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PRIORITIES UNDER THE ILLINOIS MECHANICS' LIEN LAW

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The branches of jurisprudence which most frequently bewilder the inexperienced practitioner are generally those which have not been slowly molded by custom and usage, but rather have sprung full grown from the halls of the state legislatures. Human ingenuity cannot be expected to provide at once a complete system of jurisprudence, no matter how finely limited or closely defined, that will foresee and accommodate the countless situations that may arise and that must be decided under that system. Especially is this true of the Illinois Mechanics' Liens Act.[2]

The Mechanics' Liens Act now in force in Illinois has been subjected to judicial interpretation for more than a quarter of a century, and the justices of our Supreme Court have examined and elaborated almost every phrase in the statute. Nevertheless, there are goodly portions of the statute which are still unfamiliar to many members of the profession. Perhaps the most perplexing sections of the Mechanics' Liens Act deal with the various priorities and rights of lien claimants and others having interests in the property; and it is to problems arising under these sections that this article will be devoted.[3]

Some of the problems discussed here may have only an academic value; others may have some practical value. All of them, however, should be of interest to the legal profession, especially at this time, when innumerable foreclosure suits are pending in the Illinois courts.

Cases are numerous in which questions of the relative rights and priorities of the parties litigant arise; but the

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[2] Cahill's Ill. Rev. St. 1931, Ch. 82; Laws 1903, p. 230. Act of May 18, 1903, in force July 1, 1903. Former Acts: 1825, 1833, 1839, 1845, 1861, 1863, 1869, 1874, 1879, 1887, 1891, 1895.

[3] In this connection reference will hereafter be made to sections 1, 3, 5, 7, 9, 15, 16, 19, 21, 24, 27, 28, and 33, which all have some bearing direct or otherwise upon the questions of priorities between the parties litigant.

most common cases are those wherein the lien claimant makes a contract with owner, vendee, or tenant and seeks to enforce his lien against mortgagee, vendor, or landlord. Other problems that arise less frequently are concerned with outstanding dower and homestead interests.

Original and sub-contractors have a different status under the lien act, although their remedies are similar. An original contractor is one who has a contract express or implied with the owner or his agent for the improvement of the premises.[4] A sub-contractor is one whose contract is not with the owner or his agent but with the original contractor, and it is to cover some portion of the work which the original contractor is obliged to perform.[5] Under the lien act the original contractor has four months from the date of completion or the last date of delivery of materials or performance of labor in which to file a claim for lien with the clerk of the circuit court for the county wherein the premises are situated,[6] and he has two years from the same date in which to file a bill in chancery to foreclose his lien.[7] He may, however, file his bill within the four-month period and thus dispense with the claim for lien.[8] The sub-contractor, however, has only sixty days after completion of performance or after the last date of the delivery of materials or furnishing labor in which to serve notice of his claim on the owner of the premises,[9] and he must file his bill to foreclose his lien within four months after payment is due

4 See Mechanics' Liens Act, sec. 1, for a more complete definition. See also Olson v. Sheffield, 90 Ill. App. 198; Wells v. Sherwin, 92 Ill. App. 282.

5 See Mechanics' Liens Act, sec. 21, for a more complete definition. See also Henry Marble Co. v. Church, 205 Ill. App. 249.

6 See Mechanics' Liens Act, sec. 7. Note, however, that in the event the premises in question are registered under the Torrens System, the claim for lien must be filed with the Registrar of Deeds and a memorial thereof noted upon the Torrens' Certificate.

7 See Illinois Mechanics' Liens Act, sec. 9. See also In re Bickel, 301 Ill. 484; Philip Gollner Co. v. Gillette, 216 Ill. App. 25.

8 Marshall v. Butler, 174 Ill. App. 502; Dunham v. Woodworth, 158 Ill. App. 486. See also Illinois Mechanics' Liens Act, sec. 7.

9 See Illinois Mechanics' Liens Act, sec. 24.

him.[10] His notice of lien may, however, be dispensed with when the original contractor's statement to the owner sets out the sub-contractor's claim.[11] His notice of lien does not protect him, however, even if served within sixty days if the original contractor's statement does not include or includes incorrectly his claim where the owner has paid the original contractor before the sub-contractor's notice of lien is served.[12]

The question of whether or not the lien claimant can claim a priority over an estate of homestead to which the owner of the premises may be entitled can be settled by a reference not to the lien act but to the chapter of the statutes on Exemptions,[13] where it is provided: "But no property shall by virtue of this Act be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof." This clearly establishes the lien claimant's superiority. If, however, the premises are owned jointly by a husband and wife, and the contract is made with either of them the question of the lien claimant's superiority over the homestead estate is settled not by the Homestead Act but by section 3 of the lien act[14] which provides that neither spouse can set up a claim of homestead in such a case to defeat the lien.

The second simple question is whether the lien claimant can claim superiority over the dower interest of the owners' spouse. The dower interest of the owner's spouse has priority over the lien claimant unless the spouse had knowledge of the improvement and did not give notice in writing of his or her objection to such improvement

10 See Illinois Mechanics' Liens Act, sec 33. See also Western Valve Co. v. Hardin, 181 Ill. App. 414.

11 Kiefer v. Reis, 331 Ill. 38.

12 Knickerbocker Ice Co. v. Halsey Co., 262 Ill. 241.

13 Cahill's Ill. Rev. St. 1931, Ch. 52, par. 3.

14 The end of this section reads as follows: " . . . and in case the title to such lands upon which improvements are made is held by husband and wife jointly, the lien given by this act shall attach to such lands and improvements, if the improvements be made in pursuance of a contract with both of them, or in pursuance of a contract with either of them, and in all such cases no claim of homestead right set up by a husband or wife shall defeat the lien given by this act."

before the making thereof.[15] The law on this point is clear, but a great many lawyers fail to allege in their bills that the spouse had notice of the improvements and failed to make written objection thereto. Care should be taken to make this allegation.

A question of major importance arises, however, when the contract for the improvement of the premises is made by a vendee in possession under an unrecorded contract of sale and the lien claimant seeks to assert a lien superior to the interest of the titleholder, the vendor. Except as explained later, in all such cases the vendor's interest in the property is superior and paramount to the interests of the mechanic lien claimant. It would be well in this connection, however, to refer to that portion of the lien act which says, " . . . any person who shall by any contract or contracts, expressed or implied, or partly expressed and partly implied, with the owner of a lot or tract of land or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or to improve the same, . . . shall have a lien . . . ."[16] It appears, therefore, that if the lien claimant is in a position to show that the contract for the improvements for which the lien is claimed was made by the vendee with the authority of the vendor or if the latter has knowingly permitted the same, then in either of those events the vendor's interest will be subject to the lien claim.

Such is the law, and there are many cases in which the courts of this state have so held. The difficulty arises not in applying the law but in establishing the facts. In some cases, the contract between the vendor and the vendee for the sale of the premises will provide that the vendee is to erect certain improvements or give him the right to alter or change the improvements on the prem-

15 See Illinois Mechanics' Liens Act, sec. 1, the latter part of which reads as follows: "This lien . . . shall be superior to any right of dower of husband or wife in said premises, *provided* the owner of such dower interest had knowledge of such improvement and did not give written notice of his or her objection to such improvement before the making thereof . . . ."

16 Illinois Mechanics' Liens Act, sec. 1.

ises. The vendor will then be presumed to have agreed to the improvements and his fee will be subjected to the contractor's lien.[17] In other cases, however, the proof is more difficult to obtain. But, in general, wherever the vendor had knowledge that the improvements were being made or that the contract was being entered into and had failed to object and permitted the improvements to be made, the law will hold the vendor's estate subordinate to the lien claim.

Another question is raised when the contractor makes a contract with a lessee and seeks to hold the estate of the lessor subject to his lien. Generally, the same rules are applicable here as are applicable to situations where the vendee's contractor seeks to hold the vendor.[18] However, most leases expressly exempt the landlord's estate from liens asserted by the tenant's contractors. Such provisions have been held of no effect if not brought to the knowledge of the contractor. Even if the contractor has actual knowledge of such a provision in the lease he can still maintain a lien superior to the estate of the landlord by showing that the landlord had knowledge of the improvements or of the contract and did not object to them.[19]

In many instances, the lease will bind the lessee to erect certain improvements or to repair, alter, or remodel existing improvements. The landlord will be deemed to have authorized the contract and his estate will be subject to the mechanic's lien.[20] Even if in such a case there is also a clause in the lease exempting the landlord's estate from liability for such improvements

17 Henderson et al. v. Connelly, 123 Ill. 98; Builders Supply & Coal Co. v. Eggmann, 190 Ill. App. 572; Edward Hines Lumber Co. v. G. L. Chemical Works, 237 Ill. App. 246.

18 For decisions holding that the landlord knowingly permitted the improvements to be made by the tenant see Fehr Construction Co. v. Postl System, 288 Ill. 634; Friebele v. Schwartz, 164 Ill. App. 504; Wertz v. Mulloy, 144 Ill. App. 329.

19 Loeff v. Meyer, 284 Ill. 114.

20 Haas Electric Co. v. Amusement Co., 236 Ill. 452; Sorg v. Crandall, 233 Ill. 79; Crandall v. Sorg, 198 Ill. 48 (reversing 99 Ill. App. 22); Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203; Henry v. Miller, 145 Ill. App. 628.

and such clause is brought to the knowledge of the contractor, the courts will hold it void "as a declaration, on the part of persons engaged in the construction of a building under circumstances which subject their property to the mechanic's lien laws of the state, that such laws shall not have operation against their property or the property of one of such persons."[21] The courts hold that the provisions in the lease obligating the tenant to make the improvements serve to charge the landlord's estate with the lien and the other provisions seeking to save the landlord's estate from this liability have not that effect but amount merely to covenants on the part of the lessee to discharge the said liens.[22]

In cases of this nature the character of the improvements must also be kept in mind. Improvements which may be classed as trade fixtures and which are removable by the tenant at the termination of the lease are not sufficient to form the foundation of a lien maintainable against the lessor's estate.[23]

Another distinction is that between improvements and repairs or, as is more commonly stated, between alterations and repairs. Alterations are chiefly improvements which change the character of the premises, while repairs are usually improvements which restore the premises to a previously existing state and rectify decay or partial destruction. Almost every lease obligates the tenant to keep the premises in repair. This serves as sufficient evidence of the landlord's authorization of the contract for repairs, so the contractor's lien will attach to the lessor's estate. However, the expressed authorization in the lease for making repairs will not extend to alterations. Here the contractor must produce other evidence,

21 Crandall v. Sorg, 198 Ill. 48; Loeff v. Meyer, 284 Ill. 114; Provost v. Shirk, 223 Ill. 468; Haas Electric Co. v. Amusement Co., 236 Ill. 452.

22 Haas Electric Co. v. Amusement Co., 236 Ill. 452; Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203.

23 Southern Illinois Contracting Co. v. Launtz, 169 Ill. App. 87; Darlington Lumber Co. v. Burton, 156 Ill. App. 82; Alexander Lumber Co. v. Champaign Baseball Club, 201 Ill. App. 246.

under the rules already given, in order to charge the lessor's estate.[24]

The most perplexing of all the situations concerned with priorities occurs in those cases where the lien claim is not the only claim on the property but where there are also mortgages and other incumbrances of record. Under the present lien act, wherever and whenever the lien claimant asserts a claim against property already subject to one or more mortgages or trust deeds, the lien claimant's remedy becomes extremely unsatisfactory. And this is precisely the major point in nine out of ten lien foreclosures.

The present lien act provides that where questions arise between lien claimants and encumbrancers whose incumbrances are of record before the making of the lien claimant's contract, the lien claimant shall be preferred to the value of the improvements erected on the premises and the encumbrancers preferred to the extent of the value of the land at the time of making the contract.[25] This general statement of the law is subject to certain qualifications, however, dependent on how carefully the lien claimant has followed the time limitations for filing his claim for lien or his bill to foreclose.

Regarding original contractors, the act provides that if the lien claimant has filed his bill within the four-month period, or his claim within the four-month period and his bill within the two-year period, he is protected and given priority over the owner, parity with other lien claimants, and relative or proportionate priority over encumbrancers in accordance with the provisions of section 16 of the act. However, if he fails to file his claim for lien within four months but does file a bill after the four-month period but within the two years allowed, the proportionate priority over encumbrancers obtainable under section 16 can no longer be claimed; and the lien becomes subordinate, although it can be enforced against

[24] On this general distinction see Hacken v. Isenberg, 288 Ill. 589 (reversing 210 Ill. App. 120).

[25] See Illinois Mechanics' Liens Act, sec. 16.

the owner.[26] In the event a bill to foreclose is not filed within the two-year period, the lien cannot be enforced against anyone.[27]

Granting, however, that the lien claimant has complied with the foregoing rules and has filed his claim for lien within the four-month period and his bill within the two-year period, what is his exact status under section 16?

Section 16 reads: "All previous incumbrances shall be preferred to the extent of the value of the land at the time of making of the contract." The Supreme Court of Illinois has interpreted the word "land" as here used to mean "the land with such improvements as there are upon it at the time of the execution of the mortgage."[28] Although the court here used the word "mortgage" at the end of the quotation, it is clear from the context that this was a mistake and that the word intended was "contract." That this is a true interpretation is established by a long line of cases. The section then continues as follows, "and the lien creditor shall be preferred to the value of the improvements erected on said premises." It is obvious that to satisfy the provisions of the act in situations like these the moneys realized from a sale of the premises must be apportioned.[29] The court is empowered by this section to ascertain "what proportion of the proceeds of any sale shall be paid to the several parties in interest." The court therefore determines the value of the premises before the lien claimant makes his contract and the enhanced value after the contract is completed. The proceeds of the sale of the premises are then divided into two funds having the same proportions to each other as the values found have to each other.

26 For a fuller explanation of these rules see Illinois Mechanics' Liens Act, sec. 7. See also Denkman v. Newbanks, 220 Ill. App. 515; Lyle v. Rosenberg, 192 Ill. App. 378.

27 See Illinois Mechanics' Liens Act, sec. 9.

28 Croskey et al. v. Northwestern Mfg. Co., 48 Ill. 481.

29 Bradley v. Simpson et al., 93 Ill. 93; Grundeis et al. v. Hartwell, 90 Ill. 324; Wing et al. v. Carr, 86 Ill. 347; Clark et al. v. Moore et al., 64 Ill. 273; Howett v. Selby et al., 54 Ill. 151; North Presbyterian Church v. Jevne, 32 Ill. 214; Smith v. Moore, 26 Ill. 392; Raymond et al. v. Ewing et al., 26 Ill. 329.

The encumbrances then have priority over the one fund and the lien claimant priority over the other.[30]

This procedure often proves impracticable. What, for example, is the value of lien rights incident to a contract to repair a roof of a large building where the contract involves about five hundred dollars and the premises are subject to a trust deed securing a bond issue of five hundred thousand? A case is also conceivable where the lien claimant's work has not enhanced the value of the improvements; for example, a satisfactory heating plant may be torn out to install one of a different character but one which does not increase the value of the premises. In such cases, a plausible argument might be advanced that since no increased value resulted to the improvements the lien claimant has no priority over the encumbrancer.

The question of distribution becomes complex in most cases because there is more than one lien claimant. Some of the claimants may have an absolute priority over the encumbrancers, others may have only a relative or proportionate priority, still others may have no priority whatsoever over the encumbrancers. The master and the solicitors then have a difficult situation to handle.

Occasionally, the lien claimant may assert an absolute priority over an incumbrance. In the first place, although technically a secret lien, the lien attaches as of the date of the contract.[31] Suppose, then, that a contract for improvements is made and subsequently the premises are mortgaged and the incumbrance placed of record. The lien claimant, by adhering to the statutory time limitations, may file his claim later and still assert a lien ahead of that of the mortgagee. This, of all situations where the lien claimant has an absolute priority over the encumbrancer, arises most frequently. However, it may be well at this time to note another instance by no means so common wherein the lien claimant may assert an abso-

30 See Stephen Love, Mechanics' Liens in Illinois (Callaghan and Co., Chicago, 1931) pp. 37 to 44 for a very clear and complete analysis of the procedure followed in these situations.

31 See Illinois Mechanics' Liens Act, sec. 1.

lute priority over the encumbrancer, although the incumbrance is placed on record long before the lien claimant's contract is made. If the incumbrance is upon two tracts of land and the lien claim is on one of the tracts only, and thereafter the encumbrancer releases from the lien of his incumbrance the tract not subject to the lien claim, the encumbrancer will lose any priority, whether absolute or merely relative, that he might have had over the lien claimant. This results from the application of the equitable doctrine of marshaling assets.[32]

Nor are instances lacking where even though the lien claimant has faithfully complied with all the time limitations, he cannot avail himself of the relative priority provided for by section 16. These cases, however, almost all hinge upon the doctrine of estoppel; that is, the facts in the case are such that the lien claimant cannot be heard to assert a claim paramount to that of the encumbrancer. The most common cases are those in which actions or statements of the contractor have led the mortgagee to believe the building to be free of secret liens and therefore the mortgagee has on the strength of that belief paid out the loan.

There are also cases in which the facts are just sufficiently unique to increase the rights of the encumbrancer. For example, in one case there were three lien claimants. The mortgagee used the proceeds of the loan to pay two of them off. The court held that by virtue of the payments the mortgagee became subrogated to the rights of the two lien claimants who were paid and was entitled to share on a parity with the remaining lien claimant.[33]

The writer has made no attempt to elaborate on any of the situations discussed. Reference by the reader to the cases in the footnotes will satisfy any further curiosity on these matters. The writer's purpose has been not to teach or elucidate the law, but merely to open a few avenues of approach to the situations mentioned.

32 McCarthy v. Miller, 122 Ill. App. 299.

33 Clark et al. v. Moore et al., 64 Ill. 273. See also Stephen Love, Mechanics' Liens in Illinois, p. 31.