

# Mechanics' Liens--1929 Amendments--1930 Amendments

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## CURRENT LEGISLATION

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### MECHANICS' LIENS—1929 AMENDMENTS—1930 AMENDMENTS.

The primary end that is sought to be obtained by the various mechanics' lien statutes which the state of New York and her sister states have enacted is to provide a means whereby those, whose labor and materials are transmuted into permanent improvements to real property with the consent of the owner thereof, may hold such real property as security for payment of such labor and materials. While the common law recognized the artisan's lien<sup>1</sup> and the unpaid seller's lien,<sup>2</sup> neither of these was available to the laborer, mechanic, or material man who furnished work, skill or materials for a building operation, since both of these liens depended on possession.<sup>3</sup> Nor could protection be obtained by attempting to retain title to the material, as by the doctrine of accession the material lost its identity as soon as it was incorporated in the building and title passed to the owner of the realty.<sup>4</sup> Although courts of equity recognized the vendor<sup>5</sup> and vendee<sup>6</sup> liens, and in a few exceptional cases closely analogous, equitable liens,<sup>7</sup> it never extended its beneficent jurisdiction to the protection of laborers, mechanics and material men. The mechanics' lien statutes also seek to protect a sub-contractor, or a laborer or material man who has not contracted with the owner but who has furnished work or material to a general contractor who is in privity of contract with the owner, by providing that a lien may be had against the money due to the general contractor. This remedy is also available on public contracts.

While the first so-called "Lien Law" in the state of New York was passed in 1830 it was only applicable to the city of New York and merely gave a lien on moneys due to a general contractor. Subsequent acts, notably those of 1832 and 1844, extended the right to lien, but were likewise only applicable to the city of New York. It was not until 1885 that the first state-wide lien law was enacted. While there have been many amendments to this Act it was not until 1929 that the basic principles set forth therein were materially changed.<sup>8</sup> Prior to the amendments passed by the 1929 Legislature which became effective October 1, 1929, the law provided that "a contractor, sub-contractor, laborer or material man who performs labor

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<sup>1</sup> *Scott v. Delahunt*, 65 N. Y. 128 (1875).

<sup>2</sup> *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302 (C. C. A., 6th, 1895).

<sup>3</sup> *Supra* Notes 1, 2.

<sup>4</sup> *Johnson v. Hunt*, 11 Wend. (N. Y.) 135 (1834).

<sup>5</sup> *Wythes v. Lee*, 3 Drew, 396 (1855).

<sup>6</sup> *Stevenson v. Pratt*, 3 Jones & S., 496 (N. Y. Sup. Ct., 1874).

<sup>7</sup> *Perry v. Board of Mission*, 102 N. Y. 99, 6 N. E. 116 (1886).

<sup>8</sup> Report of Joint Legislative Committee investigating the Lien Law, p. 5 (1930).

or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price of such labor or materials, upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien."<sup>9</sup> By the 1929 amendments this section provides that materials actually manufactured but not delivered shall be deemed to be materials furnished.<sup>10</sup> Also, that a husband or wife shall be presumed to be the agent of the other unless such other, having knowledge of the improvement, shall within five days after the filing of a notice of commencement of the work give the contractor written notice of his or her refusal to consent.<sup>11</sup> The only amendment to this section enacted by the 1930 Legislature which became effective October 1, 1930 changed the time of notice to ten days after learning of the contract.<sup>12</sup> While section 3 tells us who may assert a lien, the definition of the word "improvement" used therein tells us the character of the work or materials for which a lien may be asserted. The statute prior to 1929 defined this term as follows: "The term 'improvement,' when used in this chapter, includes the erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or material furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light and shall also include the drawing by an architect or engineer or surveyor, of any plans or specifications or survey which are used in connection with such improvements." No change has been made in this definition by the 1929 or 1930 amendments. The extent of such lien, or the property charged therewith, is probably the most mooted phase of this subject and it is here that most of the radical changes have been made by the Legislature. The statute provides that such lien shall extend to the owner's right, title or interest in the property and improvements existing at the time of the filing of such lien.<sup>13</sup> Prior to 1929 any and all mortgages, including building loan mortgages, which were recorded before the filing of the lien, had priority over the lien. This was the cause of considerable hardship, as it enabled operators, who in many cases were only lessees, to divert the proceeds of a building loan mortgage to purposes other than paying for the improvement. The amendments of 1929 undertake to cure this difficulty by requiring that the proceeds of such a mortgage be devoted to the cost of improvement. This is attempted to be accompanied by: 1. Making mandatory a covenant in every such building

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<sup>9</sup> N. Y. Lien Law, sec. 3.

<sup>10</sup> *Ibid.*, sec. 3, 1929 Amendment.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, 1930 Amendment.

<sup>13</sup> *Ibid.*, sec. 4.

loan mortgage that such funds will be held as trust funds for the payment of the cost of improvement.<sup>14</sup> 2. By carefully defining the cost of improvement.<sup>15</sup> 3. By making it a misdemeanor for any owner or operator to consent to the application of such funds to any other purpose before all liens are paid.<sup>16</sup> 4. By broadening the definition of the term "building loan contract" so that it includes all such contracts.<sup>17</sup> The 1930 amendments further corrected this condition and secured the liens of mechanics by: 1. Making the diversion of funds a felony instead of a misdemeanor.<sup>18</sup> 2. By further amendment of the term "cost of improvement" so as to include premium on surety bonds and reasonable cost of subsequent financing.<sup>19</sup> 3. By making insurance proceeds stand in place of the improvement and impressing thereon a trust in favor of the lienors.<sup>20</sup> 4. By giving priority to the lienors over all mortgages recorded subsequent to the commencement of the improvement, unless such mortgages contain a covenant that such funds will be held as trust funds for the cost of the improvement.<sup>21</sup> Substantially the same amendments have been made in regard to the assignment of moneys due under such contracts so that the lienors cannot be defeated by the diversion of funds in this manner.<sup>22</sup>

By the 1929 amendments priority among lienors, excepting laborers, was abolished.<sup>23</sup> This would seem more equitable as among the lienors themselves, and, also, in many instances, it will preserve the operator's credit from being ruined, for it was the former practice of every sub-contractor and material man on the job to file liens as soon as one lien was filed.<sup>24</sup> This course was necessary as the old law left no alternative but to endeavor to file a lien before all the equity in the operation was absorbed by prior liens.

Although the lien law seeks primarily to protect laborers, material men and sub-contractors, yet in these days of complex and speculative financing of real estate projects the Legislature must also be solicitous of the rights of the owner, lessee, lender, and general contractor, lest the lien law be used as a sword instead of a shield. Therefore, the Laws of 1929 provided a remedy against liens filed *mala fides* by providing that even though the lien has been discharged by a surety bond the party against whom the lien was filed could compel the lienor to begin an action of foreclosure.<sup>25</sup> Prior to this

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<sup>14</sup> *Ibid.*, sec. 13, subd. 2, 3.

<sup>15</sup> *Ibid.*, sec. 2.

<sup>16</sup> *Ibid.*, sec. 36.

<sup>17</sup> *Ibid.*, sec. 2.

<sup>18</sup> *Ibid.*, secs. 36, 36a, 36b.

<sup>19</sup> *Ibid.*, sec. 2, 1930 Amendment.

<sup>20</sup> *Ibid.*, sec. 4a.

<sup>21</sup> *Ibid.*, sec. 13, subds. 2, 3.

<sup>22</sup> *Ibid.*, sec. 25.

<sup>23</sup> *Ibid.*, sec. 13.

<sup>24</sup> Report of Joint Legislative Committee investigating Lien Law, p. 6.

<sup>25</sup> N. Y. Lien Law, sec. 59.

amendment this could not be done. By the Laws of 1930, a further remedy is given against such liens by providing that an order of the court may summarily vacate liens which are not valid on their face.<sup>26</sup> These substantial changes to the Lien Law is the result of the recommendations of the Joint Legislative Committee investigating the Lien Law, which committee is continuing their study of the workings of the Lien Law and the effects of the recent changes.<sup>27</sup>

While the 1929 and 1930 amendments have had the general approbation of the many diverse interests involved, there is no doubt that new amendments will be needed in the near future to overcome some of the imperfections in the present law. Two such changes suggest themselves at this moment: 1. An amendment to invalidate any provision in a mortgage recorded prior to the commencement of an improvement, to the effect that such mortgage may be subordinated to a building loan mortgage, for by such method, the salutary effect of the amendments of 1929 and 1930 may be circumvented. 2. The requirement that a small undertaking be filed with the notice of lien on public contracts or on improvements made under a building loan contract, as a deterrent against the present practice of filing a lien to embarrass the general contractor or operator by holding up a scheduled payment. The undertaking, *i.e.*, agreeing to indemnify the party against whom the lien was asserted in the event that the party asserting fails to establish the lien.

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PRIVILEGES OF NEWSPAPERS IN ACTIONS FOR LIBEL.—Both State and Federal Constitutional provisions guarantee the "freedom of the press." At its best, this oft-quoted phrase is over-burdened with indefiniteness and ambiguity.<sup>1</sup> "Freedom" is not "license," and libelous statements may not be published under the cloak of news items. Newspaper publishers must, at their peril, see that the supervision of their business is such as to exclude from publication all defamatory articles.<sup>2</sup> However, the law of libel, taking cognizance of the peculiar province of newspapers in community life, as disseminators of information to the public, grants to them more latitude and privileges than it ordinarily gives to individuals. This doctrine of privilege rests on public policy.

<sup>26</sup> *Ibid.*, sec. 19, subd. 6 and sec. 21a.

<sup>27</sup> Report of Joint Legislative Committee investigating the Lien Law, p. 29.

<sup>1</sup> Cooley, *Law of Torts* (1906), 3rd ed., p. 442: "They (the Constitutions) have not, however, undertaken to define it, and what is meant by it is not made very plain by the authorities. On one point all are agreed, namely, that the freedom of the press implies exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right."

<sup>2</sup> *Ibid.* at 374.