. Ex. R. 259.

If the agreement for the work is entire and indivisible, that is, if the contract between the parties is one for the delivery of a completed article, and the chattel is accidentally destroyed, without negligence on the part of either party, before the completion of the contract, the destruction of the subject-matter discharges the liability and excuses further performance of the agreement. In such case the employer of the labor cannot sue the contractor for the return of any sums already paid to him on account, in an action for money had and received, and correlatively the contractor had no legal claim to compensation for that portion of the work actually executed by him at the time of the destruction of the chattel. Paine on Bailments, 163; *Appleby* v. *Myers*, (1867) 2

L. R. C. P. 651; *Ashford* v. *Booth*, (1835) 7 C. & P. 108; *Anglo-Egyptian Navigation Co.* v. *Rennie*, (1875) 10 L. R. C. P. 271 and 571.

To take your own property from one who has a valid lien upon it and was rightfully in possession, may be theft. *People* v. *Long*, 50 Mich. 249 (a buggy); *State* v. *Stevens*, 32 Tex. 155 (a watch); *Queen* v. *Hollingsworth*, 2 Can. Cr. Cas. 291 (baggage). See *Com.* v. *Greene*, 111 Mass. 392.

If assigned, the lien is lost. *Glascock* v. *Lemp*, 26 Ind. App. 175; *Ruggles* v. *Walker*, 34 Vt. 468.

A sale of personalty in the vendor's possession implies a warranty against liens. *Clevenger* v. *Lewis*, (1908) 16 L. R. A. (N.S.) 410. A person having no interest, who pays a debt secured by a lien, is not entitled to subrogation. *In re North River Co.*, 38 N. J. Eq. 433. As to procedure to enforce lien upon personalty, see *Pocock* v. *Novitz*, (1912) 21 W. L. R. 418 (Sask.).

The improvement of personal property at the instance of a bailee thereof, with knowledge of the ownership of the bailor, and either without the latter's knowledge or consent, or with his mere knowledge under such circumstances that no consent to liability can be implied, creates no liability against the bailor or the property. *Baughman Automobile Co.* v. *Emanuel*, (1911) 38 L. R. A. 97. As to priority of lien for services on personal property over a prior chattel mortgage, see *Reeves & Co.* v. *Russell*, L. R. A. 1915 D, 1149, and *Drummond* v. *Griffith*, L. R. A. 1916 B. 743.

Proof of usage may establish a possessory lien. *Welch* v. *Scott*, (1919) 3 W. W. R. 425, (1920) 2 W. W. R. 510.

A lien implies the right of continuing possession, or the continuing right of possession. *Katzman* v. *Mannie*, (1919) 46 O. L. R. 121.

As to implied authority given by the owner to the bailee to have the chattel repaired and in so doing to subject it to the ordinary repairer's lien, see *Commercial Finance Corporation* v. *Stratford*, (1920) 47 O. L. R. 392.

THE ALBERTA MECHANICS' LIEN ACT.

CHAPTER 21.

AN ACT FOR THE BENEFIT OF MECHANICS AND LABORERS.

(*Assented to May* 9, 1906.)

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly, of the Province of Alberta, enacts as follows:

SHORT TITLE.

1. **Short title.**—This Act may be cited as "The Mechanics' Lien Act."

2. **Interpretation.**—In the construction of this Act—

1. "Court" or "judge" shall mean the court within the province exercising jurisdiction in civil cases to the amount claimed in the action or proceeding whether brought in respect of one lien or more than one lien, and the interpretation herein given shall for all purposes be deemed to have been included in the original Act; 1908, c. 20, s. 12.

2. "**Contractor.**"—"Contractor" shall mean a person employed directly by the owner for doing the work or placing or furnishing materials for any of the purposes mentioned in this Act;

3. "**Sub-contractor.**"—"Sub-contractor" shall mean a person not contracting with or employed directly by the owner for the purpose aforesaid, but contracting with or employed by the con-

tractor or under him, by another sub-contractor, to do all or a certain portion of the work or to place or furnish material, but a person doing manual or mental labor for wages shall not be deemed a "sub-contractor";

4. "**Owner.**"—"Owner" shall extend to and include a person having any estate or interest, legal or equitable, in the lands upon or in respect of which the work is done or materials are placed or furnished, at whose request and upon whose credit or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done or materials are placed or furnished, and all persons claiming under him whose rights are acquired after the work in respect to which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

5. "**Works or improvements.**"—"Works or improvements" shall include every act or undertaking for which a lien may be claimed under this Act;

6. "**Laborer.**"—"Laborer" shall mean, extend to and include every mechanic, miner, artisan, builder, or other person doing labor for wages;

7. "**Material.**"—"Material" shall include every kind of movable property;

8. "**Wages.**"—"Wages" shall mean money earned by a laborer, for work done whether by time or as piece work.

As to interpretation of sub-section 1, prior to amendment of 1908, see *Freese* v. *Carey*, (1907) 1 Alta. L. R. 81, 7 W. L. R. 287.

The word "owner" includes a leaseholder. *James Prentice & Co.* v. *Brown*, (1914) 7 Alta. L. R. 464.

The Act gives no power to file a lien against the lands of a Dominion railway as there is no means of enforcing such a lien. The Act does not give a lien for work done or materials furnished in connection with the digging of wells, apart from the work done or materials furnished in connection with one of the "works"

enumerated in this section. *Stiffel* v. *Corwin*, (1911) 1 W. W. R. 339.

APPLICATION.

3. Application.—This Act shall apply to any contract made or work begun previous to the passage hereof, but only so far as regards any moneys remaining unpaid and as respects any such unpaid moneys.

NATURE OF LIENS.

4. Mechanics and others to have liens for work done, etc.—Unless there is an agreement in writing to the contrary signed by the person claiming the lien, every contractor, sub-contractor, laborer, and furnisher of material doing or causing work to be done upon or placing or furnishing any materials to be used in or for the construction, erection, alteration or repairs, either in whole or in part of, or addition to, any building, tramway, railway, erection, wharf, bridge or other work, or doing or causing work to be done upon, or in connection with, or the placing or furnishing to be used in or for the clearing, excavating, filling, grading, tracklaying, draining, or irrigating of any land in respect of a tramway, railway, mine, sewer, drain, ditch, flume or other work, or improving any street, road or sidewalk adjacent thereto, at the request of the owner of such land, shall by virtue thereof have a lien or charge for the price of such work, and the placing or furnishing of such materials upon such building, erection, wharf, machinery, fixture, or other works, and all materials furnished or produced for use in constructing or making such works or improvements so long as the same are about to be in good faith worked into or made part of the said works or improvements, and the land, premises, and appurtenances thereto, occupied thereby or enjoyed therewith, but limited in amount as hereinafter mentioned:

Provided such lien shall affect only such interest in the said land, premises and appurtenances thereto as is vested in the owner at the time the works or improvements are commenced, or any

greater interest the owner may acquire during the progress of the works or improvements, or have at any time during which the lien stands as an encumbrance against said land.

Neither the owner nor the land can be held liable to the lienholders for a greater aggregate sum than the amount of the contract price. *Ross* v. *Gorman*, 1 Alta. L. R. 109.

If, by arrangement with the owner the claimant has delayed completion in order to give the owner time to arrange for payment, and work is then done to keep the lien alive, the owner having accepted the benefit of the delay, and the work being necessary, the date of completion of such work will be taken as the date upon which the claimant "has ceased" to work. *Clarke* v. *Moore*, (1907) 1 Alta. L. R. 49, 8 W. L. R. 405. As to the taxation of school property, see *Mallet* v. *Kovar*, (1910) 14 W. L. R. 327. As to right to lien when work is done at the instance of lessee, see *Scratch* v. *Anderson*, (1909) 2 Alta. L. R. 109, 13 W. L. R. 113; *Limoges* v. *Scratch*, (1910) 44 Can. S. C. R. 86.

A lien arises and attaches as soon as work is done or materials are furnished, subject to be increased or decreased in amount from time to time, as further work is done or materials furnished, on the one hand, or payments made to the lienholder on the other hand. *Ross* v. *Gorman*, (1908) 1 Alta. L. R. 109, 516, 9 W. L. R. 319.

Where part of the contract price was agreed to be paid by conveyance of land to contractor, who, however, did not complete his work, sub-contractors who had registered liens against the property built on were held entitled to the equity in the lots which had been agreed to be conveyed to the contractor. The claim of the sub-contractor, however, was subject to the owner's claims for payments made to the contractor and for damages against the contractor. *Head Co.* v. *Coffin*, (1910) 13 W. L. R. 663.

The installation of a furnace in a building comes within the terms of this section. The lands of a school board may be subject to a mechanic's lien. *Mallett* v. *Kovar*, (1910) 14 W. L. R. 327.

Where the lienholder is not the contractor, the onus is on the owner to show that the contractor should not have been given an extension of time. *Lundy* v. *Henderson*, 9 W. L. R. 327.

Payments made by owner will not discharge him from liens existing at the time of such payments. *Union* v. *Porter*, (1908)

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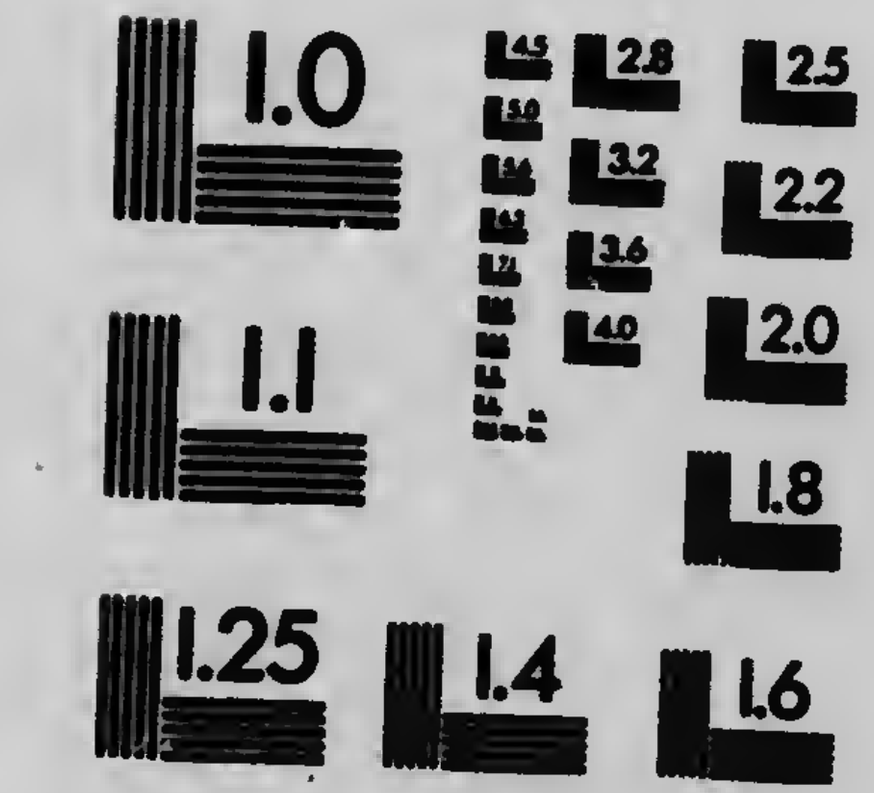

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9 W. L. R. 325. See *Gorman* v. *Henderson*, (1908) 8 W. L. R. 422; *Ross* v. *Gorman*, (1908) 1 Alta. L. R. 109, 516, 9 W. L. R. 319. The words "land . . . occupied thereby or enjoyed therewith," are not necessarily restricted to the particular lot upon which the building is situated, but will include other lots intended for use with the house. *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49, 8 W. L. R. 405.

The claim of a lien-holder will not be defeated by the absence of an architect's final certificate. *Lundy* v. *Henderson*, 9 W. L. R. 327. See *Ross* v. *Gorman*, 1 Alta. 516; *Swanson* v. *Mollison*, 6 W. L. R. 678; *Clarke* v. *Moore*, 1 Alta. L. R. 498, 8 W. L. R. 405, 411.

Superintendents of construction are entitled to a lien. *High River Trading Co.* v. *Anderson*, (1909) 10 W. L. R. 126.

A claimant is not bound to give notice of lien to the owner. *Ross* v. *Gorman*, (1908) 1 Alta. L. R. 516, 9 W. L. R. 319. A lien claimed by a partnership stands in no different position from any other lien by reason of "the owner" being a member of the partnership. *Ross* v. *Gorman*, 1 Alta. L. R. 516. As to scope of the word "owner," see *Scratch* v. *Anderson*, (1911) 16 W. L. R. 145.

Where the contractor is entitled to a quantum meruit, a fair and reasonable sum to compensate him for the work undertaken and done and for the responsibility involved in the doing of it, should be added to the actual cost of it to him. *Rohl* v. *Ffaffenroth*, 31 W. L. R. 197.

Sub-contractors gave the contractor receipts for money which he had received from the owner to pay the sub-contractors and had not paid them, thereby led the owner to believe that they had been paid. The owner, influenced by this belief, made other payments to the contractor in excess of the work which he did or caused to be done on the building, and the owner completed the building when the contractor abandoned it. The owner also made payments to another sub-contractor and lienholder. It was held that the sub-contractors who gave the receipts in question were not entitled to enforce a lien against the owner's land, though they had not been paid in full for the work done and materials furnished by them. *Ringland* v. *Edwards*, (1911) 19 W. L. R. 219.

Del credere agents supplying materials have such an interest in the goods as entitles them to a mechanics' lien as materialmen. *Gorman* v. *Archibald*, (1908) 1 Alta. L. R. 524.

As to overpayment to contractor, see *Travis* v. *Breckenridge-Lund Lumber & Coal Co.*, (1909) 2 Alta. L. R. 71, 43 Can. S. C. R. 59.

Where trial judge finds defendant had promised to pay plaintiff and there was sufficient consideration, it is not open to the court to reverse that finding. *Union* v. *Porter*, 9 W. L. R. 325.

The words in this section "land . . . occupied thereby or enjoyed therewith," have been construed as not necessarily restricted to the particular lot upon which the building is situated, but may include other lots purchased by the owner for his use with the house. *Clarke* v. *Moore and Simpson*, (1908) 1 Alta. L. R. 49.

A lien claimed by a partnership against a property the "owner" of which is a member of the partnership is enforceable in the same way as any other lien. The individual claimant and the firm of which he is a member are different entities, and the fact that he as an individual may, as a member of the firm, be entitled to share in the payment, will not affect the question. *Ross* v. *Gorman*, (1908) 1 Alta. L. R. 516.

Miners employed by a lessee of a coal mine are not entitled to mechanics' liens in respect of their work where it has not been actually requested by the owner. *Wester et al.* v. *Jago et al.* (1917) 11 Alta. L. R. 52. See *Scratch* v. *Anderson*, *post*, cited also under s. 11.

The work of superintendence is work done in or for the construction of a building within the terms of the Act, so as to give the superintendent a lien. *Scratch* v. *Anderson*, (1909) 11 Alta. L. R. 55; *High River Trading Co.* v. *Anderson*, (1909) 10 W. L. R. 126.

The Act gives no power to file a lien against the lands of a Dominion railway as there is no means of enforcing such a lien. The Act does not give a lien for work done or materials furnished in connection with the digging of wells, apart from the work done or materials furnished in connection with one of the "works" enumerated in s. 2. *Stiffel* v. *Corwin & C. P. R.*, (1911) 1 W. W. R. 339.

The work done in excavating the basement of a building is included in the term "construction," and gives rise to a lien, and this notwithstanding the fact that the word "excavating" is expressly used with reference to certain classes of construction

(including tramway and railway) mentioned later in the same section. *Farr* v. *Groat*, (1913) 24 W. L. R. 860; 4 W. W. R. 1097.

The expression "furnisher of material," in this section cannot be applied to a laborer working for wages, but is intended to cover only persons who sell or supply material on contract at a certain price.

The phrase "furnishing any materials" in this section is referable only to the term "furnisher of materials," in the same section, and does not refer in any way to the word "laborer" therein. *Mylnzyuk* v. *Northwestern Brass Co., Ltd.* (1913) 6 Alta. L. R. 413.

If it appears that moneys were paid by the owner to the contractor or sub-contractor for the very purpose of being applied in paying wage-earners having a privileged and preferential lien over other lienholders, and the moneys were in fact so applied, the owner is entitled to credit for such payments against the contract price. *Metals Ltd.* v. *Trusts & Guarantee Co.*, 22 D. L. R. 495.

Where a building in respect to which a mechanics' lien is sought to be enforced is situate upon one of several contiguous sections of land "enjoyed therewith," the failure to file the lien against the section upon which the building stands does not render ineffective a lien filed against the other sections. *The Jackson Water Supply Co.* v. *Bardeck et al*, (1915) 8 Alta. L. R. 305.

A mechanics' lien is maintainable for installing a water system in a dwelling house as against the land occupied or enjoyed therewith, and which was specified in the mechanics' lien which was registered, although the parcel of land itself upon which the house was situate was not included in the registered claim of lien; its omission therefrom operated only as a relinquishment of part of the security and did not have the effect of extinguishing the remainder of it. *The Jackson Water Supply Co.* v. *Bardeck et al.*, (1915) 8 Alta. L. R. 305, 21 D. L. R. 761.

Even if the correct rule be that a Mechanics' Lien Act must refer expressly to the property of municipalities in order to render ordinary municipal property subject to the Act, such a rule is not applicable to property acquired by a municipality for the purpose of alienating it to a manufacturing company, and where the municipality has agreed to convey the land to the company on the fulfilment of certain conditions, the fact that, owing to the non-fulfilment of such conditions, the conveyance has not been made,

and, therefore, the company has not acquired any interest in the land, does not prevent a lien attaching to the land in the absence of proof of the notice called for by section 11 for material used in a building constructed by the company in pursuance of said agreement. *Revelstoke Saw Mill Co.* v. *Alberta Bottle Co.*, (1915) 9 Alta. L. R. 155.

The interest of the registered owner of land upon which a church has been erected by a contractor pursuant to a contract with the trustees for an unincorporated church congregation who held under an agreement for sale from the owner, is chargeable with a lien in the contractor's favor where the owner has not given the notice required by section 11 of the Alberta Mechanics' Lien Act, and the fact that the contractor was a member of the congregation, and knew of the interest of the various parties in the land does not cut down his right of lien. *Rohl* v. *Pfaffenroth*, (1915) 31 W. L. R. 197.

The liability of the "owner" as designated in section 11 is not limited to such alterations and repairs (made by his tenant) as increase the value of his interest in the land and premises. The lien of those who furnish materials and do work in altering and repairing the premises will be enforced against the interest of the landlord. *Peters, Rohls & Co.* v. *MacLean*, (1913) 25 W. L. R. 358.

A contractor H. gave to R. a materialman, an order upon the building owner J., in the following form:—"J. Please pay to R. the sum of $800 dollars on account of material delivered and shipped to X. H." It was held that the order amounted to a good equitable assignment of the fund over which R. would ultimately have the disposition as between H. and J., but that there was nothing to warrant an inference by R. that J. had relinquished in his favor the right to make out of the moneys payable to H. such payments as might be necessary to protect his property from liens and to insure the completion of the building contract, and to deduct payments so made from the moneys which would otherwise be payable to H. *Ritchie* v. *Jeffrey*, (1915) 9 W. W. R. 1534.

Where progressive payments under the contract of the principal contractor are made contingent upon advances being made to the owner by the mortgagee, the court may, on the trial of the action brought by a sub-contractor who had completed his sub-contract, direct that his lien remain in force, so that it may attach in respect

of any such further advances which may in future be made by the mortgagee, reserving leave to the owner and the mortgagee to apply for the discharge of the lien. *Colling* v. *Stimson*, 6 Alta. L. R. 71, 10 D. L. R. 597.

One who delivers materials for use in or upon a building under course of construction by a contractor, is not, after the latter's default and the taking over of the work by the property owner entitled to a mechanics' lien for such of the materials as were subsequently worked into the building by the latter; the right to a lien under such circumstances being denied under this Act. *Canadian Equipment and Supply Co.* v. *Bell & Schiesel*, (1913) 24 W. L. R. 415; 11 D. L. R. 820.

If the work upon which the lien claimant relies as giving a new day from which the statute begins to run against his lien, is something which the owner could have insisted upon before accepting it as complete, it will be sufficient for that purpose. The test to apply is to ascertain if the work in question, trifling though it might be, was necessary to be done in order to complete the fulfilment of the contract. *Day* v. *Crown Grain Company*, 39 S. C. R. 258.

Building materials are sufficiently delivered as regards a building in course of erection, so as to satisfy this Act, where, because of lack of storage room on the land, they were delivered in its immediate vicinity. *Trussed Concrete Steel Co. of Canada* v. *Taylor Engineering Co.*, (1919) 2 W. W. R. 123; *Canadian Equipment and Supply Co.* v. *Bell et al.*, 11 D. L. R. 821. Decisions in Ontario and Nova Scotia appear to be in conflict with this view. See annotations under section 4 of the Ontario Act, *post*.

There was no waiver of a lien upon a certain lot where a form of waiver as to that lot had been signed without consideration and by mistake, there being no intention to waive and the claimant not knowing at the time of signing that he was to do work on that particular lot. The principle of estoppel did not apply in that particular case. *Palfrey* v. *Brown*, (1915) 31 W. L. R. 535.

The word "placing" in this section qualifies the word "laborer" as well as the term "furnisher of material." Laborers employed at a distance from the site of a building in excavating and loading filling-in material for use in furthering the construction of the building cannot maintain a mechanics' lien against it.

Teamsters employed in hauling filling-in material from a distance to the site of a building may maintain a mechanics' lien

against it, either on the ground that they are entitled to the benefit of the word "placing" in this section, or because they must be treated as doing "work upon the construction," within the meaning of that phrase in this section. *Mylnzyuk* v. *Northwestern Brass Co., Ltd.* (1913) 6 Alta. L. R. 413.

Whether specific articles are "fixtures" and lienable is a question of fact as to each item. *Prentice* v. *Brown,* (1914) 28 W. L. R. 226. Electric light fixtures and an electric light sign on the outside of the building, put up by the tenant, were considered not to have become part of the realty, but to be chattels removable by the tenant. *Peters, Rohls & Co.* v. *MacLean,* (1913) 25 W. L. R. 358.

As to meaning of "extra work," in a building contract, see *Janse-Mitchell Construction Co.* v. *City of Calgary,* 14 Alta. L. R. 214.

Where a plumber agreed in a single written document to instal plumbing and heating apparatus in each of two houses situated on two adjoining lots for the sum of $620 for each house, it was held that the contract contained two severable or divisible promises, one in respect of each house. The work in connection with the house on lot No. 30 was completed on the 29th July, 1908, and that in connection with the house on lot No. 29 on the 15th June, 1909; the sewer connections from both houses were joined on a line between the two lots. It was held that a claim filed against both lots on the 1st February, 1909, in respect of the whole contract price for the two houses, was filed too late to preserve the lien against lot 30. *The A. Lee Co.* v. *Hill,* (1909) 2 Alta. L. R. 368. This decision is apparently not in accord with *Ontario Lime Association* v. *Grimwood,* (1910) 22 O. L. R. 17.

A person who supplies coal to a building contractor for generating steam for the purpose of hoisting material and to dry the building in course of construction may be entitled to a mechanics' lien. *Wortman* v. *Frid Lewis Co.,* (1915) 9 W. W. R. 812.

The wages claims of laborers which are given a special privilege if for "not more than six weeks' wages," are the wages earned within a continuous period of six weeks counting backward from the last day's work. *Rendall* v. *Warren,* 8 W. W. R. 113.

A mechanics' lien filed by a sub-contractor is not to attach so as to make the owner liable for a greater sum than the sum owing

by the owner to the contractor; consequently if the latter's contract with the owner does not entitle him to a further payment until completion, the lien of the sub-contractor who has completed his contract cannot be made effective until completion of the entire work of the principal contractor, but the court may, on the trial of the lien action, direct that such lien shall remain in force, so that it may attach in respect of further sums that may thereafter become due by the owner to the principal contractor, reserving leave to the owner to apply to discharge the lien. *Colling* v. *Stimson et al.*, (1913) 10 D. L. R. 597, 23 W. L. R. 789.

This section does not give a lien for wages for work done in boring for oil. *Henshaw* v. *Federal, etc., Corporation, Ltd.*, (1916) 34 W. L. R. 208.

Where the contract work both with the principal contractor and the sub-contractor for excavating expressly included the cleaning up of the debris on the completion of the building, and the owner called upon the principal contractor to do it before taking over the building and the latter replied that he would have the sub-contractor do it, the sub-contractor's lien for the excavation work will be kept alive by the cleaning up done by the latter in good faith in fulfilment of his sub-contract, although his last prior work (the excavating) was done more than five months before. *Foster* v. *Brocklebank*, (1915) 22 D. L. R. 38, 8 W. W. R. 464.

An unregistered foreign company is entitled to a mechanics' lien inasmuch as the enforcement of the lien does not involve the acquisition or holding of lands or any interest therein or the registration of any title thereto under the Lands Titles Act. *Wortman* v. *Frid Lewis Co.*, 9 W. W. R. 812; 33 W. L. R. 119.

5. Material subject to lien.—When any material is brought upon any land to be used in connection with such land for any of the purposes enumerated in the last preceding section hereof, the same shall be subject to a lien for the unpaid price thereof in favor of any person supplying the same until it is put or worked into the building, erection or work as part of the same.

To preserve the unpaid seller's lien given by this section, possession of the materials delivered must be resumed before the same are worked into the building. *Metals Ltd.* v. *Trusts & Guarantee Co. Ltd.*, (1914) 29 W. L. R. 953.

The general lien arising under section 4, covering not only land and buildings but also materials for the work, is subject to the lien on materials given by sub-section 5 to the person supplying the same. *Trussed Concrete Steel Co.* v. *Taylor, etc.*, (1919) 2 W. W. R. 123. Such lien under this section exists notwithstanding that the materials are not delivered on the lands where the building is being erected, if there is no room there for storing them, and they are deposited on ground in the immediate vicinity thereof. *Trussed Concrete Steel Co.* v. *Taylor Engineering Co.*, (1919) 2 W. W. R. 123, 46 D. L. R. 663.

6. Agreement as to liens.—No agreement shall be held to deprive any one otherwise entitled to a lien under this Act and not a party to the agreement of the benefit of the lien and the lien shall attach notwithstanding such agreement.

7. Certain proceedings not to be deemed satisfaction or waiver of lien.—The taking of any security for, or the acceptance of any promissory note for, or cheque which on presentation is dishonored, or the taking of any other acknowledgment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lienholder agrees in writing that it shall have that effect.

Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this section shall institute proceedings to enforce such lien within the time limited by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time:

Provided further, that notwithstanding such extension of time such person may where proceedings are instituted by any other person to enforce a lien against the same property prove and obtain payment of his claim in such suit or action as if no such extension had been given.

Where the contract price is payable in instalments, if default is made in payment of an instalment, the contractor, prior to the falling due of the later instalments, can commence proceedings to enforce his lien. The words, "No further proceedings shall be taken in the action until after such extension of time," are to be construed distributively. *Spears* v. *Bannerman*, (1907) 1 Alta. L. R. 98.

The claimant does not waive or lose his lien by taking and negotiating the owner's promissory note in part payment of the amount then due. *Clarke* v. *Moore*, (1907) 1 Alta. L. R. 49, 8 W. L. R. 405. See *Brooks-Sanford Co.* v. *Theodore Telier Construction Co.*, (1910) 19 O. L. R. 303; also *Swanson* v. *Mollison*, (1907) 6 W. L. R., at 682, citing approvingly the following paragraph from the first edition of this work: "After the note has been negotiated, the debt then becomes due to a third party, and the original creditor becomes guarantor of the payment of the debt. While the note is in the hands of the third party, no proceedings can be taken to enforce the lien. If the lien claimant pays the note, and is the holder of the note at the time he begins proceedings, the fact of his having negotiated the note will not take away his lien."

8. Amount to which lien limited.—Such lien shall be limited in amount to the sum actually owing to the person entitled to the lien.

Where in an action to enforce a lien against a building, by reason of the owner of the property not being indebted to the contractor, the claimant cannot have a lien, he is entitled to a declaratory judgment that the administrator of the contractor's estate is, in the due course of administration, liable therefor. *Canadian Equipment and Supply Co.* v. *Bell*, 11 D. L. R. 821, 24 W. L. R. 415.

9. Liens on mortgaged premises.—Where works or improvements are put upon mortgaged premises the liens by virtue of this Act shall be prior to such mortgage as against the increase in value of the mortgaged premises by reason of such works or improvements but not further unless the same is done at the request of the mortgagee in writing; and the amount of such increase shall be ascertained upon the basis of the selling value upon taking on the

account, or by the trial of an action or issue as provided herein, and thereupon the judge may if he shall consider the works or improvements of sufficient value to justify the proceedings order the mortgaged premises to be sold at an upset price equal to the selling value of the premises immediately prior to the commencement of such works or improvements (to be ascertained as aforesaid) and any sum realized in excess of such upset price shall be subject to the liens provided for by this Act. The moneys equal to the upset price as aforesaid shall be applied towards the said mortgage or mortgages according to their priority. Nothing, however, in this section shall prevent the lien from attaching upon the equity of redemption or other interest of the owner of the land subject to such mortgage or charge.

(2) **Interpretation of mortgage.**—"Mortgage" in this section shall not include any part of the principal sum secured thereby not actually advanced to the borrower at the time the works or improvements are commenced, and shall include a vendor's lien and an agreement for the purchase of land, and for the purposes of this Act and within the meaning thereof the purchaser shall be deemed mortgagor and the seller a mortgagee.

A mechanics' lien attaches to the interest which is vested in the owner at the time the work is commenced, or to any interest which he may acquire during the progress of the work; and the lien will take priority over a mortgage upon which no money was advanced until after the commencement of the work, although the mortgage had been registered before that time. *Colling* v. *Stimson et al.*, (1913) 10 D. L. R. 597, 23 W. L. R. 789.

The limitation of the priority of mechanics' liens over mortgages to the amount whereby the premises have been increased in value by the work does not apply where no money was advanced by the mortgagee until after the commencement of the work for which the lien is claimed. *Colling* v. *Stimson & Buckley*, (1913) 4 W. W. R. 597, 23 W. L. R. 798, 10 D. L. R. 597.

See *McSporran* v. *Miller*, 9 W. W. R. 81, 32 W. L. R. 392.

10. **Claims for wages.**—Without prejudice to any liens which he may have under the preceding sections every mechanic, laborer

or other person who performs labor for wages upon the construction, alteration or repairs of any building or erection, or in erecting or placing machinery of any kind in, upon or in connection with any building, erection or mine shall to the extent of the interest of the owner have upon the building, erection or mine and the land occupied thereby or enjoyed therewith a lien for such wages, not exceeding the wages of six weeks or a balance equal to his wages for six weeks.

(2) The lien for wages given by this section shall attach when the labor is in respect of a building, erection or mine on property belonging to the wife of the person at whose instance the work is done, upon the estate or interest of the wife in such property as well as upon that of her husband.

An owner is entitled to discharge liens for six weeks' wages of laborers no matter by whom employed, even though the result may be to reduce the fund which would otherwise be available for other lien claimants. If money be paid by the owner to a contractor for the very purpose of being applied in payment of wage-earners and such money is in fact so applied, the owner is entitled to credit for such payments against the contract price. *Metals Ltd.* v. *The Trusts and Guarantee Co. Ltd.*, (1914) 7 W. L. R. 605.

A sub-contractor is not a "laborer" so as to acquire as to labor done as part of the contract, the special privileges given by that Act to laborers. *Rendall* v. *Warren*, 21 D. L. R. 801, 8 W. W. R. 113.

The wages must be earned within a continuous period of six weeks counting backwards from the last day's work. *Stafford* v. *McKay*, (1919) 2 W. W. R. 280.

11. Owner of land deemed to have authorized the erection of buildings thereon.—Every building or other improvement mentioned in the fourth section of this Act constructed upon any lands with the knowledge of the owner or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the request of such owner or person having or claiming any interest therein, unless such owner or person having or claiming any interest therein shall, within three days after he shall have obtained knowledge of the construction,

alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement thereon.

(2) Notice by owner that he will not be responsible for work done on his land.—Whenever such owner or such person, not having contracted for or agreed to such construction, alteration, repair, works or improvements being done or made, but who has failed to give said notice within the said three days, shall post a notice in writing in some conspicuous place upon said land, or upon the buildings or improvements thereon, to the effect that he will not be responsible for the works or improvements, no works or improvements made after such posting shall give any right as against such owner or person, or his interest in said land, to a lien under this Act.

It is knowledge of the fact of construction and not knowledge of the intention to construct which gives rise to the statutory request created by this section. *Johnson* v. *Butler and Spencer*, (1914) 7 Alta. L. R. 427. Where an owner of land does not obtain knowledge of the construction of a building upon his land until after such construction has been completed, he is not obliged in order to avoid liability for the cost of such construction to post the notice called for by this section. *Johnson* v. *Butler and Spencer, supra.*

"The two-fold purpose of the section is obvious. It is to give to a contractor, who otherwise might have the mistaken idea that he was doing the work in hand for the owner of the land, notice to the contrary so that he may with his eyes open to the facts elect whether or not he will proceed with it on the personal liability of him by whom he is employed, and at the same time to work a statutory estoppel against an owner who stands by while the work is being done to his knowledge, and says nothing." *Johnson* v. *Butler & Spencer, supra,* per Walsh, J.

This section applies only to the cases that do not come within section 4, in which the owner has in fact requested "the work to be done." *Scratch* v. *Anderson,* (1909) 16 W. L. R. 145.

Where an owner leased premises for seven years, the lessee having an option to purchase the right to remove a building and

erect another in lieu thereof, which new building was to become property of the lessor, a lien claimant filed liens in connection with erection of new building. The lessee being in arrears for rent, the lease was forfeited. It was held that the liens were valid against the land. *High River Trading Co.* v. *Anderson,* (1909) 10 W. L. R. 126.

The interest of the registered owner of land upon which a church has been erected by a contractor pursuant to a contract with the trustees for an unincorporated church congregation, who held under an agreement for sale from the owner, is chargeable with a lien in the contractor's favor, where the owner has not given the notice required by this section. *Rohl* v. *Pfaffenroth,* 31 W. L. R. 197.

The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner was aware of the work being done, but gave no notice disclaiming responsibility therefor. Mechanics' liens having been filed under the Act, the interest of the owner was held subject to such liens. *Scratch* v. *Anderson,* (1909) 2 Alta. L. R. 109, 13 W. L. R. 113; *Limoges* v. *Scratch,* (1910) 44 Can. S. C. R. 86.

The general principle of the Mechanics' Lien Act is, that the land which receives the benefit shall bear the burden. By virtue of this section (11), where a building is constructed with the knowledge of the owner, who gives no notice disclaiming responsibility, then, the same result follows as if the building had been constructed at his request under section 4, and the lien will bind his interest in the land. *Scratch* v. *Anderson,* (1909) 11 Alta. L. R. 55. The only lien which can attach to bind an owner not actually requesting the work must be in respect to a building or other improvement constructed on the land. *Wester et al.* v. *Jago et al.,* (1917) 11 Alta. L. R. 52.

Where an owner of land is informed that improvements are being placed thereon and does not discredit what he is told, but does not make any investigations as to the truth of the report, he will be held to have "knowledge of the work" within the meaning of this section. *The Jackson Water Supply Co.* v. *Bardeck et al.,* (1915) 8 Alta. L. R. 305, 21 D. L. R. 761.

Lands agreed to be conveyed by a city to a purchaser buying same as an industrial site upon his building and equipping a fac-

tory and performing certain conditions as to the operation of the factory, are not exempt from having a mechanics' lien enforced against the city's title for the cost of the building, if the city has failed to post up the notice under this section. *Revelstoke Saw Mill Co.* v. *Alberta Bottle Co.*, (1915) 21 D. L. R. 779; 9 Alta. L. R. 155.

This section does not limit the liability of the "owner" to such alterations and repairs (made by his tenant) as increase the value of his interest in the land and premises. The lien of those who furnish materials and do work in altering and repairing the premises will be enforced against the interest of the landlord.

The provisions of this section preclude the application to it of the definition of "owner" in sub-section 4 of section 2.

Alterations and repairs are not excluded from the liability imposed by this section, but the landlord can avoid liability by giving the notice prescribed by this section. *Peters, Rohls & Co.* v. *MacLean*, (1913) 25 W. L. R. 358, 13 D. L. R. 519.

The onus of proving the posting of the notice mentioned in this section is on the "owner." *Revelstoke Saw Mill Co.* v. *Alberta Bottle Company*, (1915) 9 Alta. L. R. 155.

"Owner" is a variable term, and as used in this section will include "leaseholder" when read with the interpretation clause. *Prentice* v. *Brown*, 7 Alta. L. R. 454, 17 D. L. R. 36.

"Subsequent encumbrancers" who are not to be made parties to the action, but who are to be served with notice of the judgment or order in a vendor's action for specific performance under Alberta Rule 47, mean those encumbrancers whose claims arose subsequently to the making of the agreement of sale, and include one claiming under a subsequent mechanics' lien although he may be entitled to priority over the vendor's claim for the whole or a part of his claim either under this section, by reason of the vendor as "owner" having had knowledge of the construction and not disclaimed, or under section 9 by showing an increased value in the property. The rights of such mechanics' lien claimant should be determined in the same action brought by the vendor, and such claimant should not be required to bring a separate action for such purpose. *Canadian Pacific Railway Company* v. *The Canadian Wheat Growing Company*, (1919) 2 W. W. R. 313, 14 Alta. L. R. 452; 47 D. L. R. 102.

12. Insurance moneys.—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any insurance receivable thereon by the owner, prior mortgagee or chargee, shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in section 9 hereof, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by the sale of such property in an action to enforce a lien.

Where the claimants of the proceeds of a policy of fire insurance are jointly interested, but not adversely to one another, in establishing as great a liability as possible in the insurance company, and the question outstanding, once the amount of such liability is settled, is that of the claimants' respective rights and priorities under the Mechanics' Lien Act, an application by the company for leave to interplead is not the proper procedure for it to take in respect to the amount which it admits to be due. (Per Stuart, J., Harvey, C.J., concurring, Beck, J., contra.) Hyndman, J., concurred with Walsh, J., below, in the view that the liability of the company is one for unliquidated damages and not for a debt or money and therefore it is not entitled to interplead.

The effect of this section is that an insurance company which admits liability in respect to property against which mechanics' liens are filed is a trustee of the amount of such liability, and where, in such circumstances, there is a dispute between the lienholders and mortgagees as to how the money is to be divided, s. 27 of The Trustee Ordinance, c. 119, C. O., is applicable and, therefore, the company is entitled under Rule 448 to petition for leave to pay the money into Court. (Per Stuart, J., Harvey, C.J., concurring). The *Liverpool and London and Globe Insurance Company, Limited* v. *Kadlac and Imperial Lumber Co.*, (1918) 13 Alta. L. R. 498.

13. Lien expires in 31 days after completion of work unless registered.—Every lien upon such building, erection, mine, works or improvements, or land shall absolutely cease to exist after the expiration of thirty-five days, except in the case of a claim for

wages owing for work in, at or about a mine, in which case the lien shall cease after the expiration of sixty days after the claimant has ceased from any cause to work thereon, or place or furnish the materials therefor; provided, however, that any laborer shall not be held to have ceased work upon any building, erection, mine, works or improvements until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor, unless in the meantime the person claiming the lien shall file in the land titles office of the land registration in which the land is situate or in the office of the clerk of the Superior Court of the province in the judicial district in which the land lies, an affidavit sworn before any person authorized to take oaths, stating in substance: 1915, c. 2, s. 27.

(a) The name and residence of the claimant, and of the owner of the property or interest to be charged;
(b) The particulars of the kind of works or improvements done, made or furnished;
(c) The time when the works or improvements were finished or discontinued;
(d) The sum claimed to be owing and when due;
(e) The description of the property to be charged;
(f) The address for service of the claimant. 1915, c. 2, s. 27,

which affidavit shall be received and filed as a lien against the property, interest or estate. Every registrar under the Land Titles Act, and every such clerk shall be supplied with printed forms of such affidavits in blank, which may be in the form or to the effect of schedule A to this Act, and which shall be supplied to every person requesting the same and desiring to file a lien. Every such registrar and clerk shall keep an alphabetical index of all claimants of liens, and the persons against whom such liens are claimed, which index shall be open for inspection during office hours, and it shall be the duty of such registrar and clerk to decide whether his is or is not the proper office for the filing of such affidavits, and to direct the applicant accordingly; and no

affidavit shall be adjudged insufficient on the ground that it was not filed in the proper registry office or clerk's office. The said claim of lien may be described as a mechanic's lien:

Provided, however, that no lien shall be filed unless the claim or joined claims shall amount to or aggregate $20 or more.

(2) **Claims to be filed as encumbrances, with registrar.**—Upon the filing of such affidavit in any such land titles office the registrar shall enter and register the claim as an encumbrance against the land or the estate or interest in the land therein described as provided in the Land Titles Act.

(3) **With clerk.** — Upon the filing of such affidavit in the office of any such clerk the clerk shall forthwith transmit to the registrar of the land registration district in which the land lies a certificate of the filing of such lien in his office, and specifying the particulars in the affidavit contained, and upon the receipt by the said registrar of such certificate he shall enter and register the claim as an encumbrance against the land or the estate or interest in the land therein described as provided in the Land Titles Act.

Under a similar section of the British Columbia Act it has been decided that the omission to register in the Land Registry Office within the specified time was not cured by the curative section, and is fatal to the validity of the lien, even where registration was effected within the prescribed time in the County Court Registry. See *Dale* v. *International Mining Syndicate*, (1917) 25 B. C. R. 1.

Where the last day for the filing of an affidavit falls on a Sunday, an action to enforce the lien is in time if brought on the following day. *Revelstoke Saw Mill Co.* v. *Alberta Bottle Co.*, (1915) 21 D. L. R. 779.

An owner's acceptance of the contractor's order given in return for the release of a materialman's lien operates as an accord and satisfaction of the materialman's claim, which cannot be revived by the subsequent delivery of additional material. *Wortman* v. *Frid Lewis Co.*, 9 W. W. R. 812.

In determining when the lien claimant has ceased to work the doing of work or supplying materials even of a trivial character,

if done or furnished in good faith, should be considered. *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49, 8 W. L. R. 405. See *Sayward* v. *Dunsmuir*, (1906) 11 B. C. R. 375; *Steinman* v. *Koscuk*, 4 W. L. R. 514; and *Swanson* v. *Mollison*, (1907) 6 W. L. R. 678.

This section will protect a laborer who has done his last work more than 35 days before his lien was filed. *Stafford* v. *McKay*, (1919) 2 W. W. R. 280.

One claim of lien can be filed in respect of all goods supplied, though from different principals, and the time of filing it will run from the date of the last delivery irrespective of whose goods constitute it. *Gorman* v. *Archibald*, (1908) 1 Alta. L. R. 524. Delivery of the certificate of *lis pendens* to the land titles office before 4 p.m. on the last day for filing is, as against the "owner" a sufficient filing within the Act, notwithstanding that the registration is not completed until the next day. *Gorman* v. *Archibald*, (1908) 1 Alta. L. R. 524.

When a claim of a mechanics' lien is prepared in respect to and registered against land other than that which is properly subject to the lien, an order giving leave to correct the claim can be made in Alberta only by the Court or Judge who is trying the action to enforce the lien, and cannot be made after the expiration of 31 days within which the affidavit prescribed by this section must be filed in the Land Titles Office. *McDonald* v. *McKenzie*, (1914) 7 Alta. L. R. 435. See also *Rafuse* v. *Hunter*, 12 B. C. R. 126. No court has authority to re-create a lien which has ceased to exist under the statute. *McDonald* v. *McKenzie*, *supra*.

A plumbing contract to furnish and instal a hot air furnace for heating a house, including the necessary pipes, registers and fittings, comprises the furnishing and installation of the incidental cold air registers as a material part thereof; and the time within which a mechanics' lien may be filed for such work is to be computed with reference to the installation of the cold air registers, where that is the last work done under the contract, notwithstanding a delay of two months after the installation of the furnace itself and of the other incidental fittings. *Colling* v. *Stimson et al.*, (1913) 10 D. L. R. 597, 6 Alta. L. R. 71.

This section which makes necessary the filing in the land titles office of an affidavit in support of the lien, does not apply to a lien under section 5.

14. Substantial compliance with section 13 only necessary.—A substantial compliance only with section 13 of this Act shall

be required and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless in the opinion of the court or judge adjudicating upon the lien under this Act the owner, contractor, sub-contractor, mortgagee or other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the Court or judge may allow the affidavit and statement of claim to be amended accordingly.

The word "prejudiced" in this section means "unjustly made to suffer." *Rendall et al.* v. *Warren et al.*, (1915) 21 D. L. R. 801.

The filing of an affidavit in support of a mechanics' lien with the deputy clerk of a District Court, instead of with a deputy clerk of the Supreme Court, where one person carries on both of said offices in the same room in the same court house, is a defect in the proceedings which is covered by the remedial provisions in this section, although it is not covered by those of section 13. *Revelstoke Saw Mill Company* v. *Alberta Bottle Company et al.*, (1915) 9 Alta. L. R. 155; 21 D. L. R. 779, 7 W. W. R. 1002, 30 W. L. R. 312.

An error in the affidavit misnaming the company for whom the work was done as equitable owner of the land is cured by this section, where no prejudice has been shown. *Revelstoke Saw Mill Co.* v. *Alberta Bottle Co., supra.*

This section may operate to make a lien effective although the affidavit of lien did not shew, as required by section 13, the name and residence of the owner of the property or interest to be charged, *ex. gr.* on a lien which the affidavit shewed to be for work on a school identified by name and location, although the board of school trustees was not named as owner. *Foster* v. *Brocklebank*, (1915) 22 D. L. R. 38, 8 W. W. R. 464.

15. Liens to pass on death to legal representatives or may be assigned.—In the event of the death of a lienholder his lien shall pass to his personal representatives, and the right of a lienholder may be assigned by any instrument in writing subject to the limitations contained in section 17 hereof.

16. During continuance of lien property must not be removed.—During the continuance of any lien no portion of the property

affected thereby shall be removed to the prejudice of such lien and any attempt at such removal may be be restrained on application to the court or judge.

17. Receipted pay rolls to be posted on works.—No contractor or sub-contractor shall be entitled to demand or receive any payment in respect of any contract where the contract price exceeds $500 until he or some person in charge of the works or improvements shall post upon the works or improvements a copy of the receipted pay roll, from the hour of 12 a.m. to the hour of 1 p.m. on the first legal day after pay day, and shall have delivered to the owner, or other person acting on his behalf, the original pay roll containing the names of all laborers who have done work for him upon such works or improvements, with a receipt in full from each of the said laborers, with the amounts which were due and had been paid to each of them set opposite their respective names, which pay roll may be in the form of schedule C hereto, and no payment made by the owner without the delivery of such pay roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favor of any such laborer. No assignment by the contractor or any sub-contractor of any moneys due in respect to the contract shall be valid as against any lien given by this Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favour of the owner against the contractor:

Provided, however, that the failure to comply with the provisions of this section respecting the posting of the receipted pay roll and delivery of the same shall not prejudice the right of lien of the contractor or sub-contractor so in default, or his right to maintain an action or other proceeding to enforce the same, but the court or judge on application may at any stage before trial order a stay of proceedings until proof be made to his satisfaction that all workmen employed by such contractor or sub-contractor on such works or improvements have been paid in full, and may

in such order limit the time within which such proof may be furnished, and if the same be not furnished to the satisfaction of such court or judge such action may be dismissed, and in any such action or proceeding the court or judge may in his discretion award costs against the plaintiff in any event and notwithstanding that he may have successfully maintained his action to judgment. 1908, c. 20, s. 12.

The effect of this section is that as between the owner and lienholders an agreement to pay the contract price or any part of it, otherwise than in money, is ineffective to discharge the owner, *False Creek Lumber Co.* v. *Sloan,* (1911) 17 W. L. R. 525, 3 Alta. L. R. 363.

This section is intended solely to protect the laborers, and to afford the owner the means of securing himself from liability to the laborers, and non-compliance by the contractor with this section does not prevent his lien coming into existence, or nullify a lien already existing, or prevent the lienholder from keeping it alive by commencing proceedings. *Spears* v. *Bannerman,* (1907) 1 Alta. L. R. 98.

The latter part of this section applies only to an "indebtedness, offset or counterclaim" by the owner against the contractor arising *dehors* the contract. *False Creek Lumber Co.* v. *Sloan,* (1911) 17 W. L. R. 525. See *Ross* v. *Gorman,* 1 Alta. L. R. 516.

The effect of the words of this section is that, as between the owners and the holders of mechanics' liens, an agreement to pay the contract price, or any part of it, otherwise than in money, is ineffective to discharge the owner. The distinction between the agreement to pay in future and actual payment effected in accordance with the agreement is of the greatest importance. The latter part of this section applies only to an "indebtedness, offset or counterclaim" by the owner against the contractor arising *dehors* the contract. *False Creek Lumber Co.* v. *Sloan,* (1911) 17 W. L. R. 525.

This section does not operate so as to prevent payments made by the owner to creditors of the contractor, under an arrangement between the owner and the contractor, from being effective as payments on account of the contract price, in the ascertainment of the amount due from the owner to the contractor, upon which alone the lien of materialmen attaches under section 32 of the Act, as

amended by section 12 of the Statute Law Amendment Act, 1908. *Secus*, if the arrangement had been one for payment in the future; but, once the arrangement was acted upon and payments were made in pursuance of it, the assignment (if the arrangement amounted to an assignment) ceased to be of importance, and the payments must be regarded as payments to the contractor,—no notice in writing having been given by the plaintiffs,—and the owner was protected to the amount of these payments. *Pioneer Lumber Co.* v. *Rooney*, (1911) 19 W. L. R. 913. See *False Creek Lumber Co.* v. *Sloan*, 17 W. L. R. 525, 3 Alta. L. R. 363.

The onus is not upon the plaintiffs (materialmen) to show that there is a sum of money owing by the owner to the contractor out of which the lien can be realized. If this is disputed it is a matter of defence. *Gorman & Co.* v. *Archibald*; *Anderson* v. *Archibald*, (1908) 1 Alta. L. R. 524.

The owner who makes payments to the contractor without satisfying himself that all wages have been paid, does so at his own risk. *Stafford* v. *McKay*, (1919) 2 W. W. R. 280.

Enforcement.

18. Consolidation of liens.—Any number of lienholders may be joined in one suit and all suits or proceedings brought by a lienholder shall be brought on behalf of all lienholders who may be made parties to such suits or proceedings within the time mentioned in section 35 hereof:

Provided that the moneys realized in such suit shall be distributed amongst the lienholders, parties to such suit or proceedings, in the order and manner provided in section 30 of this Act. Any lienholder not originally joined may be made a party to such suit or proceedings by order of a judge, upon *ex parte* application supported by an affidavit stating the particulars of the claim, and any lienholder so joined in any such suit or proceedings shall be deemed to have complied with section 35 of this Act as fully as if he had instituted a suit in his own behalf.

See *Gardner* v. *Gorman*, (1907) 1 Alta. L. R. 106; *Head* v. *Coffin*, 2 Alta. L. R. 663; *Howlett & Bell* v. *Doran*, (1913) 24 W. L. R. 401, 11 D. L. R. 372, 4 W. W. R. 674.

An unregistered foreign company is entitled to a mechanics' lien inasmuch as the enforcement of the lien does not involve the acquisition or holding of lands or any interest therein or the registration of any title thereto under the Land Titles Act within the meaning of s.-s. 2 of s. 11 of the Foreign Companies Ordinance. *Wortman* v. *Frid-Lewis Co.*, (1915) 9 W. W. R. 812.

Where action has been brought to enforce a mechanics' lien under a building contract, other claimants against the same property should make ex parte application to be added to the action, instead of bringing separate actions, and where they pursue the latter course they are entitled to such costs only as they would have properly incurred in making an ex parte application. *Howlett* v. *Doran*, (1913) 11 D. L. R. 372, 24 W. L. R. 401.

A plaintiff in an action to enforce a mechanics' lien is not obliged to add as a party an encumbrancee whose claim was created *pendente lite*. *Canada Foundry Co.* v. *Edmonton Portland Cement Co.*, (1919) 2 W. W. R. 310.

19. Owner may apply to have suits consolidated.—If more than one suit is commenced in respect of the same contract the owner or contractor shall apply to have the causes consolidated, and failing to do so he shall pay the costs of such additional suit or suits. Save as hereinafter mentioned the owner complying with the provisions of this Act shall not be liable for any greater sum than he has agreed to pay by contract.

The expressions "the owner shall not be liable" and "to make the owner liable" contained in this section and section 32, do not refer to personal liability, but refer only to the liability of the property to which a lien attaches. The effect of these two sections is to limit the amount of the liens for which the property can be liable to the amount of the contract price; and when the time is reached when payments already properly made in satisfaction or prevention of liens and the amount unpaid for which liens exist, together equal the contract price, no liens can arise thereafter. *Breckenridge & Lund* v. *Short*, (1909) 2 Alta. L. R. 71; 10 W. L. R. 392; 43 Can. S. C. R. 59.

20. Judge may order consolidation of actions.—If two or more actions are brought in respect of the same contract or work the court or judge may by order on the application of any person

interested consolidate all the actions and may make such order as to costs as he shall think fit.

Once an action to enforce a mechanics' lien is commenced, it is improper for another lienholder, in respect of the same subject-matter, to commence an action, because all suits or proceedings brought by a lienholder shall be taken to be brought on behalf of all lienholders who became parties within the time limited for instituting proceedings. *Gardner* v. *Gorman*, (1907) 1 Alta. L. R. 106, 7 W. L. R. 630.

21. Summary proceedings to enforce liens.—Proceedings to enforce a lien or liens under this Act may be taken before the court or a judge in a summary way by originating summons subject to the provisions in that behalf of the Judicature Ordinance, and of the rules of court, which are now or which shall hereafter be in force in the province. The court or judge upon the return of the summons may either proceed to take the accounts and make the necessary inquiries for the purpose of determining the matter, or he may try or direct the trial of any issue or issues in relation thereto as he shall think necessary, and he may give directions as to the conduct of any such issue, the parties thereto, pleadings, particulars, production and discovery therein (if any such proceedings be by him thought necessary), and any other directions he shall deem advisable for the proper disposal and trial thereof; and in default of payment of any amount that shall be found to be due, the court or a judge may direct the sale of the estate or interest charged and such further proceedings may be taken for the purposes aforesaid as the court or judge may think proper, and any conveyance under the seal of such court or judge shall be effectual to pass the estate or interest sold, and the fees and costs in all proceedings so taken shall be such as are payable according to the ordinary procedure of the said court, and except as herein otherwise provided the proceedings shall be as nearly as possible according to the practice and procedure in force in the said court. 1909, c. 4, s. 10.

22. Proceedings by suit.—Proceedings to enforce a lien or liens under this Act may also be taken by suit in the ordinary way, pro-

vided, however, that the court or judge before whom such action is tried may in dealing with the question of the costs of such action take into consideration the difference in costs occasioned by reason of an action having been brought instead of proceedings having been taken by originating summons as provided in section 21 hereof, and may make such order as to costs therein, both as between solicitor and client as well as between party and party, as to him shall seem just. 1909, c. 4, s. 10.

23. Appeal to Supreme Court.—There shall be an appeal to the Supreme Court *en banc* from the decision of the court or a judge hereunder in all matters where the amount of the lien or the total amount of the liens joined in one action or proceeding is $200 or over, but where the amount of the lien or the total amount of the liens so joined is less than $200, the decision of the court or judge of first instance shall be final. 1909, c. 4, s. 10.

24. Judgment for amount of claim.—Upon the hearing of any claim for a lien the court or judge may so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favor of the latter for any indebtedness or liability arising out of the claim in the same manner and to the same extent as if such indebtedness or liability had been sued upon in the said court in the ordinary way without reference to this Act. (See *Mallet* v. *Kovar*, (1910) 14 W. L. R. 327.

25. Summons to show cause why lien should not be cancelled.—Any person against whose property a lien has been registered under the provisions of this Act may apply to the court or judge on an affidavit setting forth the registry of the same, and that hardship or inconvenience is experienced or is likely to be experienced thereby, with the reasons for such statement, for a summons calling upon the opposite party to show cause why such lien should not be cancelled upon sufficient security being given. Such summons, together with a copy of the affidavit on

which the same is granted, shall be served on the opposite party and made returnable in three days after the issuing thereof, or in such greater or less time as the judge may direct.

26. Judge may order cancellation of lien.—On the return of such summons the court or judge may order the cancellation of such lien, either in whole or in part, upon the giving of security by the party against whose property the said lien is registered to the opposite party in an amount satisfactory to the said court or judge, and upon such other terms, if any, as the court or judge may see fit to impose.

27. On Judge's order lien to be cancelled.—The registrar in whose office the said lien is registered shall on the production of such order file the same and cause the said lien to be cancelled as to the property affected by the order.

28. In certain cases owner or contractor to pay costs.—When it shall appear to the court or judge in any proceedings to enforce a lien or liens under this Act that such proceedings have arisen from the failure of any owner or contractor to fulfil the terms of his contract or engagement for the work in respect of which the liens are sought to be enforced or to comply with the provisions of this Act, such court or judge may order the said owner or contractor, or either of them, to pay all the costs of such proceedings in addition to the amount of the contract or sub-contract, or wages due by him or them to any contractor, sub-contractor or laborer, and may order a final judgment against such contractor or owner or either of them in default for such costs with execution as provided in section 21 of this Act.

See *Pioneer Lumber Co.* v. *Rooney*, (1911) 19 W. L. R. 913.

29. Leasehold property.—If the property sold in any proceedings under this Act shall be a leasehold interest the purchaser at any such sale shall be deemed to be the assignee of such lease.

30. Distribution of moneys realised under Act.—All moneys realized by proceedings under this Act shall be applied and distributed in the following order:

FIRST.—The costs of all the lienholders of and incidental to the proceedings, and of registering and proving the liens;

SECOND.—Six weeks' wages (if so much be owing) of all laborers employed by the owner, contractor or sub-contractor;

THIRD.—The several amounts owing for material, placed or furnished, in respect of the works or improvements;

FOURTH.—The amounts owing the sub-contractor and other persons employed by the owner and contractor;

FIFTH.—The amount owing the contractor.

(2) Each class of lienholders shall rank *pari passu* for their several amounts, and the portions of said moneys available for distribution shall be distributed among the lienholders *pro rata* according to their several classes and rights.

(3) Any balance of said moneys remaining after all the above amounts have been distributed shall be payable to the owner or other person legally entitled thereto:

Provided, however, that when any laborer has more than six weeks' wages owing to him by any sub-contractor, contractor or owner, the court or judge shall cause the extra sum beyond six weeks' wages to be deducted out of any sum actually coming under the above distribution to such sub-contractor, contractor or owner, and shall order the same to be paid to such laborer.

A person who has contracted to do a certain specified part of a building contractor's work and to supply all the needed material therefor for one set sum can only rank in priority as a sub-contractor, and not as a materialman under this section. *Wortman* v. *Frid-Lewis Co.*, (1915) 9 W. W. R. 812. See also *Coughlin* v. *Carver*, 7 W. W. R. 457.

In an action to enforce a mechanics' lien for materials supplied to a building contractor, the owner is ordinarily entitled to costs out of the fund in court before it is distributed. *Howlett* v. *Doran*, 11 D. L. R. 372, 24 W. L. R. 401. Where action has been brought to enforce a mechanics' lien under a building contract,

other claimants against the same property should make ex parte application, under section 18, to be added to the action, instead of bringing separate actions. *Howlett* v. *Doran, supra.*

As to mechanics' liens as "subsequent encumbrances," where vendor sues for specific performance, see *C. P. R. Co.* v. *The Canadian Wheat Growing Co.*, 14 Alta. L. R. 453.

31. Device to defeat priority of wage-earners void.—Every device by an owner, contractor or sub-contractor, adopted to defeat the priority given to wage-earners for their wages by this Act shall, as against such wage-earners, be null and void.

32. Owner's liability as to wages.—No lien, except for not more than six weeks' wages in favor of laborers, shall attach so as to make the owner liable for a greater sum than the sum owing by the owner to the contractor at the time of the receipt by the owner or person having superintendence of the work on behalf of the owner, of notice in writing of such lien and of the amount thereof, or which may become owing by the owner to the contractor at any time subsequent thereto while such lien is in effect. 1908, c. 20, s. 12.

In order to enforce a mechanics' lien under this section a "notice *in writing* of such lien and of the amount thereof" must be given to the "owner or person having superintendence of the work on behalf of the owner." *City of Calgary* v. *Dominion Radiator Co.*, (1918) 40 D. L. R. 65.

(2) **What latest notice shall contain.**—Where more than one such notice is given by a lienholder to the owner in regard to material furnished to the same contractor the lienholder shall in the latest notice so given state the total amount or balance owing at the time of the giving of such latest notice by the contractor to the lienholder, and in default of such total amount or balance being so stated it shall, with respect to any payments made by the owner, be taken to be the amount of the lien mentioned in the said latest notice, and no lien or liens of such lienholder shall attach so as to make the owner liable for more than the amount or the total amount or balance so ascertained. 1908, c. 20, s. 12.

(3) **Statement of lienholder.**—Where notice of a lien has been given as in this section provided the lienholder shall upon request furnish to the contractor or owner a statement in writing of the amount or balance due and payable in respect of the material, for the supplying or furnishing of which such lien is claimed, and no lien or liens of such lienholder for material supplied or furnished up to the time of the giving of such statement shall attach so as to make the owner liable for any greater sum than is so stated. 1908, c. 20, s. 12.

(4) **Court may order statement to be given.**—The contractor or owner may apply to the court by originating summons as set out in the Judicature Ordinance, to compel any lienholder who refuses or neglects to do so, to furnish such a statement as in the next preceding sub-section required or with respect to the accuracy of any statement furnished in accordance with the provisions of this section, and the court may upon such application make such order in the premises and as to the costs of the application as to the court shall seem just. 1908, c. 20, s. 12.

This section does not protect an "owner" who is not under a contractual obligation to pay the persons seeking to enforce a lien.

Payment actually made by the owner to sub-contractors under an arrangement with the contractor is payment to the contractor so as to protect the owner under this section, and is not within section 17, which makes invalid, as against the lien, assignments by a contractor or sub-contractor of any moneys due in respect of the contract. *Pioneer Lumber Co.* v. *Rooney,* (1911) 4 Alta. L. R. 1; see also *False Creek Lumber Co.* v. *Sloan,* 3 Alta, L. R., 17 W. L. R. 525; *Swanson* v. *Mollison,* (1907) 6 W. L. R. 678; *Breckenridge* v. *Travis,* 2 Alta. L. R. 71, 43 S. C. R. 59.

This section, it is alleged, was enacted to overcome the difficulty in *Breckenridge & Lund* v. *Short,* 2 A. L. R. 71, and *Travis* v. *Breckenridge Land Co.,* 43 Can. S. C. R. 59.

The existence of the lien itself and its extent depend upon the provisions of the Mechanics' Lien Act, and, therefore, legislation in other Acts cannot be considered as neutralizing or modifying the limitation upon the extent of the lien which the mechanics'

lien explicitly imposes. *City of Calgary* v. *Dominion Radiator Co.*, (1917) 40 D. L. R. 65.

The effect of this section is to make the giving of notice in writing to the owner a condition of the mechanics' or materialman's lien attaching so as to make the owner liable, just as other sections of the Act make registration and the institution of an action within defined period conditions of its preservation.

A notice given by a sub-contractor under this section cannot avail to give the sub-contractor a priority over those who by virtue of section 30 have priority over him, but who have given no notice under this section. *Wortman* v. *Frid-Lewis Co.*, (1915) 9 W. W. R. 812; 33 W. L. R. 110.

The wages claims of laborers which are given a special privilege under this section are the wages earned within a continuous period of six weeks, counting backward from the last day's work. *Rendall et al.* v. *Warren et al.*, (1915) 21 D. L. R. 801.

A sub-contractor is not a "laborer" so as to acquire as to labor done as part of the contract, the special privileges given to laborers. The priority acquired by notice under this section is a priority only over other lienholders of the same class as fixed by section 30, and does not interfere with the priority fixed by that section as between the different classes of lienholders. *Rendall et al.* v. *Warren et al., supra.*

No fund exists to which can attach a mechanics' lien for material furnished a contractor, where, on the construction of the building being taken over by the owner in accordance with the terms of a contract, the money already paid the contractor and that subsequently expended in completing the work, exceeded the contract price. *Canadian Equipment and Supply Co.* v. *Bell et al.*, (1913) 11 D. L. R. 820, 24 W. L. R. 415.

In order to enforce a mechanics' or a materialman's lien under this section a "notice in writing of such lien and of the amount thereof" must be given to the "owner, or person having superintendence of the work on behalf of the owner." *Calgary* v. *Dominion Radiator Co.*, 56 Can. S. C. R. 141, (1918) 1 W. W. R. 137, 40 D. L. R. 65.

This section as amended is for the protection of an owner who is under a personal contractual obligation to pay and not otherwise. *Prentice* v. *Brown*, 7 Alta. L. R. 454, 17 D. L. R. 36.

33. Materials exempt from execution.—Where any mechanic, artisan, machinist, builder, miner, contractor or any other person has furnished or procured materials for use in the construction, alteration or repair of any building, erection or mine at the request of and for some other person, such materials shall not be subject to execution or other process to enforce any debt (other than for the purchase thereof), due by the person furnishing or procuring such materials, and whether the same have or have not been in whole or in part worked into or made part of such building or erection.

34. Enforcing liens for the improvement of chattels.—Every mechanic or other person who has bestowed money or skill and materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien upon such chattel or thing for the amount or value of the money, skill, or materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have power to sell the chattel in respect of which the lien exists, on giving two weeks' notice by advertisement in a newspaper published in the city, town or judicial district in which the work was done, or in case there is no newspaper published in such city, town or judicial district, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, the time and place of sale; and after such sale such mechanic or other person shall apply the proceeds of such sale in payment of the amount due to him, and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto on application being made to him therefor, and a notice in writing of the result of the sale shall be left at or posted to the address of the owner at his last known place of abode or business.

Expiration, Cancellation and Discharge.

35. When a lien shall expire.—Every lien in respect of which an affidavit has been filed against the title of any land or any interest therein shall be deemed to have lapsed after the expiration of sixty days after service, in the manner in which service of process is usually made and proved to the satisfaction of the registrar of land titles for the district in which the said affidavit has been filed, of a notice in form A in the schedule D to this Act, or to the like effect, shall have been made upon the lienholder, unless before the expiration of the said period of sixty days the lienholder shall have taken proceedings in court to enforce his lien, and shall have filed or caused to have been filed a certificate thereof in form B in the schedule D. to this Act, or to the like effect, in the land titles office for the said district: 1915, c. 2, s. 27.

Provided that the court or judge may, upon an *ex parte* application, shorten the said period of thirty days to such period as he shall specify in such order, and a copy of such order shall be served with the notice in this section referred to.

(2) Such certificate may be granted by the court or judge in which or before whom proceedings are instituted or by the clerk of such court. 1907, c. 5, s. 17. *Repealed and substituted* 1915, c. 2, s. 27.

In computing the statutory period, fractions of a day will not be counted. *Clarke* v. *Moore,* (1907) 1 Alta. L. R. 49, 8 W. L. R. 405, 411.

As to defect constituting ground for vacating registration, see *Horne* v. *Jenkyn,* 6 D. L. R. 55.

An owner's acceptance of the contractor's order given in return for the release of a materialman's lien operates as an accord and satisfaction of the materialman's claim, which cannot be re-awakened by the subsequent delivery of additional material and the filing of a fresh lien within the statutory period therefor. *Wortman* v. *Frid-Lewis Co.,* (1915) 9 W. W. R. 812.

A certificate of the commencement of an action to realize a mechanics' lien which states that "some title or interest is called in question in the following lands," (describing the lands as they

are set out in the statement of claim) "under the Mechanics' Lien Act of Alberta, is a sufficient compliance with the requirements of this section, although it does not state that the action referred to was taken by the plaintiff to "realize his lien." *Revelstoke Saw Mill Company* v. *Alberta Bottle Company*, (1915) 9 Alta. L. R. 155.

Failure to serve a statement of claim in a mechanics' lien action within six months after issue does not destroy the lien. *Crown Lumber Co.* v. *Malcolm*, 9 W. W. R. 481.

36. When a registered lien shall be cancelled.—The registrar of the land registration district shall on receiving a certificate under the seal of the clerk of the court wherein any action in respect of any lien registered in the land titles office within the jurisdiction of such registrar is pending, stating the names of the lienholders, parties to such action, and that the amount due by the owner in respect of such liens has been ascertained and paid into court in pursuance of an order of such court or judge or that the property has been sold to realize such liens or that such lien has been improperly filed or that such lien has otherwise ceased to exist or, on receiving a statement in writing signed by the claimant or his agent that the lien has been satisfied, cancel all liens registered by such parties.

37. Receipted pay rolls of woodman's wages must be produced.—Every person making or entering into any contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining timber or logs, by which it is requisite or necessary to engage and employ workmen and laborers in the obtaining, supplying and furnishing such logs or timber as aforesaid, shall before making any payment for or on behalf of, or under such contract, engagement or agreement, of any sum of money, or by kind, require such person to whom payment is to be made to produce and furnish a pay roll or sheet of the wages and amount due and owing, and of the payment thereof, which pay roll or sheet may be in the form of schedule C annexed to this Act, or if not paid, the amount of wages or pay due and owing to all the

workmen or laborers employed or engaged on or under such contract, engagement or agreement, at the time when the said logs or timber is delivered or taken in charge for or by or on behalf of the person so making such payment and receiving the timber or logs.

The effect of this section and the two following sections is to constitute moneys owing to a contractor for getting out timber and logs a specific fund, on which the workmen have a lien for wages, with an equitable as well as statutory legal remedy in regard thereto. *Pomerleau* v. *Thompson*, 16 D. L. R. 142, 27 W. L. R. 254.

38. Persons not requiring production of receipted pay roll shall be liable at suit of workman.—Any person making any payment under such contract, engagement or agreement without requiring the production of the pay roll or sheet as mentioned in section 37 of this Act shall be liable at the suit of any workman or laborer so engaged under said contract, engagement or agreement for the amount of pay so due and owing to the said workman or laborer under said contract, engagement or agreement.

39. Sums mentioned in pay roll as unpaid to be retained.—The person to whom such pay roll or sheet is given shall retain for the use of the laborers or workmen whose names are set out in such pay roll or sheet the sums set opposite their respective names which have not been paid, and the receipt or receipts of such laborers or workmen shall be a sufficient discharge therefor.

40. Judges may make rules of court.—The judges of the said court, or any two of them, may make general rules and regulations not inconsistent with this Act for expediting and facilitating the business before such court under this Act and for the advancement of the interests of suitors therein.

41. Construction of this Act.—Nothing in this Act contained shall be construed to affect any mechanic's lien filed or registered or the rights or liabilities of any person by or against whose

property any mechanic's lien has been filed or registered prior to the coming into force of this Act; and all such liens may be enforced in the same manner as though this Act had not been passed.

42. Repeal.—Save as herein provided The Mechanics' Lien Ordinance of the North-West Territories and all amendments thereto are hereby repealed.

SCHEDULE A.

In the matter of The Mechanics' Lien Act and in the matter of a lien claimed by . I, of Alberta, make oath and say:

1. That of claim a mechanic's lien against the property or interest hereinafter mentioned whereof residing at is owner.

2. That the particulars of the work done or materials furnished are as follows:

3. That the work or materials were finished, furnished or discontinued on or about the day of .

4. That the said was in the employment of contractor for the work in respect of which the lien is claimed, for days after the above mentioned date.

5. That the sum of dollars is owing to in respect of the same, and was or will be due on the day of .

6. That the description of the property to be charged is as follows:

Sworn at Alberta, this day of before me.

1907, c. 5, s. 17.

SCHEDULE B.

(*Repealed*—1907, c. 5, s. 17.)

SCHEDULE C.

Pay Roll.

Name	Description	From 5th Jan., 1891, to 10th Jan., 1891 (inclusive)			Amount paid	Date of payment	Received payment in full
		No. days employed	Rate per day	Total amount earned			
R. Roe	.....	Six days	$3.50	$21.00	$21.00	12th Jan. 1891	R. Roe

I hereby certify that the above statement is correct to the best of my knowledge and belief, and is made by me in compliance and in accordance with section 17 of The Mechanics' Lien Act, on account of (my contract to, *or* employment by, *as the case may be*). (*Here insert brief description of the work*) for (*owner's name*) up to the day of 19 .

(*Signed*)

Dated day of 19 . *Contractor.*

SCHEDULE D.

Form A.

To :

Take notice that the mechanics' lien filed by you in the land titles office for the Alberta Land Registration District on the day of 19 , as D.B. No. shall be deemed to have lapsed according to the provisions of section 35 of The Mechanics' Lien Act unless, within days from the date of service of this notice on you, you shall have taken proceedings in court to enforce such lien and shall have caused a certificate thereof to be filed as required by said section.

FORM B.

To the Registrar Alberta,
Land Registration District:

This is to certify that proceedings have been taken in court to enforce a certain mechanic's lien filed by against (*here describe lands*), which said lien was filed on the day of 19 , as D.B. No.

(L.S.)
Clerk of the Court.

1915, c. 2, s. 27.

THE BRITISH COLUMBIA MECHANICS' LIEN ACT.

CHAPTER 154.

AN ACT RESPECTING LIENS OF MECHANICS, WAGE-EARNERS AND OTHERS.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

SHORT TITLE.

1. Short title.—This Act may be cited as the "Mechanics' Lien Act." 1910, c. 31, s. 1.

INTERPRETATION.

2. In the construction of this Act—

"Contractor."—"Contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or service, or placing or furnishing material for any of the purposes mentioned in this Act;

"Sub-contractor."—"Sub-contractor" means a person not contracting with or employed directly by the owner or his agent for the purpose aforesaid, but contracting with or employed by the contractor, or under him by another sub-contractor, to do the whole or a certain portion of the work, or to place or furnish material, but a person doing manual or mental labor for wages shall not be deemed a sub-contractor;

"Owner."—"Owner" means and shall extend to and include a person having any estate or interest, legal or equitable, in the

lands upon or in respect of which the work or service is done, or material is placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work or service is done, or material is placed or furnished, and all persons claiming under him whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the material placed or furnished have been commenced to be furnished;

"**Laborer.**"—"Laborer" means and shall extend to and include every mechanic, miner, artisan, builder, or other person doing labor for wages;

"**Person.**"—"Person" includes a body corporate, firm, partnership, or association;

"**The judge.**"—"The judge" means the judge of the county court of the district in which the premises upon which the works or improvements are being carried on are situate;

"**Works or improvements.**"—"Works or improvements" shall include every act or undertaking for which a lien may be claimed under this Act;

"**Material.**"—"Material" shall include every kind of movable property;

"**Wages.**"—"Wages" means money earned by a laborer for work done, whether by time or as piece-work;

"**Mortgage.**"—[*See section 9, sub-section (a), of this Act*]. 1910, c. 31, s. 2.

As to distinction between "sub-contractor" and materialman see *Coughlan* v. *Carver*, (1914) 7 W. W. R. 457.

Actual possession under a grant from the Crown, coupled with a statutory right to register the grant, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanics' lien may attach. *Dorrell* v. *Campbell*, 23 B. C. R. 500, 32 D. L. R. 44, (1917) 1 W. W. R. 500.

The holder of a special timber license has no estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse* v. *Hunter*, (1906) 12 B. C. R. 126, 3 W. L. R. 331, but the holder of a working option on a mining claim comes within the definition of "owner" as he has an equitable estate. *Anderson* v. *Godsall*, (1900) 7 B. C. R. 404. See reference to this case in *Scratch* v. *Anderson*, (1900) 16 W. L. R. 145. See *Fortin* v. *Pound*, 1 W. L. R. 333.

L. bought property from T. for $1,200, paid $50 down, balance to be payable immediately, and took possession and erected buildings, etc. Plaintiff supplied lumber for these and claimed lien against L. and T. It was held, following *Anderson* v. *Godsall*, 7 B. C. R. 404, that the lien only extended to the equitable interest of L., and that claim against T. should be dismissed. *B. C. Timber and Trading Co.* v. *Leberry*, (1902) 22 C. L. T. 273.

A lien for material cannot exist unless expressly created by the statute. *Albion I. Works* v. *A. O. U. W.*, (1895) 5 B. C. R. 122, note.

It cannot be said merely because one of several "owners" has knowledge of work being done on their property, that the work is done at their "request and upon their credit" or with their "privity and consent" or "for their direct benefit." *Isitt* v. *Merritt Collieries*, (1920) 1 W. W. R. 879.

3. Act not to apply to public street.—Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon. 1910, c. 31, s. 3.

See *Vannatta* v. *Uplands*, (1913) 25 W. L. R. 85, cited under section 6. *post*.

4. Contracting out by laborer forbidden.—(1) Every agreement, verbal or written, express or implied, on the part of any laborer or other person employed in any kind of manual labor intended to be dealt with in this Act, that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of such person, shall be null and void.

(2) **Exception.**—This section shall not apply to a manager, officer, or foreman, or to any other person whose wages are more than five dollars per day. 1910, c. 31, s. 4.

5. Husband to be deemed wife's agent.—Where work or service is done or material is furnished upon or in respect of the land of a married woman, with the privity and consent of her husband, he shall be conclusively presumed to be acting as well for himself so as to bind his own interest, and also as her agent for the purposes of this Act, unless before doing such work or service, or furnishing such material, the person doing or furnishing the same shall have had actual notice to the contrary. 1910, c. 31, s. 5.

See *Lawrence* v. *Landsberg*, (1910) 14 W. L. R. 477. See also notes under corresponding section of Ontario Act.

Nature of Liens.

6. Mechanics, miners, contractors, materialmen, and others to have lien.—Unless there is an agreement in writing to the contrary, signed by such person, and in that case subject to the provisions of section 4, every person—

(1) Who does work or service or causes work or service to be done upon, or places or furnishes any material to be used in the making, constructing, erecting, altering, or repairing, either in whole or in part of, or adding to, any erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke or other work, or the appurtenances to any of them, or improving any street, road, or sidewalk adjacent thereto, for any owner, contractor, or sub-contractor, or who does such work, or causes such work to be done, and places or furnishes any such material; or

(2) Who does such work or service, or causes work or service to be done, or places or furnishes any material for or in respect of clearing, excavating, filling, grading, or ditching

any land for any owner, contractor, or sub-contractor, or who does such work, or causes such work to be done, and places or furnishes any such material,—

shall, by virtue thereof, have a lien for the price of such work, service, or material, or work, service and material, upon—

(a) Said erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, or other work, and the appurtenances to any of them;

(b) The materials so placed or furnished for said works or improvements;

(c) The lands occupied or benefited thereby or enjoyed therewith, or upon or in respect of which such work or service is done, or upon which such material is placed or furnished to be used:

Notice of lien for material to be given.—Provided that no lien for material supplied shall attach or be enforced unless the person placing or furnishing the same shall, before delivery, or within ten days thereafter, give notice in writing of his intention to claim such lien. Such notice shall be given to the owner or his agent, or to such person and in such manner as the judge may, on summary application, order. Such notice may be given in respect of any specific delivery, or in respect of all deliveries of material made within ten days prior to such notice, and all deliveries subsequent thereto. Such notice may be in the form or to the effect of Schedule A to this Act. 1910, c. 31, s. 6.

The word "delivery" in this section means actual physical delivery, and a lien does not attach under the above proviso for material furnished more than ten days before the notice, although other material also included in the notice was supplied within the ten days for the same work. *Rat Portage Lumber Co.* v. *Watson*, (1912) 10 D. L. R. 833, 17 B. C. R. 489.

A sub-contractor who not only supplies material, but works it into the building, is not obliged to give notice to the owner of the material supplied, in order to make his claim for a lien valid in respect of the material. This section applies only to a materialman. *Irvin* v. *Victoria Home Construction and Investment Company, Limited,* 18 B. C. R. 318; *Fitzgerald* v. *Williamson,* 18 B. C. R. 322. See *Ferrara* v. *National Surety,* (1916) 34 W. L. R. 697.

One who makes the excavation for the foundation of a building is entitled to a lien. *Turner* v. *Fuller,* (1913) 12 D. L. R. 255.

Property held by public school trustees for school purposes is liable to mechanics' liens. *Hazel* v. *Lund,* (1915) 9 W. W. R. 749. See conflicting cases cited under Ontario Mechanics' Lien Act, section 4, *post.*

An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase-price on the completion of said undertaking, is such a request in writing as gives a mechanics' lien arising from the erection of the works general application, and, therefore, the lien is not restricted to the increase in value of the premises by reason of such works. *British Columbia Granitoid, etc., Co. Ltd.* v. *Dominion Shipbuilding, Engineering and Dry Dock Co.,* (1918) 2 W. W. R. 919. The defence that nothing is payable by the owner to the contractor must be raised in the dispute note, and the onus is on the owner to show that nothing is due. *Brown* v. *Allan,* 18 B. C. R. 326.

A squatter on Crown land who accepts work and materials applied to the erection of a building thereon, holds himself out to be the "owner" of the land, and will be regarded as having an "interest" in the land. *Macdonald* v. *Hartley,* (1918) 3 W. W. R. 910.

The Land Act, which vests in the holder of a special timber license all rights of property in all trees, timber and lumber cut within the limits of the license during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse* v. *Hunter,* 12 B. C. R. 126.

Sections creating the right to a lien are strictly construed, but provisions dealing with procedure on the enforcement of the lien should be liberally construed. *Nobbs* v. *C. P. R.,* 6 O. W. W. R. 759.

A laborer who worked for a contractor who was employed to clear a quantity of land for the purpose of cultivation has no lien under this Act. *Black* v. *Hughes*, (1902) 22 C. L. T. 220. As to contract for clearing land, see *Beseloff* v. *The White Rock Resort Development Co.*, (1915) 22 B. C. R. 33.

As to notice, see *Coughlan* v. *National*, (1909) 11 W. L. R. 202, 491; *Sayward* v. *Dunsmuir*, (1905) 2 W. L. R. 319. As to appropriation of payment on account, see *British Columbia Mills, etc., Co.* v. *Horrobin*, (1907) 12 B. C. R. 426, 5 W. L. R. 275; *Lemon* v. *Dunsmuir*, (1907) 5 W. L. R. 505.

Where sub-contractors completed their work, as they thought, but upon a test it was ascertained that the work could not effectively serve the purpose for which it was intended, and after an unavoidable delay of several months, further work was done to increase the efficiency of the earlier work, it was held that this later work was substantial work, and not work that could be described as being done to remedy slight defects, and the sub-contractors having acted in good faith, the lien was registered in time. *Whimster* v. *Crow's Nest Pass Coal Co.*, (1910) 13 W. L. R. 621. See *Sayward* v. *Dunsmuir*, (1908) 2 W. L. R. 319.

As to work done after acceptance of building and after final certificate of architect, see *Lawrence* v. *Landsberg*, (1910) 14 W. L. R. 477. As to attempt of sub-contractor to preserve lien after time for filing lien had expired, see *Sheritt* v. *McCallum*, (1910) 12 W. L. R. 637.

Where the land is misdescribed the court will not give leave to amend. *Rafuse* v. *Hunter*, 12 B. C. R. 126. But an error in naming the owner of the lands is not sufficient to prevent the instrument claiming the lien from shewing "substantial compliance" under section 17. *Nobbs* v. *C. P. R.*, 6 W. W. R. 759.

Under the sections of the Mechanics' Lien Act, relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll, showing that the wages were actually paid by the contractor. *Young* v. *West Kootenay Shingle Co.*, (1905) 11 B. C. R. 171, 1 W. L. R. 184.

Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial judge, and his decision

as to such fact should govern. *Sayward* v. *Dunsmuir*, (1905) 11 B. C. R. 375, 2 W. L. R. 319. As to implied request of owner, see *Fortin* v. *Pound*, (1905) 1 W. L. R. 333.

The lien of a sub-contractor will attach when he has completed his contract, or if the contract provides for progress payments on account, a lien would attach for the amount of each instalment as it became due; and in the absence of evidence that either the whole or some part of the contract price was due or payable to the sub-contractor at the time of payment by the owner to the principal contractor of the only sum which accrued due to the latter before his abandonment of the contract, the sub-contractor cannot rely upon such payment to establish his lien. *Nepage* v. *Pinner*, 21 B. C. R. 81, 21 D. L. R. 315, 8 W. W. R. 322, 30 W. L. R. 720. See also *Turner* v. *Fuller*, 18 B. C. R. 69, *Rosio* v. *Beech*, 18 B. C. R. 73; *Braden* v. *Brown*, 24 B. C. R. 374.

Whether authority has been conferred on an agent is a question of fact, and such authority may be inferred by acts of recognition. *Sayward* v. *Dunsmuir*, 11 B. C. R. 375.

In an action by the assignee of an architect against the owner, the latter's objection that the architect had not posted upon the buildings or delivered to the owner a receipted pay-roll showing payment of the wages of the foreman, draftsman, and other employees of the architect, in compliance with s. 15 of the Mechanics' Lien Act, not being raised in the pleadings and no evidence being given upon it, the owner could not avail herself of this defence. *Sickler* v. *Spencer*, (1911) 19 W. L. R. 557. In this action it was held upon the evidence that there was such a substantial performance of the contract of the architect as to entitle him or his assignee to a lien, although a trifling part of the material contracted for had not been supplied by one of the contractors at the time he received his final certificate from the architect. *Sickler* v. *Spencer*, (1911) 19 W. L. R. 557.

The Act is not so broad in its scope as to charge one lot for services rendered upon another lot because the person rendering the service upon each lot did so under an indivisible contract. *Barr & Anderson* v. *Percy & Co.*, (1912) 21 W. L. R. 236. See *Lee* v. *Hill*, (1909) 11 W. L. R. 611 (Man.); *Fairclough* v. *Smith*, (1901) 13 Man. L. R. 509.

Where part of a claim is for materials and part for labor, the particulars stated in the affidavit for lien being "the putting in

bath tubs, wash tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, $220," were held insufficient as including two classes (Davie, C.J., dissenting). *Weller* v. *Shupe*, (1897) 6 B. C. R. 58. Where the two classes of charges for labor and for materials are so mingled, the contract being entire, that they cannot be determined respectively, there is no lien for either. *Gogin* v. *Walsh*, (1878) 124 Mass. 516; *Clark* v. *Kingsley*, (1864) 8 Allen (Mass.) 543; *Driscoll* v. *Hill*, (1865) 11 Allen (Mass.) 154.

As to defective work and unreasonable usage, see *Allen* v. *Deane*, (1910) 14 W. L. R. 622.

A lien for materials cannot exist unless expressly created by the statute. *Albion I. Works* v. *A. O. U. W.*, (1895) 5 B. C. R. 122, note. A lien may be enforced upon a *quantum meruit*. *Fuller* v. *Beach*, (1912) 21 W. L. R. 391.

The true tenor and intent of the instrument claiming a mechanics' lien is a claim of a lien upon certain specified land and not a claim of lien upon the estate or interest in the lands of certain named persons. *Nobbs* v. *C. P. R.*, 6 W. W. R. 759.

The right to a declaration of a lien is wholly statutory, and is enforceable only in the manner provided by the statute and the Act is not broad enough to charge one lot for services rendered upon another lot, because the person rendering the service upon each lot did so under an indivisible contract. *Barr & Anderson* v. *Percy & Co.*, (1912) 21 W. L. R. 236.

The doctrine of substantial performance has no place in Canadian jurisprudence. *McDonald* v. *Simons*, 15 W. L. R. 218; *Brydon* v. *Lutes*, (1891) 9 Man. L. R. 471; *Merriam* v. *Public Parks Board*, (1912) 22 Man. L. R. 107; *Smith* v. *Bernhart*, (1909) 11 W. L. R. 623. But see later Canadian cases cited under section 4 of Ontario Act, *post*.

As to appropriation of payments on account, see *B. C. Mills* v. *Horrobin*, (1907) 12 B. C. R. 426.

As to notice to owner's agent see *Coughlin* v. *National Construction Co.*, (1909) 14 B. C. R. 339.

No lien can be claimed against a railway under the control of the Dominion Government. *Larsen* v. *Nelson and F. S. Ry.*, (1895) 4 B. C. R. 151. See observations in respect to lien legislation as applied to railways, in chapter entitled "Property which may be subject to lien," *ante*.

A person who has delivered material to be used in the construction and improvement of a place, although the place of delivery is upon the land, is not a person who has done work or service *upon* the premises. *Vannatta* v. *Uplands, Limited,* (1913) 25 W. L. R. 85. But where claimants supplied teams of horses, waggons and drivers to the contractor for hauling sand, gravel and earth upon the property, for which they were paid so much per day, and these teams, waggons and drivers were subject to the contractor's foreman, and did only what work he required of them, such claims should be allowed. *Vannata* v. *Uplands, Limited, supra.*

An action to enforce a mechanics' lien is not an action for "any kind of debt" but is for penalty or forfeiture. *Dillon* v. *Sinclair,* (1900) 7 B. C. R. 328.

A lienholder is entitled in preference to holders of equitable assignments from the contractor. *Johnson* v. *Braden,* (1887) 1 B. C. R., part 2, p. 265.

Defendant employed contractor under written contract to clear land for cultivation purposes. Laborer who worked for contractor in clearing the land held not entitled to lien. *Black* v. *Hughes,* (1902) 22 C. L. T. 220.

The Act does not give a lien for cooking. *Anderson* v. *Godsal,* 7 B. C. R. 404.

There is no lien in respect to the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor. *B. C. Granitoid Co.* v. *Dominion Shipbuilding Co.,* (1918) 2 W. W. R. 919.

Mechanics' liens were filed against mining claims and judgment recovered on them in the County Court. On the same day a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order to give first lien on property in order to get funds to take out Crown grants. The lienholders were not notified of this application and did not appear. They did not appeal, but applied for leave to enforce their judgment in priority to charge given by liquidator. Held, that liquidator's order was made without jurisdiction and that lienholders were not bound by it. *Re Ibex Mining and Development Co.,* (1902) 9 B. C. R. 557.

Plaintiff was employed by Green as a logger. Green had a contract with defendant company. In an action to enforce

mechanics' lien for wages it appeared that prior to this action plaintiff and sixteen others obtained a judgment against Green under the Woodman's Lien Act for gross amount of their wages and had seized the logs and sold. Held, that they could not get another judgment under the Mechanics' Lien Act for the same claim. *Waka* v. *C. P. Lumber Co.*, (1901) 8 B. C. R. 358.

The defendants, the contractors, had a contract with the defendants, the owners, to make streets, boulevards, and sewers in a tract of land of several hundred acres, which was being subdivided for residential purposes, and mechanics' liens were asserted by several persons, who had done work for the contractors in making these streets, boulevards and sewers. It was held that the streets were not to be regarded as public highways, and lien-claimants were not precluded by section 3, *ante*. The streets were not dedicated to the public before completion. *Vannatta* v. *Uplands, Limited*, (1913) 25 W. L. R. 85.

As to the general law relating to the question of what constitutes "fixtures," see *Dominion Trust Co.* v. *Mutual Life Assce. Co. of Canada*, (1918) 26 B. C. R. 237.

Where the contractor also supplies the materials, and no notice of claim is filed by any materialman within the statutory period, the conditions of this section as to notice, do not apply to the contractor. *Gidney* v. *Morgan*, 16 B. C. R. 18.

The word "owner" in the Mechanics' Lien Act does not necessarily mean registered owner. *National Mortgage Co.* v. *Rolston*, (1915) 8 W. W. R. 630.

A person who accepts an order from a contractor for structural steel to be used in the construction of a building, fashions it at his factory to meet specified requirements, and delivers it so made ready at the building site, but takes no part in the construction thereof, is a "materialman" only; his status is not affected by the fact that he expended labor on the material before delivery. He is bound, therefore, to give the notice prescribed by this section, and, in order to preserve his lien, to file his claim within 31 days after the last delivery of material, as prescribed by section 19, *post*. *J. Coughlan & Sons* v. *John Carver & Company*, 20 B. C. R. 497.

There is no waiver of a lien upon a certain lot where a form of waiver as to that lot had been signed without consideration and by mistake. *Palfrey* v. *Brown*, 31 W. L. R. 535.

The plaintiff, in pursuance of an agreement, having done work and supplied material in connection with the construction of a building, brought action to enforce a lien. He gave no notice of his intention to obtain a lien, but he was able to segregate the amount due for labor from the value of the material supplied. In such case he is a person who "does such work or causes such work to be done," within the meaning of this section; and even if his claim for materials failed, there was no reason why he should not succeed for work done. *Brown* v. *Allen & Jones*, 18 B. C. R. 326.

Where a materialman has contracted to supply all of a certain class of supplies required in the construction of a particular building, as mentioned in the specifications, and the materialman supplied not only the goods which are mentioned in the specifications, but further materials which were contemplated by his contract as extras or additions, for the amount of which the fixed price was subject to increase, the lien for the entire bill is not lost by the lapse of the statutory period for filing liens between the last delivery of that portion of the goods, the class and quantities of which were shown in the specifications, and the later delivery of the extras; the lien in such case is in time if filed within the statutory period following the last delivery of extras. *Flett* v. *World Construction*, 15 D. L. R. 628, 19 B. C. R. 73, 26 W. L. R. 612.

The lien for work done in clearing a townsite consisting of several tracts extends to the whole land benefited by the work within the meaning of section 6 (c), except whatever may be excluded from it by section 3, as being "a public street or highway. *Beseloff* v. *White Rock, etc.*, 22 B. C. R. 33, 23 D. L. R. 676.

A workman is entitled to a lien upon the part of a sewer, extending below low water mark into the ocean, upon which he worked. *Baker* v. *Uplands*, (1913) 24 W. L. R. 768.

To bring an action under the Mechanics' Lien Act, as in any other case, a cause of action must have arisen. In the case of a contract containing conditions precedent to payment, no action can be brought to enforce a lien alleged to arise out of labor performed and materials supplied under such contract until the conditions have been complied with. *Champion and White* v. *The World Building*, 20 B. C. R. 156.

The lien upon a mine is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine. *Law* v. *Mumford*, 14 B. C. R. 233.

An architect is not entitled to a mechanics' lien for preparing plans, and where a lump sum is to be paid for preparing plans and for superintendence he is not entitled to a lien for any amount. *Fripp* v. *Clark*, 18 B. C. R. 216. But see decisions cited under Ontario Mechanics Lien Act, section 4, *post*.

A sub-contractor has a lien on the interest of his principal acquired through his (the principal's) lien. *Nobbs* v. *C. P. R.*, 6 W. W. R. 759.

7. Amount to which lien is limited.—The amount of such lien shall not exceed the sum actually owing to the person entitled to the lien, and distribution of any moneys derived from the realization of the liens shall be made in accordance with section 36 of this Act. 1910, c. 31, s. 7.

8. Owner's liability as to wages unpaid by contractor.—With the exception of liens in favor of laborers for not more than six weeks' wages, no lien shall attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor:

Provided that this clause shall not be construed to apply to liens under section 11 hereof. 1910, c. 31, s. 8.

Where upon default of a contractor, a building owner takes over the work under the provisions of the contract, in effect becoming the contractor's agent for that purpose, the full balance of the contract price must, as between the building owners and lienholders, be treated as still owing by the owners to the contract. *Hazel* v. *Lund*, (1915) 9 W. W. R. 749; 22 B. C. R. 264.

The lien of a sub-contractor will attach when he has completed his contract, or if the contract provides for progress payments on account, a lien would attach for the amount of each instalment as it became due; and in the absence of evidence that either the whole or some part of the contract price was due or payable to the sub-contractor at the time of payment by the owner to the principal contractor of the only sum which accrued due to the latter before his abandonment of the contract, the sub-contractor cannot rely upon such payment to establish his lien. *Nepage* v. *Pinner*, (1915) 21 D. L. R. 315. See also *Turner* v. *Fuller*, 12 D. L. R. 255, 18 B. C. R. 69, and *Rosio* v. *Beech*, 9 D. L. R. 416, 18 B C. R. 73.

School property may be the subject of a mechanics' lien. *Hazel* v. *Lund*, 22 B. C. R. 264, 25 D. L. R. 204.

A defence under this section, that no money is payable by the owner to the principal contractor, must be pleaded in the dispute note filed in an action brought by a sub-contractor to enforce a lien for the balance due to him by the principal contractor. *Fitzgerald* v. *Williamson*, 12 D. L. R. 601, 18 B. C. R. 322. See also *Brown* v. *Allen*, 18 B. C. R. 326.

9. Liens on mortgaged premises.—Where works or improvements are put upon mortgaged premises, the liens, by virtue of this Act, shall be prior to such mortgage as against the increase in value of the mortgaged premises by reason of such works or improvements, but not further, unless the same is done at the request of the mortgagee in writing; and the amount of such increase shall be ascertained upon the basis of the selling value upon taking of the account, or by the trial of an issue as provided in section 31 hereof, and thereupon the judge may, if he shall consider the works or improvements of sufficient value to justify the proceedings, order the mortgaged premises to be sold at an upset price equal to the selling value of the premises immediately prior to the commencement of such works or improvements (to be ascertained as aforesaid), and any sum realized in excess of such upset price shall be subject to the liens provided for by this Act. The moneys equal to the upset prices as aforesaid shall be applied towards the said mortgage or mortgages, according to their priority. Nothing, however, in this section shall prevent the lien from attaching upon the equity of redemption or other interest of the owner of the land subject to such mortgage or charge:

(a) **Interpretation of "mortgage."**—"Mortgage" in this section shall not include any part of the principal sum secured thereby not actually advanced to the borrower at the time the works or improvements are commenced, and shall include a vendor's lien and an agreement for the purchase of land; and for the purposes of this Act, and within the meaning thereof, the purchaser shall be deemed a mortgagor, and the seller a mortgagee. 1910, c. 31, s. 9.

This section was amended by section 40 of the Acts of 1917, *post*.

The provisions of this section do not give relief to lienholders as against prior mortgagees, unless, from the proceedings at the trial, the increase in the value of the mortgaged premises can be ascertained. Lienholders for work consisting entirely of the taking out of ore from a mine cannot, except when it is strictly development work, enforce their liens as against a prior mortgagee. *Anderson* v. *Kootenay Gold Mines, Ltd.*, 18 B. C. R. 643.

Mechanics' liens had been filed against the property of a company and judgment recovered in respect to them in the County Court. On the same day as the judgment a winding-up order was made in the Supreme Court. Subsequently the liquidator obtained an order authorizing him to give a first charge on the property of the company in order to raise money to take out certain Crown grants of property to which the company was entitled. The lienholders had no notice of the application, and did not appear on the hearing. They did not appeal, but applied for leave to enforce their judgment in priority to the charge created by the liquidator under the order of court. Held, that the order was made without jurisdiction, and the lien-holders were not bound by it. *Re Ibex Mining and Development Co.*, (1902) 9 B. C. R. 557.

Under this section the value of the property before the lien attached is to be taken for the purpose of fixing the upset price for which the lienholder would have priority over a mortgagee as against the increase in value of the mortgaged premises by reason of the work and improvements. *Champion & White* v. *The World*, 22 B. C. R. 596, 27 D. L. R. 506, 34 W. L. R. 317, 10 W. W. R. 470.

A covenant in the plaintiffs' mortgage, entitling them to pay "liens, taxes, rates, charges or encumbrances" affecting the mortgaged lands and adding them to the mortgage debt, did not entitle them as against defendants, subsequent mortgagees, to add to their mortgage debt amounts used to pay off mechanics' liens of later date than the registration of defendants' mortgage, and as to which there had been no adjudication establishing priority to defendants' mortgage through increase in value of the premises under this section. The meaning of such covenant must be confined to the payment of liens which affect the plaintiffs' interest in the property. A lien filed prior to plaintiffs' mortgage came

within such covenant and the amount used to pay off same could be added to plaintiffs' claim. *Great West Permanent Loan Company* v. *National Mortgage Company*, (1919) 1 W. W. R. 788, 47 D. L. R. 751.

The claim of a mortgagee in respect of advances made subsequently to the commencement of the work done by lienholders is postponed to the rights of the lienholders. The mortgagee as a subsequent incumbrancee might have been entitled to be given an opportunity in the lien action to redeem the lienholders had it applied for registration at once, but having neglected to do so until after the sale of the land in question, any such right has been lost. *National Mortgage Co.* v. *Rolston*, 59 Can. S. C. R. 219, 49 D. L. R. 567, affirming 23 B. C. R. 384, (1917) 1 W. W. R. 494.

10. Owner deemed to have authorized works.—All works or improvements mentioned in section 6 of this Act constructed upon any lands with the knowledge, but not at the request, of the owner, or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the instance and request of such owner or person having or claiming any interest therein: Provided this section shall not apply to any works or improvements done after there has been posted, on at least two conspicuous places upon said land, or upon the works or improvements thereon, by authority of such owner or person, a notice in writing that he will not be responsible for such works or improvements, or after actual notice in writing to the above effect has reached the person claiming a lien under the provisions of this Act. 1910, c. 31, s. 10.

This section in its present amended form has overcome the decision in *Anderson* v. *Godsal*, 7 B. C. R. 404, the words "and request" having been added after the words "constructed at the instance." See *Venness* v. *Stoddard*, (1915) 9 W. W. R. 832.

This section does not apply to any case already provided for by section 6, but only applies where the actual owner had not authorized the works or improvements, which were authorized by the supposed owner, the actual owner standing by, and allowing the work to be done in order to take advantage of it. The governing phrase in section 6 is "at the request of the owner." The holder

of a working option comes within the definition of "owner," as he has an equitable estate. *Anderson* v. *Godsall*, (1900) 7 B. C. R. 404. Irving, J., dissented in this case and held that this section (or rather a former section corresponding to this one) incorporated the words of section 6 as to "other improvements," and therefore included "excavating land in respect to a mine," and was therefore applicable in the case of work done on a mining claim which appears, from the agreement, to have been done for the direct benefit of the owner, and subject to the inspection of his engineer. See *Scratch* v. *Anderson*, (1910) 16 W. L. R. 145, concerning the case of *Anderson* v. *Godsall*, (1900), 7 B. C. R. 404.

In an action to enforce a lien where the owner of the property did not contract for the work or improvements, it is incumbent upon the plaintiff to shew that the owner had knowledge of such work or improvements. *Baker* v. *Williams*, (1916) 23 B. C. R. 124.

A miner may enforce a mechanics' lien against a mineral claim which has not been Crown granted. *Venness* v. *Stoddard*, 9 W. W. R. 832.

11. Owner's liability for works on premises held under option.—Notwithstanding anything in the last preceding section contained, all works or improvements mentioned in section 6 of this Act placed upon premises held under option or working bond where the grantee of the option is required or permitted by the grantor of such option to make works, or improvements thereon, shall, for the purpose of creating a lien, be held to have been constructed at the instance and request of the owner of such premises, and the grantor of such option and the liens by virtue of this Act shall attach and be enforceable against the interest both of the owner of the said premises and the grantor of such option. 1910, c. 31, s. 11.

A miner may enforce a mechanics' lien against a mineral claim, which has not been Crown granted.

An option (mining) or working bond can be distinguished from an agreement of sale, in that in the former, the vendor looks to payment from whatever ore may be extracted from the mine and not to the vendee's covenant for payment. *Venness* v. *Stoddard*, (1915), 9 W. W. R. 832.

12. Insurance moneys.—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any insurance receivable thereon by the owner, prior mortgagee, or chargee shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in section 9 of this Act, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by the sale of such property in action to enforce a lien. 1910, c. 31, s. 12.

13. Lienholder may demand particulars of contract.—Any lienholder or person entitled to a lien may at any time demand of the owner, or his agent, the terms of the contract or agreement with the contractor for and in respect of which the work is done or material is furnished or placed, and a statement of the amount due or unpaid thereunder; and if such owner or his agent—

(a) Does not at the time of such demand, or within a reasonable time thereafter, inform the person making such demand of the parties to and general terms of such contract or agreement, and the amount due or unpaid on such contract or agreement; or

(b) Intentionally or knowingly falsely states the terms of such contract or agreement, or the amount due and unpaid thereon;

and if the person claiming the lien sustains loss by reason of such refusal, or neglect, or false statement, such owner shall be liable to him in an action therefor to the amount of such loss. 1910, c. 31, s. 13.

14. Owner may demand particulars from lienholder.—Any owner or other person who may be liable for the payment therefor may at any time demand from any contractor or sub-contractor performing work, or person who has given notice that he intends to claim a lien for materials, the terms of and parties to any contract or agreement under which he is performing work or placing or

furnishing material, and a statement of account under same to the date of such demand; and if such contractor, sub-contractor, or person, or his agent—

(a) Does not at the time of such demand, or within reasonable time thereafter, inform the person making the demand of the terms of such contract or agreement, and the amount due or unpaid on such contract or agreement, and furnish the account as demanded; or

(b) Intentionally or knowingly falsely states the terms of such contract or agreement, or the amount due or unpaid thereon, or furnishes a false account;

and if the owner or person making such demand sustains loss by reason of such refusal, neglect, or false statement, such contractor, sub-contractor, or person shall be liable to him in an action therefor to the amount of such loss, and, in any event, the lien of such contractor, sub-contractor, or person shall be limited by the statement given or furnished. 1910, c. 31, s. 14.

15. Receipted pay-rolls to be posted on works.—No owner shall be required to make any payment to any contractor or sub-contractor in respect of any contract where the contract price exceeds five hundred dollars until such contractor, or sub-contractor, or some person in charge of the works or improvements shall post upon the works or improvements a copy of the receipted pay-roll from the hour of twelve o'clock noon to the hours of one o'clock p.m., on the first legal day after pay-day, and shall have delivered to the owner, or other person acting on his behalf, the original pay-roll containing the names of all laborers and persons placing or furnishing materials who have done work, or placed or furnished material for him upon such works or improvements, with a receipt in full from each of the said laborers and persons placing or furnishing material with the amounts which were due and had been paid to each of them set opposite their respective names, which pay-roll may be in the form of Schedule B hereto, or until

the time for filing liens in respect of such works or improvements shall have expired; and no payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate, or interest in favor of any such laborer or person placing or furnishing material. 1910, c. 31, s. 15.

A contractor building a house under a profit sharing arrangement with his helpers, on completion of the work, not having any wages to pay is not subject to the provision for the posting of a receipted pay roll. *Gidney* v. *Morgan,* (1910) 16 B. C. R. 18.

An objection alleging non-compliance with a provision somewhat similar to the one in this section in regard to posting upon the buildings and delivering to the owner a receipted pay-roll, is not available unless it has been raised in the pleadings and evidence has been given of the fact. *Sickler* v. *Spencer,* (1911) 19 W. L. R. 557. See *Young* v. *West Kootenay Shingle Co.,* (1905) 11 B. C. R. 171, 1 W. L. R. 184.

The failure of the contractor to keep a pay-roll as required by this section, prevents any one from bringing an action against the owner for payment. This section does not prevent a sub-contractor from filing a lien. *Irvin* v. *Victoria Home, etc., Co.,* 18 B. C. R. 318.

A sub-contractor is not entitled to take advantage of the failure by the owner to obtain duly receipted pay-rolls under this section. A sub-contractor at a lump sum for painting work, including the supply of the necessary materials for that purpose, is not a "laborer" nor "person placing or furnishing materials." *Rosio* v. *Beech,* 18 B. C. R. 73.

16. Assignment by contractor not to defeat lien.—No assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this Act. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, set-off, or counterclaim in favor of the owner against the contractor. 1910, c. 31, s. 16.

A stipulation in a building contract, that upon default of the contractor, the school trustees shall be entitled to take his place to complete the contract and deduct the cost of completion from the balance of the purchase price, is in effect an assignment of the unpaid balance of the contract price within the purview of this section and therefore invalid against the lien for the full balance of the contract price acquired under the Act. *Hazel* v. *Lund*, 22 B. C. R. 264, 25 D. L. R. 204.

17. During continuance of lien property must not be removed.—During the continuance of any lien, no portion of the property affected thereby shall be removed to the prejudice of such lien, and any attempt at such removal may be restrained on application to the judge. 1910, c. 31, s. 17.

18. Devices to defeat priority of wage-earners void.—Every device by an owner, contractor, or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as against such wage-earners, be null and void. 1910, c. 31, s. 18.

REGISTRATION AND TRANSMISSION.

19. Lien expires in thirty-one days after completion of work, unless registered.—Every lien upon any such erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, works, or improvements, the appurtenances to any of them, material or lands, shall absolutely cease to exist,—

1. In the case of a claim for lien by a contractor or sub-contractor, after the expiration of thirty-one days after the completion of the contract.

(2) In the case of a claim for lien for materials, after the expiration of thirty-one days after the furnishing or placing of the last materials so furnished or placed.

(3) In the case of a claim for lien for services, after the expiration of thirty-one days after the completion of services.

(4) In the case of a claim for lien for wages, after thirty-one days after the last work is done for which the lien is claimed (except in the case of a claim for wages owing for work in, at or about a mine, in which case the lien shall cease after the expiration of sixty days after the last work is done for which the lien is claimed): Provided, however, that any laborer shall not be held to have ceased work upon any erection, building, railway, tramway, road, bridge, trestle-work, wharf, pier, mine, quarry, well, excavation, embankment, sidewalk, sewer, drain, ditch, flume, tunnel, aqueduct, dyke, works, or improvements, or land, until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor,—

unless in the meantime the person claiming the lien shall file in the nearest County Court registry, in the county wherein the land is situate, an affidavit, sworn before any person authorized to take oaths, stating in substance—

(a) The name and residence of the claimant, and the name of the owner of the property or interest to be charged;

(b) The particulars of the kind of works, services, improvements, or materials done, made, or furnished;

(c) The time when the works, services, or improvements were finished or discontinued, or the materials furnished or placed;

(d) The sum claimed to be owing, and when due;

(e) The description of the property to be charged;

and shall within the respective times hereinbefore in this section mentioned, file in the Land Registry Office of the land registry district within the limits of which the lands, mines, or premises in respect of which the lien is claimed are situate a duplicate or a copy certified by the said County Court Registrar to be a true copy of such affidavit, which duplicate or certificate copy of such affidavit shall be received and filed in the said Land Registry Office

as a lien against the property, interest, or estate against which the lien is claimed. Every County Court Registrar shall be supplied with printed forms of such affidavits, in blank, which may be in the form or to the effect of Schedule C. to this Act and which shall be supplied to every person requesting the same and desiring to file a lien. Every County Court Registrar shall keep an alphabetical index of all claimants of liens, and the persons against whom such liens are claimed, which index shall be open for inspection during office hours, and it shall be the duty of such County Court Registrar to decide whether his is or is not the proper office for the filing of such affidavit, and to direct the applicant accordingly; and no affidavit shall be adjudged insufficient on the ground that it was not filed in the proper County Court registry. 1910, c. 31, s. 19. (*Redrawn.*)

A person who accepts an order for steel beams to be used in the erection of a building, and has to fashion them so as to meet specified requirements, and then delivers the material so made ready at the building site, is a "ma. .man" as distinguished from a "sub-contractor." *Coughlan & ..s* v. *Carver*, (1914) 7 W. W. R. 457.

Where sub-contractors completed their work, as they thought, but upon a test it was ascertained that the work could not effectively serve the purpose for which it was intended, and, after an unavoidable delay of several months, further work was done to increase the efficiency of the earlier work, it was held that this later work was substantial work, and not work that could be described as being done to remedy slight defects, and the sub-contractors having acted in good faith, the lien was registered in time. *Whimster* v. *Crow's Nest Pass Coal Co.*, (1910) 13 W. L. R. 621. See *Sayward* v. *Dunsmuir*, (1905) 2 W. L. R. 319, 11 B. C. R. 375.

A statement of claim did not disclose the kind of materials furnished. Held, defective, but as the lien is operative when registered and action brought and certificate of *lis pendens* registered, it was held that plaintiff's lien was not prejudiced. *Johnson* v. *Braden*, (1887) 1 B. C. R. (Pt. 2), p. 265. See *Weller* v. *Shupe*, (1897) 6 B. C. R. 58, where particulars of claim in affidavit for lien were held insufficiently stated. See also *Knott* v. *Cline*, (1896) 5 B. C. R. 120, and *Smith* v. *McIntosh*, (1893) 3 B. C. R. 26.

In a proceeding for the purpose of realizing a mechanics' lien the affidavit was sworn before a person now plaintiff's solicitor. Held, sufficient. *Elliott* v. *McCallum*, (1899) 19 C. L. T. 412.

But now Rule 309, which provides that an affidavit shall not be sworn before the solicitor for the party on whose behalf it is to be used, is held to apply to the affidavit required under this section. *Braden* v. *Brown*, 24 B. C. R. 374, (1917) 3 W. W. R. 906.

Completion may be considered as dating from the doing of a little "touching up," if such work be a part of the work necessary under the contract. *Fuller* v. *Beach*, (1912), 21 W. L. R. 391.

Lienholders are entitled to priority over an unregistered charge or transfer of which they had no knowledge actual or constructive; the unregistered interests, therefore, cannot prevail against a purchaser of the property to whom it has been sold in satisfaction of the registered charges. *National Mortgage Co.* v. *Rolston*, 32 D. L. R. 81, 23 B. C. R. 384, (1917) 1 W. W. R. 494, affirmed by Supreme Court of Canada, (1917) 2 W. W. R. 1114.

The claim of a mortgagee in respect of advances made subsequently to the commencement of the work done by lienholders is postponed to the rights of the lienholders. The mortgagee as a subsequent incumbrancee might have been entitled to be given an opportunity in the lien action to redeem the lienholders had it applied for registration at once, but having neglected to do so until after the sale of the land in question any such right has been lost. (a) *National Mortgage Co.* v. *Rolston*, (1919) 49 D. L. R. 567.

A person who accepts an order from a contractor for structural steel to be used in the construction of a building, fashions it at his factory to meet specified requirements, and delivers it so made ready at the building site, but takes no part in the construction thereof, is a "materialman" only and, in order to preserve his lien, must file his claim within 31 days after the last delivery of material, as prescribed by this section. *Coughlan & Sons* v. *Carver & Company*, 20 B. C. R. 497.

The term "delivery" in section 6 means actual, physical delivery. Where a materialman, who had contracted to furnish all the materials for a building, and after some of the material had been delivered, gave notice of intention to claim a lien in respect of more material than had been delivered, it was held that the notice was defective as to the material not delivered. *Rat Portage Lumber Company, Limited* v. *Watson & Rogers*, 17 B. C. R. 489.

An action to realize a lien can be brought only when the money sought to be recovered has become payable and within 30 days after the filing of the lien; no action lies for the purpose of keeping the lien *in esse* where the due date is deferred beyond the time limited by the Act. *Champion* v. *World Building*, 18 D. L. R. 555, 20 B. C. R. 156, 29 W. L. R. 299, 6 W. W. R. 1469.

20.—Mode of construing last preceding section.—A substantial compliance only with the last preceding section shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites thereof, unless, in the opinion of the judge adjudicating upon the lien under the said Act, the owner, contractor, sub-contractor, mortgagee, or some other person is prejudiced thereby, and then only to the extent to which he is prejudiced, and the judge may allow the affidavit, statement of claim, plaint, and summons to be amended accordingly; and may allow the addition or substitution of all proper parties to the claim of lien, and the action to enforce the same, although the time for filing the affidavit mentioned in the said last preceding section, and instituting proceedings under section 23 hereof, shall have, or either of them has, expired. 1910, c. 31, s. 20.

But where the land sought to be charged by a lien is misdescribed in the lien affidavit the court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien. *Rafuse* v. *Hunter*, (1906) 12 B. C. R. 126.

An affidavit stating that work finished or discontinued "on or about" a stated date was held sufficient. *Holden* v. *Bright Prospects G. M. Co.*, (1899) 6 B. C. R. 439.

Particulars of claim in affidavit for lien were: "The putting in bath-tubs, wash-tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, $220. Part was for material and part for labor. It was held (Davie, C.J., dissenting), that the statement was fatally defective, as including two classes, in regard to one of which there was no statutory lien. Davie, C.J., was of the opinion that the particulars were sufficient and that the separation of the price of the labor from that of the material was a function of the court exercisable

at the trial. *Weller* v. *Shupe*, (1897) 6 B. C. R. 58. In another case the particulars for lien were: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of $123." Held, insufficient. *Knott* v. *Cline*, (1896) 5 B. C. R. 120.

Under the Mechanics' Lien Act of 1888 it was held that the affidavit must be strictly followed in order to validate the lien. *Smith* v. *McIntosh*, (1893) 3 B. C. R. 26.

See *Barr & Anderson* v. *Percy & Co.*, (1912) 21 W. L. R. 236.

An error in naming the owner of the lands with respect to which a lien is claimed, is not sufficient to prevent the instrument claiming the lien from showing the substantial compliance with the statutory form. *Nobbs and Eastman* v. *C. P. R.*, 6 W. W. R. 759, 27 W. L. R. 664.

The omission to register a mechanics' lien within the time specified in the Land Registry Office is not cured by this section, and is fatal to the validity of the lien, even where it has been registered within the prescribed time in the County Court Registry. *Dale* v. *International Mining Syndicate*, (1917) 2 W. W. R. 1031.

As to certain irregularities in affidavits not rendering the affidavits insufficient, see *MacDonald* v. *Hartley*, (1918) 3 W. W. R. 910.

A rule of practice which provides that an affidavit shall not be sworn before the solicitor for the party on whose behalf it is to be used, applies to the affidavit required under the Lien Act. *Columbia Bitulithic, Ltd.* v. *Vancouver Lumber Co.*, 21 D. L. R. 91; *Braden* v. *Brown*, (1917) 3 W. W. R. 906.

As to powers of amendment of the court, see *Isitt* v. *Merritt Collieries, Ltd.*, (1920) 1 W. W. R. 879.

21. No lien to be filed for less than $20.—No lien shall be filed unless the claim or joined claims shall amount to or aggregate twenty dollars or more. 1910, c. 31, s. 21.

22. Liens pass on death to legal representatives, or may be assigned.—In the event of the death of the lien-holder, his lien shall pass to his personal representatives, and the right of a lienholder may be assigned by any instrument in writing, subject to the limitation contained in section 16 hereof. 1910, c. 31, s. 22.

The lien of an architect is assignable and then enforceable by the assignee. *Sickler* v. *Spencer*, (1911) 19 W. L. R. 557.

EXPIRATION, CANCELLATION AND DISCHARGE.

23. When a lien shall expire.—Every lien shall absolutely cease to exist after the expiration of thirty-one days after the filing of the affidavit mentioned in section 19 of this Act, unless the claimant in the meantime shall have instituted proceedings to realise his lien under the provisions of this Act in the County Court registry in which the lien was filed, or unless in the meantime the consent in writing, signed by the owner or party whose interest is charged, extending the existence of said lien for a period named in said consent, is filed in the County Court registry in which the lien was filed. Said consent may be in the form or to the effect of Schedule D to this Act. 1910, c. 31, s. 23.

See *Dunn* v. *Holbrook*, (1900) 7 B.C.R. 503, and compare *Neill* v. *Carroll*, (1880) 28 Gr. 34, 399; *Bank of Montreal* v. *Haffner*, (1884) 10 O. A. R. 592; and *McNamara* v. *Kirkland*, (1891) 18 O. A. R. 270.

24. Cancellation of lien.—(1) The County Court Registrar shall cancel any lien when the amount due in respect thereof has been ascertained and paid into court in pursuance of an order of the court or judge, or the property has been sold to realize such lien, or such lien has been improperly filed or has otherwise ceased to exist, or on receiving a statement in writing, signed by the claimant or his agent, that the lien has been satisfied.

(2) Upon such cancellation the County Court Registrar shall issue a certificate thereof to the owner, and the Registrar-General or District Registrar of Titles (as the case may be) shall, upon the production of such certificate of cancellation, cancel the registration of such lien in the books of the Land Registry Office. 1910, c. 31, s. 24. (*Part new.*)

The certificate of action required by this section must be filed within the time therein limited, otherwise the lien ceases to exist. *Dunn* v. *Holbrook*, (1899) 7 B. C. R. 503.

25. Summons to show cause why lien should not be cancelled. --Any person against whose property a lien has been registered under this Act may apply to the judge, on an affidavit setting forth registry of the same, and that hardship or inconvenience is experienced, or is likely to be experienced thereby, with the reasons for such statement, for a summons calling upon the opposite party to show cause why such lien should not be cancelled upon sufficient security being given. Such summons, together with a copy of the affidavit on which the same is granted, shall be served on the opposite party and made returnable in three days after the issuing thereof, or in such greater or less time, as the judge may direct. 1910, c. 31, s. 25.

26. Judge may order cancellation of lien.—On the return of such summons, the judge may order the cancellation of such lien, either in whole or in part, upon the giving of security by the party against whose property the said lien is registered to the opposite party, in an amount satisfactory to the judge, and upon such other terms (if any) as the judge may see fit to impose. 1910, c. 31, s. 26.

The giving of security is a condition precedent to the cancellation of the lien., *Walsh* v. *Mason*, (1914) 26 W. L. R. 942, 19 B. C. R. 48.

27. On judge's order, lien to be cancelled.—The County Court Registrar and the Registrar-General or District Registrar of Titles (as the case may be), in whose office the said lien is registered shall, on the production of such order, or an office copy thereof, file the same and cause the said lien to be cancelled as to the property affected by the order. 1910, c. 31, s. 27.

Enforcement.

28. Consolidated liens. — Any number of lienholders may be joined in one suit, and all suits or proceedings brought by a lienholder shall be taken to be brought on behalf of all lienholders

who may be made parties to such suits or proceedings within the time mentioned in section 23 hereof: Provided that the moneys realized in such suit shall be distributed amongst the lienholders, parties to such suit or proceedings, in the order and manner provided in section 36 of this Act. Any lienholder not originally joined may within the time mentioned in section 23 hereof, be made a party to such suit or proceedings by order of the judge, upon ex parte application, supported by an affidavit stating the particulars of the claim, and any lien-holder so joined in any such suit or proceedings shall be deemed to have complied with section 23 of this Act as fully as if he instituted a suit in his own behalf. 1910, c. 31, s. 28.

29. Owner or contractor may apply to have suits consolidated.—If more than one suit is commenced in respect of the same contract, the owner or contractor shall apply to have the causes consolidated, and failing to do so he shall pay the costs of such additional suit or suits. 1910, c. 31, s. 29.

A bank holding an assignment of the balance of the contract price owing by the owner to the principal contractor has a sufficient interest to be added a party defendant. *Dorrell* v. *Campbell*, 22 B. C. R. 584; 10 W. W. R. 492, 27 D. L. R. 425, 34 W. L. R. 367. See also 32 D. L. R. 44, 23 B. C. R. 500 (1917) 1 W. W. R. 500.

30. Judge may order consolidation of actions.—If two or more actions are brought in respect of the same contract or work, the judge shall, by order, on the application of any person interested, consolidate all the actions, and may make such order as to costs as he shall think fit. 1910, c. 31, s. 30.

See *Coughlan* v. *National Construction Co.*, (1909) 14 B. C. R. 339.

31. Suits to be brought in County Court. — Whatever the amount of lien or liens, proceedings to realize same may be taken before the judge, who is hereby authorized and empowered to proceed in a summary manner by summons and order, and he may

take accounts and make requisite inquiries, try issues, and in default of payment may direct the sale of the estate or interest charged, and such further proceedings may be taken for the purpose aforesaid as the judge may think proper in his discretion, and any conveyance under his seal shall be effectual to pass the estate or interest sold. And, when not otherwise provided, the proceedings shall be, as nearly as possible, according to the practice and procedure in force in the County Court; and when these are no guide, the practice and procedure used in the Supreme Court shall be followed. 1910, c. 31, s. 31.

As to appeals see *Champion* v. *World Building Co.*, (1914) 51 C. L. J. 63.

32. Leasehold property.—If the property sold in any proceedings under this Act shall be a leasehold interest, the purchaser of any such sale shall be deemed to be the assignee of such lease. 1910, c. 31, s. 32.

33. In certain cases owner or contractor to pay costs.—When it shall appear to the Judge in any proceedings to enforce a lien or liens under this Act that such proceedings have arisen from the failure of any owner or contractor, or both of them, to fulfil the terms of the contract or engagement for the work in respect of which the liens are sought to be enforced, or to comply with the provisions of this Act, the judge may order the said owner or contractor, or both of them, to pay all the costs of such proceedings, in addition to the amount of the contract or sub-contract, or wages due by him or them to any contractor, sub-contractor, or labórer, and may order a final judgment against such contractor or owner, or both of them, for such costs. 1910, c. 31, s. 33.

34. Judgment for amount of claim.—Upon the hearing of any claim for a lien, the court or judge may, so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favor of the latter for any indebtedness or liability arising out of the claim, in the same manner as if such

indebtedness or liability had been sued upon in the County Court in the ordinary way, without reference to this Act.

And judgment may be given for the sum actually due, notwithstanding such sum may exceed the ordinary jurisdiction of the County Court. 1910, c. 31, s. 34.

See *Sayward* v. *Dunsmuir*, (1905) 11 B. C. R. 375.

35. No appeal where action for less than $250.—In any action for a lien where the amount claimed to be owing is less than two hundred and fifty dollars, the judgment shall be final, binding, and without appeal; but in any other action for a lien an appeal shall lie from any judgment or order of the judge in like manner as in ordinary cases. 1910, c. 31, s. 35.

This provision applies only where a sum of money has been awarded and the existence of a valid lien is pre-supposed. *Coughlan* v. *National Construction Co.*, (1909) 14 B. C. R. 339.

Where the amount adjudged to be owing was only $172.05, an appeal from the judgment was dismissed. *Gillies Supply Co.* v. *Allan*, (1910) 15 B. C. R. 375 (C.A.); 14 W. L. R. 458.

Though several lienholders may bring suit on their respective and distinct claims in one action and judgment may be entered for the whole amount of said claims, yet for the purposes of appeal each claim is deemed to be severable, and the adjudication thereon is a distinct one, and not appealable unless it amounts to $250. *Gabriele* v. *Jackson Mines*, 15 B. C. R. 373, 2 M. M. C. 399. The claims of several lien claimants, each one of which is under $250, cannot be joined together so as to bring the amount up to $250, and so permit of an appeal. *Baker* v. *Uplands*, (1913) 24 W. L. R. 768. No appeal lies to the Supreme Court of Canada in an action to enforce a mechanic's lien. *Champion & White* v. *The World Building Co.*, 50 Can. S. C. R. 382.

36. Distribution of moneys realized under Act.—All moneys realized by proceedings under this Act shall be applied and distributed in the following order:—

(1) The costs of all the lienholders of and incidental to the proceedings and of registering and proving the liens;

(2) Six weeks' wages (if so much be owing) of all laborers employed by the owner, contractor, and sub-contractor;

(3) The several amounts owing for services rendered, work done (in excess of six weeks' wages), and material placed or furnished in respect of the works or improvements;

(4) The amounts owing the sub-contractor and other persons employed by the owner and contractor;

(5) The amount owing the contractor.

Each class of lienholders shall rank *pari passu* for their several amounts, and the portions of said moneys available for distribution shall be distributed among the lienholders *pro rata* according to their several classes and rights.

Any balance of said moneys remaining after all the above amounts have been distributed shall be payable to the owner or other person legally entitled thereto. 1910, c. 31, s. 36.

37. Mechanic's lien on chattels.—Every mechanic or other person who has bestowed money or skill and materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien upon such chattel or thing for the amount or value of the money, skill, or materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have power to sell the chattel in respect of which the lien exists, on giving two weeks' notice by advertisement in a newspaper published in the city, town, or county in which the work was done, or in case there is no newspaper published in such city, town, or county, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, the time and place of sale; and after such sale such mechanic or other person shall apply the proceeds of such sale in payment of the amount due to him, and the costs of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made to him there-

for, and a notice in writing of the result of the sale shall be left at or posted to the address of the owner at his last-known place of abode or business. 1910, c. 31, s. 37.

See chapter entitled "Mechanics' Liens on Personalty," ante.

38. Certain proceedings not to be deemed satisfaction or waiver of lien.—The taking of any security, or the acceptance or discounting of any promissory note, or cheque (which, on presentation, is dishonored), for the claim, or the taking of any other acknowledgment of the claim, or the taking of any proceedings for the recovery of the claim, or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice, or destroy any lien created by this Act, unless the lienholder agrees in writing that it shall have that effect: Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act, to obtain the benefit of this section, shall institute proceedings to enforce such lien within the time limited by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time: Provided further that notwithstanding such extension of time, such person may, where proceedings are instituted by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such suit or action as if no such extension had been given. 1910, c. 31, s. 38.

A lien lost by taking a promissory note is not revived upon dishonor thereof. *Edmonds* v. *Tiernan*, (1891) 2 B. C. R. 82, 21 Can. S. C. R. 406. See cases where this decision and the decisions in two Manitoba cases are distinguished or questioned. *Swanson* v. *Mollison*, 6 W. L. R. 678; *Clarke* v. *Moore*, (1908) 1 Alta. L. R. 49, 8 W. L. R. 405, 411; *Gorman* v. *Archibald*, (1908) 1 Alta. L. R. 524.

Where promissory notes had been received and discounted by the lienholder for the materials supplied, the lien was not thereby waived. *Coughlan* v. *National Construction Co.*, (1909) 14 B. C. R. 339. See particularly the judgment of Irving, J., at 350.

39. Judges of County Court to make rules of court.—The judges of the County Courts, or any two of them, may make gen-

eral rules and regulations, not inconsistent with this Act, for expediting and facilitating the business before such courts under this Act, and for the advancement of the interests of suitors therein. 1910, c. 31, s. 40.

Costs.

40. Limit of fees in money or stamps.—No fees in stamps or money shall be payable to any judge or other officer in any action brought to realize a lien under this Act, nor on any filing, order, record, or judgment, or other proceedings in such action, excepting that every person, other than a wage-earner, shall, on filing his statement of claim where he is a plaintiff, or on filing his claim where he is not a plaintiff, pay in stamps one dollar on every one hundred dollars, or fraction of one hundred dollars, of the amount of his claim up to one thousand dollars. 1910, c. 31, s. 41.

41. Limit of costs to plaintiff.—The costs of the action under this Act awarded by the judge or officer trying the action to the plaintiffs and successful lienholders, exclusive of the costs of any appeal, shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge or other officer who tries the action may direct. 1910, c. 31, s. 42.

42. Limit of costs to be awarded against plaintiff.—Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge or said other officer may direct. 1910, c. 31, s. 43.

43. Costs where least expensive course not taken.—In case the least expensive course is not taken by a plaintiff under this

Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken. 1910, c. 31, s. 44.

A loan company forcing lienholders to go to trial to establish their rights and priorities were ordered to pay the costs of the trial. *Palfrey* v. *Brown*, 31 W. L. R. 535.

44. Costs of vacating lien.—Where the lien is discharged or vacated under section 27 of this Act, or where in an action judgment is given in favor of or against a claim for a lien, in addition to the costs of an action, the judge or other officer may allow a reasonable sum for costs of drawing and registering the lien, or for vacating the registration of the lien. 1910, c. 31, s. 45.

45. Costs not otherwise provided for.—The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the judge or officer to whom the application or by whom the order is made. 1910, c. 31, s. 46.

SCHEDULES.

SCHEDULE A.

To

You are hereby notified that the undersigned will claim a lien under the "Mechanics' Lien Act" for the price of [*here give a general description of material*] delivered on or about the day of , 19 , or delivered within ten days prior to this date, and to be delivered hereafter, to be used in the works or improvements on your premises, situate [*description of the premises*], which said material was ordered by .

Amount due for material delivered to date, $.

Dated this day of , 19 .

1910, c. 31, Sch. A.

1799.

SCHEDULE B.

Pay Roll.

Name	Description	From 3rd Jan., 1910, to 10th Jan., 1910 (inclusive)				Amount paid.	Date of payment	Received payment in full.
		No. days employed	Rate per day	Total amount earned	Amount due for material delivered			
R. Roe...	.....	Six days	$3.50	$21.00	....	$21.00	10th Jan., 1910	R. Roe...
S. Doe...	.....	.....	.....	.....	$25.00	$25.00	10th Jan., 1910	S. Doe...

I hereby certify that the above statement is correct to the best of my knowledge and belief, and is made by me in compliance and in accordance with section 15 of the "Mechanics' Lien Act," on account of [my contract to or employment by, *as the case may be*], [*here insert brief description of the work*], *for* [*owner's name*], up to the day of , 19 .

(*Signed.*)

Contractor.

Dated this day of , 19 .

1914, c. 31, Sch. B.

SCHEDULE C.

In the Matter of the "Mechanics' Lien Act," and in the Matter of a lien claimed by

I, , of , British Columbia, make oath and say:—

1. That , of , claim a mechanic's lien against the property or interest hereinafter mentioned, whereof is owner.

2. That the particulars of the work done, services rendered, or material furnished are as follows:—

3. That the work, service or material was finished, discontinued, placed, or furnished, on or about the day of .

4. That the said was in the employment of , contractor for the work or service in respect of which the lien is claimed, for days after the above-mentioned date.

5. That the sum of dollars is owing to in respect of the same, and was, or will be, due on the day of .

6. That the description of the property to be charged is as follows:—

Sworn at , B.C., this day of , 19 , before me.

.....

1910, c. 31, Sch. C.

SCHEDULE D.

To the Registrar of the County Court of :

The undersigned hereby consents to an extension of time until the day of , 19 , for instituting proceedings under the "Mechanics' Lien Act" for work done and material placed or furnished by , amounting to dollars, in respect of works or improvements on my premises situate .

Dated this day of , 19 .

.....

1910, c. 31, Sch. D.

CHAPTER 40.

AN ACT TO AMEND THE "MECHANICS' LIEN ACT."

(*Assented to May* 19, 1917.)

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. Short title.—This Act may be cited as the "Mechanics' Lien Act Amendment Act, 1917."

2. Amends section 9.—Section 9 of the "Mechanics' Lien Act," being chapter 154 of the "Revised Statutes of British Columbia, 1911," is hereby amended by adding thereto the following provisoes:—

"Provided always that in connection with work done in or about any mine or mineral claim, notwithstanding anything to the contrary in this or any other Act contained, a laborer's lien as provided for in section 6 hereof to the extent of twenty-five days' wages as salary, whether the employment in respect of which the same is payable is by the day, by the week, by the job or piece, or otherwise, shall be absolute, and shall to such extent, but no further or otherwise, be prior to any mortgage or other encumbrance whatsoever;

"Provided further that the holder of any such mortgage or other encumbrance may, at his option, on default by the mortgagor or other encumbrancer, for a period of five days from the entry of the judgment establishing any such lien, to satisfy the same, pay the same, and may treat any money so paid as principal advanced on account of such mortgage or other encumbrance, and money so paid shall bear interest as from the date of such payment at the rate provided for on principal in such mortgage or other encumbrance."

The effect of this section making a laborer's lien for work done in or about a mine, etc., to the extent specified, "absolute" and prior to any mortgage, etc., is to exclude, in favor of such laborer and to the extent aforesaid, all the conditions which might otherwise have to be satisfied before a lien could be impressed upon certain interests in the property. *Isitt* v. *Merritt Collieries, Ltd.*, (1920) 1 W. W. R. 879. In deciding this case Swanson, Co.J., holds that the word "absolute" in this amendment means "unconditional."

THE MECHANICS' AND WAGE-EARNERS' LIEN ACT OF MANITOBA.

CHAPTER 125.

AN ACT RESPECTING LIENS OF MECHANICS, WAGE-EARNERS AND OTHERS.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

1. **Short title.**—This Act may be cited as "The Mechanics' and Wage Earners' Lien Act." R. S. M. c. 110, s. 1.

2. **Interpretation.**—In this Act, unless the context otherwise requires,—

(a) "**Contractor.**" — The expression "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or placing or furnishing of materials for any of the purposes mentioned in this Act;

(b) "**Sub-contractor.**" — The expression "sub-contractor" means a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor;

(c) "**Owner.**"—The expression "owner" extends to and includes any person, firm, association, body corporate or politic, including a municipal corporation, having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed

or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

(d) "**Person.**"—The expression "person" extends to and includes a body corporate or politic, a firm, partnership or association;

(e) "**Material.**"—The expression "material" includes every kind of moveable property;

(f) "**Registry Office.**"—The expression "registry office" includes a land titles office;

(g) "**Registrar.**"—The expression "registrar" includes a district registrar;

(h) "**Wages.**"—The expression "wages" means money earned by a mechanic or laborer for work done, whether by the day or as piece work;

(i) "**Judge.**"—The expression "judge" means a judge of the County Court of the judicial division in which the property affected by a lien is situated. R. S. M. c. 110, s. 2; 3 Geo. 5, c. 32, s. 8.

This section differs from the corresponding Ontario provision (section 2), by omitting "railway company" from the definition of owner.

A foreign unlicensed corporation is entitled to acquire a lien under this Act. See *Bank of Montreal* v. *Condon*, (1896) 11 Man. L. R. 366.

Defendant mortgagees claiming through the owner have no better right to dispute the lien, or to make any charge of bad faith, than the owner. *Brynjolfson* v. *Oddson*, (1916) 27 Man. L. R. 390.

One who furnishes gravel and the use of a number of teams by agreement with a contractor is a "sub-contractor" and not a wage-earner, though he uses the term "wages" in his claim for the purpose of computing the amount of it. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72.

ORIGIN AND NATURE OF LIENS.

3. Contracts not to deprive third party of lien.—No agreement shall be held to deprive anyone otherwise entitled to a lien under this Act, and not a party to the agreement, of the benefit of the lien; but the lien shall attach, notwithstanding such agreement. R. S. M. c. 110, s. 3.

See Ont. Act, section 5.

A contractor cannot bind any sub-contractor by any such agreement. *Anley* v. *Holy Trinity Church*, (1885) 2 Man. L. R. 248.

A lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed. *Sprague* v. *Besant*, (1885) 3 Man. L. R. 519. See Ont. Act, section 6 (e), "to be used." See also *Dominion Radiator* v. *Cann*, 27 N. S. R. 237.

4. Nature of lien.—Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of, any erection, building, land, wharf, pier, bulkhead, bridge, trestle-work, vault, mine, well, excavation, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed or way, or the appurtenances to any of them for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, sidewalk, paving, fountain, fishpond, drain, sewer, acqueduct, roadbed, way, and appurtenances thereto, and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the said work or service is performed, or upon which such materials are placed, or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner:

No lien for sum under $20.—Provided that no such lien shall exist under this Act for any claim under the sum of twenty dollars.

(3) Commencement of lien.—Such lien, upon registration as hereinafter provided, shall arise and take effect from the date of the commencement of such work or service, or from the placing of such materials, as against purchasers, charges or mortgagees under instruments, registered or unregistered. R. S. M. c. 110, s. 4.

This section omits the words "railway," "fence" and "fruit and ornamental trees," which are included in the Ontario section. See Ont. Act, section 6. Sub-section (a) is not in the Ontario Act, which omits also the limitation of liens to claims for twenty dollars and upwards.

A workman for a materialman is not entitled to a lien. *Allen* v. *Harrison*, 9 W. L. R. 198.

The lien arises and takes effect against the owner from the commencement of the work or service. *Merrick* v. *Campbell*, (1914) 24 Man. L. R. 446, 17 D. L. R. 415.

A contractor cannot enforce a lien for more than the amount actually due according to the contract. *Brydon* v. *Lutes*, (1891) 9 Man. 463; *McArthur* v. *Dewar*, (1885) 3 Man. 72.

Municipal buildings have in Manitoba been held to be subject to mechanics' liens. *McArthur* v. *Dewar*, (1885) 3 Man. 72; *McLennan and Winnipeg*, (1882) 3 Man. 74.

Proceedings were taken to enforce a mechanics' lien by levy, after winding-up order had been made. Held, that neither section 16 (now section 22) nor 17 (now 23) of the Winding-up Act could be invoked against proceedings. Sections 62 (now sections 76, 77, 78 and 79) and 66 (now 84), of that Act should be read together. The lien was not created by the proceedings but prior to that time; hence, section 66 (now 84) did not take it away. *Re Empire Brewing & Malting Co.*, (1891) 8 Man. 424. See *Re Good and Nepisiquit Lumber Co.*, (1911) 2 E. L. R. 252.

In *Moore* v. *Bradley*, (1887) 5 Man. 49, Dubuc, J., held that a public school building was not exempt from the operation of the mechanics' lien law, and while some decisions elsewhere are opposed to this view it is now the prevailing view in Canadian Courts. See Ontario Act, section 6 (h). An assignee of a mechanic is entitled to a lien and may make the affidavit necessary for registration. *Kelly* v. *McKenzie*, 1 Man. L. R. 169. See *McAllister* v. *Des Rochers*, 132 Mich. 381.

The plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and as to the

first job, if considered separately, his lien was not filed within the time required by the statute. It was held that, in such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient. *Carroll* v. *McVicar*, 15 Man. L. R. 379.

A sub-contractor is entitled to a lien even though the contractor under whom he claims has agreed with the owner that no workman shall be entitled to a lien. *Anly* v. *Holy Trinity Church*, (1885) 2 Man. 248. An assignee of the contract price for the erection of the building is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee. *Anly* v. *Holy Trinity Church*, 2 Man. L. R. 248.

As to lien of sub-contractor, see also *Wasdell* v. *White*, 4 W. L. R. 562; *McCauley* v. *Powell*, 7 W. L. R. 443.

In *Robock* v. *Peters*, (1900) 13 Man. 124, Killam, J., points out a difference in the phraseology of section 4 (a) and section 5 (b), and says: "The difference is probably inadvertent, but liens are purely statutory and must be strictly followed as in derogation of ordinary rights." See *Dunn* v. *Sedziak*, 17 Man. L. R. 484.

The claim of a lien-holder is a preferential claim under The Dominion Winding-up Act (R. S. C. c. 144). *Re Empire Brewing & Malting Co.*, (1891) 8 Man. 424.

Under a former Act it was held that a lien had no existence until it was registered. *Kievell* v. *Murray*, (1884) 2 Man. 209.

A lien for materials only arises where the goods are supplied for the purpose of being used in the particular building on which the lien is claimed. *Sprague* v. *Besant*, (1885) 3 Man. 519; but a materialman is not bound to show that his materials were used in the building; delivery upon the ground for the purpose of being used is sufficient. *McArthur* v. *Dewar*, (1885) 3 Man. L. R. 72. See also *Dominion Radiator Co.* v. *Cann*, (1904) 37 N. S. R. 237. See Ontario cases and references to this question in chapter entitled, "The Lien of the Materialman," *ante*.

The court has no jurisdiction to enforce a lien out of its territorial jurisdiction. *Chadwick* v. *Hunter*, (1884) 1 Man. 363.

A mechanics' lien registered against two lots owned by different persons, in respect to work done upon two houses, one on each of

the lots, on the order of one of the owners, and for an amount claimed to be due for work on both houses, without apportioning the same, cannot be enforced, nor can effect be given to the lien as against one of the lots only for the proper amount. *Fairclough* v. *Smith*, (1901) 13 Man. L. R. 509.

An agreement was made with plaintiffs to instal plumbing in two houses, one to be built on each lot. The work on A. was finished in July, and on B. in January following. While the plaintiffs were working on A. it was bought by H. who, 30 days after completion of plaintiffs' work on A. paid the defendant the full purchase price, having no notice of any lien. Plaintiffs subsequently registered a lien against both lots. Held, the contract was divisible, and that there was no lien against A. *Lee* v. *Hill*, 11 W. L. R. 611.

As to facts which would constitute separate sales of materials so as to require separate registrations, see *Stephens Paint Co.* v. *Cottingham*, (1916) 10 W. W. R. 627; *Chadwick* v. *Hunter*, 1 Man. L. R. 39.

This section prevents a waiver of the statute by the lien claimant except by an "express agreement." An estoppel *in pais* cannot prevent such lien. *United States Construction Co.* v. *Rat Portage Lumber Co., Ltd.*, (1915) 25 Man. L. R. 793; *Anderson* v. *Fort William Commercial Chambers, Ltd.*, (1915.) 25 D. L. R. 319. While the retention of title is not inconsistent with the statutory right to a mechanics' lien, if a lien claimant invokes the provisions of the Mechanics' Lien Act to enforce his claim for materials furnished for and erected in a building, he should be taken to have elected to make them a part of the building and realty against which he claims the lien and to be thereafter estopped from claiming that the materials are his property, and that he has a right to remove them. *United States Construction Company* v. *The Rat Portage Lumber Co.*, (1915) 25 Man. L. R. 793.

If the contractor agrees to assert no lien he will be bound by such agreement. *Brydon* v. *Lutes*, 9 Man. L. R. 463.

Where it is agreed that all bills shall be paid by cheque of the contractor (*Ritchie* v. *Grundy*, 7 Man. L. R. 532) or that the contractor shall satisfy all claims (*Anly* v. *Holy Trinity Church*, 2 Man. L. R. 248), or that the building shall be delivered free from liens, the contractor's right to a lien will not be defeated. See *Schmid* v. *Palm Garden Imp. Co.*, 162 Pa. 211.

Where payment under a building contract is conditioned on the completion of the work to the satisfaction of the engineer, and upon the strict compliance with all the provisions of the contract, the contractor cannot recover the contract price without asserting and proving strict compliance with all conditions precedent. *Merriam* v. *Public Parks Board*, (1912), 2 D. L. R. 702, following *Brydon* v. *Lutes*, 9 Man. L. R. 463. See also *Davidson* v. *Francis*, 14 Man. L. R. 141. There is no presumption that a husband is acting as his wife's agent. *Gillies* v. *Gibson*, (1907) 7 W. L. R. 243.

As to non-liability of company for contract made by promoters, see *Desrochers* v. *Crump*. (1911) 17 W. L. R. 47.

The lien comes into existence as soon as the work begins, or any materials are delivered. *McCauley* v. *Powell*, (1908) 7 W. L. R. 443.

As to construction of word "claim," see *Phelan* v. *Franklin*, (1905) 2 W. L. R. 29.

Although the lien may be registered before commencing or during the progress of the work, an action thereon cannot be begun before completion of the contract. *Curtis* v. *Richardson*, (1909) 18 Man. L. R. 519.

The defendant H. agreed to build a house for the defendant W. for $4,860.75. The plaintiffs supplied lumber to H. for the building, and after they had delivered $1,075.68 worth of material on the premises and had not been paid anything for it, they saw W. and made an arrangement with him, the terms of which were in dispute between them. It was held, upon the evidence, that W. did not undertake to pay the plaintiff for the deliveries then already made, but entered into a new agreement with the plaintiffs, whereby he agreed to take, on his own account, and pay for, the lumber he yet required.

The plaintiffs having contended, as part of their case, that H. was released by themselves and W. from all liability to them, did not ask for judgment against H. It was held that the action should be dismissed as against H., but without costs. The plaintiffs did not press for judgment against the defendant company, mortgagees from W., and as against the company the action was also dismissed without costs. As against W., the plaintiffs were held entitled to judgment for the full price of the goods supplied by them after the new arrangement, and (by way of enforcing their mechanics' lien) for a proportion of the price of the goods supplied before that

arrangement, equal to 20 per cent. of the proportion which the value of the work executed and materials delivered at the time bore to the contract price. *Rat Portage Lumber Co.* v. *Hewitt*, (1912) 22 W. L. R. 249, 6 D. L. R. 871.

If at the time of the abandonment by a contractor of his building contract, there is, by the terms of it, nothing payable to him by the owner, a sub-contractor, whether for work or materials, can have no lien upon the property, for anything due him by the contractor. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72; (1917) 1 W. W. R. 4.

One lien may be filed against two houses owned by two persons together, though they afterwards divide the houses between them. *Polson* v. *Thomson*, (1917) 26 Man. L. R. 410.

When the owner of a number of lots in one locality makes a general arrangement with a materialman for the supply on credit of such materials as he deals in for all the houses to be built by him upon the different lots, and, in pursuance of such arrangement, the materialman delivers such materials as are ordered by such owner on the lots or at such place in the vicinity as are designated by the owner, for the purpose of their being used in construction of houses on said lots, he is entitled to file one lien against all the lots for the cost of all such materials so delivered. *Polson* v. *Thomson*, (1917) 26 Man. L. R. 410.

The Act does not authorize the registration of one lien for one lump sum against the lands of different owners, although the work may have been done or the materials furnished under one contract for the building of houses on the lands of the different owners, unless, perhaps, in a case where the lien claimant did not know and had no means of ascertaining before filing his lien, that the lands were owned by different persons. *Builders Supply Co.* v. *Huddlestone*, 25 Man. L. R. 718.

5. Property upon which lien shall attach.—The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed or roadway, and the appurtenances thereto, upon or in respect of which the work or service is performed or the materials are placed or furnished to be used, and the lands occupied thereby or enjoyed therewith.

(2) **Where estate charged is leasehold.**—In cases where the estate or interest charged by the lien is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to said lien, provided such consent is testified by the signature of such owner upon the claim of the lien at the time of the registering thereof, and duly verified.

(3) **Mortgaged land.**—If the land upon or in respect of which the work is done, or materials or machinery are placed, be encumbered by a mortgage or other charge existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge shall have priority over a lien under this Act to the extent of the actual value of such land at the time the improvements were commenced. R. S. M. c. 110, s. 5.

Compare Ontario Act, section 8 (1), and see cases thereunder. See *Flack* v. *Jeffrey*, (1895) 10 Man. 514; and *In re Empire Brewing & Malting Co.*, (1891) 8 Man. 424.

The lien attaches from the placing of the materials. *Robock* v. *Peters*, (1900) 13 Man. 124. See statement of this case under section 20, *post*.

It is probable that though the contract is never carried out the lienholder may assert his lien upon the increase in value against the vendor as if the relationship had been that of mortgagor and mortgagee. *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227.

In determining the value of a parcel of land upon which stands a portion of a house which has been, by mistake, built partly upon the parcel in question and partly on an adjoining lot owned by another person, for the purpose of adjudicating upon the respective rights of a mortgagee and a lienholder, no regard can be had to the fact that such other person would, if applied to, have consented to the removal of the house off his lot, and the priority of a mortgage on the lot in question over the lien of a workman subsequently arising, for the cost of removing the house so as to place it wholly on the parcel in question, is limited to the actual value of such parcel with the part of the house upon it at the time he began the work, which value must be ascertained without reference to the subsequent removal.

Rule 603 of the King's Bench Act affords no relief to the mortgagee in such a case or any foundation for a contention that the value should be ascertained by deducting the cost of removal from the value after removal. *Jack* v. *McKissock*, (1917) 27 Man. L. R. 548.

Prior encumbrancers have priority over the mechanics' liens only to the extent of the actual value of the premises at the time the improvements are made, and the lienholders have priority as to the increase in value effected by the improvements; the rights of the latter cannot be worked out in an action for the foreclosure of a vendor's lien or mortgage, but can only be given effect to in an action brought to enforce their liens. *Dure* v. *Reed*, (1917) 27 Man. L. R. 417, (1917) 1 W. W. R. 1395, 34 D. L. R. 38.

When the plaintiff in an action to realize upon a mechanics' lien intends to dispute the right of a prior mortgagee to priority for more than the actual value of the land at the time the improvements were commenced, being the limit of such priority imposed by sub-section (3) of this section, it is not necessary to make the mortgagee a party to the action in the first place, but the notice of trial may, under section 35, be served upon the mortgagee and the question of priority, and for what amount may be determined at the trial under section 37. *Dominion Lumber & Fuel Co.* v. *Paskov*, 29 Man. L. R. 325, (1919) 1 W. W. R. 657.

6. Application of insurance when lien attaches.—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire, any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in sub-section (3) of the last preceding section, be subject to the claims of all persons for liens to the same extent as if such moneys were realized by a sale of such property in an action to enforce a lien. R. S. M. c. 110, s. 6.

See Ont. Act, section 9, to the same effect.

7. Limit of amount of lien.—Save as herein provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. R. S. M. c. 110, s. 7.

See Ont. Act, section 10, to the same effect.

The contractor cannot by release or assignment of his rights under his contract with the owner, defeat the registered lien of a sub-contractor claiming under him. *Anly* v. *Holy Trinity Church*, (1885) 3 Man. L. R. 193, decided under a former Act, is no longer applicable, in view of the present section 4 (2).

If at the time of the abandonment by a contractor of his building contract, there is by the terms of it, nothing payable to him by the owner, a sub-contractor, whether for work or materials, can have no lien upon the property for anything due him by the contractor, nor can he have any right to share in the percentage of the contract price or value of the work actually done by the contractor up to that time held back by the owner pursuant to section 9, *post*. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72.

When the contractor has fulfilled his contract, the contract-price if not paid in cash is "owing" to the contractor, although in connection with some other transaction there was an old balance due by the contractor to the owner. *Bennett* v. *Devitt*, (1915) 25 Man. L. R. 491.

8. Limit of lien when claimed by some person other than contractor.—Save as herein provided, where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished. R. S. M. c. 110, s. 8.

See Ont. Act, section 11, to the same effect. See *Black* v. *Wiebe*, (1905) 1 W. L. R. 75; reported fully under section 12, *post*.

9. Percentage to be deducted and retained by owner.—In all cases the person primarily liable upon any contract or by virtue of which a lien may arise under the provisions of this Act shall, as the work is done or materials are furnished under any contract, deduct from any payments to be made by him in respect of such contract, and retain for a period of thirty days after the completion or abandonment of the contract, twenty per cent. of the value of the work, service and materials actually done, placed or furnished, as defined by section 4 of this Act, and such value shall be calculated on the basis of the price to be paid for the whole contract:

Provided that, when any contract exceeds fifteen thousand dollars, the amount to be retained shall be fifteen per cent., instead of twenty per cent.

(2) The liens created by this Act shall be a charge upon the amounts directed to be retained by this section, in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(3) All payments, up to eighty per cent. (or eighty-five per cent. where the contract price exceeds fifteen thousand dollars) of such value, made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of such lien given by the person claiming the lien to the owner, contractor or sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

(4) Payment of the percentage required to be retained under this section may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned herein, unless in the meantime proceedings have commenced under this Act to enforce any lien or charge against such percentage as provided by section 21 of this Act. R. S. M. c. 110, s. 9.

Under this section a person who has delivered materials to the contractor loses his lien therefor, as against the 20 per cent. of the contract price to be held back by the owner from the contractor, unless he registers his lien within 30 days after the abandonment of the contract, if he had not supplied any materials to the contractor after such abandonment, though he was not notified of it, and a delivery of some materials for use in the building to the owner after such abandonment, in exchange for some of the materials formerly supplied to the contractor, will not have the effect of extending the time for registering the lien for the materials supplied to the contractor. *Brown* v. *Dunhill*, 25 Man. L. R. 546.

The owner of a building in course of erection, when the contract price exceeds $15,000, being required by this section to keep back fifteen per cent. of the amounts from time to time earned

by the contractor and retain such percentages until thirty days after the completion or abandonment of the contract for the benefit of sub-contractors who may become entitled to file liens, must reserve such percentages at his peril, and cannot afterwards, in an action by a person who has supplied materials, deduct therefrom any payment he may have made under section 10 for wages or materials in order to prevent the filing of liens therefor, as section 10 at the end says in effect that payments made under it are not to "affect the percentage to be retained by the owner as provided by" section 9. *McArthur* v. *Martinson*, 16 Man. L. R. 387.

As to liability to sub-contractor of owner who fails to retain percentage, see *Carroll* v. *McVicar*, 15 Man. L. R. 379.

After bill filed and *lis pendens* registered another lienholder filed a bill and obtained decree first. The latter claimed to have his costs added to his lien. The application was refused. Section 24, *post*, qualifies this section. *Henry* v. *Bowes*, (1883) 3 C. L. T. 606.

See *Smith Co.* v. *Sissiboo Co.*, 36 N. S. R. 348. On appeal in this case (1904) 35 S. C. R. 93, Nesbitt, J., said in referring to section 8 of the Nova Scotia Act, which is similar to section 9 of the Manitoba Act: "The only ground upon which the plaintiffs can hope to maintain a lien as against the defendant company would be that section 8 of the Act applies, but we think that that section does not by its terms apply to a case where there was no price specified or capable of being ascertained, for the erection of the building, but the contract price of the building was blended with considerations for other matters from which it could not be separated."

As to retention of percentages, see *Carroll* v. *McVicar*, (1905) 2 W. L. R. 25; 41 C. L. J. 668; *Phelan* v. *Franklin*, (1905) 2 W. L. R. 29.

If at the time of the abandonment by a contractor of his building contract there is, by the terms of it, nothing payable to him by the owner, a sub-contractor, whether for work or materials, can have no lien upon the property for anything due him by the contractor, nor can he have any right to share in the percentage of the contract price or value of the work actually done by the contractor up to that time held back by the owner pursuant to this section. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72.

The value of the work upon which, to the extent of eighty per

cent. the owner may pay the contractor prior to receiving written notice of a sub-contractor's lien claim, is, in case of abandonment of the work while uncompleted by the principal contractor, the value of the work actually done and material furnished up to the date of abandonment, but such value is to be calculated on the basis of the price to be paid for the whole contract. *Merrick* v. *Campbell*, (1914) 24 Man. L. R. 446, 17 D. L. R. 415.

The period of thirty days during which the owner is to retain twenty per cent. of the value from his contractor for the protection of other lienholders is to be computed from the completion or abandonment of the contract by the principal contractor, but the expiry of such period does not relieve the owner from his obligation to protect the interests of a sub-contractor of whose right to register a lien the owner has notice; and such obligation is enforceable by a sub-contractor who was enabled to file his lien more than thirty days after the abandonment of the work by the principal contractor by having been permitted by the owner thereafter to go on and complete the sub-contract, and who had filed his lien within 30 days of completing his own work. *Merrick* v. *Campbell*, (1914) 24 Man. L. R. 446, 17 D. L. R. 415.

10. Payment made in good faith without notice of lien.—If an owner or contractor chooses to make payments to any persons referred to in section 4 of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned, and within three days afterwards gives, by letter or otherwise, to the contractor or his agent, or to the sub-contractor or his agent, as the case may be, written notice of such payments, such payments shall as between the owner and the contractor or as between the contractor and the sub-contractor, as the case may be, be deemed to be payments to the contractor or sub-contractor, as the case may be, on his contract generally, but not so as to affect the percentage to be retained by the owner, as provided by the last preceding section. R. S. M. c. 110, s. 10.

See Ont. Act, section 13, to the same effect.

See *McArthur* v. *Martinson*, 16 Man. L. R. 387, noted under section 9, *supra*.

Notice in writing to the owner by the sub-contractor giving the particulars of the sub-contract and stating that the owner will be held liable therefor is sufficient as a notice in writing of the lien, and payments thereafter made by the owner to the principal contractor, even within the statutory eighty per cent., are not protected as against the sub-contractor's lien. *Merrick* v. *Campbell*, (1914) 24 Man. L. R. 446, 17 D. L. R. 415.

11. Priority of lien.—The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders, recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided.

(2) **Agreements for purchase, part of purchase money unpaid.**—In case of an agreement for the purchase of land, and the purchase money or part thereof being unpaid and no conveyance made to the purchaser, the purchaser shall, for the purposes of this Act and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee.

(3) **Priority among lienholders.**—Excepting where it is otherwise declared by this Act, no person entitled to a lien on any property or to a charge on any moneys under this Act shall be entitled to any priority or preference over another person of the same class entitled to a lien or charge on such property or moneys under this Act, and each class of lienholders, except where it is otherwise declared by this Act, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject, as aforesaid, be distributed among the lienholders *pro rata*, according to their several classes and rights. R. S. M. c. 110, s. 11.

See Ont. Act, section 14, to the same effect.

See also *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227, 22 C. L. T. 357; *Rat Portage Lumber Co.* v. *Hewitt*, (1912) 22 W. L. R. 249, 6 D. L. R. 871.

The Act does not authorize the registration of one lien for one lump sum against the land of different owners, although the work may have been done or the materials furnished under one contract for the building of houses on the lands of the different owners, unless, perhaps, in a case where the lien claimant did not know and had no means of ascertaining before filing his lien, that the lands were owned by different persons. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718.

The representatives of the creditors of a building contractor who contracts with the owner to take over, as the nominee of the contractor, the work of completing the contract, and obtains from the owner a stipulation whereby all moneys earned or to be earned under the contract were to become payable to such representative in the place of the original contractor, is entitled to file a mechanics' lien for the amount due on completion of the work in like manner as would the original contractor, notwithstanding that there was no express assignment in writing of the right to such lien from the latter. *Alsip* v. *Monkman*, (1913) 22 Man. L. R. 779, 9 D. L. R. 97.

The nominee of the contractor's creditors who by agreement with the owner takes over the unfinished contract and completes the same on the contractor's default, with a stipulation that he shall be entitled to the same amount as would be coming to such contractor had he himself completed the work, will not be held in an action brought by him to enforce a lien, to a strict compliance with a clause of the original contract requiring the contractor, before action brought, to supply evidence that no other undischarged liens than his own remain a charge on the property, if in fact there were no such liens and the owner raising such objection had knowledge that the creditors other than the plaintiff had agreed with the latter not to file mechanics' liens. *Alsip* v. *Monkman*, (1913) 22 Man. L. R. 779.

12. **Priority of lien for wages.**—Every mechanic or laborer whose lien is for work done for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price directed by section 9 of this Act to be retained, to

which the contractor or sub-contractor through whom such lien is derived is entitled, and all such mechanics and laborers shall rank *pari passu* on said twenty per cent. or fifteen per cent., as the case may be.

(2) **Enforcing lien when contract not fulfilled.**—Every wage-earner shall be entitled to enforce a lien in respect of a contract not completely fulfilled.

(3) **Calculating percentage in such case.**—If the contract has not been completely fulfilled when the lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage-earners are employed.

(4) **Percentage not to be otherwise applied.**—Where the contractor or sub-contractor makes default in completing his contract the percentage aforesaid shall not, as against a wage-earner claiming lien under this Act, be applied to the completion of the contract or for any other purpose by the owner or contractor, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor.

(5) **Devices to defeat priority of wage earners.**—Every device by an owner, contractor or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall, as respects such wage-earners, be null and void. R. S. M. c. 110, s. 12.

See Ont. Act, section 15, and section 2 (7).

Defendant agreed to purchase land from D. & McC., price to be paid 15th August, 1901. In default D. & McC. could either cancel agreement forfeiting any payments made, or re-sell and recover any deficiency from defendant. Defendant made improvements on land and employed plaintiff as a carpenter. Plaintiff claims lien for wages. No part of purchase money was paid. Work went on after 15th August with concurrence of D. & McC.

Held, that parties must be regarded as mortgagor and mortgagee. D. & McC. having granted extension could not cancel without giving more time, hence agreement was still subsisting when plaintiff did the work. Plaintiff was entitled to the lien, subject to charge of D. & McC. for unpaid purchase money and interest. *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227, 22 C. L. T. 337.

In *Black* v. *Wiebe*, (1905) 1 W. L. R. 75, the facts were as follows: The defendants, Wiebe and Jardine, entered into an agreement with the defendant, Kate Hubert, to erect for her a house on land belonging to her on S. Avenue, Winnipeg. The agreement under which the work was to be done was contained in a written contract, to which the plans and specifications of the building were attached, forming a part of the agreement. The contract price was $2,600, payable $30 on the execution of the contract, $470 when the roof was covered in, $1,500 "on or before the completion of the building," and the balance as should be arranged between the parties. The $1,500 was to be raised by a loan on the premises, the contractor to receive an order for the proceeds of the loan. The plaintiff supplied the lumber for the erection of the house and also for the erection of a barn upon the same lot. The lumber was supplied upon the order of the contractors and pursuant to an arrangement made between them and the plaintiffs. The house was never fully completed, but when partially finished was occupied by Mrs. Hubert. The specifications were departed from in certain particulars with the assent, as was alleged, of the proprietress. The quality of the work and material was not in accordance with the contract. Although it was alleged that a stone foundation had been put in as an extra, the evidence showed that the building as it stood was, owing to defects, not worth more than $2,000. A mortgage for $1,000 was placed on the property and the proceeds applied on the contract. The plaintiffs received a portion of these proceeds, and the balance remaining unpaid was $321.66. Part of the lumber supplied went into the construction of the barn. The plaintiffs' lien did not include the barn, but only referred to material used in the erection of the house. The value of the lumber used for the barn was $100, leaving $221.66 as the amount proved by the plaintiffs under the lien. Several other liens were filed by other parties.

Perdue, J., having stated the above facts in his judgment, said:—

"It is urged on behalf of the owner that as the house has never been completed there is nothing due to the contractors, and that sub-contractors are, under section 8 of the Mechanics' and Wage-Earners' Lien Act, limited to the amount owing to the contractors. Section 12 of the Act introduces special provisions for the protection of wage-earners and provides for the enforcement of the lien in their favor in respect to a contract not completely fulfilled. It also provides that in such cases the wage-earners may enforce their liens against the percentage required to be retained by the proprietor, and this percentage was, in the case of a contract not completely fulfilled, to be calculated on the work done or materials furnished by the contractor. The insertion in the Act of the provisions contained in section 12 shows that the protection extended to the lienholder of giving him a right to enforce his lien derived through a contractor, where the contractor has not fulfilled the contract, is limited to claims for wages. Where, however, the money is payable under a contract by instalments as the work progresses, the general lienholders may enforce their liens to the extent of the instalments earned in so far as the same remain unpaid in the hands of the proprietor. *Brydon* v. *Lutes*, (1891) 9 Man. 463.

It was urged on behalf of the plaintiffs that the owner had accepted the work by occupying the house and by mortgaging the same. It is clear that the mortgage was in pursuance of a term in the contract in order to raise money to pay the contractors, and that this was done during the progress of the construction. The giving of the mortgage could not, therefore, be taken as an acceptance of the whole work. There is a wide difference between the receiving and retaining of a chattel and the occupation of a building erected upon the land of the occupant, in respect of the inference of acceptance from the act of the party. This has been clearly pointed out in *Pattison* v. *Luckley*, L. R. 10 Ex. 330; *Sumpter* v. *Hedges*, (1898) 1 Q. B. 673, and other cases. The building, although incomplete and unsatisfactory, is upon the owner's land and is, perhaps, partly paid for. The owner may, although protesting against its incomplete or unsatisfactory state, be compelled to use and occupy it, unless he abandoned his land until the dispute is settled. Occupation under these conditions should not be construed as an acceptance. The contract in the case provided that $30 should be paid on execution of the instru-

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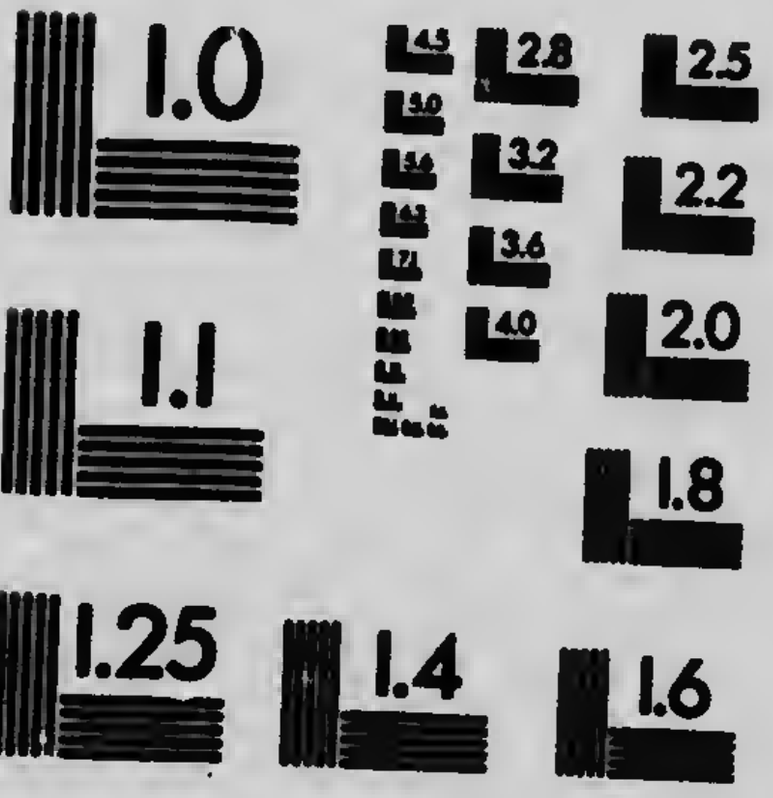

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ment, and this payment has been made. A second payment of $470 was to be made when the roof was covered in. This payment became due and the contractors received on account of it the equivalent of $200, leaving the sum of $270 still due and available for lienholders. The proceeds of the mortgage were not applicable on this, but on the $1,500, under the terms of the contract. The further sum of $1,500 was payable 'on or before the completion of the building.' As the owner had the option of paying this sum either before the completion of the building or upon its completion, it is manifest that she is not legally compellable to pay the amount until the longer period had elapsed, and that payment cannot be enforced until the building has been completed."

For other cases, showing that mere occupation of the house does not constitute acceptance, see citations under s. 6 of the Ontario Act.

Although at the time of the abandonment by a contractor of his building contract there is, by the terms of it, nothing payable to him by the owner, a wage-earner may, nevertheless, have a lien upon the percentage held back by the owner pursuant to section 9, *ante*, and a right to preferential payment, under sub-sec. 2, of the above section. *Wilks* v. *Leduc*, (1916) 27 Man. L. R. 72.

13. Attempting to remove material affected by lien.—During the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien, and any attempt at such removal may be restrained on application to a judge.

(2) **Costs.**—The judge to whom any such application is made may make such order as to the costs of and incidental to the application and order as he deems just.

(3) **Goods furnished for certain purposes not to be subject to execution.**—When any material is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 4 of this Act, the same shall be subject to a lien in favor of the person supplying the same until put in the building, erection or work. R. S. M. c. 110, s. 13; 3 Geo. V., c. 32, ss. 2, 3.

See Ont. Act, section 16, to the same effect as this section, with the exception of (*b*), which contains a substantial variation.

Registration of Lien.

14. Where lien to be registered.—A claim for lien may be registered in the land titles office in which instruments or dealings affecting the lands affected or proposed to be affected thereby are to be registered, if such lands have been brought, or if application has been made to bring them, under the operation of "The Real Property Act;" and if the lands have not been so brought nor application made therefor, then such statement shall be registered in the registry office or land titles office for the registration district or land titles district in which such lands are situate. If the lands be partly under the operation of the said Act and partly not, each portion shall be affected only by registration in the proper office. R. S. M. c. 110, s. 14.

See Ont. Act, section 17, to the same effect.

15. A claim for lien shall state,—

(a) **Contents of claim.**—The name and residence of the person claiming the lien and of the owner of the property to be charged (or of the person whom the person claiming the lien, or his agent, believes to be the owner of the property to be charged) and of the person for whom and upon whose credit the work (or service) is done, or the materials are furnished or placed, and the time or period within which the same was, or was to be, done or furnished or placed;

(b) a short description of the work (or service) done, or the materials furnished or placed, or to be furnished or placed;

(c) the sum claimed as due or to become due;

(d) a description of the land to be charged, sufficient for the purpose of registration;

(e) the date of expiry of the period of credit (if any) agreed by the lienholder for payment for his work (or service) or materials, where credit has been given.

(2) **Form of claim.**—The claim may be in one of the forms given in Schedule A to this Act, and shall be verified by the affi-

davit of the person claiming the lien or of his agent or assignee having a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge. R. S. M. c. 110, s. 15.

See Ont. Act, section 17 (a), to the same effect, except that clause (3) of that Act, providing for the registration of liens against railway companies, is omitted here.

The affidavit verifying the claim may be sworn before the claimant's solicitor. *Polson* v. *Thompson,* (1917) 26 Man. L. R. 410.

The claim need not give details of the work and materials. See Form No. 1 in the Schedule, and *Irwin* v. *Beynon,* (1886) 4 Man. 10.

"Objection is taken to the description of the residence of the claimant, which should state in what part of the town of Minnedosa he resides, but I hold that when he describes himself as of the town of Minnedosa, it is quite sufficient." *Irwin* v. *Beynon, supra, per* Dubuc, J.

"It is also argued that the statement of claim does not sufficiently state who is the reputed owner, and also the person for whom the work was done. The statement of claim registered states that the plaintiff claims a lien upon the estate of G. W. Beynon, barrister-at-law. I think this is sufficient and it is also in accordance with the form given in the Ontario statute." *Irwin* v. *Beynon, supra, per* Dubuc, J.

In *Flack* v. *Jeffrey,* (1895) 10 Man. 514, the lien as filed stated that the work was commenced on a specified day and that it was finished "on or before" a certain other day. Held, following *Truax* v. *Dixon,* 17 O. R. 356, and in view of the Manitoba Interpretation Act, that the statement was sufficient. See *Kelly* v. *McKenzie,* (1884) 1 Man. 169.

It is sufficient if the claim states the name of the person whom the claimant believes to be the "owner" of the property. *Polson* v. *Thomson,* (1917) 26 Man. L. R. 410.

16. What may be included in claim.—A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein,

but where more than one lien is included in one claim eacl. lien shall be verified by affidavit as provided in the last preceding section. R. S. M. c. 110, s. 16.

See Ont. Act, section 18, to the same effect. See also *Fairclough* v. *Smith*, (1901) 13 Man. 509, cited with the cases under section 6 of the Ontario Act.

17. Claims not to be invalidated for informality.—A substantial compliance only with the two last preceding sections shall be required, and no lien shall be invalidated by reason of failure to comply with any of the requisites of the said sections, unless in the opinion of a judge the owner, contractor or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) **Liens must be registered.**—Nothing in this section contained shall be construed as dispensing with registration of the lien required by this Act. R. S. M. c. 110, s. 17; 3 Geo. V., c. 32, s. 4.

See Ont. Act, section 19 to the same effect.

In *Robock* v. *Peters*, (1900) 13 Man. 124, the facts in which are stated under section 20, *post*, it was held that although "S.'s" claim was from 1st August to 27th October, he might claim for work done prior to 1st August unless some one were prejudiced and that the onus was on the person to show his being prejudiced.

A substantial compliance with the terms of the statute as to the prescribed form of lien is sufficient to enable the lien to attach. *Flack* v. *Jeffrey*, 10 Man. L. R. 514. See *Scratch* v. *Anderson*, (1909) 2 Alta L. R. 109; *Limoges* v. *Scratch*, (1910) 44 Can. S. C. R. 86.

It is not a fatal objection to a lien that it was registered against too much land, if there were no fraudulent intent and no one is prejudiced or injured thereby. *Polson* v. *Thomson*, (1917) 26 Man. L. R. 410.

18. Lien to be registered as an encumbrance.—The registrar, upon payment of his fee, shall register the claim, so that the same may appear as an encumbrance against the land therein described.

(2) **Fee for registration.**—The fee for registration of a claim of lien for wages shall be twenty-five cents. R. S. M. c. 110, s. 18.

See Ont. Act, section 20, to the same effect.

19. Person registering a purchaser pro tanto.—Where a claim for lien is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of "The Registry Act"; but, except as herein otherwise provided, "The Registry Act" shall not apply to any lien arising under this Act. R. S. M. c. 110, s. 19.

See Ont. Act, section 21, to the same effect.

20. Claims for liens, when to be registered.—A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or within thirty days after the completion thereof.

(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished or placed.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last day's work for which the lien is claimed. R. S. M. c. 110, s. 20.

See Ont. Act, section 22, to the same effect.

"Completion" means "substantial completion." See *Kelly* v. *McKenzie*, (1884) 1 Man. 169; *McLennan* v. *Winnipeg*, (1882) 3 Man. 474; *Irwin* v. *Beynon*, (1886) 4 Man. 10. See also notes under section 22, Ont. Act.

The plaintiff quit work on an elevator, it being understood that he should return and finish his contract when the elevator was far enough advanced to allow him to test the machinery which he had placed in it. When the plaintiff's men returned

to finish the contract they were stopped by the company. Then the plaintiff registered a mechanics' lien within thirty days from the attempt to finish his contract, but more than thirty days after his last work had been done on the elevator. It was held, upon the evidence, that the lien was registered in time and could be enforced. It was held, upon appeal, that the time limited for the registration of claims for liens by section 20 does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder. *Day* v. *Crown Grain Co.*, (1907) 39 Can. S. C. R. 258. See *Whimster* v. *Crow's Nest Pass Coal Co.*, (1910) 13 W. L. R. 621.

In *Chadwick* v. *Hunter*, (1884) 1 Man. 39, it was decided that where materials are supplied as required from time to time during the progress of the work, not under a contract covering the whole supply, each sale is a separate transaction and requires separate registration. But see *Robock* v. *Peters*, (1900) 13 Man. 124, in which this case is distinguished, and *Morris* v. *Tharle*, (1893) 24 O. R. 159, followed, and *Kelly* v. *McKenzie*, *supra*, held not applicable. In *Robock* v. *Peters*, *supra*, the facts were as follows: In 1899 defendant bought land and paid part of purchase money. There was no conveyance. He made a contract with plaintiff to build a hotel and stable. Work began in July and finished on 5th of September. The lien was registered on the 22nd of September, and a certificate of *lis pendens* on the 2nd of November. There was no defence. Appointment and trial duly fixed. "S." consented to supply materials on credit and did so from time to time as they were ordered between 16th of June and 27th of October. Defendant occupied the hotel from July and the work went on until after the 27th of October. "S." registered lien on the 25th of November and certificate of *lis pendens* on the 20th of January, 1900. Defendant obtained loan of $300 on the 5th of August, 1899, and took mortgage for $435. A deed to defendant was executed on the 18th of October when remaining $135 was advanced by "B." "B.'s" mortgage was registered on the 7th of November, 1899. Defendant mortgaged to loan company on the 3rd of October for $900. Registration of mortgage 20th of October, 1899. There was due on that mortgage only $22.75, for solicitor's fees. Defendant mortgaged to S. & D. to secure claims, dated 17th November, incumbrance registered 18th

November, 1899. Defendant conveyed to "W." on 30th January 1900, registered 1st February, 1900. All these parties were brought in by notice of trial and appeared by counsel.

Held, under sections 20 (2), 21, 28, 31, 32, 27 (1) and (2), that "S.'s" claim could be realized in this action, although he was not a party to it, and there was no binding contract to deliver the materials, the several orders being so linked together as to constitute one cause of action. The time ran from the supply of the last materials.

Also, that incumbrancers other than lienholders might be dealt with in this action. *Bank of Montreal* v. *Haffner*, (1884) 10 A. R. 592, and *McVean* v. *Tiffin*, (1885) 13 A. R. 1, modified by section 23 of Ontario Act. If the work is done in good faith, and in order to complete the building, and not colorably to revive the lien, the time begins to run from the completion of such work and from delivery of the last materials supplied in performing it. *Steinman* v. *Koscuk*, (1906) 4 W. L. R. 514.

The plaintiff's right to a lien depended on whether they were entitled to reckon the thirty days after the completion of their contract, from the doing of a small job of pointing some stonework at the request of the owner more than thirty days after the completion of all the rest of the work. It was held that they were so entitled. *Brynjolfsen* v. *Oddsen*, (1916) 27 Man. L. R. 390.

When materials are delivered to a contractor under one contract covering them all, the time for filing the lien for all runs from the last delivery and it is not necessary to file separate liens for each lot delivered. *Polson* v. *Thomson*, (1917) 26 Man. L. R. 410.

Under this provision enabling claim for liens by contractors or sub-contractors to be registered within thirty days after the completion of "the contract," a sub-contractor is to register his lien within thirty days after the completion of his contract with the principal or superior contractor. *Merrick* v. *Campbell*, (1914) 24 Man. L. R. 446, 17 D. L. R. 415.

Determination of Lien.

21. Liens to cease if not registered within time fixed by Act.—Every lien which is not duly registered under the provisions of this Act shall absolutely cease to exist on the expiration of the

time hereinbefore limited for the registration thereof. R. S. M. c. 110, s. 21; 3 Geo. V., c. 32, s. 11.

See Ont. Act, section 23, to the same effect.

See *Davidson* v. *Campbell*, (1888) 5 Man. L. R. 250, referred to under section 23 of the Ontario Act.

Under a former Act the lien had no existence until registered (*Kievell* v. *Murray*, (1884) 2 Man. 209.

22. When lien to cease if registered and not proceeded upon.—Every lien which has been duly registered under the provisions of this Act shall absolutely cease to exist after the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where such period is mentioned in the claim of lien registered, unless in the meantime an action is commenced, to realize the claim under the provisions of this Act or an action is commenced in which the claim may be realized under the provisions of this Act, and a certificate of *lis pendens* in respect thereof, issued from the court in which the action is brought, according to form No. 5 in the schedule hereto, is registered in the proper registry office, or land titles office. R. S. M. c. 110, s. 22; 7-8 Ed. VII., c. 28, s. 2.

A certificate that some title or interest in the land is called in question, without any reference to a mechanics' lien, is not a sufficient compliance with the Act. *Curtis* v. *Richardson*, (1909) 18 Man. L. R. 519.

See Ont. Act, section 24 (1), to the same effect.

An action to realize the lien, commenced in a judicial division other than that in which the property affected is situated, though within the ninety days, cannot be transferred to the County Court of the proper judicial division under sections 73 and 74 of the "County Courts Act" so as to confer upon it any jurisdiction to proceed with the realization of the lien. *Meunier* v. *Hinman*, (1916) 27 Man. L. R. 70.

A claim, under this section, cannot be "realized" unless the person who is the registered owner of the land at the time of the commencement of the action is made a party to it, or unless there

is some other action pending, to which such owner is a party, in which the claim may be "realized," and, in such case, although the lien has been duly registered within the time required by the Act, it absolutely ceases to exist unless some action to which the registered owner is a party has been commenced under the provisions of the Act, within the period of 90 days prescribed by the Act. *Abramovitch* v. *Vrondressi*, (1913) 23 Man. L. R. 383, 11 D. L. R. 352.

Transmission of Lien.

23. Death of lienholder.—In the event of the death of a lienholder his right of lien shall pass to his personal representatives; and the right of a lienholder may be assigned by any instrument in writing. R. S. M. c. 110. s. 23.

See Ont. Act, section 26, to the same effect.

Discharge of Lien.

24. Discharge of lien.—A lien may be discharged by a receipt signed by the claimant or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered, the fees for such registration being the same as for registering a claim of lien.

(2) Security or payment into court and vacating lien thereon.—Upon application a judge may receive security or payment into court in lieu of the amount of the claim, and may thereupon vacate the registration of the lien.

(3) Vacating registration on other grounds.—The judge may vacate the said registration upon any other ground. R. S. M. c. 110, s. 24, part; 7-8 Ed. VII., c. 28, s. 3; 3 Geo. V., c. 32, ss. 5, 6.

25. Certain acts not to prejudice right to enforce lien.—The taking of any security for, or the acceptance of any promissory note for, or the taking of any other acknowledgment of, the claim, or the giving of time for the payment of the claim, or the taking

of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by this Act, unless the lienholder agrees in writing that it shall have that effect.

(2) The discounting or negotiation of any promissory note, or other security, taken or accepted as aforesaid, shall not waive, pay, satisfy, prejudice or destroy any lien created by this Act, but the lienholder taking or accepting such promissory note, or other security, shall retain his lien for the benefit of the holder of said promissory note or other security:

Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act, shall, in order to obtain the benefit of this section, commence an action to enforce such lien within the time limited by this Act, and register a certificate as required by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time:

Provided, further, that, notwithstanding such extension of time, such person may, where an action is commenced by any other persons to enforce a lien against the same property, prove and obtain payment of his claim in such action, as if no such extension had been given. R. S. M. c. 110, s. 24, *part*; 7-8 Ed. VII., c. 28, s. 1.

The cases of *Arbuthnot Co.* v. *Winnipeg M. Co.*, 16 Man. L. R. 401, and *National Supply Co.* v. *Horrobin*, 16 Man. L. R. 472, were decided under a former section.

Discovery.

26. Lienholders to be entitled to information from owners as to terms of contract.—Any lienholder or person entitled to a lien may at any time demand of the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the work, services or materials is or are performed or furnished or placed, and if such owner or his said agent shall not, at

the time of such demand or within a reasonable time thereafter, inform the person making such demand of the terms of such contract or agreement and the amount due and unpaid upon such contract or agreement, or shall intentionally or knowingly falsely state the terms of said contract or agreement or the amount due or unpaid thereon; and if the person claiming the lien sustain loss by reason of such refusal or neglect or false statement, said owner shall be liable to him in an action therefor to the amount of such loss.

(2) **Order for inspection of contract by lienholders.**—A judge may on a summary application at any time before or after any action is commenced for the enforcement of such lien, make an order for the owner or his agent to produce and allow any lienholder to inspect any such contract, and may make such order as to the costs of such application and otherwise as may be just. R. S. M. c. 110, ss. 25, 26; 3 Geo. V. c. 32, s. 7.

See Ont. Act, section 30, to the same effect.

ENFORCEMENT OF LIEN.

27. Liens to be realized in County Court.—A lien created by this Act, whatever the amount thereof, may be realized by action in the County Court of the judicial division in which the property affected by the lien is situated, according to the ordinary procedure of such court, except where the same is varied by this Act. 3 Geo. V., c. 32, s. 1 (27).

See *Meunier* v. *Hinman*, (1916) 27 Man. L. R. 69, noted under section 22, *ante*.

See Ont. Act, section 31 (1), (4), to the same effect.

See *Robock* v. *Peters*, (1900) 13 Man. 124, where parties were brought in by notice of trial. Under a former Act, where any material amendment to a bill was made, the amended bill had to be registered as a *lis pendens* within the time prescribed for registration, or the lien would cease. Thus in *Davidson* v. *Campbell*, (1888) 5 Man. 250, the bill alleged a contract with defendant "C." for the performance of certain work in the

erection of a building upon land of "C." By amendment made after the time for filing the bill had elapsed the plaintiffs alleged that their contract was with the defendants "K. and McD.," who had contracted with "C." for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed. Held, that the plaintiff could not rely upon the original bill and certificate of *lis pendens*. But an immaterial amendment did not necessitate re-registration. *Irwin* v. *Beynon*, (1886) 4 Man. 10.

An owner of property who employed a contractor to build a house and before the filing of a lien by a sub-contractor against the contractor conveyed all his interest in the land to a purchaser, is neither a necessary nor a proper party to the action afterwards commenced to realize the lien, as the plaintiff could not have any relief against him. Although the plaintiff's claim would be limited to the amount due by the original owner to the contractor, and he would have to prove what the indebtedness was, yet that would not justify making the original owner a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the Master without having the original owner before the court. *Christie* v. *McKay*, 15 Man. L. R. 612, 2 W. L. R. 303.

See *Dominion Lumber & Fuel Co.* v. *Paskov*, 29 Man. L. R. 325, (1919) 1 W. W. R. 657, noted under section 5 *ante*.

28. Statement of claim.—A writ of summons shall not be issued, but the action shall be commenced by filing in the office of the court a statement of claim, entitled in the court and cause, giving in plain and ordinary language the grounds and particulars of the claim. 3 Geo. V. c. 22, s. 1 (28).

29. Notices of address, etc.—The statement of claim and every copy thereof served shall contain or have endorsed upon it a notice giving the name and address of the solicitor who issues the same or of the plaintiff, if issued by the plaintiff in person, and the office in which and the time within which the statement of defence is to be filed. 3 Geo. V., c. 32, s. 1 (29).

30. Defence.—A defendant may, within sixteen days after being served with the statement of claim, file in the office of the

court a statement of defence, entitled in the court and cause, showing clearly and concisely the nature of his defence, and serve on the plaintiff or his solicitor a copy thereof, and if he fail to do so he shall, unless otherwise ordered by a judge, be precluded from disputing the plaintiff's claim and right to a lien, and the plaintiff shall have the right to sign interlocutory judgment against the defendant in a manner similar to the signing of such judgment in an action in the Court of King's Bench.

(2) The defendant may, in a proper case, be allowed in to defend by order of the judge upon such terms as he shall think just. 3 Geo. V., c. 32, s. 1 (30).

31. Notice of address.—The statement of defence, and the copy thereof served, shall contain or have endorsed upon it a notice giving the name and address of the solicitor who files the same, or of the defendant if filed by the defendant in person. 3 Geo. V., c. 32, s. 1 (31).

32. Action shall enure for benefit of all lienholders.—It shall not be necessary to make any lienholders parties defendant to the action, but all lienholders served with the notice of trial shall for all purposes be treated as if they were parties to the action. 3 Geo. V., c. 32, s. 1 (32).

33. Lienholders may join in action.—Any number of lienholders claiming liens on the same property may join in an action, and any action brought by a lienholder shall be taken to be brought on behalf of all other lienholders on the property in question. 3 Geo. V., c. 32, s. 1 (33).

The expression "lienholder" in this section means a person having a lien which was valid at the time of commencing his action, so that when, in an action commenced by a lien claimant it is decided that he had no valid lien and no action was commenced within the time prescribed by section 22 of this Act by any other person claiming a lien on the same property, all the liens upon it must fail. *Builders Supply Co.* v. *Huddlestone*, (1915) 25 Man. L. R. 718.

34. Appointing day for trial.—After the filing and service of the statement of defence, or after the time for filing and serving the same, if none is filed and served, upon application to a judge by any party to the action, he shall give an appointment, fixing a time and place for the trial of the action, which time may be the date of the ordinary sittings of the court or otherwise. 3 Geo. V., c. 32, s. 1 (34).

See *Humphrey* v. *Cleave*, 15 Man. L. R. 23, also *Dixon* v. *Ross*, (1912) 1 D. L. R. 14.

35. Service of notice of trial.—The party obtaining such appointment shall, at least eight clear days before the day fixed for the trial (unless the judge directs that a shorter notice may be given), serve a notice of trial, which may be according to form No. 10 in Schedule A to this Act, upon the solicitors for the parties who appear by solicitors, and on all lienholders known to him who have registered their liens as required by this Act, and on all other persons having any registered charges, incumbrance or claims on the said lands, who are not parties or who, being parties, appear personally in the said action; and such service shall be personal, unless otherwise directed by the judge or local judge who is to try the case, who may, in lieu of personal service, direct in what manner the notice of trial may be served.

See Ont. Act, section 37, to the same effect.

36. Every lienholder not already a plaintiff in the action, shall within six days after being served with the notice of trial file in the office of the court a statement showing the grounds and particulars of his claim, and if he fail to do so, he shall, unless otherwise ordered by the judge, be precluded from asserting his lien.

37. On the day fixed for the trial, or on such other day to which the trial may be adjourned, the judge shall proceed to try the action, and all questions which arise therein, or which are necessary to be tried, to completely dispose of the action, and to adjust

the rights and liabilities of the persons appearing before him, or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action, or which have been served with the notice of trial, and shall embody all the results in the judgment. 3 Geo. V., c. 32, s. 1 (37).

When the plaintiff in an action to realize upon a mechanics' lien intends to dispute the right of a prior mortgagee to priority for more than the actual value of the land at the time the improvements were commenced, it is not necessary to make the mortgagee a party to the action in the first place, but the notice of trial may, under section 35, be served upon the mortgagee and the question of priority and for what amount may be determined at the trial. *Dominion Lumber & Fuel Co.* v. *Paskov*, 29 Man. L. R. 325, (1919) 1 W. W. R. 657. In this case the plaintiff had joined the mortgagee as a defendant to the action and in his statement of claim had expressly conceded priority for the whole amount of the mortgage. It was held that unless the mortgagee could show that it had been induced to alter its position to its prejudice in consequence of that concession, the plaintiff should be permitted to amend.

38. Sale may be ordered.—The judge may, in the judgment, order that the estate or interest charged with the lien may be sold, and may direct the sale to take place at any time after judgment, allowing, however, a reasonable time for advertising such sale.

(2) The judge may also direct the sale of any materials and authorize the removal thereof. 3 Geo. V., c. 32, s. 1 (38).

39. Report on sale.—When a sale is had, the moneys arising therefrom shall be paid into court to the credit of the action, and the judge shall make a report on sale and therein direct to whom the moneys in court shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in

connection therewith; and, where sufficient to satisfy the judgment and costs is not realized from the sale, he shall certify the total amount of the deficiency and the proportion thereof falling upon each person entitled to recover, and the persons by the judgment adjudged to pay the same.

(2) **Vesting order.**—The judge may make all necessary orders for the completion of the sale, and for vesting the property in the purchaser. 3 Geo. V., c. 32, s. 1 (39).

40. Deficiency recoverable by usual process.—All judgments in favor of lienholders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after sale of the property adjudged to be sold; and, whenever on such sale sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered against the property of such person or persons by the usual process of the court. 3 Geo. V., c. 32, s. 1 (40).

See Ont. Act, section 48, to the same effect.

41. Personal judgment when lien fails.—Whenever any claimant shall fail for any reason to establish a valid lien, he may nevertheless recover in the action a personal judgment against the party or parties to the action for such sum or sums as may appear to be due to him and which he might recover in an action in contract against such party or parties. 3 Geo. V., c. 32, s. 1 (41).

See Ont. Act, section 49, to the same effect.

42. Allowing claim to be proved after trial.—Any lienholder, who has not proved his claim at the trial, may, on application to the judge who tried the action and on such terms as to costs and otherwise as may be just, be let in to prove his claim at any time before the amount realized in the action has been distributed; and, where such claim is proved and allowed, the judge shall amend the judgment so as to include such claim therein. 3 Geo. V., c. 32, s. 1 (42).

43. Consolidation of actions.—Where more than one action is brought to realize liens in respect of the same property, a judge may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate such actions into one action, and may give the conduct of the consolidated action to any plaintiff in his discretion. 3 Geo. V., c. 32, s. 1 (43).

44. Carriage of proceedings.—The judge, on the application of any lienholder entitled to the benefit of the action, may make an order giving such lienholder the carriage of the proceedings, and such lienholder shall thereafter for all purposes be deemed to be the plaintiff in the action. 3 Geo. V., c. 32, s. 1 (44).

45. When judgment final.—In actions where the total amount of the claims of the plaintiff and all other persons claiming liens is one hundred dollars or less, the judgment at the trial shall be final, binding and without appeal, except that, upon application within fourteen days after judgment is pronounced, the judge who tried the action may grant a new trial. 3 Geo. V., c. 32, s. 1 (45).

46. When appeal lies.—In actions where the total amount of the claims of the plaintiff and all other persons claiming liens exceeds one hundred dollars, any person affected by the judgment may appeal therefrom to the Court of Appeal, whose judgment shall be final and binding, and no appeal shall lie therefrom. The procedure on such appeal shall be the same as in ordinary cases of appeal from the County Court. 3 Geo. V., c. 32, s. 1 (46).

See *Crown Grain Co.* v. *Day*, (1908) A. C. 504, declaring the limitation of the right of appeal *ultra vires*.

47. Limit of costs to plaintiff.—The costs of the action awarded by the judge trying the action shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne as the judge may direct. 3 Geo. V., c. 32, s. 1 (47).

See *McDonald Dure Lumber Co.* v. *Workman*; 18 Man. L. R. 419; *Humphreys* v. *Cleave*, 15 Man. L. R. 23; *Leibrock* v. *Adams*, 17 Man. L. R. 575.

48. Limit of costs against plaintiff. — When the costs are awarded against the plaintiff or other persons claiming liens, such costs shall not exceed in the aggregate an amount equal to twenty-five per cent. of the claim of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge may direct. 3 Geo. V., c. 32, s. 1 (48).

49. Counsel fees.—Counsel fees shall not be deemed disbursements under the next two preceding sections. 3 Geo. V., c. 32, s. 1 (49).

50. Least expensive course to be taken.—If the least expensive course is not taken by a party under this Act, the costs allowed to him shall in no case exceed what would have been incurred if the least expensive course had been taken. 3 Geo. V., c. 32, s. 1 (50).

51. Costs in discretion of judge.—The costs of and incidental to all applications and orders made under this Act, and not otherwise provided for, shall be in the discretion of the judge to whom the application, or by whom the order, is made. 3 Geo. V., c. 32, s. 1 (51). Repealed. See c. 60 of the Statutes of 1914, *post*.

52. Costs of vacating lien.—Where a lien is discharged or vacated under section 24 of this Act, or when in an action judgment is given in favor of or against a claim for a lien, the judge may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration thereof. 3 Geo. V., c. 32, s. 1 (52).

53. No fees on payments out of court.—No fees shall be payable on any cheques or proceedings to pay money into court or obtain money out of court in respect of a claim of lien, but sufficient postage stamps to prepay a return registered letter shall

be enclosed with every requisition for cheques. 3 Geo. V., c. 32, s. 1 (53).

54. Winnipeg actions may be referred to referee of K.B.—In an action brought in the County Court of the judicial division of Winnipeg, a judge of the said court may refer the action to the referee in chambers of the Court of King's Bench, who thereupon shall have the same powers and jurisdiction to hear and dispose of the action and all matters and questions therein involved as a judge would have under this Act, and his judgment shall be subject to the same right of appeal, but the action shall continue to be an action in the County Court, and the proceedings shall be intituled and taken therein, and in all other respects such proceedings shall be the same as if the action had not been so referred. 3 Geo. V., c. 32, s. 1 (54).

55. King's Bench practice to be adopted in certain cases.—In any case not satisfactorily covered by the procedure provided for by this Act or by the ordinary procedure of the County Court, the practice and procedure of the Court of King's Bench may be adopted and applied. 3 Geo. V., c. 32, s. 1 (55).

Forms.

56. Forms.—The forms in the schedule hereto, or forms similar or to the like effect, may be adopted in all proceedings under this Act. 3 Geo. V., c. 32, s. 1 (56).

CHAPTER 60.

AN ACT TO AMEND "THE MECHANICS' AND WAGE-EARNERS' LIEN ACT."

(*Assented to February 2nd*, 1914.)

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

1. Section 51 of "The Mechanics' and Wage-earners' Lien Act," being chapter 125 of the Revised Statutes of Manitoba, 1913, is hereby repealed and the following substituted therefor:—

51. Notwithstanding anything contained in "The County Courts Act," the costs of and incidental to all actions, applications and orders commenced or made under this Act shall be in the discretion of the judge, subject always to the limitations provided for by sections 47, 48 and 49 of this Act.

2. This Act shall come into force on the day it is assented to.

SCHEDULE.

The following is the schedule referred to in this Act:—

SCHEDULE A.

FORM NO. 1.—(SECTION 15.)

CLAIM OF LIEN.

A. B. (*name of claimant*), of (*here state residence of claimant*), (*if so*, as assignee of, *stating name and residence of assignor*), under the "Mechanics' and Wage Earners' Lien Act," claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed*) in the undermentioned land in respect of the following work (service *or* materials), that is to say (*here give a short description of the nature of the work done or materials furnished, and for which the lien is claimed*), which work (*or* service) was (*or* is to be) done (*or* materials were furnished) for (*here state the name and residence of the person upon whose credit the work is done or materials furnished*), on or before the day of , 19 .

The amount claimed as due (*or* to become due) is the sum of $

The following is a description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

When credit has been given, insert: The said work was done (*or* materials were furnished) on credit, and the period of credit agreed to expired (*or* will expire) on the day of , 19 .

Dated at , this day of , 19 .

(*Signature of claimant.*)

R. S. M. c. 110, sch., form 1.

FORM No. 2.—(SECTION 15.)

CLAIM OF LIEN FOR WAGES.

A. B. (*name of claimant*), of (*here state residence of claimant*), (*if so, as assignee of, stating name and residence of assignor*), under the "Mechanics' and Wage Earners' Lien Act," claims a lien upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*) in the undermentioned land, in respect of days' work performed while in the employment of (*here state the name and residence of the person upon whose credit the work was done*) on or before the day of , 19 .

The amount claimed as due is the sum of $.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at , this day of , 19 .

(*Signature of claimant.*)

R. S. M. c. 110, sch., form 2.

FORM No. 3.—(SECTION 15.)

CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons, under the "Mechanics' and Wage Earners' Lien Act," claim a lien upon the estate of (*here state the name*

and residence of the owner of land upon which the lien is claimed) in the undermentioned land in respect of wages for labor performed thereon while in the employment of (*here state name and residence or names and residences of employers of the several persons claiming the liens*).

A. B. of (*residence*) $ for days' wages.
C. D. of (*residence*) $ for days' wages.
E. F. of (*residence*) $ for days' wages.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at , this day of , 19 .

(*Signatures of the several claimants.*)

R. S. M. c. 110, sch., form 3.

FORM No. 4.—(SECTION 15.)

AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (*or* annexed) claim, do make oath that the said claim is true.

Or, we, A. B., and C. D., named in the above (*or* annexed) claim, do make oath, and each for himself saith that the said claim, so far as relates to him, is true.

[*Where affidavit is made by agent or assignee, a clause must be added to the following effect:* I have full knowledge of the facts set forth in the above (*or* annexed) claim.]

Sworn before me at , in of , this day of , 19 .

Or the said A. B. and C. D. were severally sworn before me at in the of , this day of , 19 .

Or the said A. B. was sworn before me at in the of this day of , 19 .

R. S. M. c. 110, sch., form 4.

(FORM No. 5.—(SECTION 32.)

CERTIFICATE OF LIS PENDENS.

(*Style of Court and Cause.*)

I certify that the above-named plaintiff has commenced an action in the above court to enforce against the following land (*describing it*) a claim to a mechanics' lien for $.

Dated at , this day of , 19 .

[SEAL]

R. S. M. c. 110, sch., form 6.

FORM No. 6.—(SECTION 35.)

NOTICE OF TRIAL.

(*Style of Court and Cause.*)

Take notice that this action will be tried at the Court House in the of , on the day of , by a judge of this Court, and at such time and place the said judge will proceed to try this action and all questions which arise in or which are necessary to be tried to completely dispose of the same and to adjust the rights and liabilities of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all inquiries and give all directions and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions and accounts arising therein, and will give all necessary relief to all parties.

And further take notice that, if you do not appear at the trial and prove your claim (if any) or prove your defence (if any) to the action, the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above-named plaintiff against the above-named defendants to enforce a mechanics' lien against the following lands: (*set out description of lands*)

This notice is served by, etc.

R. S. M. c. 110, sch., form 10.

REVISED STATUTES OF NEW BRUNSWICK, 1903.

CHAPTER 147.

Respecting Mechanics' Lien.

1. Short title.—This chapter may be cited as "The Mechanics' Lien Act." 57 V. c. 23, s. 1.

2. Interpretation.—Wherever the following words occur in this chapter or in the schedule thereto, they shall be construed in the manner hereinafter mentioned unless a contrary intention appears:

(1) "**Contractor.**"—"Contractor" shall mean a person contracting with or employed directly by the owner for the doing of work, or placing or furnishing of machinery or materials for any of the purposes mentioned in this chapter.

(2) "**Sub-contractor.**"—"Sub-contractor" shall mean a person not contracting with or employed directly by the owner for the purposes aforesaid, but contracting with or employed by the "contractor" or under him by a "sub-contractor."

(3) "**Owner.**"—"Owner" shall extend to and include a person having any estate or interest in the lands upon or in respect of which the work is done or materials or machinery are placed or furnished, at whose request and upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit any such work is done, or materials or machinery placed or furnished, and all persons claiming under him whose rights are acquired after the work in respect of which the lien is claimed is commenced, or the materials or machinery furnished have been commenced to be furnished.

(4) "**Wage-earner.**"—"Wage-earner" shall mean any person performing labor for wages, by the day, week or month as the case may be, and not by the job.

(5) "**County Court.**"—"County Court" in this chapter shall mean the County Court of the county in which the lands sought to be affected by the lien are situate.

(6) "**Judge.**"—"Judge" shall mean the judge of the County Court of the county in which the lands sought to be affected by the lien are situate, or the judge of a County Court before whom proceedings may be taken in case of the said judge being interested or related to any of the parties.

(7) "**Registrar.**"—"Registrar" shall mean the registrar of deeds of the county where the lands sought to be affected by the lien are situate.

(8) "**Registered.**"—"Registered" shall mean filed in the office of the registrar of deeds of the county where the lands sought to be affected by the lien are situate. 57 V. c. 23, s. 2.

See Ontario Act, section 2. The Ontario Act includes a municipal corporation and a railway company under the definition of "owner."

A person is not an "owner" within the meaning of sub-section 3 of section 2 so as to make his land liable to a lien for materials supplied under a contract with the tenant, for the purpose of adding to or improving an hotel upon the land in the possession of the tenant with an option to purchase, unless there is something in the nature of a direct dealing between the owner and the person furnishing the materials. Mere knowledge of, or consent to, the materials being supplied, is not enough; there must be a request, either express or by implication from circumstances, to give rise to the lien. *Eddy Co. Ltd.* v. *Chamberlain,* (1917) 45 N. B. R. 261.

3. Agreement not to affect lien of person not a party thereto.—No agreement shall be held to deprive anyone otherwise entitled to a lien under this chapter, and not a party to the agreement, of

the benefit of the lien, but the lien shall attach notwithstanding such agreement. 57 V. c. 23, s. 3.

See Ont. Act, section 5.

4. **Lien of mechanic, builder, laborer, contractor, etc., for work, materials, etc.**—Unless he signs an express agreement to the contrary, every mechanic, machinist, builder, laborer, contractor or other person doing work upon or furnishing materials to be used in the construction, alteration or repair of any building or erection, or erecting, furnishing or placing machinery of any kind in, upon or in connection with any building, erection or mine, shall, by virtue of being so employed or furnishing, have a lien for the price of the work, machinery or materials upon the building, erection or mine and the lands occupied thereby or connected therewith. 57 V. c. 23, s. 4.

See Ont. Act, section 6, and cases cited thereunder. A number of things mentioned in the Ontario Act as subject to the lien are not specified in this section, but at least some of these would probably be held to be covered by the words, "building, erection or mine, and the lands occupied thereby or connected therewith." As to what constitutes a building or erection, see a large number of cases cited in *Adamson* v. *Rogers*, (1895), 22 O. A. R. 415.

G. a builder, contracted to erect two houses for F. in the city of Moncton, one on Birch Street and one on Union Street. O., the claimant, claims to have been employed by G., and at his request did carpenter work on the Birch Street house to the amount of $171, and on the Union Street house to the amount of $21.75. After deducting credits he claims a general balance of $80.05, and filed a lien for such balance, covering both houses. It was held that the lien on these two houses should have been discharged, as a lien only attaches to the house upon or in respect to which work is performed, although the work is done for a contractor who had an entire contract with the owner for the erection of both houses. *O'Brien* v. *Fraser*, (1918) 45 N. B. R. 539; 41 D. L. R. 324.

Property held by trustees for school purposes under the provisions of the Schools' Act, C. S. 1903, c. 50, is not Crown property and therefore not exempt from the operation of the Mechanics'

Lien Act, although such property is not liable to be sold under execution. An order for the payment of money under the Mechanics' Lien Act can be enforced in the same way as a judgment by compelling the School Trustees to make an assessment. *Trustees School Dist. No. 8* v. *Connely*, (1912) 41 N. B. R. 374.

5. Lien to attach to building, etc.—The lien shall attach upon the estate and interest of the owner, as defined by this chapter, in the building, erection or mine upon or in respect of which the work is done or the materials or machinery placed or furnished, and the land occupied thereby or connected therewith. 57 V. c. 23, s. 5.

See Ont. Act, section 8.

6. (1) Lien for thirty days' wages.—Every wage-earner who performs labor for wages upon the construction, alteration or repairs of any building or erection, or in erecting or placing machinery of any kind in, upon, or in connection with any building, erection or mine, shall, to the extent of the interest of the owner, have, upon the building, erection or mine, and the land occupied thereby or connected therewith, a lien for such wages, not exceeding the wages for thirty days, or a balance equal to his wages for thirty days.

(2) Lien for wages on property of wife.—The lien for wages mentioned in this section shall attach, when the labor is in respect of a building, erection or mine on property belonging to the wife of the person at whose instance the work is done, upon the estate or interest of the wife in such property as well as upon that of her husband.

(3) Device to defeat lien for wages to be void.—Every device by an owner or contractor which shall be adopted in order to defeat the lien of wage-earners under this chapter, shall, as respects such wage-earners, be null and void. 57 V. c. 23, s. 6.

See Ont. Act, sections 7 and 15.

7. Reservation of percentage of price on completion of contract.—The owner shall, in the absence of a stipulation to the contrary, be entitled to retain, for a period of thirty days after the completion of the contract—

(a) Fifteen per centum of the price to be paid to the contractor when such price does not exceed $1,000.

(b) Twelve and a half per centum of the price to be paid to the contractor when such price is more than $1,000, but does not exceed $5,000; and

(c) In all other cases, ten per centum of the price to be paid to the contractor. 57 V. c. 23, s. 7.

See Ont. Act, section 12.

8. Limit to lien of sub-contractor.—In case the lien is claimed by a sub-contractor, the amount which may be claimed in respect thereof shall be limited to the amount payable to the contractor or sub-contractor (as the case may be) for whom the work has been done, or the materials or machinery have been furnished or placed. 57 V. c. 23, s. 8.

See Ont. Act, section 10.

9. (1) Pro tanto discharge of lien by payments up to 90 per cent. of price made in good faith before notice of lien.—All payments up to ninety per centum of the price to be paid for the work, machinery or materials, as defined by section 4 of this chapter, made in good faith by the owner to the contractor, or by the contractor to the sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing by the person claiming the lien has been given to such owner, contractor or sub-contractor (as the case may be) of the claim of such person, shall operate as a discharge *pro tanto* of the lien created by this chapter, but this section shall not apply to any payment made for the purpose of defeating or impairing a claim to a lien existing or arising under this chapter.

(2) Lien on 10 per cent. of price for ten days after completion of work, etc., where no notice of lien given.—A lien shall, in addition to all other rights or remedies given by this chapter, also operate as a charge to the extent of ten per centum of the price to be paid by the owner for the work, machinery or materials as defined by section 4 of this chapter, up to ten days after the completion of the work or of the delivery of the materials in respect of which such lien exists, and no longer, unless such notice in writing be given as herein provided.

(3) Priority of lien for wages on 10 per cent. of price to contractor.—A lien for wages for thirty days or for balance equal to the wages for thirty days, shall, to the extent of the said ten per centum of the price to be paid to the contractor, have priority over all other liens under this chapter, and over any claim by the owner against the contractor for or in consequence of the failure of the latter to complete his contract.

(4) Increase of percentage where price does not exceed $1,000 or where price between $1,000 and $5,000.—When the total price to be paid or contracted or agreed to be paid for the whole of the work, machinery or materials, as defined by section 4 of this chapter does not exceed $1,000, the three preceding sub-sections of this section shall be read as if the word "ninety" was omitted therefrom, and the word "eighty-five" inserted in lieu thereof, and if the word "ten" was omitted therefrom and the word "fifteen" inserted in lieu thereof; and where the said total price exceeds $1,000, but does not exceed $5,000, the said first three sub-sections shall be read as if the word "ninety" was omitted therefrom and the word "eighty-seven and a half" inserted in lieu thereof, and as if the word "ten" was omitted therefrom and the words "twelve and a half" inserted in lieu thereof. 57 V. c. 23, s. 9.

See Ont. Act, section 12.

10. Owner not liable to sum greater than sum payable to contractor.—Save as herein provided the lien shall not attach so as

to make the owner liable to a greater sum than the sum payable by the owner to the contractor. 57 V. c. 23, s. 10.

See Ont. Act, section 10.

11. Lien for material or labor supplied to person having lien.—All persons furnishing material to or doing labor for the person having a lien under this chapter, in respect of the subject of such lien, who notified the owner of the premises sought to be affected thereby, within thirty days after such materials furnished or labor performed, of any unpaid account or demand against such lienholder for such material or labor, shall be entitled, subject to the provisions of sections 6 and 9, to a charge therefor *pro rata* upon any amount payable by such owner under said lien, and if the owner thereupon pays the amount of such charge to the person furnishing material or doing labor as aforesaid, such payment shall be deemed a satisfaction *pro tanto* of such lien. 57 V. c. 23, s. 11.

See Ont. Act, section 12.

12. Trial where dispute as to claim under preceding section.—In case of a dispute as to the validity or amount of an unpaid account or demand, of which notice is given to the owner under the preceding section, the same shall be first determined by action in the proper court in that behalf; and pending the proceedings to determine the dispute, so much of the amount of the lien as is in question therein may be withheld from the person claiming the lien, or the judge may order such amount paid into a bank to the credit of the cause. 57 V. c. 23, s. 12.

13. Payment of judgment or claim by owner where failure by primary debtor to pay.—In case the person primarily liable to the person giving such notice as mentioned in section 11, fails to pay the amount for which judgment is recovered within ten days after the judgment is obtained, the owner, contractor or sub-contractor may pay the amount out of any moneys due by him to the person

primarily liable as aforesaid, on account of the work done, or materials or machinery furnished or placed in respect of which the debt arose; and such payment if made after the judgment as aforesaid (or if made without any action being previously brought or dispute existing, then, if the debt in fact existed, and to the extent thereof) shall operate as a discharge *pro tanto* of the moneys so due as aforesaid to the person primarily liable. 57 V. c. 23, s. 13.

14. Property not to be removed while subject to lien.—During the continuance of a lien, no portion of the property or machinery affected thereby shall be removed to the prejudice of the lien; and any attempt at such removal may be restrained by application to the judge. Disobedience of the judge's order restraining such removal shall be punishable by attachment for contempt by the judge as in the Supreme Court for disobedience of an order of a judge of that court. 57 V. c. 23, s. 14.

See Ont. Act, section 16.

15. (1) **Registration of claim of lien.**—A claim of lien applicable to the case may be registered in the office of the registrar, and shall state:

(a) The name and residence of the claimant and of the owner of the property to be charged, and of the person for whom and upon whose credit the work is done or materials or machinery furnished, and the time or period (if any time is specified in the contract) within which the same was or was to be done or furnished;

(b) The work done or materials or machinery furnished;

(c) The sum claimed;

(d) The description of the land to be charged;

(e) The date of expiry of the period of credit agreed to by the lienholder for payment for his work, materials or machinery, where credit has been given.

(2) **Form of claim of lien for registration.**—The claim may be in one of the forms (1), (2) and (3) given in the schedule to this chapter, and shall be verified by the affidavit of the claimant,

or his agent or assignee having full knowledge of the matters required to be verified, and the affidavit of an agent or assignee shall state that he has such knowledge. 57 V. c. 23, s. 15.

See Ont. Act, section 17.

16. Joinder of claims for wages.—A claim for wages may include the claims of any number of wage-earners who may choose to unite therein. In such case each claimant shall verify his claim by his affidavit, but need not repeat the facts set out in the claim; and an affidavit substantially in accordance with form (4) of this chapter shall be sufficient. 57 V. c. 23, s. 16.

See Ont. Act, section 18.

17. (1) **Duty of registrar to register claim of lien.**—The registrar, upon payment of his fees, shall register the claim so that the same may appear as an incumbrance against the land therein described, and the day, hour and minute when the same was registered shall appear upon the registry.

(2) **Fee to registrar.**—The fee for registration shall be twenty-five cents; if several parties join in one claim the registrar shall have a further fee of ten cents for every person after the first.

(3) **Claim to be entered in mechanics' lien book.**—The registrar shall not be bound to copy in any registry book any claim or affidavit, but he shall enter each claim in a book to be kept for that purpose, to be called "The Mechanics' Lien Book," and shall insert therein particulars of the claim, with a description of the property against which the lien is sought. 57 V. c. 23, s. 17.

See Ont. Act, section 20.

18. Effect of registration of claim of lien.—Where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act, chapter 151 of these Consolidated Statutes, but except as herein otherwise provided, the Registry Act shall not apply to any lien arising under this chapter. 57 V. c. 23, s. 18.

See Ont. Act, section 21.

19. (1) When claim of lien for wages may be registered.—Where the lien is for wages under sections 6 or 9, the claim may be registered at any time within thirty days after the last day's labor for which the wages are payable.

(2) Such lien shall not be entitled to the benefit of the provisions of sections 6 and 9, after the said period, unless the same is duly registered before the expiration of the said period so limited.

(3) **Priority of lien for wages.**—Such lien shall have the same priority for all purposes after as before registration. 57 V. c. 23, s. 19.

See Ont. Act, section 22.

20. Where other claims of lien may be registered.—In other cases the claim of lien may be registered before the commencement or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing of the machinery. 57 V. c. 23, s. 20.

See Ont. Act, section 22.

21. Effect of failure to register lien within limited time.—Every lien which has not been duly registered under the provisions of this chapter, shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime proceedings are instituted and are being prosecuted without delay to realize the claim under the provisions of this chapter, and a certificate of the pending of such proceedings (which may be granted by the judge), is duly registered. 57 V. c. 23, s. 21.

See Ont. Act, section 23.

22. (1) Within what time after registration of lien proceedings to realize claim to be instituted, etc.—Every lien which has been duly registered under the provisions of this chapter shall absolutely cease to exist after the expiration of ninety days after the work has been completed, or materials or machinery furnished, or

wages earned, or the expiry of the period of credit, where such period is mentioned in the claim of lien filed, unless in the meantime proceedings are instituted and are being prosecuted without delay to realize the claim under the provisions of this chapter, and a certificate of such proceedings (which may be granted by the judge) is duly registered.

(2) **Renewal of registration where proceedings not instituted.**—The registration of a lien under this chapter shall cease to have any effect at the expiration of six months from the registration thereof, unless the lien shall be again registered within the same period, except in the meantime proceedings have been instituted to realize the claim and are being prosecuted without delay, and a certificate of the pendency of such proceedings as aforesaid has been duly registered as provided in the preceding sub-section. 57 V. c. 23, s. 22.

See Ont. Act, section 24.

Where the question is whether an alleged lien is in existence, an order made by the trial Judge assuming to determine such question without taking the evidence thereon, will on appeal be vacated, if it appears that the lien was not prosecuted within the period prescribed by this section. *Boucher* v. *Belle Isle,* 14 D. L. R. 146, 41 N. B. R. 509.

23. Effect of failure to institute proceedings within 90 days after completion of work, etc., where no period of credit.—If there is no period of credit, or if the date of the expiry of the period of credit is not dated in the claim so filed, the lien shall cease to exist upon the expiration of ninety days after work has been completed or materials or machinery furnished, unless in the meantime proceedings have been instituted pursuant to section 22 of this chapter and are being prosecuted without delay, and a certificate of the pendency of such proceedings as aforesaid has been duly registered as provided in section 22. 57 V. c. 25, s. 23.

See Ont. Act, section 25.

24. Death of lienholder.—Assignment of right.—In the event of the death of a lienholder his right of lien shall pass to his per-

sonal representatives, and the right of a lienholder may be assigned by an instrument in writing. 57 V. c. 23, s. 24.

See Ont. Act, section 26.

25. Discharge of lien.—A lien may be discharged by a receipt signed by the claimant or his agent, duly authorized in writing, acknowledging payment and verified by affidavit, and filed in the office of the registrar; such receipt shall be numbered and entered by the registrar in the mechanics' lien book. The fees shall be the same as for registering a claim for lien. 57 V. c. 23, s. 25.

See Ont. Act, section 27.

26. Contractor to bear cost of registering discharge of lien.—When there is a contract for the execution of the work as hereinbefore mentioned, the registration of all discharges of liens shall be at the cost of the contractor unless the judge otherwise orders. 57 V. c. 23, s. 26.

27. (1) Vacating registry on payment into court.—Upon application to the judge, he may receive security or payment into court in lieu of the amount claimed, and may thereupon vacate the registry of the lien.

(2) The judge may annul the said registry upon any other ground. 57 V. c. 23, s. 27.

See Ont. Act, section 27.

28. (1) Lien for work, etc., on chattels.—Sale of chattel.—Every mechanic or other person who has bestowed money or skill or materials upon any chattel or thing in the alteration and improvement in its properties, or which imparts an additional value to it, so as thereby to be entitled by law to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three

months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell the chattel or thing in respect of which the lien exists, on giving one week's notice by advertisement by posters put up in three or more public places adjacent to the place of sale, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale (which shall be a public place), and the name of the auctioneer, and leaving a notice in writing two weeks prior to the sale at the last or known place of residence (if any) of the owner, if he be a resident of such county.

(2) **Application of proceeds of sale.**—Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the cost of advertising and sale, and shall, upon application, pay over any surplus to the person entitled thereto. 57 V. c. 23, s. 28.

A special agreement does not of itself destroy the right to retain the chattel except where the agreement contains some term inconsistent with that right. *Bathurst Lumber Co.* v. *Nepisiguit Lumber Co.*, (1911) 41 N. B. R. 41.

See Chapter XIV., "Mechanics' Liens upon Personalty," *ante*.

29. Voluntary payment by owner to mechanics, etc., to be deemed a payment to contractor.—In case an owner chooses to make payments to the mechanics, laborers, or other persons referred to in section 4 of this chapter, for or on account of, but not exceeding, the amount of the just debts due to them for work done or materials or machinery placed or furnished as therein mentioned, without the proceedings mentioned in section 12, and shall within three days afterwards give, by letter or otherwise, written notice of such payment to the contractor or his agent, such payment shall, as between the owner and the contractor, be deemed to be a payment to the contractor, on the contract generally, but not so as to affect the percentage to be retained by the owner as provided by sections 7 and 9. 57 V. c. 23, s. 29.

30. (1) **Declaration by contractor.—Form of declaration.**—Before the contractor for any work shall be entitled to receive a payment on his contract, it shall be his duty to produce to and leave with the owner or his agent an affidavit or a statutory declaration by the contractor (or his agent, competent from personal knowledge to speak to the facts), stating that all persons, who up to that time have been employed on the work and entitled to wages, have been paid in full up to and inclusive of the fourteenth day previous to such payment being made by the owner to the contractor. The said affidavit or statutory declaration may be to the effect set forth in forms (5) and (6) in the schedule to this chapter.

(2) **Deduction from amount due contractor.**—Or if it is admitted, or otherwise appears that any wages are unpaid, the contractor shall not be entitled to receive the amount otherwise payable to him without there being deducted therefrom an amount sufficient to cover what is so unpaid to such wage-earners.

(3) **Protection of owner making payment under declaration of contractor.**—The said affidavit or statutory declaration shall be conclusive evidence in favor of the owner making the payment; unless at or before making the payment he had actual and express notice of the wages not having been paid.

(4) **Effect of payment made without declaration.**—Any payment made on the contract without the owner having received such affidavit, or statutory declaration, or with actual and express notice of unpaid wages, shall not be a valid payment as against persons whose wages are unpaid at the time of the payment on the contract.

(5) **Cases in which declaration not required.**—The affidavit or statutory declaration aforesaid shall not be necessary when the architect's estimate for the month, in case the contract provides for such estimate, does not exceed $100, or when the payment made

in good faith in respect of the progress of the work for the month (in case the contract does not provide for estimates) does not exceed $100.

Sub-section 1 of this section does not apply to a claim of lien that is made after the contract has been completed the section only applies where a contractor is getting advances during the progress of the work, that is where he is getting payment on progress estimates. *Brown* v. *Bathurst Lumber Co., Ltd.*, (1915) 28 D. L. R. 295.

31. Lien of wage-earners not to be defeated by garnishment, execution, etc.—The lien of wage-earners for thirty days' wages, or for a balance equal to thirty days' wages, provided for by sections 6 and 9, shall not be defeated or impaired by any garnishment had subsequently to the contract, or by any execution subsequently issued, or by reason of the work contracted for being unfinished, or of the price, for that or any other reason, not being payable to the contractor. 57 V. c. 23, s. 31.

32. (1) Calculation of percentage where contract not completed.—In case of the contract not having been completely fulfilled when lien is claimed by wage-earners, the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor.

(2) Lien on unfinished building.—Every wage-earner shall be entitled to enforce a lien in respect of an unfinished building to the same extent as if the building were finished.

(3) Percentage not to be applied in completion of work by owner.—The percentage as aforesaid shall not, as against wage-earners, be applied to the completion of the work by the owner when the contractor makes default in completing the same, nor to the payment of damages for the non-completion thereof by the contractor. 57 V. c. 23, s. 32.

33. Priority of claims of mechanics, etc., to advances under mortgage during progress of work.—When a mortgage is given

to secure an intended loan of money, which money is to be paid thereafter according or with reference to the progress of work done, or materials or machinery placed or furnished as aforesaid, on the land mortgaged, no advance thereafter made by the mortgagee shall have priority over the claims of mechanics, laborers or other persons referred to in section 4 of this chapter as aforesaid, if the mortgagee at or before the time of such advance has actual and express notice that there are any such claims as aforesaid unpaid; nor unless at the time of such advance he shall require and receive from the mortgagor or his contractor an affidavit or statutory declaration, stating that all such persons as aforesaid have been paid in full up to the time of the advance. The said affidavit or statutory declaration may be to the effect set forth in form (7) in the schedule to this chapter. 57 V. c. 23, s. 33.

34. Priority of claims of mechanics, etc., over purchaser or mortgagee of unfinished building.—In case of the sale or mortgage of an unfinished house or building, if its being an unfinished house or building is such as to be apparent to an ordinary observer, the purchaser, before paying his purchase money, or giving a mortgage or other value or security for any balance of such purchase money, or the mortgagee before advancing any money on the security of a mortgage or otherwise, shall require from the vendor (in the case of a sale, or from the mortgagor in the case of a mortgage) a similar affidavit or statutory declaration of the payment of all claims as is provided for in section 33 of this chapter, and the purchaser or mortgagee shall not be entitled to priority in respect to such claims, if at or before the time aforesaid he had actual and express notice that there were such claims as aforesaid unpaid; nor unless he shall have received such affidavit or statutory declaration aforesaid. 57 V. c. 23, s. 34.

35. Where purchase money for land unpaid, vendor to be deemed a mortgagee, etc.—In cases where there is an agreement

for the purchase of land, and the purchase money, or part thereof, is unpaid, and no conveyance is made to the purchaser, the purchaser shall for the purposes of this chapter, and within the meaning thereof, be deemed a mortgagor and the seller a mortgagee. 57 V. c. 23, s. 35.

36. Effect of proceedings to enforce a lien on rights of mortgagee.—When any proceeding is taken to enforce a lien under this chapter, in case a mortgagee of the land is served with a written notice of such proceeding being had, he shall thereafter be entitled to attend the proceedings; and in case of being so served, he shall not thereafter, without the leave hereinafter mentioned, take any proceedings for sale or foreclosure, nor proceed to exercise any power of sale until the proceedings to enforce the lien have terminated; but he may without leave serve any notices required to be served in order to the due exercise of the power. The leave aforesaid may be granted by the judge, and shall only be granted by consent, or (if without consent) on a reasonable consideration of all the circumstances in view of what would be just to both parties. 57 V. c. 23, s. 36.

37. Address for service with claim of lien.—Every claim of lien shall give an address, at which all notices and papers may be served, and service of any notice or paper may be effected by sending the same by registered letter to the address so given. 57 V. c. 23, s. 37.

38. Enforcement of lien.—Any person claiming a lien under this chapter may enforce the same by means of the proceedings hereinafter set forth. 57 V. c. 23, s. 38.

39. Statement of claim.—No writ of summons shall be necessary, but the claimant may file a statement of claim with the judge. 57 V. c. 23, s. 39.

See Ont. Act, section 31 (2).

40. Affidavit with statement of claim.—Certificate by Judge.—Such statement of claim shall be verified by affidavit, Form (8);

upon the filing of such statement of claim and affidavit the judge shall issue a certificate in duplicate. 57 V. c. 23, s. 40.

See Ont. Act, section 31 (2).

41. Registration of certificate.—Upon the registration of such certificate in the office of the registrar, the action shall be deemed to have been commenced as against the owner and all other parties against whom the lien is claimed. 57 V. c. 23, s. 41.

See Ont. Act, section 31 (2).

The certificate, under this section, read with ss. 22, 38, 39, 40, is the commencement of the lien proceedings against an owner. *Boucher* v. *Belle Isle*, 14 D. L. R. 146, 41 N. B. R. 509.

42. Appointment of time and place for hearing claim.—Form of certificate and appointment.—The judge shall also in and by such certificate appoint a time and place at which he will inquire into the claim of the plaintiff and take all necessary accounts; such certificate shall be issued in duplicate, and may be in the Form (9) set forth in the schedule hereto. 57 V. c. 23, s. 42.

See Ont. Act, section 37.

43. Service of certificate and appointment.—A copy of such certificate and appointment shall be served on the owner and all other proper parties, at least fifteen days before the day therein named for taking the first proceedings thereunder. 57 V. c. 23, s. 43.

See Ont. Act, section 37.

44. Notice disputing claim.—Within ten days after the services of such certificate and appointment any person served therewith may file with the judge a notice in the Form (10) in the schedule hereto disputing the plaintiff's right to a lien. 57 V. c. 23, s. 44.

See Ont. Act, section 37.

45. Hearing of dispute as to claim, and certificate of finding.—In case a notice disputing the plaintiff's lien is filed, the judge

shall, before taking any further proceedings, determine the question raised by the notice, and if so required by any of the parties, may thereupon issue a certificate of his finding. 57 V. c. 23, s. 45.

Where a notice disputing the lien is filed, the existence of the lien must, as a distinct preliminary proceeding, be first and separately determined by the court. *Boucher* v. *Belle Isle*, 14 D. L. R. 146, 41 N. B. R. 509.

46. Note instead of certificate of finding.—But if not required to issue such last named certificate, it shall suffice for the judge to enter in his book a note of his findings. 57 V. c. 23, s. 46.

47. Verified statement of account by owner where proceedings by sub-contractor.—Where no notice disputing the plaintiff's lien is filed as aforesaid, and the proceedings are instituted by a sub-contractor, the owner shall file with the judge a statement of account, Form (11), verified by affidavit, Form (12), showing what, if anything, he admits to be due for the satisfaction of the plaintiff's lien and all other liens of the same class as plaintiffs; such statement shall be filed at least eight days before the day named in the certificate mentioned in section 42 for taking accounts, and in case the owner shall not file such statement, or shall file an untrue statement, he may be ordered by the judge to pay all costs incurred in establishing the true amount due and owing from him. 57 V. c. 23, s. 47.

48. Verified statements of account by lien-holders.—All lien-holders of the same class served with the appointment, or who may claim to be entitled to the benefit of the action, shall also within six days from the day named in the appointment for taking accounts, or within such further time as the judge may allow, file with the judge a statement of account, showing the just and true sum due to them respectively after giving credit for all sums in cash, merchandise, or otherwise, to which the debtor is entitled to credit on account of their respective claims, which account shall

be verified by affidavit, and such account and affidavit may be in the Forms (13) and (14) set out in the schedule hereto. 57 V. c. 23, s. 48.

49. Application by lienholder to prove claim where claim not filed within limited time.—A lienholder who has registered his lien, but has not filed his claim with the judge within the time limited by the next preceding section, may apply to the judge to be let in to prove his claim at any time before the amount realized by the proceedings for the satisfaction of liens has been distributed, and such application may be granted or refused, and upon such terms as to costs or otherwise as may appear just. 57 V. c. 23, s. 49.

See Ont. Act, section 37 (6).

50. Hearing and proceedings on taking accounts.—Directions to owner to pay money into bank.—Upon the return of the appointment to take accounts, the judge shall proceed to take an account of what is due from the owner and also what is due to the respective lienholders who have duly filed their claims and shall also tax to them respectively such costs as he may find them entitled to, and shall settle their priorities, and shall make all other inquiries, and take all necessary accounts for the adjustment of the rights of the various parties, and shall thereupon make a report of the result of such inquiries and accounts and shall direct that the money found due by the owner shall be paid into a bank to the credit of the action at the expiration of one month from the date of the report. 57 V. c. 23, s. 50.

See Ont. Act, section 37.

51. Costs where dispute as to amount due by owner.—In case any dispute arises as to the amount due by the owner for the satisfaction of liens under this chapter, or as to the amount claimed to be due to any other lienholders, the costs occasioned by the dispute shall be in the discretion of the judge, and shall be borne and paid as he directs. 57 V. c. 23, s. 51.

See Ont. Act, sections 41, 42, 43, 44, and 45, as to costs.

52. Order and certificate where finding in favor of owner.—If nothing is found due by the owner, the judge may make an order staying all further proceedings, and make such order as to costs as may be just, and at the expiration of fourteen days thereafter may grant a certificate vacating the lien of the plaintiff, and all other liens of the same class as the plaintiffs. 57 V. c. 23, s. 52.

See Ont. Act, sections 41, 42, 43, 44, and 45, as to costs.

53. Certificate vacating lien where payment by owner into bank to credit of action.—Where anything is found due by the owner he may on, or at any time before the day appointed for payment, pay the amount found to be due by him into a bank named by the judge to the credit of the action, and thereupon, upon the proof of such payment, the judge may grant *ex parte* a certificate in Form (16) in the schedule to this chapter, vacating the lien of the plaintiff, and all other liens of the same class as plaintiffs. 57 V. c. 23, s. 53.

54. Costs on certificate vacating lien.—The judge may make such order as to the owner's costs of obtaining and registering any certificate vacating the lien as may be just. 57 V. c. 23, s. 54.

See Ont. Act, sections 41, 42, 43, 44, and 45, as to costs.

55. Effect of registration of certificate vacating lien.—Upon the registration of a certificate vacating any lien or liens, the same shall thereupon be vacated and discharged. 57 V. c. 23, s. 55.

See Ont. Act, section 27.

56. Payment out of bank.—Upon payment into a bank of the amount which may be found due by the owner, the same shall be (subject to the payment of any costs thereout, as may be ordered) paid out to the parties found entitled thereto by the report of the judge. 57 V. c. 23, s. 56.

57. Judgment for sale of land on default of payment by owner.—In default of payment by the owner within the time directed

by the report, the plaintiff may apply to the said judge, who, upon due proof of the default, may grant an order or judgment for the sale of the land in question for the satisfaction of the lien of the plaintiff, and other liens of the same class. 57 V. c. 23, s. 57.

See Ont. Act, section 37.

58. Form of judgment for sale.—The judgment for sale may be in Form (15), set forth in the schedule to this chapter. 57 V. c. 23, s. 58.

59. Judgment to be entered with clerk of County Court.—Such judgment for sale shall be entered as other judgments are required to be entered in the office of the clerk of the County Court and shall have the same force or effect as a judgment in the ordinary case of an action between the said parties. 57 V. c. 23, s. 59.

See Ont. Act, section 37.

60. Sale by sheriff.—The sale under said judgment shall be conducted by the sheriff who shall execute a deed to the purchaser; the proceedings on such sale shall be in the manner prescribed by statute respecting sales of land made under writs of *fieri facias*. 57 V. c. 23, s. 60.

61. Report of sale by sheriff.—After the sale the sheriff shall pay the proceeds into a bank to the credit of the action and make a report upon the sale to the judge, who shall thereupon tax the costs of the sale to the party entitled thereto, and shall apportion the money realized among the parties entitled thereto, and may order the moneys realized to be paid out of the bank to the parties so found by him entitled thereto. 57 V. c. 23, s. 61.

62. (1) Plaintiff to represent all lienholders in proceedings for sale, etc.—For the proper proceedings to obtain an order for sale and carrying out of the sale, and the apportionment of the moneys realized thereunder, the plaintiff shall be deemed suffici-

ently to represent all other lienholders entitled to the benefit of the action unless judge otherwise orders.

(2) **Lienholders of a class to rank pari passu.**—Where there are several liens under this chapter against the same party each class of the lienholders shall, subject to the provisions of sections 6, 9 and 11, rank *pari passu* for the several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed amongst them *pro rata* according to their several claims and rights.

(3) **Adding parties.**—The judge shall have power from time to time to add any parties to the proceedings as he may deem necessary or advisable, and may direct as to service of notices on such new parties.

(4) **Death of owner, etc.**—The death of an owner or any other defendant shall not cause the proceedings to abate, but they may be continued against the personal representatives of such owner or other defendant. 57 V. c. 23, s. 62.

63. Carriage of proceedings.—Any lienholder entitled to the benefit of the action may apply for the carriage of the proceedings, and the judge may thereupon make such order as to costs and otherwise as may be just; and any lienholder who obtains the carriage of the proceedings shall, in respect of all proceedings taken by him, be deemed to be the plaintiff in the action. 57 V. c. 23, s. 63.

See Ont. Act, section 36.

64. Dismissal of proceedings for want of prosecution.—Any person affected by the proceedings may apply to the judge to dismiss the same for want of due prosecution, and the judge may make such order upon the application as to costs or otherwise as may be just. 57 V. c. 23, s. 64.

65. Service on guardian of infant defendant.—Where any infants are named as defendants the appointments referred to in

section 42 may be served upon the official guardian of such infants. If there is no official guardian, the judge may appoint a guardian *ad litem*. Such official guardian or guardian so appointed shall thereupon become and be the guardian *ad litem* for such infants in the proceedings, and it shall not be necessary to serve any such infant defendant with any further or other proceedings, and such infant shall be bound thereby. 57 V. c. 23, s. 65.

66. (1) **Costs.—Reduction of costs where in excess of ten per cent. of proceeds.**—The fees and costs in all proceedings taken under this chapter shall be such as are payable in respect of similar matters according to the ordinary procedure of the County Court, but where the taxed costs of proceedings to enforce any lien are payable out of the amount realized by such proceedings for the satisfaction of the lien, and shall exceed ten per cent. of the amount realized thereby for the satisfaction of the lien, such costs shall be reduced proportionately by the judge so as the same shall not in the aggregate exceed the said ten per cent., and no more costs than such reduced amount shall be recoverable between party and party or solicitor and client.

(2) **Limit to costs.**—In no case shall the costs taxed against any of the parties exceed ten per cent. of the amount in dispute between such party and the party to whom the costs are awarded. 57 V. c. 23, s. 66.

See Ont. Act, sections 41, 42, 43, 44, and 45, as to costs. See also *Donal* v. *Segel*, (1896) 32 C. L. J. 681.

67. Certificate for balance of claim where lien not paid in full.—After the amount of the lien shall be realized, any lienholder who has proved a claim may apply to the said judge, upon notice to his primary debtor, for judgment for the payment of any balance which may remain due after deducting the amount received or payable in respect of the lien, and thereupon the judge may grant or refuse the application upon such terms as to costs or otherwise as may be just; and in case he sees fit to grant the application he

will grant a certificate of the amount for which he finds the applicant is entitled to judgment for debt and costs. 57 V. c. 23, s. 67.

68. Certificate to be enforced as a judgment of County Court.—Such certificate may be filed in the office of the clerk of the court, and the same, whether the amount awarded exceeds the ordinary jurisdiction of the County Court or not, shall thereupon be entered in the judgment book and shall thereupon become a judgment of the court, and may be enforced in like manner as any other judgment for the payment of money is enforced in the said court. 57 V. c. 23, s. 68.

See Ont. Act, section 47.

69. (1) Appeal.—Orders and certificates made by a judge under this chapter shall be appealable to the Supreme Court in like manner as any order or decision of a County Court judge in ordinary actions is appealable.

(2) Stay of proceedings pending appeal.—In case of appeal from any such order or certificate, the proceedings upon such order or certificate may be stayed as in ordinary cases. 57 V. c. 23, s. 69.

See Ont. Act, section 40.

70. Proceeding to be deemed an action.—A proceeding under this chapter shall be deemed to be an action. 57 V. c. 23, s. 70.

71. (1) Joinder of lienholders.—Proceedings by lienholder deemed to be taken for whole class registering liens, etc.—Any number of lienholders may join in one action or proceeding; and any action or proceeding brought by a lienholder shall be taken to be brought on behalf of all the lienholders of the same class who have registered their liens before or within fourteen days after the commencement of the action, or who shall within the said fourteen days, or within such further time as may be allowed for that purpose, file with the judge of the County Court of the county where

the proceedings have been brought, a statement, entitled in or referring to the said action, of their respective claims.

(2) **Consolidation of proceedings.**—Where separate proceedings are instituted by lienholders, the judge may consolidate the proceedings and give all such directions as to carrying on the same, after consolidation, as he may deem necessary or desirable. 57 V. c. 23, s. 71.

See Ont. Act, section 35.

But although the Act allows any number of lienholders to be joined in one suit it does not enable a lienholder to consolidate liens against several different buildings. *O'Brien* v. *Fraser,* (1918) 45 N. B. R. 539, 41 D. L. R. 324. Some decisions, however, indicate that the lien may attach against several pieces of property as one individual claim. See *Ontario Lime Assn.* v. *Grimwood,* 22 O. L. R. 17; *Polson* v. *Thomson,* (1916) 29 D. L. R. 395.

72. Enlargement of time.—The judge may on good cause extend the time within which any proceedings are to be taken under this chapter, upon application made either before or after the time for taking any such proceedings has expired. 57 V. c. 23, s. 72.

73. Order by judge for payment out of money in bank.—Any money paid into a bank under this chapter shall be paid out by the order of the judge as he may direct. 57 V. c. 23, s. 73.

74. Provision for other judge to act in case of interest.—In case the judge of the County Court in which the land, in respect of which the lien is claimed is situate, is interested in any proceeding under this chapter, or related to any of the parties, the proceedings may be taken before any judge of another County Court, who in so acting shall, for the purpose of such proceedings, be deemed to be a judge of the County Court of the county in which the lands in question are situate. 57 V. c. 23, s. 74.

75. Before whom affidavit may be sworn.—Any affidavit required under this chapter may be sworn before a justice of the peace or commissioner for taking affidavits. 57 V. c. 23, s. 75.

See Ont. Act, section 17, note "j."

76. Application of chapter.—The provisions of this chapter shall not apply to contracts entered into prior to the first day of August, A.D., 1894. 57 V. c. 23, s. 76.

See Ont. Act, section 50.

SCHEDULE.

FORM 1—SECTION 15.

CLAIM OF LIEN.

A. B. (name of claimant) of (here state residence of claimant) (if so, as assignee of), (stating name and residence of assignor), under the Mechanics' Lien Act, claims a lien upon the estate of (here state the name and residence of owner of the land upon which the lien is claimed), in the undermentioned land in respect of the following work (or materials), that is to say: (here give a short description of the nature of the work done or the materials furnished for which the lien is claimed), which work was (or is to be) done, (or materials were furnished), for (here state the name and residence of the person upon whose credit the work is done or materials furnished, on or before the day of . The amount claimed as due (or to become due) is the sum of $.

The following is a description of the land to be charged: (here set out a concise description of the land to be charged, sufficient for the purpose of registration). (Where credit has been given, insert): The said work was done (or materials were furnished) on credit, and the period of credit agreed to, expired (or will expire) on the day of , A.D., 19 .

Dated at this day of , A.D., 19 .

(*Signature of claimant.*)

51 V. c. 23—Form (1).

FORM 2—SECTION 15.

CLAIM OF LIEN FOR WAGES.

A. B. (name of claimant) of (here state residence of claimant) (if so, as assignee of), (stating name and residence of assignor) under the Mechanics' Lien Act, claims a lien upon

the estate of (here state the name and residence of the owner of the land upon which the lien is claimed), in the undermentioned land in respect of days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done), on or before the day of .

The amount claimed as due is the sum of $.

The following is a description of the land to be charged: (here set out a concise description of the land to be charged, sufficient for the purpose of registration).

Dated at this day of , A.D., 19 .

(*Signature of claimant.*)

57 V. c. 23—Form (2).

FORM 3—SECTION 15.

CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons under the Mechanics' Lien Act claim a lien upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed) in the undermentioned lands in respect of wages for labor performed thereon, while in the employment of (here state name and residence or names and residences of employers of the several persons claiming the lien).

A. B., of (residence) $, for days' wages.
C. D., of (residence) $, for days' wages.
E. F., of (residence) $, for days' wages.

The following is a description of the land to be charged:—

(*Here set out a concise description of the land to be charged sufficient for the purpose of registration.*)

Dated at this day of , A.D., 19 .

(*Signature of claimants.*)

57 V. c. 23—Form (3).

FORM 4—SECTION 16.

AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (or annexed) claim, do make oath that the said claim is true (or that the said claim so far as relates to me is true) or

We, A. B. and C. D., named in the above (or annexed) claim, do make oath, and each for himself, saith that the said claim so far as it relates to him is true.

(Where the affidavit is made by agent or assignee a clause must be added to the following effect):—

I have full knowledge of the facts set forth in the above (or annexed) claim.

Sworn before me at in the County of this day of , A.D., 19 . Or, } (*Signature.*)

The said A. B. and C. D. were severally sworn before me at in the County of this day of , A.D., 19 .. Or, } (*Signature.*)

The said E. D. was sworn before me at , in the County of this day of , A.D., 19 . } (*Signature.*)

57 V. c. 23—Form (4).

FORM 5—SECTION 30.

CONTRACTOR'S AFFIDAVIT.

I, A. B., contractor (or sub-contractor, as the case may be), for certain work on the land of , which may be known and described as follows: (here describe land briefly), make oath and say (or do solemnly declare) that I have paid all wages earned in respect to or on the said work up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the day of .

Sworn (or declared), etc.

57 V. c. 23—Form (5).

FORM 6—SECTION 30.

AFFIDAVIT OF AGENT.

I, A. B., agent for C. D., contractor, (or sub-contractor, as the case may be) in respect of certain work on the land of ,

which may be known and described as follows: (here describe land briefly), make oath and say (or do solemnly declare);

That I know of my own personal knowledge, that all wages earned in respect to or on the said work up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the day of , have been paid.

Sworn to (or declared), etc.

57 V. c. 23—Form (5).

FORM 7—SECTION 33.

AFFIDAVIT OF MORTGAGOR.

I, A. B., the mortgagor named in a certain mortgage, bearing date the day of , made between myself of the first part and C. D., as mortgagee, and registered in the office of the Registrar of Deeds for the County of , as No. , make oath and say (or do solemnly declare):—

That all claims of mechanics, labourers and other persons referred to in the fourth section of the Mechanics' Lien Act, with reference to work done, or materials or machinery placed or furnished on the land included in the said mortgage have been paid in full. I further say that all wages earned in respect to, or on the said work, up to and inclusive of the 14th day preceding this day, that is to say, up to and inclusive of the day of , have been paid.

Sworn (or declared), etc.

57 V. c. 23—Form (7).

FORM 8—SECTION 40.

AFFIDAVIT VERIFYING CLAIM.

(*Title of Court and Clause.*)

I, make oath and say: that I have read (or heard read) the foregoing statement of claim, and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me, after giving credit

for all sums of money or goods or merchandise to which (naming the debtor) is entitled to credit as against me.

Sworn, etc.

57 V. c. 23—Form (8).

FORM 9—SECTION 42.

CERTIFICATE AND APPOINTMENT BY JUDGE.

(*Title of Court and Clause.*)

I certify that the above named plaintiff, claiming to be a contractor with the defendant (naming the owner), or a sub-contractor of the defendant, A. B. who is (or claims under C. D.) a contractor with (naming the owner), has filed with me a statement of his claim to enforce a mechanics' lien against (describe the lands) and take notice that I will, at my chambers at the of in , proceed on , the day of , to determine whether the plaintiff is entitled to the lien in case his right thereto is disputed, and on the day of I will, in case his right is undisputed, or if disputed, is established before me, proceed and take all necessary accounts, and tax costs, for the purpose of enforcing such lien, and if you do not attend at the time and place appointed, and prove your claim, if any, the proceedings will be taken in your absence, and you may be deprived of all benefit of the proceedings.

Dated the day of , A.D., 19 .

Judge of the County Court.

(*Signature.*)

57 V. c. 23—Form (9).

FORM 10—SECTION 44.

NOTICE DISPUTING PLAINTIFF'S RIGHT OF LIEN.

(*Title of Court and Cause.*)

I dispute that the plaintiff is now entitled to a mechanics' lien on the following grounds (setting forth the grounds shortly):

(a) That the lien has not been prosecuted in due time, as required by statute;

(b) That there is nothing due to plaintiff;

(c) That plaintiff's lien has been vacated and discharged;

(d) That there is nothing due by A. B. (the owner) for the satisfaction of the plaintiff's claim.

(*Signature of defendant, in person, or his solicitor.*)

This notice is filed by me, A. B., defendant, in person, and my address for service is (stating address within two miles of Chambers or judge) (or, this notice is filed by X. Z., of , solicitor for the defendant, A. B.).

57 V. c. 23—Form (10).

FORM 11—SECTION 47.

STATEMENT OF ACCOUNTS TO BE FILED BY OWNER.

(*Title of Court and Cause.*)

Amount of contract price for work contracted to be performed (as plumber) on the lands in question herein $500.00

Amount paid on account.

1903.

June 1. Paid E. F. $200.00

July 5. Paid G. H. and B. K., sub-contractors of B. F. 100.00

Total $300.00

Balance admitted to be due $200.00

for satisfaction of lien of plaintiff and other lienholders of same class as plaintiff.

57 V. c. 23—Form (11).

FORM 12—SECTION 47.

AFFIDAVIT OF OWNER VERIFYING ACCOUNT.

(*Title of Court and Cause.*)

I, A. B., of , being the owner of the lands in question in this action, make oath and say:

That I have in the foregoing account (or, account now shown to me, marked "A") set forth a just and true account of the amount of the contract price agreed to be paid by me to E. F., for the work contracted to be done by him on the lands in question.

I have also justly and truly set forth the payments made by me on account thereof, and the persons (or person) to whom the same were made, and the balance of $200, appearing by such account to be still due and payable, is the just and true sum now due and owing by me in respect of my contract with the said E. F.

Sworn, etc.

57 V. c. 23—Form (12).

FORM 13—SECTION 48.

STATEMENT OF ACCOUNT BY LIENHOLDER.

(*Title of Court and Cause.*)

E. F.

To G. H.,

1903.		Dr.	
Jan. 1.	To 12 dozen brackets		$12.00
Feb. 3.	To 50 lbs. nails		5.00
Oct. 3.	To 40 sheets glass		40.00
			$57.00
1903.		Cr.	
Feb. 4.	By cash	$ 4.00	
June 1.	By cash	20.00	24.00
			$33.00

57 V. c. 23—Form (13).

FORM 14—SECTION 48.

AFFIDAVIT OF LIENHOLDER VERIFYING CLAIM.

(*Title of Court and Cause.*)

I, G. H., of (address and occupation) make oath and say:—

I have in the foregoing account (or, in the account now shown to me, marked "A") set forth a just and true account of

the amount due and owing to me by E. H. (the owner) (or, by E. F., who is a sub-contractor with the defendant L. G.) (the owner) of the lands in question, and I have in the said account given credit for all sums in cash or merchandise or otherwise, to which the said E. F. is justly entitled to credit in respect of the said account, and the sum of ($33) appearing by said account to be due to me as the amount (or balance) of such account, is now justly due and owing to me.

Sworn, etc. (address of claimant or his solicitor for service to be set forth as in Form (10)).

57 V. c. 23—Form (14).

FORM 15—SECTION 58.

(*Title of Court and Cause.*)

Date

Upon motion of the aforesaid plaintiff, and upon hearing read the statement of claim, and the report made herein on the day of , it is ordered and adjudged that the land in question (describe the lands) be forthwith sold by the sheriff of the said County ; that the purchase money be paid into the bank of to the credit of this cause; that the proceeds of the said sale be paid by the court to the person who may be found entitled thereto by the judge of the said court.

Entered this day of , A.D., 19 .

(*Signature.*)
Judge, etc.

Entered this day of , A.D., 19 .

(*Signature.*)
Clerk.

57 V. c. 23—Form (15).

FORM 16—SECTION 53.

CERTIFICATE VACATING LIEN.

(*Title of Court and Cause.*)

Date

I certify that the defendant A. B. (the owner) has paid into the Bank of to the credit of this cause all moneys due and payable by him for the satisfaction of the liens of the plaintiffs and E. F., G. H., J. K., and J. L., and their liens are hereby vacated and discharged so far as the same affect the following lands: (describe lands).

(*Signature.*)
Judge, etc.

57 V. c. 23—Form (16).

FORM 17—SECTION 52.

CERTIFICATE VACATING LIEN.

(*Title of Court and Cause.*)

Date

I certify that I have enquired and find that the plaintiff is not entitled to any mechanics' lien upon the lands of the defendant A. B. (the owner), and that his claim for lien is vacated and discharged so far as the same affects the following lands: (describe lands).

(*Signature.*)
Judge, etc.

57 V. c. 23—Form (17).

FORM 18—SECTION 67.

CERTIFICATE FOR JUDGMENT FOR BALANCE AFTER REALIZATION OF LIEN.

(*Title of Court and Cause.*)

Date

Upon the application of A. B., on due notice to C. B., I do certify that A. B. is entitled under the provisions of the Mechanics' Lien Act to recover against C. D. $ debt and $ costs, and that upon filing this certificate in the office of the clerk of this court he is entitled to enforce the same as a judgment of the court.

(*Signature.*)
Judge, etc.

57 V. c. 23—Form (18).

NOVA SCOTIA MECHANICS' LIEN ACT.

CHAPTER 2.

An Act to Amend and Consolidate the Mechanics' Lien Act.

(Passed the 15th day of April, A.D., 1915).

SECTION.

1. Title.
2. Interpretation.
   (a) Contractor.
   (b) Material.
   (c) Owner.
   (d) Registrar.
   (e) Sub-contractor.
   (f) Wages.
3. Act not applicable certain cases.
4. (1) Certain agreements void.
   (2) Limitation.
5. Agreement not defined party entitled to lien.
6. When lien arises.
7. Property married woman.
8. (1) When it attaches.
   (2) Upon what lien attaches.
   (3) Provision respecting prior mortgage.
   (4) Lien dates from registration.
9. When property destroyed by fire.
10. Amount lien limited.
11. Amount in case of person other than contractor.
12. (1) Deductions in favor of contractors, etc.
   (2) Amount to be retained.
   (3) Lien a charge.
   (4) Payments made before notice.
13. Payments when allowed against contractor.
14. Pri[illegible]f lien.
15. Lien [illegible]echanic, for wages, p[illegible]rity of.
16. Materials not to be removed.
17. Registration of lien.
18. Contents and form of claim.
19. Union of claims.
20. Irregularity not to invalidate.
21. Claim to be registered.
22. Registry Act applies.
23. Registration in other cases.
24. When lien expires unless action brought.
25. When registered lien expires.
26. Lien ceases in certain cases in 90 days.

SECTION.
27. Lien assignable.
28. Provisions respecting discharge and vacating lien.
29. Taking security, etc., not to affect lien.
30. Enforcement of lien where time extended.
31. Lienholder may demand inspection of contract.
32. Provisions respecting liens on mining claims.
33. Jurisdiction of Court and procedure.
34. Trial and powers of Court.
35. Notice of Trial.
36. Consolidation of actions.
37. Carriage of action.
38. Judgment in petty cases.
39. Appeal.
40. Costs.
41. Law stamps.
42. Deficiency after sale recoverable.
43. Certificate vacating lien.
44. Mechanics' lien on chattels.
45. Personal judgment.
46. Forms.
47. Acts repealed.

Be it enacted by the Governor, Council, and Assembly, as follows:—

SHORT TITLE.

1. **Title.**—This Act may be cited as "The Mechanics' Lien Act."

2. **Interpretation.**—In this Act—

(a) "**Contractor.**"—"Contractor" shall mean a person contracting with or employed directly by the owner or his agent for the doing of work or service or placing or furnishing materials for any of the purposes mentioned in this Act;

(b) "**Material.**"—"Material" or "materials" shall include every kind of movable property;

(c) "**Owner.**"—"Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit, or
(ii) on whose behalf, or
(iii) with whose privity and consent, or
(iv) for whose direct benefit

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

(d) "**Registrar.**"—"Registrar" means registrar of deeds;

(e) "**Sub-contractor.**" — "Sub-contractor" shall mean a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor;

(f) "**Wages.**"—"Wages" shall mean money earned by a mechanic or laborer for work done, whether by the day or other time or as piece work.

See Ont. Act, section 2, and notes thereunder.

A foreign corporation would be entitled to acquire a lien under this Act. See *Bank of Montreal* v. *Condon*, (1896) 11 Man. L. R. 366.

3. Act not applicable to certain cases.—Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon.

4. (1) **Certain agreements void.**—Every agreement, verbal or written, expressed or implied, on the part of any workman, servant, laborer, mechanic or other person employed in any kind of manual labor intended to be dealt with in this Act, that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of such person, shall be null and void.

(2) **Limitation.**—This section shall not apply to a manager, officer or foreman, or to any other person whose wages are more than $5.00 a day.

5. Agreement not defined, party entitled to lien.—No agreement shall deprive any person otherwise entitled to a lien under this Act who is not a party to the agreement, of the benefit of the lien, but it shall attach, notwithstanding such agreement.

6. When lien arises.—Unless he signs an express agreement to the contrary, and in that case subject to the provisions of section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor, or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, and appurtenances, and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner.

(The foregoing section is as amended by c. 72 of the Acts of 1917).

See Ont. Act, section 6, and cases cited.

As to what constitutes a building or erection, see a large number of cases cited in *Adamson* v. *Rogers,* (1895) 22 O. A. R. 415.

C. & W., who were awarded a contract to place heating apparatus in a hotel building owned by the defendant D., ordered materials required from plaintiffs in a letter stating: "We have secured contract for hotel which requires above goods." Held,

that these words sufficiently identified the building for which the goods were required. *Dominion Radiator Co.* v. *Cann et al.*, (1904) 37 N. S. R. 237.

The word "mine" used as affecting claims of others than laborers includes the areas and the deposit of ore, and the parcel of land on which such deposit is found; and the word "appurtenances" refers to articles of movable property in working the mine. *Pelton* v. *Black Hawk Mining Co.*, (1903) 40 N. S. R. 385.

Certain loads of gravel had been placed on the street in front of a sidewalk adjoining the building which was being repaired. As the gravel was not "placed on the land" it was held that it did not come within the terms of the Act. Materials placed near the land cannot be treated as within the terms of the section. *Brookfield* v. *Hopgood*, (1919) decision of Wallace, Co.J., Halifax, unreported.

"It appears that the builder at first paid the sub-contractors promptly and then suddenly stopped paying them. Subsequently one of them called on him twice for money, but unsuccessfully. The last payment by the defendant to the builder was on the 10th June. The builder had then represented to the wife of the defendant, who was the active agent of the defendant, that the work was all finished. Obviously this was a deliberately false statement, and made for the purpose of getting payment from the owner. Soon after it was made the builder "left town," having failed to pay any more money to the sub-contractor, or to do anything further in relation to the contract. There could scarcely be stronger evidence of an abandonment of a contract, unless the builder had given a formal written notice to the owner that he had abandoned the contract." *Dobson* v. *Major*, (1917); decision of Wallace, Co.J., Halifax, unreported.

The hauling of the material to the land is essential to the construction, and is as much work done in respect to the construction of a building as the labor of a hod-carrier who may at times be obliged to leave the building and procure bricks or mortar some distance from the land in question, and who nevertheless would have a lien for labor so performed. The charge for the teamster's work is, therefore, allowed. *Falconer* v. *Hartlen*, (1920); Wallace, Co.J., Halifax, N.S. (unreported).

7. Property married woman.—Where work or service is done or materials furnished upon or in respect of the land of a mar-

ried woman with the privity and consent of her husband he shall be deemed to be acting as well for himself so as to bind his own interest, and also as her agent for the purpose of this Act, unless before doing such work or service or furnishing such materials the person doing or furnishing the same shall have had notice to the contrary.

8. (1) **When it attaches.**—The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) **Upon what lien attaches.**—Where the estate or interest upon which the lien attaches is leasehold, the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

(3) **Provision respecting prior mortgage.**—Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge; and

(a) The selling value of the land is increased by the work or service, or by the furnishing or placing of the materials; and

(b) The mortgagee consents to the performance of such work or service or the furnishing, or placing of such materials;

the lien shall attach upon such increased value in priority to the mortgage or other charge.

(4) **Lien dates from registration.**—Such lien, upon registration, as in this Act provided, shall attach and take effect from the date of the registration as against subsequent purchasers, mortgagees, or other incumbrancers.

9. When property destroyed by fire.—Where any of the property upon which a lien attaches is wholly or partly destroyed by fire any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall be subject to the claims of all persons for liens to the same extent as if such money was realized by a sale of such property in an action to enforce the lien.

10. Amount of lien limited.—Save as herein otherwise provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable to the contractor.

A sub-contractor cannot share in the statutory percentage retained or paid into court by the owner unless there is by the terms of the contract money payable by the owner to the contractor. The right of the sub-contractor, unlike the right of the wage-earner, is measured by the amount justly due by the owner to the contractor, and the owner would not be liable to the sub-contractor for a greater sum than is payable to the contractor. *Boyce* v. *Kennedy*, (1919); Wallace, Co. J., Halifax, N.S. (unreported).

11. Amount in case of person other than contractor.—Save as herein otherwise provided, where the lien is claimed by any person other than the contractor the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials placed or furnished.

See amendment made by c. 43 of the Acts of 1920.

See *McDonald* v. *Dominion Iron & Steel Co.*, (1903) 40 N. S. R. 465.

12. (1) Deductions in favor of contractors, etc.—In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of thirty days after the completion or abandonment of the contract, twenty per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section

6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service, or materials.

(2) **Amount to be retained.**—Where the contract price or actual value exceeds $15,000, the amount to be retained shall be fifteen per cent. instead of twenty per cent.

(3) **Lien a charge.**—The lien shall be a charge upon the amount directed to be retained by this section in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(4) **Payments made before notice.**—All payments up to eighty per cent. or eighty-five per cent. where the contract price or actual value exceeds $15,000, of such price or value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of such lien given by the person claiming the lien to him, shall operate as a discharge *pro tanto* of the lien.

(5) Payment of the percentage required to be retained under sub-sections 1 and 2 may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the period of thirty days mentioned in sub-section 1, unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as hereinafter provided.

B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, verbally, that a portion of the proceeds of the bonds and shares transferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the sub-contractor by whom the machinery for the mill was supplied:—Held, that in the absence of notice, the company are not liable to plaintiff for failure to retain out of

the moneys paid to B. the percentage required to be retained under the provisions of the Act. Also that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the consideration therefor, were delivered to B., was not one within the provisions of section 8 of the Act and that the company was not required to retain anything on that date for the benefit of future contractors. *Smith Co.* v. *Sissiboo, etc., Co.*, (1903) 36 N. S. R. 348.

On appeal to the Supreme Court of Canada this judgment was affirmed, and it was held that section 8 which requires the owner to retain fifteen per cent. of the contract price until the work is completed did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated. *Smith Co.* v. *Sissiboo, etc., Co.*, (1904) 35 S. C. R. 93.

C. contracted with the owner of the Queen Hotel to do certain work in connection with the hotel for the sum of $7,200. A sub-contract was made by C. with M. to do certain work in connection with the heating system for the sum of $250. M. in turn made a sub-contract with plaintiff to do the latter work for the sum of $200.

M. having assigned, plaintiff asserted a lien upon the hotel property for the amount of his contract, with the sum of $21.90 for extras, making in all $221.90. It appeared that the balance due by C. to M. was $75. It was held by Wallace, Co.J., that under the circumstances in evidence plaintiff's lien was limited to the sum of $75. An appeal from this judgment was dismissed by the Supreme Court of Nova Scotia. *Briggs* v. *McInnis*, (1919) 53 N. S. R. 417.

"It is contended that under this section the phrase 'person primarily liable' must refer to the owner. But it cannot have such a meaning in this section when dealing with contracts of sub-contractors made with the main contractor, because the section in express terms requires the person primarily liable to make the deductions from any payments made by him *in respect to such contract*, that is to say, in this case, such sub-contract. But the owner in the present case was not required to make any payments to the sub-contractor, and, therefore, the 'person primarily liable' in this case must be the person with whom the sub-contractor made his contract,—that is to say, the main contractor."

Briggs et al. v. *McInnis et al, supra,* per Wallace, Co. J., Halifax, N.S.

The above section has since been amended. See c. 43 of the N. S. Acts of 1920.

13. Payments, when allowed against contractor.—If an owner, contractor or sub-contractor makes a payment to any person entitled to a lien under section 6 for or on account of any debt justly due to him for work or service done or for materials placed or furnished to be used as therein mentioned, for which he is not primarily liable, and within three days afterwards gives, by letter or otherwise, written notice of such payment to the person primarily liable, or his agent, such payment shall be deemed to be a payment on his contract generally to the contractor or sub-contractor primarily liable, but not so as to affect the percentage to be retained by the owner as provided by section 12.

14. (1) **Priority of lien.**—The lien shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided.

(2) Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) Except where it is otherwise provided by this Act no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights.

15. (1) Lien of mechanics, etc., for wages, priority of. — Every mechanic or laborer whose lien is for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, directed to be retained by section 12 to which the contractor or sub-contractor, through whom such lien is derived is entitled, and all such mechanics and laborers shall rank thereon *pari passu*.

(2) Every wage-earner shall be entitled to enforce a lien in respect of a contract not completely fulfilled.

(3) If the contract has not been completed when the lien is claimed by a wage-earner, the percentage shall be calculated on the value of the work done or materials furnished by the contractor or sub-contractor by whom such wage-earner is employed, having regard to the contract price, if any.

(4) Where the contractor or sub-contractor makes default in completing his contract the percentage shall not, as against a wage-earner claiming a lien, be applied by the owner or contractor to the completion of the contract or for any other purpose, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim against the contractor or sub-contractor.

(5) Every device by an owner, contractor or sub-contractor to defeat the priority given to a wage-earner for his wages, and every payment made for the purpose of defeating or impairing a lien, shall be null and void.

See *McDonald* v. *Dominion Iron & Steel Co.*, (1903) 40 N. S. R. 465.

Material.

16. (1) Materials not to be removed.—During the continuance of a lien no part of the material affected thereby shall be removed to the prejudice of the lien.

(2) Material actually brought upon any land to be used in connection with such land for any of the purposes enumerated in

section 6, shall be subject to a lien in favor of the persons furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due to the person furnishing the same.

REGISTRATION OF CLAIM.

17. Registration of lien.—A claim for lien may be registered in the registry of deeds for the registration district in which the land is situated.

18. (1) Contents and form of claim.—A claim for lien shall state—

(a) the name and residence of the person claiming the lien, and of the owner of the property to be charged (or the person whom the person claiming the lien, or his agent, believes to be the owner of the property proposed to be charged) and of the person for whom and on whose credit the work or service was, or is to be, done, or materials furnished or placed, and the time within which the same was, or is to be done, or furnished or placed;

(b) a short description of the work or service done, or to be done, or materials furnished or placed, or to be furnished or placed;

(c) the sum claimed as due or to become due;

(d) a description of the land or property to be charged;

(e) the date of expiry of the period of credit, if any, agreed upon by the lienholder for payment for his work or service or materials, where credit has been given.

(2) The claim may be in one of the forms A or B in the schedule to this chapter, or to the like effect, and shall be verified by the affidavit (form C) of the person claiming the lien, or of his agent or assignee having a personal knowledge of the matters

required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

(3) Where it is desired to register a claim for lien against the lands of a railway company, it shall be a sufficient description of such lands to describe them as the lands of such railway company, and every such claim for lien shall be registered in the registry of deeds for the registration district in which such lien is claimed to have arisen.

Sub-section 1 (*d*) was substituted for former sub-section by c. 72, s. 2, of the Acts of 1917.

As to error in designating owner, not being fatal to lien, where property can be easily identified, see note to s. 23, *post*.

10. Union of claims.—A claim for lien may include claims against any number of properties, and any number of persons claiming liens on the same property may unite therein (form D), but when more than one lien is included in one claim each lien shall be verified by affidavit (form C), as provided in the next preceding section of this Act.

20. (1) **Irregularity not to invalidate.**—Substantial compliance only with the next two preceding sections of this Act shall be required, and no lien shall be invalidated by reason of the failure to comply with any of the requisites of such sections, unless in the opinion of the court or judge who has power to try the action under this Act, the owner, contractor, or sub-contractor, or mortgagee or other person, as the case may be, is prejudiced thereby and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with the registration required by this Act.

21. Claim to be registered.—The registrar, upon payment of a fee of twenty-five cents, shall register the claim so that the same may appear as an incumbrance against the land so described.

22. Registry Act applies.—Where the claim for lien is so registered the person entitled to such lien shall be deemed the purchaser *pro tanto* and within the provisions of "The Registry Act," but,

except as in this Act provided, "The Registry Act" shall not apply to any lien arising under this Act.

23. (1) **Registration in other cases.**—A claim for lien by a contractor or sub-contractor, in cases not otherwise provided for, may be registered before or during the performance of the contract, or within thirty days after the completion or abandonment thereof.

(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished or placed.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last work is done for which the lien is claimed.

(5) In the case of a contract which is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made, the claim for lien by a contractor may be registered within the time mentioned in sub-section 1, or within seven days after the architect, engineer or other person has given, or has, upon application to him by the contractor, refused to give a final certificate.

One Rhuland had a contract with Wright for the construction of some houses. Dempster & Co. were the sub-contractors and supplied Rhuland on his credit with materials for the work, the whole of which was delivered before the 28th April, 1900. On the 18th May, 1900, Dempster & Co. registered a lien against the property under the Mechanics' Lien Act, 1899, but no proceedings were instituted by them to realize the claim until 13th August, 1900. On an application to set aside Dempster's lien, Ritchie, J., delivered the following judgment: "I think the word 'contract' in the 20th section of the Act means the original contract

with the owner and not the contract between the contractor and a sub-contractor. If no claim has been registered, Dempster & Co. could, I think, have registered one at any time within thirty days after the completion of that contract. There seems to be no reference to the abandonment of the contract except in section 9, but in view of that section I am inclined to the opinion that an abandonment would be held as equivalent to a completion, and no claim could be registered after thirty days from the abandonment of a contract. In this case no period of credit is mentioned in the claim and Mr. Dempster has sworn in an affidavit attached to the claim that none was given nor is the lien claimed upon materials or machinery as provided by section 20, sub-section 2. The difficulty, I think, arises in construing the words 'after the work or service has been completed,' in the cases of sub-contractors. Does this mean after the original contract has been completed or after the completion of the sub-contract? Sub-sections 2 and 3 of section 22 of the Ontario Act have been omitted from the corresponding section (20) of our Act, and decisions on these sections, including *Hall* v. *Hogg*, 20 O. R. 15, are not, I think, applicable. Application dismissed. *Dempster* v. *Wright*, (1900) 21 C. L. T. 88.

Where a claim was erroneously made against a person who was assumed to be the owner of the property but the lien claimant evidently supposed that he was inserting the right name, and the property could be clearly identified by the description, and no one could be prejudiced by the mistake, an amendment, stating the name of the true owner was granted, notwithstanding that the statutory thirty days had expired. The claim is against the land and building instead of the person, and the name of the alleged owner is only a circumstance of description to give notice to purchasers. Entire accuracy in such matters is not essential. *Noonan* v. *Gaiety, Limited*, (1919). Decision of Wallace, Co. J., unreported.

Where the plaintiff misconstrued the terms of his contract and assumed that he had completed it, and, therefore, removed his men and materials from the property, it was held there was no "abandonment." The word "abandonment" would include such acts as flight, or a refusal to complete a contract on some specific ground, while admitting its non-completion, and would also include such deliberate neglect to continue the work, after due notice or request from the employer, as would be equivalent to refusal, but the word

"abandonment" in this section cannot mean ceasing to work under the belief that the contract is completed. *Boyce* v. *Huxtable*, (1919); Wallace, Co. J., unreported.

Expiry and Discharge of Lien.

24. When lien expires unless when action brought.—Every lien for which a claim is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime an action is commenced to realize the claim or in which the claim may be realized under the provisions of this Act, and a certificate thereof (form E) is registered in the registry office in which the claim for lien might have been registered.

25. (1) Registered lien expires.—Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for in sub-section 5 of section 23, on the expiration of thirty days from the registration of claim, unless in the meantime an action is commenced to realize the claim or in which the claim may be realized under the provisions of this Act, and a certificate is registered as provided by the next preceding section.

(2) Where the period of credit mentioned in the claim for lien registered has not expired, it shall nevertheless cease to have any effect on the expiration of six months from the registration or any re-registration thereof if the claim is not again registered within that period, unless in the meantime an action is commenced and a certificate thereof has been registered as provided by sub-section 1.

26. Lien ceases in certain cases in 90 days.—If there is no period of credit, or if the date of the expiry of the period of credit is not stated in the claim so registered, the lien shall cease to exist

upon the expiration of ninety days after the work or service has been completed or materials furnished or placed, unless in the meantime an action is commenced and a certificate thereof registered as provided by section 24.

27. Lien assignable.—The right of a lienholder may be assigned by an instrument in writing and, if not assigned, upon his death shall pass to his personal representative.

28. (1) **Provisions respecting discharge and vacating lien.**—A lien may be discharged by a receipt signed by the claimant, or his agent, duly authorized in writing, acknowledging payment, and verified by affidavit and registered.

(2) The receipt shall be numbered and entered like other instruments, but shall not be copied in any registry book, and there shall be entered against the entry of the lien to which the discharge relates the word "discharged" and the registration number of such discharge.

(3) The fee shall be the same as for registering a claim.

(4) Upon application, the court or judge having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other proper ground and a certificate of the order may be registered.

(5) Where the certificate required by sections 24 and 25 has not been registered within the prescribed time, and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate required by sections 24, 25 or 26, the order vacating the lien may be made *ex parte* upon production of the certificate of the registrar certifying the facts entitling the applicant to such order.

Effect of Taking Security or Extending Time.

29. (1) **Taking security, etc., not to affect lien.**—The taking of any security for, or the acceptance of any promissory note or

bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of any proceedings for the recovery, or the recovery of a personal judgment for the claim, shall not merge, waive or pay, satisfy, prejudice or destroy the lien unless the claimant agrees, in writing, that it shall have that effect.

(2) Where any such promissory note or bill of exchange has been negotiated, the lienholder shall not thereby lose his lien if, at the time of bringing his action to enforce it, or where an action is brought by another lienholder, he is, at the time of proving his claim in such action, the holder of such promissory note or bill of exchange.

(3) Nothing in sub-section 2 shall extend the time limited by this Act for bringing the action to enforce the lien.

(4) A person who has extended the time for payment of a claim for which he has a lien, to obtain the benefit of this section, shall commence an action to enforce such lien within the time prescribed by this Act, and shall register a certificate as required by sections 24, 25 or 26, but no further proceedings shall be taken in the action until the expiration of such extension of time.

30. Enforcement of lien where time extended.—Where the period of credit in respect of a claim has not expired, or where there has been an extension of time for payment of the claim, the lienholder may nevertheless, if an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action as if the period of credit or the extended time had expired.

Lienholder's Right to Information.

31. (1) Lienholder may demand inspection of contract.—Any lienholder may at any time demand of the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the work, service or material is or is to be performed or furnished or placed, and if such owner or his agent

does not, at the time of such demand or within reasonable time thereafter, inform the person making such demand of the terms of such contract or agreement, and the amount due and unpaid upon such contract or agreement, or if he knowingly falsely states the terms of the contract or agreement, or the amount due or unpaid thereon, and if the person claiming the lien sustains loss by reason of such refusal or neglect or false statement, the owner shall be liable to him in an action therefor for the amount of such loss.

(2) The court, or judge having jurisdiction to try an action to realize a lien, may, on a summary application at any time before or after an action is commenced for the enforcement of such lien, make an order requiring the owner or his agent to produce and allow any lienholder to inspect any such contract or agreement upon such terms as to costs as he may deem just.

Liens on Mining Claims.

32. (1) **Provisions respecting liens on mining claims.**—Every laborer or workman to whom wages is due by any person, firm or corporation for work or labor performed at a mine or in connection with mining operations carried on by such person, firm or corporation, shall have a lien upon the property and mining leases or licenses in respect to which such work and labor has been performed to the extent of two months' wages.

(2) Such lien shall have priority over all other liens, mortgages or charges upon the said property and mining leases or licenses, whether the same are prior or subsequent to the performing of such work and labor.

(3) In the registration of such lien it shall not be necessary to describe the property and mining leases affected thereby, but it shall be sufficient to designate such property and mining leases as the property and mining leases of such person or corporation.

(4) Such lien shall be registered in the office of the Commissioner of Public Works and Mines at Halifax, as well as at the registry of deeds, of the registration district in which the mine is

situate, and the provisions of this Act shall, in so far as the same are applicable, apply to registration in the office of said Commissioner.

(5) Proceedings to enforce a lien created by this section may be taken at any time within six months from the registration thereof and shall be deemed to be taken on behalf of all persons holding such liens at the time such proceedings are commenced or within thirty days thereafter.

(6) In this section the expression "mine" means a mine to which the Coal Mines Regulation Act or the Metalliferous Mines Regulation Act applies, and the expression "mining" shall have the same meaning as the expression "to mine" in the Mines Act.

Realizing Liens and Procedure.

33. (1) **Jurisdiction of court and procedure.** — The liens created by this Act may be enforced by an action to be brought and tried in the County Court of the County Court District in which the lands are situated, whether the amount claimed is over $800.00 or not, and according to the ordinary procedure of such court, except where the same is varied by this Act.

(2) Without issuing a writ of summons an action under this Act shall be commenced by filing a statement of claim in the office of the clerk.

(3) Any number of lienholders claiming liens on the same property may join in the action, and any action brought by a lienholder shall be taken to be brought on behalf of all other lienholders on the property in question.

(4) It shall not be necessary to make any lienholders defendants to the action, but all lienholders served with a notice of trial shall, for all purposes, be treated as if they were parties to the action.

(5) Every such lienholder who is not a party to the action shall file his claim, verified by affidavit. (Form G).

(6) The statement of claim shall be served within one month after it is filed, but the court or judge having power to try the action may extend the time for service thereof.

(7) The statement of defence may be in one of the forms H or I. The time for delivering a statement of defence shall be the same as for entering an appearance in an action in the Supreme Court.

(8) The service of all papers necessarily or usually served in the enforcement of this Act may be effected by any literate person. (This sub-section was added by c. 46, of the Acts of 1918).

See *McDonald* v. *Consolidated G. M. Co.*, (1901) 21 C. L. T. 482, and *Pennington* v. *Morley*, (1902) 3 O. L. R. 514.

Notice of taking an order for judgment should be given prior encumbrancers so as to protect their rights. *Pelton* v. *Black Hawk Mining Co.*, (1903) 40 N. S. R. 385.

34. (1) **Trial and powers of court.**—After the delivery of the statement of defence, where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than at the ordinary sittings of the court, either party may apply to a judge who has power to try the action to fix a day for the trial thereof, and the judge shall make an appointment fixing the day and place of trial, and on the day appointed, or on such other day to which the trial is adjourned, shall proceed to try the action and all questions which arise therein, or which are necessary to be tried to fully dispose of the action, and to adjust the rights and liabilities of the persons appearing before him, or upon whom the notice of trial has been served, and at the trial shall take all accounts, make all inquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of the action, and of all matters, questions and accounts arising in the action, or at the trial, and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action, or who have been served with the notice of trial, and shall embody all results in the judgment. (Form K).

(2) The judge who tries the action may order that the estate or interest charged with the lien be sold, and when by the judgment a sale of the estate or interest charged with the lien is ordered, the judge who tries the action may direct the sale to take

place at any time after judgment, allowing, however, a reasonable time for advertising such sale.

(3) The judge who tries the action may also order the sale of any materials, and authorize the removal thereof.

(4) Any lienholder who has not proved his claim at the trial of any action to enforce a lien, on application to the judge who tried the action, upon such terms as to costs and otherwise as are just, may be let in to prove his claims at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where such claim is proved and allowed, the judge shall amend the judgment so as to include such claim therein.

(5) Any lienholder for an amount not exceeding one hundred dollars, or any lienholder not a party to the action, may attend in person at the trial of an action to enforce a lien, and on any proceedings in such action, or may be represented thereat or thereon by a solicitor.

(6) Where a sale is had the moneys arising therefrom shall be paid into court to the credit of the action, and the judge upon whose order the lands were sold shall direct to whom such moneys shall be paid, and may add to the claim of the person conducting the sale his actual disbursements incurred in connection therewith; and where sufficient to satisfy the judgment and costs is not realized by the sale, he shall certify the amount of such deficiency, and the names of the persons, with the amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and such persons shall be entitled to enforce the same by execution or otherwise, as a judgment of the court.

35. Notice of trial.—The party who obtains an appointment fixing the day and place of trial, shall, at least eight clear days before the day fixed for the trial, serve a notice of trial, which may be in the form L in the schedule, or to the like effect, upon the solicitors for the defendants who appear by solicitors, and upon all lienholders who have registered their liens as required by this

Act, and upon all other persons having any registered charge or incumbrance or claim on the said lands who are not parties, or, who being parties, appear personally in the said action, and such service shall be personal unless otherwise directed by the court or judge who is to try the action, and the court or judge may, in lieu of personal service, direct in what manner the notice of trial shall be served.

36. Consolidation of actions.—Where more than one action is brought to realise liens in respect to the same property, the court or judge having power to try such actions may, on the application of any party to any one of such actions, or on the application of any other person interested, consolidate all such actions into one action, and may give the conduct of the consolidated action to any plaintiff in his discretion.

37. Carriage of action.—Any lienholder entitled to the benefit of the action may apply for the carriage of the proceedings, and the court or judge having power to try the action may thereupon make an order giving such lienholder the carriage of the proceedings, and such lienholder shall, for all purposes in the action, be the plaintiff in the action.

38. Judgment in petty cases.—In any action where the total amount of the plaintiff and other persons claiming liens is one hundred dollars or less, the judgment of the court or judge having power to try such action shall be final, binding, and without appeal, except that upon application, within fourteen days after judgment is pronounced to the court or judge who tried the same, a new trial may be granted.

39. Appeal.—In all actions where the total amount of the claim of the plaintiff and other persons claiming liens is more than one hundred dollars, any party affected thereby may appeal therefrom to the Supreme Court, *en banc,* whose judgment shall be final and binding, and no appeal shall lie therefrom. The "Judi-

cature Act" and the rules of the Supreme Court shall, so far as the same are applicable, apply to all appeals under this section.

40. (1) Costs.—The costs of the action under this Act awarded to the plaintiffs and successful lienholders, shall not exceed in the aggregate an amount equal to twenty-five per cent. of the amount of the judgment, besides actual disbursements, and shall be in addition to the amount of the judgment, and shall be apportioned and borne in such proportion as the judge who tries the action may direct.

(2) Where the costs are awarded against the plaintiff or other persons claiming the lien, such costs shall not exceed an amount in the aggregate equal to twenty-five per cent. of the claims of the plaintiff and other claimants, besides actual disbursements, and shall be apportioned and borne as the judge may direct.

(3) In case the least expensive course is not taken by a plaintiff under this Act, the costs allowed to the solicitor shall in no case exceed what would have been incurred if the least expensive course had been taken.

(4) Where a lien is discharged or vacated under section 28 of this Act, or where in an action judgment is given in favor of or against a claim for a lien, in addition to the costs of an action, the judge may allow a reasonable amount for costs of drawing and registering the lien or for vacating the registration of the lien.

(5) The costs of and incidental to all applications and orders made under this Act, and not otherwise provided for, shall be in the discretion of the judge.

In mechanics' lien actions it is a sound rule that the owner is entitled ordinarily to his costs out of the fund. In the present case some of the costs incurred related to the contestation of the claim of the Starr Construction Company. The owner, by retaining and subsequently paying into court the proper sum, had fulfilled the obligation imposed upon him by the statute, and as that amount was not accepted as correct, and an issue was thereby created, it seems just and reasonable that, on a trial of that issue, where the

owner (who is, in such case in a position analogous to a stakeholder) succeeds, he should be entitled to his costs out of the fund, before the fund is divided among the other parties whose claims have been established. *Silliker & McMann* v. *Smith*, (1920); Wallace, Co. J., Halifax, N.S., unreported.

41. Law stamp.—Every statement of claim filed in the City of Halifax in an action to enforce a lien under this Act shall be accompanied by a fee of fifty cents, which shall be included in the costs, and paid by law library stamp.

42. Deficiency after sale recoverable.—All judgments in favor of lienholders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after sale of the property adjudged to be sold, and whenever on a sale of any property to realize a lien under this Act sufficient to satisfy the judgment and costs is not realized therefrom, the deficiency may be recovered against the property of such person or persons by the usual process of the court.

43. Certificate vacating lien.—A certificate vacating a lien may be in one of the forms M or N in the schedule, or to the like effect.

Miscellaneous Provisions.

44. (1) **Mechanics' lien on chattels.**—Every mechanic or other person who has bestowed money, or skill and materials upon any chattel or thing in the alteration and improvement in its properties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money, or skill and materials bestowed, shall, while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell by auction the chattel or thing in respect to which the lien exists, on giving one week's notice by advertisement in a newspaper published in the county in

which the work was done, or in case there is no newspaper published in such county, then in a newspaper circulating therein, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he is a resident of such county.

(2) Such mechanic, or other person, shall apply the proceeds of the sale in payment of the amount due him, and the costs of advertising and sale, and shall upon application pay over any surplus to the person entitled thereto.

See Chapter XIV., "Mechanics' Liens upon Personalty" and cases cited, including Nova Scotia cases.

As to insufficiency of possession, see *McKenzie* v. *Martinson*, (1902) 40 N. S. R. 346.

A shipwright who, under a contract for repairs in course of execution, has possession of the defendant ship at the time of her arrest at the suit of the plaintiffs, can claim *priority* in the distribution of the proceeds of the sale of the vessel under an order of the court, in respect to the claim for work in completing such repairs after the arrest,—the repairs being necessary and having been made in good faith, although without the sanction of the court. The award for such repairs was, in the circumstances, subject to this restriction,—"so far as the selling value of the defendant ship was thereby increased." *Halifax Shipyards, Limited*, (Intervenors), and *Montreal Dry Docks and Ship Repairing Company*, (Plaintiffs) v. *The Ship "Westerian,"* (1919) 19 Can. Ex. C. R. 259, affirmed on appeal to the Supreme Court of Canada, (1920).

The restricting clause quoted would not apply if the assent of the plaintiffs to the completion of the repairs had been expressly given or might fairly have been implied. *Jowitt & Sons* v. *Union Cold Storage Co.*, (1913) 3 K. B. 1.

The right of the plaintiffs who seized the vessel is in the value of the vessel at the date of the seizure, and not in the value subsequently enhanced by the necessary work of the shipwright.

45. Personal judgment.—When in any action brought under the provisions of this Act, any claimant fails for any reason to

establish a valid lien, he may nevertheless recover therein a personal judgment against the party or parties to the action for such sum or sums of money as appear to be due him from such party or parties, and which he might recover in an action on the contract against such party or parties.

Where certain work done was done on property which could not be the subject of a lien there can be no recovery of a personal judgment for such work. *Falconer* v. *Hartlen*, (1920); Wallace, Co. J., Halifax, N.S. (unreported).

46. Forms.—The forms in the schedule hereto, or forms similar thereto, or to the like effect, may be adopted in all proceedings under this Act.

47. Acts repealed. — The Acts and parts of Acts in the schedule hereto are repealed to the extent in such schedule mentioned.

SCHEDULE.

Form A.—Section 18.

Claim of Lien for Registration.

A. B. (name of claimant) of (here state residence of claimant, and, if so, as assignee of, stating name and residence of assignor), under the "Mechanics' Lien Act," claim a lien upon the estate of (here state the name and residence of owner of land upon which the lien is claimed), in the undermentioned land in respect to the following work (service or materials), that is to say (here give a short description of the nature of the work done or materials furnished, and for which the lien is claimed), which work (or service) was (or is to be) done (or materials were furnished) for (here state the name and residence of the person upon whose credit the work is done or materials furnished), on or before the day of

The amount claimed as due (or to become due) is the sum of $

The following is a description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

When credit has been given, insert: The said work was done (or materials were furnished) on credit, and the period of credit agreed to expired (or will expire) on the day of , 19 .

Dated at this day of , 19 .

(*Signature of Claimant.*)

FORM B.—SECTION 18.

CLAIM OF LIEN FOR WAGES FOR REGISTRATION.

A. B. (name of claimant) of (here state the residence of claimant, and, if so, as assignee of, stating name and residence of assignor), under the "Mechanics' Lien Act," claims a lien upon the estate of (here state the name and residence of the owner of land upon which the lien is claimed) in the undermentioned land in respect to days' work performed thereon while in the employment of (here state the name and residence of the person upon whose credit the work was done) on or before the day of , 19 .

The amount claimed as due is the sum of $.

The following is the description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at this day of , 19 .

(*Signature of Claimant.*)

FORM C.—SECTIONS 18, 19.

AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (*or* annexed) claim, make oath and say that the said claim is true.

Or, We, A. B. and C. D., named in the above (*or* annexed) claim, make oath and say, and each for himself saith, that the said claim, as far as relates to him, is true.

(*Where the affidavit is made by agent or assignee, a clause must be added to the following effect.*) I have full knowledge of the facts set forth in the above (*or* annexed) claim.

Sworn before me at
in the county of ,
this day of ,
19 .

Or, the said A. B. and C. D. were severally sworn before me at ,
in the county of ,
this day of , 19 .

Or, the said A. B. was sworn before me at , in the county of , this day of , 19 .

FORM D.—SECTION 19.

CLAIM OF LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons under the "Mechanics' Lien Act," claim a lien upon the estate of (here state the name and residence of the owner of the land upon which the lien is claimed) in the undermentioned land, in respect to wages for labor performed thereon while in the employment of (here state name and residence or names and residences of employers of the several persons claiming the lien.)

A. B., of (residence)	$	for	days' wages.
C. D., of (residence)	$	for	days' wages.
E. F., of (residence)	$	for	days' wages.

The following is the description of the land to be charged (here set out a concise description of the land to be charged sufficient for the purpose of registration).

Dated at this day of , 19 .

(*Signatures of the several Claimants.*)

FORM E—SECTION 24.

CERTIFICATE OF LIS PENDENS.

(*Style of Court and Cause.*)

I certify that the above-named plaintiff has commenced an action in the above court to enforce against the following land (describing it) a claim of mechanics' lien for $.

Dated this day of , 19 .

.....

Prothonotary (*or Clerk.*)

FORM G—SECTION 33.

AFFIDAVIT OF LIENHOLDER VERIFYING CLAIM.

(*Style of Court and Cause.*)

I, G. H., of (*address and occupation*), make oath and say:

I have in the foregoing account (*or*, in the account now shown to me, marked A), set forth a just and true account of the amount due and owing to me by E. H. (*the owner*), or by E. F., who is a contractor with the defendant, L. G. (*the owner*), of the lands in question, and I have in the said account given credit for all sums in cash, or merchandise, or otherwise, to which the said E. F. is justly entitled to credit in respect to the said account, and the sum of $ appearing by such account to be due to me as the amount (*or balance*) of such account is now justly due and owing to me.

Sworn, etc.

FORM H—SECTION 33.

DEFENCE.

(*Style of Court and Cause.*)

A. B. disputes that the plaintiff is now entitled to a mechanics' lien on the following grounds: (*setting forth the grounds shortly.*)

(a) That the lien has not been presented in due time, as required by statute.

(b) That there is nothing due to the plaintiff.

(c) That the plaintiff's lien has been vacated and discharged.

(d) That there is nothing due by (*owner's name*) for the satisfaction of the plaintiff's claim.

Delivered on the day of by A. B. in person, whose address for service is (*stating address*) *or*

Delivered on the day of by Y. Z., solicitor for the said A. B.

NOTE.—*If the owner does not dispute the claim entirely, and only wishes to have the accounts taken, he may use the following form:—*

FORM I—SECTION 33.

DEFENCE WHERE THERE ARE NO MATTERS DISPUTED, OR WHERE THE MATTERS IN DISPUTE ARE MATTERS OF ACCOUNT.

(*Style of Court and Cause.*)

A. B. admits that the plaintiff is entitled to a lien, and claims that the following is a just and true statement of the account in question:—

Amount of contract price for work contracted to be performed by E. F., as plumber, on the lands in question herein		$500 00
Amounts Paid on Account.		
June 1st, 1900, paid E. F.	$200 00	
June 1st, 1900, paid G. H. and I. K., sub-contractors of E. F.....	100 00	300 00
Balance admitted to be due		$200 00

For satisfaction of the lien of plaintiff and other lienholders (*as the case may be*) A. B., before action, tendered to the plaintiff $ in payment of his claim, and now brings into court $ and submits that that account is sufficient to pay the plaintiff's claim and asks that this action be dismissed as against him, with costs.

Delivered, etc.

FORM K—SECTION 34.

JUDGMENT.

In the Court
S.S.
Between *Plaintiff*,
and
Defendant.

This action coming on for trial before in at upon opening of the matter and it appearing that the following persons have been duly served with notice of trial herein (*set out the names of all persons served with notice of trial*) and all such persons (*or as the case may be*) appearing at the trial (*if so,*) and the following persons not having appeared, (*set out the names of non-appearing persons*), and upon hearing the evidence adduced and what was alleged by counsel for the plaintiff and for C. D. and E. F. and the defendant (*if so*) (and by A. C. appearing in person).

1. This court doth declare that the plaintiff and the several persons mentioned in the first schedule hereto are respectively entitled to a lien under "The Mechanics' Lien Act," upon the lands described in the second schedule hereto, for the amounts set opposite their respective names in the first, second and third columns of the first schedule, and the persons primarily liable for such claims respectively are set forth in the fourth column of such schedule.

2. (*If so.*) And this court doth further declare that the several persons mentioned in the third schedule hereto are also entitled to some lien, charge or incumbrance upon the said lands for the amounts set opposite their respective names in the fourth column of the third schedule.

3. And this court doth further order and adjudge that upon the defendant (*A. B., the owner*) paying into court to the credit of this action the sum of (*gross amount of liens in the first and third schedules for which the owner is liable*) on or before the day of next that the said liens in the said first schedule mentioned be and the same are hereby discharged, (and the several persons in the third schedule mentioned shall release and discharge their said claims and assign and convey the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*) or to such person as he appoints and the said moneys so paid into court shall be paid out in payment of the claims of the said lienholders (*if so,* and incumbrancers).

4. But if the said defendant (*owner*) makes default in payment of the said moneys into court as aforesaid, this court doth order and adjudge that the said lands be sold with the approbation of of this court at , and that the purchase money be paid into court to the credit of this action, and all proper parties do join in the conveyances as the said directs.

5. And this court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said first (*and third*) schedule(*s*), mentioned as the said directs, with subsequent interest and subsequent costs to be computed and taxed.

6. And this court doth further order and adjudge that if the purchase money is insufficient to pay in full the claims of the several persons mentioned in the first schedule, the persons primarily liable for such claims as shown in such schedule do pay to the persons to whom they are respectively primarily liable the amounts remaining due to such persons forthwith after the same have been ascertained by the said .

7. (*If so,*) and this court doth declare that have not proved any lien under "The Mechanics' Lien Act," and that they are not entitled to any such lien, and this court doth order and adjudge that the claims of lien respectively registered by them against the lands mentioned in the second schedule be and the same are hereby discharged.

Dated the day of , 19 .

SCHEDULE 1.

Names of lien holders entitled to Mechanics' Liens	Amount of debt and interest (if any)	Costs	Total	Names of primary debtors

SCHEDULE 2.

The lands in question in this matter are (*set out description sufficient for registration purposes.*)

SCHEDULE 3.

Names of persons entitled to encumbrances other than Mechanics' Liens	Amount of debt and interest (if any)	Costs	Total

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Form L.—Section 35.

Notice of Trial.

(*Style of Court and Cause.*)

Take notice that this action will be tried at the court house at on the day of by and at such time and place the will proceed to try the action and all questions which arise in or which are necessary to be tried to completely dispose of the action, and to adjust the rights and liabilities of the persons appearing before him, or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all enquiries, and give all directions, and do all things necessary to try and otherwise finally dispose of this action, and of all matters, questions, and accounts arising in such action, and will give all necessary relief to all parties.

And further take notice, that if you do not appear at the trial and prove your claim, if any, or prove your defence, if any, to the action, the proceedings will be taken in your absence, and you may be deprived of all benefit of the proceedings, and your rights disposed of in your absence.

This is a Mechanics' Lien action brought by the above named plaintiff against the above named defendants to enforce a mechanics' lien against the following lands: (*set out description of lands.*)

This notice is served by, etc.

FORM M—SECTION 43.

CERTIFICATE VACATING LIEN.

(*Style of Court and Cause.*)

I certify that the defendant, A. B. (*the owner*) has under an order made herein by and dated the day of paid into court to the credit of this cause all money due and payable by him for the satisfaction of the liens of the plaintiff and E. F., G. H., I. J., and K. L., and their liens are hereby vacated and discharged so far as the same affect the following lands: (*describe lands*).

Dated at the day of 19 .

Prothonotary (or Clerk.)

FORM N—SECTION 43.

CERTIFICATE VACATING LIEN.

(*Style of Court and Cause.*)

I certify that I have inquired and find that the plaintiff is not entitled to any Mechanics' Lien upon the lands of the defendant A. B. (*the owner*) and that his claim of lien is hereby vacated and discharged so far as the same affects the following lands: (*describe lands.*)

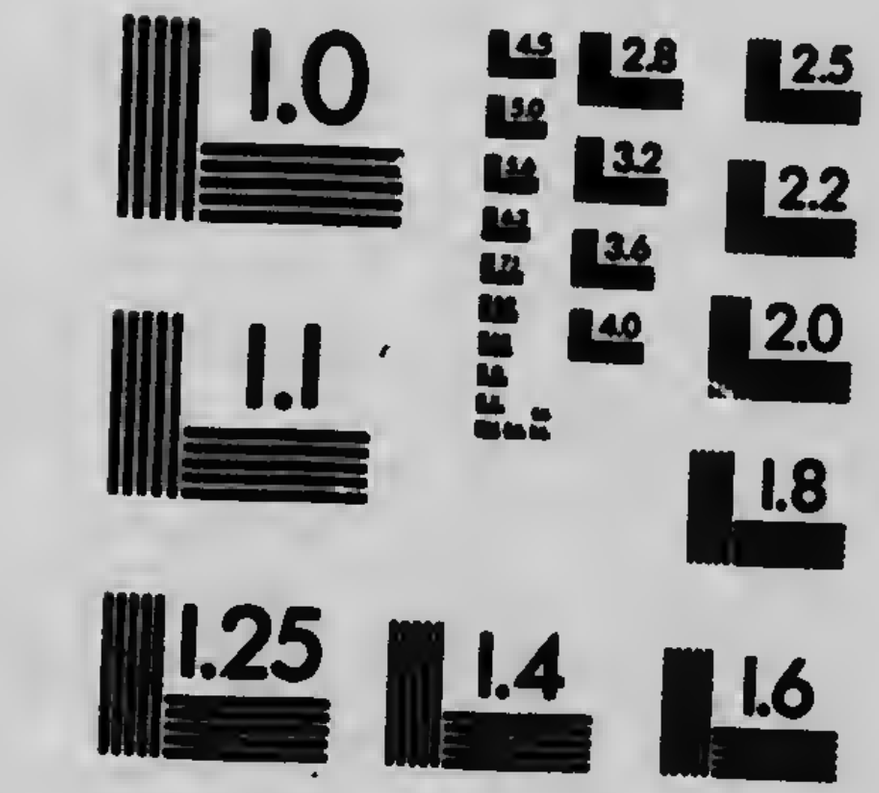
Dated at the day of 19 . .

Referee.

ACTS REPEALED.	EXTENT OF REPEAL.
Revised Statutes, 1900, c. 171.	The Whole Chapter.
Acts 1902, c. 27.	The Whole Act.
Acts 1903, c. 68.	Section 3.
Acts 1904, c. 25.	The Whole Act.
Acts 1905, c. 31.	The Whole Act.
Acts 1909, c. 40.	The Whole Act.
Acts 1914, c. 40.	The Whole Act.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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ONTARIO MECHANICS' LIEN ACT.

CHAPTER 140.

AN ACT RESPECTING LIENS OF MECHANICS, WAGE-EARNERS AND OTHERS.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Short title.—This Act may be cited as The Mechanics' and Wage-earners' Lien Act. 10 Edw. VII. c. 69, s. 1.

2. Interpretation.—In this Act:—

(a) "**Contractor.**" — "Contractor" shall mean a person contracting with or employed directly by the owner or his agent for the doing of work or service or placing or furnishing materials for any of the purposes mentioned in this Act;

(b) "**Material.**"—"Material" or "materials" shall include every kind of movable property;

(c) "**Owner.**"—"Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon which or in respect of which the work or service is done, or materials are placed or furnished, at whose request and

(i) upon whose credit, or

(ii) on whose behalf, or

(iii) with whose privity and consent, or

(iv.) for whose direct benefit,

work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose

rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

(d) "**Registrar.**"—"Registrar" shall include Master of Titles and Local Master of Titles;

(e) "**Registry office.**" — "Registry office" shall include Land Titles Office;

(f) "**Sub-contractor.**" — "Sub-contractor" shall mean a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by a contractor, or under him by another sub-contractor;

(g) "**Wages.**"—"Wages" shall mean money earned by a mechanic or laborer for work done, whether by the day or other time or as piece work. 10 Edw. VII. c. 69, s. 2. amended 1923, whether by Time or as piece work.

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner," so as to subject the land to mechanics' lien for work done and materials furnished under contracts with the purchaser but by virtue of section 14 (2) is deemed "mortgagee." *Marshall Brick Co.* v. *York Farmers' Colonization Co.*, (1917) 54 Can. S. C. R. 569, 36 D. L. R. 420.

(a) "*Contractor.*"—Any person contracting directly with the "owner" is a contractor. The nature and extent of the lien of contractor are dealt with in the chapter entitled "Who may acquire a lien," *ante*. The architect is a "contractor." *Read* v. *Whitney*, (1919) 45 O. L. R. 377.

(b) "*Sub-contractor.*"—The lien of the sub-contractor is considered in the chapter entitled, "Who may acquire a lien," *ante*.

As ordinarily there would be no obligation on the part of an owner to pay the contractor's debts, the sub-contractor in a claim against the "owner" must show that this liability was created by the statute and that his claim as sub-contractor comes within its terms. *Reeve* v. *Elmendorf*, 38 N. J. L. 125.

(c) "*Owner.*"—Municipal corporations are now within the definition of "owner" given in this section. In *General Contract-*

ing Co. v. *Ottawa*, (1909) 16 O. W. R. 479, the court considered that the language of some of the sections of the Act seemed to imply an intention to include some classes of municipal property. The question whether existing Mechanics' Lien Acts in Canada create a lien against property held by a municipal corporation is discussed in the chapter entitled, "Property which may be subject to lien," *ante*.

Work contracted by a sub-lessee in pursuance of an agreement with his lessor authorizing him to build upon the land, constituted a "request," *Orr* v. *Robertson*, 23 D. L. R. 17; 34 O. L. R. 147, but although the lien given attaches to the estate or interest of the "owner" it does not include a purchaser of land whereon improvements were made prior to his taking possession without his request, express or implied. *Cut-rate Plate Glass Co.* v. *Solodinski*, 25 D. L. R. 533, 34 O. L. R. 604. See also *Sterling Lumber Co.* v. *Jones*, 29 D. L. R. 288, 36 O. L. R. 153.

As to mechanics' liens on trust property see *Pond, Extrx.* v. *Harrison*, L. R. A. 1916, B. and annotations.

The contract should be sufficiently definite to enable the amount to be determined with reasonable certainty. *Wilder* v. *French*, 75 Mass. 395; *Eisendrather* v. *Gebhardt*, 124 Ill. App. 325, affirmed, 222 Ill. 113; *Merritt* v. *Crane Co.*, 225 Ill. 181. One member of a partnership can make a contract involving a lien. *Wahlstrom* v. *Trulson*, 165 Mass. 429.

A railway company is also within the definition of "owner" in this section. The constitutionality and scope of this and similar provisions as applicable to railway companies are discussed in the chapter entitled, "Property which may be subject to lien," *ante*.

See cases cited under chapter, "The Owner and his Interest," *ante*.

(d) "*Or service.*"—These words would probably be construed as enlarging the scope of the section so as to clearly include professional services rendered by engineers and architects in respect to the building, in addition to superintendence.

(e) "*With whose privity or consent.*"—To create a lien against the interest of an "owner" there must be something in the nature of direct dealing between the contractor and the "owner" or person whose estate is sought to be charged, Where an "owner" merely has knowledge that the work is being done or that the material is being furnished, and silently assents to and

benefits by the furnishing of such work or materials a lien is not thereby created against his interest. See *Gearing* v. *Robinson*, (1900) 27 A. R. 364, and cases cited under chapter entitled, "Consent of Owner," *ante*.

(*f*) An architect has been held to be a "contractor" under section 2 (a), contracting with the owner for the "doing of work or service," and the assistant architect is a "sub-contractor" under section 2 (*f*), employed by the "contractor." *Read* v. *Whitney*, (1919) 45 O. L. R. 377.

A homestead entrant is an "owner." *Beaver Lumber Co.* v. *Miller*, (1917) 32 D. L. R. 428 (Sask.).

Actual possession under a grant from the Crown, coupled with a statutory right to register the grant, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanics' lien may attach. *Dorrell* v. *Campbell*, (1917) 1 W. W. R. 500, 23 B. C. R. 500, 32 D. L. R. 44.

Public school buildings and the lands upon which they are erected are subject to the provisions of the Mechanics' and Wage-earners' Lien Act. *Benson* v. *Smith & Sons*, (1916) 37 O. L. R. 257, 31 D. L. R. 416. See *Hazel* v. *Lund*, 25 D. L. R. 204 (B.C.); *Connely* v. *Havelock School Trustees*, 9 D. L. R. 875 (NB.).

Roads laid out by private persons cannot be regarded as public highways before dedication. *Vannatta* v. *Uplands Limited*, (1913) 25 W. L. R. 85.

A workman is entitled to a lien upon the part of a sewer extending below water mark into the ocean, upon which he worked. *Baker* v. *Uplands*, (1913) 24 W. L. R. 768.

Public school buildiugs and the lands upon which they are erected are subject to the provisions of this Act. *Benson* v. *Smith*, 37 O. L. R. 257, 31 D. L. R. 416; but a lien cannot be enforced under this Act against a railway company incorporated under Dominion Act. *Johnson* v. *C. N. R. Co.*, 44 O. L. R. 533, 47 D. L. R. 75.

A person who has delivered material to be used in the construction and improvement of a place, although the place of delivery is upon the land, is not a person who has done work or service *upon* the premises within the meaning of section 6 of the British Columbia Act, and is not entitled to a lien. *Vannatta* v. *Uplands Limited* (1913) 25 W. L. R. 85. This section as worded differs from the corresponding section in Mechanics' Lien Acts

in other provinces, which has been construed to give a lien for haulage of materials.

Where claimants supplied teams of horses, wagons and drivers to the contractor for hauling sand, gravel and earth upon the property, for which they were paid so much per day, and these teams, wagons and drivers were subject to the contractors' foreman and did only what work he required of them, it was held that these claims were covered by the words of the British Columbia Act, section 6,—"every person who does work or service or causes work or service to be done upon," etc., and should be allowed. *Vannatta* v. *Uplands Limited*, (1913) 25 W. L. R. 85.

As to lien claim where building is partly on two parcels of land, see *Sheppard* v. *Davidovitch*, (1916) 10 O. W. N. 159.

A purchaser of an unfinished building whose deed is registered prior to the registration of any mechanics' liens without actual notice thereof, thereby acquires a priority by virtue of the Registry Act (R. S. O. 1914, c. 124) and takes the property free of the liens. Mere knowledge that building was going on upon the land does not amount to actual notice; nor can the purchaser be deemed an "owner" within the meaning of this section. *Sterling Lumber Co.* v. *Jones*, (1916) 36 O. L. R. 153, 29 D. L. R. 280. See also *Cook* v. *Koldoffsky*, 35 O. L. R. 555, 28 D. L. R. 34; *Marshall Brick Co.* v. *York Farmers Colonization Co.* (1917) 54 Can. S. C. R. 569, 36 D. L. R. 420; *Cut-Rate Plate Glass Co.* v. *Solodinski*, 34 O. L. R. 604, 25 D. L. R. 533; *Orr* v. *Robertson*, 23 D. L. R. 17, 34 O. L. R. 147.

A lien which appears to be for work done at the instance of other persons, without indicating that the work was done for the "owner" of the property to be charged, is incurably defective, and the owner's subsequent undertaking to assume such lien is not binding on him. *Northern Plumbing & Heating Co.* v. *Greene*, (1916) 27 D. L. R. 410, 34 W. L. R. 293 (Sask.).

A contractor's offer to build a pair of semi-detached houses on two adjoining lots, owned by different persons, naming separate terms for each house but addressed to both owners together, implies a distinct acceptance by each of them, and the acceptance by one does not create a joint contract binding on both as subjecting both lots to a mechanics' lien for plumbing materials furnished for both houses; nor can the interest of the accepting owner be charged for materials furnished on the adjoining lot not at "his

request or for his direct benefit." *Compaigne* v. *Carver,* (1916) 35 O. L. R. 232, 27 D. L. R. 76.

The lien may also attach against several pieces of property as one individual claim; the fact that the houses are subsequently divided between different owners cannot impair the lien, which becomes effective from the time of the commencement of the work. *Polson* v. *Thomson,* (1916) 26 Man. L. R. 410, 29 D. L. R. 395, 34 W. L. R. 745.

Under the Saskatchewan Act it has been held that a materialman is not entitled to register as one individual claim, a lien for the amount due for materials supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts with the contractor for the erection of houses on their respective parcels; nor do they have such interest in one another's land as "owners" so as to charge the other's land for materials furnished at the owner's request or benefit. *Security Lumber Co.* v. *Plested,* (1916) 9 Sask. L. R. 183, 27 D. L. R. 441, 34 W. L. R. 352.

Actual possession under a Crown grant coupled with the statutory right to register same, and thereupon to become the owner in fee, creates an estate or interest upon which a mechanics' lien can attach. *Dorrell* v. *Campbell,* (1916) 32 D. L. R. 44, 35 W. L. R. 500, 22 B. C. R. 584.

Where a squatter on Crown land accepts work and materials applied to the erection of a building thereon he will be considered an "owner." *Macdonald* v. *Hartley,* (1918) 3 W. W. R. 910 (B.C.).

To create a lien against the interest of an "owner for work done and materials furnished with his privity and consent," there must be something in the nature of a direct dealing between the contractor and the owner or person whose estate is to be charged; when the latter merely has knowledge that the work is being done or materials furnished, and silently assents thereto and benefits thereby, a lien is not thereby created against his interest. Such lien is not created for work done and materials furnished under a contract exclusively with a lessee of the property. *Eddy Co* v. *Chamberlain and Landry,* 37 D. L. R. 711 (N.B.).

An agreement for the sale of land which contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to

remit a specified amount from the purchase price on the completion of said undertaking, is such a request in writing as gives a mechanics' lien arising from the erection of the said works general application under section 6 of the British Columbia Mechanics' Lien Act, and therefore the lien is not restricted to the increase in value of the premises by reason of such works. *British Columbia Granitoid Co.* v. *Dominion Shipbuilding Engineering and Dry Dock Co.*, (1918) 2 W. W. R. 919 (B.C.).

3. Exception of streets or highways.—Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon. 10 Edw. VII. c. 69, s. 3.

The lien for work done in clearing a townsite, consisting of several tracts, extends to the whole land benefited by the work, except whatever may be excluded from it by being "a public street or highway." *Beseloff* v. *White Rock Resort Dev. Co.*, 23 D. L. R. 676.

4. (1) Contracts waiving application of Act to be void.—Every agreement, verbal or written, express or implied, on the part of any workman, servant, laborer, mechanic or other person employed in any kind of manual labor intended to be dealt with in this Act, that this Act shall not apply, or that the remedies provided by it shall not be available for the benefit of such person, shall be null and void.

(2) Exception as to certain employees.—This section shall not apply to a manager, officer or foreman, or to any other person whose wages are more than $5 a day. 10 Edw. VII. c. 69, s. 4.

(a) *"Shall be null and void."*—This section is intended to protect those who do the manual labor, and the effect of the whole section is to limit its application to that class.

5. Effect upon third party of agreement waiving lien. — No agreement shall deprive any person otherwise entitled to a lien under this Act who is not a party to the agreement, of the benefit of the lien, but it shall attach notwithstanding such agreement. 10 Edw. VII. c. 29, s. 5.

(a) "*No agreement.*"—This section is to be read in connection with sections 10, 11, 12 and 15, *post*.

Unless by the agreement the contractor forfeits all claim to payment in the event of a mechanics' lien being claimed or registered, it is difficult to understand how such an agreement could affect any persons but the parties to it and their representatives and assignees. The section in terms only applies to persons "otherwise entitled to a lien under the Act." By sections 6 and 11 the lien is limited to the sum payable by the owner to the contractor subject to the provisions of sections 12 and 15 as to percentage to be retained. If, then, there is nothing due by the owner to the contractor there can be no lien and this section will not help the sub-contractor, unless it is held to mean that any such agreement, viz., that provides that nothing shall be due until completion, or that the right to payment shall be forfeited if any mechanics' lien is claimed or registered or otherwise takes away the contractor's right to payment, shall not deprive the sub-contractor of the benefit of the lien. Such a construction would in effect be extending the provisions of the Act creating the lien, which this section does not purport to do. It is probable that the section does not go further than to preserve to sub-contractors and others not parties to the agreement the right to enforce their liens against the owner to the extent at least of the percentage to be retained, even though the owner has attempted to protect himself against liens by his agreement with the contractor.

Special provision is made in section 15 for wage-earners, and section 4, *supra*, enacts that any such agreement made by a "workman, servant, laborer, mechanic or other person employed in any kind of manual labor, intended to be dealt with in this Act," and who receives not more than five dollars a day, shall be null and void and of no effect.

In a building contract for the erection of a church the contractor agreed with the building committee to settle with all other persons doing work upon or furnishing materials for the construction thereof, and stipulated that neither he nor they should have any lien upon the building for their work or materials. Held binding on the sub-contractors, though made without their knowledge or assent. It was also stipulated that twenty per cent. of the contract price should not be payable until thirty days after the architect should have accepted the work, and that the

balance of the contract price so to be retained should not be payable until all sub-contractors were fully paid and settled with. Held, that no trust was thereby created in favor of the sub-contractors, as to the sum agreed to be retained; and, the contractor having assigned his interest in the contract to a third party, and the committee having waived their right to insist that the sub-contractors should be paid, that the assignee was entitled to receive the twenty per cent. retained, to the exclusion of the sub-contractors. *Forhan* v. *Lalonde*, (1880) 27 Gr. 600. See 47 Vic. c. 18, s. 1; 59 Vic. c. 35, s. 4.

6. General right of workman or materialman to a lien. — Unless he signs an express agreement to the contrary, and in that case subject to the provisions of section 4, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, and appurtenances, and the land occupied thereby or enjoyed therewith, or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner. 10 Edw. VII. c. 69, s. 6. By 8 Geo. V. c. 29, this section was amended by adding after the word "upon" in the eighteenth line thereof, the words "or adjacent to."

(a) "*Any person.*"—See cases cited in chapter entitled, "Who may acquire a lien," *ante*.

(b) "*Performs any work or service.*" — A blacksmith employed for sharpening and repairing tools at a mine is entitled to a lien; a cook is not. Work on tools is work on a mine; cooking is not. *Davis* v. *Crown Point M. Co.*, (1901) 3 O. L. R. 69. But a materialman is not entitled to a lien for tools furnished the contractor with which to work on the building. *Evans* v. *Lower*, (1904) 58 Atl. Rep. 294.

To create a lien there must be something in the nature of direct dealing between the contractor and the person whose estate is sought to be charged. Mere knowledge that the work is being done or the materials furnished is not enough, nor is silent assent.

The lien claimant to succeed must have been employed to do the work or furnish the materials by some one having either an interest in the land or an interest in a contract made with the owner. The person with whom the contract was made must be an "owner" or else some relation of the parties must have existed which would give a right of lien. *Gearing* v. *Robinson*, (1900) 27 A. R. 364; *Webb* v. *Gage*, (1902) 1 O. W. R. 327; *Flack* v. *Jeffrey*, (1895) 10 Man. 514; *Blight* v. *Kay*, (1893) 23 O. R. 415; *Graham* v. *Williams*, (1884) 8 O. R. 478; 9 O. R. 458; *Sampson* v. *Dalrymple*, (1852) 11 Cush. 308; *Batchelder* v. *Hutchinson*, (1894) 161 Mass. 462, 464. See also *Garing* v. *Hunt*, (1895) 27 O. R. 149; *Cornell* v. *Barney*, (1884) 33 Sup. Ct. N.Y. 134; 94 N. Y. 394, and cases cited in Ch. VIII. and Ch. IX., *ante*.

To create a lien in favor of the materialman, there must be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. See *Slattery* v. *Lillis*, 10 O. L. R. 697.

The section is to be read distributively. *Brooks-Sandford Co.* v. *Theodore Telier Const. Co.*, (1910) 22 O. L. R. 176.

The contractor is not entitled to a lien merely because he has performed work or service; such work or service must be performed under a definite contract. If, therefore, a contractor is wrongfully prevented by the owner from fully performing his contract he has no lien for damages caused thereby, although he has a right of action for such damages. In like manner, if the contract is rescinded, the contractor cannot claim a lien for work or materials furnished afterwards; nor can the contractor recover

unless he shows that the person with whom he made the contract had some interest in the land and was not a mere occupant without title. *Gearing* v. *Robinson*, (1900) 27 A. R. 364; *Webb* v. *Gage*, (1902) 1 O. W. R. 327; *Stevens* v. *Lincoln*, (1874) 114 Mass. 476.

A contractor cannot recover in an action for damages for wrongful dismissal and breach of contract and for declaration of lien already registered. A motion was granted to cancel registration and strike out statement of claim as the claim disclosed no reasonable cause of action. On appeal the Divisional Court varied the order by omitting the part which directed the vacating of the lien, without prejudice to the right of plaintiff to file a new statement of claim for damages for wrongful dismissal. *Beveridge* v. *Hawes*, (1903) 3 O. W. R. 619.

A sub-contractor who has performed labor or furnished materials may file a lien therefor before the completion of the building. *Baldridge* v. *Morgan*, (1910) 24 Am. & Eng. Ann. Cas. 337. When the sub-contractor has performed labor or furnished materials his contract is executed. The building might be still in construction or it might never be completed, and when by force of the statute a privity of contract exists between the owner and a sub-contractor without reference to the original contract there is no good reason that the sub-contractor should be compelled to wait the happening of an event which neither fixes nor affects his rights and which he cannot control. *Ib.*

It is essential before the lien can arise that the material should be furnished and placed upon the land upon which the lien is claimed. *Ludlam-Ainslie Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 419. Proximity to the land is not enough. *Milton Pressed Brick Co.* v. *Whalley*, 42 D. L. R. 395, 42 O. L. R. 369. (But the Ontario Act has since been amended so as to include materials placed "adjacent to" the land to be affected. See 8 Geo. V. c. 29, s. 1, Ont.). As to whether it is essential to the lien that the materials should be incorporated in the building, see the chapter entitled, "The Lien of the Materialman," *ante*.

An action was brought by a materialman who supplied materials to the contractor for the work done by him for the owner. The work was done by the contractor, the defendant Bishop, under an agreement with the owner (the appellant) and the work contracted for was the erection and completion of two brick houses. By the

terms of the agreement the work was to be completed on, or before, the 14th August, 1902. The contractor proceeded with the work, but only a comparatively small part had been done on that date. The owner entered into new contracts with other tradesmen for the completion of the work, and it was completed by them at his expense. The official referee decided that the owner was not entitled to set-off against the value of the work done by the contractor the difference between the actual cost to the owner of the work and the price he had agreed to pay to the contractor. On appeal it was held that it was a proper conclusion from the evidence that there was an unqualified and absolute refusal by the defendant Bishop to go on with and complete the work on his contract, after he had been more than once requested to do so, which evidenced an intention no longer to be bound by the contract and justified the appellant in proceeding to complete; and the appellant was, therefore entitled to recover the damages sustained by him owing to the default of defendant Bishop in the performance of his agreement. These damages exceeded the amount found due to the defendant Bishop.

The appeal was allowed with costs, and the judgment appealed from was set aside so far as it affected the appellant and the action as to him was dismissed with costs. *Ontario Paving Brick Co.* v. *Bishop,* (1904) 2 O. W. R. 1063, 4 O. W. R. 34.

The creation of the lien is contemporaneous with the commencement of the work (*McNamara* v. *Kirkland,* 18 O. A. R. 276), but the right to a lien may be waived by the contractor for a sufficient consideration during the pendency of the work. *Kelly* v. *Johnson,* (1911), 215 Ill. 135.

An infant can plead infancy and defeat the lien. *Price* v. *Jennings,* 62 Ind. 111; *Alvey* v. *Reed,* 115 Ind. 148.

The burden is on the claimant to show that there is a debt due and to establish all essential facts. *Merritt* v. *Crane Co.,* 126 Ill. App. 337; *Brant* v. *City of New York,* 186 N. Y. 599; *Bradley Co.* v. *Gagham,* 208 Pa. 511.

Tearing down a building to erect a new one will create a lien, but the mere demolition or removal of a building may not give a lien. *Thompson-Starrett Co.* v. *Brooklyn Heights Realty Co.,* 111 App. Div. (N.Y.) 358.

Where work is done on a foundation, but the building is not proceeded with, the workmen are entitled to a lien against the land. *Baker* v. *Waldron,* 92 Me. 17.

A lien may be enforced upon a *quantum meruit* (*Fuller* v. *Beach*, (1912) 21 W. L. R. 391), unless the contract is entire and there is no default of owner. *Kelly* v. *Tourist Hotel Co.*, (1910) 20 O. L. R. 267. See *Craigholme* v. *Southwicke*, (1916) 21 O. W. R. 445.

Under some statutes the knowledge of the owner and his failure to give the statutory notice of non-responsibility will subject the owner's interest to the lien. *Limoges* v. *Scratch*, (1910) 44 S. C. R. 86. See *High River Trading Co.* v. *Anderson*, (1909) 10 W. L R. 126.

As to trade fixtures, see *Hanson* v. *News Pub. Co.*, 97 Me. 102.

As to unreasonable and arbitrary refusal of architect's certificate, see *Blome* v. *Wahl-Hennis Institute*, (1909) 150 Ill. App. 164; *Thaler Bros.* v. *Greisser*, (1911) 229 Pa. 512, and cases cited *ante*, page 77.

As to completion to satisfaction of inspector being a condition precedent, see *Schultz* v. *Faber*, (1912) 21 W. L. R. 163, and cases cited *ante*, at page 77.

(c) "*In respect of*," etc. As to the construction of this phrase in a statute, see *Brett* v. *Rogers*, (1897) 1 Q. B. 525; *Antil* v. *Godwin*, (1899) 15 Times Rep. 462. See also remarks of MacMahon, J., in *Davis* v. *Crown Point Mining Co.*, (1901) 3 O. L. R., at p. 69; *Woodruff* v. *Oswego Starch Factory*, 74 N. Y. Supp. 961, 963, 70 App. Div. 481; *Muzzey* v. *Reardon*, 57 N. H. 378.

(d) "*Places or furnishes any materials.*"—See cases cited in chapter, entitled, "The Lien of the Materialman." See also *Friedman* v. *County of Hampden*, (1910) 204 Mass. 494.

(e) "*To be used.*"—A materialman is not bound to show that his materials were used in the building; delivery upon the ground for the purpose of being used is sufficient (*McArthur* v. *Dewar*, (1885) 3 Man. 72), but a materialman has no lien unless the materials were supplied for the purpose of being used in the particular building upon which he claims to have a lien. *Pollock* v. *Morrison*, 177 Mass. 412; *Sprague* v. *Besant*, (1885) 3 Man. 519. In the latter case, Taylor, J., said: "It will be observed the words are not 'material used' or 'materials which have been used,' but 'materials to be used,' plainly implying that to give a lien to the person furnishing the material he must have supplied it for the purpose of being used in the particular building upon which he claims to have the lien." See, also, *Dominion Radiator Co.* v.

Cann, (1904) 37 N. S. R. 237. It is not necessary that the materials should actually have formed part of the structure. It is sufficient if their use was necessary and they were consumed in the making of the improvements. *Repauno Chemical Co.* v. *Greenfield*, 59 Mo. App. 6; *Hercules Powder Co.* v. *Knoxville L. & J. R. Co.*, (1904) 67 L. R. A. 487. The test is whether such materials were necessary to the work of erection under the contract.

See chapter, "The Lien of the Materialman," *ante*. The material must at least be placed upon the land. In *Ludlam & Ainslie Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 419, it would seem that the court concluded that the lien would have attached if the material had been placed upon the land, under the control of the owner, within the statutory time, even although not incorporated in the building. This is now the prevailing view in Canada.

Whether the transaction was really materials furnished for a building or merely a sale of a chattel is mainly a question of fact. If it is shown that such chattels are so attached as to become part of the structure, and it was contemplated by the parties that they should be furnished, a lien may be enforced by furnishing them, or for work performed for attaching them. *La Grill* v. *Mallard*, 90 Cal. 373; *General Fire Extinguisher Co.* v. *Chaplin*, (1903) 183 Mass. 375. See *Bunting* v. *Bell*, (1876) 23 Gr. 588; *The Scottish American Investment Co.* v. *Sexton*, (1894) 26 O. R. 77.

There is no lien for unsuitable or unnecessary materials furnished, but not used. *Hunter* v. *Blanchard*, 18 Ill. 318; *Boyd* v. *Mole*, 9 Phila. 118.

One merely guaranteeing payment for material is not one who furnishes material and is not entitled to a lien. *Rounds* v. *Bashman*, 116 Me. 199.

Where one owner enters into an entire contract for the supply of material to be used in several buildings the materialman can ask to have his lien follow the form of the contract, and that it be for an entire sum upon all the buildings. If the owner desires to invoke the statute to the extent of having the lien upon any building confined to the value of the material going into that building, the onus is upon him to show the facts, and, if the facts cannot be ascertained, less violence will be done to the statute by construing it as indicated than by rendering it nugatory in many instances in which the legislature apparently intended a lien to exist. *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R.

17. *Polson* v. *Thomson,* (1916) 29 D. L. R. 395. In Indiana it has been held that it is not sufficient for the enforcement of a materialman's lien to show that the materials were furnished to the contractor and were in fact used in the building, and that the contractor purchased them for that purpose; it must further appear that they were furnished by the materialman for use in the particular building on which it is sought to hold a lien. *Topp* v. *Standard Metal Co.,* (1910) 47 Ind. App. 483. But the terms of the contract must be considered.

Where a materialman furnishes material to an owner of certain land ostensibly for the construction of a building on that land the materialman is entitled to a lien on that land, even if the materials were not actually incorporated in the building. *Canadian Lumber Yards, Limited* v. *Ferguson et al.,* (1920) 1 W. W. R. 266. See also *Kalbfleisch* v. *Hurley,* 34 O. L. R. 268, 25 D. L. R. 469.

(f) *"In the making, construction, etc."*—Making slight changes in a building, which work is merely incidental to the putting in of machinery which is personal property, will not give rise to a mechanics' lien, even under statutes allowing a lien for alterations and repairs. *Curnew* v. *Lee,* (1886) 143 Mass. 105.

Defendant employed contractor under a written contract to clear land for cultivation purposes. A laborer who worked for the contractor in clearing the land was held not entitled to a lien under s. 4 of the British Columbia Act, as amended. *Black* v. *Hughes,* (1902) 22 C. L. T. 220.

The lien is given for labor furnished, as well as for labor performed (*Wera* v. *Bowerman,* 171 Mass. 458), but under some statutes where a person contracts to furnish completed articles his employees have no lien. *Monroe* v. *Clarke,* (1912) 107 Me. 134.

Where the owner dismisses the contractor and arranges with a sub-contractor of the original "contractor" to finish the work, the sub-contractor is entitled to a lien as a "contractor" in respect to all work done after such arrangement. *Petrie* v. *Hunter,* 2 O. R. 233; 10 A. R. 127.

The lien does not extend to unliquidated damages due to the contractor from the owner on account of the violation of the terms of the contract. *Hoyt* v. *Miner,* 7 Hill (N.Y.) 525.

A provision that a certain portion of the money shall be held by the owner is imperative, and the owner neglects it at his peril.

Torrance v. *Cratchley*, 31 O. R. 546; *Green Lumber Co.* v. *Nutriment Co.*, 113 Ill. App. 635.

There can be no doubt that filling in and grading the earth about buildings already erected would be work giving a lien under this section. Even under a statute not so comprehensive in its terms it has been held that a mechanics' lien may exist for grading a lot, the test being whether it was reasonably necessary for the proper construction and occupation of a house. *Reid* v. *Berry*, (1901) 178 Mass. 260. See also *Perry* v. *Potashinski*, (1897) 169 Mass 351.

Whether grading a lot on which a house is afterwards built, is done as part of the work of construction, so as to constitute a commencement of the building, is a question of fact depending on the circumstances of each particular case. Boisot, s. 57, citing *Kelly* v. *Rosenstock*, 45 Md. 389.

The lien given for labor and materials furnished in respect to any structure or land includes hauling the materials there. *Fowler* v. *Pompelly*, (1903) 76 S. W. 173; *McClain* v. *Hutton*, 131 Cal. 132; *Hill* v. *Newman*, (1861) 80 Am. Dec. 473.

Pumping water which an independent contractor caused to flood the basement is properly allowed as an extra expense in a suit to enforce a mechanic's lien (*Vaughan* v. *Ford*, (1910) 162 Mich. 37); but items for street car tickets and meals for the superintendent of the work are not proper items in a claim of lien. *Haas Electric & Mfg. Co.* v. *Springfield Amusement Park Co.*, (1908) 236 Ill. 452.

A contractor who has built two separate buildings on the same lot under two distinct contracts does not acquire a lien on the entire property for his entire account. *Currier* v. *Friedrick*, (1875) 22 Gr. 243. See *Oldfield* v. *Barbour*, 12 Pr. Rep. 554; *Fairclough* v. *Smith*, (1901) 13 Man. 509.

Commenting on the decision in *Currier* v. *Friedrick*, *supra*, Boisot says (s. 174): "The reason given for the decisions from Massachusetts, Minnesota and Canada is that a mechanic cannot have a lien on one building for work done on another. But, as we have seen, this rule does not apply where both buildings are erected on the same lot, for the same owner, under one contract. It seems difficult to see why the fact that the work was done under two or more contracts between the same parties should make any difference." But it would be an extension of the terms of the statute to impose an incumbrance upon one property for work

done upon another. Where there are two contracts they must be separated. See *O'Brien* v. *Fraser*, 41 D. L. J. at p. 327, where McKeown, C.J., says, "I think the law is correctly stated in Wallace's Mechanics' Lien Laws in Canada.

In *Fairclough* v. *Smith*, *supra*, the lien was registered against two lots of land owned by different persons in respect to work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two. Killam, C.J., said: "I regret that I can devise no method to give effect to the claims asserted in this suit. It is impossible to find that the registered claims were sufficient to bind both lots held severally, and it seems equally impossible to give effect to them against one of the lots only for the proper amount. To choose one or the other to be bound would be wholly arbitrary." See also *Booth* v. *Booth*, (1902) 3 O. L. R. 294, cited, *post*; and *Orr* v. *Fuller*, (1899) 172 Mass. 597, referred to under s. 17, *post*.

The Act does not give a lien upon property owned by one person for materials furnished in respect of another property owned by another person. *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249. See *Ontario Lime Association* v. *Grimwood*, 22 O. L. R. 17; *Builders' Supply Co.* v. *Huddlestone*, 25 Man. L. R. 718.

Where there is an entire contract for labor and materials and the claim for materials was disallowed, it was held that the plaintiff, a sub-contractor, could nevertheless recover for the labor, under the terms of the British Columbia Act. *Brown* v. *Allan*, (1913) 25 W. L. R. 128; *Irvin* v. *Victoria Home Cons. Co.*, followed.

Where the terms of the contract were "15 per cent. time and materials," and defendant bought and supplied some bricks, the plaintiffs were held to be entitled to the 15 per cent. commission on the materials furnished by the defendant. *Thomas* v. *Roelofson*, (1917) 13 O. W. N. 201. Plaintiffs under a contract to do extensive repairs, were to be paid by the owner on the basis of 15 per cent. on the cost of the work. Plaintiffs engaged a firm of plasterers as sub-contractors to do the plastering. It was contended by defendant that he should not be required to pay this sub-contractor's bill, involving a fair profit to the sub-contractor, and also pay to the plaintiffs 15 per cent. profit on the charge made by the sub-contractor. It appeared, however, from the evidence that this method of getting the plastering done, including the sub-contractor's profit, was at least as cheap as if the plaintiffs

had directly supervised the work, and as this work cost the plaintiffs the amount of the plasterer's bill, the 15 per cent. was properly chargeable. *Falconer* v. *Hartlen*, (Wallace Co. J.), unreported (N.S.).

(g) *"Altering, improving or repair ng."*—See *Curnew* v. *Lee*, 143 Mass. 105, as to certain work on a building not constituting an alteration within the statute. See also construction of the word "repaired" as used in Workmen's Compensation Act, 1897. *Dredge* v. *Conway*, 70 L. J. K. B. 494, (1901) 2 K. B. 42, 84 L. T. 345.

(h) *"Shall by virtue thereof have a lien."*—There are conflicting decisions upon the question whether a right to a lien arises where the work has been done on public buildings, such as schoolhouses, which are not liable to sale in execution. The question is dealt with in the chapter entitled, "Property which may be subject to lien," *ante*.

(i) *"Upon the erection, building, etc., and the lands occupied thereby, or enjoyed therewith."* It has been held in Pennsylvania (*Presbyterian Church* v. *Stetler*, 26 Penn. 246), that a destruction of the building for which the work has been done or the materials furnished, by fire, or otherwise, discharges the lien. Lewis, C.J., in delivering the opinion of the Court in that case, said: "The equity of a mechanics' lien upon a building is founded upon the labor and materials furnished by him in constructing it. Attaching itself to the building, and depending upon it for existence, the lien must, necessarily, share the fate of the building. So, if the building, after erection, should be destroyed by accident, before the ground on which it stood passed to a purchaser, the lien would be gone. The reason for binding the land is gone, with the building." See also *Coddington* v. *Dry Dock Co.*, (1863) 31 N. J. L. 477. But a recent decision in Missouri (*Hooven* v. *Featherstone*, (1901) 49 C. C. A. 229), holds that the lien continues attached to the real estate, notwithstanding the destruction of the building. See also to the same effect, *Armigo* v. *Mountain Electric Co.*, (1902) 67 Pac. Rep. 726; *Smith* v. *Neubauer*, (1895) 33 L. R. A. 685. Under the lien Acts existing in Canada, it would probably be held that after the lien is acquired it will continue attached to the entire freehold, and the destruction of the building will not defeat it.

Where a lien on a mine was claimed in British Columbia, it appeared that none of the work was done and none of the materials

were furnished on mining locations Nos. 128 and 129, but these were "enjoyed" with No. 258, on which the work was done, and it was held that the former locations were therefore subject to the lien. *Davies* v. *Crown Point M. Co.*, (1901) 3 O. L. R. 69.

As to the area of land subject to the lien, Fuller, C.J., in *Springer Land Association* v. *Ford*, (1897) 168 U. S. 513, said: "The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same."

"In one sense lands cannot be said to be 'enjoyed with' a building until it has been erected, but, as the lien may be registered before the execution of the work, and may expire before the land has become occupied, the words do not admit of so narrow a construction, and the purposes for which the building is to be erected, the situation of the adjoining land of the owner, the contract for the performance of the work, and all other relevant facts and circumstances must be taken into consideration in determining what lands are affected by the lien." *Wentworth Lumber Co.* v. *Coleman*, (1904) 3 O. W. R. 618, *per* Osler, J.A.

A mechanics' lien is maintainable for installing a water system in a dwelling house as against the land occupied or enjoyed therewith and which was specified in the lien which was registered, although the parcel of land itself upon which the house was situate was not included in the registered claim of lien; its omission therefrom operated only as a relinquishment of part of the security and did not have the effect of extinguishing the remainder of it. *Jackson Water Supply Co.* v. *Bardeck*, (1915) 21 D. L. R. 761. Where the buildings are separate but are all on one tract the lien extends to the whole parcel. *Judah* v. *Cheyne*, (1913) 53 Ind. App. 476.

A house not attached to the land upon which it rests is a chattel, not part of the realty. *Devine* v. *Callery*, 38 D. L. R. 542, 40 O. L. R. 505.

(j) *"Wharf."*—A statute giving a lien on wharves "and other structures connected therewith" extends to all structures on, or connected with, a wharf. *Collins* v. *Drew*, (1876) 67 N. Y. 149.

The word "wharf" as used in two statutes in England (Factory and Workshops Act, 1895, s. 23, and Workmen's Compensation

Act, s. 7), was held to include a floating structure carrying cranes for loading and unloading vessels, and which was moored in the River Thames, 500 feet from the shore by chains fastened to piles driven in the bed of the river. There was no connection with the shore except by boats. *Ellis* v. *Cory*, (1902) 1 K. B. 38. See also *Haddock* v. *Humphrey*, (1900) 1 Q. B. 609; *Kenny* v. *Harrison*, (1902) 2 K. B. 168.

Where the land is sold under execution, or otherwise, the lien is transferred to the proceeds. Phillips, ss. 196-8.

Under the Winding-Up Act (R. S. C. c. 129), s. 62, the lien is a preferential claim. *Re Empire Brewing and Malting Company*, (1891) 8 Man. 424. See *Re Ibex Co.*, (1902) 9 B. C. 557.

As a liquidator represents no higher claim than that of the insolvent company, liens registered within thirty days after their commencement, for materials supplied and for work done, prior to the service of the petition to wind up the company, are to be paid in priority to ordinary creditors. *Re Clintin Thresher Co.*, (1910) 15 O. W. R. 318.

A private corporation cannot defeat a lien on the ground that the contract was *ultra vires*. *General Fire Extinguisher Co.* v. *Magee*, (1901) 49 Atl. Rep. 366.

There can be no lien on the property of a minor for work ordered by his guardian where the guardian had not obtained an order of the court authorizing him to have the work done. *Copley* v. *O'Neil*, (1869) 57 Barb. (N. Y.) 299; *Collins* v. *Martin*, (1877) 41 U. C. Q. B. 602.

In the absence of a valid legal authority for the making of improvements no lien for such improvements can attach to an infant's land—whether the contract is made with the guardian or with the infant in person. *Logan Planing Mill Co.* v. *Aldredge*, (1908) 15 L. R. A. 1159.

(k) *"Limited, however, in amount."*—In *Smith Co.* v. *Sissiboo Pulp & Paper Co.*, (1903) 36 N. S. R. 342; (affirmed, (1904) 35 S. C. R. 93), Mr. Justice Graham, in referring to s. 3, s.-s. 1 of the Nova Scotia Mechanics' Lien Act, which is similar to section 6 of the Ontario Act, said (at p. 358): "It is quite clear that, except where the owner has made payments contrary to the provisions of section 8"—(section 12 of Ontario Act)—"that is, either exceeding the 85 per cent. before the time limit, or within that amount after notice in writing of the lien, or which are not *bonâ fide*, a

sub-contractor is not entitled to enforce his lien against the property for a greater amount than the amount due from the owner to the contractor. This is the effect of s. 3, s.-s. 1, last part"—(section 6 of the Ontario Act, last part)—"and ss. 6 and 7." See *Briggs* v. *Lee*, (1880) 27 Gr. 464; ss. 13 (3); ss. 14 (1) and s. 47. See also remarks of Bole, Co. J., in *Leroy* v. *Smith*, 8 B. C. 293, on similar words in corresponding section of British Columbia Act.

(l) "*Except as herein provided.*"—"*Herein*," *i.e.*, by ss. 12, 15. This section (6) differs from former section 4 in the British Columbia Act, and the decision in *Anderson* v. *Godsall*, (1900) 7 B. C. R. 404, would not apply to this or any section of the Ontario Act.

The lien is subject to the dower of the wife of the owner. *Van Vrouker* v. *Eastman*, (1843) 7 Met. 157, 161, 162; 20 Am. and Eng. Ency. of Law, 2nd ed., 486.

The general lien under this section and the special one in the nature of a vendor's lien upon the material itself, depend upon the placing upon the land to be affected, of the material in question. Proximity to the land is not enough, it must be on the land. *Milton Pressed Brick Co.* v. *Whalley*, (1917) 42 O. L. R. 369, 42 D. L. R. 395. The section has since been amended by adding after the word "upon" in the eighteenth line thereof the words "or adjacent to." The decisions under the Alberta Act are in conflict with the above case. See *Trussed Concrete Steel Co.* v. *Taylor Engineering Co.*, (1919) 46 D. L. R. 663. Although an unimportant part of the contract remains unfinished, one who contracts to supply material or do work on a building is entitled to enforce a lien for the contract price less the cost of completing the contract. *Taylor Hardware Co.* v. *Hunt*, (1917) 39 O. L. R. 85, 35 D. L. R. 504. See also 36 D. L. R. 383.

Where a builder has substantially completed the work, but a portion of it is not as it should be according to the contract, he is entitled to recover the price agreed upon subject to a deduction, the measure of which is the sum which it would take to alter the work so as to make it correspond with the contract. Halsbury, (1918) Supp

The representative of the creditors of a building contractor who contracts with the owner to take over, as the nominee of the contractor, the work of completing the contract, and obtains from the owner a stipulation whereby all moneys earned or to be earned

under the contract were to become payable to such representative in the place of the original contractor, is entitled to file a mechanics' lien for the amount due on completion of the work in like manner as would the original contractor, notwithstanding that there was no express assignment in writing of the right of such lien from the latter. *Alsip* v. *Monkman*, (1912) 9 D. L. R. 97 (Man.).

There is no lien in respect to the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor. *British Columbia Granitoid Co.* v. *Dominion Shipbuilding, Engineering and Dry Dock Co.*, (1918) 2 W. W. R. 919 (B.C.).

A mechanics' lien will attach for all materials supplied in the erection of a building, although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shown that there was a prior agreement to purchase all material required for the building from such vendor. *Whitlock* v. *Loney*, (1918) 38 D. L. R. 52, 10 Sask. L. R. 337. See also *Flett* v. *World Construction*, 15 D. L. R. 628, 19 B. C. R. 73.

The lien of a contractor attaches when he has completed his contract, but if the contract provides for *interim* payments, a lien attaches when each payment becomes due to the extent of the amount thereof. *Braden* v. *Brown*, (1917) 24 B. C. R. 374.

The words of the section relating to work to be done in connection with a "mine," would not include the drilling of an oil well. *Henshaw* v. *Federal Oil & Gas Corp., Ltd.*, (1916) 28 D. L. R. 750.

The Act does not give a lien for work done or materials furnished in connection with the digging of wells, apart from the work done or materials furnished in connection with one of the "works" enumerated in the section. *Stiffel* v. *Corwin*, (1911) 1 W. W. R. 339.

The lien of a sub-contractor does not attach until he has completed his contract, or until, if the contract provides for interim payments on account, such a payment becomes due. *Nepage* v. *Pinner*, 21 D. L. R. 315; *Braden* v. *Brown*, (1917) 3 W. W. R. 906 (B.C.).

Where the act of the employer prevents the completion of the work the employer cannot set up non-completion in answer to the lien. *Taylor Hardware Co.* v. *Hunt*, (1917) 36 D. L. R. 383.

An estoppel *in pais* cannot prevent a lien. "It would emasculate this section to hold that an estoppel *in pais* would do what the

section declares only a signed agreement can do." *Anderson* v. *Fort William Commercial Chambers*, (1915) 25 D. L. R. 319, per Riddell, J.

The statute does not extend to the cost of preparing for work to be done upon a site, such as assembling of the necessary tools and equipment, although such work has been frustrated without fault of the contractor. Any such loss must be treated as damages. *British Columbia Granitoid, etc., Co.* v. *Dominion Shipbuilding, Engineering and Dry Dock Co.*, (1918) 2 W. W. R. 919.

Where land has a potential value as a future business site, and is subject to a mechanics' lien for material used in erecting a building thereon, the proper method of determining the increased selling value occasioned by the building, is to ascertain the value of the property without the building, and then sell the whole property. *Whitlock* v. *Loney*, (1918) 38 D. L. R. 52, 10 Sask. L. R. 377.

Where the title to furnaces sold is retained by a vendor until the payment of the price, the rights of such parties in Ontario are governed by section 9 of the Conditional Sales Act, R. S. O. 1914, c. 136, and such vendor cannot rank as a lienholder under the provisions of the Mechanics' and Wage-Earners' Lien Act. *Hill* v. *Storey*, (1915) 34 O. L. R. 489, 25 D. L. R. 247.

As to right of lessor of article who leases to owner with a right to purchase and reserves the title until paid, see *U. S. Construction Co.* v. *Rat Portage Lumber Co.*, 25 D. L. R. 162, 9 W. W. R. 657, 33 W. L. R. 101.

Electric light fixtures and an electric light sign on the outside of the building, put up by the tenant, were considered not to have become part of the realty, but to be chattels removable by the tenant. *Peters, Rohls & Co.* v. *MacLean*, (1913) 25 W. L. R. 358 (Alta.). See also *Re McConkey*, (1920) 47 O. L. R. 411; *Scott Fruit Co.* v. *Wilkins* (1920) 3 W. W. R. 155.

The old rule applicable to the construction of covenants was quoted approvingly by Hodgins, J.A., in *Deldo* v. *Gough-Sellers*, 34 O. L. R. at p. 277. It was thus stated by Buller, J., in *Terry* v. *Duntze*, 2 H. Bl. 339: "It is a rule of construction long established in the construction of covenants, that if any money is to be paid before the thing is done, the covenants are mutual and independent. . . . By the terms of the contract then two several sums of money were to be paid before the thing to be done was done. The plaintiffs, therefore, were clearly entitled to their

action for the money without averring performance, and the defendant to his remedy on the covenants." See also *Government of Newfoundland* v. *Newfoundland R. W. Co.*, (1888) 13 A. C. 199; *Workman, Clark & Co.* v. *Lloyd Brazileno*, (1908) 1 K. B. 968.

7. When husband's interest liable for work done or materials furnished on land of married woman.—Where work or service is done or materials are furnished upon or in respect of the land of a married woman with the privity and consent of her husband, he shall be conclusively presumed to be acting as well for himself so as to bind his own interest, and also as her agent for the purposes of this Act, unless before doing such work or service or furnishing such materials the person doing or furnishing the same shall have had actual notice to the contrary. 10 Edw. VII. c. 69, s. 7.

(a) "*Lands of a married woman.*"—Before this section was passed the separate property of a married woman only became subject to a mechanics' lien by virtue of a contract made by her or under authority express or implied. There was no presumption that the husband acted as the agent of the wife; the question of agency was one of fact to be determined from all the circumstances of the case. *Wagner* v. *Jefferson*, (1876) 37 U. C. Q. B. 551; *Kincaid* v. *Reid*, (1884) 7 O. R. 12. Knowledge by the wife that the work was being done on her property and silent acquiescence was not sufficient to make her property subject to the lien. See *West* v. *Sinclair*, (1892) 23 C. L. J. 119, 12 C. L. T. 44. In the absence of knowledge of or participation in a fraudulent intent on the part of the husband to improve his wife's property at the expense of his creditors, the wife's property was not liable for such improvements. To protect contractors and others in dealing with the husband when the property was the wife's separate estate this section was enacted. Instead of the claimant being compelled to prove the husband's authorization by the wife, he is now *conclusively presumed* to be acting as the agent of his wife, unless the claimant has actual notice to the contrary.

The contract, however, is the contract of the wife; hence, where the husband makes one contract for repairs to two houses, one belonging to his wife and the other to himself, a lien cannot be claimed

against both properties for an amount due in respect to both houses without apportioning the same. *Fairclough* v. *Smith*, (1901) 13 Man. 509.

A husband may assert a lien upon the property of his wife for work or materials performed or supplied. *Booth* v. *Booth*, (1903) 3 O. L. R. 294.

Under this section a married woman will not be permitted to shew that her husband was not authorized by her to make the contract unless she can also shew that the contractor had actual notice of the absence of such authority.

A person contracting with the husband without actual notice that the husband was not authorized to make the contract may assert a mechanics' lien upon the interest of the wife in the property subject to the lien, as well as upon the interest of the husband.

As to effect of verbal undertaking by wife, to secure builder, by a mortgage, see *Chute* v. *Gratten*, 32 N. B. R. 549.

Formerly a widow's dower was not affected by the lien of the mechanic unless the husband acquired the property after the lien had attached *Schæffer* v. *Weed*, 8 Ill. 513; *Gove* v. *Cather*, 23 Ill. 634; *Bishop* v. *Boyle*, 9 Ind. 169.

The lien may, probably, under this section be enforced against the widow's dower since the husband may bind his wife's estate or interest.

8. (1) **Property upon which lien shall attach.**—The lien shall attach upon the estate or interest of the owner in the property mentioned in section 6.

(2) **Where estate charged is leasehold.**—Where the estate or interest upon which the lien attaches is leasehold the fee simple may also, with the consent of the owner thereof, be subject to the lien, provided that such consent is testified by the signature of the owner upon the claim of lien at the time of the registering thereof, verified by affidavit.

(3) **Prior mortgage.**—Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is encumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien

shall attach upon such increased value in priority to the mortgage or other charge. 10 Edw. VII. c. 69, s. 8.

By 8 Geo. V. c. 29, s. 3, s.-s. 1 of this section was amended by adding at the commencement thereof the words "save as herein otherwise provided."

Where a mortgage has been duly registered, advances made thereunder after mechanics' liens on the mortgaged property have arisen, but before their registration, take precedence of the liens. A mortgage having been held to have priority over liens, both upon the land and the improvements, a lienholder cannot take away that priority by shewing that the work and materials increased the selling value of the property. *Warwick* v. *Sheppard*, (1917) 39 O.L.R. 99, 35 D.L.R. 98. Under the Saskatchewan Act it has been held that a lienholder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials supplied by him exclusively bears to the whole cost of the building, and not for any part of the increase brought about otherwise. In computing the proportionate amount, no regard should be taken to amounts paid the lienholder on account before the action was brought. *Security Lumber Co.* v. *Duplat*, (1916) 9 Sask. L. R. 318, 29 D. L. R. 460, 34 W. L. R. 1131. See *Northern Trust Co.* v. *Battell*, (1916) 9 Sask. L. R. 103, 29 D. L. R. 515. The value of the property before the lien attached is to be taken for the purpose of fixing the upset price for which the lienholder could have priority over a mortgagee as against the increase in value of the mortgaged premises by reason of the work and improvements: the latter, however, must be limited only to the extent to which the specific contract enhances the selling value, and not for work and improvements by others under independent contracts; if no greater sum than the upset price is obtained at the sale the lienholder has no priority, and his only recourse is against the equity of redemption. *Champion* v. *The World*, (1916) 22 B. C. R. 596, 27 D. L. R. 506, 34 W. L. R. 317.

A vendor of land to whom a portion of the purchase price is due is to be treated as if mortgagee, despite the fact that the land has been conveyed to the purchaser, and mortgaged by him; a duly registered reconveyance to the vendor in payment of the unpaid purchase money, the vendor assuming the existing mortgage, has

priority to any unregistered lien under the Mechanics' and Wage-Earners' Lien Act of which the vendor had no actual notice. *Charters* v. *McCracken*, (1916) 36 O. L. R. 260, 29 D. L. R. 756.

It is not essential to the preservation of a lien against a prior mortgagee that it shall be stated in the registered claim that it is against the mortgagee, inclusively or otherwise. *Whaley* v. *Linnenbank*, (1916) 36 O. L. R. 361, 29 D. L. R. 51.

As to question of lien upon increased value in priority to mortgage, see *Henderson* v. *Morris*, (1916) 10 O. W. R. 34.

Sub-section 3 of this section gives a lien priority over mortgages upon the increase of work or service done thereon or materials supplied. Section 14 gives priority to a lien which has been registered, or of which written notice has been given to the mortgagee upon the land itself, including the buildings and erections thereon, over all subsequent advances under a mortgage.

The priority of an unpaid vendor is not forfeited by the substitution of a mortgage for the unpaid amount. *Cook* v. *Koldoffsky*, (1916) 28 D. L. R. 346. See also *Sterling Lumber Co.* v. *Jones*, 29 D. L. R. 288.

By 8 Geo. V. c. 29, s. 4, this section was amended by adding thereto the following sub-section: (4) The selling value of land incumbered by a prior mortgage or other charge, shall be deemed to be increased by the value of the work or service performed upon and of the material furnished o. placed thereon or adjacent thereto.

(a) "*The lien, etc.*"—That is, every lien created by section 6, whether arising by virtue of the performance of work or services or the placing or furnishing of materials in the making or improving of any building, etc., upon such building, etc., for the price of such work, service or material, limited in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as to the percentage to be retained) by the owner. This lien is now further limited to "the estate or interest of the owner as defined by this Act."

This section, read with section 6 and the definition of "owner" in section 2, gives the principal characteristics of a mechanics' lien. It arises by virtue of a contract, but may be claimed by persons not parties to that contract, as sub-contractors and laborers; the person against whom it is claimed must have some estate or interest in the property sought to be made subject to the lien; it is limited in amount both by the sum due the claimant and the amount owing

by the owner; and it only binds the estate or interest of the owner, that is the person with whom a contract, express or implied, for the performance of the work or service or the placing or furnishing of the materials has been made. Subject to the limitations imposed by the Act every person who performs work or furnishes material in the carrying out of the contract has *pro tanto* a lien for the price thereof. There is nothing in the Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution, of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanics' lien is not analogous to a vendors' lien. *King* v. *Alford*, (1885) 9 O. R. 643. The mechanics' lien is the creature of the statute and must be limited by its provisions. This section applies to and qualifies all liens created by the Act. *Crone* v. *Struthers*, (1875) 22 Gr. 247.

The lien of a sub-contractor being limited to the amount owing by the owner attaches not only upon the property on which the work is done or materials furnished, but also upon the amount so due by the owner. The lien arises from the commencement of the work or the furnishing of materials, continues for thirty days without registry, and by registration for sixty days longer; at any time within those periods proceedings to enforce may be taken and *lis pendens* registered. See *Lang* v. *Gibson*, (1885) 21 C. L. J. 74. Compare *McCully* v. *Ross*, (1886) 22 C. L. J. 63, and 22 C. L. J. 75.

The lien is an interest in land. *Stewart* v. *Gesner*, (1881) 29 Gr. 329; *Ormsby* v. *Ottman*, (U.S.) 85 Fed. 492, 29 C. C. A. 295.

(b) *"Shall attach upon the estate or interest of the owner."*—A further limitation of the lien is imposed by these words, and it was considered necessary to declare expressly that the definition of "owner" contained in section 2, is applicable. It follows, as an essential to the existence of a lien, that the person at whose request, and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit the work or service is performed or materials are placed or furnished should have some estate or interest in the land sought to be affected by the lien. If he has any estate or interest, however small, the lien attaches to the extent of that interest. Not only must he have an estate or interest, but the work, etc., must be done at his request. *Graham*

v. *Williams*, (1885) 8 O. R. 478, on appeal, 9 O. R. 458; *Gearing* v. *Robinson*, (1900) 27 A. R. 364; *Webb* v. *Gage*, (1902) 1 O. W. R. 327; *Fairclough* v. *Smith*, (1901) 13 Man. 509. The contractor, workman or materialman, must inquire as to the estate or interest of the employer in the land; he accepts the employment or supplies the materials at his own risk.

The lien attaches upon this estate or interest from the commencement of the work or service or from the commencement of the furnishing of materials. Section 2 (3) *ante*. In this respect the present differs from the preceding Act and from the present Manitoba Act, under which the lien attaches from the placing of the materials. See Manitoba Act, s. 4 (a), *ante*; *Robock* v. *Peters*, (1900) 13 Man. 124.

See cases cited in chapter "The Owner and His Interest," *ante*. See also chapter entitled "Priorities," *ante*.

(c) *"Where the estate or interest charged by the lien is leasehold."*—The landlord's interest only becomes subject to the lien where this sub-section is complied with. He may have been aware that the work was being done, the doing of the work may even have been one of the terms of the lease, yet his interest will not be affected by the lien unless by his own consent signified as provided. *Webb* v. *Gage*, (1902) 1 O. W. R. 327; *Graham* v. *Williams*, (1885) 8 O. R. 478, 9 O. R. 458; *Flack* v. *Jeffrey*, (1895) 10 Man. 514. It does not matter that the landlord becomes entitled to the benefit of the improvements. See *Birkett* v. *Brewder*, (1902) 1 O. W. R. 62.

It follows also from this sub-section that a lien upon the landlord's interest must be registered. The lien upon the tenant's is good for thirty days without registry; here the consent must be signified at the time of registering the lien.

(d) *"Upon or in respect of any work or service is performed."*—The lien extends only to the property upon or in respect of which the work is performed or the materials furnished to be used, and this being so, it follows that though the work is done under one contract and for the same owner, no lien is created upon one property for work done or materials furnished upon another distinct property. *Currier* v. *Friedrick*, (1875) 22 Gr. 243; *Oldfield* v. *Barbour*, (1888) 12 P. R. 544; *Rice* v. *Nantasket Co.*, (1870) 140 Mass. 256. If the amount for which the lien is claimed can be apportioned between two or more properties, or if separate prices

are fixed, it seems a separate lien may be claimed on each property for the amount due in respect to it. *Booth* v. *Booth*, (1902) 3 O. L. R. 294; *Shaw* v. *Thompson*, (1870) 105 Mass. 345; but see *Fairclough* v. *Smith*, (1901) 13 Man. 509; *Rathbun* v. *Hayford*, (1862) 87 Mass. 406. In an action by a husband against a wife to enforce a lien, it appeared that defendant's wife and plaintiff's mother each owned a dwelling, both dwellings being in one building which was damaged by fire. Plaintiff contracted to repair both for a lump sum—the amount of insurance. Held, that the amounts due in respect to each dwelling might be separated and that plaintiff came within sections 4 and 7 of the Act. *Booth* v. *Booth*, *supra*.

In *Webb* v. *Gage*, (1902) 1 O. W. R. 327, defendant leased premises to the Hoeffner Co. The company agreed to erect buildings and plant to the value of $100,000, which were to become the property of defendant. Held, that the lien only attached to the company's interest.

Where a contractor was to furnish the plant, etc., necessary for the carrying out of the contract, which was to become the property of the owner if the contract was not fulfilled, it was held that the value of the plant so furnished should not be included in the amount on which the owner was required to retain the percentage, though the contractor had failed to complete the contract and the plant had become the property of the owner. *Birkett* v. *Brewder*, (1902) 1 O W. R. 62.

(e) "*Prior mortgage.*"—These words have been substituted for the words "encumbered by a mortgage or other charge existing or created before the commencement of the work or the placing of the materials or machinery." It may be that the change has slightly restricted the meaning. A "prior mortgage" is a mortgage existing, though not necessarily registered at the time of the lien. *Cook* v. *Belshaw*, (1893) 23 O. R. 545. As a lien may be registered immediately after the contract is made, and before the performance of any work or the placing of any materials (see section 22), it would seem that a mortgage may be made before the commencement of the work or the placing of materials and not be a prior mortgage. The correct statement seems to be that the lien attaches at the time when the work is being performed or when the materials are placed, and, while it attaches as the work progresses, it relates back to the time when the contract was made. The distinction is not of much consequence since it has been held that, except in the

case of actual notice, the lien may be defeated by prior registration of a conveyance, mortgage or other instrument. *Hynes* v. *Smith*, (1879) 27 Gr. 150; *Reinhart* v. *Shutt*, (1888) 15 O. R. 325; *Wanty* v. *Robins*, (1888) 15 O. R. 474; *West* v. *Sinclair*, (1892) 28 C. L. J. 119, 12 C. L. T. 44; *McVean* v. *Tiffin*, (1885) 13 A. R. 1; *McNamara* v. *Kirkland*, (1891) 18 A. R. 271. Save as between rival lienholders it is difficult to see how effect is to be given to section 21, which provides that "except as herein otherwise provided, the Registry Act shall not apply to any lien arising under this Act." It is probable that actual notice will in any event defeat prior registration. See *Rose* v. *Peterkin*, (1885) 13 S. C. R. 710, and remarks of Killam, J., in *Robock* v. *Peters*, (1900) 13 Man. 124, at p. 145.

A mortgage subsequent in point of time takes priority over an unregistered lien. *Cook* v. *Belshaw*, (1893) 23 O. R. 545. A mortgagee for future advances is also protected to the extent of all advances made before registry of the lien and before he had actual notice of the lien. *Ibid.*

Where a mortgage has been duly registered, advances made thereunder after mechanics' liens on the mortgaged property have arisen, but before their registration, take precedence of the liens. *Warwick* v. *Sheppard*, 35 D. L. R. 98, 39 O. L. R. 99. But the claim of a mortgagee in British Columbia in respect of advances made subsequently to the commencement of the work done by lienholders is postponed to the rights of the lienholders. *National Mortgage Co.* v. *Rolston*, 59 Can. S. C. R. 219.

It has been held that a mortgage, subsequent to a lien, but given for the purpose of paying off prior incumbrance will be protected to the extent of such prior incumbrance. *Locke* v. *Locke*, (1898) 32 C. L. J. 332. In Massachusetts, under a similar provision, it has been held that a mortgagee, under a mortgage given to pay off existing mortgages, even to himself, acquires no rights under them. *Batchelder* v. *Hutchinson*, (1894) 161 Mass. 462; *Easton* v. *Brown*, (1898) 170 Mass. 311. See *Colonial Investment & Loan Co.* v. *McCammon*, (1905) 5 O. W. R. 315.

The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials placed on the ground before the mortgage money was advanced. *Robock* v. *Peters*, (1900) 13 Man. L. R. 12.

See also chapter entitled "Priorities," *ante*.

(f) *"Upon such increased value."*—Under the Mechanics' Lien Acts in some of the United States mechanics' liens are given priority over mortgages as to the building, but are postponed to prior mortgages as to the land; in some other States the Act gives the mortgage priority to the extent of the value of the land when the contract under which the lien arose was made. See *Wimberley* v. *Mayberry*, (1891) 94 Ala. 240, 14 L. R. A. 305; *Croskey* v. *N. W. Mfg. Co.*, 48 Ill. 481. The latter is in effect the same as the priority here given. While, however, the mechanics' lien only has priority over the mortgage to the extent of the increased value, yet if there is a surplus after satisfaction of the mortgage, the lienholder may resort to it for satisfaction of the balance of his claim.

Unless the selling value of the property has been increased the lien has no priority over the mortgage. *Kennedy* v. *Haddow*, (1890) 19 O. R. 240. The lien, however, may be asserted subject to the prior rights of the mortgagee. See *Boake Mfg. Co.* v. *McCrimmon*, (1905) 6 O. W. R. 979.

The mortgagee is a necessary party to any proceedings to enforce a lien against the increased value, and unless he is a party the premises must be sold subject to the mortgage. *Finn* v. *Miller*, (1889) 10 C. L. T. 23. In this case a mortgagee, not a party to the proceedings, having sold under a power of sale in the mortgage, applied to have the registry of the lien and *lis pendens* vacated, and the order was made, the mortgagee to pay surplus proceeds into court, to be available for the lienholders.

Several lienholders may be entitled to share *pro rata* in this increased value. *Bank of Montreal* v. *Haffner*, (1882) 3 O. R. 183; *Broughton* v. *Smallpiece*, (1878) 25 Gr. 290. See this latter case also as to limitation of contractors' lien to increased value of land, irrespective of buildings.

The mortgagee should be made a party to the proceedings when a prior lien on account of increased value is claimed, and the statement of claim should set up such prior lien. *Douglas* v. *Chamberlain*, (1878) 25 Gr. 288; *Richards* v. *Chamberlain*, (1878) 25 Gr. 402. The onus is on the lienholder to prove the amount by which the selling value of the property has been increased, and the decree should settle the amount and the priorities. *Croskey* v. *Corey*, 48 Ill. 442; *Croskey* v. *N. W. Mfg. Co.*, 48 Ill. 481; and see *Robock* v. *Peters*, (1900) 13 Man. 124. The same provisions as

to the time within which proceedings must be taken against an owner apply to proceedings to enforce a lien against a prior mortgagee (*Bank of Montreal* v. *Haffner*, (1884) 10 A. R. 592; *Keffer* v. *Miller*, (1895) 10 C. L. T. 90), nor can the mortgage be added after the time has expired though the proceedings against the owner were commenced in time. *McDonald* v. *Wright*, (1868) 14 Gr. 284; *Keffer* v. *Miller*, *supra*; *Larkin* v. *Larkin*, (1900) 32 A. R. 80.

Where there is an actual agreement for the sale of the property, but no conveyance has been made, the purchaser is to be considered a mortgagor, and the vendor, a mortgagee. See section 13 (2); *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227. It seems, however, that a tenant with an option of purchase is not to be considered a mortgagee, nor the landlord a mortgagor. *Graham* v. *Williams*, (1888) 9 O. R. 458; *Blight* v. *Ray*, (1893) 23 O. R. 415.

Where on a reference in a mechanics' lien proceeding under a former Act it was found as between a lienholder and a prior mortgagee that the selling value of the property has been increased by the work done and materials supplied to an amount equal to the claim of the lienholder who is declared entitled to rank on such increased value in priority to the mortgagee, and pending the proceedings the premises are destroyed by fire, the claim of the lienholder is at end so far as the interests of the mortgagee are affected by it:—Semble, the amount of the increased value to which the lienholder is entitled to resort as against the mortgagee cannot be ascertained until the property has been sold. *Patrick* v. *Walbourne*, (1896) 27 O. R. 221. Under section 9 of the present Act the insurance money stands in the place of the destroyed building.

As to claim of lienholders to priority under special agreement, see *Boake Mfg. Co.* v. *McCrimmon*, (1905) 6 O. W. R. 979.

The limitation of the priority of mechanics' liens over mortgages to the amount whereby the premises have been increased in value by the work, does not apply where no money was advanced by the mortgagee until after the commencement of the work for which the lien is claimed. *Colling* v. *Stimson*, 10 D. L. R. 597.

9. Application of insurance when lien attaches.—Where any of the property upon which a lien attaches is wholly or partly

destroyed by fire any money received by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed, and shall be subject to the claims of all persons for liens to the same extent as if such money was realized by a sale of such property in an action to enforce the lien. 10 Edw. VII. c. 69, s. 9.

(a) *"Any insurance."*—A lienholder has an insurable interest in the building to which the lien attaches, though the lien is only inchoate. *Insurance Co.* v. *Sinson,* (1880) 103 U. S. 25. In *Greene* v. *Holmstead Fire Ins. Co.,* (1880) 82 N. Y. 517, a policy of insurance provided that the company should not be liable if without written consent thereon the property should thereafter be encumbered in any way. Subsequently to the issuing of the policy a mechanics' lien was filed against the property, but no proceedings were ever taken to enforce the same. It was not shown that the plaintiff had knowledge of the filing of the lien until after the destruction of the property by fire. Held, that the filing of the lien did not create an incumbrance within the meaning of the condition and that the policy was not avoided thereby. The term "incumbrance" as used in an application for fire insurance relating to the incumbrance on the property should be construed to include a subsisting lien of a mechanic or materialman for which a claim had been filed. *Redman* v. *Phoenix Fire Ins. Co.,* (1881) 8 N. W. 226; 51 Wis. 293; 37 Am. Rep. 830.

Before this section was enacted the lienholder had no right to enforce his lien against the proceeds of an insurance policy taken out by the owner or mortgagee. *Patrick* v. *Walbourne,* (1896) 27 O. R. 221. As to destruction of building in course of erection, see *Appleby* v. *Myers,* (1867) L. R. 2 C. P. 651, in which case Blackburn, J., says: "We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." See other cases on this point cited, *ante.*

Under this section the lien is extended to the proceeds of fire insurance policies whether taken out by the owner, mortgagee or chargee. It should be noted, however, that in the case of a prior mortgagee the lien would extend only to the increased selling value of the property subject to lien. The person asserting the

lien must establish the fact of such increased selling value before he can make any claim to insurance money payable to a prior mortgagee. The proceeds of fire insurance policies are now made to take the place of the property subject to the lien and are made available to the lienholder. At the same time the lienholder's right to proceed against the land is not taken away, so that he has his remedy both against the insurance money and the land. Only insurance against fire is mentioned in the section; destruction of the building from any other cause is not provided for.

As to application of insurance money, see *Agnew* v. *East*, (1916) 10 O. W. N. 428, 11 O. W. N. 78.

10. Limit of amount of owner's liability.—Save as herein otherwise provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

A sub-contractor supplying materials is not entitled to claim, where, owing to the contractor's default there is no "sum justly due or payable," to the contractor by the owner. *Wilks* v. *Leduc & Toronto General Trusts*, (1916) 27 Man. L. R. 72, 30 D. L. R. 792, 35 W. L. R. 4. See *Deldo* v. *Gough-Sellers*, 25 D. L. R. 602.

(a) *"Payable by the owner to the contractor."*—This section is to be read with sections 6, 11, 12, 14 and 15. Subject to the provisions of these sections as to the lien of wage-earners, the percentage to be retained, *bonâ fide* payments to lienholders and payments made to defeat the lien, the owner can assert against the lienholder the same defences as he can against the contractor. It was held in *Crone* v. *Struthers*, (1875) 22 Gr. 248, that as nothing was payable at the time the lien was claimed there was no lien, and that the lien being the creature of the statute, must be limited by its provisions. Any condition or stipulation agreed upon between the owner and contractor, performance of which is a condition precedent to the contractor's right to recover from the owner may be set up by the owner in answer to a sub-contractor's claim to be entitled to a lien, *i.e.*, an *independent* lien. See *Rice Lewis* case. This statement would not apply to the statutory percentage retention provision in section 12. The usual case is non-fulfilment of the contract. *Appleby* v. *Myers*, (1867) L. R. 2 C. P. 651; *Thorn* v. *Mayor of London*, (1874) L. R. 10 Ex. 112; *Crone* v.

Struthers, supra; Goddard v. *Coulson,* (1884) 10 A. R. 1; *Sherlock* v. *Powell,* (1899) 26 A. R. 407; *Dermott* v. *Jones,* (1864) 2 Wall. 1. But the owner may, by acceptance of the work or by other acts, waive a compliance with the contract. A certificate from the architect may be made a condition precedent to the contractor's right to recover, and though the contractor may set up in an action against the owner and architect that the certificate has been wrongfully and fraudulently withheld from him, it seems that the lienholder cannot join the architect as defendant in proceedings to enforce the lien. *Bagshaw* v. *Johnson,* (1901) 3 O. L. R. 58. In *Good* v. *Toronto H. & B. Ry. Co.,* (1899) 26 A. R. 133, it was held that the rule that the contractor was bound by the provision of the contract making the decision of the engineer final did not extend to a case where the named engineer, while in fact the engineer of the employer, was described in the contract as the engineer of a third person. Fulfilment of the contract is not excused because the work cannot be completed according to the plans and specifications prescribed.

In an action by a sub-contractor asserting a lien can the "owner" plead by way of set-off a debt due to him by the contractor entirely unrelated to the original contract under which the work was done or the material furnished? It would defeat the primary purpose of the statute if a general debt could be set off against the amount payable under the contract. The principle of set-off cannot apply unless there has been an agreement providing for such set-off before the lien arose. *Bennett* v. *Devitt,* (1915) 25 Man. L. R. 421.

See also *Smith Co.* v. *The Sissiboo Pulp & Paper Co.,* (1903) 36 N. S. R. 348; (1904) 35 S. C. R. 93; *Smith* v. *Bernhardt,* (1909) 11 W. L. R. 623.

The rights of lienholders are measured by the amount "justly owing," by the owner to the contractor, and where an agreement provides payment by instalments, with the right to retain an amount as a drawback on the completion of the work, the lien accrues for the full amount of any instalment payable, subject to the owner's right of deduction in the event of the non-completion of the whole contract. *Deldo* v. *Gough-Sellers Investments,* 34 O. L. R. 274, 25 D. L. R. 602.

11. Limit of lien when claimed by some other than contractor.—Save as herein otherwise provided, where the lien is claimed by

any person other than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials placed or furnished.

(a) *"Limited to the amount."*—This section is also to be read with sections 6, 11, 12, 14 and 15, and deals with cases in which the lien is claimed by sub-contractors and others who do not contract directly with the owner. The lien claimed by a person performing work or furnishing materials for a sub-contractor is limited not only to the amount due by the owner to the contractor, but also to the amount due to the sub-contractor for whom he has done work or service or furnished materials. All payments made *bonâ fide* up to the percentage mentioned in section 12, are protected unless notice in writing has been given by the person claiming the lien. Payments made to defeat or impair the lien are, by section 15, null and void to the extent of the sums improperly paid. *Briggs* v. *Lee,* (1880) 27 Gr. 464. Sections 9 and 10 are both subject to the provision of section 14 giving wage-earners a prior claim for thirty days' wages on the percentage retained under section 12.

As to both claim and costs being paid out of the twenty per cent., see *Ontario Paving Brick Co.* v. *Bishop,* 4 O. W. R. 34; *Gold Medal Furniture Co.* v. *Craig,* (1905) 6 O. W. R. 954.

There can be no claim as on a *quantum meruit* for the price of work actually done or materials actually supplied where the contract is an entire and indivisible one, and performance is a condition precedent. *Sherlock* v. *Powell,* (1899) 26 A. R. 407.

The amount due to a contractor or sub-contractor cannot be determined in proceedings to enforce the lien unless the parties liable on the contract or sub-contract are before the court. *Wood* v. *Stringer,* (1890) 20 O. R. 148.

12. (1) Retention of percentage by owner for thirty days.—In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise shall, as the work is done or materials are furnished under the contract, deduct from any payments to be made by him in respect of the contract, and retain for a period of thirty days after the completion or abandonment of

the contract, twenty per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 6, and such value shall be calculated on the basis of the contract price, or if there is no specific contract price, then on the basis of the actual value of the work, service or materials.

(2) **Where contract price exceeds $15,000.**—Where the contract price or actual value exceeds $15,000, the amount to be retained shall be fifteen per cent. instead of twenty per cent.

(3) **Effect of lien on amounts retained.**—The lien shall be a charge upon the amount directed to be retained by this section in favor of sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(4) **Payments made in good faith without notice of lien.**—All payments up to eighty per cent. or eighty-five per cent. where the contract price or actual value exceeds $15,000 of such price or value made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of such lien given by the person claiming the lien to him, shall operate as a discharge *pro tanto* of the lien.

(5) **Payment of percentage and discharge of liens.**—Payment of the percentage required to be retained under sub-sections 1 and 2 may be validly made so as to discharge all liens or charges in respect thereof after the expiration of the period of thirty days mentioned in sub-section 1 unless in the meantime proceedings have been commenced to enforce any lien or charge against such percentage as provided by sections 23 and 24. 10 Edw. VII. c. 69, s. 12.

(a) *"Primarily liable."*—This section is for the protection of sub-contractors. It creates a fund out of which persons claiming a lien under a contract not made directly with the owner may have their lien satisfied. Before the year 1882 the percentage to be

retained was upon "the price to be paid to the contractor." Under the former section it was held that the owner was not required to retain a percentage upon all payments made to the contractor. It was sufficient if such payments did not in the aggregate exceed the specified percentage of the whole contract price, and if the contractor failed to complete the contract, or if for any other reason the contract price never became due, there was no fund available to satisfy the liens of sub-contractors. *Goddard* v. *Coulson*, (1884) 10 A. R. 1; *Harrington* v. *Saunders*, (1887) 23 C. L. J. 48, 7 C. L. T. 88; *Truax* v. *Dixon*, (1889) 17 O. R. 366; *Reggin* v. *Manes*, (1892) 22 O. R. 443; *Re Sear and Woods*, (1892) 23 O. R. 474. In *Re Cornish*, (1884) 6 O. R. 259, it was held that where a contractor failed to complete his contract and his surety undertook to finish the work there were two contracts, and that the ten per cent. was to be paid on the amount earned under each. It was also held that a mechanics' lien was postponed to the owner's claim for damages for non-completion; the priority of a wage-earner's lien was not decided. See *Harrington* v. *Saunders*, *supra*; *McBean* v. *Kinnear*, (1892) 23 O. R. 313.

It was afterwards held in *Russell* v. *French*, (1896) 28 O. R. 215, that if any owner, contractor or sub-contractor under whom a lien may arise pays more than the specified percentage of the value of the work and materials done or finished, he does so at his peril, and a lien may be successfully asserted against him to the extent of the percentage which he should have retained, by any lienholder who is prejudiced by the excessive payment.

But this decision was not followed in *Farrell* v. *Gallagher*, (1911) 23 O. L. R. 130, which declared that this section recognizes that the charge is a charge upon money to become payable to the contractor.

In the subsequent important case of *Rice Lewis & Son, Ltd.* v. *Harvey et al.*, (1913) 9 D. L. R. 114, doubts as to the construction of this section were removed. It was held that the property owner is, as regards lienholders holding claims against the principal contractor, a trustee of the twenty per cent. of payments which become due to the latter under the contract during the progress of the work; and the owner will be liable for such percentage, so far as may be required to satisfy the unpaid lien claims, although by his contract he was to pay and did pay the contractor only 80 per cent. of the value of work as certified by progress certificates of the

architect, where the contractor afterwards abandoned the work and the 20 per cent. retained of the value so certified by the architect was insufficient to pay the cost of completing the contract. The property owner is entitled to deduct from the sums for which he is liable to his contractor on progress estimates while the work is going on, twenty per cent. thereof (or fifteen per cent. where the contract price exceeds $15,000), for the protection of persons entitled to liens as sub-contractors; and the owner is not entitled as against the sub-contractor to apply such percentage to answer the cost of completing the work on the contractor's default. The principle established by *Farrell* v. *Gallagher, supra,* that the Act does not make the owner liable for any greater sum than he has contracted to pay (save in the case of wage-earners), is recognized as sound, but where the owner has agreed to make interim payments to the contractor as the work progresses, he is required by the Act to hold 20 per cent. of such interim payments as a statutory fund available for all lienholders, and this fund is not answerable for any sum which the owner may claim against the contractor upon the completion of the work. When there is but one payment called for by the contract, general lienholders must take the situation as it is found to be, for there is no provision requiring the creation of a "statutory fund" for the protection of the lienholders. This fund is to be created by the owner deducting 20 per cent "from any payment to be made by him in respect of the contract." When there is a lump sum to be paid upon the completion of the contract and the work is not done, nothing is payable. *Burton* v. *Hookwith,* (1919) 45 O. L. R. 348, 48 D. L. R. 339.

The statutory amount of payment which the owner may retain forms a fund available for the lienholders only, to which the owner cannot resort as security against or to make good any loss occasioned by the non-fulfilment of the contract. *Peart Bros. Hardware Co.* v. *Battell,* (1915) 8 Sask. L. R. 305, 23 D. L. R. 193, 8 W. W. R. 1159, 31 W. L. R. 956.

The fact that the owner did not retain from his contract any of the percentage of the value of the work does not make him liable for sub-contractors' claims, as to which no lien was filed or notice of claim given the owner until after the expiry of thirty days following the abandonment of the work by the principal contractor, the statutory obligation to retain the percentage being

limited to thirty days after completion of abandonment of the contract with the owner. *Brooks* v. *Mundy*, 16 D. L. R. 119.

As to the computation of the 15 per cent., see *Birkett* v. *Brewder*, 22 C. L. T., 1 O. W. R. 62.

Where a statute requires service of notice of claim this is construed to mean personal service. *Sykes Steel Roofing Co.* v. *Berstein*, 156 Ill. App. 500; *South Side Lumber Co.* v. *Date*, (1910) 156 Ill. App. 436.

(b) *"Period of thirty days."*—Section 22 limits the time within which a lien may be registered to within thirty days after the completion of the work or the supplying of the materials for which the lien is claimed. By retaining the percentage for the same period the owner, contractor or sub-contractor is in a position to know whether any lien will be asserted, the same limit of time being adopted in both instances. The twenty per cent. to be deducted from the payments to be made is not twenty per cent. of the payments, but twenty per cent. of the value of the work done and materials furnished, calculated on the basis of the contract price. As to the proper method of finding the value of the work done prior to default by a defaulting contractor, see *Batts* v. *Poyntz*, (1916) 11 O. W. N. 204.

(c) *"Shall be a charge."*—Under a former section where the contractor or sub-contractor never earned the contract price a sub-contractor had no lien or claim upon the percentage. See *Goddard* v. *Coulson*, (1884) 10 A. R. 1; *Harrington* v. *Saunders*, (1887) 23 C. L. J. 48, 7 C. L. T. 88; *Truax* v. *Dixon*, 17 O. R. 366; *Reggin* v. *Manes*, (1892) 22 O. R. 443; *Re Sear and Woods*, 23 O. R. 474.

(d) *"Payments."*—This word is here used not in its technical but in a popular sense. It covers a bill of exchange, promissory note, tripartite agreement and payments directed by the contractor to be made to third parties. *Jennings* v. *Willis*, (1892) 22 O. R. 439. Also payments made by the owner or contractor to sub-contractors in order to obtain the delivery of goods or to get work done; it would be otherwise in the case of payments made to the assignee of the contractor. *McBean* v. *Kinnear*, (1892) 23 O. R. 313. Payments made to contractors or sub-contractors are only invalid when they would have been liable for the satisfaction of a lien. (*Ib.*) The percentage, payment of which is protected, is to be computed upon the value of the work actually done or materials furnished.

To defeat the effect of the statute the owner is allowed to show that payment has been made "without notice" of the lien of all that he became liable to pay. Hence the onus of showing payments which will extinguish the lien is upon the owner. The owner is entitled to be credited with the amount of promissory notes made by the contractor and endorsed by the owner which became due and were taken up as payments upon the building contract before the notice of lien was filed. It is not absolutely necessary that such notes should be charged up in the account. From the time the agreement is made to pay the notes, as well as from the time of their actual payment by the owner, he is entitled to have them treated as payments upon the building contract existing between him and the contractor. *Smith* v. *Merriam,* (1873) 67 Barb. (N.Y.) 403. Payments made after the lienholder's claim has attached, of moneys not due according to the terms of the contract, should not be protected. *Travis* v. *Breckenridge,* 43 S. C. R. 59; *Ringland* v. *Edwards,* (1911) 19 W. L. R. 686.

The acceptance by the owner of an order drawn on him by the contractor for part of the moneys due upon the contract, which order was made payable to a contractor who had filed a mechanics' lien for the amount represented thereby, and the owner's promise in writing to pay it, accepted by the sub-contractor in satisfaction of the lien which was thereupon discharged of record, constitutes a payment, and the filing of the order is not requisite in order to make it valid as against subsequent lien claimants. A provision requiring the filing of orders drawn by a contractor or sub-contractor upon the owner for moneys payable upon the contract does not affect payments made by the owner on account of labor performed or materials furnished under the contract. *Harvey* v. *Brewer,* (1904) 178 N. Y. App. 5.

(e) *"Notice in writing."*—Payments to the extent of the percentage mentioned will not be protected if before payment is made notice in writing has been given by a person claiming a lien. The necessity for this provision is obvious as otherwse the owner before making any payment would always be obliged to make a search to ascertain if any lien had been registered. Only *bonâ fide* payments are protected. See section 15 as to the payments made for the purpose of defeating or impairing liens.

Lien claimants for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar

Street buildings" to "see that a cheque for at least $400 is made payable to us on acount of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made to-day." Held, Meredith, J., dissenting, a sufficient "notice in writing" of their lien. *Craig* v. *Cromwell*, (1900) 32 O. R. 27, affirmed, 27 A. R. 585. On the appeal in this case, at p. 587, Osler, J.A., thus refers to the notice required by sub-section 2, of the former section: "The object of the notice is to warn the owner that he cannot safely make payments on account of the contract price even within the 80 per cent. margin, because of the existence of liens of which he was not otherwise bound to inform himself or to look for. The notice does not compel him to pay the lien. It does not prove the existence of the lien. Its sole purpose is to stay the hand of the paymaster until he shall be satisfied—either by the direction of the debtor—or of the court in case proceedings are taken to realize the lien—that there is a lien, and that some amount is really due and owing to the lienholder. . . . The notice under section 11, sub-section 2, is purely informal, and was manifestly intended to be so, no form or special particulars of detail being prescribed in regard that it might have to be given promptly or by illiterate persons who might, as it were, read and understand the sections as they ran."

(f) "*May be validly made.*"—The payment of the percentage retained cannot be validly made to any person within the thirty days mentioned in sub-section 1. After the expiration of the thirty days payments may be validly made to lienholders unless proceedings have been taken under sections 23 and 24 to enforce a lien or charge against the percentage retained. Proceedings by one lienholder would be sufficient as such proceedings would be available for other lienholders claiming against the amount retained.

A mechanics' lien is postponed to the owner's claim for damages; as to a wage-earner's lien *quære*.

In *Torrance* v. *Cratchley*, (1900) 31 O. R. 546, Street, J., in referring to the 11th and following sections says (at p. 549): "The only object of the provision requiring the owner to retain the twenty per cent. for thirty days appears to be that indicated by sub-section 3 of section 11, viz., to give persons entitled to liens an opportunity of enforcing them against the fund directed to be retained."

This section recognizes that the charge is a charge upon money to become payable to the contractor; and when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had and their lien fails. *Farrell* v. *Gallagher*, (1911) 23 O. L. R. 130.

There is no sum "justly owing" or "payable" by the owner to the contractor where the building was never completed by the contractor and where the building contract provided that time was of the essence of the contract and stated a specific time for completion and fixed a specific sum for every day beyond a stated period that the owner is denied the full possession of the premises. *McManus* v. *Rothschild*, (1911) 25 O. L. R. 138.

Where there is no lien for the laborers a contractor has no right to withhold payment of the amount due sub-contractors until these laborers are paid. *Woolek* v. *Bradley*, (1911) 18 W. L. R. 622.

"Calculated on basis of contract price." See *Batts* v. *Poyntz*, (1916) 11 O. W. N. 204.

In *Craig* v. *Cromwell*, (1900) 27 A. R., at p. 587, Osler, J.A., said: "Section 12 would appear to authorize him (the owner) to pay the sub-contractor, but if he does so he assumes the risk of being able to prove as between himself and the contractor, that the debt was justly due and his right or power to pay the sub-contractor does not depend upon notice having been given to him under s. 11 s.-s. 2."

In *Torrance* v. *Cratchley*, (1900) 31 O. R. 546, Street, J., referring to this section, said: "Section 12 of the Act was much urged upon as supporting the lien-holder's contention. That section appears, however, merely to give authority to the owner without the consent of the contractor, but upon mere notice to him to make payments out of the contract price direct to persons who would be entitled to liens, limiting, however, the right to make such payments to the moneys which the owner is not directed to retain under the 11th section. It does not apply at all to the moneys which the owner is directed to retain, and, therefore, it does not affect the present case."

13. Payments made direct by owner to persons entitled to lien.—If an owner, contractor or sub-contractor makes a payment to any person entitled to a lien under section 6 for or on account of

any debt justly due to him for work or service done or for materials placed or furnished to be used as therein mentioned, for which he is not primarily liable, and within three days afterwards gives, by letter or otherwise, written notice of such payment to the person primarily liable, or his agent, such payment shall be deemed to be a payment on his contract generally to the contractor or subcontractor primarily liable but not so as to affect the percentage to be retained by the owner as provided by section 12. 10 Edw. VII. c. 69, s. 13.

14. (1) **Priority of lien.**—The lien shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payment or after registration of a claim for such lien as hereinafter provided.

(2) **Agreements to purchase where part of purchase money unpaid.**—Where there is an agreement for the purchase of land and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

(3) **Priority among lienholders.**—Except where it is otherwise provided by this Act, no person entitled to a lien on any property or money shall be entitled to any priority or preference over another person of the same class entitled to a lien on such property or money, and each class of lienholders shall rank *pari passu* for their several amounts, and the proceeds of any sale shall be distributed among them *pro rata* according to their several classes and rights. 10 Edw. VII. c. 69, s. 14.

By 8 Geo. V. c. 29, s. 5, sub-section 2 of section 14 was amended by adding at the commencement thereof the words "Save as herein otherwise provided."

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner" within the meaning of section

2 (c), so as to subject the land to mechanics' lien for work done and materials furnished under contracts with the purchaser, but by virtue of the above section such vendor is deemed a "mortgagee" for the purpose of giving priority to the liens upon the increased selling value of the land caused by the improvements. *Marshall Brick Co.* v. *York Farmers' Colonization Co.*, (1917) 54 Can. S. C. R. 569, 36 D. L. R. 420; *Sterling Lumber Co.* v. *Jones*, 29 D. L. R. 288.

(a) "*Assignments, attachments, garnishments.*"—The conflicting views expressed in *Lang* v. *Gibson*, 21 C. L. J. 74; and *McCully* v. *Ross*, 22 C. L. J. 63, are disposed of by this section.

A sub-contractor commenced work on 19th August, 1903, and finished on 11th October, 1904, and registered his lien October 12th, 1904. Contractor gave an equitable assignment of amount due him 14th October, 1904, and notice was given to the owners. At that time $2,588 had been earned, but not payable until architect's certificate given 4th November, 1904. Held, under section 13 (1), that the lien was entitled to priority over the assignment, for the full amount of the lien and not merely for that portion thereof actually earned by the sub-contractor up to the date of the assignment. Under section 14 the sub-contractor's lien related back to the commencement of his work.

The assignment was valid and bound the debt assigned though it was not payable at the date of the assignment. The debt due and owing was a sufficient consideration for the assignment of a chose in action and the assignment was, therefore, not revocable or impeachable as being voluntary. *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, 5 O. W. R. 161, 41 C. L. J. 260, 25 C. L. T. 58.

(b) "*Advances made on account of any conveyance or mortgage,*" *i.e.*, advances made on security of a mortgage registered prior to the lien. It is, therefore, necessary for the mortgagee to examine the registry for mechanics' liens on every occasion of making a fresh advance on the mortgage.

(c) "*The purchaser shall be deemed a mortgagor and the seller a mortgagee.*"—See *Blight* v. *Ray*, 23 O. R. 415. See also *Hoffstrom* v. *Stanley*, (1902) 14 Man. 227, 22 C. L. T. 337, cited under sections 8 and 15.

(d) "*Excepting where it is otherwise declared.*"—The exception is that in favor of the liens for wages for thirty days or less.

See section 12 (1) as to the percentage to be retained, and section 11.

(e) *"According to their several classes and rights."*—It had formerly been decided (*Goddard* v. *Coulson*, (1884) 10 A. R. 1; *Re Cornish*, (1884) 6 O. R. 259; and *Re Sear* v. *Woods*, 23 O. R. 474) that where a contractor never earned the percentage retained, a sub-contractor under him had no lien against the owner in respect to such percentage, but it was held in *Russell* v. *French*, 28 O. R. 215, that that percentage is liable for the claims of sub-contractors even though the contractor had not actually earned it. Meredith, C.J., said: "That percentage it was the duty of the owner to retain out of the payments to be made to the contractor, and it appears to have been intended to form a fund for the payment of the lienholders, and not subject to be affected by the failure of the contractor to perform his contract." The three cases cited, *supra*, are, therefore, not applicable to the present Act. See also *Rice Lewis* v. *Harvey*, 9 D. L. R. 114.

As to the effect of general assignment for the benefit of creditors upon mechanics' liens registered before the date of the assignment, see *In re Demaurez*, (1899) 5 Terr. L. R. 84.

The assignment of a lienable claim carries with it the right to the lien and clothes the assignee with authority to take the necessary legal proceedings to perfect and enforce it. *Sickler* v. *Spencer*, 17 B. C. R. 41; *Boyer* v. *Keller*, (1913) 258 Ill. 106; *Tisdale Lumber Co.* v. *Read Realty Co.*, (1912) 154 App. Div. 270.

By section 8 (3) a lien is given priority over mortgages upon the increase in selling value of land by reason of work or service done thereon or materials supplied. The above section gives priority to a lien which has been registered or of which written notice has been given to the mortgagee upon the land itself, including the buildings and erections thereon, over all subsequent advances under a mortgage.

The priority of an unpaid vendor is not forfeited by the substitution of a mortgage for the unpaid amount.

Actual notice not in writing is not sufficient to give a lien the priority over mortgages provided under this section. *Cook* v. *Koldoffsky*, (1916) 28 D. L. R. 346. See *Cut-Rate Plate Glass Co.* v. *Solodinski*, 25 D. L. R. 533; *Sterling Lumber Co.* v. *Jones*, 29 D. L. R. 288.

15. (1) Priority of lien for wages. — Every mechanic or laborer whose lien is for wages shall, to the extent of thirty days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, directed to be retained by section 12, to which the contractor or sub-contractor through whom such lien is derived is entitled, and all such mechanics and laborers shall rank thereon *pari passu*.

(2) Enforcing lien in such cases.—Every wage-earner shall be entitled to enforce a lien in respect of a contract not completely fulfilled.

(3) Calculating percentage when contract not fulfilled. — If the contract has not been completed when the lien is claimed by a wage-earner, the percentage shall be calculated on the value of the work done or materials furnished by the contractor or sub-contractor by whom such wage-earner is employed, having regard to the contract price, if any.

(4) Percentage not to be otherwise applied.—Where the contractor or sub-contractor makes default in completing his contract the percentage shall not, as against a wage-earner claiming a lien, be applied by the owner or contractor to the completion of the contract or for any other purpose, nor to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, nor in payment or satisfaction of any claim against the contractor or sub-contractor.

(5) Devices to defeat priority of wage earners.—Every device by an owner, contractor or sub-contractor to defeat the priority given to a wage-earner for his wages, and every payment made for the purpose of defeating or impairing a lien shall be null and void. 10 Edw. VII. c. 69, s. 15.

(a) *"Every wage-earner."*—This sub-section is only meant to apply to wage-earners who are in the position of sub-contractors,

and who are not themselves in default in respect to their own contracts.

Defendant agreed to purchase land from D. & McC., price to be paid 15th August, 1901. In default D. & McC. could either cancel agreement forfeiting any payments made or re-sell and recover any deficiency from defendant. Defendant made improvements on land and employed plaintiff as a carpenter. Plaintiff claimed lien for wages. No part of purchase money was paid. Work went on after 15th of August with concurrence of D. & McC. Held, that parties must be regarded as mortgagor and mortgagee. D. & McC. having granted extension could not cancel without giving more time, hence agreement was still subsisting when plaintiff did the work. Plaintiff was entitled to the lien subject to charge of D. & McC. for unpaid purchase money and interest. *Hoffstrom* v. *Stanley*, (1902) 14 Man. L. R. 227.

(b) "*The percentage.*"—See *Black* v. *Wiebe*, (1905) 1 W. L. R. 75; *Brydon* v. *Lutes*, (1891) 9 Man. L. R. 463; *Brienzi* v. *Samuel*, 12 O. W. R. 1233.

The defendant P. contracted to build a house for the defendant T., but abandoned the contract when the work was not half done. Liens were claimed by wage-earners, and proceedings were had under the provisions of the Act. It was contended that section 14 (3) enacts a rule for wage-earners, in a case in which the contract has not been completely fulfilled, different from the rule in any other set of circumstances, and that the only thing to be looked at is the value of the work done and materials furnished by the contractor:—Held, that the interpretation of the words of this sub-section is to be found from an examination of the course of legislation, and there is nothing therein to indicate that "the percentage aforesaid" is not the same percentage as that in sub-section (1) of this section, and in section 11, and, therefore, in ascertaining the amount upon which is to be computed the 20 per cent. provided by the Act, the value of the work done and materials furnished is to be calculated upon "the basis of the price to be paid for the whole contract." *Cole* v. *Pearson*, 17 O. L. R. 46.

(c) "*The value of the work done.*"—Where lienholders (other than wage-earners) claiming under the contractors claimed that the owner must account to them for 20 per cent. of the value of the work done, and could not resort to this 20 per cent. to recoup herself for damages sustained by the contractors' breach of con-

tract it was held that where the contract was a losing one for the contractors, "the value of the work done" to the contractors and those claiming under them could only be arrived at by taking the contract price, plus the extras, and deducting the omissions and the cost of completion, including rectification. *Farrell* v. *Gallagher*, (1911) 23 O. L. R. 130.

But the subsequent important case of *Rice Lewis & Son, Ltd.* v. *Harvey et al.*, (1913) 9 D. L. R. 114, sets at rest doubts in relation to the construction of this section and section 12. (See notes of this case under section 12.) In this case it was held that the special provision for priority of wage-earners whereby it is declared that as against wage-earners the percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default nor to the payment of damages for non-completion, does not affect the other provisions of the Act regarding mechanics' liens generally; and it is not to be implied from such prohibition that the owner may in cases other than for wages so apply the statutory percentage toward the cost of completion as against the liens of materialmen or sub-contractors in the event of the contractor's default.

(d) *"Shall be taken to be null and void."*—Under a former Act it was held that payments were valid which were made to a contractor by an "owner," after registration of the lien of a sub-contractor, but without notice thereof or without any intention to impair the claim. *Briggs* v. *Lee*, (1880) 27 Gr. 464. Other cases under the former Act touching this question of payments are: *Re Sear* v. *Woods*, (1892) 23 O. R. 474; *Jennings* v. *Willis*, (1892) 22 O. R. 439, and *McBean* v. *Kinnear*, (1892) 23 O. R. 313.

The question as to any payment being made for the "purpose" mentioned is a question which must be determined according to the special circumstances of each case and the burden of establishing the purpose or intent would be on the lienholder.

See also *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, cited under section 14 (*a*).

While the contract remains in force no payment made to the contractor, after notice of lien has been filed by a sub-contractor, can affect the lien thereof (*McMillan* v. *Seneca Lake G. & W. Co.*, 12 N. Y. Supr. Ct. 12), and the owner cannot plead in defence to

the lien any payments thereafter made by him. *Boisot*, section 367; *Morehouse* v. *Moulding*, 74 Ill. 322; *Budd* v. *Trustees*, (1888) 51 N. J. Law 36; *Anderson* v. *Huff*, (1892) 49 N. J. Eq. 349. After notice to the owner from a sub-contractor, the owner cannot rightfully pay the original contractor so as to defeat the demands of the sub-contractor, nor can he pay one sub-contractor in full, and another nothing, as his partiality may determine. Phillips, section 62 (*h*); *Morehouse* v. *Moulding*, *supra*. As to payments made by collusion for the purpose of defeating other claimants, see *Hofgesang* v. *Meyer*, 2 Abb. N. Cas. (N.Y.) 111.

Any legal assumption of liability by the owner on account of the contractor, such as the acceptance of an order for the payment of money, is equivalent to a payment, and has the same effect. *Gibson* v. *Lenane*, (1883) 94 N.Y. 183.

Material.

16. (1) Restraining attempt to remove material affected by lien.—During the continuance of a lien no part of the material affected thereby shall be removed to the prejudice of the lien.

(2) Exemption from execution of material furnished for certain purposes.—61 V. c. 29, s. 13 (3) Man.—Material actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 6, shall be subject to a lien in favor of the person furnishing it until placed in the building, erection or work, and shall not be subject to execution or other process to enforce any debt other than for the purchase thereof, due by the person furnishing the same. 10 Edw. VII. c. 69, s. 16.

(a) "*During the continuance of a lien.*"—The life of a lien is controlled by section 23 and section 24.

As to the object of this section see observation of Meredith, C.J.C.P., in *Benson* v. *Smith*, (1915) 37 O. L. R. 257.

(c) "*Material.*"—This would include any plant or machinery or materials brought upon the land for the purpose of being used in the work upon the building (*Dixon* v. *La Farge*, 1 E. D. *Smith* 722), or in blasting in order to lay the foundations of a building. *Hazard Powder Co.* v. *Byrnes*, 12 Abb. Pr. 469, s.c.

21 How. Pr. (N.Y.) 189; *Giant Powder Co.* v. *Oregon Pac. Ry. Co.*, 42 Fed. 470. Under a statute giving a lien for "timber or other materials used in or about the mine," a lien lies for powder, steel and candles furnished for the use of the mine. *Keystone Min. Co.* v. *Gallagher*, 5 Col. 23; *California Powder Works* v. *Blue Tent & Mines*, 22 Pac. Rep. 391.

(d) "*Shall not be subject to execution.*"—See *Ludlaw-Ainslie Lumber Co.* v. *Fallis*, (1909) 19 O. L. R., at p. 424.

(e) "*Due by the person furnishing the same.*"—These words should be read in connection with the words "any debt" in sub-section 2. They refer only to persons furnishing or procuring materials in pursuance of the provisions of section 6. See sections 6 and 13.

Sub-section 2 of this section was amended by 8 Geo. V. c. 29, s. 2, by adding after the word "upon" in the first line thereof the words "or adjacent to."

Registration of Lien.

(As to registration of liens against mining claims and mining lands, see R. S. O. c. 32, s. 182).

17. (1) Registration of claim for lien.—Rev. Stat. c. 26.—A claim for a lien, Forms 1, 2 and 3, may be registered in the registry office of the registry division, or where the land is registered under the Land Titles Act in the land titles office of the locality in which the land is situate, and shall set out:—

(a) **Contents of claim of lien.**—The name and residence of the person claiming the lien and of the owner, or of the person whom the person claiming the lien, or his agent, believes to be the owner of the land, and of the person for whom the work or service was or is to be done, or materials furnished or placed, and the time within which the same was or was to be done or furnished or placed;

(b) a short description of the work or service done or to be done, or materials furnished or placed or to be furnished or placed.

(c) the sum claimed as due or to become due;

(d) a description of the land sufficient for the purpose of registration and, where the land is registered under the Land Titles Act, also a reference to the number of the parcel of the land and to the register in which such land is registered in the Land Titles Office;

(e) the date of expiry of the period of credit when credit has been given.

(2) **Form of affidavit.**—The claim shall be verified by the affidavit, Form 4, of the person claiming the lien or of his agent or assignee, having a personal knowledge of the matters required to be verified, and the affidavit of the agent or assignee shall state that he has such knowledge.

(3) **Description of land where lien registered against railway.**—When it is desired to register a claim for lien against a railway, it shall be sufficient description of the land of the railway company to describe it as the land of the railway company, and every such claim shall be registered in the general registry in the registry office for the registry division wherein which such lien is claimed to have arisen. 10 Edw. VII. c. 69, s. 17.

(a) "*May be registered.*"—The registration does not create the lien, but is necessary to keep it alive after thirty days from the completion of the work or the furnishing of the materials. See in this connection sections 22, 23, 24 and 28 and cases cited.

As to registration being necessary to charge the interest of a lessor, see *ante*, notes under section 8.

A lien may be registered and enforced against a mere possessory interest. *Christie* v. *Mead*, (1888) 8 C. L. T. 312.

Where G. claimed a lien in respect to materials furnished by virtue of an assignment from the original furnisher thereof:—Held, that "G." had a right to register a claim for the same, but the affidavit of verification required by section 4, sub-section 2, must be made by himself and not by the assignor. *Grant* v. *Dunn*, (1883) 3 O. R. 376.

A claim may be registered by the assignee of the person doing the work or furnishing the materials. See sub-section 2 of this section and also section 26.

Constructive notice of lien is not sufficient to postpone a mortgage taken subsequent to the contract but registered prior to the registry of the lien. Notice must be actual. Knowledge of the existence of the contract is not sufficient notice. *West* v. *Sinclair*, (1892) 12 C. L. T. 44, 28 C. L. J. 119.

As to the application of the Registry Act to liens, see *Wanty* v. *Robins*, (1888) 15 O. R. 474; *Rose* v. *Peterkin*, (1885) 13 S. C. R. 677; *McNamara* v. *Kirkland*, (1891) 18 A. R. 271; *Miller* v. *Duggan*, (1890) 23 N. S. R. 120, (1892) 21 S. C. R. 33.

There was no evidence that plaintiff had notice of contract under which defendant, Roy, claimed title, and her conveyance was registered after registry of *lis pendens* in present action. Held, that she need not have been joined as defendant as she took subject to the proceedings in the action. *Fraser* v. *Griffiths*, (1902) 1 O. W. R. 141.

A lienholder claiming priority against a prior registered mortgagee or grantee should make such a party an original defendant and the grounds of the claim should be stated. *Reinhart* v. *Shutt*, (1888) 15 O. R. 325.

A claimant who files a claim for lien does not thereby waive any other right he may have against his debtor in respect to the claim. *Dunn* v. *Stakern*, (1885) 43 N. J. Eq. 401; *Cremier* v. *Byrnes*, 4 E. D. Smith (N.Y.) 756.

(b) "*The name and residence.*"—Plaintiffs were day laborers who did work for defendants in Rainy River District and say they resided in that district. Held, that the statutory act which gives vitality to the lien is its due registration and this may be effected by affidavit of an agent or assignee. The Act allows wage-earners (section 32) to group themselves as litigants, and as all are within the limits of the district and the address of the solicitor is given, the action should not be stayed. *Crerar* v. *C. P. R.*, (1903) 5 O. L. R. 383. "Objection is taken to the description of the residence of the claimant, which should state in what part of the town of Minnedosa he resides, but I hold that when he describes himself as of the town of Minnedosa it is quite sufficient." *Irwin* v. *Beynon*, (1886) 4 Man. 10, *per* Dubuc, J. See also *Anderson* v. *Godsall*, (1900) 7 B. C. R. 404, where it is

stated that the rule which might apply to a large city as to giving the street and number of the residence would not apply to small towns and villages. See also similar remarks by Boyd, C., in *Crerar* v. *C. P. R. Co.*, (1903) 5 O. L. R. 383.

Under a former Act it was held that the remedy of the lienholder is against the increased value of the premises and the lienholder cannot question the validity of a mortgage.

The name of the town and county in which the lienholder resides was held a sufficient address under 56 Vict. c. 24, s. 11. The Act only authorized "proceedings to enforce the lien," and the *bona fides* of a mortgage cannot be brought up and decided in such proceedings. *Dufton* v. *Horning*, (1895) 31 C. L. J. 281, 26 O. R. 252.

(c) "*Of the owner of the property to be charged.*"—Work was commenced by contractor on 31st December, 1877. Two mortgages were recorded on the 31st May and 8th June respectively. Contractor afterwards registered lien and began action on 28th August, 1878. The Master held that the mortgagees were prior incumbrancers and refused to make them parties. Judgment affirmed. *Hynes* v. *Smith*, (1879) 15 C. L. J. 136. In *Irwin* v. *Beynon, supra*, Dubuc, J., said: "It is also argued that the statement of claim does not sufficiently state who is the reputed owner and also the person for whom the work was done. The statement of claim registered stated that the plaintiff claims a lien upon the estate of G. W. Beynon, barrister-at-law. I think this is sufficient and it is also in accordance with the form given in the Ontario statute." A notice of lien is sufficient which, under special circumstances, states the name of the owner in the alternative. *Abelman* v. *Myer*, 122 App. Div. (N.Y.) 470.

If a notice fails to state the name of the true owner, the validity of the lien is preserved so far as the person named as owner and against whom a lien is asked may in fact have some title or interest to the extent of that interest. *Strauchen* v. *Pace*, (1909) 195 App. Div. (N.Y.) 167. Substituting the name of a wrong party as contractor in a statement of the lien is fatal to the claim. *Lacy* v. *Piatt Power Co.*, (1909) 157 Mich. 545. See *Curtis* v. *Medansky*, (1910) 141 App. Div. (N.Y.) 883. The inversion of the names of the lienor and the contractor, in the caption of the statement of account included in the certificate filed by a lienor, which inversion is an obvious error, does not affect the validity of the lien.

De Vingo v. *Hall*, (1910) 205 Mass. 407. A misnaming the owner is immaterial where no prejudice is shewn. *Revelstoke Saw Mills Co.* v. *Alberta Bottle Co.*, 9 Alta. L. R. 155, 21 D. L. R. 779; *Polson* v. *Thomson*, 29 D. L. R. 395. See also *Foster* v. *Brocklebank*, 22 D. L. R. 38.

(d) "*The land is situated.*"—Where the land affected by the lien is partly in one registration division and partly in another, the registration should be made in both divisions. See *Arkansas River L. R. & C. Co.* v. *Flinn*, 33 Pac. 1006; 3 Colo. App. 381. As to the area of land subject to the lien, see *Springer Land Association* v. *Ford*, (1897) 168 U. S. 513; *Whalen* v. *Colins*, (1895) 164 Mass. 147. The latter case decides that the statutes do not authorize the holder of a lien at his own option to enforce it upon a part only of the land subject to the lien. The question as to whether the whole or only a part of such land shall be sold is for the court. See also on this point, *Pollock* v. *Morrison*, (1900) 176 Mass. 83.

(e) "*The sum claimed as due.*"—As between the parties the fact that the lien is claimed for a greater sum than is actually owing does not vitiate the claim when honestly made. *Springer Land Association* v. *Ford*, (1897) 168 U. S. 513; *Kendall* v. *Fader*, (1901) 199 Ill. 294. But when a party inserts in a notice of lien statements of fact which are not only untrue, but are wilfully and intentionally false in some important respect he thereby forfeits the right to a lien and renders the notice void or ineffectual. *Aeschlimann* v. *Presbyterian Hospital*, (1901) 165 N. Y. App. 296. A very large number of cases are reviewed in this case. See also *Vaughan* v. *Ford*, (1910) 162 Mich. 37; *Montjoy* v. *Heward*, 10 W. L. R. 282.

(f) "*Owner.*"—See notes under section 2, sub-section 3, and section 8. See also *De Klyn* v. *Gould*, (1901) 165 N. Y. App. 282.

(g) "*Of the person for whom and upon whose credit the work or service was or is to be done.*"—In a case under the former Act (*Wallis* v. *Skain*, (1892) 21 O. R. 532) it was held that the omission from the registered claim of lien of the name and residence of the person for whom or upon whose credit the work is done or materials furnished is fatal to the lien. But see section 19.

(h) "*And the time.*"—Under the British Columbia Mechanics' Lien Act it was held that a miner may enforce a lien against a mineral claim and that an affidavit stating that work finished or

discontinued "on or about" a stated date was sufficient. *Holden* v. *Bright Prospects G. M. Co.*, (1893) 6 B. C. R. 439.

In *Flack* v. *Jeffrey*, (1895) 10 Man. 514, the lien as filed stated that the work was commenced on a certain day and that it was finished *on or before* a certain other day. Held, following *Truax* v. *Dixon*, 17 O. R. 356, and in view of the Manitoba Interpretation Act, that the statement was sufficient.

(i) "*Description of the land to be charged.*"—The description need not be strictly accurate. In *Cleverley* v. *Moseley*, (1889) 148 Mass. 280, a very inaccurate description was held sufficient. "A description is sufficient which will enable one who is familiar with the locality to identify the land with reasonable certainty." *Dodge* v. *Hall*, (1897) 168 Mass. 435. See also *Pollock* v. *Morrison*, (1900) 176 Mass. 83; 177 Mass. 412; *Noonan* v. *Gaiety Theatre Co.*, noted under corresponding section of the Nova Scotia Act. See also *Driscoll* v. *Floyd*, (1914) 217 Mass. 33.

While precision in description of the land is not necessary, the description must be sufficient in itself to identify the property. Evidence *dehors* is not admissible to supply a deficiency (*Hurley* v. *Tucker*, (1908) 128 App. Div. (N.Y.) 580); but if there appear enough in the description to enable a party familiar with the locality to identify with reasonable certainty the premises intended to be described, to the exclusion of others, it will be sufficient. *Linden Steel Co.* v. *Ref. Co.*, 138 Pa. 10; *Smith* v. *Newbaur*, 144 Ind. 95; *Safe Deposit & Steel Co.* v. *Columbia Iron and Steel Co.*, 176 Pa. 536. Where no one is misled by unintentional misstatements the lien will stand. *Ringle* v. *Wallis Iron Works*, 149 N.Y. 439. The precise terms of the contract need not be set out. *Felgenhauer* v. *Haas*, (1907) 123 App. Div. (N.Y.) 75.

As illustrating an inaccurate but sufficient description and an insufficient description, compare *York* v. *Barstow*, (1900) 175 Mass. 167 and *Muto* v. *Smith*, (1900) 175 Mass. See also for sufficient description, *Christie* v. *Mead*, (1888) 8 C. L. T. 312, cited under section 8. In *Orr* v. *Fuller*, (1889) 172 Mass. 597, it was held that the fact that the work was done and the materials were furnished in the erection of several houses under one contract with the owner of a tract of land which had no visible division warrants a finding, if not a ruling, that the whole tract is one lot and that there is a mechanics' lien upon the whole of it for the whole sum due. See *Phillips* v. *Gilbert*, 101 U. S. 721; *Stoltze* v. *Hurd*, (1910) 24 Am. & Eng. Ann. Cas. 871.

(j) "*Verified by the affidavit.*"—For form of affidavit, see the schedule to this Act. As to immaterial defect, see *Currier* v. *Friedrick,* (1875) 22 Gr. 243; *Waters* v. *Goldberg,* (1908) 124 App. Div. (N.Y.) 511. An affidavit attached to a lien was sworn before a person who afterwards became plaintiff's solicitor, whereupon objection was raised to the affidavit. The objection was overruled. *Elliott* v. *McCollum,* (1899) 19 C. L. T. 412. See also *Crerar* v. *C. P. R. Co.,* 5 O. L. R. 383. *Vernon* v. *Cooke,* 49 L. J. C. P. 767, followed; *Baker* v. *Ambrose,* (1896) 2 Q. B. 372, distinguished.

But where the statement was filed without affidavit attached, the registry of lien was vacated. It was suggested that section 19 might be applied, but the Master said that this was confined in its terms to sections 17 and 18. It would be judicial legislation to say that no affidavit was necessary. *Bruce* v. *National Trust Co.,* (1913) 11 D. L. R. 842. The nature of the procedure under this Act was considered in *Canada S. L. & B. Co.* v. *Poole,* (1907) 10 O. W. R. 1041.

As to who is authorized to take the affidavit, see R. S. O. c. 74, s. 12; *Truax* v. *Dixon,* 25 C. L. J. 249; R. S. O. c. 175, s.-ss. 3 and 4; *Canada Permanent Loan & Savings Co.* v. *Todd,* 22 O. R. 515. *Cf. Baker* v. *Ambrose,* (1896) 2 Q. B. 372.

The particulars of claim in an affidavit for a lien were: "The putting in bath-tubs, wash-tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace and waste pipes, $220." Part was for material and part for labor. It was held, Davie, C.J., dissenting, that the statement was fatally defective, as including two classes, in regard to one of which there was no statutory [illegible]. Davie, C.J., was of opinion that the particulars were sufficient and that the separation of the price of the labor from that of the material was a function of the court exercisable at the trial. *Weller* v. *Shupe,* (1897) 6 B. C. R. 58.

In another case the particulars for lien were: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described for which I claim the balance of $123." Held, insufficient. *Knott* v. *Cline,* (1896) 5 B. C. R. 120. See also *Johnson* v. *Braden,* 1 B. C. R. Pt. 2, p. 265; *Gogan* v. *Walsh,* (1878) 124 Mass. 516; *Clarke* v. *Kingsley,* (1864) 8 Allen (Mass.) 543.

A notice of lien alleging an agreement to furnish the plumbing for a dwelling house, stable and gardener's cottage for a certain sum and that the lien claimants had furnished certain of the

materials and had done a portion of the work, but failing to state how much of the agreement had been performed or the value thereof, is fatally defective. *White* v. *Livingstone*, 69 App. Div. 361; (1903) 174 N.Y. 538.

A claim is not insufficient because it fails to set forth the plans and specifications which are made part of an alleged contract. *Oriental Hotel Co.* v. *Griffiths*, (1895) 30 L. R. A. 765.

One partner may verify the lien claim of the firm. *Waters* v. *Goldberg*, (1908) 124 App. Div. (N.Y.) 511.

A notice which fails to state the kind or amount of labor performed or materials furnished by the lien claimant is invalid. *Toop* v. *Smith*, (1905) 181 N. Y. 283.

(k) *"Or of his agent."*—In a recent New York case, even where these words were omitted, it was held that the affidavit of an agent was sufficient. *McDonald* v. *Mayor of New York*, (1902) 170 N. Y. App. 409 See *Devings* v. *Hall*, (1910) 205 Mass. 407. But without these words in a former Ontario Act the affidavit of an agent was held insufficient. *Grant* v. *Dunn*, (1883) 3 O. R. 376.

See observations on this section in *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249.

It is not essential that the true ownership of the property be stated in the claim, and it is immaterial that the claim describes too much land, nor is the claim void (under the Manitoba Act) if sworn before a solicitor for the claimants. *Polson* v. *Thomson*, (1916) 39 Man. L. R. 410, 29 D. L. R. 395, 34 W. L. R. 745; *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17.

Where the statute required that a statement of claim shall be filed by "the person claiming it" and shall be "signed and sworn to by him or a person in his behalf," it is sufficient if it is signed in the name of the firm by one of the partners and is sworn to by that partner. *Lays* v. *Hurley*, (1913) 215 Mass. 582.

As to a defective description not being material see *Hillyard* v. *Robbins*, (1913) 53 Ind. App. 107.

An unregistered foreign company is entitled to register a mechanics' lien. *Wortman* v. *Frid Lewis Co.*, (1915) 9 W. W. R. 812.

18. What may be included in lien.—A claim for lien may include claims against any number of properties, and any number

of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 17. 10 Edw. VII. c. 69, s. 18.

(a) *"Any number of properties."*—In other words, one claim of lien for registration may include work done or materials furnished in respect to different properties of the same owner. *Halstead & Harmount Co.* v. *Arick,* (1904) 76 Conn. 382.

The policy of the mechanics' lien law is to make every building and the lot on which it is erected liable to the lien for work done upon it and for materials furnished for the erection and construction of the building. Where a number of buildings are erected under a single contract upon contiguous lands the statute does not contemplate that there should be a separate and distinct lien claim filed for each one of the buildings. It recognizes but a single lien. *Johnson* v. *Algor,* (1900) 65 N. J. L. 363.

See *Dunn* v. *McCallum,* (1907) 14 O. L. R. 249; *Ontario Lime Association* v. *Grimwood,* 22 O. L. R. 17; *Builders Supply Co.* v. *Huddlestone,* 25 Man. L. R. 718.

19. (1) **Informality in cases of registering liens.**—A substantial compliance with sections 17, 18 and 31 shall be sufficient, and no lien shall be invalidated by reason of failure to comply with any of the requisites of those sections unless, in the opinion of the court, judge or officer who tries an action under this Act, the owner, contractor or sub-contractor, mortgagee or other person, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) **Exception.**—Nothing in this section shall dispense with registration of the claim for lien. 10 Edw. VII. c. 69, s. 19,—as amended by Geo. V. c. 30, s. 4.

(a) *"A substantial compliance."*—This is a salutary provision. The parties to be affected by a claim are entitled to such information as it is essential for them to have in order to protect them against imposition and to safeguard their rights, but it is intended by the legislature that the terms of sections 17 and 18 should be followed merely in substance, so that on the one hand valid claims would not be lost on mere technicalities by applying a rigid

literality to the terms of these sections, and on the other hand the obvious purpose of the sections would be secured by such compliance with their provisions as would by affording sufficient data ensure protection to owners, contractors, sub-contractors, mortgagees or other interested persons.

The courts will doubtless be indulgent in respect to omissions and defects which do not affect the substance of the notice and are not necessary as safeguards against imposition. In *Crerar* v. *C. P. R. Co.*, (1903) 5 O. L. R. 383, Boyd, C., said: "But these forms are not of inflexible use, and if the verification is in the same way and to like effect as in the case of registration, I think there has been 'substantial compliance," to use the phrase found in section 19 (1), with the scheme of the Act. . . . It is not desirable, nor is it needful, that all the niceties of practice in due sequence should attach to the summary procedure provided for the realization of workmen's liens." See also observations of Killam, C.J., in *Robock* v. *Peters*, (1900) 13 Man. 139. Defective descriptions of the land to be charged are immaterial if the description is sufficient to prevent anyone from being misled. On the other hand a total non-compliance with such conditions cannot be waived even by the owner, at least so far as third persons are concerned. Boisot, S. 5; *White* v. *School District*, 42 Conn. 541; *Burnside* v. *O'Hara*, 35 Ill. App. 150. In a recent New York case (*Mahley* v. *German Bank*, (1903) 174 N. Y. App. 499), it was held that a notice of lien which failed to state when the first item of work was done or anything from which that time might be inferred, as required by sub-division 6 of section 9 of the N. Y. Lien Law, was insufficient, notwithstanding that the notice substantially complied with the other provisions of the statute; since the provision thereof that the law shall be construed liberally does not authorize the court to dispense with what the statute says the notice shall contain. In Canada, however, the saving clause in a Mechanics' Lien Act may operate to make a lien effective although the affidavit of lien did not shew, as required by the statute, the name and residence of the owner of the property or interest to be charged, if the property may be otherwise identified. *Foster* v. *Brocklebank*, 22 D. L. R. 38. As to effect of other defects in affidavit see *Lemon* v. *Young*, (1916) 10 O. W. N. 82.

Where a lien was filed against the owner of a property on which a building had been erected by the lessee, the failure to state the

correct name of the person for whom the materials had been furnished and the labor performed would not invalidate the lien. *Steeves* v. *Sinclair*, (1902) 171 N. Y. 676. As to sufficiency of statement of labor performed, see *Clarke* v. *Heylman*, 80 N. Y. S. 794. A recent case in Massachusetts, *Angier* v. *Bay State*, (1901) 178 Mass. 163, illustrates the nature of the errors which may defeat a claim.

Claiming a lien upon too much property will not absolutely invalidate the lien. *Ontario Lime Assn.* v. *Grimwood*, (1910) 22 O. L. R. 17.

The plaintiff contracted with E. to supply him with lumber to be used in a building he was erecting at Port Arthur for the defendant. The lumber was sent in different shipments, the last of which arrived at Port Arthur on November 11th, 1907, and was taken possession of by E.'s foreman, but was not in fact placed upon defendant's land. E. having made default in payment, the plaintiffs on December 10th, registered a claim for lien for the price of the lumber. It was held that the lien was registered too late. *Ludlam-Ainslie Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 419. See *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249.

The validity of the lien will not be affected by the omission of an item as credit in the statement of the lien, or by an understatement of the amount due the claimant if it does not appear affirmatively that the defendant was misled by inaccuracies. *Vickery* v. *Richardson*, (1905) 189 Mass. 53. See *Thompson* v. *Luciano*, (1912) 211 Mass. 169. As to fatally defective omission, see *Riley* v. *Durfey*, (1911) 145 App. Div. N. Y. 583.

A substantial compliance exists if enough appears on the face of the statement to point the way to successful inquiry. *American Car & Foundry Co.* v. *Alexandria Water Co.*, (1906) 215 Pa. 520. The question of a validity of a notice turns upon substantial compliance with the provisions of the statute, with the limitation that this rule of construction cannot be applied so far as to dispense entirely with what the statute says the notice shall contain. *Waters* v. *Goldberg*, (1908) 124 App. Div. (N.Y.) 511. A sufficient description of the materials furnished in a statement annexed to the claim and marked as Exhibit A will constitute "a substantial compliance." *Monarch Lumber Co.* v. *Garrison*, (1911) 18 W. L. R. 686.

A claim for a lien was made out on a printed form, and was against the contractor for the erection of certain buildings, the claimant erroneously believing this contractor to be the owner.

The claim was for "materials supplied" on or before a named date, no description of the materials being given and no mention being made of the commencement of the lien. The claimant's residence was given as "of Toronto." It was held that the claimant's residence was sufficiently designated; that the claim against the contractor was sufficient, the Act merely requiring it to be made against the owner or person believed to be the owner; that it was not necessary to give the date of the commencement of the lien; and that while the term "materials supplied" was not a substantial compliance with the Act, yet under this section it did not invalidate the lien, no prejudice being occasioned thereby, and that the lien was therefore valid. *Barrington* v. *Martin*, 16 O. L. R. 635.

A lien will not be defeated by the fact that the claim described more land than should be within the lien. *Scott* v. *Goldinghurst*, 123 Ind. 258.

While the inclusion through mistake of non-lienable items will not destroy the claimant's right to a lien where said items can be segregated from the others, yet unless this can be done with reasonable certainty the defect is fatal to the whole lien. *Gilbert Hunt Co.* v. *Parry*, (1910) 59 Wash. 446, 23 Am. & Eng. Ann. Cas. 225.

A failure to insert in the statement of claim the individual names of the partners is not fatal to the lien claimed. *Lays* v. *Hurley*, (1913) 215 Mass. 582.

If through mistake, made in good faith, the actual owner is not named, but the name of some one else, supposed to be the owner, is erroneously inserted, such error is not material. *Polson* v. *Thomson*, (1916) 29 D. L. R. 395.

(b) *"Dispensing with registration."*—If the provisions of section 23 are complied with, no other registration of the lien is necessary, except where the lien is claimed against the owner of the fee.

20. (1) **Effect of registration.**—The registrar, upon payment of the proper fee, shall register the claim, describing it as "Mechanics' Lien," against the land therein described in like manner as if it were a mortgage, but he shall not copy the claim or affidavit in any registry book.

(2) Fee for registration.—The fee for registration of a claim for lien shall be twenty-five cents, and if several persons join in one claim the registrar shall be entitled to a further fee of ten cents for each person after the first. 10 Edw. VII. c. 69, s. 20.

(a) *"Shall register."*—As to the registrar omitting or delaying to register the claim, see *Lawrie* v. *Rathbun*, (1876) 38 U. C. Q. B. 255; *Getchell* v. *Moran*, (1878) 124 Mass. 404, 408; *Orne* v. *Barstow*, (1900) 175 Mass. 193.

21. Status of lienholder.—Rev. Stat. cc. 124, 126.—Where a claim is so registered the person entitled to the lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act. 10 Edw. VII. c. 69, s. 21.

(a) *"Shall be deemed a purchaser pro tanto."*—Mortgagees under registered mortgage had advanced money to pay off prior mortgage and for improvements, when lien filed and action begun. Mortgagees were not parties. Mortgagees notified lienholders and sold under mortgage and applied for order vacating registry of liens and *lis pendens*. Order granted mortgagees to pay surplus proceeds into court where they would be available for lienholders. *Finn* v. *Miller*, (1889) 10 C. L. T. 23, 26 C. L. J. 55. See *Russell* v. *Russell*, (1881) 28 Gr. 419; *McCormick* v. *Bullivant*, (1878) 14 C. L. J. 85. See also *Hynes* v. *Smith*, 8 P. R. 73, 27 Gr. 150. In that case, however, the effect of former sections 7 and 2, subsection 3, does not appear to have been considered except in the dissenting judgment of Proudfoot, J.

(b) *"Except as herein otherwise provided."*—Sections 22, 23 and 24 contain the exceptions. See *McVean* v. *Tiffin*, (1885) 13 A. R. 1; *Wanty* v. *Robins*, (1888) 15 O. R. 474.

(c) *"Those Acts shall not apply."*—See *Latch* v. *Bright*, (1869) 16 Gr. 653, and notes under sections 2 and 8. See the Ontario Registry Act, sub-sections 87, 97, and *Rose* v. *Peterkin*, (1885) 13 S. C. R. 677, which decided that although section 81 R. S. O. c. 111, declared that "no equitable lien, charge or interest affecting land shall be deemed valid in any court in this province after this Act shall come into operation as against a registered

instrument executed by the same party, his heirs or assign," that section did not apply to a case in which the party registering such instrument had actual notice of the equitable lien, charge or interest, even though the same had been created by parol.

See also *Miller* v. *Duggan*, (1890) 23 N. S. R. 120; (1892) 21 S. C. R. 33.

22. (1) **Limit of time for registration.**—A claim for lien by a contractor or sub-contractor, in cases not otherwise provided for, may be registered before or during the performance of the contract, or within thirty days after the completion or abandonment thereof.

(2) **Materials.**—A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished or placed.

(3) **Services.**—A claim for lien for services may be registered at any time during the performance of the service, or within thirty days after the completion of the service.

(4) **Wages.**—A claim for lien for wages may be registered at any time during the performance of the work for which such wages are claimed, or within thirty days after the last work is done for which the lien is claimed.

(5) **In case of supervision by architect, etc.**—In the case of a contract which is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made, the claim for lien by a contractor may be registered within the time mentioned in sub-section 1, or within seven days after the architect, engineer or other person has given, or has, upon application to him by the contractor, refused to give a final certificate. 10 Edw. VII. c. 69, s. 22.

(a) "*In cases not otherwise provided for.*"—*i.e.*, such cases as are not provided for in sub-sections (3) and (4).

(b) "*Within thirty days.*"—Where there is a prior arrangement, although not binding, between a contractor and a supplier of

building materials, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides, a lien for all materials so supplied is in time if registered within thirty days of the furnishing of the last item. *Morris* v. *Thorle*, (1893) 24 O. R. 159; *Robock* v. *Peters*, (1900) 13 Man. L. R. 124.

The plaintiffs contracted with E. to supply him with lumber to be used in a building he was erecting for the defendant on lands in Port Arthur. The lumber was sent in different shipments, the last of which arrived at Port Arthur on November 11th, 1907, and was taken possession of by E.'s foreman, but was not in fact used in the defendant's building or placed upon his land. E having made default in payment, the plaintiffs on December 10th registered a claim for lien on the lands for the price of the lumber. It was held that the lien was registered too late, as it was not registered until more than thirty days had elapsed since any material furnished by the plaintiffs had been placed upon the land or used in the construction of the building. *Ludlam-Ainslie Lumber Co.* v. *Fallis*, (1909) 19 O. L. R. 419.

The thirty days within which the registration is to be effected should be computed not from the time certain trifling alterations were made in the machinery as supplied, but from the time the machinery was supplied and placed. *Neill* v. *Carroll*, (1880) 28 Gr. 30. See *Summers* v. *Beard*, 24 O. R. 641. But this decision is not now followed. In view of later legislation the old cases on this question are not applicable in Ontario. *Hurst* v. *Morris*, 32 O. L. R. 346, 351. See chapter "Computing the Statutory Time," *ante*.

It cannot be said as a matter of law that work done by a mechanic under a contract substantially performed at an earlier date is only colorable because it is trifling in amount and done with the ulterior purpose of saving the lien. *Miller* v. *Wilkinson*, (1896) 167 Mass. 136. See *Brynjolfson* v. *Oddson*, (1916) 27 Man. L. R. 391, where all the recent decisions are reviewed. See also *Benson* v. *Smith*, 37 O. L. R. 257, 31 D. L. R. 416.

The right of one furnishing materials to a contractor for use in a building to fix his lien for the materials begins when the last

material is delivered, whether it is used in the building or not. *Voightman & Co.* v. *Southern Ry. Co.*, (1910) 24 Am. & Eng. Ann. Cas. 211. See chapter entitled "The Lien of the Materialman," *ante*.

A claim cannot be amended after the time limit for filing has expired. *May, etc., Brick Co.* v. *General Engineering Co.*, 180 Ill. 535. As to the right to amend lien see *Refuse* v. *Hunter*, 12 B. C. R. 126. The claim must be filed within the statutory time and in conformity with the statute. *Hilliard* v. *Allen*, 4 Cush. 532; *Christian* v. *Allee*, 104 Ill. App. 177.

Under the provisions of the Act of 1874, it was held that a contractor, though entitled to a lien upon property for the construction of which he had furnished material to an original contractor or another sub-contractor, must in order to enforce such lien institute proceedings for that purpose within thirty days after the material furnished; the lien in such case arising from the furnishing of the material or the doing of the work, not from registration as under the Act of 1873. *McCormick* v. *Bullivant*, (1877) 25 Gr. 273.

See *Lindop* v. *Martin*, (1883) 3 C. L. T. 312; *Morris* v. *Tharle*, (1893) 24 O. R. 159, and *Rathbone v. Michael*, (1909) 9 O. L. R. 428, 20 O. L. R. 503.

Merchants supplied material to the contractor for certain buildings and claimed a lien in respect thereof. There was no contract for the placing of these materials upon the property; the last of them was bought by the contractor from the merchants on the 22nd November and were by him placed in the building on the 23rd November. Held, that the time for registering the claim of lien under section 21, R. S. O. 1877, c. 126, began to run from the 22nd November. *Hall* v. *Hogg*, (1890) 20 O. R. 13.

See *Dempster* v. *Wright*, (1900) 21 C. L. T. 38, referred to under section 20 of the Nova Scotia Mechanics' Lien Act.

In a number of Massachusetts cases it has been held that the filing must be within thirty days after the last of the items for which a lien is given was performed or furnished, although other items for which there is no lien were performed or furnished later. *Gale* v. *Blaikie*, (1880) 129 Mass. 206; *Kennebec Co.* v. *Pickering*, (1886) 142 Mass. 80; *Worthen* v. *Cleveland*, (1880) 129 Mass. 570; *O'Driscoll* v. *Bradford*, (1898) 171 Mass. 231.

If a sworn statement of a mechanics' lien is filed within thirty days after the claimant had ceased to labor and if the last items of labor were performed in good faith under the contract, the lien is none the less valid because before the work named in the last items was done, no work had been done for about 34 days, and before the last work was done the houses on which the lien was claimed appeared to be completed and were purchased by their present owner without knowledge of any lien. *D. L. Billings Co.* v. *Brand*, (1905) 187 Mass. 417. See also *Cole* v. *Uhl*, 46 Conn. 296, and *Nichols* v. *Culver*, 51 Conn. 177. But see *Kilbourne* v. *McEwan*, 6 W. L. R. 562.

Sundays are included in the thirty days, and if the last day falls on Sunday, the registration must take place the day before. See *Haley* v. *Young*, (1883) 134 Mass, 364; *Oakland Manufacturing Co.* v. *Lemieux*, 98 Me. 488 . See also *Bowes* v. *N. Y. Christian Home*, 54 How. Pr. 509, as to rule about computation of time.

But in Ontario and other Canadian provinces the Interpretation Act (R. S. O. 1897, c. 1, s.-ss. 16 and 17) provides that if the time limited for the doing of anything expires upon a Sunday, such thing may be done on the day next following which is not a holiday.

Under the Massachusetts Act, a person who furnishes lumber at a certain price per thousand feet at different times under an entire contract in the erecting of a building, loses his lien if he neglects to file his statement of the amount due him within thirty days after the last item is furnished which is actually used in the erection of the building. In this case the last lot of lumber sent was piled up in the building and not used. *Kennebec Framing Co.* v. *Pickering*, (1886) 142 Mass. 80. But this decision would not be followed in some provinces of Canada. See chapter entitled "The Lien of the Materialman," *ante*.

Whether the last work done by a mechanic was part and parcel of the original job or not depends upon evidence and upon the finding of that fact the lien depends. *Holden* v. *Winslow*, 18 Penn. 160; *Bartlett* v. *Kingan*, 19 Penn. 341.

The putting up of a wire screen, without request or knowledge of the owner, after the sub-contractor's contract had been substantially finished, after final payment had been demanded and treated as due by him, does not operate to revive a lien, the right

to which had previously expired. *Schaller-Hoerr Co.* v. *Gentile*, (1910) 153 Ill. App. 458.

Lien creditors are concluded as to the sufficiency of the completion of the building, in the absence of fraud or mistake, by its acceptance by the architect and the owner. *Oriental Hotel Co.* v. *Griffiths*, (1895) 30 L. R. A. 765.

(c) "*Abandonment.*"—In *Boyce* v. *Huxtable*, (1919), unreported, Wallace, Co.J. (Halifax), after finding as a fact that the plaintiff ceased work under the genuine belief that he had completed his contract, the belief being erroneous, however, because of the plaintiff's misconstruction of the contract, thus interprets the word "abandonment,"—"It is now contended by defendant that plaintiff's letter and the subsequent removal of his workmen constituted an "abandonment" of the contract. Counsel for defendant argues that as there was no completion there must have been an abandonment in view of the foregoing facts. But a situation may exist which would involve neither a completion nor an abandonment of the contract. Plaintiff's letter was due to an erroneous construction of the contract. Indeed, instead of an abandonment of the contract his letter asserts that he had completed it, and he subsequently acted in accordance with that inaccurate assertion. Usually an abandonment of a contract takes place either by the contractor "throwing up" the job because of financial or other inability to continue it, or by his suddenly leaving town for parts unknown, or by his refusing to complete the contract on some specific ground, although at the same time recognizing that the contract was not completed. The word "abandonment" in this section cannot mean ceasing to work under the belief and with the assertion that the contract is completed, but must mean a refusal to complete a contract admittedly incomplete, or such deliberate neglect to continue the work after due notice or request from the employer as would be equivalent to refusal. (See *Anderson* v. *Fort William Commercial Chambers, Ltd.*, 25 D. L. R. 331). In the present case no such condition arose. I therefore decide that the contract was not abandoned."

Long delay in completing a contract ordinarily would be a material element in deciding whether the contract had been abandoned. This together with the extent of the unfinished parts of the contract well might be decisive in passing upon the good faith of the lien claimant. If, in addition, a time had been fixed for the

completion of the contract, delay thereafter might be a significant fact. *Winer* v. *Rosen*, (1918) 231 Mass. 418.

The plaintiff entered into a contract with the defendant to furnish the necessary materials and labor for the alteration of a building. It was provided that upon the refusal, neglect or failure of the contractor to perform being certified by the architect the owner might after three days' written notice to the contractor provide any such labor or materials and deduct the cost thereof from any money due or to become due under the contract, and also that if the architect should certify that such refusal, neglect or failure was sufficient ground for such action, the owner might terminate the contract and complete the work. The architect having furnished such certificate, it was held that the plaintiff's conduct amounted to such an abandonment of the work as justified the defendants in terminating the contract. *Midtown Contracting Co.* v. *Goldsticker*, (1914) 165 N. Y. App. Div. 264.

(d) "*May be registered.*"—A mistake of the registrar in connection with the registration cannot prejudice the claimant. *Getchell* v. *Moran*, (1878) 124 Mass. 404, 408; *Lawrie* v. *Rathbun*, (1876) 38 U. C. Q. B. 255, and *Orne* v. *Barstow*, (1900) 175 Mass. 193.

(e) "*Materials.*"—Materials were supplied from day to day, nothing being said as to the particular building and there being no express contract. Held, that the lien might be registered at any time within thirty days from the last item. In the absence of appropriation payment on running account to be credited on the first items and lien might be claimed for balance. *Lindop* v. *Martin*, (1883) 3 C. L. T. 312. See *British Columbia Timber Co.* v. *Leberry*, (1902) 22 C. L. T. 273. See also *Robock* v. *Peters*, (1900) 13 Man. 124, the facts in which are stated under section 20 of the Manitoba Lien Act, *ante*, in which case *Chadwick* v. *Hunter*, 1 Man. 39, is distinguished, and *Morris* v. *Tharle*, 24 O. R. 159, followed. *Summers* v. *Beard*, (1894) 24 O. R. 641, and *Kelley* v. *McKenzie*, (1884) 1 Man. 169, not applicable.

Where a materialman contracts to deliver material in a manufactured form, the contract is for materials only, and a lien cannot be had for labor performed in manufacturing the materials as a claim for labor. *Tracey* v. *Wetherell*, (1896) 165 Mass. 113; *Donaher* v. *Boston*, (1879) 126 Mass. 309.

An existing building which is sold for the purpose of constituting part of a larger building to be erected may be considered materials furnished within the statute. *Selden* v. *Melks*, 17 Cal. 128.

Where materials were supplied from time to time as required, not under any contract, it was held that the furnishing of each lot of goods was a separate transaction. *Chadwick* v. *Hunter*, (1884) 1 Man. 39. See this case distinguished in *Robock* v. *Peters*, (1900) 13 Man. 124, and *Morris* v. *Tharle*, (1893) 24 O. R. 159, followed.

A claimant who has supplied material to be used in the erection of a building under a contract by which the materials were to be supplied from time to time and has filed a lien, which at the request of the owner he has subsequently discharged, taking instead an order upon certain moneys, which was not paid, cannot, upon supplying further material under his contract and within the statutory period, file a lien for the total amount of his claim. *Wortman* v. *Frid-Lewis Co.*, (1915) 33 W. L. R. 119 (Alta.).

A mechanics' lien is enforceable if registered within the statutory period from the last delivery of materials, even though the materials last delivered may never have been used in the construction of the building, if they were furnished for the purpose of being used therein. *Kalbfleisch* v. *Hurley*, 25 D. L. R. 469, 34 O. L. R. 268.

When a contractor working for several owners has but a single contract for the supply of materials with the materialmen, the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the materialman and the contractor, but by the completion of the work by the contractor for the several owners. *Re Moorehouse* v. *Leake*, (1886) 13 O. R. 290. As to the time within which a sub-contractor for materials must register, see *Hall* v. *Hogg*, (1890) 20 O. R. 13.

Where the work has been done and accepted by the "owner" it was formerly held that the existence of trifling defects subsequently rectified by the contractor will not extend the time until thirty days from the date when the defects were rectified, even though the work was accepted on the understanding that the defects were to be remedied. *Makins* v. *Robinson*, (1884) 6 O. R. 1; *Kilbourne* v. *McEwan*, 6 W. L. R. 562; *Kelly* v. *McKenzie*, (1884) 1 Man. 169. See also *Neill* v. *Carroll*, 28 Gr. 30, affirmed 28 Gr. 339. See report as to this case in *Summers* v. *Beard*, (1894) 24 O. R. 641. But

Summers v. *Beard* and similar cases are now treated as over-ruled See *Day* v. *Crown Grain Co.*, 39 S. C. R. 258, and cases cited in Chapter XII, *ante*.

But in a number of recent Massachusetts cases it has been held that where the last work, although trifling in amount and done with the ulterior purpose of saving the lien, was nevertheless called for by the contract which had been treated as fully completed at an earlier date, the thirty days are to be reckoned from such last work. *Morse, Williams Co.* v. *Ellis*, (1899) 172 Mass. 378; *Sprague* v. *McDougall*, (1899) 172 Mass. 553; *Monaghan* v. *Goddard*, (1899) 173 Mass. 468; *Burrell* v. *Way*, (1900) 176 Mass. 164; *McLean* v. *Wiley*. (1900) 176 Mass. 233. See also *D. L. Billings Co.* v. *Brand*, (1905) 187 Mass. 417, and *Irwin* v. *Benyon*, (1886) 4 Man. L. R. 10.

(f) "*Services.*"—This word used here and in section 6 is broad enough to include the professional work of an architect in drawing plans and specifications, or the work of an engineer in furnishing expert calculations in respect to the building subsequently erected. See chapter, "Who May Acquire a Lien," *ante*.

(g) "*Wages,*"—See section 2 (7), *ante*.

(h) "*Upon whose certificate.*"—The certificate of an architect in a dispute between the building owner and the builder is no estoppel in an action by the building owner against the architect for negligence. *Badgley* v. *Dickson*, (1886) 13 O. A. R. 494; *Rogers* v. *James*, (1891) 8 Times L. R. 67.

A person who has delivered materials to the contractor loses his lien therefor, as against the twenty per cent. of the contract price to be held back by the owner from the contractor, unless he registers his lien within thirty days after the abandonment of the contract, if he has not supplied any materials to the contractor after such abandonment, though he was not notified of it, and a delivery of some materials for use in the building to the owner after such abandonment, in exchange for some of the materials formerly supplied to the contractor, will not have the effect of extending the time for registering the lien for the materials supplied to the contractor. *Brown* v. *Dunhill*, (1916) 25 Man. L. R. 546.

Where all the work by a person claiming a mechanics' lien is done, or all the materials are furnished, under one entire continuing contract, although at different times, a lien claim filed within the statutory period after the last item was done or furnished is

sufficient as to all the items; and, in order that the contract may be a continuing one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount or nature of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon; but a mere general agreement to furnish labor or materials for a particular building or improvement is sufficient if complied with. *Morris* v. *Tharle*, 24 O. R. 159; *Whitlock* v. *Loney*, (1917) 3 W. W. R. 971, 37 D. L. R. 52 (Sask.) See also *Hurst* v. *Morris*, 32 O. L. R. 346; *Flett* v. *World Construction*, 15 D. L. R. 628.

The time for registration does not begin to run until after the completion of additional work necessary for the full performance of the contract. *Benson* v. *Smith & Son*, (1916) 37 O. L. R. 257, 31 D. L. R. 416; *Anderson* v. *Fort William*, 25 D. L. R. 319, *Kalbfleisch* v. *Hurley*, 25 D. L. R. 469; *Colling* v. *Stimson*, 10 D. L. R. 597.

Work performed by a contractor on buildings in pursuance of and to complete his contract, after the date fixed for completion, entitles him to file his mechanics' lien within the statutory limit of time as from the performance of such work,—even if the work be trifling in extent or value. *Brynjolfson* v. *Oddson*, 27 Man. L. R. 390, (1917) 1 W. W. R. 1000, 32 D. L. R. 270.

No lien attaches to the land in the absence of evidence that any materials furnished for the building were supplied within the statutory period of the registration of the lien. *Compaigne* v. *Carver*, 35 O. L. R. 232, 27 D. L. R. 76.

The obligation of the owner to retain a statutory percentage of the value of the work and materials is limited to the period of thirty days after the completion or abandonment of the contract by the contractor with whom the owner had contracted, and where such contractor had abandoned the work uncompleted and the owner had to pay more than the balance of the contract price to finish it, a sub-contractor filing his claim more than thirty days after the principal contractor's abandonment although within thirty days of his own last work on the building, has no lien, if nothing then remained due the principal contractor. *Brooks* v. *Mundy*, 16 D. L. R. 119.

Expiry and Discharge of Lien.

23. Expiry of liens.—Every lien for which a claim is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof unless in the meantime an action is commenced to realize the claim, or in which the claim may be realized under the provisions of this Act, and a certificate thereof is registered in the registry office in which the claim for lien might have been registered. 10 Edw. VII. c. 69. s. 23.

(a) *"For which a claim is not registered."*—Under the present Act the cases of *Burritt* v. *Renihan*, (1877) 25 Gr. 183, and *Neill* v. *Carrol*, (1880) 28 Gr. 30, 339, and see *Ritchie* v. *Grundy*, (1891) 7 Man. 532, are no longer applicable in this connection, as an action can now be commenced and a *lis pendens* registered before the period of credit has expired. See section 28. See *Robock* v. *Peters*, (1900) 13 Man. 124.

(b) *"An action is commenced."*—*i.e.*, by any lienholder. See section 32; *Bunting* v. *Bell*, (1876) 23 Gr. 584; *Hovenden* v. *Ellison*, (1877) 23 Gr. 448; *McPherson* v. *Gedge*, (1883) 4 O. R. 246.

In an action brought against the builder and owner the plaintiff must show that his right of action was complete at the time the action was commenced. *Titus* v. *Gunn*, (1903) 69 N. J. L. 410.

The period of ninety days, limited by section 21 of the Mechanics' Lien Act, (1887) for the commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not been taken against the owner within the ninety days. The plaintiffs, assignees of a mechanics' lien, brought an action against the owner and a prior mortgagee, but this action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien as against the owner, they brought this action after the lapse of more than ninety days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land. Held, reversing the judgment in 3 O. R. 183, that the lien had

ceased to exist as against the mortgagee. *Bank of Montreal* v. *Haffner*, (1884) 10 A. R. 592; s.c., 29 Gr. 319. See *Cole* v. *Hall*, (1888) 12 P. R. 584; 13 P. R. 100; *Keffer* v. *Miller*, (1890) 10 C. L. T. 90, and *McGuirl* v. *Fletcher*, (1889) 3 Terr. L. R. 137, in which case *Cole* v. *Hall*, *supra*, is criticized.

In an action under a former Act by lienholders to enforce their lien it was held that it is not necessary to make other holders of registered liens parties in the first instance in order to attack their status as lienholders; but this can be done when they are added as defendants in the Master's office. *Hall* v. *Hogg*, (1890) 14 P. R. 45.

(c) *"An action is commenced to realize the claim."*—In *Davidson* v. *Campbell*, (1888) 1 Man. 250, the bill alleged a contract with defendant, C., for the performance of certain work in the erection of a building upon land of C. By amendment made after the time for filing the bill had lapsed, the plaintiffs alleged that their contract was with the defendants K. and McD., who had contracted with C. for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed. Held, that the plaintiff could not rely upon the original bill and certificate of *lis pendens*. The case might be different if formal amendments were made, but the course taken in the present proceedings, if sanctioned, would be introducing by amendment an entirely new cause of action after the expiration of the period for commencing their suit. "If the lien ceased to exist in consequence of the plaintiffs not filing a bill upon their real contract, it could not be revived by a failure to plead properly, and the plaintiffs ought not thereby to acquire rights which they had not when the bill was amended," *per* Killam, J. See *Cole* v. *Hall*, cited *supra*.

The "owner," and also the person liable on the contract under which the plaintiff claims, should both be made defendants. (See *Wood* v. *Stringer*, 20 O. R. 148), and also a prior mortgagee where relief is sought against him under section 8. *Bank of Montreal* v. *Haffner*, 29 Gr. 319; (1884) 10 A. R. 592. See also notes under section 31, "Parties."

(d) *"A certificate thereof."*—For form of certificate for registration, see Appendix.

(e) *"Duly registered."* — For cases in relation to errors of registrar in indexing or omitting to index instruments, see section 22.

As to what constitutes sufficient registration of *lis pendens*, see *Bunting* v. *Bell*, (1876) 23 Gr. 584; *McPherson* v. *Gedge*, (1883) 4 O. R. 246. See also section 32.

24. (1) **When lien to cease if registered and not proceeded upon.**—Every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit, where such period is mentioned in the claim for lien registered, or in the cases provided for by sub-section 5 of section 22, on the expiration of thirty days from the registration of the claim, unless in the meantime an action is commenced to realize the claim or in which the claim may be realized under the provisions of this Act, and a certificate is registered as provided by the next preceding section.

(2) **Necessity for renewal.**—Where the period of credit mentioned in the claim for lien registered has not expired, it shall nevertheless cease to have any effect on the expiration of six months from the registration or any re-registration thereof if the claim is not again registered within that period, unless in the meantime an action is commenced and a certificate thereof has been registered as provided by sub-section 1. 10 Edw. VII. c. 69, s. 24.

Any proceeding taken during the existence of a lien, is within the meaning of the words "unless in the meantime an action is commenced," the words "in the meantime" being held to mean any time before the lien ceases to exist.

Where a lienholder had registered a claim of lien and judgment in the action had been delivered, but not signed, a lienholder who registered his lien after the judgment was delivered may be let in to prove his claim on payment of his own costs of the application. *Eadie-Douglas* v. *Hitch & Co.*, (1912) 9 D. L. R. 239.

(a) "*Registered.*"—When a contractor working for several owners has but a single contract for the supply of materials with the materialman the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the materialman and the

contractor, but by the completion of the work by the contractor for the several owners. *Re Moorehouse* v. *Leake*, (1886) 13 O. R. 290; but the time for registration of a sub-contractor's lien or the bringing of an action to enforce it is not extended by any delay on the part of the contractor or sub-contractor to whom the materials are supplied in actually placing them on the premises. Thus where merchants supplied materials to the contractor for certain buildings and it appeared that there was no contract for the placing of these materials upon the property, the last of them being bought by the contractor from the merchants on 22nd November and by him placed in the building on the 23rd November, it was held that the time for registering the claim of lien under section 21 of the Statute of 1877 began to run from the 22nd of November. *Hall* v. *Hogg*, (1890) 20 O. R. 13.

(b) "*Shall absolutely cease to exist.*"—An action was begun to enforce a lien against M., the person for whom the work was done, and at that time the owner. The action was begun within the ninety days, but after advances by M. to C., plaintiff obtained *ex parte* order adding C. after expiry of the ninety days. Order set aside as no right of action against C. after expiry of ninety days, and action dismissed against C. and *lis pendens* against him vacated. *Bank of Montreal* v. *Haffner*, 10 A. R. 593 followed. *Keffer* v. *Miller*, (1890) 10 C. L. T. 90.

(c) "*The expiry of the period of credit.*"—See *Burritt* v. *Renihan*, (1877) 25 Gr. 183; *Haggerty* v. *Grant*, (1892) 2 B. C. R. 173, and sections 25 and 28.

(d) "*An action is commenced to realize the claim.*"—Persons who have registered liens but have taken no proceedings to realize them cannot have the benefit of proceedings taken by other persons to enforce liens against the same land where the liens of such other persons are not enforceable. *Re Sear* v. *Woods*, (1892) 23 O. R. 474. A defence filed by a lienholder within the period mentioned in the Act, in an action by the owner of the property to set aside a lien is not a proceeding "to realize the claim" within the meaning of section 23 of the Act, though a counterclaim if properly framed and a certificate thereof duly registered might be. *McNamara* v. *Kirkland*, (1891) 18 A. R. 271.

(e) "*If the claim is not again registered.*"—Re-registration is unnecessary if proceedings are taken under section 28.

The ninety days allowed by this section for commencing an action to realize a claim are not to be computed exclusively of

long vacation. Although such an act is begun by a proceeding called a "statement of claim," the Rules of Court with respect to the filing of the statement of claim in an action begun by writ of summons are not applicable to it. Where the last of the materials in respect of which the plaintiffs claimed a lien were furnished on May 30th, 1907, and the lien was registered within a month, but the action for the enforcement was not begun by the filing of a statement of claim until September 23rd, 1907, it was held that the lien had ceased to exist. *Canada Sand, Lime and Brick Co.* v. *Ottaway*, (1907) 15 O. R. 128. See *Wesner Drilling Co.* v. *Tremblay*, 18 O. L. R. 439.

(*t*) "*In the meantime.*"—These words have the primary signification of during or within the time which intervenes between one specified period or event and another. In strictness there is in contemplation a *terminus a quo*, as well as a *terminus ad quem* —a date or event with which the period begins as well as a date or event with which it ends. But in some instances the *terminus a quo* is not in mind at all, but it is the *terminus ad quem* which is the only date in contemplation. In such a case the words are equivalent to before such an event, date or period. The result is that any proceedings taken during the existence of the lien are taken "in the meantime" within the meaning of this section if taken before the expiration of the period therein mentioned. *Eadie-Douglas* v. *Hitch & Co.*, (1912) 48 C. L. J. 672, (1913) D. L. R. 239.

25. When lien to cease if there is no period of credit.—If there is no period of credit, or if the date of the expiry of the period of credit is not stated in the claim so registered, the lien shall cease to exist upon the expiration of ninety days after the work or service has been completed or materials furnished or placed, unless in the meantime an action is commenced and a certificate thereof registered as provided by section 23. 10 Edw. VII. c. 69, s. 25.

(*a*) "*Period of credit.*"—See note under section 28 (*a*) and cases cited thereunder.

(b) "*Work or service has been completed or materials furnished.*"—Where the work has been done and accepted by the

"owner" the existence of trifling defects subsequently rectified by the contractor will not extend the time until thirty days from the date when the defect was rectified, even though the work was accepted on the understanding that the defect was to be remedied. *Makin* v. *Robinson*, (1884) 6 O. R. 1; *Kelly* v. *McKenzie*, (1884) 1 Man. 169. See reference to *Neill* v. *Carroll*, *ante*, p. 6, which case is inaccurately reported in 28 Gr. 339. See note summarizing *Irwin* v. *Beynon*, (1886) 4 Man. 10, *ante*. The case of *Neill* v. *Carroll* is now treated as overruled. See chapter "Computing the Statutory Time," *ante*.

Where the ninety days since the completion of the work had expired, the Court cannot assist the lienholder by permission to file an affidavit *nunc pro tunc*. *Lemon* v. *Young*, (1916) 10 O. W. N. 82.

26. Assignment or death of lienholder.—The right of a lienholder may be assigned by an instrument in writing and, if not assigned, upon his death shall pass to his personal representative. 10 Edw. VII. c. 69, s. 26.

A bank holding an assignment of the balance of the contract price owing by the owner to the principal contractor has a sufficient interest to be added a party defendant in a mechanics' lien action. *Dorrell* v. *Campbell*, (1916) 22 B. C. R. 584, 27 D. L. R. 425, 34 W. L. R. 367.

It is doubtful whether there can be an assignment of a part of a claim so as to entitle the assignee to maintain an action for the recovery of such part from the debtor under section 58 (5) of the Judicature Act (Ont.). The Court of Appeal favored the view presented in *Foster* v. *Baker*, (1910) 2 K. B. 636, in preference to the earlier case of *Skipper* v. *Halloway*, (1910) 2 K. B. 630. *Seaman* v. *Canadian Stewart Co.*, (1911) 18 O. W. R. 56; 2 O. W. N. 576.

(a) "*The right of a lienholder may be assigned.*"—A counterclaim or set-off is available against the assignee. *Lawrence* v. *Congregational Church*, (1900) 164 N. Y. App. 115. A defect of parties to an action by an assignee, arising from the failure to join a prior assignee, to whose assignment plaintiff's assignment was expressly subject, is waived where the attention of the trial court is not directed to the point at the trial. *Ib.* See this

case also as to effect of an order substituting assignee as plaintiff, as an adjudication of the right to prosecute the action. See also *Moore* v. *Dugan*, (1901) 179 Mass. 153, and *Hawkins* v. *Mapes-Reeves Co.*, (1904) 178 N. Y. App. 236. Under a general assignment for the benefit of creditors made by a general contractor who has furnished and provided materials and towards the erection of a building for which moneys are due or to become due to him, the assignee takes such moneys, subject to liens filed by laborers, mechanics, materialmen or sub-contractors, subject to the assignment and within the ninety days prescribed by the statute. *Kane Co.* v. *Kinney*, (1903) 174 N. Y. App. 69. As to effect of assignment of claim before filing lien, see *Williams* v. *Weinbaum*, (1901) 178 Mass. 239. See also *Wiley* v. *Connelly*, (1901) 179 Mass. 360. As to what constitutes an equitable assignment, see *Van Kannell Revolving Door Co.* v. *Astor*, 119 App. Div. (N.Y.) 214. As to sufficiency of assignment, see *Alsip* v. *Monkman*, (1912) 22 W. L. R. 667.

A mechanic having a claim for the erection of buildings under a contract assigned his claim to the plaintiff to secure money due to the plaintiff, and the plaintiff for the purpose of enabling the mechanic to register under the Act re-assigned to him. Held, that such re-assignment enabled the mechanic to make the claim for registry notwithstanding the equitable right of plaintiff. *Currier* v. *Frederick*, (1875) 22 Gr. 243.

The lien is created when the work is performed, and an assignment of the claim after the work is done carries the lien with it. *Wiley* v. *Connelly*, (1901) 179 Mass. 360.

27. (1) **Discharge of lien.**—A lien may be discharged by a receipt signed by the claimant, or his agent duly authorized in writing, acknowledging payment, and verified by affidavit and registered.

(2) **Registration.**—The receipt shall be numbered and entered like other instruments, but shall not be copied in any registry book, and there shall be entered against the entry of the lien to which the discharge relates the word "discharged" and the registration number of such discharge.

(3) **Fee.**—The fee shall be the same as for registering a claim.

(4) Security or payment into court and vacating lien thereon.—Upon application the court, judge or officer having jurisdiction to try an action to realize a lien, may allow security for or payment into court of the amount of the claim, and may thereupon order that the registration of the lien be vacated or may vacate the registration upon any other ground and a certificate of the order may be registered.

(5) When notice of application to vacate not requisite.—Where the certificate required by section 23 or 24 has not been registered within the prescribed time, and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate required by sections 23, 24 or 25, the order vacating the lien may be made ex parte upon production of the certificate of the proper registrar certifying the facts entitling the applicant to such order. 10 Edw. VII., c. 69, s. 27.

"If any one affected by the registration of a lien desires to take advantage of the cesser thereof by reason of the provisions of sections 23, 24 or 25, he may apply *ex parte* under section 27, sub-section 5 to vacate the registration of the certificate of *lis pendens;* and if he is successful the lien itself may be discharged. In such a case there is no trial, and no judgment can be pronounced. But where the question is left to be tried, the provisions of section 49 apply, and a judgment for the amount properly due may be had, although no lien is established." *Kendier* v. *Bernstock,* 33 O. L. R. 351, 22 D. L. R. 475, *per* Hodgins, J.A.

(a) "A *receipt.*"—Any form of receipt which acknowledges payment of a specified claim and is verified by affidavit sworn before a commissioner is sufficient, if registered.

(b) "*Or his agent duly authorized in writing.*"—It is desirable to register also the written authority of the agent.

(c) "*Court or judge or officer.*"—These tribunals are designated in section 34. See as to awarding costs, section 44.

An order, in Chambers, was granted, vacating, upon payment into Court of $3,787.36, two mechanics' liens registered by the defendants against interests in certain lands in Toronto. On appeal the Court directed that the money paid into Court in this action be transferred to the credit of the proceeding commenced

under this Act; one of the liens having been extinguished by payment, the portion of the money paid into Court applicable to that lien should be paid out to the plaintiffs. *Yolles* v. *Robertson*, (1920) 18 O. W. N. 85, 126.

(d) *"Payment into court."*—The mode of payment is prescribed by the Con. Rules, 405, 410.

(e) *"Upon any other proper ground."*—Mortgagees under registered mortgage had advanced money to pay off prior mortgage and for improvement when lien filed and action begun. Mortgagees were not made parties. Mortgagees notified lienholders and sold under mortgage and applied for order vacating registry of liens and *lis pendens*. Order granted mortgagees to pay the surplus proceeds into court where it could be applied for by lienholders. *Finn* v. *Miller*, (1889) 10 C. L. T. 23, 26 C. L. J. 55.

Defendant was sole owner of lots covered by plaintiffs' lien at the time the contract was made. Later, defendant sold part of the lands without notice to plaintiffs. Plaintiffs registered certificates of lien and *lis pendens* against all the property. Defendant's motion to vacate the registry was dismissed. *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17.

By the Land Titles Act, chapter 28 of the Statutes of Ontario, section 67, it is provided that on its appearing to the satisfaction of the proper Master of Titles that a lien under the Mechanics' and Wage-earners' Lien Act has ceased to exist, the Master may make an entry accordingly, or an entry cancelling the claim; and the land affected shall thereby be released from the claim.

Where a lien has been filed by a partnership, even though it be trading under the name of what purports to be an incorporated company, the Registrar is justified in insisting that a discharge of the lien be executed by all the partners, or some one duly authorized on their behalf, and that proof be given him of the composition of the partnership. *Re Land Titles Act; Re Mechanics Lien Act*, (Sask.), (1918) 1 W. W. R. 411.

Effect of Taking Security or Extending Time.

23. (1) **Effect generally.**—The taking of any security for, or the acceptance of any promissory note or bill of exchange for, or the taking of any acknowledgment of the claim, or the giving of time for the payment thereof, or the taking of any proceedings for

the recovery, or the recovery of a personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice or destroy the lien unless the claimant agrees in writing that it shall have that effect.

(2) **Where period of credit not expired.**—Where any such promissory note or bill of exchange has been negotiated the lien-holder shall not thereby lose his lien if, at the time of bringing his action to enforce it, or where an action is brought by another lien-holder, he is, at the time of proving his claim in such action, the holder of such promissory note or bill of exchange.

(3) **Time for bringing action not extended.**—Nothing in sub-section 2 shall extend the time limited by this Act for bringing the action to enforce the lien.

(4) **Time for bringing action by person who gave time for payment.**—A person who has extended the time for payment of a claim for which he has a lien, to obtain the benefit of this section, shall commence an action to enforce such lien within the time prescribed by this Act, and shall register a certificate as required by sections 23, 24 or 25, but no further proceedings shall be taken in the action until the expiration of such extension of time. 10 Edw. VII. c. 69, s. 23.

(a) "*The taking of any security.*"—The taking of security, note or acknowledgment or the giving of time, destroys the lien if the lien-holder neglects to proceed to enforce his lien within the time limited by sections 23, 24 and 25.

A lien lost by taking a promissory note is not revived upon dishonor thereof. *Edmonds* v. *Tiernan*, (1891) 2 B. C. R. 82, 21 S. C. R. 406. This case has now no application in Ontario owing to the provisions of this section. See *Brooks-Sanford Hardware Co.* v. *Telier Construction Co.*, (1910) 17 O. W. R. 167, 22 O. L. R. 176.

Without this section it would be a question of fact in every case whether the note was taken in payment of the account. *Casey* v. *Weaver*, (1886) 141 Mass. 280; *Jones* v. *Shawhan*, 4 Watts & Serg. (Pa.) 257. If the note was taken in payment the lien was gone. If the note was not taken in payment it amounts to no

waiver of the lien. *Edwards* v. *Derrickson*, (1859) 28 N. J. L. 39; *Jones* v. *Moores*, (1893) 74 N. Y. 109, 22 N. Y. Supp. 53; *Linneman* v. *Bieber*, (1895) 92 N. Y. 477, 33 N. Y. Supp. 129. The other provisions of the Act must be complied with even if it involves taking proceedings to enforce the lien before the maturity of the note, in which case it seems that proceedings may be taken within the time, subject, possibly, to being stayed until after the maturity of the note.

After the note has been negotiated the debt then becomes due to a third party and the original creditor becomes a guarantor of payment of the debt. While the note is in the hands of a third party no proceedings can be taken to enforce the lien. If the lien claimant pays the note and is the holder of the note at the time he begins proceedings the fact of his having negotiated the note will not take away his lien.

The foregoing proposition, contained in the first edition of this treatise, is quoted approvingly in *Swanson* v. *Mollison*, (1907) 6 W. L. R. 678, and *Brooks-Sanford Co.* v. *Theodore Telier Const. Co.*, (1910) 19 O. L. R. 303.

See also *McLean* v. *Wiley*, (1900) 176 Mass. 233; *Brewer Co.* v. *B. & A. R. R. Co.*, (1901) 179 Mass. 228.

There is a conflict in the decisions as to the provision in this section in its application to promissory notes when discounted. See *Swanson* v. *Mollison*, (1907) 6 W. L. R. 678, in which the decision in *Edmonds* v. *Tiernan*, *supra*, is distinguished, and the decisions in *National Supply Co.* v. *Horrobin*, 16 Man. L. R. 472, and *Arbuthnot Co.* v. *Winnipeg Mfg. Co.*, 16 Man. L. R. 401, were questioned. See also *Coughlan* v. *National Construction Co.*, 14 B. C. R. 339, holding that where promissory notes had been received and discounted by the lienholder for the materials supplied, the lien was not thereby waived. See also *Clarke* v. *Moore*, 1 Alta. L. R. 49.

29. Proving claim in action by another lienholder.—Where the period of credit in respect of a claim has not expired, or where there has been an extension of time for payment of the claim, the lienholder may nevertheless, if an action is commenced by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such action as if the period of credit or the extended time had expired. 10 Edw. VII. c. 69, s. 29.

LIENHOLDERS' RIGHT TO INFORMATION.

30. (1) Lienholder's right to information from owner as to terms of contract.—Any lienholder may at any time demand of the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the work, service or material is or is to be performed or furnished or placed, and if such owner or his agent does not, at the time of such demand or within a reasonable time thereafter, inform the person making such demand of the terms of such contract or agreement, and the amount due and unpaid upon such contract or agreement, or if he knowingly falsely states the terms of the contract or agreement, or the amount due or unpaid thereon, and if the person claiming the lien sustains loss by reason of such refusal or neglect or false statement, the owner shall be liable to him in an action therefor for the amount of such loss.

(2) Order for inspection of contract by lienholders.—The court, judge, or officer having jurisdiction to try an action to realize a lien may, on a summary application at any time before or after an action is commenced for the enforcement of such lien, make an order requiring the owner or his agent to produce and allow any lienholder to inspect any such contract or agreement upon such terms as to costs as he may deem just. 10 Edw. VII. c. 69, s. 30.

(a) *"Any lienholder may at any time demand."*—A form of demand is not given in the Act and a written demand is really unnecessary. This section is for the protection of sub-contractors, laborers and materialmen. See *Lumbard* v. *Syracuse*, (1874) 55 N. Y. 494.

(b) *"An action therefor,"* i.e., an ordinary action.

(c) *"The court, judge or officer."*—See sections 31 and 34 as to these tribunals.

Under a former Act (R. S. O. 1887, c. 126, s. 23), which allowed proceedings to recover the amount of a mechanics' lien to be taken under certain circumstances in County Courts and Division Courts, it was held that this provision applied only to actions in

which the party seeking to enforce his lien was suing in the ordinary way to obtain judgment and execution. These courts cannot entertain an *action* in the nature of an action of account by a lienholder against a mortgagee who has sold the land in question under mortgage prior to the lien, though there may be wider powers by way of summary application. *Hutson* v. *Valliers*, (1892) 19 A. R. 154.

Action to Realize Claim.

31. (1) **Mode of realizing lien.**—A lien may be realized by action in the Supreme Court, according to the ordinary procedure of that court, excepting where the same is varied by this Act.

(2) **Statement of claim.**—Without issuing a writ of summons an action shall be commenced by filing in the proper office a statement of claim, verified by affidavit, Form 5, which affidavit may be made by any of the persons named in sub-section of section 17.

(3) **Service.**—The statement of claim shall be served within one month after it is filed, but a judge or officer having jurisdiction to try the action may extend the time for service thereof, and the time for delivering the statement of defence shall be the same as for entering an appearance in an action in the Supreme Court.

(4) **Parties.**—It shall not be necessary to make any lienholders parties defendant to the action, but all lienholders served with the notice of trial shall for all purposes be deemed parties to the action. 10 Edw. VII. c. 69, s. 31 (as amended by Geo. V., c. 30, s. 5).

When any part of a claim has matured, an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial, as provided for in section 37. *Northern Lumber Mills* v. *Rice*, (1918) 41 O. L. R. 201, 40 D. L. R. 128.

(a) "*Excepting where the same is varied.*"—Sub-sections 2, 3 and 4 and section 33 state the variations from ordinary procedure.

(b) "*A statement of claim.*"—Where there was no averment in statement of claim that anything was due by the owner, held, on demurrer, that the statement of claim was bad. *Townsley* v.

Baldwin, (1889) 10 C. L. T. 13. A statement of claim did not disclose the kind of materials, etc. Held, bad, but as lien is operative when registered and action brought and certificate of *lis pendens* registered, plaintiff's lien was not prejudiced. *Johnson* v. *Braden*, (1887) 1 B. C. R. Pt. 2, p. 265.

All actions and proceedings to enforce mechanics' liens must be brought and taken in the High Court of Justice under the procedure enacted by 59 Vict. c. 35, as amended by 60 Vict. c. 24. Although by sections 31 and 32 of the former Act, a County Court Judge has complete jurisdiction in such an action or proceeding if in the High Court, yet, if the proceedings are instituted in a County Court he has no jurisdiction. *In Re Ribble* v. *Aldwell*, (1898) 18 C. L. T. 59. Under 53 Vict. c. 37, it is competent to join liens so as to give jurisdiction to the High Court though each apart may be within the competence of an inferior court. The plaintiffs in proceeding under that Act to enforce their lien filed with a Master as the "statement of claim" a copy of the claim lien and affidavit registered, verified by an affidavit, and the Master thereupon issued his certificate. Held, that if the "statement of claim filed was not in proper form, yet as it contained all the facts required for compliance with the Act, an amendment *nunc pro tunc* should be allowed." *Bickerton* v. *Dakin*, (1890) 20 O. R. 192, 695. See *Beveridge* v. *Howes*, (1903) 2 O. W. R. 619; *Canada Land, etc., Co.* v. *Poole*, (1907) 10 O. W. R. 1041.

Parties; Plaintiffs.—A plaintiff need not name any other lienholders as co-plaintiffs.

Defendants. — The "owner" and any subsequent transferees should be made parties. Any prior mortgagee against whom the plaintiff claims relief under section 8 (3) should also be made a defendant. A decree enforcing a mechanics' lien is a conclusive determination of the rights of the parties, but it does not conclude persons who are neither parties nor privies. *Bank of Montreal* v. *Hoffner*, (1884) 29 Gr. 319, 10 A. R. 592, S. C. *sub nom.* *Bank of Montreal* v. *Worswick*, Cass. Dig. 289. In *Fraser* v. *Griffiths*, (1902) 1 O. W. R. 141, where plaintiff had no notice of contract under which defendant Ray claimed title and her conveyance was registered after registration of *lis pendens* in present action, held, that she need not have been joined as defendant as she took subject to the proceedings in the action.

A mortgagee filed a bill of sale, making certain lien-holders under the Act parties defendants therein, alleging that the work by virtue of which their liens arose, was commenced after the registration of his mortgage. Held, that the lien-holders should have been made parties in the Master's office; the costs of making them defendants by bill were disallowed, on revision of taxation. *Jackson* v. *Hammond*, (1879) 8 P. R. 157.

The grantees of the owner, although the transfers to them were fraudulent, are entitled to contest the validity of the lien. *Toop* v. *Smith*, (1905) 181 N. Y. 283.

Where a bill is filed by a sub-contractor against the owner of the property and a contractor with him to enforce a claim against such contractor; the owner of the property and all persons claiming to have liens are necessary parties in the Master's office, whose costs will be ordered to be paid out of the amount found due the contractor and the balance distributed ratably among the several lien-holders and a personal order made against the contractor for the deficiency, if any. A suit brought by a lien-holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act, keeps alive all similar liens then existing. *Hovenden* v. *Ellison*, (1877) 24 Gr. 448. See *Finn* v. *Miller*, (1889) 10 C. L. T. 23, 36 C. L. J. 55.

A plaintiff in an action to enforce a mechanics' lien is not obliged to add as a party an encumbrancee whose claim was created *pendente lite*. *Canada Foundry Company, Limited* v. *Edmonton Portland Cement Company, Limited*, (1919) 2 W. W. R. 310.

A bank holding an assignment of the balance of the contract price owing by the owner to the principal contractor has a sufficient interest to be added a party defendant in a mechanics' lien action. *Dorrell* v. *Campbell*, 27 D. L. R. 425, 22 B. C. R. 584. See also 33 D. L. R. 44.

In an action for the enforcement of a lien on land the title to which was in the A. Company, while the defendant company held an agreement for the purchase of the land, it appeared that the work of the plaintiff company was done for the defendant company, and it was alleged by the plaintiff company that the selling value of the land was increased by that work, and the plaintiff company claimed a lien in priority to the A. Company for the amount

of the increased value. The only defendant to the action as begun was the defendant company. The A. Company was served with notice of the trial, but not until after the time for bringing an action for the enforcement of the lien had elapsed; the A. Company did not appear, and was not represented at the trial. It was held upon the appeal of the A. Company, that, if it ever became a party to the action, it was only when the notice of trial was served upon it, and that the lien as against it, if it ever existed, was then at an end. *Metals Recovery Co.* v. *Molybdenum Products Co.*, (1919) 46 O. L. R. 532. There is a difference between the provisions of the Ontario and the Manitoba Acts. See *Dominion Lumber & Fuel Co.* v. *Paskov*, (1919) 29 Man. L. R. 325.

Plaintiff in action to enforce lien joined architect as defendant and claimed damages against him for fraudulently withholding certificate. Held, that he should be struck out as defendant and claim against him dismissed. Actions under the Mechanics' Lien Act have many incidents created by the Act which other actions do not have, but no power is given to join such a claim. The claim was good as against the owner, but as against the architect plaintiff must pursue his ordinary remedy. *Bagshaw* v. *Johnson*, (1901) 3 O. L. R. 58. See also *Larkin* v. *Larkin*, (1900) 32 O. R. 80, cited, *ante*.

(c) "*Shall be served within one month after it is filed.*"—An order allowing service of writ out of jurisdiction should also authorize service of statement of claim at the same time and fix a time for delivery of defence. If not, eight days must be allowed from time limited for appearance under Rule 246. Chapter 153, section 35 (1) requires appointment to be signed by judge, and section 36 requires eight clear days' notice of trial. *McIver* v. *Crown Point*, (1900) 19 P. R. 335.

The plaintiff registered a mechanics' lien against the defendant company, and subsequently filed his statement of claim. He obtained an order for the service of the statement of claim out of the jurisdiction, and service was effected in pursuance thereof. The defendant company applied to have the order and service thereunder set aside, on the ground that there was no statutory authority therefor. Section 28, sub-section 1, of the Mechanics' Lien Act, R. S. N. S. c. 171, provides that "the liens created by this chapter may be enforced by actions to be brought and tried according to the ordinary procedure in the respective courts." Sub-

section 2 of the same section provides that without issuing a writ of summons an action under this chapter shall be commenced by filing in the office of the prothonotary . . . "a statement of claim verified by affidavit." Sub-section 6 provides that "the statement of claim shall be served within one month after it is filed." Held, that the service was good by reason of section 28 of the Act, the ordinary procedure of the court with respect to the service of a writ having been followed in serving the statement of claim. Application dismissed with costs. *McDonald* v. *Consolidated G. M. Co.*, (1901) 21 C. L. T. 482.

But a more recent decision in Ontario is in conflict with this case. In the Ontario case it was decided that service of a statement of claim out of the jurisdiction as the initial step in the action is not allowed under the Judicature Rules, and the history of legislation as to service out of the jurisdiction in Ontario is given. See *In re Busfield, Whaley* v. *Busfield*, (1886) 32 Ch. D. 123. It is not a matter of practice, but of jurisdiction. The provisions in that behalf form a complete code on the subject and cannot be extended by analogy. *Pennington* v. *Morley*, (1902) 3 O. L. R. 514. This case, which was decided by Meredith, C.J., is more in accordance with the principles governing service out of the jurisdiction than the case reported in 21 C. L. T. 482 and probably correctly states the law on the subject.

The month is a calendar month. See the Interpretation Acts (R. S. O. c. 1, s. 8, s.-s. 15); R. S. N. S. c. 1, s. 22, s.-s. 24; R. S. M. c. 89, s. 8 (q); R. S. B. C. c. 1, s. 10, s.-s. 16; R. S. N. B. c. 1, s. 8, s.-s. 27; R. O. Terr. c. 1, s. 8, s.-s. 18.

"The Rules of Practice and Procedure" must be applied. *Canada Land Co.* v. *Poole*, 10 O. W. R. 1041.

Amendment of pleadings. See *Orr* v. *Davis*, 22 O. R. 430.

Where a single debt exists for work done or materials furnished in the erection of several buildings, the liens therefor are to be enforced by a single lien claim, and a single declaration, in which the debt is to be apportioned among the buildings and curtilages according to their respective liability. *Culver* v. *Lieberman*, (1903) 69 N. J. L. 341.

(d) "*Be deemed parties.*"—See *Robock* v. *Peters*, (1900) 13 Man. 124, where parties were brought in by notice of trial.

As to the general scheme of the Act, and the provisions dealing with procedure to enforce a lien, see *Robertson* v. *Bullen*, (1908)

13 O. W. R. 56. A decree enforcing the lien does not conclude persons who are neither parties nor privies. *Bank of Montreal* v. *Haffner*, 10 O. A. R. 599.

Plaintiffs instituted lien proceedings and also issued a writ for the same relief. Motion by defendants to have latter action stayed was dismissed on the ground that the two proceedings are quite different, for in the personal action, there may be a more speedy recovery, and a different and fuller judgment than in the other proceeding, therefore it was not right to interfere. *Hamilton Bridge Works* v. *General Contracting Co.*, (1909) 14 O. W. R. 646; 1 O. W. N. 34.

When an action to enforce a lien for materials supplied by the plaintiffs under one contract for several buildings was brought against several defendants having separate interests in the land sought to be charged, a summary application by the defendant G., who made the contract with the plaintiffs, and was also alleged to have an interest in the land, to vacate the registry of the lien, upon the ground that there could be no valid lien against several buildings, was dismissed, it being held that it was not so clearly demonstrated that the lien was bad that it should be vacated upon a summary application by G., who was not in a position to invoke the benefit of the Registry Act. *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249, distinguished; *Ontario Lime Association* v. *Grimwood*, (1910) 22 O. L. R. 17.

32. Lienholders joining in action.—Any number of lienholders claiming liens on the same land may join in an action, and an action brought by a lienholder shall be taken to be brought on behalf of the other lienholders. 10 Edw. VII. c. 69, s. 32.

(a) *"On behalf of the other lienholders."*—Plaintiffs were day-laborers who did work for defendants in Rainy River District and said that they resided in that district. Held, that the statutory act which gives vitality to a lien is its due registration, and this may be effected by affidavit of an agent or assignee. This section allows wage-earners to group themselves as litigants and as all are within the limits of the district and the address of the solicitor is given the action should not be stayed. *Crerar* v. *C. P. R.*, (1903) 5 O. L. R. 383.

See *Robock* v. *Peters*, (1900) 13 Man. 124.

(b) Under section 15 of a former Act (1877) it was held that suits brought by a lienholder should be taken to be brought on behalf of all lienholders of the same class, and in case of a plaintiff's death or his refusal or neglect to proceed, the suit may by leave of the court be prosecuted by any lienholder of the same class. A number of unregistered lienholders brought an action under the Act to enforce their liens against one G., which proceeded to the close of the pleadings and was then dismissed with the plaintiff's assent. P., the assignee of a registered lienholder, relying on the action, took no steps to enforce his lien or to register a certificate within ninety days, under section 21. On being informed of the dismissal of the action he applied to be allowed to intervene as plaintiff and to prosecute the suit on his own behalf. Held, that the applicant should be allowed to intervene and prosecute the action, and that the applicant was of the same class as the plaintiffs, in that they all contracted with, or were employed by, G. Lienholders "of the same class" are those who have contracted with the same person, whether their liens are registered or not. *McPherson* v. *Gedge*, (1883) 4 O. R. 246. A lienholder thus intervening must indemnify the original plaintiff against all costs past and future (*Patterson* v. *Scott*, 4 Gr. 145) and if he carry on the action in the name of the original plaintiff, he must also give the defendant security for his costs. *McPherson* v. *Gedge*, *supra*. No such intervention can be beneficial unless the original plaintiff had a right of action. *Re Sear* v. *Woods*, (1892) 23 O. R. 474. See also *Builders Supply Co.* v. *Huddlestone*, 25 Man. L. R. 718.

When any claim is ripe for action and the defendants fail to settle it, an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial as provided for in section 37. *Northern Lumber Mills, Limited* v. *Rice*, (1917) 41 O. L. R. 201.

An action to enforce a lien was dismissed by consent when the trial came on. A lienholder for wages applied for leave to proceed with the action, and it was ordered that the applicant be substituted on behalf of himself and all other lienholders of the same class and that necessary amendments be made. R. S. O. c. 126, s. 30. *Richardson* v. *Mark*, (1891) 11 C. L. T. 283.

A class suit, after decree, cannot be dismissed, as the decree enures to the benefit of other creditors. Neither on the same principle can any order be made vacating the *lis pendens* to the pro-

judice of other creditors. The only proper order is that all proceedings in the suit on the part of the plaintiff be stayed, but without prejudice to the rights of other creditors (if any) to apply to prosecute the same. *Arnbery* v. *Thornton*, (1874) 6 P. R. 190.

Under a former Act, which enacted that a plaintiff represented "all other lienholders entitled to the benefit of the action," it was held that in a case where a lien had been discharged the day before proceedings had commenced and said lien had not been registered, it could not be added to the claim to give jurisdiction. *Watson* v. *Kennedy*, (1891) 11 C. L. T. 340. In *Hall* v. *Pils*, (1886) 11 P. R. 449, where the words in question were "all other registered lienholders," they were construed to mean all who had an apparent right by virtue of the registration of their liens.

Under a Manitoba Act, after a bill filed and *lis pendens* registered, another lienholder filed a bill and obtained a decree first and applied to have his costs added to his lien, but this application was refused. Section 24 of the Manitoba Act qualifies section 9 of that Act. *Henry* v. *Bowes*, (1883) 3 C. L. T. 606.

Lienholders not parties to the action must see that it is prosecuted to judgment or it may be dismissed or compromised. *Smith* v. *Doyle*, (1879) 4 O. A. R. 477.

Each individual building must bear the burden of its own construction. *O'Brien* v. *Fraser*, (1918) 45 N. B. R. 539, 41 D. L. R. 324.

33. Who may try action to enforce lien.—The action shall be tried in the County of York before the Master in Ordinary or the Assistant Master in Ordinary, and outside of the County of York before a judge of the county or district court of the county, or district in which the land is situate. 6 Geo. V., c. 30, s. 1, repealing former section.

(a) *"In which the lands are situate."*—Under a former Act it was held that the lien should be enforced in the Division Court for the division in which the cause of action arose and defendant resided. Where there was no machinery providing for the sale, the sale should be by the order of a judge acting as Master in Chancery. Dartnell, J. A form of order is given in this case. See R. S. O. (1877) c. 120, s. 12; 36 Vict. c. 27, s. 5; 38 Vict. c. 20, s. 10. *Burt* v. *Wallace*, (1881) 17 C. L. J. 70.

See *Yolles & Rotenberg* v. *Robertson*, (1920) 18 O. W. N. 85.

34. Powers of certain officers.—The Master in Ordinary, Assistant Master in Ordinary and the County or District Judge, in addition to their ordinary powers, shall have all the jurisdiction, powers and authority of the Supreme Court to try and completely dispose of the action and questions arising therein. Geo. V. c. 30, s. 2.

(a) "*All the jurisdiction, powers and authority.*"—These words are simply sufficient to enable such officers to make any appointment or to grant any order necessary to dispose of all questions in the action. See *Hall* v. *Hogg*, (1890) 14 P. R. 45; *Patten* v. *Laidlaw*, (1895) 26 O. R. 189. See also sections 41, 42 and 43 as to limitation of costs.

(b) "*Including the giving or refusing of the costs.*"—A certain sum was found due from the owner to the contractor and the latter was found indebted to other lienholders. Payment of the former sum into court was ordered and made, the amount, however, being insufficient to pay the claims of lienholders against the contractor. The latter then appealed unsuccessfully and was ordered to pay the costs of appeal to the owner, who claimed that these costs should be paid out of the moneys paid by her into court. Held, that by the payment into court for distribution she was discharged from her liability and the money ceased to be hers, and that she was not entitled to have the costs due to her deducted from the amount paid in. *Patten* v. *Laidlaw*, *supra*.

An interlocutory application to stay proceedings brought by workmen against both their employer and the property owner should not be granted to enable the owner to complete the work on the contractor's default, and so ascertain the balance, if any owing by the owner under the contract; such a question should not be determined in Chambers, but should be determined at the trial, or if the pleadings properly raise the question of law under Ont. Consolidated Rule 259, it can be determined by a motion in court. *Saltsman* v. *Berlin Robe & Clothing Co.*, (1912) 6 D. L. R. 350.

35. Consolidation of actions.—Where more actions than one are brought to realize liens in respect of the same land, a Judge or officer having jurisdiction to try such actions may, on the applica-

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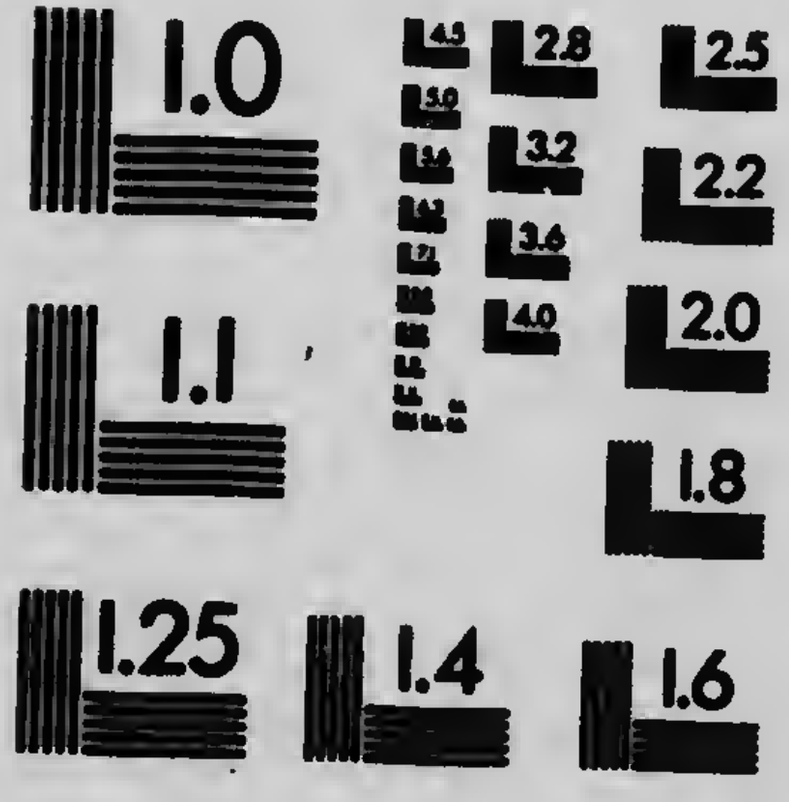

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tion of any party to any one of them, or on the application of any other person interested, consolidate all such actions into one action, and may give the conduct of the consolidated action to any plaintiff as he may see fit. 10 Edw. VII. c. 69, s. 35.

Where an action is intended to realize a mechanics' lien, but the plaintiff's statement of claim fails to set out the allegations and prayer for relief, necessary to entitle him to the usual judgment in such an action, a certificate of *lis pendens* should not be issued, and if issued it cannot be validated by amending the statement of claim. Since a certificate of *lis pendens* under this section is the act of the court, acting through its clerk, it cannot if improperly issued be validated by something which a party to the action does at some subsequent time of his own motion. *Horne* v. *Jenkyn,* (1912), 5 Alta. L. R. 359.

(a) "*May apply to a judge or other officer.*"—See *Robock* v. *Peters,* (1900) 13 Man. 124. In *West* v. *Sinclair,* (1892) 12 C. L. T. 44; 28 C. L. J. 119, the jurisdiction of a Master under 53 Vict. c. 37, to set aside a conveyance as fraudulent under Stat. Eliz. is considered. A Master in Chambers has jurisdiction to vacate registration of mechanics' liens under R. S. O. c. 120, s. 23. In *Re Peake,* (1886) 6 C. L. T. 596.

Under a former Act it was held that a Master had no jurisdiction to entertain summary proceedings to enforce a mechanics' lien action begun in the County Court, nor could he amend the heading of papers by substituting High Court for County Court. *Jacobs* v. *Robinson,* (1894) 16 P. R. 1.

In *Secord* v. *Trumm,* (1890) 20 O. R. 174, it was held that the Ontario Statute, 53 Vict. c. 37, was intended to simplify procedure in the High Court alone, and that the Division and County Courts were unaffected by it.

In the High Court, proceedings to enforce a mechanics' lien must be taken under 39 Vict. c. 45, as amended by 60 Vict. c. 24.

A Master of the High Court of Justice has no jurisdiction as such to entertain a summary proceeding under 53 Vict. c. 37, to enforce a mechanics' lien begun in a County Court. *Secord* v. *Trumm, supra,* followed. Nor can he confer jurisdiction upon himself by subsequently directing an amendment to the affidavit and papers filed by substituting the High Court for the County Court. *Jacobs* v. *Robinson,* (1894) 16 P. R. 1.

A County Court Judge has jurisdiction as Master of proceedings in High Court, but not if instituted in County Court. *In re Ribble* v. *Aldwell,* (1898) 18 C. L. T. 59.

As to policy of consolidation see *Sheppard* v. *Davidovitch,* (1916) 10 O. W. N. 159. In this case one lien claimant built partly on two parcels of land. As to enforcing lien where defendant does not appear, see *Guest* v. *Linden,* 1 D. L. R. 908.

In *Hutson* v. *Valliers,* (1892) 19 A. R. 154, it was held that R. S. O. c. 126, s. 23, does not give County and Division Courts jurisdiction in an action of account by lienholder against mortgagee who has sold through powers in summary proceedings. Resort must be had to High Court for equitable relief. (McLennan, J., dissenting.)

(b) *"To fix a day for the trial."*—There should be notice of application to fix the day for trial. No judicial officer can fix the day for trial before another judicial officer. Counterclaim for damages for breach of contract may be asserted in mechanics' lien action. *Pilkington* v. *Brown,* (1898) 19 P. R. 337.

(c) *"Report on the sale."*—See Con. Rules 743, 769. The Master's certificate is thus equivalent to a judgment of the court and may be so enforced.

(d) *"A judgment of the court."*—A petition was presented by a judgment creditor to vacate the judgment so far as it affected petitioner. The judgment recited that petitioners had a lien and declared that plaintiffs and others were entitled to liens, but did not otherwise settle priorities. Petitioners had no notice of trial and did not appear. The trial took place on 30th June, 1903. The sheriff had petitioners *fi. fa.* on 15th June, 1903. It was ordered that the names of petitioners and all reference to their claim be struck out of the judgment. *Haycock* v. *Sapphire,* (1903) 2 O. W. R. 1177; 7 O. L. R. 21. Plaintiff claimed interest from date when lien arose. Held, that interest being an incident of the principal sum found due and unreasonably withheld is properly allowed and secured by the lien, but should be paid from date of action. *Metallic Roofing Co.* v. *Jamieson,* (1903) 2 O. W. R. 316.

A judgment by a claimant against the contractor is not conclusive upon the owner. It may be offered as evidence of the amount due, but it will not prevent the owner from showing that the claim is excessive to the knowledge of the claimant. *Taylor* v. *Wahl,* (1903) 69 N. J. L. 471.

36. Transferring carriage of proceedings.—Any lienholder entitled to the benefit of an action may apply for the carriage of the proceedings, and the Judge or officer may take an order giving such lienholder the carriage of the proceedings. 10 Edw. VII. c. 69, s. 36.

37. (1) **Appointing day for trial.**—After the delivery of the statement of defence where the plaintiff's claim is disputed, or after the time for delivery of defence in all other cases, where it is desired to try the action otherwise than before a Judge of the Supreme Court, either party may apply to a Judge or officer who has jurisdiction to try the action to fix a day for the trial thereof, and the Judge or officer shall appoint the day and place of trial.

(2) **Notice of trial and service of.**—The party obtaining an appointment for the trial shall, at least eight clear days before the day appointed, serve notice of trial, Form 6, upon the solicitor for the defendants who appear by solicitors, and upon defendants who appear in person, and on all lienholders who have registered their claims as required by this Act, or who are known to him, and on all other persons having any charge, incumbrance or claim on the land subsequent in priority to the lien, who are not parties, and such service shall be personal unless otherwise directed by the Judge or officer who may direct in what manner the notice of trial may be served.

(3) **Trial.**—The judge or officer shall try the action and all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before him or upon whom the notice of trial has been served, and shall take all accounts, make all enquiries, give all directions, and do all other things necessary to finally dispose of the action and of all matters, questions and accounts arising therein or at the trial, and to adjust the rights and liabilities of and give all necessary relief to all parties to the action and all persons who have been served with the notice of trial, and shall embody the results in a judgment, Form 7.

(4) **Sale.**—The judge or officer may order that the estate or interest on which the lien attaches be sold, and where, by the judgment, a sale is directed he may direct the sale to take place at any time after the judgment, allowing a reasonable time for advertising such sale.

(5) **Sale of materials.**—The judge or officer may also direct the sale of any materials and authorize the removal thereof.

(6) **Letting in lienholders who have not proved their claims at trial.**—A lienholder who has not proved his claim at the trial on application to the Judge or officer before whom the action was tried, may be let in to prove his claim on such terms as to costs and otherwise as may be deemed just at any time before the amount realized in the action for the satisfaction of liens has been distributed, and where such a claim is allowed the judgment shall be amended so as to include such claim.

(7) **Right of lienholders to representation.**—Every lienholder for an amount not exceeding $100 may be represented by a solicitor or by an agent who is not a solicitor. 10 Edw. VII. c. 69, s. 37.

When any part of a claim has matured, an action lies, and in that action all claims, whether then payable or not, are to be dealt with at the trial, as provided for in this section. *Northern Lumber Mills* v. *Rice*, (1918) 41 O. L. R. 201, 40 D. L. R. 128. Where a lienholder had registered a claim of lien and judgment in the action had been delivered, but not signed, a lienholder who registered his lien after the judgment was delivered may be let in to prove his claim on payment of his own costs of the application. *Eadie-Douglas* v. *Hitch & Co.*, (1912) 9 D. L. R. 239. Under a section in the Nova Scotia Act, similar to section 37 (3), it was decided that it is sufficient if the trial judge disposes of all questions which are necessary to be tried to enable him to dispose of the action. *Dixon* v. *Ross*, 1 D. L. R. 17.

(a) *"At least eight clear days."*—Both the day of service and the day of trial are to be excluded from the eight days.

(b) *"Who have registered their claims."*—See *Robock* v. *Peters*, (1900) 13 Man. 124, and *Bunting* v. *Bell*, (1876) 23 Gr. 584.

(c) *"Persons having any charge or incumbrance."*—"In proceedings under the Mechanics' and Wage-earners' Act, section 36 seems to render it unnecessary to consider how far one or the other of these modes of procedure would have been the proper one to apply, for, as I have pointed out, it is the persons who are incumbrancers at the time fixed for the service of notice of trial and those only who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in." *Haycock* v. *Sapphire Corundum Co.*, (1903) 7 O. L. R. 21, *per* Meredith, C.J., at p. 23.

As to dismissal of proceedings to enforce lien, default of plaintiff in making discovery, etc., see *Ramsay* v. *Gordon*, (1912) 2 D. L. R. 889.

Where a contractor has a claim against an owner of land larger than the value of the land, and wishes to prove his claim in an action, independently of mechanics' lien proceedings, section 37 does not give the officer charged with the trial of the lien proceedings power to stay the independent action. *Dick* v. *Standard Underground Cable Co.*, (1912) 23 O. W. R. 96.

An interlocutory application to stay proceedings brought by workmen against both their employer and the property owner, should not be granted to enable the owner to complete the work on the contractor's default and so ascertain the balance, if any, owing by the owner under the contract; such a question should not be determined at Chambers. *Saltsman* v. *Berlin Robe & Clothing Co.*, 6 D. L. R. 350.

As to proceedings to vacate lien filed on land of stranger, see *Boggs* v. *Hall*, 13 D. L. R. 941.

As to the necessity for service upon defendants who do not defend, see *Elliot* v. *Rowell*, (1916) 11 O. W. N. 203.

Where a contractor has a claim against an owner of land larger than the value of the land and wishes to prove his claim in an action, independently of mechanics' lien proceedings, this section does not give the officer charged with the trial of the lien proceedings power to stay his independent action. *Dick* v. *Standard Underground Cable Co.*, (1912) 23 O. W. R. 96.

38. Report where land is had.—Where a sale is had the judge or officer with whose approbation the sale takes place shall make a report thereon and therein direct to whom the money realized shall

be paid, and may add to the claim of the person conducting the sale his actual disbursements in connection therewith, and where enough to satisfy the judgment and costs is not realized he shall certify the amount of the deficiency and the names of the persons, with their amounts, who are entitled to recover the same, and the persons by the judgment adjudged to pay the same, and the persons entitled may enforce payment by execution, or otherwise, as on a judgment. 10 Edw. VII. c. 69, s. 38.

The final judgment in a lien suit is the decree of sale which establishes the lien for a certain amount and orders a sale of the premises. The warrant of sale which issues upon and follows this decree corresponds to an execution. *Massasoit-Pocasset National Bank* v. *Borden*, (1917) 228 Mass. 581.

39. Right of lienholders whose claims are not payable to share in proceeds.—Where property subject to a lien is sold in an action to enforce a lien, every lienholder shall be entitled to share in the proceeds of the sale in respect of the amount then owing to him, although the same or part thereof was not payable at the time of the commencement of the action or is not then presently payable. 10 Edw. VII. c. 69, s. 39.

The right, title and interest of certain parties under a lease of lands was offered for sale by the court, pursuant to a judgment in a mechanics' lien action. The lands were, at the time of the sale, subject to a tax imposed by the Supplementary Revenue Act, 1907, though this was not known either to the vendors or purchaser. Held, that the purchaser took subject to the tax, and the utmost relief to which he was entitled was to have the contract wholly rescinded. *Wesner Drilling Co.* v. *Tremblay*, (1909) 18 O. L. R. 439.

New Trial and Appeal.

40. (1) Where judgment of court of first instance to be final.—Where the aggregate amount of the claims of the plaintiff and all other persons claiming liens is not more than $100, the judgment shall be final and without appeal, but the judge or officer who

tried the action may, upon application within fourteen days after judgment is pronounced, grant a new trial.

(2) **Where appeal to Divisional Court final.**—Where the aggregate amount of the claims of the plaintiff and all other persons claiming liens is more than $100, and not more than $500, any person affected by the judgment may appeal therefrom to a Divisional Court, whose judgment shall be final and without appeal.

(3) **Appeal in other cases.**—In all other cases an appeal shall lie and may be had in like manner and to the same extent as from the decision of a judge trying an action in the Supreme Court without a jury. 10 Edw. VII. c. 69, s. 40.

(a) "*Is more than* $100."—The right of appeal is governed by the aggregate amount of the claims.

Con. Rule 826 is applicable to an appeal by the respondent in the court below from an order of the Division Court reversing the judgment upon the trial where the amount in question is more than $100 and not more than $200, and therefore security for the costs of such an appeal must be given unless otherwise ordered. *Sherlock* v. *Powell,* (1889) 18 P. R. 312.

(b) "*As from the decision of a judge trying an action in the High Court without a jury.*"—See Judicature Act, section 75 (1), and Con. Rule 787. See also the Supreme and Exchequer Court Act (R. S. C., c. 135), and amendments thereto. See sections 24, 28; Coss. Pr. 14-17.

Under 53 Vict. c. 37, ss. 13 and 35, it was held that section 35 of that statute applied to appeals from "Certificates," and not "Reports." An appeal from a report is to judge in court under Rule 850. *Wagner* v. *O'Donnell,* (1891) 11 C. L. T. 962; 14 P. R. 254. The practice given is grafted on the ordinary practice of the Court. See *Bickerton* v. *Dakin,* 20 O. R. 192, 695; *Wentworth Lumber Co.* v. *Coleman,* (1904) 3 O. W. R. 618; see *Sherlock* v. *Powell,* 18 P. R. 312.

Fees and Costs.

41. (1) **Limits of fees in money or stamps.**—No fees in stamps or money shall be payable to any Judge or other officer, in any

action brought to realize a lien under this Act, nor on any filing, order, record or judgment, or other proceeding in such action, excepting that every person other than a wage-earner shall, on filing his statement of claim where he is plaintiff, or on filing his claim where he is not a plaintiff, pay in stamps $1 on every $100 or fraction of $100 of the amount of his claim up to $1,000, and $1 on every $1,000 or fraction of $1,000 of the amount of his claim over $1,000. Geo. V., c. 30, s. 3.

(2) **Fees of local master.**—When the proceedings are taken before a local master who is paid by fees such amount shall be payable to him in cash instead of in stamps. 10 Edw. VII. c. 69, s. 40.

42. Limit of costs to plaintiff.—The costs of the action, exclusive of actual disbursements awarded to the plaintiffs and successful lienholders, shall not exceed in the aggregate twenty-five per cent. of the total amount awarded to them by the judgment, and shall be apportioned and borne in such proportion as the judge or officer who tries the action may direct. 10 Edw. VII. c. 69, s. 42.

(a) *"The costs of the action."*—i.e., solicitors' costs. Court fees are dealt with by section 40. See section 45 for costs for drawing and registering or vacating the lien.

(b) *"Actual disbursements"* do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and *a fortiori* not counsel fees charged by the solicitor himself. *Cobban Mfg. Co.* v. *Lake Simcoe Hotel Co.*, (1903) 5 O. L. R. 447, followed in *Humphreys* v. *Cleave*, 15 Man. L. R. 23. See note under section 37 of the Manitoba Act, *ante*.

Where the defendants unsuccessfully appealed to the Divisional Court, the Master should have added to the amount allowed the plaintiffs, the cost of the appeal successfully opposed by them. *Wesner Drilling Co.* v. *Tremblay*, (1909) 18 O. L. R. 439. The judgment in the action directed the Master to compute and tax subsequent interest and subsequent costs; the Master should have taxed to the plaintiffs their costs in connection with the sale proceedings, the same not exceeding twenty-five per cent. of the judg-

ment recovered, and not merely the disbursements. *Wesner Drilling Co.* v. *Tremblay, supra.*

"Judgment," in this section is identical with "judgment" in section 37 (3). *Powell Lumber & Door Co.* v. *Hartley,* (1915) 9 O. W. N. 249.

(c) *"Shall be apportioned and borne."*—The officer can exercise a judicial discretion in fixing the costs.

Defendant amended defence by paying into court twenty per cent. and costs to date. Held, that subsequent costs were payable by defendant. *Ontario Paving Company* v. *Bishop,* (1904) 4 O. W. R. 34.

Costs of appeal are not included in costs which by section 42 shall not exceed twenty-five per cent. of amount of judgment. See costs of appeal, dealt with by former section 45 and in discretion of court or judge. *Gearing* v. *Robinson,* (1900) 19 P. R. 192. As to scale of costs between party and party, see *Freeze* v. *Corey,* 7 W. L. R. 287.

See summary of all important cases decided in Western Canada where the question of costs was dealt with, 2 Canadian Encyclopedic Digest, section 127, pp. 425-427.

43. Limit of costs to be awarded against plaintiffs.—Where costs are awarded against the plaintiff or other persons claiming liens they shall not exceed twenty-five per cent. of the claim of the plaintiff and the other claimants besides actual disbursements, and shall be apportioned and borne as the judge or officer may direct. 10 Edw. VII. c. 69, s. 43.

(a) *"Costs."*—See *Gearing* v. *Robinson,* 19 P. R. 192; *Hall* v. *Pilz,* 11 P. R. 449; *Truax* v. *Dixon,* 13 P. R. 279; *Hall* v. *Hogg,* 14 P. R. 45; *Patten* v. *Laidlaw,* 26 O. R. 189; *Simpson* v. *Rubcck,* (1912) 21 O. W. R. 360; *Rowlin* v. *Rowlin,* 9 O. W. R. 297; *Jamieson* v. *Hagar,* 17 O. W. N. 104.

(b) *"The claim of the plaintiff and the other claimants."*—Actual disbursements under this section do not include counsel fees paid by solicitor to counsel, and, *a fortiori,* counsel fees charged by solicitor himself or his firm. *Cobban M. Co.* v. *Lake Simcoe Co.,* (1903) 5 O. L. R. 447.

This section was intended to make it the interest of both parties to proceed as inexpensively as possible. See *Rowlin* v. *Rowlin,* (1907) 9 O. W. R. 297.

44. Costs where least expensive course not taken.—Where the least expensive course is not taken by a plaintiff the costs allowed to him shall in no case exceed what would have been incurred if the least expensive course had been taken. 10 Edw. VII. c. 69, s. 44.

See *Rowlin* v. *Rowlin*, 5 O. W. R. 297.

45. Costs of drawing and registering and vacating registration of lien.—Where a lien is discharged or vacated under section 27, or where judgment is given in favor of or against a claim for a lien, in addition to the costs of the action the judge or officer may allow a reasonable amount for the costs of drawing and registering the claim for lien or of vacating the registration thereof. 10 Edw. VII. c. 69, s. 45.

46. Costs not otherwise provided for.—The costs of and incidental to all applications and orders not otherwise provided for shall be in the discretion of the judge or officer. 10 Edw. VII. c. 69, s. 46.

On motion, *ex parte*, by the defendant and owner for leave to pay into court $225, the amount of the claim, and $75 as security for costs and for discharge of lien, Cartwright, K.C., M. in C., held that notice should be given plaintiff or his consent obtained before any order should be granted. *Wilais* v. *Williamson*, (1911) Lear's Digest, 604.

Payment Out of Court.

47. (1) Payments out of court.—Except in actions tried by a judge of the Supreme Court, the judge or officer who tries the action, where money has been paid into court and the time for payment out has arrived, shall forward a requisition for cheques with a certified copy of his judgment and of the report on sale, if any, to the accountant of the Supreme Court who shall, upon receiving the same, make out and return to the judge or officer cheques for the amounts payable to the persons mentioned in the requisition,

and the judge or officer, on receipt of cheques, shall distribute them to the persons entitled.

(2) **Fees.**—No fees or stamps shall be payable on any cheques or on proceedings to pay money into court or to obtain money out of court, in respect of a claim for lien, but sufficient postage stamps to prepay a return registered letter shall be enclosed with every requisition for cheques. 10 Edw. VII. c. 69, s. 47.

JUDGMENTS IN ACTIONS.

48. Form of judgment in favor of lienholders.—All judgments in favor of lienholders shall adjudge that the party personally liable for the amount of the judgment shall pay so much of any deficiency which may remain after sale of the property directed to be sold as might have been recovered in an ordinary action against him, and where on the sale enough to satisfy the judgment and costs is not realized such part of the deficiency may be recovered by executions against the property of such party. 10 Edw. VII. c. 69, s. 48.

(a) *"Shall pay so much of any deficiency."*—This section gives to the lienholder a right to judgment against the person in respect to whom his claim arises for any balance remaining due after realizing upon the lien. The lienholder must first proceed against the property. If it is not sufficient he is entitled to judgment. A lienholder may always abandon his claim to a lien and sue on his contract, but this and the succeeding section are the only provisions for recovering personal judgments in proceedings to enforce mechanics' liens. See *Dunn* v. *McCallum*, (1907) 14 O. L. R. 249.

49. Personal judgment when claim for lien fails.—Where a claimant fails to establish a valid lien he may nevertheless recover a personal judgment against any party to the action for such sum as may appear to be due to him and which he might recover in an action against such party. 10 Edw. VII. c. 69, s. 49.

(a) *"Recover therein a personal judgment."*—The debtor, however, must be a party to the proceedings. Under a section which provided that if the lien claimant shall fail for any reason to estab-

lish a valid lien he may recover judgment for such sums as are due him or which he might recover in an action on a contract; a defendant in an action to foreclose a mechanics' lien who has filed no lien as required by the mechanics' lien law is not entitled to recover a personal judgment though he might have a claim against the owner. *Deane Steam Pump Co.* v. *Clark*, 84 N. Y. S. 851.

The right of a plaintiff to pursue his right for the debt and also for the enforcement of his lien at the same time, but by different actions, cannot be questioned. *Pierce* v. *Kinney*, 152 App. Div. (N.Y.) 638.

This section is generally construed to apply only to cases in which the lien claimed has been defeated in consequence of some technicality or informality, or where the lien claimed has been rendered valueless by reason of the priority of other liens, or by some similar occurrence, but does not apply to cases where the plaintiff could never have had a valid lien.

As to motion for summary judgment against defendants personally liable, see *Robertson* v. *Bullen*, 13 O. W. R. 56.

Plaintiffs instituted proceedings under Mechanics' Lien Act and also issued a writ for the same relief. Motion by defendants to have latter action stayed was dismissed on the ground that the two procedures are quite different, for in the personal action there may be a more speedy recovery and a different and fuller judgment than in the other proceedings. *Hamilton Bridge Works* v. *General Contracting Co.*, (1909) 14 O. W. R. 646.

The right to a personal judgment under Mechanics' Lien Acts, is, of course, purely statutory, and in order to obtain a personal judgment it must first be shown that there was a right to a lien. Where no lien could legally exist this form of proceedings cannot be resorted to for the purpose of enforcing a mere personal contract between the parties. *Johnson & Carey Co.* v. *C. N. R. W. Co.*, (1918) 44 O. L. R. 538; *Murphy* v. *Watertown*, 112 App. Div. (N.Y.) 670; *Weyer* v *Beach*, 79 N. Y. 409; *Quinn* v. *Allen*, 85 Ill. 39.

But if a contractor, having a lienable claim, fails to enforce his lien against the owner because of failure to commence the action within the statutory period, the contractor may be awarded in the same hearing a personal judgment. *Kendler* v. *Bernstock*, 33 O. L. R. 351, 22 D. L. R. 475.

Liens on Chattels.

50. (1) **Right of mechanics entitled to lien on a chattel to sell the chattel.**—Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration and improvement of its properties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed shall, while such lien exists but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to any other remedy to which he may be entitled, to sell by auction the chattel or thing, on giving one week's notice by advertisement in a newspaper published in the municipality in which the work was done, or in case there is no newspaper published in such municipality then in a newspaper published nearest thereto, setting forth the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence, if any, of the owner, if he is a resident of such municipality.

(2) **Application of proceeds of sale.**—Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale, and shall, upon application, pay over any surplus to the person entitled thereto. 10 Edw. VII. c. 69, s. 50.

See chapter entitled "Liens on Personal Property," *ante*. See also *Schultz* v. *Reddick*, 43 U. C. R. 155; *Blanchard* v. *Ely*, 179 Mass. 586; *Keith* v. *Maguire*, 170 Mass. 210; *Bruce* v. *Everson*, 1 Cab. & E. 18; *Sinclair* v. *Bowles*, 9 B. & C. 92.

FORMS.

As to the use of these forms, see observations of Boyd, C., in *Crerar* v. *C. P. R. Co.*, (1903) 5 O. L. R. 383, and Osler, J.A., in *Craig* v. *Cromwell*, (1900) 27 O. A. R., at p. 589.

Form 1.

(*Sections 17-22.*)

Claim for Lien.

A. B. (*name of claimant*) of (*here state residence of claimant*), (*if claimant is a personal representative or assignee set out the facts*) under the Mechanics and Wage-earners Lien Act claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed*), in the undermentioned land in respect of the following work (*or* service *or* materials) that is to say (*here give a short description of the nature of the work done or to be done, or materials furnished or to be furnished, and for which the lien is claimed*), which work (*or* service) was (*or* is to be) done (*or* materials were *or* are to be furnished) for (*here state the name and residence of the person upon whose request the work is done or to be done, or the materials furnished or to be furnished*), on or before the day of 19 .

The amount claimed as due (*or* to become due), is $.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

(*Where credit has been given, insert;* The work was done (*or* materials were furnished) on credit, and the period of credit agreed to expire (*or* will expire)) on the day of 19 .

Dated at this day of 19 .

(*Signature of Claimant.*)

10 Edw. VII. c. 69, Form 1.

FORM 2.

(*Sections 17-22.*)

CLAIM FOR LIEN FOR WAGES.

A. B. (*name of claimant*) of (*here state residence of claimant*), (*if claimant is a personal representative or assignee set out the facts*) under the Mechanics' and Wage-earners' Lien Act, claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed*), in the undermentioned land in respect of work performed (*or* to be performed) thereon while in the employment of (*here state the name and residence of the person upon whose request the work was or is to be performed*), on or before the day of , 19 .

The amount claimed as due (*or* to become due), is $.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged, sufficient for the purpose of registration*).

Dated at this day of 19 .

(*Signature of Claimant.*)

10 Edw. VII. c. 69, Form 2.

FORM 3.

(*Sections 17-22.*)

CLAIM FOR LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons claim a lien under the Mechanics' and Wage-earners' Lien Act, upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*), in the undermentioned land in respect of wages for labor performed (*or* to be performed) thereon while in the employment of (*here state name and residence or names and residences of employers of the several persons claiming the lien*).

A. B. of	(*residence*)	$	for wages.
C. D.	"	$	"
E. F.	"	$	"

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at this day of 19 .

(*Signatures of the several claimants.*)

10 Edw. VII. c. 69 Form 3.

FORM 4.

(*Sections 17-22.*)

AFFIDAVIT VERIFYING CLAIM.

I, A. B., named in the above (*or* annexed) claim, make oath and say that the said claim is true.

Or, we, A. B. and C. D., named in the above (*or* annexed) claim, make oath and each for himself makes oath that the said claim so far as relates to him, is true.

Where the affidavit is made by agent or assignee a clause must be added to the following effect: I have full knowledge of the facts set forth in the above (*or* annexed) claim.

Sworn before me at in the county of , this day of 19 .

Or, The said A. B. and C. D. were severally sworn before me at in the county of this day of 19 .

Or, The said A. B. was sworn before me at in the county of this day of 19 .

10 Edw. VII. c. 69, Form 4.

FORM 5.

(*Section 31.*)

AFFIDAVIT VERIFYING CLAIM ON COMMENCING AN ACTION.

(*Style of Court and Cause.*)

I, make oath and say, that I have read (*or* heard read) the foregoing statement of claim, and that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all the sums of money or goods or merchandise to which (*naming the debtor*) is entitled to credit as against me.

Sworn before me, etc.

10 Edw. VII. c. 69, Form 5.

As to defective affidavit and powers of referee at trial see *Lemon* v. *Young*, (1916) 10 O. W. N. 82.

FORM 6.

NOTICE OF TRIAL.

(*Style of Court and Cause.*)

Take notice that this action will be tried at the in the of in the County (*or district*) of on the day of by and at such time and place the will proceed to try the action and all questions which arise in or which are necessary to be tried completely to dispose of the action and to adjust the rights and liability of the persons appearing before him or upon whom this notice of trial has been served, and at such trial he will take all accounts, make all enquiries, and give all directions and do all things necessary to try and otherwise finally dispose of this action and all matters, questions and accounts arising therein and will give necessary relief to all parties.

And further take notice that if you do not appear at the trial and prove your claim, if any (*or* your defence, if any), to the

action the proceedings will be taken in your absence and you may be deprived of all benefit of the proceedings and your rights disposed of in your absence.

This is a mechanics' lien action brought by the above named plaintiff against the above named defendants to enforce a mechanics' lien against the following lands: (*set out description of lands*).

This notice is served by, etc.

Dated 19 .

To

10 Edw. VII. c. 69, Form 6.

FORM 7.

JUDGMENT.

In the Supreme Court of Ontario.

Monday, the day of 19 .

(*Name of Judge or Officers*).

William Spencer, Plaintiff,

and

Thomas Burns, Defendant.

This action coming on for trial before at upon opening of the matter, and it appearing that the following persons have been duly served with notice of trial herein (*set out names of all persons served with notice of trial*), and all such persons (*or as the case may be*), appearing at the trial (*or* and the following persons not having appeared, (*set out names of non-appearing persons*), and upon hearing the evidence adduced and what was alleged by counsel for the plaintiff and for C. D. and E. F. and the defendant (*or* and by A. B. appearing in person).

1. This court doth declare that the plaintiff and the several persons mentioned in the first schedule hereto are respectively entitled to a lien under the Mechanics' and Wage-earners' Lien Act, upon the land described in the second schedule hereto, for the amounts set opposite their respective names in the 2nd, 3rd and 4th columns of the said first schedule, and the persons primarily liable for the said claims respectively are set forth in the 5th column of the said schedule.

2. (And this court doth further declare that the several persons mentioned in schedule 3 hereto are also entitled to some lien,

charge or incumbrance upon the said land for the amounts set opposite their respective names in the 4th column of the said schedule 3, according to the fact).

3. And this court doth further order and adjudge that upon the defendant (A. B. the owner) paying into court to the credit of this action the sum of (*gross amount of lien in schedules 1 and 3 for which owner is liable*), on or before the day of next, that the said liens in the said 1st schedule mentioned be and the same are hereby discharged (and the several persons in the said 3rd schedule are to release and discharge their said claims and assign and convey the said premises to the defendant (*owner*) and deliver up all documents on oath to the said defendant (*owner*), or to whom he may appoint), and the said money so paid into court is to be paid out in payment of the claims of the said lienholders (*or* any incumbrancers).

4. In case the said defendant (*owner*) shall make default in payment of the said money into court, this court doth order and adjudge that the said land be sold with the approbation of the Master of this court at , and that the purchase money be paid into court to the credit of this action, and that all proper parties do join in the conveyance as the said Master shall direct.

5. And this Court doth order and adjudge that the said purchase money be applied in or towards payment of the several claims in the said 1st (and 3rd) schedule(s) mentioned as the said Master shall direct, with subsequent interest and subsequent costs to be computed and t xed by the said Master.

6. And this Court doth further order and adjudge that in case the said purchase money shall be insufficient to pay in full the claims of the several persons mentioned in the said 1st schedule, the persons primarily liable for such claims as shewn in the said 1st schedule do pay to the persons to whom they are respectively primarily liable the amount remaining due to such persons forthwith after the same shall have been ascertained by the said Master.

7. (And this court doth declare that have not proved any lien under the Mechanics' and Wage-earners' Lien Act, and that they are not entitled to any such lien, and this Court doth order and adjudge that the c! ims of liens registered by them against the land mentioned in the said 2nd schedule be and the same are hereby discharged, (*according to the fact*).

10 Edw. VII. c. 69, Form 7.

SCHEDULE 1.

Names of lienholders entitled to Mechanics' Liens	Amount of debt and interest (if any)	Costs	Total	Names of primary debtors

(Signature of officer.)

10 Edw. VII. c. 69, Schedule 1.

SCHEDULE 2.

The lands in question in this matter are

(*Set out by a description sufficient for registration purposes.*)

(Signature of officer.)

10 Edw. VII. c. 69, Schedule 2.

SCHEDULE 3.

Names of persons entitled to encumbrances other than Mechanics' Liens	Amount of debt and interest (if any)	Costs	Total

(Signature of officer.)

10 Edw. VII. c. 69, Schedule 3.

QUEBEC LAW RELATING TO MECHANICS' LIENS.

The civil law, in its relation to the subject of mechanics' liens, has already been referred to. (See Chapter I., p. 2.)

The law of the Province of Quebec on this subject is based on the civil law as originally declared in art. 2013 of the Civil Code, which came into force on the first of August, 1866. The law was changed in 1894, when twelve articles were added, 2013A to 2013L, and these articles have subsequently undergone some change. Article 2013 at present reads as follows:—

"**2013.** A laborer, workman, architect, builder and the supplier of materials have a right of preference over the vendor and other creditors, on the immovable, but only upon the additional value given to the immovable by the work done."

"In case the proceeds are insufficient to pay the laborer, workman, architect, builder and the supplier of materials, or in cases of cont- -tation, the additional value given by the work is established by a relative valuation effected in the manner prescribed in the Code of Civil Procedure."

"The aforesaid privileged claim is paid only upon the amount established as being the additional value given to the immovable by the work done."

The articles in the Code of Procedure referred to in art. 2013 of the Civil Code are the three following:—

Article 805.

Code of Procedure.—"In case the disposable moneys are insufficient, the prothonotary, if the record does not offer him sufficient data to confirm the relative valuation himself, must suspend the distribution and report the facts to the judge, in the following cases:—

"(1) When several immovables or pieces or parcels of land, separately charged with different claims, are sold for one and the same price;

"(2) When a vendor's claim comes in concurrence with a builder's privilege;

"(3) When a creditor has some preferable claim upon part of an immovable by reason of improvements or other cause."

Article 806.

"806. Upon application of one of the parties interested, after notice given to the others, the judge orders experts to be named in the ordinary manner, in order to establish the respective values of the immovables, pieces of land, or improvements, and the proportion which should be allotted to each out of the moneys to be distributed."

Article 807.

"807. The relative valuation being established upon the report of the experts, the cause is sent back to the prothonotary by the judge in order that he may proceed to determine the order of the collocation and the distribution of the moneys."

Decisions Under Article 2013.

A plaintiff who has a legal privilege on a property in connection with the work done by him thereon, cannot, in the event of a fire, claim by a conservatory attachment the proceeds of policy covering the building, because these proceeds do not represent the property but represent a debt resulting from a contract of insurance. *De Anna Isaacs et vir* v. *Samuel Tafler & The Guardian Assurance Co., Limited, Garnishee,* (1910) 11 Que. P. R. 359.

The privilege given to laborers, workmen, architects and builders by the Civil Code, arts. 2013 *et seq.*, extends only to persons of the classes mentioned under engagement with the owner of lands or the building contractors employed by him and does not enure to the benefit of sub-contractors or persons furnishing labor or

materials without direct agreement with or knowledge of the owner. *Frechette* v. *Ouimet*, Q. R. 28 S. C. 4.

There is no provision of the law which gives a clerk the right *de plano* to attach the movable possessions of his employer on which he has a lien for his salary without proving acts on the part of the employer which are likely to prejudice his lien. *Gladu* v. *Hurtubise*, 10 Q. P. R. 272.

The *cessionaire* of a privileged debt and registered according to the dispositions of art. 2013 *et seq.* C. C. has not an hypothecary action against the detenteur of the immovable in question until after the signification of the transfer upon the personal debtor. The service made on the *detenteur is not sufficient. Demers* v. *Byrd*, 17 K. B. 303. On appeal, this decision was reversed. See decision on appeal noted in decisions under article 2013 B, *post.*

The expenses of tilling and sowing do not constitute an incumbrance in the sense of art. 2072 of the Civil Code, the special privilege for tilling and sowing only exist when the immovable is sold before the harvest. Cooke, J., *Carnignan* v. *Gilbert*, 7 Q. P. R. 364.

Motormen and conductors of an electric railway and the carters who carry materials, clear away snow, etc., for their companies, are employees of a railway doing manual labor in the sense of art. 9 of 2009 C. C.

These employees have a right of privilege on the tramway and its outbuildings for their wages during three months without respect to the date of the seizure or of the sale which may have taken place of them. *Paquette et al.* v. *New York Trust*, 15 K. B. 179.

A contractor for making timber by the job has, for what may be due him, the lien given by art. 1994c. of the Civil Code.

A creditor having a lien upon movables may as a rule exercise the right by conservatory attachment to secure his privilege. *Ross* v. *St. Onge*, Q. R. 14 K. B. 478.

A corporation held to the upkeep of a public road which agrees by contract with a company that the latter can construct and operate a tramway on condition that they perform the work of maintenance, acquire no privilege on the tramway for the cost of the same works which it is forced to do owing to the failure of the company. *Morse* v. *Levis County Railway et al.*, 30 S. C. 353.

A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the princi[illegible] and interest of an issue of its debenture-bonds, hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for the debenture-holders, and transferred the movable property of the company and its present and future revenues to the trustees. By a provincial statute, 3 Edw. VII. c. 91, s. 1 (Que.), the deed was validated and ratified. On the sale, in execution, of the tramway, as a going concern:—Held, that whether at the time of such sale, the cars in question were movable or immovable in character, the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, the unpaid vendors thereof were not entitled, under art. 2000 of the Civil Code of Lower Canada, to priority of payment by privilege upon the distribution of the moneys realized on the sale and execution.

Per Girouard, J., Duff, J., *contra*:—After the car in question had been delivered to the tramway company and used by it for the operation of their tramway, they became immovable by destination.

In the result, the judgment appealed from, Q. R. 18 K. B. 82, was affirmed. *Ahearn & Soper Limited* v. *The New York Trust Company*, 42 S. C. R. 267.

The mason has a special privilege in the nature of a mortgage upon any building erected by him and for repairs. This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless within a year and day there be something specific to show the nature of the work done or the amount of the debt due thereon.

Court of Appeals, 1827, *Jourdain & Miville*, Stuart's Rep. 263; 1 R. J. R. Q. 249, 513.

The valuation made at the instance of the architect or builder at the time of the inscription of his privilege may be attacked by the vendor, and the latter may obtain a contradictory valuation, if the two privileges are in conflict.

Monk, J., 1860, *Doutre* v. *Green*, 5 L. C. J. 152; 9 R. J. R. Q. 137.

The builder of a railway has no right of retention on the work done by him unless he has acquired and preserved the privilege

conferred by article 2013 on the additional value given by him to the immovables.

Rainville, J., 1882, *Banque d'Hochelaga* v. *Montreal, Portland & Boston Ry. Co.*, M. L. R. 1 S. C. 146; 8 L. N. 99.

In virtue of art. 2013 C. C., the builder who has observed the formalities required by that article has no privilege other than for the additional value given to the real estate by the buildings put up by him, and he has no privilege or hypothec on the land itself.

The registration of the relative valuation required by article 2013 for the preservation of the said privilege does not create a tacit hypothec in favor of the builder on the said immovable.

K. B., 1885, *Corporation du Seminaire de St. Hyacinthe & Banque de St. Hyacinthe*, M. L. R. 1 Q. B. 396, 4 Q. B. R. 293, 29 L. C. J. 261, 8 L. N. 354.

It was sufficient for the expert to state in his second report, made within six months, that the works described had been executed and that such works had given to the immovable the additional value fixed by him.

If the expert includes in his valuation works for which the builder had by law no privilege, such error will not be a cause of nullity, but will only entitle the interested parties to ask for a reduction of the expert's valuation.

Dufresne v. *Prefontaine*, 21 S. C. R. 607, Q. B. 16 L. N. 48.

Held (reversing the judgment of Trenholme, J.): The fact of describing in the memorial for the registration of a laborer's privilege the immovables affected by such privilege in the following manner: "Two lots of land known and designated under the numbers two C. and three C. of the official sub-division of lot number 907," instead of designating them, as described in the *cadastre*, as: "two lots of land known and designated under the numbers, two, sub-division C., and three, sub-division C., both of the sub-division of official No. 907," is not an irregularity sufficient to involve the nullity of the registration privilege, especially when the designation in the memorial is identical with that contained in the title of the owner (who had acquired the immovables from the respondent) and in the report of seizure, and when the registrar, on presentation of the memorial, had registered the same against these immovables such as they were described in the books of his office.

In this case, the respondent who had caused the immovables to be sold had filed in the record a declaration that the land was not worth more than $3,000 (the property and the buildings thereon had been sold for $5,000), and a hypothecary creditor represented by the attorney of the respondent had obtained an order from the court for the distribution of the moneys without proceeding to a *ventilation* (*i.e.*, relative valuation of the land and of the buildings to establish the value of improvement).

Held, that, under these circumstances, the respondent, who was *dominus litis*, must be held to have acquiesced in the omission of such ventilation, and that he could not be heard to complain that the amount of the increase of value given to the land by the new constructions thereon had not been established by a ventilation.

The omission by the workman to give notice to the proprietor of the immovable within three days after the registration of the memorial (2103 C. C.) does not affect the validity of this registration or of the privilege.

Daniel v. *MacDuff*, in the Court of King's Bench in Appeal, 1904, R. J. Q. 13 K. B. 361.

. The holder of a note secured by a builder's lien may, in suing on it, claim a declaration of the existence of the lien in his favor. A contractor may take, in his own name, a builder's lien not only for the work done by himself, but also for that done by a sub-contractor, and in these circumstances it is not necessary that his contract with the sub-contractor should be made known to the owner of the works to be constructed.

The time limited for registry of a builder's lien runs from the date on which the works were entirely completed and not from that on which the person entitled to the lien begins to profit from their construction before completion. The owner of the works to be constructed cannot take advantage of the lien being registered too late, nor even of entire failure to register it. *La Banque Jacques Cartier* v. *Picard*, (1900) 18 Que S. C. 502.

The plaintiff having contracted to furnish materials to a builder to be used in the construction of a building, gave written notice to the defendant, owner of the land, under article 2013g, of the Civil Code of Quebec, and subsequently registered a memorial that he had furnished materials to the amount stated, and he then notified defendant of such registration. The present action was brought against the owner of the immovable more than three

months subsequently, asking that he be condemned to pay the amount. No proceedings had been taken against the purchaser of the materials: Held, that the privilege created in favor of the supplier of the materials, and his recourse against the owner of the land, by the registration of the memorial, lapse unless legal proceedings are taken within three months following the notice to have the debtor condemned—by the "debtor" in article 2013i being meant the purchaser of the materials. *Lalonde* v. *LaBelle*, (1899) 16 Que. S. C. 573.

A contractor who stipulates directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of article 2013 as amended by 59 Vict. (Q.) c. 42.

The additional value referred to in the above article is the additional value given to the immovable by the work at the time it is done. *Galarneau* v. *Tremblay*, (1903) 22 Que. S. C. 143. (Archibald, J.).

A manufacturer who enters into an agreement with a contractor to deliver a number of closets intended for a building which the contractor has undertaken to construct, is not a workman, but a furnisher of materials. The registry by the manufacturer of a workman's lien upon the immovable of the owner to secure payment of the price of the closets is void under the circumstances, the manufacturer not being entitled to other security for such payment than that given by law in articles 2013g, 2013h, 2013i, 2013l, when he conforms to the provisions of these several articles. The contract between the manufacturer and the contractor is a sale and not a letting of work (*louage d'ouvrage*). To enable a workman to claim a lien upon the immovable of an owner it is essential that he should be employed upon such immovable. It is not sufficient for him to work at and finish materials intended for the building which the owner constructs or causes to be constructed. *Montmorency Cotton Mills Co.* v. *Gignac*, (1901) 10 Que. Q. B. 158.

When the owner of land builds on it, the perron furnishing material who desires to obtain a right of hypothec should, before delivery of the material, give notice to him who lends money to the owner, and a notice given too late to such lender will not suffice to give said right of hypothec. When two portions of the same land have been sold by separate contracts to different purchasers and buildings are put upon it, the furnisher of material for

the building should in the particulars of claim (*bordereau*) which he registers under article 2013, indicate the part of the land belonging to each purchaser, and his registration will have no effect if he describes the whole land as being the property of the two purchasers. *Paquette* v. *Mayer,* (1900) 18 S. C. 563.

The enhanced value given to an immovable by a workman is settled by valuation at the time of the decree, when the moneys are sufficient to pay the workman who has registered a privilege or in case the increased value is disputed by parties interested. The contention when it can take place should be raised by a pleading *au fond,* and not by inscription *en droit.* The defendant being owner of the immovable, the workman need not allege the increase in value. *Therrien* v. *Hainault,* (1901) 8 R. de J. 314, 5 Que. P. R. 61 (Pagnuelo, J.).

See also under this article, *Brassard* v. *Chisholm,* (1898) 4 R. Q. de J. 419, and *La Banque Jacques Cartier* v. *Picard,* (1899) R. J. Q. 15 S. C. 389.

As to the restricted powers of an official of a municipality to bind the municipality, see *Noiseaux* v. *La Cité de Lachine,* (1919) 24 Rev. Leg. 491.

When lumbermen take action for wages with conservatory seizure, and at the same time claim a lien upon the timber cut, and this right is denied upon the ground that the notice given was irregular, there is a chose jugée in a subsequent action to compel a person formerly in possession of the timber cut, which had been disposed of, to bring into court an amount representing its value, in order to permit them to exercise their liens. *Marinier* v. *Riordan Paper Mills Co.,* (1917) 51 Que. S. C. 532.

By the passing of 4 Edw. VII. c. 43 (1904), the legislature of Quebec has explicitly given to the supplier of materials a right of privilege, by adding to articles 2013 and 2013a, the words "the supplier of materials," and consequently the latter has now a privilege on the increased value, and not only an hypothec on the whole property. Since the passing of that statute, the supplier of materials is one of the privileged creditors by article 2013. Under article 2013, the creditor's privilege "dates only from the registration within the proper delay," which by analogy must mean, in the case of the supplier of materials, thirty days after the building is completed.

The obligation imposed by law upon the supplier of materials to preserve his right of notifying the owner is sufficiently fulfilled when, before delivering the materials, the supplier obtains delivery receipts signed by the owner or by his authorized employees. It was held, from the deeds filed, that the notices had been properly given; such notices could be legally given by the supplier of materials to the plaintiff's vendor during the whole course of the building, as well before as after the plaintiff's deed of acquisition; the defendant was not bound to register his privilege before the registering of plaintiff's title; the defendant, the supplier of materials, had notified the plaintiffs' vendors of the registering of his privilege and he had also notified the plaintiffs themselves; and, finally, at the time of the institution of the present action, the defendant was still within the statutory "delays." *Pacaud* v. *Limoges*, (1918) 24 Rev. de Jur. 4. Affirmed, 56 Que. S. C. 242.

A person who agrees with the proprietor to build him a house, to purchase the materials required therefor and to supply labor, is a "builder," and acquires, after due observance of the formalities, the privilege provided. *St. Just* v. *Blanchette*, (1910) 21 Que. K. B. 1.

An architect has a lien on the increased value given to an immovable property by the buildings thereon erected in accordance with his plans and specifications, provided he had his lien registered within 30 days from the date at which such buildings became fit for the use intended for them. *Brunswick Balke Collender Co.* v. *Racette*, (1916) 49 Que. S. C. 50.

A laborer who works on the macadamizing of a public road has not a lien on the road, it being a part of the public domain. *Desrosiers* v. *Leedham*, 49 Que. S. C. 33.

An action by a contractor against an owner for the price for which the defendant executed a deed of obligation in favor of the plaintiff is an action based upon a hypothec and not upon a lien. *Choquette* v. *Couture*, 17 Que. P. R. 480.

CIVIL CODE, 2013A.—"For the purposes of the privilege the laborer, workman, architect and builder rank as follows:—(1) The laborer; (2) The workman; (3) The architect; (4) The builder.

"2013B.—The right of preference or privilege upon the immovable exists as follows:—

"Without the registration of the claim, in favor of the debt due the laborer, workman and builder, during the whole time they are occupied at the work, or while such work lasts, as the case may be; and with registration provided it be registered within thirty days following the date upon which the building has become ready for the purpose for which it is intended.

"But such right of preference or privilege shall exist only for one year from the date of registration, unless a suit be taken in the interval or unless a longer delay for payment has been stipulated in the contract."

Decisions Under Article 2013B.

The obligation of the proprietor to pay the price of the work does not come into effect until after the execution of such works and their examination and acceptance by the architect on the terms and conditions of contract. *Mireault* v. *Gauthier*, 17 R. de J. 361.

The doctor's privilege for medical attendance during the last illness, though subject to registration within six months if not registered, takes priority over hypothecs previously registered. Tellier, Archibald and Bruneau, JJ., 14 R. de J. 136.

A workman who causes his claim to be registered on the immovable on which his work is performed in order to secure a privilege or hypothec under Art. 2013B, but neglects to bring suit within the delay prescribed in the article, is not bound to cause the registration to be cancelled at his expense. The owner of the immovable must put him in default (*en demeure*) to sign the discharge, attend to the cancelling and pay the cost. *Ryry* v. *Gariepy*, 36 Que. S. C. 238.

The laborer's lien and that of the furnisher of materials (article 2013 C. C. amended by 4 Edw. VII. c. 43), are distinct; they are acquired and kept valid by different means; the lien for furnishing materials, notably, as different from that of the laborer, is not liable to be set aside under the provisions of article 2013b C. C. The action provided in 2013b C. C. may be a personal action, nothing in the context indicating that it must be of any other kind to preserve the lien of the creditor of the laborer; there must be a judgment against the debtor with recourse reserved to maintain the lien. *Tremblay* v. *Simard*, (1909) D. R. 36 S. C. 398.

A house, even when leased and occupied by the lessee, does not "become ready for the use to which it is destined" so long as there is work to be finished, such as joining work and painting. The delay of 30 days for registering the builder's preference or privilege only begins to run from the completion of such work. *Letellier de St. Just* v. *Blanchette,* 21 Que. K. B. 1.

Where article 2013b provides that a builders' and workmen's privilege exists only for one year from the date of registration unless a suit be taken in the interval, the suit required is a hypothecary action to enforce the privilege and a personal action against the debtor does not suffice. The action to enforce a builders' privilege under this article is a personal hypothecary action if the property is still in the debtor's hands, or an action in declaration of hypothec if it has passed into the hands of third parties. *Demers* v. *Byrd,* (1912) 6 D. L. R. 807 (Quebec King's Bench), 41 Que. K. B. 330.

A building has not become fit for the use intended for it, according to the terms of this article, as long as any work in it is to be done, even if it was inhabited by its owner, who had installed in it a bar for his hotel. *Brunswick-Balke Collendar Co.* v. *Racette,* 49 Que. S. C. 50.

A laborer who has worked at the macadamizing of a public road cannot have a lien on that road, the latter being a part of the public domain. *Desrosiers* v. *Leedham,* 49 Que. S. C. 33.

Where a privilege both by the law as it previously existed and by the amending Act, is made to depend upon and date from its registration, the effects of the registration of such privilege after the coming into force of the amended statute are governed by the provisions thereof. Therefore, the prescription applicable to a builder's privilege registered after the coming into force of the amended statute, 59 Vict. (Q.) c. 42, is that of one year from the date of the registration.

In order to obtain the hypothecary privilege of a supplier of material under this article, the memorial or *bordereau* registered must state the cost of the materials furnished, apart from the cost of the work done.

The fact that subsequently to the registration of a builder's privilege, the person registering the same accepted notes for his claim from the debtor and agreed to have the same renewed for a term of three years, has not the effect of altering the conditions of

the privilege or prolonging its existence beyond the period fixed by law. Doherty, J., *City of Monreal* v. *Lafebvre,* (1898) R. J. Q. 14 S. C. 473. This judgment was confirmed in the Court of Queen's Bench in Appeal, and is reported, R. J. Q. 19 Q. B. 282. And the judgment of the Court of Queen's Bench in Appeal was confirmed by the Privy Council. Lord Macnaghten, who delivered the judgment, remarked that "their Lordships entirely concurred in the judgment of the Court of Queen's Bench delivered by Lacoste, C.J., who adopted the reasoning of the Superior Court." *La Banque d'Hochelaga* v. *Stevenson,* (1900) A. C. 600.

The thirty days provided for registry of the lien of a laborer, workman or contractor, are computed from the time when the construction of the building on which they have worked is ended, and not from the date on which it was first used. *Quintal* v. *Benard,* (1901) 20 S. C. 199.

See also *La Banque Jacques Cartier* v. *Picard,* (1900) Langelier, J., 18 S. C. 502.

The registration of a builder's privilege, for work done at the request of a person owning an immovable subject to a resolutory condition entitling the vendor to demand the dissolution of the sale by reason of failure to pay the price, ceases to have any effect after the vendor has taken back the property under the condition. *La Tour* v. *L'Heureux,* (1900) 16 Que. S. C. 485.

The words in this article concerning the privilege on immovable with registration "unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract," refer to an action by the creditor to recover his claim during the year, and not to anything relating to the validity of the privilege. *Waxman* v. *Girouard,* 24 Rev. Leg. 429.

A letter by a contractor to the proprietor notifying him that his work is terminated, in the absence of any proof to the contrary, will be considered as fixing the date upon which the building has become ready for the purpose for which it is intended, and in which the builder may register a privilege under this article. *Weiss* v. *Silverman,* (1918) 24 Rev. Leg. 204. (Reversed by Supreme Court of Canada).

The signing and delivery of a document by one entitled to a lien for material and labor, within the delay in which he had a lien on the property without registration under this article, by which he

renounces all legal privilege, is an absolute renunciation which extinguishes such privilege. *Weiss* v. *Silverman*, 58 Can. S. C. R. 363, 47 D. L. R. 161.

"2013C.—The preservation of the privilege is subject to the following conditions:—

"The laborer and workman must give notice in writing, or verbally before a witness, to the proprietor of the immovable, that they have not been paid for their work, at and for each term of payment, due to them."

"Such notice may be given by one of the employees in the name of all the other laborers or workmen who are not paid, but in such cases the notice must be in writing."

"The architect and builder shall likewise inform the proprietor of the immovable, or his agents, in writing, of the contracts which they have made with the chief contractor, within eight days from the signing of the same."

Decisions Under Article 2013C.

The right of privilege is a strict right resulting from the law, and whoever claims a privilege should scrupulously observe the formalities prescribed by the law creating it.

The workman who claims a lien for his wages should inform the owner of the estate that he has not been paid for his work "to and for each term of payment which is due him," and should give such notice at once on the expiration of the term; notice given six days after the expiration of the term, and when the owner had settled with his contractor is insufficient to preserve the lien of the workman. The knowledge the owner should have of the workman having been employed by his contractor cannot take the place of the notice required by law. *Wells* v. *Newman*, (1897) De Lorimier, J., 12 S. C. 216.

In the matter of a lien the prescribed formalities are essential, and should be strictly observed; a builder desiring to preserve his lien as such should give the owner of the immovable on which he wishes to have a lien a notice in writing of the contract within eight days from the date on which it was signed pursuant to the

provisions of article 2013a C. C. *Moreau* v. *Guimont*, 8 Que. P. R. 424 (Loranger, J.).

A promise of sale of an immovable with delivery and actual possession is equivalent to a sale thereof, and the notice to preserve a mechanics' lien, articles 2013c and 2103, may be properly given to the promisor—buyer; such notices are not required under pain of nullity, and he who has the right to give them may renounce it and the recognition which he gives, in a petition to the court, of the registration of such lien, is equivalent thereto. The disclaimer made by a vendor of immovable property of a lien registered against it, under reserve of a right to contest it, does not liberate him from the obligation of guaranteeing his purchaser against it. *Lavoie* v. *Desrosiers*, (1914) 46 Que. S. C. 89.

An action for workmen's privilege is of its nature hypothecary, and is within the jurisdiction of the Superior Court, whatever the amount claimed. *Pontini* v. *Lacavalier*, (1915) 16 Que P. R. 371.

Workmen acquire a privilege on the immovable on which their work is performed as regards the increased value thus given to it, in a two-fold manner; (a) without registration for the period of the duration of the work, or (b) by registration within thirty days of the completion of the work for one year only, unless a suit be brought in the interval to recover upon it. To secure such a privilege the notices required by article 2013c must be given, otherwise it does not accrue. When, therefore, a contractor pays wages to laborers hired by a sub-contractor, for which he is not liable and for which they have not secured a privilege, as aforesaid, no subrogation takes place and he cannot set up a claim for the amount against the sub-contractor. *Harris Manufacturing Co.* v. *McGovern*, S. C. 340 C. R.

The lien on immovables under article 2013 *et seq.* exists for the benefit of workmen in the service of sub-contractors though no notice of the sub-contract has been given to the owner. It is sufficient if there is given to the latter a verbal notice before a witness that the workmen have not been paid for each term of payment due them. Therefore, they can register their claims in the manner and for the purposes provided for by article 2013c. *Rousseau* v. *Toupin*, Q. R. 32 S. C. 228.

The notice given by a sub-contractor after the expiration of the delay of eight days prescribed by 2013c can not give rise to the privilege foreseen by this article.

The architect charged with the overseeing of the construction of a building is not the agent of the proprietor to receive service of the prescribed notice.

Inability of a contractor to pay his workmen, avowed before them and the owner, and the promise of the latter to pay them as soon as the works are finished, is a verbal notice sufficient to permit the workmen to register a lien upon the increased value given to the immovable by their labor. *Laflamme* v. *Laplante*, 51 Que. S. C. 38.

The formalities prescribed are essential and of strict right. *Moreau* v. *Guimont*, 8 Q. P. R. 424.

The want of notice to the owner within 3 days after the registration of the architect's lien does not affect the validity of this registration because no provision in the law meets the case in which a notice is not given. *Brunswick Balke Collender Co.* v. *Racette*, 49 Que. S. C. 50.

Article 2013D.

"**2013**D. — In order to meet the privileged claims of the laborer and workman, the proprietor of the immovable may retain an amount equal to that which he has paid or will be called upon to pay, according to the notices he has received, so long as such claims remain unpaid."

Article 2013E.

"**2013**E.—In the event of a difference of opinion between the creditor and the debtor, with respect to the amount due, the creditor shall, without delay, inform the proprietor of the immovable, by means of a written notice, which shall also mention the name of the creditor, the name of the debtor, the amount claimed, and the nature of the claim."

"The proprietor then retains the amount in dispute until notified of an amicable settlement or a judicial decision."

Article 2013F.

"**2013**F.—The sale to a third party by the proprietor of the immovable or his agents, or the payment of the whole or a portion

of the contract price, cannot in any way affect the claims of persons who have a privilege under Article 2013, and who have complied with the requirements of Articles 2013A, 2013B 2013C and 2103."

Article 2013G.

"2013G.—The supplier of materials shall, before delivery of the materials, give notice in writing to the proprietor of the immovable, of contracts made by him for the delivery of materials, and mention the cost thereof, and the immovable for which they are intended."

Decisions Under Article 2013G.

The person who furnishes building materials only acquires a lien on the property for which they are intended by giving a notice to the owner, before delivering them, in which he sets out the contract for the materials, their cost and their intended designation. *Carriere* v. *Sigouin,* Q. R. 33 S. C. 423.

The privilege granted to the supplier of materials by article 2013 of the Civil Code as replaced by 59 Vict. c. 42, s. 2, and amended by 4 Edw. VII. c. 43, is not distinguishable from the hypothecary privilege given by article 2013b and that consequently the action of the supplier in declaration of privilege cannot be maintained, if it be not alleged and proved that notice has been given to the owner of the immovable pursuant to article 2013g C. C., of the contract for the materials and before delivery. *Carriere* v. *Milot,* 15 R. de J. 89.

The lien of the person who supplies materials for an immovable of which they become part only arises on observance of the necessary condition of giving notice to the owner before delivery specifying the contracts under which they are supplied, their cost and describing the immovable for which they are intended. *Carriere* v. *Sigouin,* Q. R. 18 K. B. 176, affirming 33 S. C. 423.

The materialman who registers his lien must give notice of the registration of the owner of the property subject to the lien within three days of the registration on pain of absolute nullity. *Duncan* v. *Brunelle,* 10 Q. P. R. 268.

Article 2013g C. C. which obliges the materialman, for the preservation of his lien, to give notice of it to the owner of the

property on which the materials are used, does not apply where the materialman deals directly with the owner of the property.

The materialman is not bound to give notice to one who at the time of the delivery of the materials had made to a third party a formal agreement for sale, before the completion of the work. *Duncan* v. *Brunelle*, 10 Q. P. R. 268.

The person who furnishes materials for construction of a building acquires a lien for his debt only on the essential condition of giving to the owner of the land, before delivery, notice of the contract to furnish containing a statement of the cost and specifying the immovable for which they are intended. *W. Rutherford Sons Company* v. *Racicot*, Q. R. 19 K. B. 428. Cf. *Carriere* v. *Sigouin*, Q. R. 18 K. B. 176.

The promise of sale of the land by the owner to the contractor to whom the materials have been sold and delivered which is not registered, is of no effect as against third parties in whatever relates to the creation of the lien. *W. Rutherford & Sons Co.* v. *Racicot*, Q. R. 19 K. B. 428.

The notice required by article 2013g, 59 Vict. c. 46, s. 2, to give to the person furnishing materials for a building a lien under the first paragraph of article 2013, and the hypothec provided for by article 2013*l* is necessary whether he deals directly with the owner or by sub-contract from the contractor. *Racicot* v. *Wm. Rutherford & Sons Co.*, Q. R. 36 S. C. 97 Ct. Rev.

Where a privilege, both by the pre-existing law and by the statute amending the same, is made to depend upon and to date from its registration, the effects of the registration of such privilege effected only after the coming into force of the amending statute are governed, as to the duration of the privilege and the time by which it is prescribed, by the provisions of the amending Act; consequently the prescription applicable to a builder's privilege which was only registered after the coming into force of the amending Act, 59 Vict. (Q) c. 42, is that of one year from the date of the registration, although the work for which the privilege was sought was done before the amending Act came into force.

In order to obtain the hypothecary privilege of a supplier of materials under article 2013 (1) of the Code, the formalities prescribed by law, as to notice to the proprietor, must be complied with, and the memorial or *bordereau* mentioned in article 2013

C. C., must state the cost of the materials furnished. *La Banque d'Hochelaga* v. *Stevenson*, 9 Que. Q. B. 282.

Held, affirming the above decision, on appeal to the Judicial Committee of the Privy Council, that under the Quebec Civil Code, as amended by 59 Vict. c. 42, a builder's privilege is limited to one year from the date of registration thereof; and with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under article 2013g and registered under article 2103, and lapses unless the prescribed legal proceedings are taken within three months from the date of notice. *La Banque d'Hochelaga* v. *Stevenson*, R. J. Q. 9 Q. B. 282, (1900) A. C. 600.

An action in which a materialman claims from the contractor the price of materials furnished by him, and asks against the owner of the land upon which buildings have been erected with the plaintiff's materials that the land shall be declared to be charged with the amount of the plaintiff's claim unless the owner prefers to pay the price of the materials, will be dismissed upon demurrer by the owner if it does not appear that the plaintiff has begun his action within the three months following the notice mentioned in article 2013g, C. C. *McLaren* v. *Loyer*, (1901) 3 Q. P. R. 60, 20 C. L. T. 277.

See also *Paquette* v. *Mayer*, (1900) 18 S. C. 563, cited *ante*, under art. 2013, and *Montmorency Cotton Mills Co.* v. *Gignac*, (1901) 10 Que. Q .B. 158, cited *ante*, under article 2013. See also *Charpenter* v. *Lapointe*, (1901) 7 R. de J. 92 (Pagnuelo, J.), and *Harris* v. *Charbonneau*, (1901) 7 R. de J. 119, R. J. Q. 25 S. C. 180 (Pagnuelo, J.).

The notice required by this article is essential to the validity of the lien.

An architect not specially authorized has no power to receive from a materialman the written notice which should be given to the owner to create a lien, especially if the architect is at the same time one of the contractors on the building. *Duncan Company* v. *Desjardins*, 51 Que. S. C. 71.

Builders and furnishers of material cannot acquire any lien upon an immovable possessed under agreement for sale except by giving notice to the owner of the immovable in conformity with articles; this notice is an essential condition of the lien, which

can only be claimed by following strictly the formalities imposed by law. *Kalmanovitch* v. *Frank*, (1917) 52 Que. S. C. 171.

Under articles 2013-2013*l*, no delay is fixed for registration of the privilege of a supplier of materials, and the latter has no priority in respect of his hypothecary privilege over a purchaser of the land who registered his title prior to the registration of the privilege. *Emard* v. *Gauthier*, (1916) 29 D. L. R. 315, 49 Que. S. C. 413.

Where a proprietor cancels the contract made with a contractor and pursues the work himself and employs the same workmen, he is to be considered as building for himself and as being substituted for the contractor. Under these circumstances one of the workmen may register a lien upon the property for work done and for the supply of materials without giving the notice required by 2013c and 2013g, the notice provided for under 2013 being sufficient. *Temple Baptist Church* v. *Perras*, (1915) 48 Que. S. C. 84.

Article 2013H.

"**2013H.**—In order to meet the privileged claims of the *suppliers of materials*, the proprietor of the immovable retains, on the contract price, an amount equal to that mentioned in the notices he has received."

Article 2013I.

"**2013I.**—The notices mentioned in article 2013G have the effect of an attachment by garnishment on the contract price.

"Within the three months following the notice given in accordance with article 2013G, the interested parties must take legal proceedings to have the debtor condemned and the seizure declared valid, otherwise the latter lapses; and, to such suit, the proprietor of the immovable must be made a party."

See *McLaren* v. *Villeneuve*, 11 Q. B. 131.

Where a garnishment becomes void owing to the creditor failing to take action within the three months following the notice, the owner is free from the obligation imposed on him by article 2013h, of retaining, on the price of the building contract, an

amount equal to that of the privileged claim. *Noiseaux* v. *La Cité de Lachine*, (1918) 24 Rev. Leg. 491.

The builder is not subject to paragraph 2 of this article. *Letellier de St. Just* v. *Blanchette*, 21 Que. K. B. 1.

Article 2013J.

"**2013J.**—In the event of the proprietor of the immovable erecting the building himself without the intermediary of any contractor, the notices mentioned in article 2013G may be given to the person or persons who lend or may lend money to the person building, and thereupon the latter shall, *mutatis mutandis*, be subject to the provisions of the preceding articles.

Article 2013K.

"**2013K.**—No transfer of any portion of the contract price or of the amount borrowed, as the case may be, either before or during the execution of the work, can be set up against the said suppliers of materials, nor can any payment, exceeding the cost of the work done, according to a certificate of the architect or superintendent of the works, affect their rights."

Decisions Under Article 2013K.

A valid privilege may be obtained by registration of a claim for building materials furnished, although the person to whom they were furnished was in possession of the land only under an unregistered conditional promise of sale, and the registration of the privilege was made only with such formalities as would be sufficient if he had been the absolute owner; but upon violation of the conditions and the determination of the right of the conditional purchaser to obtain a title, the privilege in question, as well as all acts depending upon a right of property in the conditional purchaser, becomes null and void; and therefore the property cannot be seized and brought to sale under a judgment against the latter, to which the conditional vendor was not a party. *Metivier* v. *Wand*, (1898) Q. R. 13 S. C. 445. (Archibald, J.).

Article 2013L.

"2013L.—On notice given to the proprietor in virtue of article 2013G, and registered according to article 2013, the suppliers of materials shall have a hypothecary privilege which shall rank after the hypothecs previously registered and the privileges created by this Act."

Decisions Under Article 2013L.

Although the right of suppliers of materials is called in article 2013*l* in the French version "un droit d'hypotheque," and in the English version "a hypothecary privilege," the right is nevertheless of the nature of a privilege and not of the nature of a hypothec, and all suppliers for the same building who have availed themselves of the privileges of the article and registered their claims, rank concurrently. *Jamieson* v. *Charbonneau,* 17 Que. S. C. 514. (Archibald, J.).

Where a contractor's lien has been registered by the husband of the claimant, duly authorized to this effect, it fulfils the requirements of the law that the lien shall be registered by the claimant himself. *Camirand* v. *Durand,* 10 Q. P. R. 174.

See also *City of Montreal* v. *Lefebvre,* (1898) R. J. Q. 14 S. C. 473 (Doherty, J.), and reference to decision of that case, *sub nom. La Banque d'Hochelaga* v. *Stevenson,* under article 2013g.

See also *MacLaren & Villeneuve,* (1900) R. J. Q. 11 Q. B. 131, *contra* Court of Review, 1889; *Lalonde* v. *LaBelle,* R. J. Q. 16 S. C. 573, cited *ante,* under article 2013.

On the subject of *payment* of workmen and in connection with it, reference might be had to articles 1697A to 1697D of the Civil Code, both inclusive. These four articles refer to the payment of workmen employed by builders or contractors and the manner in which they may secure their claim by giving notices to the proprietor of the land.

No delay is stated within which the supplier of materials must register his claim against a building, when he delivers the material directly to the proprietor. In the event of the sale of the building, and the registration of his deed by the purchaser before registration by the supplier of materials of his claim, the latter loses his privilege. *Emard* v. *Gauthier,* (1913) 20 R. de J. 138.

Registration of Privilege of Builders, Etc.

Civil Code 2103.

"**2103.**—The privilege of the persons mentioned in article 2013 dates, in the cases mentioned in the first clause of article 2013B, only from the registration, within the proper delay, at the registry office of the division in which is situated the immovable affected by the inscription, of a notice or memorial drawn up according to form A, with a deposition of the creditor, sworn to before a justice of the peace or a commissioner of the Superior Court, setting forth the nature and amount of the claim, and describing the immovable so affected."

"(2) In registering such memorial, it is sufficient to mention, opposite the official number of the *cadastre* which describes the immovable, if the *cadastre* be deposited, or opposite the title of the registered deed, if the *cadastre* be not yet deposited, the name of the claimant and the amount due at the time the memorial is filed."

"(3) The memorial shall be made out in duplicate, one copy of which shall remain in the archives of the registry office, and the other be delivered to the creditor with the registrar's certificate thereon."

"(4) The creditor shall, within three days from the registration of the memorial, give a written notice to the proprietor of the immovable, or to his agents, if he cannot be found."

Decisions Under Articles 2103 and 2168.

See *Doutre* v. *Greene*, cited under article 2013.

In Quebec, article 2168 of the Civil Code must be strictly complied with in respect to the description of an "immovable" in the notice for registration of a workman's "privilege." A description as part of lot 4101 of the *cadastre* of the Parish of Montreal, omitting the conterminous properties, does not comply with said article, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is part of a certain official number upon the plan and in the

book of reference, and mentioning who is the owner and the properties conterminous thereto. Such notice, therefore, did not create any privilege. *Therien* v. *Henault*, (1902) 21 S. C. 452.

A builder is without privilege on the proceeds of real estate, if he has not complied with the formalities prescribed by 4 Vict. c. 30, ss. 31 and 32 (C. S. L. C. 352-3), requiring a *procès-verbal* to be made before the work is begun; establishing the state of the premises in regard to the work about to be made; requiring also a second *procès-verbal* within six months after the completion of the work, establishing the increased value of the premises; requiring also that the second *procès-verbal*, establishing the acceptance of the work, be registered within thirty days from the date of such second *procès-verbal*, in order to secure such privilege: Berthelot, J., 1861, *Clapin* v. *Nagle*, 6 L. C. J. 196, 10 R. J. R. Q. 271, R. J. Q. 1 C. B. 332.

The person who has advanced moneys for the construction of a division wall between him and his neighbor cannot claim a privilege when the neighboring property is sold by the sheriff as against the hypothecary creditors of said land, if he has not observed the formalities required by the registry ordinance, C S. L. C. c. 37, s. 26, s.-s. 4, even though the value of the land has been augmented by the construction of the wall. 1863, Taschereau, J., *Stillings* v. *McGillis*, 14 L. C. R. 129, 12 R. J. R. Q. 342, R. J. Q. 1 Q. B. 332.

The possessor in good faith who has put up buildings on the land of another is not held, in order to be paid for his work, to establish that he has complied with the requirements of articles 2013 and 2103 of the Civil Code. These articles apply only to the builder or other workmen who put up buildings for the owner of the land under a contract with the proprietor. 1904, Gagne, J., *Chinic Hardware Company* v. *Laurent*, 1 R. de J. 278; 1892, Supr. Court of Canada, *Dufresne & Prefontaine*, 21 S. C. R. 607, 16 L. N. 48. See also the case of *Daniel* v. *Macduff*, cited under article 2013 of the Civil Code.

At different times in recent years essays have appeared in law periodicals on this subject in the Province of Quebec, and among these the more notable, perhaps, are those written by Mr. Baker, Advocate, 1 Rev. Leg. N. S., page 281, by Mr. Belanger, Notary, in the same volume, page 376, by Mr. Baudion, Notary, 6 Rev. Leg. N. S., 273, and by Mr. Lafontaine, K.C., in the second volume of *La Thémis*, page 161.

The whole subject has been treated by Mr. Pelissier, K.C., of the Quebec Bar in a short treatise entitled "*Architects et Entrepreneurs.*"

The law as stated in articles 2013 to 2013k has been in force since January, 1894. It is said to be doubtful whether the large class of workmen and builders, whom it was intended to benefit, derive any substantial advantage from it. Some legal writers in Quebec do not regard this law as beneficial, and point out that in a country like ours, still comparatively new and requiring capital from abroad, everything that diminishes the security offered to an intending lender necessarily makes it more difficult for the proprietor of land to borrow. He may have thousands of dollars of land value to offer, but, as the lender will naturally require a first mortgage, applications for loans will frequently be refused because the capitalist sometimes considers that a first mortgage cannot secure him with certainty, since builders, contractors, architects and workmen will be privileged for their claims in preference to his.

The difficulty is frequently overcome by waiting until thirty days after the completion of the buildings, but this delay is in itself an objection, hampers business and delays loans.

It is claimed that this legislation has sometimes stood in the way of loans on vacant real estate, and thus prevented building operations and, therefore, there is a difference of opinion in the Province of Quebec in respect to the beneficial effect of the present law in its relation to builders, contractors, architects and workmen. In the other provinces of Canada, while there was formerly considerable difference of opinion as to the advantage of mechanics' lien legislation, there is to-day, as a result of important amendments to the original legislation, general satisfaction with the present legislation, which is regarded on the whole as decidedly beneficial to the classes for whom it was specially intended. See observations in Chapter I., at p. 8.

A lien of a materialman registered after the coming into force of the amending Act is governed by the latter Act, although the materials for which the lien is sought were delivered before the Act came into force. *Cantin* v. *Chevalier*, 52 Que. S. C. 97.

Lien of Workmen on Movable Property.

The workman by the law of Quebec has a secured right of retention in the thing which he has improved by his work, or a right to be paid by privilege out of the price. The Civil Code contains several articles dealing with these rights.

In some cases there is more than a right of retention or of privilege. For instance, a right of ownership is recognized in the workman who has been provided with materials by his employer in some cases and these cases, as stated in article 429 of the Code, are entirely subordinate to the principles of natural equity. The Code then proceeds to enumerate a set of rules which are obligatory in the cases where they apply, and serve as examples for cases not provided for according to circumstances. The first of these rules is contained in article 430 of the Code, which reads as follows:—

"**430.**—When two things belonging to different owners have been united so as to form a whole, although they are separable and one can subsist without the other, the whole belongs to the owner of the thing which forms the principal part, subject to the obligation of paying the value of the other thing, to him to whom it belonged."

And the commentators of the corresponding article of the Code Napoléon lay it down that *a fortiori* the principle of article 430 is to apply when the things are not separable without inconvenience or cannot be separated at all.

The pulpwood contractor who has employed sub-contractors, and who has been obliged to cart the blocks from the forest to the river on account of the failure of one of his sub-contractors, cannot oppose his alleged privilege for having hauled these blocks or for having kept the common pledge to the privilege of the woodcutter for having made the blocks.

Under these circumstances the contractor would not even have any privilege for he could only fulfil his contract with the company which has employed him.

In any event if one of the contractors had a privilege he could not exercise it by contesting the seizure conservators of the woodcutters and demanding main levee from them, but only by producing an opposition *afin de conserver* on the proceeds of the sale

of an execution of the S. C. of the wood-cutter. *Marinier* v. *Therrien et al.*, 12 R. de J. 488 (Taschereau, J.).

Notice of registration of a lien is for the proprietor only, and he may waive it. Though a lien registered upon a property has been transferred as collateral security, the right of action of the transferor still exists and can be continued in his name. *Lavoie* v. *Derosiers*, (1913) 46 Que. S. C. 405.

An action by a contractor against an owner for the price for which the defendant executed a deed of obligation in favor of the plaintiff, is an action based upon a hypothec and not upon a lien; and if no document is produced showing that a lien was registered against the immovable, and that notice of the lien was given to the owner, the judgment will be for dismissal only reserving the rights of the plaintiff. *Choquette* v. *Couture*, 17 Que. P. R. 480.

The want of notice to the owner within three days after the registration of an architect's lien does not affect the validity of this registration because no provision in the law meets the case in which a notice is not given. *Brunswick Balke Collender Co.* v. *Racette*, (1916) 49 Que. S. C. 50.

"**431.**—That part is reputed to be the principal one to which the other has been united only for the use, ornament or completion of the former."

The text of the Article 567 of the Code Napoléon is similar to article 431 of the Civil Code of Quebec, and the French commentators agree that where a person has written, printed, painted or engraved on paper, linen or other material not belonging to him, the proprietor of the material would only have a right to his material or to damages where there were any.

The next rule depends on the relative value of the things united together.

"**432.**—However, when the thing united is much more valuable than the principal thing, and has been employed without the knowledge of its owner, he may require that the thing so united be separated in order to be returned to him, although the thing to which it has been joined may thereby suffer some injury."

Article 433 deals with a case where it is impossible to say which is principal or which is accessory.

"**433.**—If two things united so as to form a whole, one cannot be considered as the accessory of the other, the more valuable, or, if the values be nearly equal, the more considerable in bulk is deemed to be the principal."

"**434.**—If an artisan or any other person have made use of any material which did not belong to him to form a thing of a new description, whether the material can resume its previous form or not, he who was the owner of it has a right to demand the thing so formed, on paying the price of the workmanship."

Decisions Under Article 434.

Workmen and laborers in a quarry have no privilege on the tools serving in the work nor on a stone taken out of the quarry and cut, especially when the tools and this stone did not belong to the man who employed the workman: 1878, Court of Review, *Prevost* v. *Wilson*, 22 L. C. J. 70, 1 L. N. 232. (The other decisions under this article relate to the cutting of wood or trees on land of another, without authority, and do not come within the purposes of this compilation.)

Article 440 of the Code.

"**440.**—In all cases where a proprietor whose material has been employed without his consent, to make a thing of a different description, may claim the proprietorship of such thing, he has the choice of demanding the restitution of his material in the same kind, quantity, weight, measure and quality, or its value."

Article 441 of the Code.

"**441.**—Whoever is bound to give back a movable object upon which he has made improvements or additions for which he is entitled to be reimbursed, may retain such object until he has been so reimbursed, without prejudice to his personal remedy."

The workman, who has made improvements to a movable thing for which improvements he has a right to be reimbursed, may retain

the object until he has been reimbursed, and he has in the thing a right of pledge. The person who so retains a thing for improvements made by him, as pledgee, opposes the sale of the thing retained or pledged: *Belleau* v. *Pitou*, (1887) 13 Q. L. R. 337, 11 L. N. 86 (Cassault, J.).

The printer has a lien on manuscript given him to be printed, for the costs of the printing. *Dussault* v. *Fortin*, (1893) R. J. Q., 4 S. C. 304 (Andrews, J.).

"**1993.**—Privileges may be upon the whole of the movable property, or upon certain movable property only."

"**1994.**—The claims which carry a privilege upon movable property are the following, and where several of them come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom."

"1. Law costs and all expenses incurred in the interest of the mass of the creditors;

"2. Tithes;

"3. The claims of the vendor;

"4. The claims of creditors who have a right of pledge or of retention;

"5. Funeral expenses;

"6. The expenses of the last illness;

"7. Municipal taxes;

"8. The claim of the lessor in accordance with article 2005;

"8a. The claim of the owner of a thing lent, leased, pledged or stolen, in accordance with article 2005A;

"9. Servants' wages and those of employees of railway companies engaged in manual labor, and sums due for supplies of provisions;

"10. The claims of the Crown against persons accountable for its moneys;

"The privileges specified under the numbers 5, 6, 7, 9 and 10 extend to all the movable property of the debtor, the others are special, and affect only some particular objects."

Article 1994 C. C. does not have the effect of making the owner of the wood a personal debtor of the lumberman who has worked

in the service of another person and that the condemnation of the appellant as such personal debtor jointly and severally with the sub-contractor, plaintiff's employee, must be set aside. *Laurentide Paper Co.* v. *Pompre,* 15 R. de J. 278.

In the case of the privilege given by article 1994 C. C. the woodcutter who works for a contractor cannot issue a writ of *saisie conservatoire* until the owner of the wood has received the prescribed notice.

As this privilege has no legal existence before the proprietor of the wood has received the prescribed notice, the seizure of the wood is premature, illegal and void. Carrol, J., *Houle* v. *Couture et al.,* 8 Q. P. R. 398.

The persons mentioned in article 1994 C. C. are not confined to those whose remuneration is fixed according to the time they work, but also includes all persons who engage to cut wood for so much a cord. *St. Onge* v. *Ross,* 7 Q. P. R. 108 (Tait, A.C.J.).

Article 2001 of the Code.

"**2001.**—Creditors having a right of pledge or of retention rank according to the nature of their pledge or of their claim.

"The following is the order among them:—

"Carriers;

"Hotel keepers;

"Mandataries or consignees;

"Borrowers in loan for use;

"Depositaries;

"Pledgees;

"Workmen upon things repaired by them, and persons having a privilege in virtue of article 1994 C.;

"Purchasers against whom the right of redemption is exercised, for the reimbursement of the price and the moneys laid out upon the property;

"This privilege cannot, however, be exercised, unless the right is still subsisting, or could have been claimed at the time of the seizure, if the things have been sold."

See *The Inverness Ry.* v. *Canadian Lines,* 29 S. C. 151.

The builder of a vessel to be delivered complete is not a "*dernier equipeur.*" within the meaning of article 931 C. C. P. with

respect to the price to be paid for such vessel, but such builder is protected by the builder's privilege to receive payment of the price.

The builder's privilege of retention until payment of the price is lost by voluntary delivery. *Hayden* v. *Meunier*, 13 R. de J. 149. (Archibald, J.).

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4 EDW. VII. C. 43.

AN ACT TO AMEND THE CIVIL CODE, RESPECTING THE PRIVILEGES OF ARCHITECTS, BUILDERS, WORKMEN AND SUPPLIERS OF MATERIALS.

(*Assented to 2nd June*, 1904.)

HIS MAJESTY, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:—

1. Article 2013 of the Civil Code, as replaced by the Act 59 Victoria, chapter 42, section 2, is amended:—

(a) By striking out the word "and" after the word "architect" in the first and sixth lines, and

(b) By adding, after the word "builder," in the first and sixth lines, the words "and the supplier of materials."

2. Article 2013a of the said Code, as enacted by section 2 of the said act, is amended by adding thereto the following paragraph:—

"5. The supplier of materials."

By Act of the Quebec Legislature (7 Geo. V. c. 52, s. 1), paragraph 7 of Article 2009 was replaced by the following:—

7. The claim of the workman, supplier of materials, builder and architect, subject to the provisions of Article 2013 and following:

By section 2, articles 2013, 2013*a* to 2013*l* inclusive of the Civil Code, as enacted, replaced or amended, as the case may be, by Acts of 29 Vict. c. 42, and 4 Edw. VII. c. 43, are repealed. By section 3, the following articles are inserted in the Civil Code in the place and stead of the articles repealed by section 2:—

"2013.—The workman, supplier of materials, builder and architect have a privilege and a right of preference over all other creditors on the immovable, but only upon the additional value given to such immovable by the work done or the materials.

"2013A.—The word "workman" includes the artisan, the laborer and generally every one who makes his living by manual labor. The words "supplier of materials" include the supplier not only of raw materials but also of every manufactured object which enters into any construction. The word "builder" includes both contractor and sub-contractor. The words "end of the work" mean the date at which the construction is ready for the use for which it is intended.

"2013B.—In case the proceeds are insufficient to pay all the claims, the additional value given to the property is established by a relative valuation ordered by a judge, upon summary petition presented by any interested party, after such notice as the judge deems necessary.

The judge appoints, in his discretion, one or three experts, who proceed with the valuation, and make their return within the delay and according to the formalities ordered. On the question of valuation, their decision, after homologation by the judge, is final and unappealable.

"2013C.—Such privileges rank as follows,—1. The workman; 2. The supplier of materials; 3. The builder; 4. The architect.

"2013D.—The workman has a privilege, by reason of the work he has done on an immovable, for arrears up to twenty days, whether he was engaged by the proprietor or by a contractor. No formality is necessary to secure this privilege. Such privilege shall subsist for thirty days after the end of the work, and need not be registered. But the privilege is extinguished on failure of the workman to sue his debtor within such delay, and to bring the proprietor into the case, as well as the registrar of the division in which the pro-

perty is situated, in order to give notice of such privilege to the latter, who must make note of the suit in the index of immovables. During the whole period and up to the end of the work, the proprietor is entitled to retain, on the contract price, an amount sufficient to pay the privileged claims. Any amount fixed by the sworn certificate of the architect or engineer in charge of the work shall be deemed sufficient, and, failing such architect or engineer, a like certificate may be given by a licensed architect or a duly qualified engineer of this Province, who may be agreed upon by the interested parties, or, failing such agreement, appointed by a judge of the Superior Court. The builder may not exact any payment on the contract price before he furnishes to the proprietor a statement, under his signature, of all amounts due by him for labor and materials. Several workmen may join in one action, the costs of which shall be those of a personal action for the amount claimed.

2013E. The supplier of materials has a privilege on the immovable in the construction of which the materials supplied to the proprietor or builder have been used, or for the construction of which they have been specially prepared. Such privilege, however, shall take effect only upon the registration of a notice, given to the proprietor or his representative, informing him of the nature and costs of the materials to be supplied, as well as the cadastral number of the immovable property affected, and shall apply only to those furnished, or those specially prepared and not delivered, for the immovable in question, after receipt of such notice by the proprietor, and its registration. In order to meet the privileged claims of the supplier of materials, the proprietor of the immovable is entitled to retain on the contract price an amount equal to that mentioned in the notices he has received. Such privilege is extinguished on failure of the supplier of materials to sue his debtor within thirty days after the end of the work, with the same formalities as those prescribed for the claim of the workman.

The supplier of materials is also entitled, in case of the insolvency of the proprietor or builder, or in case of failure to make payment at the periods agreed upon, to revendicate the materials he has supplied, but which have not yet been incorporated into the building.

2013F. The builder, or the architect, has a privilege on the immovable for the work he has done as such, provided that before the expiration of thirty days after the end of the work, he registers by memorial, at the registry office of the division in which the property is situated, a statement of his claim. Notice of such registration must be given, within the same delay, to the proprietor. Such privilege is extinguished after six months following the date of the end of the work, unless the creditor takes an action against the proprietor to preserve it. In such action, the registrar must be called into the case in order to give him notice of such action, and to cause him to note the same in his index of immovables.

In the case where the builder has had the work done, either wholly or in part, by sub-contract, if the sub-contractor has notified the proprietor of his sub-contract, such sub-contractor shall have a privilege upon the immovable for all the work done after such notification, provided that before the expiration of thirty days after the end of the work he registers a statement of his claim. Such privilege is subject to the same formalities as that of the builder or architect, in so far as concerns its creation and extinction. The proprietor, in case the sub-contractor has notified him of his sub-contract, is entitled to retain, on the contract price, an amount sufficient to meet the privileged claim of the sub-contractor; and any amount fixed by a certificate given in compliance with the formalities contained in article 3013*d* shall be deemed sufficient.

By section 4 of the Act, article 2103 is amended: (a) By repealing the first paragraph thereof, and the form A mentioned therein, and by replacing the said first paragraph thereof by the following:—

2103 I. The privilege of every person, except the workman, mentioned in article 2013, is created and preserved by registration

within the proper delay at the registry office of the division in which the immovable is situated, of a notice or memorial, drawn up in the form of an affidavit of the creditor or his representative, sworn to before a justice of the peace, a commissioner of the Superior Court, or a notary, setting forth the name, occupation and residence of the creditor, the nature and amount of his claim, and the cadastral number of the immovable so affected;

(b) By replacing paragraph 4 thereof by the following:—

4. After the expiration of six months from the date of registration of any privileged claim or from the date of the end of the work, whichever be the latest, without an action having been taken to preserve it, any interested party may cause the registrar to radiate such claim by filing with him a written application to that effect, supported by an affidavit of the expiry of such delay, and served on the priviliged creditor or his representative not later than eight days prior to such filing.

5. In the event of an action having been taken, the registrar is bound to radiate the registration of the claim upon the filing with him of a judgment dismissing the action, or other order of the Court, ordering him to do so, or of a certificate from the prothonotary establishing that the action has been discontinued.

By section 5 of the Act, it is enacted that said Act shall not affect privileges legally acquired under the articles of the Civil Code repealed by section 2. Such privileges legally acquired, shall remain subject to the same laws until they are extinguished.

By Act 4 Geo. V. c. 64, s. 1, article 1994*d*, was inserted in the Civil Code, in the following terms:—

1994D. Workmen who have worked for persons giving theatrical or other profit — making exhibitions, including circuses, shall have a privilege upon things used for the purposes of such exhibitions, above mentioned, and which belong to such persons, for thirty days' salary due and unpaid.

By Act 7 Geo. V. c. 76, article 1994 of the Civil Code was amended by replacing paragraph 9 thereof with the following:—

9. Servants' wages, and those of employees of railway companies engaged in manual labor, sums due under article 7340 of Que-

bec Revised Statutes 1909, and sums due for the supplies of provisions. (Article 7340 Q. R. S. 1909, deals with claims of persons injured).

By Act 4 Geo. V. c. 64, article 2001 of the Civil Code, as replaced by 60 Vict. c. 50, s. 34, is amended by inserting therein, after the words: Workmen, upon things repaired by them, and persons having a privilege in virtue of article 1994*c*, in the 11th and 12th lines thereof, the words: "or 1994*d*."

SASKATCHEWAN REVISED STATUTES 1909.

CHAPTER 150.

AN ACT RESPECTING THE LIENS OF MECHANICS, WAGE-EARNERS AND OTHERS.

SHORT TITLE.

1. Short title.—This Act may be cited as "The Mechanics' Lien Act." 1907, c. 21, s. 1.

INTERPRETATION.

2. Interpretation.—In this Act unless the context otherwise requires the expression:

1. "**Contractor.**"—"Contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or placing or furnishing materials for any of the purposes mentioned in this Act;

2. "**Sub-contractor.**"—"Sub-contractor" means a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid but contracting with or employed by a contractor or under him by another sub-contractor;

3. "**Owner.**"—"Owner" extends to and includes any person, firm, association, body corporate or politic having any interest or estate in the lands upon or in respect of which the work or service is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work or service is performed or materials are placed or furnished and all persons claiming under him or them whose rights are acquired after the work or

service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished;

4. "**Person.**"—"Person" extends to and includes a body corporate or politic, a firm, a partnership or association;

5. "**Material.**"—"Material" or "materials" includes every kind of movable property;

6. "**Wages.**"—"Wages" means money earned by a laborer for work done whether by time or as piece work;

7. "**Court.**"—"Court" means the District Court of the judicial district wherein the property in respect of which the lien is claimed is situated;

8. "**Judge.**"—"Judge" means a judge of the District Court;

9. "**Clerk of the court.**"—"Clerk of the court" means the clerk of the District Court;

10. "**Registrar.**" — "Registrar" means the registrar of land titles for the land registration district within which the property in respect of which the lien is claimed, is situated. 1907, c. 21, s. 2.

As to definition of "owner," see *Independent Lumber Co.* v. *Bocz*, (1911) 4 Sask. L. R. 103, 16 W. L. R. 316.

A mechanics' lien can only attach upon the estate or interest of the person at whose request and upon whose behalf and for whose direct benefit the work is done; a lien which appears to be for work done at the instance of other persons, without indicating that the work was done for the "owner" of the property to be charged is incurably defective, and the owner's subsequent undertaking to assume such lien is not binding on him. *Northern Plumbing & Heating Co.* v. *Greene*, (1916) 27 D. L. R. 410, 34 W. L. R. 293.

A materialman is not entitled to register as one individual claim, a lien for the amount due for material supplied by him to the contractor, against all the lands jointly of the owners of different parcels, who had made separate contracts with the contractor for the erection of houses on their respective parcels; nor do they have such

interest in one another's land as "owners" within the meaning of this section so as to charge the other's land for materials furnished at the owner's request or for his benefit. *Security Lumber Co.* v. *Plested*, (1916) 27 D. L. R. 441, 9 Sask. L. R. 183, 34 W. L. R. 352.

LIEN, PERSON ENTITLED TO, CREATION, EFFECT AND REGISTRATION OF.

3. Contracts where workmen waive rights under this Act to be void.—Every agreement or bargain verbal or written, express or implied, which may hereafter be entered into on the part of any workman, servant, laborer, mechanic or other person employed in any kind of manual labor intended to be dealt with in this Act by which it is agreed that this Act shall not apply or that the remedies provided by it shall not be available for the benefit of any person entering into such agreement, is and shall be null and void and of no effect as against any such workman, servant, laborer, mechanic or other person. 1907, c. 21, s. 3.

4. Nature of lien.—Unless he sign an express agreement to the contrary and in that case subject to the provisions of section 3, any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, land, wharf, pier, bulkhead, bridge, trestlework or mine or the appurtenances to any of them for any owner, contractor or sub-contractor shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, wharf, pier, bulkhead, bridge, trestlework or mine or the appurtenances thereto and the lands occupied thereby or enjoyed therewith or upon or in respect of which the said service is performed or upon which such materials are placed or furnished to be used limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as hereinafter provided) by the owner. 1907, c. 21, s. 4.

A mechanics' lien will attach for all materials supplied in the erection of a building although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor. *Whitlock* v. *Loney*, 10 Sask. L. R. 377 (1917), 3 W. W. R. 971, 38 D. L. R. 52.

The lien is in effect a statutory charge upon the estate or interest of the owner. *Galvin-Walston Lumber Co.* v. *McKinnon*, (1911) 16 W. L. R. 310.

A person holding the land under an agreement to purchase has an interest or estate on which a lien would attach. *Montjoy* v. *Heward School District*, 10 W. L. R. 282.

An owner who took possession of the premises and sold the same, and stated accounts with the contractor, was held to have accepted the work, and to have waived the presentation of an architect's certificate. *Smith* v. *Bernhardt & Fry*, (1909) 2 Sask. L. R. 315.

Damages for delay in performance cannot be set-off against a sub-contractor. *Smith* v. *Bernhardt & Fry*, (1909) 2 Sask. L. R. 315.

A reduction in the amount of the claim will not render the lien void. *Montjoy* v. *Heward School District*, (1909) 10 W. L. R. 282.

Under the Saskatchewan Mechanics' Lien Act, a lien may attach against a schoolhouse and upon the land upon which it is situated. *Lee* v. *Broley*, (1909) 11 W. L. R. 38.

A sub-contractor is in the same position as a contractor, and is only required to have furnished materials with the intent and expectation that the materials are going into the building. *Montjoy* v. *Heward School District Corporation*, (1909) 10 W. L. R. 282.

Where a materialman furnishes material to an owner of certain land, ostensibly for the construction of a building on that land, the materialman is entitled to a lien on that land even if the materials were not actually incorporated in the building. *Canadian Lumber Yards, Limited* v. *Ferguson et al.*, (1920) 1 W. W. R. 266.

A person in actual possession of land has a title thereto as against all the world except the true owner; and a person so actually in possession has a sufficient interest in the land to come within the meaning of "owner," as defined by paragraph 3 of section 2, but in order to amount to an interest which would sup-

port a lien under the Mechanics' Lien Act, the actual possession or interest must exist at the time the materials were ordered. *Galvin-Walson Lumber Co.* v. *McKinnon*, (1911) 16 W. L. R. 310, 4 Sask. L. R. 68.

In respect to entire contracts, the doctrine of "substantial compliance" is not adopted. *Smith* v. *Bernhart*, (1909) 11 W. L. R. 623, but the matter is placed upon a satisfactory basis by modern interpretation. *Taylor* v. *Hardware Co.*, 35 D. L. R. 504, and the fact that in an entire contract some item of the work has been done negligently or inefficiently or improperly would not prevent the builder from recovering in the action. In such case the builder would be entitled to recover the contract price less so much as is found ought to be allowed in respect of the items of defective work.

Where the property owner joins with the contractor in giving the order for material to be supplied in the erection of the building and it is charged to their joint account, the owner may be held liable for the full price in a mechanics' lien action brought against them both to enforce payment, although only a lesser sum be due by him to the contractor. *Rogers Lumber Co.* v. *Gray & Hosmer*, (1913) 10 D. L. R. 698.

Sections creating the right to a lien should be strictly construed but provisions dealing with procedure on the enforcement of the lien should receive a broad and liberal construction. *Nobbs* v. *C. L. R.*, 6 W. W. R. 759, 27 W. L. R. [illegible].

As to claim of lien for ploughing and breaking land see *Jordan* v. *Haugerud*, (1919) 1 W. W. R. 506. No lien for cultivating and caring for an orchard which substantially enhances the value of the land can be secured under a statute giving a lien to any person who clears, grades, fills in or otherwise improves real property. *Howe* v. *Myers L. R. A.*, (1917) D. 349 and annotations.

Where a claimant does not file his lien within the prescribed time but subsequently files it and before the actual filing thereof other claimants file their liens, but do no work or supply no material for which they would become entitled to file liens until after the first claimant files his lien, the first claimant, having done the work for which his lien was filed, is entitled to priority over the other claimants. *St. Pierre* v. *Rekert*, (1915) 8 Sask. L. R. 416, 23 D. L. R. 592, 31 W. L. R. 909.

A homestead entrant is an "owner," and a materialman is entitled to file a lien against the homestead for material furnished. *Beaver Lumber Co.* v. *Miller*, (1917) 32 D. L. R. 428.

5. Work done or materials furnished on lands of married women.—Where work or service is done or materials are furnished upon or in respect of the lands of any married woman with the privity and consent of her husband he shall be conclusively presumed to be acting for himself so as to bind his own interest and also as the agent of such married woman for the purposes of this Act unless the person doing such work or service or furnishing such material shall have had actual notice to the contrary before doing such work or furnishing such materials. 1907, c. 21, s. 5.

6. Contracts not to deprive third party of lien.—No agreement shall be held to deprive anyone otherwise entitled to a lien under this Act and not a party to the agreement of the benefit of the lien, but the lien shall attach notwithstanding such agreement. 1907, c. 21, s. 6.

7. Property upon which lien shall attach.—The lien shall attach upon the estate or interest of the owner as defined by this Act in the erection, building, land, wharf, pier, bulkhead, bridge trestlework or mine and the appurtenances thereto upon or in respect of which the work or service is performed or the materials placed or furnished to be used and the lands occupied or enjoyed therewith.

(2) Where estate charged is leasehold.—In cases where the estate or interest charged by the lien is leasehold the land itself may also with the consent of the owner thereof be subject to the said lien provided such consent is testified by the signature of such owner upon the claim of lien at the time of the filing thereof and duly verified.

A lienholder for materials supplied and used in the construction of a building upon land subject to an existing mortgage is entitled to rank upon the increased value in priority to the mortgage in the proportion only that the value of the materials supplied by him exclusively bears to the whole cost of the building, and not for any

part of the increase brought about otherwise. In computing this proportionate amount, no regard should be taken to amounts paid the lienholder on account before the action was brought. *Security Lumber Co.* v. *Duplat,* (1916) 9 Sask. L. R. 318, 29 D. L. R. 460, 34 W. L. R. 1131. See *Northern Trusts* v. *Battell,* (1916) 9 Sask. L. R. 103, 29 D. L. R. 515, 33 W. L. R. 738.

Where land has a potential value as a future business site, and is subject to a mechanics' lien for material used in erecting a building thereon, the proper method of determining the increased selling value occasioned by the building is to ascertain the value of the property without the building, and then sell the whole property. *Whitlock* v. *Loney,* (1918) 10 Sask. L. R. 377, 38 D. L. R. 52.

See notes under corresponding section in Mechanics' Lien Acts of other provinces, *ante.*

The onus of proving that the selling value of the land was increased by the materials furnished and placed is on the lien claimant. It does not follow from the mere fact that materials were furnished and placed upon the land that the selling value of the property had been thereby increased. *Independent Lumber Co.* v. *Bocz,* (1911) 16 W. L. R. 316, 4 Sask. L. R. 103. See additional references to this case in chapter on "Priorities," *ante.*

(A former sub-section (3) was repealed by chapter 38 of the Statutes of 1913.)

8. Application of insurance when lien attaches.—Where any of the property upon which a lien is given by this Act is wholly or partly destroyed by fire any money received or receivable by reason of any insurance thereon by an owner or prior mortgagee or chargee shall take the place of the property so destroyed and shall be subject to the claims of all persons for liens to the same extent as if such moneys were realised by the sale of such property in an action to enforce a lien. 1907, c. 21, s. 8.

(As amended by section 27 of the Statutes of 1915.)

9. Limit of amount of lien.—Save as herein provided the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. 1907, c. 21, s. 9.

10. Limit of lien when claimed by some other than contractor.—Save as herein provided where the lien is claimed by any other person than the contractor the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been placed or furnished. 1907, c. 21, s. 10.

11. Percentage to be deducted and retained by owner for thirty days.—In all cases the person primarily liable upon any contract under or by virtue of which a lien may arise under the provisions of this Act shall as the work is done or materials furnished under the contract deduct from any payments to be made by him in respect of the contract and retain for a period of thirty days after the completion or abandonment of the contract twenty per cent. of the value of the work, service and materials actually done, placed or furnished as mentioned in section 4 of this Act and such values shall be calculated on the basis of the price to be paid for the whole contract; and the liens created by this Act shall be a charge upon the amount directed to be retained by this section in favor of the sub-contractors whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

(2) **Payments made in good faith without notice of lien.**—All payments up to eighty per cent. of such value made in good faith by an owner to a contractor or a contractor to a sub-contractor or by one sub-contractor to another sub-contractor before notice in writing of such lien given by the person claiming the lien to the owner, contractor or sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien created by this Act.

(3) Payment of the percentage required to be retained under sub-section (1) of this section may be validly made so as to discharge all liens or charges under this Act in respect thereof after the expiration of the said period of thirty days mentioned in sub-

section (1) of this section, unless in the meantime proceedings shall have been commenced under this Act to enforce any lien or charge against such percentage as provided by sections 23 and 24 of this Act. 1907, c. 21, s. 11.

This provision requiring the owner to deduct twenty per cent. from any payments to be made by him in respect of the contract when applied to a contract providing for payment of 80 per cent. on the progress certificates, requires him to deduct twenty per cent. of the 80 per cent. The amount so deducted forms a fund for the lienholders, and thereafter it is available for them only, and not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract.

Where the amount required to complete the work over and above the contract price far exceeds the amount retained, the lienholders, other than wage-earners, have no claim upon the amount. *Peart* v. *Phillips*, (1915) 8 Sask. L. R. 305, 23 D. L. R. 193, 31 W. L. R. 956.

See notes under corresponding section of Ontario Act, *ante*.

12. Payments made direct by owner to persons entitled to lien. —In case an owner or contractor chooses to make payments to any person referred to in section 4 of this Act for or on account of any debts justly due to them for work or service done or for materials placed or furnished to be used as therein mentioned and shall forthwith give by letter notice in writing of such payment to the contractor or his agent or to the sub-contractor or his agent, as the case may be, such payments shall as between the owner and the contractor or as between the owner and the sub-contractor, as the case may be, be deemed to be payments to the contractor or the sub-contractor, as the case may be, on his contract generally but not so as to affect the percentage to be retained by the owner as provided by section 11 of this Act. 1907, c. 21, s. 12.

Payments made by the owner will not discharge him from lien existing at the time of such payments. *Union* v. *Porter*, (1908) 9 W. L. R. 325.

13. Priority of lien.—The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after such lien arises and over all conveyances or mortgages registered after registration of such lien as in this Act provided.

(2) Agreements for purchase where part of purchase money unpaid.—In case of an agreement for the purchase of land and the purchase money or part thereof is unpaid and no conveyance made to the purchaser the purchaser shall for the purposes of this Act and within the meaning thereof be deemed a mortgagor and the seller a mortgagee.

(3) Priority among lienholders.—Excepting where it is otherwise declared by this Act no person entitled to a lien on any property or to a charge on any moneys under this Act shall be entitled to any priority or preference over another person entitled to a lien or charge on such moneys or property under this Act and all lienholders except where it is otherwise declared by this Act shall rank *pari passu* for their several amounts and the proceeds of any sale shall subject as aforesaid be distributed among them *pro rata*. 1907, c. 21, s. 13.

See chapter entitled "Priorities," *ante*. See also *Independent Lumber Co.* v. *Bocz*, (1911) 16 W. L. R. 316.

A lienholder has a right to pay off the unpaid purchase money under an agreement for sale to the same extent as he would have had if the vendor's claim were that of a mortgagee. *Whitlock* v. *Loney*, 10 Sask. L. R. 377, (1917) 3 W. W. R. 971, 38 D. L. R. 52.

14. Priority of lien for wages.—Every mechanic or laborer whose lien is for wages shall to the extent of thirty days' wages have priority over all other liens derived through the same contractor or sub-contractor to the extent of and on the twenty per cent. of the contract price directed to be retained by section 11 of this Act to which the contractor or sub-contractor through whom such lien is derived is entitled and all such mechanics and laborers shall rank thereon *pari passu*.

(2) **Enforcing lien in such cases.**—Every wage-earner shall be entitled to enforce a lien in respect of the contract not completely fulfilled.

(3) **Calculating percentage when contract not fulfilled.** — In case of the contract not having been completely fulfilled when the lien is claimed by wage-earners the percentage aforesaid shall be calculated on the work done or materials furnished by the contractor or sub-contractor by whom such wage-earners are employed.

(4) **Percentage not to be otherwise applied.**—Where the contractor or sub-contractor makes default in completing his contract the percentage aforesaid shall not as against a wage-earner claiming a lien under this Act be applied to the completion of the contract or for any other purpose by the owner or contractor nor to the payment of damages for the non-completion of the contract by the contractor or the sub-contractor nor in payment or satisfaction of any claim of any kind against the contractor or sub-contractor.

(5) **Devices to defeat priority of wage-earners.**—Every device by any owner, contractor or sub-contractor adopted to defeat the priority given to wage-earners for their wages by this Act shall as respects such wage-earners be null and void. 1907, c. 21, s. 14.

15. **Payments made for purpose of defeating claim for lien.**— Nothing in this Act contained shall apply to make legal any payment made for the purpose of defeating or impairing a claim for a lien arising or existing under this Act and all such payments shall be taken to be null and void. 1907, c. 21, s. 15.

16. **Restraining attempt to remove materials affected by lien.**— During the continuance of a lien no portion of the materials affected thereby shall be removed to the prejudice of the lien and any attempt at such a removal may be restrained on application to the court or to a judge having power to try an action to realise a lien under this Act.

(2) **Costs.**—The court or judge to whom any such application is made may make such order as to the costs of and incidental to the application and order as he deems just.

(3) **Materials furnished for certain purposes not to be subject to execution.**—When any material is actually brought upon any land to be used in connection with such land for any of the purposes enumerated in section 4 of this Act the same shall not be subject to execution or other process to enforce any debt (other than for the purchase thereof) due by the person furnishing the same. 1907, c. 21, s. 16.

See Ontario Act, section 16.

17. Registration of lien.—A claim for lien applicable to the case may be filed in the land titles office of the land registration district in which the land is situated and shall set out:

(*a*) The name and residence of the person claiming the lien and of the owner of the property to be charged and of the person for whom and upon whose credit the work or service was or is to be done or materials furnished or placed and the time or period within which the same was or was to be done or furnished or placed;

(*b*) A short description of the work or service done or the materials furnished or placed or to be furnished or placed;

(*c*) The sum claimed as due or to become due;

(*d*) A description of the property to be charged;

(*e*) An address for service on the party claiming the lien.

(2) **Form of claim.**—The claim may be in one of the forms given in the schedule to this Act and shall be verified by the affidavit of the person claiming the lien or of his agent or assignee having a personal knowledge of the matters required to be verified and the affidavit of the agent or assignee shall state that he has such knowledge. 1907, c. 21, s. 17.

By chapter 38 of the Statutes of 1913, s. 3, the above section was amended as follows:—

3. Clause (a) of section 17 amended.—Clause (a) of section 17 of the said Act is amended by striking out all the words after the word "the" in the fifth line and inserting in place thereof the words "date upon which the contract or service was completed, the last material furnished or the last work done; or, where the claim is registered before the contract, service, furnishing of material or work, has been completed, the time or period within which the same was to be performed or completed."

A claim of lien was defectively drawn, but there was a sufficient description of the materials furnished in a statement annexed to the claim and marked as exhibit A, which statement, however, was not duly identified by affidavit. It was held that there was such a substantial compliance with this section of the Act as should be held good under section 19. *Monarch Lumber Co.* v. *Garrison*, (1911) 18 W. L. R. 686. See *Crapper* v. *Gillespie*, (1909) 11 W. L. R. 310; *Montjoy* v. *Heward School District Corporation*, (1908) 10 W. L. R. 282.

18. What may be included in claim.—A claim for lien may include claims against any number of properties and any number of persons claiming liens upon the same property may unite therein; but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 17 of this Act. 1907, c. 21, s. 18.

A reduction in the amount of the claim will not render the lien void. *Montjoy* v. *Heward School District*, (1908) 10 W. L. R. 282.

19. (1) Claims not to be invalidated for informality (1908).—A substantial compliance with sections 17 and 18 of this Act shall only be required and no lien shall be invalidated by reason of failure to comply with any of the requisites of the said section unless in the opinion of the court or judge who has power to try an action under this Act the owner, contractor or sub-contractor, mortgagee or other person, as the case may be, is prejudiced thereby and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section contained shall be construed as dispensing with filing of the lien required by this Act. 1907, c. 21, s. 19.

On a reference, in an action for sale under a mortgage, a claim was made by C. under a lien registered against three separate properties of which only one in question in this action. As the claim of lien showed how it was made out, and the amount claimed against each property, it was held that the claim was sufficient under this section. *Crapper* v. *Gillespie*, 11 W. L. R. 310.

A claim of lien did not appear to be executed properly under the seal of the plaintiffs, an incorporated company, but the court allowed proof to be made, upon an appeal, that the document was actually sealed with the corporate seal of the plaintiffs, and determined that attestation was unnecessary and that the execution was proper. *Monarch Lumber Co.* v. *Garrison*, (1911) 18 W. L. R. 686.

An error in naming the owner of the land with respect to which a lien is claimed is not sufficient to prevent the instrument claiming the lien from showing substantial compliance with the statutory forms. *Nobbs* v. *C. P. R.*, 6 W. W. R. 759, 27 W. L. R. 664.

Technical compliance with the directions of the Act may be excused where no one is prejudiced by the defects and there is substantial compliance under this section. *Manitoba Bridge & Iron Works* v. *Gillespie*, (1914) 20 D. L. R. 524.

20. Lien to be registered an incumbrance.—The registrar upon payment of the prescribed fee shall register the claim so that the same may appear as an incumbrance against the land therein described. 1907, c. 21, s. 20.

21. Lienholder to be deemed a purchaser.—Where a claim is so filed the person entitled to the lien shall be deemed a purchaser *pro tanto*. 1907, c. 21, s. 21.

22. Claims for liens when to be filed.—A claim for lien by a contractor or sub-contractor may in cases not otherwise provided for be filed before or during the performance of the contract or within thirty days after the completion thereof.

(2) A claim for lien for materials may be filed before or during the furnishing or placing thereof or within thirty days after the furnishing or placing of the last material so furnished and placed.

(3) A claim for lien for services may be filed at any time during the performance of the service or within thirty days after the completion of the service.

(4) A claim for lien for wages may be filed at any time during the performance of the work for which such wages are claimed or within thirty days after the last day's work for which the lien is claimed.

(5) In the case of a contract which is under the supervision of an architect, engineer or other person upon whose certificate payments are to be made the claim for a lien by a contractor may be filed within the time mentioned in sub-section (1) of this section or within seven days after the said architect, engineer or other person has given his final certificate or has upon application to him by the contractor refused to give a final certificate. 1907, c. 21, s. 22.

A contractor agreed with an owner to build a house for the latter. Plaintiff, a sub-contractor, supplied hardware at different times during the work, and installed plumbing and heating apparatus, and not being paid, filed a lien. The last work done was on the furnace on January 3rd, the other work done by plaintiff having been completed and material supplied at an earlier date. The lien was filed on February 2nd. The sub-contractor gave no formal notice of his claim to the owner, but payment of the account had been discussed between them on several occasions and the owner had promised to protect this sub-contractor. It was held that the owner by his conversations with plaintiff and assurance of protection of the account had waived notice of claim of lien. *Smith* v. *Bernhardt,* (1909) 2 Sask. L. R. 315.

It was contended that the plumbing, heating and hardware supplied by the sub-contractor constituted three different contracts, and that, therefore, the thirty days must be reckoned from the completion of each, but the court held that they were all supplied with the same object by one party to another, the parties standing in the

same relationship, and were so supplied as material and labor coming within the scope of the plaintiff's business, and were so bound into one as to form an entire contract, the last work on which having been done on January 3rd, the lien was filed in time. *Smith* v. *Bernhardt*, (1909) 2 Sask. L. R. 315.

Where all the work by a person claiming a mechanics' lien is done, or all the materials are furnished under one entire continuing contract, although at different times, a lien claim filed within the statutory period after the last item was done or furnished is sufficient as to all the items; and, in order that the contract may be a continuing one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount or nature of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon; but a mere general agreement to furnish labor or materials for a particular building or improvements is sufficient if complied with. *Whitlock* v. *Loney*, 38 D. L. R. 52, (1917) 3 W. W. R. 971.

A mechanics' lien will attach for all materials supplied in the erection of a building although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shown that there was a prior agreement to purchase all material required for the building from such vendor. *Whitlock* v. *Loney*, (1918) 10 Sask. L. R. 377, 38 D. L. R. 52.

Duration of Lien.

23. Lien to cease if proceedings not had within time fixed by Act.—Every lien a claim for which is not duly filed under the provisions of this Act shall cease to exist at the expiration of the time hereinbefore limited for the filing thereof unless in the meantime an action is commenced to realize the claim or in which the claim may be realised under the provisions of this Act and a certificate thereof according to form 6 in the schedule hereto signed by the clerk of the court is duly filed in the land titles office of the land registration district wherein the property in respect of which the lien is claimed is situated. 1907, c. 21, s. 23.

"Provided however that the failure to file such claim or to commence such action within the time mentioned in this and the pre-

ceding section shall not defeat such lien except as against intervening parties becoming entitled to a lien or charge upon such land whose claim with respect to said land is registered prior to the registration of such lien or as against an owner in respect of payments made in good faith to a contractor after the expiration of said period of thirty days before any claim of lien is filed or notice thereof given to the owner."

(The above amendment was added by chapter 38 of Statutes of 1913.)

This amendment does not create a priority in favor of intervening liens for work not performed and materials not furnished. *St. Pierre* v. *Rekert*, 8 Sask. L. R. 416, 23 D. L. R. 592.

By chapter 34 of the statutes of 1917, section 21, the following amendment to the above section was made:—

21. Section 23 of the Mechanics' Lien Act, as amended by section 4 of chapter 38 of the statutes of 1913, is further amended by inserting between the words "that" and "the" in the first line of the proviso the words "claims may be filed and actions commenced after the time hereinbefore limited for so doing, and that."

An assignment of a mechanics' lien should be registered under the Land Titles Act. *Re Registration of Assignment of Mechanics' Lien*, 5 W. W. R. 1191.

24. When a lien which has been duly filed shall expire.— Any person claiming any right, title or interest in and to any property in respect of which any claim of lien is filed as hereinbefore provided may at any time after thirty days have expired since the filing of such lien require the registrar to notify the lienholder by notice in writing in form 5 in the schedule to this Act forwarded by registered mail to the address for service of the said lienholder that unless an action to realise such claim or lien in which such claim may be realised be instituted and a certificate that such action has been so instituted, which certificate shall be in form 6 of the schedule hereto and signed by the clerk of the court in which such action is so instituted, be deposited in the said land titles office within thirty days from the date of such notice that such lien shall absolutely cease to exist; and if such action is not so instituted and the certificate aforesaid so filed within thirty

days from the date of the mailing of such notice such lien shall thereupon absolutely cease to exist and the registrar shall vacate the registration thereof unless prior to the expiration of the said thirty days there be filed in the said land titles office an order of a judge extending the time for instituting such action. 1907, c. 21, s. 24.

The right, title or interest which entitles a person to require the registrar to send out the notice provided for by this section is not necessarily a registered one, and so long as any one claiming a right, title or interest in the property in question requires him to serve the notice he must follow the provisions of this section. *Re Land Titles Act*, (1919) 1 W. W. R. 47.

Transmission of Lien.

25. Death of lienholder.—In the event of the death of the lienholder his right of lien shall pass to his personal representatives and the right of a lienholder may be assigned by any instrument in writing. 1907, c. 21, s. 25.

Discharge and Vacating Lien.

26. Discharge of lien.—A lien may be discharged by a receipt signed by the claimant or his agent duly authorized in writing acknowledging payment and verified by affidavit and filed with the registrar; such receipt shall be numbered and entered by the registrar like other instruments but need not be copied in any book; the fees shall be the same as for registering a claim of lien.

(2) **Security or payment into court and vacating lien thereon.**—Upon application the court or judge may receive security or payment into court in lieu of the amount of the claim and may thereupon vacate the filing of the lien.

(3) **Vacating filing on other grounds.**—The court or such judge may vacate the said filing upon any other ground. 1907, c. 21, s. 26.

Where a mechanics' lien has been filed by a partnership, even though it be trading under the name of what purports to be an incorporated company, the registrar is justified in insisting that a discharge of the lien be executed by all the partners, or some one duly authorized on their behalf, and that proof be given him of the composition of the partnership. *Re Land Titles Act, Re Mechanics' Lien Act,* (1918) 1 W. W. R. 411.

Effect of Taking Security on Lien.

27. Certain acts not to prejudice right to enforce lien.—The taking of any security for or the acceptance of any promissory note for or the taking of any other acknowledgment of the claim or the giving of time for the payment of the claim or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment therefor shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by this Act unless the lienholder agrees in writing that it shall have that effect. 1907, c. 21, s. 27.

Lienholder Entitled to Information and Inspection of Contract.

28. Lienholders to be entitled to information from owner as to terms of contract.—Any lienholder may at any time demand from the owner or his agent the terms of the contract or agreement with the contractor for and in respect of which the work, services or materials is or are performed or furnished or placed and if such owner or his said agent shall not at the time of such demand or within a reasonable time thereafter inform the person making such demand of the terms of such contract or agreement or the amount due and unpaid upon such contract or agreement or shall intentionally, knowingly or falsely state the terms of said contract or agreement or the amount due or unpaid thereon and if the person claiming the lien shall sustain loss by reason of such refusal or neglect or false statement the said owner shall be liable

to him in an action therefor to the amount of such loss. 1907, c. 21, s. 28.

Power of Court to Order Inspection.

29. Order for inspection of contract by lienholder.—The court or a judge may on a summary application at any time before or after any action is commenced for the enforcement of such lien make an order for the owner or his agent to produce and allow any lienholder to inspect any such contract and may make such an order as to the costs of such application and order as may be just. 1907, c. 21, s. 29.

Enforcement of Liens, Procedure.

30. Mode of realising liens.—Notwithstanding anything contained in The Judicature Act and The District Courts Act all actions to realise under a lien irrespective of the amount involved or that the title to land is called in question shall be brought, tried and determined in the district court in the same manner and subject to the same right of appeal as ordinary actions in the court. 1907, c. 21, s. 30.

The effect of this section is, notwithstanding section 26 of the District Courts Act, to confer upon the judge of the District Court jurisdiction to try in a mechanics' lien action all questions of title necessary for the determination of the interest of the owner in the land upon which the lienholder has his lien, and this includes jurisdiction to determine whether or not a mortgage which stands on the title in priority to the lien, and which, being a charge on the land covered by the lien, purports to cut down the interest which the owner would otherwise have therein, is a valid charge thereon. *Canadian Lumber Yards, Limited,* v. *Dunham,* (1920) 2 W. W. R. 1029; 53 D. L. R. 574.

(The following amendments were added to this section by chapter 38 of the Statutes of 1913.)

30a.—Lienholder's parties to action.—It shall not be necessary to make any lienholders parties defendant to the action, but all

lienholders served with the notice of trial shall for all purposes be deemed parties to the action.

30b. Notice to lienholders.—The party setting an action down for trial shall at least ten days before the opening of the sitting of the court at which the action is to be tried serve notice of trial in form 7 in the schedule to this Act, upon all lienholders who have filed their claims as required by this Act, or who are known to him; such service shall be personal, unless otherwise directed by a judge, who may direct in what manner the notice of trial may be served.

The District Court has exclusive jurisdiction over mechanics' lien cases. *Shuttelworth* v. *Seymour,* (1914) 7 Sask. L. R. 74, 6 W. W. R. 1582, 29 W. L. R. 394.

31. Lienholder joining in action.—Any number of lienholders claiming liens on the same property may join in an action and any action brought by a lienholder shall be taken to be brought on behalf of all other lienholders on the property in question. 1907, c. 21, s. 31.

32. Trial.—Upon the trial of any action to realize under a lien the judge shall decide all questions which arise therein or which are necessary to be tried in order to completely dispose of the action and to adjust the rights and liabilities of all parties concerned and shall take all accounts, make all inquiries and give all directions and do all other things necessary to try and otherwise finally dispose of the action and of all matters, questions and accounts arising in the action or at the trial and to adjust the rights and liabilities of and give all necessary relief to all parties concerned and shall embody all results in the judgment.

(2) **Estate may be sold.**—The judge who tries the action may order that the estate or interest charged with the lien may be sold and when by the judgment a sale is directed of the estate or interest charged with the lien the judge who tries the action may direct the sale to take place at any time after judgment, allowing how-

ever a reasonable time for advertising such sale and may make all necessary orders for the completion of the sale and vesting the property in the purchaser.

(3) **Sale of materials.**—The judge who tries the action may also direct the sale of any materials and authorize the removal of the same.

(4) **Letting in lienholders who have not proved their claims at trial.**—Any lienholder who has not proved his claim at the trial of an action to enforce a lien on application to the judge who tried the action on such terms as to costs and otherwise as may be just may be let in to prove his claim at any time before the amount realized in the action for the satisfaction of liens has been distributed and where such a claim is proved and allowed the judge shall amend the judgment so as to include such claim therein.

(5) **Report where sale is held.**—When a sale is held the judge shall direct to whom the moneys in court shall be paid and may add to the claim of the person conducting the sale his actual disbursements in connection therewith and where sufficient to satisfy the judgment and costs is not realised from the sale he shall certify the amount of the deficiency and the names of the persons with their amounts who are entitled to recover the same and the persons by the judgments adjudged to pay the same; and such persons shall be entitled to enforce the same by execution or otherwise as a judgment of the court. 1907, c. 21, s. 32.

The Creditors Relief Act, R. S. S. 1909, c. 63, which provides that, subject to the provisions of the Act, there shall be no priority among execution creditors is applicable where land is sold to satisfy a mechanics' lien and there is a surplus paid into Court and a number of executions have been registered against the owner. The section is not the less applicable because other mechanics' liens intervened between the first and later executions, if the claims under such liens have been abandoned. *Beaver Lumber Co.* v. *Quebec Bank et al.* (1918) 11 Sask. L. R. 320, 42 D. L. R. 779, (1918) 2 W. W. R. 1052.

The District Court judge was held to have jurisdiction to determine the validity of a prior mortgage attacked by the lien-claimant in a mechanics' lien action. *Canadian Lumber Yards, Limited,* v. *Dunham,* (1920) 2 W. W. R. 1029.

33. Consolidation of actions.—When more actions than one are brought to realise liens in respect of the same property a judge may on the application of any party to any one of such actions or on the application of any other person interested consolidate all such actions into one action and may give the conduct of the consolidated action to any plaintiff he sees fit. 1907, c. 21, s. 33.

34. Transferring carriage of proceedings.—Any lienholder entitled to the benefit of the action may apply for the carriage of the proceedings and the judge may thereupon make an order giving such lienholder the carriage of the proceedings and such lienholder shall for all purposes thereafter be the plaintiff in the action. 1907, c. 21, s. 34.

35. Costs of drawing, filing and vacating registration of lien.—Where a lien is discharged or vacated under section 26 of this Act or where in an action judgment is given in favor of or against a claim for a lien in addition to the costs of an action the judge may allow a reasonable amount for costs of drawing and filing the lien or for vacating the registration of the lien. 1907, c. 21, s. 35.

36. Costs not otherwise provided for.—The costs of and incidental to all applications and orders made under this Act and not otherwise provided for shall be in the discretion of the judge to whom the application or order is made. 1907, c. 21, s. 36.

37. Form of judgment in favor of lienholder.—All judgments in favor of lienholders shall adjudge that the person or persons personally liable for the amount of the judgment shall pay any deficiency which may remain after sale of the property adjudged to be sold and whenever on a sale of any property to realize a lien under this Act sufficient to satisfy the judgment and costs is

not realised therefrom the deficiency may be recovered by execution against the property of such person or persons. 1907, c. 21, s. 37.

An order by a District Court judge striking out a mortgagee's defence in a mechanics' lien action is a "final order" from which an appeal can be taken. *Canadian Lumber Yards, Limited,* v. *Dunham,* (1920) 2 W. W. R. 1029.

38. Personal judgment when claim of lien fails.—Whenever in an action brought under the provisions of this Act any claimant shall fail for any reason to establish a valid lien he may nevertheless recover therein a personal judgment against any party or parties to the action for such sum or sums as may appear to be due to him and which he might recover in an action on contract against such party or parties. 1907, c. 21, s. 38.

By chapter 43 of the Statutes of 1915, s. 27 (2), the following section was added after section 38:—

38a. Time for filing may be extended.—Where in this Act a time is limited for filing a document or taking a proceeding, and through accident, mistake or inadvertence the time thus limited has been allowed to expire without such document being filed or proceeding taken, a judge may nevertheless, upon such terms as may seem just, extend the time so limited; such enlargement to be subject to the rights of third persons accrued by reason of the failure or omission to file the document or take the proceeding within the time limited.

FORMS.

39. Forms.—The forms in the schedule hereto or forms similar thereto or to the like effect may be adopted in all proceedings under this Act. 1907, c. 21, s. 39.

LIENS FOR IMPROVEMENT OF CHATTELS.

40. Liens for improvement of chattels, enforcing. — Every mechanic or other person who has bestowed money or skill and

materials upon any chattel or thing in the alteration and improvement of its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien upon such chattel or thing for the amount or the value of the money or skill and materials bestowed shall while such lien exists but not afterwards in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right in addition to all other remedies provided by law to sell the chattel or thing in respect of which the lien exists on giving one month's notice by advertisement in a newspaper published in the locality in which the work was done or in case there is no newspaper published in such locality or within ten miles of the place where the work was done then by posting up not less than five notices in the most public places within the locality for one month stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale and the name of the auctioneer and leaving a like notice in writing at the residence or last known place of residence, if any, of the owner, as the case may be, or by mailing the same to him by registered letter if his address be known.

(2) Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale and shall upon application pay over any surplus to the person entitled thereto. 1907, c. 21, s. 40.

See chapter "Liens on Personalty," *ante*.

SCHEDULE.

The following is the schedule of forms referred to in this Act.

FORM 1.

(*Section 17.*)

CLAIM OF LIEN FOR REGISTRATION.

A. B. (*name of claimant*) of (*here state residence of claimant*) (*if so, as assignee of stating name and residence of assignor*) under *The Mechanics' Lien Act* claims a lien upon the estate of (*here state the name and residence of owner of the land upon which the lien is claimed*) in the undermentioned land in respect of the following work (service *or* materials) that is to say (*here give a short description of the nature of the work done or materials furnished and for which the lien is claimed*) which work (*or service*) was (*or* is to be) done (*or* materials were furnished) for (*here state the name and residence of the person upon whose credit the work is done or materials furnished*) on or before day of .

The amount claimed as due (*or* to become due) is the sum of $.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at this day of 19 .

.....

Signature of Claimant.

By chapter 46 of the Statutes of 1912-1913, section 38, this form and forms 2 and 3 were amended by adding beneath the words "signature of claimant" at the foot of each of said forms the words "address for service."

By chapter 38 of the Statutes of 1913, the following amendment was made:—

6. Form 1 in the schedule to the said Act is amended by striking out all the words in the first paragraph after the word "claimed" in the ninth line and inserting the following in place

thereof: "The contract or service was completed or the last material was furnished or the last work was done, on the day of A.D. or the contract or service to be completed or the material is to be furnished or the work is to be done on or before the day of A.D. , and the name and address of the person for whom the work was done or material furnished is

---

FORM 2.

(*Section 17.*)

CLAIM OF LIEN FOR WAGES FOR REGISTRATION.

A. B. (*name of claimant*) of (*here state residence of claimant*) (*if so, as assignee of, stating name and residence of assignor*) under *The Mechanics' Lien Act* claims a lien upon the estate of (*here state name and residence of the owner of land upon which the lien is claimed*) in the undermentioned land in respect of days' work performed thereon while in the employment of (*here state the name and residence of the person upon whose credit the work was done*) on or before the day of

The amount claimed as due is the sum of $

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at this day of 19 .

.....

Signature of Claimant.

(See note to previous form.)

FORM 3.

(*Section 18.*)

CLAIM FOR LIEN FOR WAGES BY SEVERAL CLAIMANTS.

The following persons under *The Mechanics' Lien Act* claim a lien upon the estate of (*here state the name and residence of the owner of land upon which the lien is claimed*) in the undermen-

tioned land in respect of wages for labor performed thereon while in the employment of (*here state name and residence or names and residences of employers of the several persons claiming the lien*).

A. B.	of (*residence*)	$	for	days' wages.
C. D.	"	$	for	days' wages.
E. F.	"	$	for	days' wages.

The following is the description of the land to be charged (*here set out a concise description of the land to be charged sufficient for the purpose of registration*).

Dated at this day of 19 .

.....

.....

Signatures of Several Claimants.

(See note to Form 1.)

FORM 4.

(*Section 17.*)

Affidavit Verifying Claim for Registration.

I, *A. B.*, named in the above (*or* annexed) claim, do make oath that the said claim is true.

(*Or,* We, *A. B.* and *C. D.*, named in the above (*or* annexed) claim, do make oath and each for himself says that the said claim so far as it relates to him is true.)

(*Where affidavit made by agent or assignee a clause must be added to the following effect:* I have full knowledge of the facts set forth in the above (*or* annexed) claim.)

Sworn before me at
in the Province of Saskatchewan
this day of 19 .

(*Or* the said *A. B.* and *C. D.* were severally sworn before me at , in the Province of Saskatchewan, this day of 19 .)

(*Or* the said *A. B.* was sworn before me at in the Province of Saskatchewan, this day of 19 .)

FORM 5.

(Section 24.)

To.....

.....

Under the provisions of section 24 of *The Mechanics' Lien Act* I hereby notify you that the claim of lien filed by you on the day of 19 , against the following property namely: shall absolutely cease to exist unless an action to realise such claim of lien or in which such claim may be realised be instituted and a certificate that such action has been so instituted (which certificate shall be in form 6 of the schedule to *The Mechanics' Lien Act*, signed by the clerk of the court in which such action is instituted) be deposited in the land titles office for the registration district of within thirty days from the date of this notice or within such thirty days you file with me an order of a judge extending the time for instituting such action.

Dated at this day of 19 .

.....

Registrar.

FORM 6,

(Sections 23 and 24.)

In the District Court of the Judicial District of
Between

Plaintiff.

and

Defendant.

I certify that the above named plaintiff has commenced an action in the above court to enforce against the following land (*describing it*) a claim of mechanics' lien for $.

Dated this day of 19 .

.....

Clerk of the Court.

By chapter 38 of the Statutes of 1913, the following form was added:—

7. The following form shall be form 7 in the schedule to the said Act:—

FORM 7.

Notice of Trial.

(*Style of Court and Cause.*)

Take notice that this action will be tried at the sittings of this court to be holden at in the Province of Saskatchewan, on the day of and at such time and place all questions which arise in or which are necessary to be tried completely to dispose of the action, and to adjust the rights and liabilities of the persons appearing before the court, or upon whom the notice of trial has been served, will be tried, and all accounts will be taken, inquiries made, directions given, and necessary relief given to all parties.

And further take notice that if you do not appear at the trial and prove your claim, if any (*or* your defence, if any), the proceedings will be taken in your absence, and you may be deprived of all benefit of the proceedings, and your rights disposed of in your absence.

This is a mechanics' lien action, brought to enforce a mechanics' lien against the following lands (*set out description of lands*).

This notice is served, etc.

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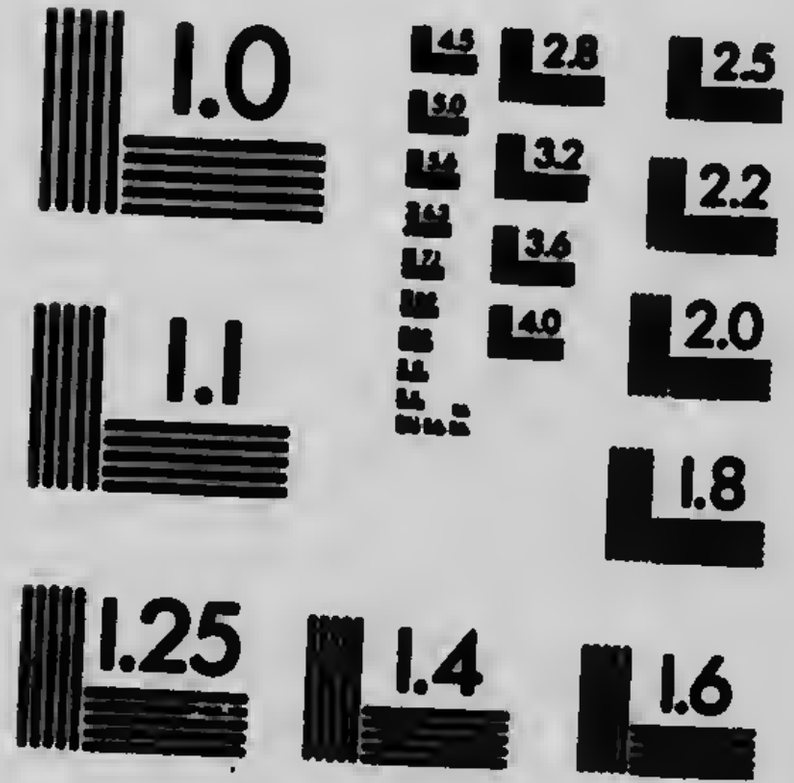
MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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