

..Legal..

CONTRACTORS' LIENS ON LAND.

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PART II.

This Act needs amendment, if contractors and workmen are to have the protection that the Legislature intended to give them. The problem that has to be solved is to devise a simple method of procedure which, while giving effective protection to contractors and workmen, does not retard bona fide dealings in land. Two policies have to be considered and reconciled. That of the Contractors and Workmen's Lien Act is to give contractors and workmen a paramount charge on the land to the extent to which their materials or labours have improved it. That of the Land Transfer Act is to free those who deal with a registered proprietor of land from the necessity of going behind the dealings recorded on the register, and to make the title they get from such proprietor secure in the absence of fraud on their part.

One amendment will be agreed upon by all parties, viz:—The alteration of the method of registration, so as to enable the lien to be registered without suing. At present it is impossible to register a lien without first issuing a summons against the owner of the land on which the lien is claimed, for the method of registration is to file a copy of the statement of claim in the action. If the contractor has given credit, it is impossible to sue until the credit expires. Therefore, if payment is not to be made until all the materials have been supplied or the job finished it is impossible for the contractor to register his lien until he has completed his contract, however great his diligence and keen his desire to protect himself. Nor will the law allow him to lodge a caveat against the land to protect his claim of lien. Even if he registers at the earliest moment that the law allows him, he may still find his lien defeated by the prior registration of a transfer. In the ordinary case, too, of a merchant supplying goods from time to time—no merchant will issue a summons so long as he has no reason to suspect the good faith of employer and owner. If he did so at an early stage of the supply, he would find that his customer resented a step that damaged the latter's credit, and the merchant would get no more orders from his customer.

One of two courses is open. The lien must attach either from the commencement of the work by the mere act of doing the work, or else from the filing of some notice. In many American States the lien is made to attach from the beginning of the work, registration, of filing, or proceedings on the lien being necessary only to prevent the extinction of the lien. The lien of any particular contractor has priority over all dealings with the land, subsequent to the date on which he began his work, in some States even over a transfer to a bona fide purchaser, for value without notice, in others over all subsequent dealings, except those to bona fide purchasers for value without notice. This course, while giving the fullest protection to contractors and workmen, checks dealings with land. There would be nothing on the land registers to show a person dealing with the land what liens were claimed, and people would be found unwilling to lend money on mortgage to the owner after the erection of the building had begun, for fear that some lien might subsequently be discovered ranking before the mortgage. The only safe course for the purchaser of an uncompleted or newly completed building to pursue would be to retain his purchase money until the lapse of the time after the completion of the building prescribed by the law as that within which proceedings must be taken on the liens if they are not to be extinguished. In a country where land is dealt in almost as freely as chattels, such a course would be found to have many drawbacks.

What is wanted is some simple and inexpensive procedure that, while giving notice of the claims of lien to all dealing with the land, would at the same time not cast any stigma on the credit or reputation of the employer or owner of the land—something in the nature of the caveat lodged by a purchaser of land under an unregistered agreement to protect his interest. A method that seems practicable would be to enable contractors and

workmen on beginning work, to give a short and simple notice of their intention to claim a lien, and to register forthwith a duplicate of such notice against the land, charging the land from the time of registration, and protecting the contractor or workmen, filing it in respect of all work done by him upon the land in connection with the contract. Proceedings to sustain the lien, would have to be taken say, within three or six months of the completion of the particular work in respect of which the lien was registered or in any event within 30 days of the completion of the building, or else the lien would be extinguished.



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The advantages of this procedure would be these. Contractors and workmen would be protected from the beginning of their work. The employer or owner would not have to be sued to enable the contractor or workmen to register his lien. All persons dealing with the land would have notice of what liens were claimed. It would become a regular practice of contractors, contemplating the supply of materials in any quantity, to register a lien at the outset, and the credit of the employer or owner would not suffer from the adoption of what would be considered an ordinary business precaution. The subtle and confusing distinction between a continuing contract, in respect of which one notice can be given within 30 days from the supply of the last item, and a series of separate contracts, in respect of each of which separate notices and separate proceedings must be taken, would be practically abolished. The filing of the notice at the outset would protect the contractor in respect of all work on the contract, whether done in respect of one large order, or of a series of separate orders from time to time. The contractor having filed a cheap and simple notice, would then know that he was secure, and need not worry his head as to whether his was a continuing contract or not. Not until he had completed his work need he take any further proceedings to protect himself, for he would be certain that no dealings with the land in the meantime could prejudice his lien. Three or six months from the completion of the work has been suggested as the time within which proceedings must be taken to sustain the lien, for this reason. A man supplying materials on a series of separate orders would never be quite sure whether there were any further orders to be received, and if he had to sue within a short time, such as 30 days from the last item, would if nearly a month elapsed between any two items, have to sue to sustain his lien. On a big building the erection of which occupied a considerable time, thirty days might easily elapse between two items of the supply of materials by a merchant, and a series of actions have to be taken. If within three or six months, the contractor did not get another order and were unpaid, he would then have to take proceedings to sustain his lien. If, on the other hand, he obtained another order within three or six months, he would then have another three or six months from that order within which to take proceedings. In order, however, not to tie the land up too long, all liens would have to be proceeded on in any event within 30 days from the completion of the building or be extinguished. That is to say, that 30 days after the completion of the building, the liens which would have to be taken into account would be those on which legal proceedings had been taken. Provision might be made for the architect sending notice to the claimants who had registered liens informing them of the date of

completion, and warning them that they must take proceedings within thirty days thereafter, or forfeit their liens. If the Act is to be amended, as it ought to be, a simple method should be prescribed of withdrawing a lien. The present Act only contemplates payment of the amount claimed by lien and the registration of a receipt verified by affidavit or the annulment of a lien by an order of the court. All that should be required for the discharge of the registration of a lien should be —“I hereby withdraw Lien No. against all the land comprised therein [or against the following lands comprised therein]” signed by the Lienor and attested in the usual way.

For the series of ambiguous and confusing definitions should be substituted simpler ones, the meaning of which should be clear to an intelligent layman. The present definitions puzzle both Bench and Bar.

The Act should further make the following matters clear —

Whether the materials must be actually used on the land to enable the contractor to claim a lien, or whether it is sufficient if he shows that the materials were delivered upon the land on the understanding that they were to be used thereon.

In the present Act “work” is defined to “include the supply of material used or brought on the premises to be used in connection with the work. “Brought on the premises to be used” seems meaningless, if the Legislature intended that the lien should exist only when the materials were actually used on the land. Nevertheless, it has been held that even if the contractor places the materials on the land for the purpose of being used thereon, he can claim no lien unless he can prove that the materials were actually used on the land.

Provision should be made, too, for the case of the erection by builders of a row of houses either for themselves or for the same owner. The building of the houses is one job, and the contractors supply material for the whole job. The material is delivered where required on the land and used as required, but it is impossible for the contractor to prove in which house the material was used. At present the contractor, if one or more houses have been transferred, the remainder still remaining in the owner, stands a great risk of losing his lien altogether. For he cannot prove that the whole or a great part of the material did not go into the house or houses transferred. So if there is a conflict between lien holders, and the materials have been just used as required, a very unsatisfactory position might be created. In such a case the fairest plan would be to treat all the houses as one job, to allow the contractors to claim one lien on all the houses, and to have recourse to all or any for the satisfaction of his lien. In any event, if once the contractor proves that the material was brought upon the land, either that in itself should entitle him to his lien, or the onus of proof should be on the owner to show that those materials were not used on the land. Some procedure should be prescribed by which all the claimants of lien should have notice of each other's proceedings, to sustain their liens, or the right to be represented thereat. At present there may be two or more lienors, whose claims conflict. For instance, as happened the other day, a builder was building two houses, 1 and 2, on adjoining sections. Two timber merchants, A and B, supplied timber. Neither had any notice of the hearing of the other's action, nor any locus standi thereat. A claimed a lien on house 1, B a lien on both houses, 1 and 2. Both liens were allowed, the builder raising no opposition in either case. On hearing the result of B's action, A asserted that B's timber was used only on house 2. The value of house, after deducting mortgages, was not more than enough to pay A's lien only. Eventually the matter was amicably adjusted. Had A had notice of B's proceedings, and the right to attend, B's claim would have been limited to house 2 in the first instance.

In an action for lien, all persons liable to pay the moneys claimed, must be made defendants, but only a judgment in rem, viz., charging the land with the lien and for a sale of the land for the purpose of satisfying each can be obtained for enforcing the lien. In the action the lienor should also be able to obtain judgment for the payment of the amount due by the person indebted to him, instead of as now having to bring a separate action. Whatever course is adopted, the Act should be redrafted so as to make it simple, consistent, and intelligible.

An order has been placed with Messrs. Heath and Ross, of Wellington, to instal a septic tank in connection with the new hospital for infectious diseases at Timaru. The firm is in receipt of news that the three septic tanks they are installing for the treatment of the drainage of Akaroa are on the point of completion.