1893

Mechanics Lien

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THESIS UPON MECHANICS LIEN.

Presented for the Decree of LL.B.

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-- Cornell University, '93.--

Cases Cited.

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— C O N T E N T S —

Chap. I.

Origin of Lien.

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The subject of "Mechanics Lien" on Real Estate has already become of great importance in the United States, and the importance of this branch of the law is assured by the rapid growth of the whole country.

The origin of the law relating to the lien of a Mechanic is doubtful, but it was known to the Romans and the justice of the lien was recognized by them in the Civil Law. Provisions were also made for this lien by the Code Napoleon and also in Belgium, Prussia, Spain and later by Mexico.

The Code Napoleon provided that "Architects, contractors, masons and others employed in building, rebuilding or repairing houses, canals or any other works whatsoever, or those who lend money to pay or re-imburse workmen, should have a "privilege" to the extent of an estimate upon usch loan or work by a competent person".

Code Napoleon, 571 - 572.

This "privilege" was nothing more or less than a specific lien which was authorized by law. The lien of the Mechanic upon realty is not a common law lien or right, but is the creature of statute and is given only to those who comply with the prescribed terms.

Russell -vs- Bell, 44 Penn St., 47.
Phillips' Mech. Lien, Secs. 1-6.

It does not arise out of the contract (Lodini -vs- Winter, 32 Md.,130), but it is a mere incidental accompaniment as a means of enforcing payment, a remedy given by law which secures the preference provided for; (Bailey -vs- Mason 4 Minn. 546) but which does not exist unless the party seeking the remedy brings himself within the provisions of the statute, no matter how equitable the claim may be, and unless he shows a substantial compliance with its terms.
Quimby -vs- Sloan, 2 Abbt.Pr.100.

The common law only recognized, in case of a debt thus contracted, a right of action against the parties who ordered the work, and the usual action was an action of assumpsit. The owner of property could thus give a good title to property, which had been enhanced in value by the efforts of the mechanic. The lack of the attaching lien in such cases was the insurer of many gross frauds, and various legislative bedies then passed laws which permitted a lien to attach in case of failure to pay the mechanic for his labor.

The Legislature of Maryland was the first of the legislative bodies in this country to pass such a law. This was passed with a view to the protection of mechanics and artisans only.

The first attempt to create a mechanic's lien arose from a desire to establish and improve as speedily as possible the City of Washington as a permanent seat of Government of the

United States. At a meeting September 8, 1891, of the Commissioners appointed for that purpose, at which both Thomas Jefferson and James Madison were present, a memorial was adopted urging the General Assembly of Maryland to pass an act for securing to Master Builders on the houses erected and land occupied, which was during the same year followed by the passage of a law as requested. The"Proceedings of Commissioners" contained the following:- "Your memorialists conceive it would encourage Master Builders to contract for the erecting and furnishing houses for certain prices agreed on, if a lien was created by law for their just claim on the house erected, and the lot of ground on which it stood".

In the course of time it was extended to those who furnished materials, and later to all cases of repairs where the amount claimed was equal to a certain specified sum. Up to the year 1885 the liens laws in the State of New York were in a most unsatisfactory condition, and as is stated by Mr. William F. Snyder in his admirable work upon this subject, there were no less than twelve distinct statutes then in force in this State, limited to specific localities. These laws greatly differed in the extent of the liens permitted and related to different cities and counties.

The act of 1885 was intended to and did consolidate these various laws relating to Mechanics Liens, and the result has

been very gratifying both to the profession at large and to those who seek the benefit of the lien laws. The act of 1885, however, was limited to private property and di not include municipal property nor property belonging to railroads or to the oil wells.

These latter subjects are regulated by the Laws of 1875, Chap. 392, and Laws of 1880, Chap. 440, respectively. Thus it will be readily seen that this subject is covered in this State by these four statutes; the first relating to liens upon private property; the second (Act of 1878 and Consolidation Act) relating to Municipal or public property; the third to railroad property, and the fourth to oil wells.

Many intricate and perplexing questions are occasioned by the law as stated by these few statutes, and the decisions are not at all harmonious, nor are the authorities or writers agreed upon the various propositions which are prominent in this branch of the law. The equities and priorities among various claimants arising from a variety of causes render this subject peculiarly irksome and extremely tedious. It may be said, however, that certain fundamental principals, whuch under the lien laws, are settled and agreed upon by all authorities throughout the Union.

These provisions were many when compared with the law at the present time. The whole subject has been one of gradual growth (Collins -vs- Mott, 45 Mo. 100), extending from very

imperfect and limited enactments which were embarrassed by adverse decisions to be the settled policy of all the States and of unquestionable importance.

Putnam -vs- Ross 46 Mo. 337.
Davis -vs- Farr 13 Penn. 170.

Chap. II.

Nature of the Lien.

As already stated the mechanic had no lien upon real property at common law; but upon chattels he had a lien so long as he retained possession of the same. Equity raises no liens upon realty other than the vendor's lien for the purchase money.

Ellison -vs- Jackson Water Co. 12 Cal.542.

But the mechanic cannot retain the possession of real property upon which he has performed labor.

Ayers -vs- Revere 25 N.J.L.474.

If the lien, therefore, has been declared to be in the nature of a mortgage, but entirely different in its inception and consequences, though it is imposed by statute in favor of a whole class of persons, it has also been likened to an attachment and to a Lis Pendens.

Robins -vs- Bunny 34 N.J.L.322.

A mortgage is the desired result of the actions of the parties. The mortgagor by his own consent is generally the moving party, while in the case of a lien the lienor, who corresponds to the mortgagee, is the moving party. The lien is the creature of a statute; a mortgage is not, nor does a mortgage depend upon statutes for its enforcement, but a lien being a creature must in every case conform to the statutory requirements, else there is nor can be no lien. Mortgages ex-

isted at common law, while liens of this class were entirely unknown either to law or equity. The principals of liens are believes to be founded on natural justice and equity in that he who shall have enhanced the value of the real estate by his labor, or by the materials supplied in its erection, shall have a preferred claim on the property to secure the payment for such labor or materials.

Overton on Liens, 565.

The nature and extent of the security effected by the lien depends on the particular statute creating it. Usually it is equal to that of a judgment or mortgage

The case of John Thompson ,2 Browne (Penn) 297.
Goodman -vs- White 26 Conn. 317.

And as has been aptly stated by many writers upon this subject, when it is declared to be of such a nature, it is to be governed in its assignment and enforcement by the rules applicable to them. Thus it will be seen that the statutes on Frauds and Fraudulent Conveyances and statutes relating to interests in lands on realty, apply to mechanics liens in every particular; and a mechanics lien can only be assigned by an instrument in writing.

Ritter -vs- Stevenson , 7 Cal.388.

Though the lien therefore is to be regarded as a remedy, yet many courts have held it to be a real or proprietary interest in the nature of a mortgage, which may in its ultimate operation divest the title of the owner as where it was at-

tempted to extend a lien to a sub-contractor without express words.

Donahy -vs- Clapp,12 Cush. 440.

It is not a judgment (Hersey -vs- Shenk, 58 Penn. 388) and does not give the mechanic a right to his debts, which arises out of the performance of contract, and exists without the aid of the Statute. But the interest of the lienor has been declared to be an insurable one.

Franklin Fire Ins.Co. -vs- Coates. 14 Md.

The lien confers no right to the possession as against the owner, nor can a receiver of rents and profits be appointed pending the suit.

Prates -vs- Tudor 14 Texas, 37.
Meyer -vs- Seebald 11 Abbt.P. 326.

It creates no privity of estate even after being judicially established by judgment or decree or right of entry thereunder; but it is simply a legal charge running with the land affecting the title by rendering subsequent transfers or alienations subordinate to the rights of the lienor.

Merchants Ins. Co. -vs- Mazauge 22 Ala. 168.
Brackney -vs- Turrentine 14 Ark.416.& 12 Wheaton 179

The lien of the mechanic is, however, not a general lien, but a specific lien. At common law a general lien is the right to retain the property of another to secure a general balance of accounts, while a specific lien is a right to retain or attach the property of another only for a charge on account of labor employed or expenses bestowed upon the iden-

tical property detained.

Taggard -vs- Buckmare,42 Me. 77.

The distinction between a general and a specific lien having been shown, it is a very simple matter to distinguish between a judgment and a mechanic's lien.

A judgment is a general lien affecting all the debtor's real estate, while the mechanic's lien affects only the property specified in the notice of lien.

Freeman -vs- Crane 3 Comst. 305.

Unless regulated by statutory provisions the lien is not affected by the statute of limitations, but will be of indifinite duration.

Knoor -vs- Elliott 5 S & R,49.

The lien confers no right of sale unless provided by Statute (Coit -vs- Waples, 1 Minn. 134). And unless the Statute is strictly followed, the sale will be irregular and may be set aside for irregularity although the statute is remedial, and,as a general rule,to be liberally construed in favor of the lienor.

Chap. III.

To what it Attaches.

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It may be said that the general rule is that Mechanics Liens attach only to real estate and not to personal property, and that the owner cannot be compelled to pay more than he contracted to pay, unless by virtue of a none compliance with a statutory requirement he has rendered himself liable to a penalty. It attaches to the land in consequence of the incorporation of labor and material in the building erected which has become part of the land itself. So also, when the improvement consists of walks, fountains, grading &c., the land has become more valuable according to the amount of time and materials expended upon the property. As to a mechanic's lien attaching to public property there has been and is a great diversity of positions taken by the various authorities. The lien attaches to and was intended to attach to property owned by an individual, and property owned by corporations formed for pecuniary profit. But whether under these statutes public buildings or public property were intended to be included, has been the source of many different opinions and statements. Some authorities hold such a construction to be against public policy.

Wilson -vs- Commissioners of Huntingdon Co.
7 Watts & S, 197.

Poillon -vs- Mayor of New York, 47 N.Y., 666.

The case of Poillon -vs- Mayor of New York arose under the Mechanic Lien law relating to the City of New York. The lien sought to be sustained was against a school house, and the court held that a public building was not included within the meaning of the act.

In Pennsylvania it was held not to attach to a court house (Wilson -vs- Conm, 7 W & S, 197), nor to a railroad bridge in Wisconsin. (L.C. & Milw. R.R. -vs- Vanderpool, 11 Wis. 119) nor to a public bridge in Missouri and California.

McPheeters -vs- Bridge Co. 28 Mo., 468.
Burt -vs- Washington, 3 Cal. 46.

But in Indiana it has been enforced against a school house.

Shattell -vs- Woodward, 17 Ind. 225.

As such property ordinarily is exempt from levy and sale by virtue of an execution upon grounds of public policy, so it has been held to be exempt from the operation of the Mechanics Lien Laws, unless it is meant by the law itself to include such property. This difficulty has been met by the Legislature of New York by an act designated the "Municipal Act", which authorizes such property to be subjected to the lien of the mechanic, contractor or a material man.

A lien cannot secure money loaned to aid in an erection of a building. The aim of the statute is to aid the workman and artisan, not the usuer or money loaner.

Pearson -vs- Ticknor, 36 Mo. 384.

Under the Statute passed by the Legislature of New York, in 1885, the property, improvements and appurtenances to which the lien attaches, are designated in very comprehensive terms, and include not only the structure itself but to the appurtenances to any lot, including fences, sidewalks, paving, fountains, fish-ponds, fruit and ornamental trees, etc. By a later amendment the provisions of the act were extended to gas fixtures, brackets and like apparatus for the lighting, heating etc. But, in order to obtain the benefits of the lien law, these articles must be attached to and form a part of realty unless otherwise declared by statute.

Leydens' Mech. Lien Laws, 2.

The material must be for the structure, and by the term material is meant whatever is ordinarily used in erecting, altering or repairing, including whatever is necessarily used for those purposes. These materials must be furnished for and used in the particular building.

Phillips -vs- Wright 5 Lans.345.

What are fixtures within the meaning of the lien law has been a very troublesome question. It has been held that materials sold in an ordinary business manner without knowledge of their intended use in,or for a particular building, does not give a lien upon the building in which the materials happen to be used. (Burst -vs- Jackson, 10 Barb., 219).

Mirrors when fastened permanently to the structure and intended to pass with it, form a part of realty and are within the statute.

Ward -vs- Hilpatrick 85 N.Y. 413.

Boilers, machinery, brewing apparatus, heating furnaces, mill-stones, lightning rods, powder and fuses furnished for and actually used in the construction of a building __ i-e __ for blasting; theatre chains and scenery when used and manufactured specially for a certain theatre; counters when permanently attached to a building, have all been declared to be within the Statute. The land subject to the lien is generally limited to the exact parcel of land upon which the building was erected, or the improvements were made upon. When the party to the lien is a tenant or lessee, then oly such tenant's or lessee's interest is attached, unless the owner consented,in which case the owner's interest is subjected to the operation of the lien.

Knapp -vs- Brown, 45 N.Y., 207.

But a mere inchoate right of dower is not an estate in theland as will become subject to the operation of the lien.

VanBroker -vs- Extein, 7 Met. 162.

But a homestead, though usually exempt from ordinary debts under the laws of various states, has been held to be subject to the operation of the lien for buildings and im-

provements thereon.

Thompson -vs- Wichershaun, 9 Baxter, 216.

So also the house of a foreign minister, when not used for the purposes of his official duties.

Byrne -vs- Hairon , 1 Daly, 344.

In general, the interest of any one contracting for work or materials, and any fixtures which become part of the realty, are subject to the operation of the lien.

Chap. IV.

Who entitled to Lien.

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Mechanics liens were originally intended for the special protection of laborers, those who worked with their hands, but their scope has since been greatly extended. Material men are now included and all other persons performing labor, whether manual or professional. The contractor, sub-contractor, the lumber-dealer and the hardware merchant, the person who furnishes the paints and oils, the workman applying them, the artist who executes a mural painting and the architect who makes the plans and supervises the erection of a building, are alike protected.

Stryker -vs- Cassidy, 76 N.Y. 50.

Any person who is legally capable of entering into the contract which forms the basis of the claim, may acquire a lien.

Husted -vs- Mathes, 77 N.Y., 388.

The right to acquire a mechanics lien, being a personal one, it cannot be acquired by an assignee (Rollin -vs- Cross, 45 N.Y., 766), unless the claim is made for the benefit of the assignor and to be enforced by claimant, or his agent, (Hallahan -vs- Herbert, 57 N.Y., 409); but this was changed by the Act of 1885. An owner cannot prejudice the rights of

other persons by acquiring a lien for himself.

Stevenson -vs- Stonehill, 5 Wharton, 301.

A husband cannot have a lien upon a building erected with common funds upon a wife's land (Peack -vs- Brummagin 31 Cal. 440). But in New York a wife can now contract with her husband the same as though she were a feme sole.
Laws of 1892, Ch. 594 reads as follows:- " married woman may contract with her husband, or any other person to the same extent, with like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary". At common law a married woman could not, with but few exceptions, hold realty, but the various acts passed from time to time permitted them to hold realty until the last vestige of the prohibition against contracting by a married woman in this State was removed by the act previously referred to. This right to contract with her huband undoubtedly permits the lien to attach to her property, when the contract was made with her husband. This particular subject, of the right of a husband to a lien upon the realty of the wife, was the cause of a great many doubtful and unsatisfactory opinions by text writers and decisions by the Courts . 'Twas also the source of many gross frauds upon hon-

est purchasers and contractors. This has,undoubtedly, been met by the passage of the various Married Woman's Acts, and by the Acts of 1885. A municipal corporation, on account of its peculiar position in law, cannot acquire a lien unless its charter expressly provides for such a lien.

Mauch Chunk -vs Shortz,61 Penn. St.,399.

And where a dealer furnishes materials to a contractor without any previous existing contract, and without any intention or understanding that they shall be applied to a particular building, it has been held that the dealer acquired no lien upon the building in which the materials happened to be used.

Hatch -vs- Coleway, 29 Barber, 201.

Money loaned or advanced can in no case be secured by filing a mechanics lien. The security is intended only for those who perform work or furnish materials; but a lien can of course be had for money paid by the contractor to his workman, and to sub-contractors.

Hauptman -vs- Cailin, 20. N. Y., 247.
Gaylord -vs- Loughridge, 50 Texas, 573.

But an agent cannot acquire a lien (Kerly -vs- Daly, 45 N. Y., 84). But where an agent makes the contract in his own name, and does not disclose his principal, a lien can be had by the agent.

Hooker -vs McGlove, 42 Conn. 95.

Partners can have a lien in the names of the members of the firm, but one partner cannot file a lien exclusively for himself.

Black's Appeal, 2 Watts & Sergt. 179.

A corporation is to be regarded as a person and can have a lien by virtue of the statutes in New York.

Chap. V.

Who is the Owner.

The meaning of this term, as used in the law of liens, has been the source of a great deal of trouble and costly litigation. The term "owner" is used as the correlative of "contractor", emaning thereby the person, corporation or city which employs the contractor or for whom the work is done.

Olmstead -vs McNall, 7 Black 'fd. (Ind.) 387.

The ownership may be either legal or equitable, the one holding the deed is ordinarily the legal owner, while a lessee is the owner of a legal interest and "a person in possession", as under a contract to purchase, owns an equitable interest.

Averill -vs- Taylor 8 N. Y., 44.
Rollin -vs- Cross, 45 N.Y., 766.
Hoyt on Mechanics Liens, 55.

The word "owner" therefore means, when used in the lien acts, not only the legal owner but also lessees and persons in possession, and any owner of a right,title or interest, either legal or equitable which is capable of sale under an execution.

McAuley -vs- Mildrumn,1 Daly,396

But a mere transitory ownership, for an instant only, is not sufficient to support a lien(Clark -vs- Butler, 5 Stew., (N.J.), 664). A person may be the"owner" within the meaning

of the statutes, even though he purchased the property with trust funds (Anderson -vs- Dillaye, 47 N. Y., 678), and, although he has mortgaged the property for its full value, or has leased it for a term of years, or though there is a vendor's lien upon it for the entire purchase money.

Althouse--vs--Warren,2 ED. Smith, 657.

But a mortgagee who holds the legal title merely as a security, is not the owner, his interest cannot be sold on execution.

Tompkins -vs- Horton, 10 Green, 284.

Lessees occupy a peculiar position in the lien law. Their interest can be sold on execution, and to the extent of their interest, a lessee is an "owner" within the meaning of the statute. But a very perplexing question often arises as to whether the lessee or the landlord is to be deemed the owner. It may be said that this question depends upon their duties and obligations by virtue of the laws relating to landlord and tenant. The tenant is to make such repairs as are necessary for the proper preservation of the property, and, ordinarily, this menas only such repairs as are absolutely necessary. A tenant, unless by special agreement, is bound to return the property in as good condition as when he took possession, reasonable wear and tear excepted; but, if a tenant expressly agrees in a lease to keep the property in good condition and a building is destroyed by fire, he must rebuild

it, and however temporary his interest in the property may be, his ownership dates from the delivery of the lease to him.

McIntosh -vs- Town, 49 Barber, 550.

The tenant ordinarily may make repairs that may be necessary and charge the landlord with the expense (Hexter -vs- Knox, 63 N. Y., 561). But, having ascertained that a tenant can make needful repairs the question of most importance here is "Can the tenant by virtue of the tenancy so contract for work and labor upon the premises, as to bind the landlord and render the property liable to the lien of the mechanic, who has not expressly contracted with the landlord ?" If the tenant is the agent of the landlord, or is to be deemed the agent of the landlord, then, of course, there can be no question as to the right and propriety of the lien attaching as against the landlord. But under such lien acts, which require a contract to sustain a lien, the tenant is not regarded as an agent to charge the landlord as "owner" merely because he is authorized or required to make certain repairs or improvements.

Knapp -vs- Brown, 45 N.Y., 207.

Even though the improvements are designed to be permanent and to revert to the landlord after the expiration of the lease.

Stuyvesant -vs Browning, 1 J.& S., 203.

It has been decided that the landlord does not render himself liable by merely extending the lease on condition that the tenant shall make repairs or improvements, or by permitting the tenant to make improvements, nor by supervising the same while being made, nor by partly paying for them, nor by any act except "either by himself or agent entering into a contract for doing the work either express or implied".

Burkitt -vs- Harper, 79 N.Y., 273.
Muldoon -vs- Pitt, 54 N.Y., 269.
Knapp -vs- Brown, 45 N.Y., 207.

But if the improvements or repairs are made with the "consent" or "permission" of the landlord, then under other lien acts the landlord is liable.

Burkitt -vs- Harper, 79 N.Y.,273.
Otis -vs- Dodd, 24 Hun. 538.

Tenants holding in common are often sought to be charged by one of the tenants for the improvements or repairs made on the property. One tenant cannot charge the interest of the others for improvements made without their consent, but he can repair or preserve the property at the expense of all, without such consent or request, especially when consent is unreasonably withheld.

Taylor -vs Baldwin,10 Barb., 626.
Crippin -vs- Morss,49 N.Y., 63.

But in any case one tenant can charge his own interest. Building contracts are now very common especially in the large

cities. Under these contracts laborers, artisans and material men are protected by the acts relating thereto, and space does not permit of any extended discussion upon this particular branch of the lien law. A married woman can now contract as though she were a feme sole, and bind her separate property to any extent that she may desire. Under the existing acts relating to married women the lien laws apply with equal force as when applied to any other owner. She may contract by means of agents, or she may be estopped from denying that her "consent or permission" was granted. Such consent or permission may be implied from her knowledge, and silence may as in many other cases, be deemed sufficient evidence of assent.

Wheeler -vs- Scofield, 67 N. Y.,409.

As to the relation of the husband and wife, this relation is brought in question by reason of a lien upon the property of either, it can be said that as in other cases, either party can be the agent of the other for the purposes of the lien statutes. Any member of a family, capable of being an agent for other purposes, can be an agent for any other member of the family including father or mother, in cases of liens. The agency may be implied from the relation of the parties of from the nature of the business transacted.

Weber -vs- Weatherly, 34 Md., 656.

But this agency will not be implied or presumed from the marital or family relations alone, nor from the mere fact that the owner knows the work to be in progress and does not object.

Post -vs- Smith, 54 N. Y., 648.

The case of Jones -vs- Walker, 63 N. Y., 612, is a very interesting case upon the question of agency in the case of husband and wife, and holds that there must be evidence to hold her as principal contractor and not the husband as agent. Architects when employed to make plans and supervise the erection of a building, are special agents for that purpose (McDonnell -vs- Dodge, 10 Wis. 106). But they cannot exceed the authority conferred upon them. Trustees cannot make extensive improvements unless authorized by the instrument creating the trust. Minors cannot bind themselves by contract; and liens cannot be acquired against a minor. But the rule that the minors contract are not void, but voidable applies in cases of liens. He may elect to satisfy the lien in which case the lien becomes binding. But this ratification should be unequivocal. Estates by the curtesy are also subject to the lien and the tenant by the curtesy takes subject to the lien.

Chap. VI.

Amount secured by the Lien.

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To the lienor perhaps the most important question to be decided, after the certainty of a lien attaching in his favor, and the specific property liable thereto, is the question as to the amount which can be secured by means of filing a notice of lien. In cases of common law liens upon chattels the lien was for the amount of, or the value of the labor and materials expended upon the chattel. In many states this is substantially the rule in cases of mechanics liens upon realty But in the State of New York this amount is limited in as much as the owner cannot be compelled to pay a greater sum than he contracted to pay. So that in a case where a material man wishes to file a lien for any specific amount, and the goods were furnished to the contractor, the notice of lien may name a greater amount than is actually owing by the owner to the contractor. To hold then that the lienor could claim a lien for a greater amount than that specified in his contract with the building contractor, would be a virtual denial of the constitutional prohibition that the state should pass no laws in violation of the obligation of contracts. The lienor in this case would be seeking to charge the owner with a greater amount than he had originally contracted to pay.

The New York Statute has been very carefully worded in this particular respect. The statute expressly declares that no greater lien can be claimed than the amount which is unpaid to and owing to the contractor. But if the owner by refusing to take notice of the lien and by paying the unpaid moneys to the contractor shall cause any loss to the lienor by reason of such non-compliance with the notice of the lien, then the lienor can hold the owner liable. This seems to be the penalty in such cases for a disregard of notices of liens.

But if the amount of money still remaining unpaid to the contractor is greater than the amount specified in the lien, then the lienor is secured to the extent of his claim.

In these cases where the lienor is dealing directly with the owner, the lienor has a lien for the full amount of his claim or contract, and where no specified amount was agreed upon then the lien shall not be greater than the reasonable value of such labor and materials.

Interest is allowed in New York from the time of filing the notice of lien. Interest in such cases is given as damages for withholding the amount due the contractor. In cases where the amount due is disputed, a reference is generally the result, and, as the enforcement of a lien is an equitable proceeding, a jury trial cannot be claimed as a matter of

right, although the court in its discretion may call a jury to compute the amount due.

Kennedy -vs- Apgar, 93 N. Y., 571.
Tooker -vs- Rinaldo, 11 Hun, 154.

Chap. VII.

When lien acquired.

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This question is of vital importance in cases where prior liens have been filed and which, for a great many causes, are not valid liens. As in cases where liens are sought to be filed at the same time and against a common property or owner. Many very important cases have centered upon this seemingly simple question, but, in its application, more difficulties have been encountered than the average person would imagine could present themselves upon such a trifling point. The general rule has been stated to be that no lien attaches until the notice of lien is filed and a copy served upon the owner, or his duly authorized agent. But in all cases of mechanics liens this question depends upon the statute under or by virtue of which the lien is sought to be enforced. Without the aid of the statutes no lien exists, consequently the statute must be followed as nearly as can be notwithstanding the rule that the lien laws are to be liberally construed in favor of the lienor. The time or moment when the lien attaches differs in the several jurisdictions. Mr. Phillips contends for the position taken by several of the states that the commencement of the work is the proper time for the lien to attach, and claims that,in adopting this time, no injustice is done

the public.

But in New York this has been the subject of legislative remedies, and it definitely stated in the statute that "upon filing the notice of lien" the party may have a lien. Thus it will be easily seen that the notice must be filed in the proper office before any lien is had. The time for filing the lien is limited in some particular instances to a certain time after the "completion" of the building. When a building may be said to be completed is not always a matter easy of determination. A building is said to be completed when it has been made to conform to and satisfy the original plan or design. Ordinarily a house may be said to be completed when roughly roofed and otherwise partially finished, although a tin roof is afterwards laid over the roofing boards, and walls plastered. But a house would not be regarded as completed if the walls were not plastered, or the roof shingled, and if by the plan, or by a change in the plan, the walls were also to be papered, or a tin roof was to be laid over the board roof, the house would not be completed until that was done.

Hoyt's Lien Law. 123.
Berry -vs- Turner, 45 Wis.,105.

The Courts are reluctant to extend the time by any very nice distinctions of terms, so much time being permitted by the statute.

In all these cases the lien is to be acquired before the expiration of the time stated in the statute. In some cases the time was from the "furnishing" of the materials. Ordinarily this means from the date of the last delivery but under special circumstances it may mean from the date of each several delivery. If the owner denies that the contract is completed, or the materials furnished, the claimant must prove performance.

Hamptman -vs- Halsey, 1 ED. S., 668.

In every case the claimant must show a substantial compliance with the statute and prove his case before he can proceed. The general doctrine of priorities applies to liens. " Qui prior est tempore, potior est juie".

Chap. VIII.

How enforced.

The question of the enforcement after the lien is acquired is generally a matter of procedure which is regulated by the various states according to their positions upon the subject of mechanics liens generally. The method of enforcing the lien is very much the same as the foreclosure of a mortgage. The foreclosure of a lien, as the foreclosure of a mortgage, is a proceeding against the specific property and it is not an ordinary action for the collection of a debt.

Randolph -vs- Leary, 3 E.D.S., 637.

Every person who has, or claims to have any interest in the property proceeded against, should be made a party, and as the mortgagor and those claiming under him are absolutely necessary in the case of the foreclosure of a mortgage, so in the case of a foreclosure of a mechanic's lien the owner, subsequent mortgagees and judgment creditors and those claiming under them should be made parties. But in no case is it necessary to make prior incumbrancerss parties, unless to determine the amount of their claims, and to have such amounts paid out of the proceeds, or, in a case where it is sought to assert some higher equity, or when the prior incumbrancers are parties to any fraud.

The pleadings are the same as in ordinary actions, the complaint must allege that the labor and materials were fur-

nished in conformity with the original contract, indebtedness must be alleged, every fact necessary to constitute the cause of action should be alleged.

A demurrer under the mechanics lien laws perform the same office as in ordinary actions (Brien -vs- Clay, 1 E.D.S.,649). Mr. Hoyt in his work upon the subject says, that as there is but one cause of action, there can be no demurrer, and cites authorities in support of this statement, but just what he means by this statement is not easily understood.

Hoyt's Mechanics' Liens, 193.

The cases cited by him do not sustain any such statement. Those are simply cases where a demurrer was not sustained upon certain conditions, but no such general rule was laid down.

Tisdale -vs- Moore, 8 Hun.
Gross -vs- Daly, 5 Daly, 540.

Indeed as the pleadings are virtually the same as in any ordinary action for the recovery of a debt why a demurrer should not lie is a proposition which no other text writer has assumed to set forth. Mr. Phillips in his work has cited numerous authorities to sustain the position which he therein takes and upon the whole I think the sentence inserted in the book of Mr. Hoyt was an inadvertence rather than an intentional statement. No special rule of procedure has been assigned to the enforcement of liens so that we must proceed by the ordinary ways, and, in so doing, we are governed by the rules

applicable to them.

In the case cited by Mr. Hoyt a demurrer was sought to be sustained on the ground of a misjoinder of parties. The demurrer was overruled, but it was not there declared that a demurrer would not be heard if properly set forth, or grounds existed upon which a demurrer could properly be based.

Chap. IX.

Continuance of Lien.

The filing of a notice of lien in the manner prescribed by statute is an essential and jurisdictional requisite, without which a lien can neither be secured nor enforced.

Shelby -vs- Hicks, 58 Md. (Tenn), 197.

This being a jurisdictional requisite an appearance in any proceeding brought to enforce or foreclose a lien will not be a waiver of this defect, and the court has no power to alter or amend the notice so as to give the claimant a lien under the statute.

Hallahan -vs- Herbert, 2 Daly, 253.

Consequently the continuance of the lien if acquired at all depends primarily upon the notice of lien being properly made out and filed. Every requisite of the statute should be complied with. A mere personal knowledge of the indebtedness and that it is a proper charge against the premises will not take the place of the public notice so as to effect the rights of a subsequent purchaser.

Sinclair -vs- Smith, 3 E.D. Smith, 677.

The notice of lien cannot be waived by the owner to the prejudice of innocent third parties. No act of the owner can divest the lienor of his lien, unless such act is one of payment or tends of the amount of the lien. The lien, one ac-

quired, continues until the period prescribed by the statute under which the lien was acquired has expired.

The statute in New York has limited the time for filing the lien to "within ninety days after the completion of the work or furnishing materials". The time of the"completion of the work or furnishing of materials", is generally a question for a jury, and the notice of the lien must have been filed within the required time. If the time prescribed by Statute expires on a legal holiday it is generally understood that the statute, although a remedial one and to be liberally construed in favor of the lienor or material man, will not be so construed as to permit a lien to be filed after the expiration of the prescribed time, even on the day following the legal holiday when the last day happens to fall on such holiday. This at first sight may seem to be a very narrow construction to placeupon such a statute, but the object is to compel lienors to file the notice of lien as soon as possible, thus in a measure, preventing vexatious litigations and defective titles. The statute also, as a general rule, prescribes a time within which an action to enforce payment of the lien indebtedness by means of the foreclosure of the lien, must be commenced. The same rule of construction applies to this statute as applies to the time within which a notice of lien must be filed. This is also to compel as speedily as possible

a settlement of the difficulty and the action must, by service of summons and complaint as prescribed by the statute, be brought within the prescribed time. The time is generally limited to within one year from the time of filing the notice of lien, and will not be extended beyond the time limited by statute.

The lien, however, continues until the expiration of these prescribed times and the property is purchased, if purchased at all, subject to the lien. The notice of lien acting as a docketed judgment for the time prescribed.

Chap. X.

Waiver and payments.

The only person to waive the lien is the lienor or those claiming under him. As to what constitutes a waiver under this subject I will not attempt to successively state, but, as a general rule, any act of the Mechanic, which can be said to expressly or impliedly waive his rights, will be so construed.

But a mere act of negligence,not amounting to gross negligence or carelessness, will not be so construed. The act to be construed as a waiver must possess the requisites of a waiver___e-g___ knowledge of the act, intentional acquiescence though this may be expressed or implied and no action on the part of the lienor which can be said to be in contravention of a waiver. Regarding payments,- but little can be added to what the many text writers upon this subject have said. A payment is understood to mean full payment as distinguished from a partial payment. Payment, therefore, discharges the lien, and proof of payment will entitle the owner to a satisfaction piece, or to an order of the Court by which the property will be declared to be free from the effects of the lien. What constitutes payment is sometimes a very difficult question. Payment need not necessarily be by way of a money trans-

action, but it must be capable of being measured by money.

Property or any other consideration will constitute payment under proper circumstances. Labor is a good consideration. The general rules which relate to consideration apply with equal force to payment in the lien law.

Payment may be made by a deposit in court by tender, but the tender must be kept good, and may be made by the owner or his agent to the lienor or his agent. Tender of payment relieves the owner from the obligation of paying costs of foreclosure and interest. The foreclosure of the lien may be the method of payment, and the proceeds of the foreclosure operate as payment of the claim, pro-tanto, and the lienor is entitled to a personal judgment against the owner for the balance.

Chap XI.

How discharged.

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A mechanic's lien may be said to be discharged the same as any other claim is discharged,- by payment and by lapse of of time.

Payment discharges the lien from the time of payment and payments operate as a discharge pro tanto. The payment of the original claim only does not relieve the property from the lien for interest and costs however, and these must be satisfied before the lien can be said to have been satisfied by payment. A foreclosure proceeding may be the means of discharging and satisfying the lien. In this case the lien is discharged from the time of final action__ e-g __ entry of satisfaction of the lien.

The lien may be discharged not by payment but by the lapse of time. This is virtually a statute of limitation,and the lien is deemed to have been satisfied within this time. If no action is brought within the time prescribed by the various statutes, the property is relieved from the lien,and any person who purchases after the expiration of this statutory time takes the property free from the incumbrance of the lien. This is a "discharge" within the meaning of the lien law. While a waiver is not exactly a discharge yet it operates as an estoppel, and the owner is thus relieved from payment

by means of foreclosure of the lien. The lienor is prevented from asserting the lien, but he can bring an action upon the contract within the time limited by the statute of limitations applying to ordinary contracts, which is generally six years from the time of making the contract, but in many building cases this six years does not begin to run until the contract is completed, or until the money is actually due. This matter is regulated by the terms of the contract, which must be referred to in every case as they happen to arise.

A judgment obtained upon the contract will bring the property of the owner from the time of docketing, but in the mean time he may have sold the property to an innocent purchaser for value. If this is the case, then the property will not be subjective to the lien of the judgment,but it will if the transfer has been a fraudulent one. This, however, is a very round-about way to enforce payment and an expensive one when compared to the foreclosure of the lien upon the specific property named in the notice of lien.

Chap. XII.

Nature of the Proceedings.

The nature of the proceedings, to enforce payment by means of a foreclosure of the lien, resembles that of a mortgage foreclosure, in part it is the same. It is a proceeding in rem with the personal judgment for the deficiency, if any, added.

Thompson -vs- Gillmore, 50 Me. 428.

And as there is specific property involved and a distribution of proceeds it partakes of the characteristics of a Bill in Equity.

Davis -vs- Alvord, 94 N.Y., 545.

As the lien is filed against the owner of the property, it will be readily seen that ordinarily no judgment is asked for as against any other, although there may be cases when this would be the case, but, unless very extraordinary circumstances attend the situation, this will not be the result. The object of the proceedings is to obtain a speedy satisfaction of the claim by subjecting the specific property to a sale, unless the lien is otherwise taken care of, and in this particular foreclosure is uncommon for any judgment for a deficiency to be rendered, the proceeds of the sale generally satisfying all claims against the property.