

10-1-1959

## The Florida Mechanics' Lien Act: Interpretation and Analysis of Selected Provisions

Myron S. Krasny

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Myron S. Krasny, *The Florida Mechanics' Lien Act: Interpretation and Analysis of Selected Provisions*, 14 U. Miami L. Rev. 73 (1959)

Available at: <https://repository.law.miami.edu/umlr/vol14/iss1/7>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# COMMENTS

## THE FLORIDA MECHANICS' LIEN ACT: INTERPRETATION AND ANALYSIS OF SELECTED PROVISIONS

### INTRODUCTION

The Mechanics' Lien Act<sup>1</sup> was drafted for the purpose of simplifying procedures and adding a greater measure of protection for lien claimants, contractors and owners against whose property mechanics' liens are sought. The drafters intended to achieve uniformity of lien procedures in the various states as well as to provide remedies for lien claimants beyond their usual right to bring action against a contractor, sub-contractor or owner in default.<sup>2</sup> Florida adopted the act in 1935 and was the only state to do so. In 1943 the act was withdrawn from the active list of Model Acts recommended for state adoption by the National Conference of Commissions on Uniform State Laws, but still remains in effect in Florida.<sup>3</sup> The act as it now stands in Florida has been a great source of discontent among workers in the building trade as well as with property owners. Those in the legal profession who must argue and abide by its provisions find them difficult to interpret.

### OPERATION AND EFFECT GENERALLY

The provisions of the act are discussed generally in this section for the purpose of giving the reader an over-all idea of the effect of the Mechanics' Lien Law. A more detailed explanation of some of the provisions and problems which arise are discussed under subsequent topical headings.

When a laborer, materialman, architect or sub-contractor performs services, supplies materials, or contributes to the enhancement of property and is entitled to receive payment, the owner is required, upon default of his contractor and receipt of proper notice,<sup>4</sup> to withhold payment from the contractor. Payments may then be made by the owner to the claimants to the extent of their claims or to the amount due and owing to the contractor.<sup>5</sup> It is the owner's interest in the property improved which may be subject to lien liability.<sup>6</sup> A lien may lie against such interest if the owner has failed to pay the contractor<sup>7</sup> or has made a payment which is deemed "improper."<sup>8</sup>

---

1. FLA. STAT. Ch. 84 (1957).

2. NAT'L CONF. OF COMM. ON UNIFORM STATE LAWS AND PROCEEDINGS 687 (1926). [hereinafter cited as 1926 NAT'L CONF.]

3. *Uniform Law Commissioners' Note*, 6 F.S.A. 531-532 (1943).

4. FLA. STAT. § 84.04 (1957). See Section in text on Notice *infra*.

5. FLA. STAT. § 84.05 (1957). See Section in text on Proper Payment *infra*.

6. FLA. STAT. § 84.02 (1957).

7. FLA. STAT. §§ 84.02, 84.05 (1957).

8. FLA. STAT. § 84.05 (1957). See Section in text on Proper Payment *infra*.

An owner who receives notice of a contractor's failure to make payments to his laborers and materialmen, and continues to make payments to the contractor under the contract, is liable to the extent of the sums paid after notice.<sup>9</sup> Such payment after notice is an example of an "improper" payment. Property so encumbered by mechanics' liens may be sold to satisfy the claims of the lienors.<sup>10</sup>

The act attempts to protect the owner by the procedures set forth in the section under "proper payments."<sup>11</sup> At best, these procedures may result in reduced liability to lienors. Liens may lie against the owner irrespective of his good faith in making payments to the contractor and notwithstanding the fact that complete and final payment has been made to the contractor.<sup>12</sup> It is the duty of the owner to ascertain that all amounts due to employees and subcontractors have been paid before rendering the final payment to the contractor. If final payment is improperly made to the contractor the owner must also pay the lienors and then attempt to recoup from the contractor the amounts paid to the lienors.

The contractor is required at the time final payment is due,<sup>13</sup> upon demand by the owner,<sup>14</sup> to furnish an affidavit stating that all lienors have been paid, or indicate therein whether any remain unpaid. The affidavit is for the protection of the owner (and the lienors) and any payment made in reliance thereon will be deemed proper.<sup>15</sup> The owner may pay the contractor in full when the latter has paid all claimants and presents receipts or lien waivers evidencing payment.<sup>16</sup> If he ascertains that the contractor has not or will not pay the claimants, he should withhold an amount equal to their claims which may be paid to them directly.<sup>17</sup> The statutory requirement of a sworn statement<sup>18</sup> would seem to be of great protective value to the owner, but the judicial construction of the statute makes the owner liable if he fails to demand the statement from the contractor.<sup>19</sup> Presumably the owner would be liable to lien claimants if he demanded the statement, and the contractor refused to furnish it. However, the owner should refuse to render final payment until the statement is furnished.

The statute provides for criminal penalties against a contractor who furnishes an affidavit containing false information.<sup>20</sup> It exempts the owner

---

9. *Bensam Corp. v. Felton*, 63 So.2d 278 (Fla. 1953).

10. FLA. STAT. §§ 84.29, 84.31 (1957).

11. FLA. STAT. § 84.05 (1957).

12. *All State Pipe Co. v. McNair*, 89 So.2d 774 (Fla. 1956); *Curtis v. McCardel*, 63 So.2d 60 (Fla. 1953); *But see Southern Supply Distribs. v. Lansdell*, 76 So.2d 266 (Fla. 1954); *Foley Lumber v. Koester*, 61 So.2d 634 (Fla. 1952).

13. FLA. STAT. § 84.04(3) (1957).

14. *All State Pipe Co. v. McNair*, 89 So.2d 774 (Fla. 1956); *Curtis v. McCardel*, 63 So.2d 60 (Fla. 1953).

15. FLA. STAT. § 84.05(12) (1957).

16. FLA. STAT. § 84.05(9) (1957).

17. FLA. STAT. § 84.05 (1957).

18. FLA. STAT. § 84.04(3) (1957).

19. Note 14 *supra*.

20. FLA. STAT. § 84.09 (1957). Amended Fla. Laws 1959, ch. 50-405.

from liability for payments made in reliance upon false statements given by the contractor in the affidavit, except where the owner has notice of impending liens from the contractor's creditor.<sup>21</sup>

#### DEFINITIONS AND STATUTORY CONSTRUCTION

##### *Parties and Interests Subject to Lien*

The act specifies the parties against whom liens may lie by broadly defining the term "owner." The act states that an owner is one who owns real property or any interest in property on which contracts for improvements are made. He may be the owner in fee or of a lesser estate (such as a term of years), or a person having any right, title or interest in real property which may be sold under legal process (e.g., purchaser of property under a tax title). A vendee in possession under a contract for the purchase of real property is also included in the statutory definition.<sup>22</sup> The purpose for allowing liens against property which may be sold under legal process is to prevent the loss of a lien in cases where interests such as dower and homestead are involved.<sup>23</sup> It further provides enough of a generality whereby situations not directly referred to in the act may be brought under its operation by judicial interpretation.<sup>24</sup>

When a party other than the fee owner contracts for improvements, acquiescence by the owner may create an agency relationship. The owner will be estopped from denying that he is the principal, and his interest will be subjected to lien.<sup>25</sup> Contracts which are made for the improvement of property owned by a husband and wife by the entireties are deemed to be contracts which bind both husband and wife and subject both interests to lien liability. The statute makes one spouse the agent of the other. The non-contracting spouse is permitted to file an objection to the contract within ten days after learning of the contract. If no objection is filed within that period, the non-contracting spouse is deemed to have consented to the improvement.<sup>26</sup> When an architect is engaged by the owner with authority to approve subcontracts, the owner's interest is liable for the liens filed.<sup>27</sup>

A vendor's interest is subject to liability for liens when an improvement is made by the purchaser, if the improvement so made was required as a condition in the contract of sale.<sup>28</sup> The liability of a lessor is the same as the vendor's where improvement is required in the lease.<sup>29</sup> However, lessor-

21. FLA. STAT. § 84.05(12) (1957).

22. FLA. STAT. § 84.01 (1957).

23. 1926 NAT'L CONF. 698 N.2

24. *Ibid.*

25. *Franklinville Realty Co. v. Arnold Const. Co.*, 120 F.2d 144 (5th Cir. 1941); *Roughan v. Rogers*, 145 Fla. 421, 199 So. 572 (1941).

26. FLA. STAT. § 84.12 (1957).

27. *Franklinville Realty Co. v. Arnold Constr. Co.*, 120 F.2d 144 (5th Cir. 1941).

28. *Tremont Co. v. H.A. Paasche*, 81 So.2d 489 (Fla. 1955).

29. Fla. Stat. § 84.03(2) (1957). *Lehigh Structural Steel Co. v. Joseph Langner, Inc.*, 43 So.2d 335 (Fla. 1950) (*Dicta*).

owner's mere acquiescence to improvements made by his lessee is not sufficient to subject the owner's interest to lien.<sup>30</sup> A leasing owner's interest is subjected to lien where he takes an active part in making the improvement and directs the lessee to proceed in a certain specified manner.<sup>31</sup> Finally, an owner was held liable for liens when there was no requirement by the lessor to make an improvement, but merely his (lessor) unexpressed contemplation that improvement would be made.<sup>32</sup> This result is inconsistent in view of the fact that the statute rather specifically<sup>33</sup> requires that the improvement be made in accordance with a *contract* between lessor and lessee before the lessor's interest can be encumbered. The factual distinctions in these situations appear to be too tenuous to support the diversity of results. A vendor's interest in property has been held to be free from liens, when the property was improved at the insistence of the purchaser who later defaulted. The vendor reacquired his land free from any claims of the unsuccessful lienors.<sup>34</sup> The justification for the court's refusal to permit the lien was the absence of a contract, express or implied, between the vendor and the lienors.<sup>35</sup> In this case, one of the purposes of the act appears to have been abandoned in order to do justice to the non-contracting vendor. Had the court liberally construed the act in favor of the lienors, it could have rationalized that the land was enriched;<sup>36</sup> that the vendor benefited by the improvement and therefore the claimants were entitled to liens against the improved property.

The act appears to lend itself readily to value judgments on the part of the court. While justice may result from such value judgments, the law becomes clouded with uncertainty. Uncertainties in the law increase litigation and leave the practitioner with little more than a gambler's chance to determine which rationale the court will adopt at any particular time. Statutes which may be construed in different ways in the same or similar fact situations are of questionable value.

---

30. *Masterbilt Corp. v. S.A. Ryan Motors of Miami*, 149 Fla. 644, 6 So.2d 818 (1942). See also *Crossman v. Pollack*, 100 So.2d 660 (Fla. App. 1958), denying lien to architect engaged by a prospective lessee when the lease never became operative.

31. *Brenner v. Smullian*, 84 So.2d 44 (Fla. 1955); *approved Brenner v. Tropical Glass & Mirror*, 84 So.2d 49 (Fla. 1955).

32. *Anderson v. Sokolik*, 88 So.2d 511 (Fla. 1956), noted in 11 *MIAMI L.Q.* 435 (1957). See FLA. STAT. § 84.03(2) (1957). "When an improvement is made by a lessee in accordance with a *contract* between such lessee and his lessor, liens shall extend also to the interest of such lessor" (Emphasis supplied). *Richard Store Co. v. Florida Bridges & Iron, Inc.*, Note 36 *infra*. "The Mechanics' Lien Law is . . . not . . . grounded on implied agency (or) ratification . . ."

33. FLA. STAT. § 84.03(2) (1957); See also *BOYER, FLORIDA REAL ESTATE TRANSACTIONS*, § 33.06 at 1076 (1959).

34. *Lee v. Sas*, 53 So.2d 114 (Fla. 1951).

35. *Ibid.*

36. *United States v. Griffin-Moore Lumber Co., Inc.*, 62 So.2d 589 (Fla. 1953); *Greenblatt v. Goldin*, 94 So.2d 355 (Fla. 1957) citing *Jones v. Great So. Fireproof Hotel Co.*, 86 Fed. 370 (6th Cir. 1898). But see *Richard Store Co. v. Florida Bridge & Iron, Inc.*, 77 So.2d 632 (Fla. 1954) "The Mechanics' Lien Law is in apposition with the theory of subrogation. We do not adhere to the lien law as grounded on implied agency, ratification or quantum meruit followed in approximately twenty states."

*Property Subject to Lien*

A lien may be secured under any contract, written or unwritten, express or implied, against any real property which has been the object of the claimant's performance.<sup>37</sup> It has been held that a married woman's separate property may be subject to mechanics' lien for labor and materials furnished when she has personally contracted for the improvement.<sup>38</sup> However, the lien claimant must strictly conform to the procedures and requirements of the act and may not proceed in the alternative for an equitable remedy as provided for in the Florida Constitution.<sup>39</sup> Undivided interests in property are subject to lien when one of the joint owners contracts for improvements; the non-contracting joint owner need not be joined in the proceeding, and if execution is had on the property the non-contracting joint owner will not be chargeable for the lien.<sup>40</sup> The non-contracting joint owner's property, however, may be made less valuable because of recorded encumbrances on the property. Property improved under contract with a state, county or municipality is not ordinarily subject to mechanics' liens.<sup>41</sup> The drafters of the act specifically excepted this type of property from the act.<sup>42</sup> Trust property held by a municipality for the benefit of the public was held not to be subject to a lien for improvements made thereon. The basis for such exemption of municipally owned or held property appears to be one of public policy. One of the purposes of the act was to guarantee prompt payment to claimants.<sup>44</sup>

The prohibition of liens against municipal or government owned or held property defeats the lien claimants' rights. The claimant has a right of action against the contractor, of course, but such right is also inherent in the claimant who improves private property. The sanctity of government property with respect to liens seems to be well settled in statutory<sup>45</sup> as well as case law<sup>46</sup> and though not wholly equitable, and seemingly contradictory to the purposes of the mechanics' lien, the public interest rationale seems to supply the justification for the refusal of the legislature and courts to allow liens against public property. Most contractors, when engaging in an improvement on public property, are required to have a surety bond;<sup>47</sup> since lienors may look to the surety for payment, liens against public property will not lie.

---

37. FLA. STAT. § 84.01 (1957).

38. *Roughan v. Rogers*, 145 Fla. 421, 199 So. 522 (1941).

39. Fla. Const. Art. XI § 2. See *Boyer, op. cit. supra* note 33, § 33.04 at 1072 (1959).

40. *Brown v. Park*, 144 Fla. 696, 198 So. 462 (1940).

41. FLA. STAT. § 84.01 (1957).

42. 1926 NAT'L CONF. 690.

43. *City of St. Augustine v. Brooks*, 55 So.2d 96 (Fla. 1951).

44. 1926 NAT'L CONF. *supra* note 42.

45. 1926 NAT'L CONF. 690.

46. *City of St. Augustine v. Brooks*, 55 So.2d 96 (Fla. 1951). *Special Tax School Dist. No. 1 v. Smith*, 61 Fla. 782, 54 So. 376 (1911). 1926 NAT'L CONF. 690.

47. 1926 NAT'L CONF. 690.

*Persons Entitled to Liens*

Contractors, subcontractors, materialmen and laborers are permitted liens under the law. The statutory definitions of each class are enumerated.<sup>48</sup> The statute defines a subcontractor as one who enters into a contract with a contractor, but a subcontractor who enters into a contract with a subcontractor is not accorded all of the lienor's rights against the owner.<sup>49</sup> The reason for this is that no privity exists between the owner and the subcontractor. In the absence of such privity the owner could not be afforded any protection from the sworn statement of the contractor. If the contractor has paid his subcontractor and has receipts to prove it, but the subcontractor has not paid his subcontractor, the owner would not be able to determine this through any sworn statement given by the contractor. Although this result appears to be just with respect to the owner, the reasoning does not seem consistent. There is generally no privity between the owner and materialmen, laborers and subcontractors in most contracts for improvements, and yet the statute gives these parties the right to a lien against the owner.<sup>50</sup> This is a matter of statutory construction and not privity. The only question that should be decided is whether the statute intended any person or merely selected persons improving property to have recourse against the owner of the property improved. To rationalize a decision on the basis of the concept of privity, a concept which the law is coming to disregard more and more, obscures the law and the valid reasoning that should be applied on the subject. The statute is arbitrary with regard to those who it has chosen to favor with the privilege of liens; the courts need say no more than that there must be a cut-off point somewhere with respect to lien claimants, and subcontractors not being mentioned in the act do not qualify. Privity, however, seems to be a legal instrument of last resort; when other legal, equitable or statutory devices fail, privity is useful to produce the desired result.

*Attaching Date and Extent of Liens*

The lien shall extend to the owner's right, title and interest existing at the time of the visible commencement of operations or those interests acquired after the visible commencement of operations.<sup>51</sup> Demolition and

---

48. FLA. STAT. § 84.01 (1957).

49. FLA. STAT. § 84.01 (1957). *Richard Store v. Florida Bridge & Iron, Inc.*, 77 So.2d 632 (Fla. 1954). The court held that there is no burden on the owner or contractor to see that a defaulting subcontractor pays his subcontractors or materialmen.

50. FLA. STAT. § 84.02 (1957). *But see Greenblatt v. Goldin*, 94 So.2d 355 (Fla. 1957), "... materialmen and laborers may be secured by mechanics' liens upon land improved or affected by their material or labor, without reference to technical and ancient concepts of privity of contract. (Emphasis supplied.)

51. FLA. STAT. § 84.03 (1957). Fla. Laws 1959, ch. 59-460 amended § 84.03 providing that in case of abandonment by a contractor, liens later acquired by subsequent laborers and materialmen do not relate back to the visible commencement of operations of the abandoning contractor, but only to the time that the subsequent contractor commenced to complete the abandoned improvement.

delivery of materials for the purpose of demolition are excluded from the definition of "visible commencement of operations."<sup>52</sup>

The attachment of liens from the date that operations are visibly commenced is known as the "relation back" doctrine.<sup>53</sup> A worker who performs services on property at the final stage of the improvement has lien rights as if he had begun his work at the time that the improvement was visibly commenced.<sup>54</sup> Thus, a purchaser may find himself liable for all claims against his newly acquired property, relating back to the beginning of the improvement. He is liable despite the fact that he was in possession after major improvements were completed and was aware of only a small improvement. The subsequent lienor may have the same or a greater degree of priority than those who improved the property at an earlier time.

One of the restrictions placed upon the relation back doctrine is that the work performed must be performed in connection with a single plan or project, prosecuted with reasonable promptness to conclusion, and without material abandonment.<sup>55</sup> Where work is abandoned and later resumed by a different contractor, the liens of the subsequent contractor's laborers and materialmen do not relate back to the time that the original construction was commenced.<sup>56</sup>

#### *Service of Notice of Intention to Claim a Lien — Cautionary notice*

The act authorizes<sup>57</sup> but does not require<sup>58</sup> the claimant to serve the owner with an informal preliminary notice of an intention to claim a lien. This notice of intention is called a "cautionary notice."<sup>59</sup> It may be served on the owner by certain classes of workers to apprise the owner that the contractor owes them a specified sum for services or materials incorporated in the improvement. The notice is not a lien; it is merely a warning to the owner that he should proceed with caution in making payments to the contractor.<sup>60</sup> At this point, the owner would be wise to contact an attorney, since any payment made to the contractor after this notice is made at the owner's peril. The rules with regard to payments made to the contractor after cautionary notice are complex and the owner's failure to follow these rules may subject him to double liability.<sup>61</sup> The owner should either hold back

52. FLA. STAT. § 84.03 (1957).

53. BOYER, *op. cit. supra* note 33, § 33.07 at 1076 (1959).

54. *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953).

55. *Geiser v. Permacrete*, 90 So.2d 610 (Fla. 1956).

56. *Geiser v. Permacrete*, *supra* note 55 (dictum). Fla. Laws 1959, ch. 59-460 is a codification of the dictum.

57. FLA. STAT. § 84.04 (1957).

58. *Roberts v. Lesser*, 96 So.2d 222 (Fla. 1957) as to subcontractors; *Robert L. Weed, Architect, Inc. v. Horning*, 159 Fla. 847, 33 So.2d 648 (1948) as to architects — the lessee was held to be the owner (as an agent). The statute exempts laborers and those dealing directly with the owner from serving cautionary notices. *Investor's Syndicate v. Henderson*, 148 Fla. 696, 6 So.2d 629 (1941).

59. *All State Pipe Co. v. McNair*, 89 So.2d 774 (Fla. 1956).

60. FLA. STAT. § 84.04(1)(A), (C) (1957).

61. FLA. STAT. §§ 84.04, 84.05 (1957).



a portion sufficient to pay these claims<sup>62</sup> or refuse to make any payment to the contractor until the contractor makes payment.<sup>63</sup> The owner would also be wise to obtain waivers of lien from these claimants if payments are made by the contractor, prior to making any further payments to the contractor.<sup>64</sup>

The serving of a cautionary notice appears to have the effect of establishing a priority among the claimants<sup>65</sup> and serves to determine the sum to which the owner is liable after receipt of the notice.<sup>66</sup>

Laborers are not required to serve a cautionary notice in order to establish lien priority.<sup>67</sup> They are generally permitted liens for the full amount of their services, irrespective of when they file their formal claim of lien.<sup>68</sup> However, laborers as well as other lienors must file within the period required in the statute.<sup>69</sup> The reason for this preferred treatment on the part of the laborer is that generally their claims are not too large and their payment would not work too serious a hardship on the owner.<sup>70</sup> The act also exempts them from as much formality and "red tape" as is practical, because of the lower educational standards within this class.<sup>71</sup>

Contractors who deal directly with the owner can receive no preferential treatment by serving a cautionary notice because the owner is, or should be, aware that he is indebted to the contractor. All persons who contract directly with the owner need not serve a cautionary notice.<sup>72</sup>

#### *Cautionary Notice — Classification of Lienors*

In order to differentiate between the different types of lienors, they will be divided, for the purpose of this discussion, into four groups: (1) laborers (2) timely lienors (3) regular lienors and (4) contractors.<sup>73</sup>

*Laborers.* — The statute defines a laborer as any person other than an architect, landscape architect or engineer, who under a properly authorized contract personally performs, on the site of the improvement, labor or services for improving real property and does not furnish materials or labor services of another.<sup>74</sup> Laborers generally need not file cautionary notices but must file their formal claim of lien in order to subject the property to lien liability.<sup>75</sup>

62. FLA. STAT. § 84.05(8) (1957). See section on Proper Payment *infra*.

63. *Ibid.*

64. *Ibid.*

65. See Section on Priority *infra*.

66. See Section on Proper Payment *infra*.

67. FLA. STAT. § 84.04 (1957).

68. Florida Fruit Co. v. Shakelford, 145 Fla. 216, 198 So. 841 (1940).

69. FLA. STAT. § 84.16 (1957). See amendment Fla. Laws 1959, ch. 59-460.

70. 1926 NAT'L CONF. 705 N. 25.

71. *Ibid.*

72. FLA. STAT. § 84.04(1),(2)(a) (1957).

73. These classifications are not designated as such within FLA. STAT. ch. 84. See BOYER, *op. cit. supra* note 33, § 33.11 at 1082 (1959).

74. FLA. STAT. § 84.01 (1957).

75. FLA. STAT. §§ 84.04(1)(A), (2)(A); § 84.04(4); § 84.16 (1957).

*Timely Lienors.* — Notice may be served before beginning, or thirty days after beginning, but not later than the day of completion. Lienors who serve a cautionary notice within these prescribed periods will here be designated as timely lienors.<sup>76</sup>

*Regular Lienors.* — Those lienors who serve notice after the period provided above for timely lienors, and all other lienors who file formal claims of lien within the period prescribed in the statute for filing of liens; those claimants who are included in the contractor's sworn statement; and all other lienors shall be designated as regular lienors.<sup>77</sup>

*Contractors.* — Notice to the owner is not required to be given by a contractor who contracts directly with the owner. Subcontractors fall into the timely or regular lienor class because they usually do not contract directly with the owner.

#### *Statutory and Judicial Construction: Effect of Notice*

The timely lienor (the lienor who serves cautionary notice prior to beginning his work, or during it, but not later than this completion date) may find himself in the unenviable position as a practical matter of risking further employment with a contractor by informing the owner that he has not been paid. A materialman or subcontractor who serves this type of notice prior to performing his services or supplying materials may find that he is unemployed as a result of his desire to protect himself from a contractor's default. From a business standpoint, one who serves such notice would place himself in a poor position with his contractor. He may place himself in jeopardy for any future business that he may desire from the contractor as well as for continuation on the improvement in question. The utility of such notice is doubtful. In view of the fact that most construction work is done on a credit basis, it would be difficult for one furnishing materials to ascertain, for example, (within the period provided in the statute) that he was in danger of not receiving payment. Furthermore, he is shifting to the owner the liability for payment for which he himself has extended credit. This is a rather unique position for the owner to be placed in. Cautionary notice prior to, and during construction, may appear to be theoretically sound, but relationships between employer and employee, vendor and vendee (materials) being based on a certain degree of trust and confidence could hardly be expected to flourish.

A timely lienor may amend or supplement his original notice by further notices setting forth any additions to the amount due him for work performed after the original notice was served.<sup>79</sup> The owner is bound by these supplements or amendments only to the extent of the money that

---

76. FLA. STAT. § 84.04(1) (1957).

77. BOYER, *op. cit. supra* note 33, § 33.11 at 1083 (1959).

78. *Ibid.*

79. FLA. STAT. § 84.04(1)(D) (1957).

he has not yet paid to the contractor.<sup>80</sup> For example, in the original notice, the claimant notifies the owner that the contractor is indebted to him for \$500.00. Upon receipt of the notice, the owner withholds \$500.00 of a \$1000.00 payment which is due on the contract, and pays the contractor \$500.00. A subsequent notice from the same lienor of an additional amount of \$100.00 due could be held for the lienor only if a subsequent payment arose in favor of the contractor. If no further payments were due, or if other lienors had notified the owner prior to the amendment, the amending lienor would have no recourse against him. The form of the cautionary notice is relatively simple and is clearly set forth in the statute.<sup>81</sup>

The notice of regular lienors may be served, up to three months after completion of performance, or furnishing of materials. This type of notice protects the claimant only to the extent of the portions yet unpaid to the contractor by the owner.<sup>82</sup> The owner is not liable for amounts which he has previously paid to the contractor prior to receipt of this notice if in other respects the payment is deemed proper.<sup>83</sup>

The failure of a subcontractor or materialman to serve a cautionary notice does not preclude his later acquiring a lien, if the lien is filed within three months after completion of the services rendered or materials furnished.<sup>84</sup> Although he may not lose his entire lien by not serving a cautionary notice, he may not receive the full amount of his lien. This may result because the owner's payments to the contractor were "proper" prior to the filing of the lien.

#### *Sworn Statement by the Contractor*

The contractor is required to furnish a sworn statement or affidavit to the owner at the time that final payment is due to the effect that all potential lienors have been paid. If there are any who have not been paid, the contractor must disclose who they are, the services that they have performed and the amount owing to them. The contractor may not enforce any lien against the owner until such a statement is furnished.<sup>85</sup>

Since the sworn statement is for the benefit of the lienors as well as for the owner's benefit, the owner may not waive the requirement of the statement.<sup>86</sup> If he fails to demand it, liens may lie against the property

80. *Ibid.*

81. FLA. STAT. § 84.04(1)(B), (C) (1957).

82. FLA. STAT. § 84.04(2) (1957).

83. See Section on Proper Payment *infra*.

84. Florida Fruit Co. v. Shakelford, *supra* note 68. See also Beam v. Jerome Supply Co., 74 So.2d 537 (Fla. 1954); Foley Lumber Co. v. Koester, 61 So.2d 634 (Fla. 1953).

85. FLA. STAT. § 84.04(3) (1957); Pope v. Carter, 102 So.2d 658 (Fla. App. 1958); Moore v. Crum, 68 So.2d 399 (Fla. 1953). Statement must be given within one year after filing of claim of lien otherwise the lien is lost.

86. Southern Supply Distributors v. Lansdell, 76 So.2d 266 (Fla. 1954); Distinguished between cases where the contract was not written and cases where the contract was in writing. See Shaw v. DelMar Cabinet Co., 63 So.2d 264 (Fla. 1953).

in favor of those lienors yet unpaid, to the extent of the final payment made to the contractor or for the full amount of the liens.<sup>87</sup>

In one case, a materialman failed to give a cautionary notice, but his lien was permitted to the extent of the payment by the owner that was "improper" because of the owner's failure to demand the sworn affidavit.<sup>88</sup> In another case a materialman received a check from the contractor, signed a paid receipt, and upon finding that the check was worthless filed a lien. No enforceable lien was created, notwithstanding the facts that the information in the sworn statement did not include the materialman and that the owner had notice of the materialman's lien.<sup>89</sup>

In the former case, the statute was strictly construed and the claimant was not required to serve a cautionary notice.<sup>90</sup> The owner's mere failure to require the affidavit was grounds for the enforcement of the lien. In the latter case, the signed receipt led the owner to believe that the lienor had been paid and the claimant was barred from enforcement of his lien through an estoppel. Although it did not appear that the lienor acted imprudently by signing the receipt the court found reason to avoid enforcing the penalty against the owner by decreeing that it was the materialman's "own doings" which caused his loss.<sup>91</sup>

#### *Proper Payment*

Payments made by the owner to the contractor are deemed properly paid if they are made in accordance with the provisions enumerated in the act.<sup>92</sup> The act specifies that the real property improved or being improved may be subject to a lien only to the extent of the amount fixed in the direct contract, reduced by any sums which under the act are deemed to be properly paid.<sup>93</sup> The provisions for proper payment were made for the purpose of protecting the owner from having to make payments more than once, if he complies with the letter of the statute. The wording of the statute relating to proper payment provides a strenuous exercise in statutory construction even to those familiar with legal terminology.<sup>94</sup> If the owners

87. All State Pipe Co. v. McNair, 89 So.2d 774 (Fla. 1956); Shaw v. DelMar Cabinet Co., Inc., 63 So.2d 264 (Fla. 1953); *Contra* Southern Supply Distributors v. Lansdell, 76 So.2d 266 (Fla. 1954). Court said it would be "inequitable" for the owner to pay twice. (overruled to some extent by AllState Pipe case.) Failure to demand oath was not discussed by the court in Beam v. Jerome Lumber Supply Co., 74 So.2d 537 (Fla. 1954). The intent of the drafters of the act was obviously thwarted by the court's requirement that the owner demand the sworn statement, 1926 NAT'L CONF. 705 N. 26.

88. Shaw v. DelMar Cabinet Co. Inc., 63 So.2d 264 (Fla. 1953).

89. Lehman v. Snyder, 84 So.2d 312 (Fla. 1955).

90. Shaw v. DelMar Cabinet Co. Inc., *supra* note 88.

91. Lehman v. Snyder, *supra* note 89.

92. FLA. STAT. § 84.05 (1957).

93. FLA. STAT. § 84.02 (1957). See Richard Store Co. v. Florida Bridge & Iron Inc., 77 So.2d 632 (Fla. 1954). Where all sums have been properly paid, materialman has no lien. Carolina Lumber Co. v. Daniel, 97 So.2d 156 (Fla. App. 1957). See also BOYER, FLORIDA REAL ESTATE TRANSACTIONS, § 33.10 at 1081 (1959).

94. FLA. STAT. § 84.05 (1957).

of property were made cognizant of their responsibilities under the proper payment provisions only a rather bold one would venture into building an improvement without the aid of expert legal counsel.

The owner may properly make payments to laborers at any time when such payment is due and payable to them.<sup>95</sup> Laborers are protected to the same extent as other lienors, but need not file a cautionary notice to establish any priority. Generally, the laborer will get the amount of his lien in full and takes priority over other classes of lienors.<sup>96</sup> The owner is required to retain funds owing to the contractor sufficient to satisfy the claims of all laborers.<sup>97</sup> However, the laborer is required to file a formal claim of lien in order to establish his lien and reach the funds retained.<sup>98</sup> All classes of laborers have priority as to satisfaction of their liens over all other classes of lienors, but as between laborers, there is no priority based on the time of their performance on the improvement.<sup>99</sup> The owner is required to give the contractor 10 days written warning of his intention to make payment to the laborer.<sup>100</sup> A laborer may not waive his lien.<sup>101</sup>

Payments made to timely lienors are deemed proper: (1) when the owner has retained sufficient funds to pay the laborers,<sup>102</sup> (2) when this second group has served cautionary notices upon the owner,<sup>103</sup> (3) when the owner has notified the contractor of his intention to make payment to those in this classification,<sup>104</sup> and (4) if the contractor does not send written objections to such payment within ten days after receipt of the warning by the owner.<sup>105</sup> The owner is liable in damages to the contractor, for payments made to lienors if the owner fails to follow the procedures set forth in the act.<sup>106</sup> This places the owner in a very precarious position, and anything short of perfection with respect to his abiding with all of these procedures could very well result in duplication of payments.

The owner may not properly pay the contractor, laborers, materialmen or other prospective lienors on the direct contract, before such payment is payable under its terms.<sup>107</sup> Payment made before it is due is not improper per se. The propriety of such payment is judged on the basis of its

---

95. FLA. STAT. § 84.05(2) (1957).

96. FLA. STAT. §§ 84.04(4), 84.06, 84.20 (1957), as amended FLA. STAT. § 84.20 (1959).

97. FLA. STAT. § 84.05(8) (1957); *Florida Fruit Co. v. Shakelford*, 145 Fla. 216, 198 So. 841 (1940).

98. FLA. STAT. §§ 84.04(4), 84.14 (1957); *Florida Fruit Co. v. Shakelford*, *supra* note 97.

99. FLA. STAT. §§ 84.06, 84.20 (1957), Amendment to § 84.20, Fla. Laws 1959, ch. 59-460.

100. FLA. STAT. § 84.05(6) (1957).

101. FLA. STAT. § 84.26 (1957); *Florida Fruit Co. v. Shakelford*, 145 Fla. 216, 198 So. 841 (1940).

102. FLA. STAT. *supra* note 96.

103. FLA. STAT. *supra* note 57.

104. FLA. STAT. *supra* note 100.

105. *Ibid.*

106. *Ibid.*

107. FLA. STAT. § 84.05(10) (1957).

having been paid at the proper time; *i.e.*, after performance by the lienor and in accordance with the terms of the contract.<sup>108</sup> If no other lienor is injured thereby the payment will be judged as proper.<sup>109</sup> When any lienor suffers because a premature payment reduced the total amount upon which he could have claimed his lien, the amount by which his claim has been reduced will be held improper, whereas the balance of the payment will be held proper.<sup>110</sup> The statute, with respect to this provision, is poorly worded and difficult to comprehend.<sup>111</sup>

The third group of lienors next entitled to receive payment from the owner are the regular lienors. Included in this group are those who did not file cautionary notices, or if they did, they filed them after completion of their work.<sup>112</sup> This group may be paid properly: (1) after the amounts owing to the laborers<sup>113</sup> and timely lienors<sup>114</sup> have been paid or set aside, (2) and no waiver of liens has been given by this group,<sup>115</sup> and such payments are due and payable to them under the contract,<sup>116</sup> (3) and after notice by the owner to the contractor as described above.<sup>117</sup> Those lienors who are referred to in the contractor's sworn statement and all other lienors (except the contractor) are included in this group.<sup>118</sup>

The fourth group includes the contractor. No notice is necessary in order for the contractor to perfect his lien, since the owner is in privity with the contractor and knows (or should know) how much is still unpaid and owing on the direct contract.<sup>119</sup> The owner may pay the contractor at any time after the money is due and payable under the contract, but only so much of the amount that is not to be retained for the payment of laborers and other claimants from whom the owner has received notice.<sup>120</sup> The sums withheld from the contractor must be sufficient to pay all the amounts owing for past services and materials; for future services and materials to lienors from whom notice has been received, and for laborers from whom no notice was received.<sup>121</sup> Payment must be made in good faith and proof of payment is *prima facie* evidence of good faith.<sup>122</sup>

When the contractor furnishes the owner with a waiver of lien which is signed by a lienor, a payment by the owner to the contractor in reliance

---

108. *Ibid.*

109. FLA. STAT. § 84.05(13) (1957).

110. FLA. STAT. § 84.05(10), (13) (1957).

111. *Ibid.*

112. FLA. STAT. § 84.04(2) (1957).

113. FLA. STAT. § 84.05(4) (1957).

114. *Ibid.*

115. *Ibid.*

116. *Ibid.*

117. FLA. STAT. § 84.05(6) (1957).

118. FLA. STAT. § 84.05(4) (1957).

119. FLA. STAT. § 84.04 (1957).

120. FLA. STAT. § 84.05(8) (1957).

121. *Ibid.*

122. *Ibid.*

upon the waiver will be deemed to be a proper payment.<sup>123</sup> If the owner instead of properly paying a lienor directly makes payment to the contractor or another, the payment will still be deemed proper so long as the money is actually received by the lienor.<sup>124</sup> This provision seems to say nothing. If the lienor receives payment from the contractor or other person to whom the owner made such payment, the lienor, having received payment, would not be entitled to a lien against the owner. This seems to be too obvious to be stated in the statute. Most certainly, receipt by the lienor of money for services performed or materials furnished on one particular improvement would preclude the assertion of a lien by such performer or supplier.

Where the direct contract calls for expenditures of less than \$3,000, the owner is not permitted to pay the contractor his final payment until after it becomes due.<sup>125</sup> The owner is not required to make this final payment until the sworn statement is furnished to him by the contractor.<sup>126</sup> Any sums paid in reliance on the contractor's sworn statement shall be deemed properly paid, provided that had the statement been true, payment would have been proper.<sup>127</sup>

A more detailed set of procedures apply to the determination of proper payment where the direct contract price exceeds \$3,000.<sup>128</sup> The owner may protect himself from paying twice or may reduce the total amount subject to lien attachment by the following alternative procedures:

1. He may require that the contractor furnish a surety bond with a company licensed in the state.<sup>129</sup> If the owner is unaware of this provision he may be liable for payment to lienors even after he has paid the contractor. The burden here seems to be placed on the owner. The statute presupposes that the owner knows that he is to require the contractor to furnish such a bond. The bond is required to cover laborers, subcontractors, and materialmen and shall be payable to the owner for at least twice the amount of the contract price.<sup>130</sup> Assuming the owner knows enough to require this bond, he could then make payments to the contractor as they become due without the necessity of withholding payments for lienors.<sup>131</sup> If the contractor failed to make payments to his laborers or materialmen, any liens filed against the owner would be satisfied by the surety company.

---

123. *Ibid.*

124. FLA. STAT. § 84.05(9) (1957).

125. FLA. STAT. § 84.05(11)(b) (1957).

126. FLA. STAT. §§ 84.04(3), 84.05(11)(b) (1957).

127. FLA. STAT. § 84.05(12) (1957).

128. FLA. STAT. § 84.05(11)(a) (1957).

129. *Ibid.*

130. *Ibid.*

131. This appears to be the effect of the bond requirement alternative in FLA. STAT. § 84.05(11)(a) (1957). But see BOYER, FLORIDA REAL ESTATE TRANSACTIONS, § 33.13 at 1087 n. 2 (1959).

2. If the owner fails to require a bond, the following alternative is available.<sup>132</sup> The owner is not permitted to make any payments to the contractor under the direct contract until the visible commencement of operations.<sup>133</sup> This provision might well supply the motive for a contractor to inform the owner of his right to require a surety bond, since the contractor might not wish to make any appreciable cash outlay prior to the commencement of operations without having received a first payment from the owner. Pity the poor owner who does not know enough to require the bond or withhold payment prior to visible commencement of operations. Any payment so made by him to the contractor would be an improper payment. It would seem that since a contractor who earns his livelihood in the field of construction should more readily be presumed to know the law, the burden for such knowledge ought to be placed on the contractor. Take the hypothetical case of when materials are specially fabricated for a particular purpose. Tiles, for example, which can only be used for one particular job are ordered by the contractor prior to the time that operations are visibly commenced and are ready for delivery. The owner has not required a bond, the contractor needs the tiles, but must pay a substantial amount to the tile manufacturer before the manufacturer will make delivery. The contractor cannot make this cash outlay and asks the owner for first payment so that operations can be commenced. If the owner refuses to pay, the contractor cannot commence operations, and the owner is still liable to the tile manufacturer for the specially made tiles.<sup>134</sup> At this point he can only engage a new contractor with money or advance his present contractor the amount required to effect delivery of the tiles. The owner is now in "hot water." If the contractor absconds, he must still make payment to the tile manufacturer, and also find another contractor. The requirements of the act seem to place the owner in a perilous position in anything he undertakes to do which is short of perfection.

After operations are visibly commenced, the owner must then withhold twenty per cent of each progress payment as it becomes due under the contract.<sup>135</sup> The act further prohibits the owner, under penalty of having an improper payment declared, from making a payment of more than eighty per cent of the contract price until the contract is fully performed and final payment is due and the contractor has furnished a sworn statement.<sup>136</sup>

---

132. FLA. STAT. § 84.05(11)(a) (1957).

133. *Ibid.*

134. Liens may extend to specially fabricated materials although not incorporated in the property if the fact of non-incorporation is not occasioned by an act of the materialman. Specially ordered materials are not the same as specially fabricated and liens would therefore not lie for materials specially ordered. *Surf Properties v. Markowitz Bros.*, 75 So.2d 298 (Fla. 1954).

135. Note 132, *supra*.

136. *Ibid.*



The owner, upon receipt of a sworn statement which recites outstanding bills for labor, services or materials, may make payment directly to the claimant, and deduct the amounts so paid from the final payment.<sup>137</sup> If this amount is insufficient to cover all the claimants the owner shall pay no money to anyone until such time as the contractor has furnished the difference to him.<sup>138</sup> The act does not state whether the owner would be liable for unsatisfied lien claimants if he made payment to some of the lienors prior to his demanding that the contractor make up the difference. It appears that by implication he would be so liable. If the contractor fails to furnish the deficiency,<sup>139</sup> the owner may prorate the amount due to each lienor according to the order of priority established under the act. The statute does not state what methods the owner may use to induce the contractor to make up the deficiency nor how long the owner must wait until the contractor's refusal to pay is deemed a failure to pay. If the contractor promised to pay the owner for such deficiency and the owner made payment to some of the lienors in full in reliance on the contractor's promise to pay, presumably the owner would be liable for an improper payment as to those claimants yet unpaid. Again it appears that an unreasonably superior knowledge is required of the owner. If the contractor abandons the improvement prior to completion, the owner must make the payments in accordance with the procedure stated above, prior to engaging other contractors or workers in order to complete the abandoned improvement.<sup>140</sup>

If the owner fails to require the bond and fails to withhold the twenty per cent and fails to make disbursements as set forth in the act, the property may be subjected to liens for the full amount of any and all outstanding bills for labor, services or materials furnished for such improvement; provided the lienors file their claims of lien within the period prescribed and the action to enforce the lien is commenced within one year from the date of the filing.<sup>141</sup> The Florida Supreme Court invalidated a portion of the act which made the owner personally liable for the full amounts which were unpaid irrespective of the date that the liens were filed and without regard for the time ordinarily required to bring an action to enforce the lien.<sup>142</sup> This penalty was the price that an owner may have been required to pay if he did not require the bond and failed to withhold the twenty per cent. The section was invalidated<sup>143</sup> on the basis that it was an unconstitutional impairment of the liberty of contract and that it was an unconscionable and unreasonable deprivation of property without due process of law. The

---

137. *Ibid.*

138. *Ibid.*

139. FLA. STAT. § 84.05(11)(a), 84.06 (1957).

140. FLA. STAT. § 84.05(11)(a) (1957).

141. *Ibid.*

142. Fla. Laws 1953, ch. 28 243 §1, at 885.

143. *Greenblatt v. Goldin*, 94 So.2d 355 (Fla. 1957).

entire section was initially invalidated, but subsequently the legislature reenacted the section eliminating the objectionable portion.<sup>144</sup>

### *Brief Summary of Proper Payment Rules*

Payments made on a direct contract and in accordance with the provision set forth in the statute constitute proper payment. Payments made otherwise subject the owner's property interest to liens.<sup>145</sup> Proper payments made to the contractor by the owner will not subject him to lien liability for these amounts.<sup>146</sup> Payments may be made to laborers whenever such sums are due and payable.<sup>147</sup> The owner should at all times hold back enough to pay all laborers, since they are not required to serve a cautionary notice.<sup>148</sup> Payments may be made to lienors serving the owner with a cautionary notice, when it is served before completion of their work, and if they have not signed waivers of lien.<sup>149</sup> After payment to timely lienors, the owner may make payment to regular lienors.<sup>150</sup> The owner must give the contractor ten days written notice of his intention to make payments to the claimants. Failure to do so will result in the owner's liability to the contractor for any damage that the contractor suffers by virtue of such payment.<sup>151</sup> The contractor must send a written objection to the owner objecting to the payment or else he is deemed to have consented.<sup>152</sup>

The owner must require a bond on contracts exceeding \$3,000.00 or in the alternative withhold twenty per cent of the payments as they become due and make payments to claimants as required.<sup>153</sup> He must also withhold the final payment until he receives a sworn statement from the contractor stating to the effect that all claimants have been paid.<sup>154</sup> If all claimants have not been paid, then the owner must withhold sums sufficient to pay those claimants.<sup>155</sup> Failure to make proper payment results in lien liability of the property improved and upon which the owner is personally liable.<sup>156</sup>

---

144. Fla. Laws 1957, ch. 57-302 §1.

145. FLA. STAT. § 84.05 (1957).

146. FLA. STAT. § 84.05(7) (1957).

147. FLA. STAT. § 84.02(2) (1957).

148. FLA. STAT. §§ 84.04(4), 84.05 (1957).

149. FLA. STAT. § 84.02(3) (1957).

150. FLA. STAT. § 84.02(4) (1957).

151. FLA. STAT. § 84.05(6) (1957).

152. *Ibid.*

153. FLA. STAT. § 84.05(11)(a) (1957).

154. *Ibid.*

155. *Ibid.*

156. This is the general effect of the provisions in FLA. STAT. § 84.05 (1957).

*Priorities**Priority of Mechanics' Liens As Between Mechanics' Lienors*

The priority of liens between lienors is as follows: (1) Laborers of all classes;<sup>157</sup> (2) Timely lienors;<sup>158</sup> (3) Regular lienors;<sup>159</sup> (4) Liens of the contractor.<sup>160</sup> In the event that the amount in the hands of the owner is insufficient to pay lienors of more than one class, liens within a single class should be paid first before liens in a subsequent class are paid.<sup>161</sup> If the amount is insufficient to pay lienors of any one class in full, the lienors should be paid pro rata from the amount of money remaining.<sup>162</sup>

*As to Purchasers, Other Encumbrances and Liens*

Since mechanics' liens take effect at the time of visible commencement of operations, a mortgage to take priority must be filed or recorded prior to the visible commencement of operations.<sup>163</sup> Likewise, other conveyances, attachments, judgments or demands against real property which is improved must be filed before operations are visibly commenced in order to prevail over a mechanic's lien.<sup>164</sup>

An innocent purchaser or mortgagee without notice is not protected as long as the lien claimant files his lien within the time permitted (90 days).<sup>165</sup> If the lien is not filed, however, the lienor loses his priority to the mortgagee or intermediate party even though such party has notice of the encumbrance.<sup>166</sup> A subsequent purchaser may find that the land he has acquired had liens filed against it after he had purchased it. This can occur even though no liens of record encumbered the property at the time of the purchase if the lienor files his formal claim of lien within the three month period. The innocent purchaser, although he may have remedies for breach of warranty against his grantor, may be liable in full for liens dating back to the visible commencement of operations. He is offered no protection by the act other than that protection which is his after the three month period has expired. He may protect himself by getting a statement from the grantor to the effect that no improvement had been made on the purchased property within the three month period prior to its sale. If a lien arises the purchaser is presumably still liable if the lienor

---

157. FLA. STAT. §§ 84.06(1), 84.20 (1957).

158. FLA. STAT. § 84.06(2) (1957).

159. FLA. STAT. § 84.06(3) (1957).

160. FLA. STAT. § 84.06(4) (1957).

161. FLA. STAT. § 84.06 (1957).

162. *Ibid.*

163. FLA. STAT. § 84.20 (1957). See Amendment Fla. Laws 1959, ch. 59-460.

164. *Ibid.*

165. BOYER, FLORIDA REAL ESTATE TRANSACTIONS, §§ 28.03 at 731, 33.17 at 1093 (1959).

166. Fisher Co. v. Verhine, 147 Fla. 670, 3 So.2d 374 (1941); Gray v. L. M. Penzi Tile Co., 107 So.2d 621 (Fla. App. 1958); Nathman v. Chrycy, 107 So.2d 782 (Fla. App. 1958).

files within the three month period, but he has his private recourse against the grantor. If the grantor absconds or is insolvent the purchaser suffers the loss. His only mode of protection would be to escrow the purchase price or a portion if it is for a three month period. However, this arrangement is usually impractical.

Contractors who commence operation in anticipation of the owner's securing a mortgage have priority over the mortgagee.<sup>167</sup> This also applies to laborers and materialmen.<sup>168</sup> The mortgagee's only protection is a visual inspection of the premises. If after such an inspection he determines that operations have been commenced, he should not approve the mortgage. The mortgagee should ascertain that his mortgage is recorded prior to any visible commencement of operations on the improvement. A contractor who knows of an impending mortgage is not precluded from asserting a mechanics' lien on the improved property; his active aid in procuring the mortgage would not preclude his priority over the mortgagee unless he yields that priority in aiding the owner in securing the mortgage.<sup>169</sup>

In Florida, federal tax liens subsequent in time to a mechanics' lien were held not to have priority.<sup>170</sup> It is apparent that priority in these cases rests with notice created by recording.

#### *Statute of Limitations*

Action to enforce liens filed within the three months as limited by the act must be brought within a year of the filing. Those lienors contracting directly with the owner are specifically excluded.<sup>171</sup> Such lienors are not required to file such a claim. In their case, action must be brought within a year from the date that the last items of labor and services are performed or materials furnished. However, if such lienors do file formal claims of lien, the time runs from the date that the lien was filed.<sup>172</sup>

#### *Miscellaneous Provisions*

The lien must be filed within three months from the date that the lienor completes his work upon the improvement.<sup>173</sup> He may file it formally

---

167. FLA. STAT. § 84.20 (1957). *Reading v. Blakeman*, 66 So.2d 682 (Fla. 1953).

168. FLA. STAT. § 84.20 (1957).

169. *Reading v. Blakeman*, 66 So.2d 682 (Fla. 1953). See also *BOYER, op cit. supra* note 165, § 32.03 at 1010 n. 15.

170. *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953). *approved Gulf Beach Bank v. Hulley, aff'd per curiam sub nom, United States v. Hulley*, 102 So.2d 599 (Fla. 1958). The trend in Federal Courts is to hold mechanics' liens lesser in priority than Federal Tax Liens. *United States v. White Bear Brewing Co.*, 227 F.2d 359 (7th Cir. 1955), *rev'd mem.*, 350 U.S. 1010 (1956); *United States v. Coletta*, 79 So.2d 474, (Miss. 1955), *rev'd mem.*, 350 U.S. 808 (1955).

171. FLA. STAT. § 84.21 (1957); *Maule Industries v. Trugnan*, 59 So.2d 27 (Fla. 1952); *Hendry Lumber Co. v. Bryant*, 135 Fla. 485, 189 So. 710 (1939).

172. *Roughan v. Rogers*, 145 Fla. 421, 199 So. 572 (1940).

173. FLA. STAT. § 84.16 (1957). Amended Fla. Laws 1959, ch. 59-460.

at any time during the progress of the work.<sup>174</sup> Failure to file the lien within the three month period precludes the claimant from bringing any action against the owner or enforcing any lien upon the land.<sup>175</sup> Claimants who file within three months have one year from the date of the filing to bring an action to enforce that lien.<sup>176</sup> As stated above, lienors who contract directly with the owner need not file formal claims of lien. It is to their advantage to do so however, since if no liens are filed record claimants may lose their right to enforce them against the property improved in the event that the property is conveyed to a bona fide purchaser.<sup>177</sup> It is also to their advantage to file since filed liens take precedence over unfilled liens if there are insufficient funds to satisfy all lien claimants.<sup>178</sup>

An action to enforce a lien is accomplished by subjecting the real property to the lien. The property is then sold in satisfaction. In the event of multiple actions, interested parties may move for consolidation or apply for the intervention of other parties.<sup>179</sup> Deficiency decrees may be awarded by the court.<sup>180</sup> The owner has the right of redemption under the act, but since Florida has no statutory right of redemption with respect to mortgages, it is doubtful whether the court would grant the right of redemption with respect to mechanics' liens.<sup>181</sup>

The act provides that liens may be discharged by: (1) Notation of satisfaction upon the record, signed by the lienor or his agent, and attested to by the clerk of the court;<sup>182</sup> (2) A certificate by the lienor, stating that the lien has been discharged (such discharge should be acknowledged and filed for record);<sup>183</sup> (3) Failure to bring an action for enforcement within the specified period;<sup>184</sup> (4) By order of the circuit court of the county where the property is located;<sup>185</sup> (5) By filing a transcript of a judgment or decree showing judgment in favor of the owner of the real property against which the lien was claimed.<sup>186</sup>

The act provides for a criminal action of embezzlement where funds are received and fraudulently misapplied.<sup>187</sup> It would seem that this would

174. *Ibid.*

175. FLA. STAT. § 84.16 (1957). *Fisher v. Verhine*, 147 Fla. 670, 3 So.2d 374 (1941); *Nathman v. Chrycy*, 107 So.2d 782 (Fla. App. 1958).

176. FLA. STAT. § 84.21 (1957).

177. Cases cited note 166 *supra*.

178. FLA. STAT. §§84.04, 84.05, 84.06, 84.16 (1957).

179. *BOYER, op. cit. supra* note 165, § 33.18 at 1095.

180. FLA. STAT. § 84.29 (1957).

181. FLA. STAT. § 84.27 (1957); See also *BOYER, op. cit. supra* note 165, § 33.18 at 1096.

182. FLA. STAT. § 84.23(1) (1957).

183. FLA. STAT. § 84.23(2) (1957).

184. FLA. STAT. § 84.23(3) (1957).

185. FLA. STAT. § 84.23(4) (1957).

186. FLA. STAT. § 84.23(5) (1957).

187. FLA. STAT. § 84.08 (1957). The Florida Legislature amended this Section in Fla. Laws 1959, ch. 59-405 §1 stating that any person, *firm or corporation* was subject to criminal liability for perjury. Prior to the amendment, the statute merely stated "person". The legislature further amended the act by deleting the requirement of intent

be a deterrent to contractors. In view of the number of liens enforced against owners who have acted in good faith by making payments to contractors, convictions under this provision are not common. If the contractor furnishes a statement under oath and it can be proved that there was intent to defraud through false statements made in the sworn statement, the contractor would be liable for perjury. There are no cases, as yet, which decide whether the owner would be liable to the lien claimant when false statements are made by the contractor.

#### CONCLUSION

##### *Comment*

It appears to the writer that the difficulty in interpretation of the statute is overshadowed by the basic injustice of the philosophy of the Mechanics' Lien Law itself. Amendments to the act would be helpful, but if the legislature merely amends provisions and takes no cognizance of the penalties which it imposes on the owner of the property through statutory "wrong doing" and not by actual wrong doing, then the courts will still be faced with the dilemma of enforcing judgments against one who does not act wrongfully but is penalized for the wrong doing of another.

For the most part the owner's land or property is subject to liens through the contractor's failure to meet his obligations except in the cases where the owner of the property wrongfully refuses to pay the contractor. It is usually the contractor's default which creates the multitude of problems that arise through the application of the provisions of the Mechanics' Lien Law. The unusual aspect of this law is that the liability for default is for all intents and purposes shifted to the owner. The criminal provisions for perjury and misapplication of funds offer little financial benefit to the penalized owner.<sup>188</sup>

There are innuendos in the background of the act which predicate the owner's liability to lienors on a theory of unjust enrichment. Certainly the owner's property is enhanced by improvement, but where the owner has in fact made payments to the person with whom he has contracted, it seems unreasonable to say that the owner was "unjustly" enriched. Can the lienor maintain that the owner owes him something when the owner promised him nothing? His redress, were it not for the statute, would be against his contractor for breach of contract. There is no question that something should be done to provide building trade workers, materialmen, etc., additional protection for their services and materials furnished. Must

---

to defraud and knowledge of the falsity of the statements "Any person who with intent to defraud . . . knowing that such a statement . . . is false . . ." The amendment appears to make the mere *furnishing* of the false statement and reliance upon such statement by the person making payments the basis for guilt of perjury.

188. *Ibid.*

it be done at the expense of an innocent party? The provisions of the act seem to create devious pitfalls into which an unwary owner may become entrapped.<sup>189</sup> He is liable for his failure to comply with the statute, but the statute makes compliance difficult. This should not be the purpose of the law. The statute should facilitate public compliance.

At the time when the Mechanics' Lien Law was written, the nation was in a different economic position than it is today. In 1925, fortunes could be more readily amassed and the country had not yet felt the pinch of the depression. Those owners desiring to improve their property could well afford to protect laborers and materialmen from unscrupulous contractors. It is more easily understandable why the act was adopted in the period of 1934. At that time, with the heavy unemployment, laborers and other building trade workers were hard pressed for employment. Those who were able to keep what they had or those few who had acquired more during the depression were at this time beginning to spend some of their money on property improvement. Certainly, at this time property owners were much more able to bear a financial loss than were building trades workers and materialmen. Since the owners who were improving their property had the money, an additional burden upon them to safeguard the employees who contributed to the enhancement of their property could to some extent be justified.

Today, building trade workers, because of labor union organizations receive a high hourly wage and their standards of living are relatively high. Materialmen are generally corporations engaged in the production or sale of their materials on a larger scale than the pre-depression or post-depression era. Architects and engineers who are protected under the act are ordinarily in a higher income bracket than their predecessors. The owner today is in a far different position. The owner who suffers the greatest liability for liens is not the large corporate owner who contracts for large hotels or office buildings. These corporate owners generally have benefit of counsel and are usually well aware of the legal requirements necessary in undertaking property improvements. It is the small property owner, the middle class and working people, who save for years or use borrowed funds to build additions onto their homes or to build new homes, that fall victim to the pitfalls of the statute.

The picture has changed in many respects as to which of the two innocent parties should suffer.

It is the writer's opinion, that neither of the innocent parties need suffer the consequences of a contractor's failure to meet his obligations. The statute in effect protects the laborers and materialmen at the expense of the owner. It gives the owner a method whereby he may reduce his liability in most cases, and leaves him the right to proceed against the

---

189. FLA. STAT. § 84.05 (1957).

contractor by actions on the contract. This is no privilege for the owner, since the same right is available to the claimants of the liens. The lien claimants generally contract with the contractor and not with the owner. Their right to sue on their contract is also available to them. Let us consider where the burden should fall. In most other forms of business today, the individual proprietor, the partnership or the corporation must meet their obligation or fail. No statutes, other than the Bankruptcy Act, seek to place these business owners in a greater advantage over their creditors. The Bankruptcy Act provides relief to the owners and sees that the funds are distributed after the windup to the creditors who qualify. Insurance companies<sup>190</sup> are rigidly regulated for the benefit of the public. They are required to keep certain funds in reserve so that those insured may be protected in some degree in the event of business failure. Real estate transactions and brokers<sup>191</sup> are regulated for the protection of the public. Dealers in securities<sup>192</sup> are regulated regarding the amount of margin required for purchase of securities; the liabilities of the dealer for unethical practices are also defined. The Mechanics' Lien Law makes a weak attempt to impose a burden on the contractor, but the burden has little preventative effect; by virtue of the increasing litigation in the field, it is evident that the act offers greater protection to the defaulting contractor than it does to the lienors or the owner.

While it is true that the standards of most contractors in the state are high and their business practices are reputable, statutes such as the Mechanics' Lien Law would rarely be resorted to if all contractors were morally and financially responsible in the conduct of their affairs. A statute such as this is not designed to offer protection to those dealing with reputable or solvent contractors, rather it is for the benefit of those who are unfortunate enough to have placed themselves in the hands of one who can not or will not meet his obligations. Construction in the state of Florida is big business. By virtue of the number of persons employed in construction work a large segment of the population falls within the realm of those needing protection in the name of public interest. It is unrealistic to burden innocent parties with the obligation of rectifying the shortcomings of those with whom they choose to do business. Were the legislature intent on placing the burden where it belongs, there is no doubt that a great hue and cry would arise from the professional contractors. The lobbyists for the contractors no doubt would put great pressure on the legislature to prevent such a result. The legitimate, solvent, and reputable contractors, however, would have no just cause for opposing such a move by the legislature, since such legislation would be to the overall benefit of legitimate contractors and would adversely effect only those with poor financial responsibility, or poor motivation. Legislative

---

190. FLA. STAT. ch. 625 (1957).

191. FLA. STAT. ch. 475 (1957).

192. FLA. STAT. ch. 517 (1957).



regulation of contractors to some degree would place a greater amount of confidence in those dealing with contractors and reduce some of the unjust effects brought about through mechanics' lien litigation.

*Possibilities for Legislative Revision of the Mechanics' Lien Law*

The problem of who should bear the loss when the contractor is in default seems to the writer to be the greatest single difficulty of the act. It is a matter of policy that should be ascertained. The courts attempt as much as possible to balance the equities in these cases. The results are diverse. In some cases the act is strictly construed against the lienor (depending on which type of lienor he happens to be), in other cases it is construed strictly against the owner.<sup>193</sup> The Mechanics' Lien Law does not appear to have been intended as a device wherein the equities should be balanced. The act implies that as between the innocent owner and the innocent lienors, the party conforming most rigidly to the provisions in the statute will bear the least loss. The greater burden for compliance rests with the owner. The procedures in the act seem to attempt to make one party more guilty than the other by holding him liable for the failure to comply rigidly to the multitudinous requirements for proper payment. The fact remains that both parties may be innocent with respect to the good faith of their actions, and their liability and penalty stem from the statute.

The requirement of the sworn statement appears in the statute to be a protective device for the owner. However, in one case<sup>194</sup> the owner was held to be liable for his failure to demand the statement from the contractor. Such a construction of the statute shifts the burden to the owner. The court held that the statute did not require the owner to demand the sworn statement from the contractor. However, since no statement was furnished by the contractor the owner's failure to demand a statement resulted in a loss to the lienor. The owner was held liable to the extent that his failure to demand occasioned the loss. This case rested not so much in justice as it did in semantics. In effect, the court construed the statute as requiring the owner to demand the statement, or be liable for the

---

193. Liberally construed in favor of laborers and materialmen, *Hendry Lumber Co. v. Bryant*, 138 Fla. 485, 189 So. 710 (1939). "Substantial Compliance" required of materialmen, *Masterbilt Corp. v. S.A. Ryan Motors of Miami*, 149 Fla. 644, 6 So.2d 818 (1942). Strict compliance by subcontractors and materialmen, *Shaw v. DelMar Cabinet Co.*, 63 So.2d 264 (Fla. 1953). Liberally construed for benefit of lienors (Federal Tax priority case), *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953). With reference to public property strictly construed against the lienors, *City of St. Augustine v. Brooks*, 55 So.2d 96 (Fla. 1951). Liberally construed as to laborers and materialmen, *Robert L. Weed, Architect, Inc. v. Horning*, 159 Fla. 847, 33 So.2d 648 (1948).

194. *All State Pipe Co. v. McNair*, 89 So.2d 774 (Fla. 1956). The court stated, "There is nothing to be gained in condemning or applauding the Mechanics' Lien Law for it is the law of this State. Admittedly, it is harsh in many respects, as applied to an owner, and no one improving property can ignore its provisions without coming to grief."

loss incurred by his failure to demand. The lienor may, in effect, at no real risk to himself, engage in contracts with contractors of questionable repute or solvency, extend credit, and be indemnified by the owner. The lienor may look to either party for payment. Most companies pay premiums for such a contract of indemnification, but here the statute grants such a privilege to the lienor.

It is therefore submitted that the legislature should evaluate the act from the point of view of determining the public policy behind the act. If they find that a philosophical reevaluation would shift the burden to the contractor rather than to the owner, with respect to cautionary notices and proper payment, then many of the provisions could be eliminated.

The legislature may consider the requirement of a surety bond which will run permanently with the contractor's license. For example, a contractor at the time that he secures his occupational license might be required to have a bond of \$5000.00 taken out with an insurance company. The bond could be regulated by the volume of business that the particular contractor engages in during the course of the year. It could be determined on the value of his average contract, his yearly income, his total assets, or through any formula designed to reach a fair appraisal of the minimum protection to be afforded to those with whom he contracts. The burden for securing such a bond could be imposed by the statute, and if the contractor failed to secure such a bond, penalties, such as suspension of right to contract for certain periods could be invoked.

As a contractor enters into more contracts, which exceed the amount of bond required by the statute, he should then be required to increase his bond by the total amount of the contracts in which he engages. The cost of securing the bonds, of course, could be included in the contract price, so that no penalty would be placed on the contractor. It seems that the owner, were he advised by the contractor of the reason for the bond, would not object to such insurance which would inure to his own benefit. Should the owner object, and not be willing to absorb the bond costs, the burden would be upon the contractor to secure a written waiver of the bond from the owner. This waiver should be worded in such a manner that the owner would clearly understand what he was signing, and the extent of his liability to lienors if he fails to sign. If no waiver is secured, then the contractor must secure the bond. The bond would be entirely for the benefit of the owner, (for the purpose of paying would-be lienors) and only the owner would have the right to waive it. His liability by waiving the requirements of the bond would not be predicated on a mere statutory policy that as between two innocent parties the owner should bear the loss, but it would be based on an expressed intention to become his own insurer.

In order to ascertain that the required bonds were secured, enforcement of the bond requirement could be handled on the municipal or county level. Upon application for a building permit, the contractor would be required to furnish either a statement from an insurance or bonding company certifying that the bond had been issued or the owner's waiver of the bond requirement.

Suitable penalties for fraudulent procurement of waivers and certification of bonds would aid as a deterrent to such practices. A more effective mode of enforcement would be to prohibit the commencement of construction through refusal of building permits to errant contractors.

It is the writer's opinion that a shift away from lien liability on the part of the innocent owner should be a matter of prime concern for the legislature's consideration. Strict regulation of the building practices is not here advocated, but proof of financial responsibility of contractors to owners would be desirable. Simplification of the lien procedure prescribed by the act is also necessary, as is evidenced by the diversity of the results obtained through the construction of its cumbersome provisions. It is submitted that if bond requirements were made a part of the lien statute, the provisions for the different types of notice, as well as the proper payment provisions would not be necessary to establish the degree of liability that the owner has to the lienors.

With the ever growing economy in Florida, much of which is directly attributable to the building industry, the streamlining of our laws with provisions for the protection of the public in dealings with members of that industry would create a greater feeling of trust and security on the part of the public and insure more ethical and financially responsible contractors for service to the public.

MYRON S. KRASNY