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I. Of the lien.

An act to secure to mechanics and others payment for their labor and materials in erecting any building.

Revision—Approved March 27, 1874.

1. That every building, hereafter erected or built within this state, shall be liable for the payment of any debt contracted and owing to any person (a) for labor performed or materials furnished, (b) for the erection and construction thereof, which debt shall be a lien on such building, and

P. L. 1853, p. 437.
 " 1855, p. 211.
 " 1859, p. 451.
 " 1860, p. 689.
 " 1863, p. 276.
 " 1866, p. 1015
 " 1868, p. 369.
 " 1870, p. 65.
 " 1871, p. 66.
 " 1873, p. 71.

Debts contracted in erection of building to be a lien.

P. L. 1853, p. 437, § 1.

(a) An architect who draws the plans and superintends the construction of a building may have a lien. *Mutual, &c., Ins. Co. v. Rowand*, 11 C. E. Gr. 389.
 (b) If the materials were furnished for the building, it does

not affect the lien that they were not used in that building. *Morris County Bank v. Rockaway Manufacturing Co., 1 McCurt.* 189.

on the land whereon it stands, including the lot or curtilage whereon the same is erected. (a)

2. [Amended by Sec. 37, *post.*]

3. [Amended by Sec. 38, *post.*]

Estate of person erecting building alone liable, unless owner consent in writing. *Ib.*, § 4.

4. That if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant, or other person so erecting such building, shall be subject to the lien created by this act and the other provisions thereof, unless such building be erected by the consent of the owner of such lands in writing, which writing may be acknowledged or proved and recorded, as deeds are, and when so acknowledged or proved and recorded, the record thereof and copies of the same, duly certified, shall be evidence in like manner. (b)

Additions and fixed machinery to be considered a building. *Ib.*, § 5.

5. That any addition erected to a former building, and any fixed machinery or gearing, or other fixtures for manufacturing purposes, shall be considered a building for the purposes of this act; but no building shall be subject to the provisions of this act, for any debt contracted for alterations made therein. (c)

Construction of the words in preceding section. P. L. 1880, p. 689.

6. That the words, "fixtures for manufacturing purpose," as used in the next preceding section, shall be construed to include any building, erection, or construction, of whatever description, attached or annexed, or intended to be attached or annexed, to any land or tenement, and designed to be used in the building or repairing of vessels, whether the same be permanently attached to the freehold, or so built as to be removed from place to place, and only temporarily attached to the land and whether the same be intended and designed for use on land or water.

Extended to repairs of fixed machinery, &c. P. L. 1855, p. 211.

7. That the lien given by this act is hereby extended to all mills and manufactories, of whatever description, within this state, and to the lots of land or curtilages whereon the same are erected, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners in writing, for work done or materials furnished for or about the repairing of any fixed machinery, or gearing, or other fixtures for manufacturing purposes, on the same.

Extended to repairs on buildings. P. L. 1859, p. 451.

8. That the lien given by this act shall be and is hereby extended to all buildings, of whatever description, within this state, and to the lots of land and curtilages whereon the same are erected, for all debts contracted by the owner or owners thereof, or by any other person, with the consent of such owner or owners in writing, for work done or materials furnished for or about the repairing of such buildings, or any of them; *provided also*, that said lien shall not be valid against a bona fide purchaser or mortgagee before said lien is filed in the office of the clerk of the county. (d)

(a) There can be no lien upon the land of a minor. *Hall v. Acken*, 18 *Vr.* 342. The lien given by the act extends to legal estates and interests only, and does not embrace equitable estates or interests. *Dalrymple v. Ramsey*, 18 *Stew.* 494. A transitory seizin, or seizin for an interest only, is not sufficient to support a mechanics' lien. *Clark v. Butler*, 5 *Stew.* 664. A lien continues, notwithstanding the alienation of the premises, after the filing of the lien and the mechanic taking the builder's notes for the amount of the claim, which notes were dishonored. *Slingerland v. Jandaley*, 1 *N. J. L. J.* 115.

(b) A lien cannot be enforced either against the land or building unless the consent be *in writing*, although the owner furnishes the money to build the house. *Babbitt v. Condon*, 3 *Dutch.* 154. An agreement by the owner to furnish the funds for erecting the building is not such consent. *Macintosh v. Thurston*, 10 *C. E. Gr.* 242. Nor where the vendor agrees to advance the funds and deliver the deed after the buildings are finished. *Associates, &c., v. Davison*, 5 *Dutch.* 415. A contract in writing to convey the land is not such consent. *National Bank v. Sprague*, 5 *C. E. Gr.* 13. An assertion made by the owner of the title to the builder "that the latter would be safe in going on" is not a contract. *Strong v. Van Deursen*, 3 *C. E. Gr.* 389. The language of this section is entirely repugnant to the notion that an unassenting landowner has any connection whatever with a contract entered into for the erection of a building upon his land by his tenant or any other person. *Earle v. Willets & Co.*, 27 *Vr.* 338. A lease and contract to convey the lands does not constitute the requisite written consent of the owner to subject his interest in the land to the lien. *Currier v. Cummings*, 18 *Stew.* 145. See *Dalrymple v. Ramsey*, 18 *Stew.* 499. *Dey v. Davis*, 18 *N. J. L. J.* 301.

(c) A piazza is an addition, folding doors are not, nor a garret converted into bed-rooms. *Whitnack v. Noe*, 3 *Stock.* 321, 413. A new foundation for a steam engine, built because the old one was insufficient, is an addition. *Dunnell v. Henderson*, 8 *C. E. Gr.* 174. Adding to the height, extending the depth or increasing the interior accommodations of a building are alterations, not additions. *Uppike v. Stillman*, 3 *Dutch.* 131. *Combs v. Lippincott*, 6 *Vr.* 481. See *Stute, Perrine v. Parker*, 5 *Vr.* 352. A fixture must be one attached to a building, not a dock floating

on the water. *Chadlington v. Dry Dock Co.*, 2 *Vr.* 477, 5 *Dutch.* 550. A flume built of wood and leading the water from a dam to the wheel inside the mill, is a fixture. *Eduards v. Derrickson*, 4 *Dutch.* 38, 5 *Dutch.* 468. See *Shever v. Collins*, 2 *Har.* 181, 183. The purpose of the act is to afford mechanics a lien upon machinery of which they cannot have such possession as would give them a lien by the common law. This statutory lien is confined to fixed machinery. *Griggs v. Stone*, 22 *Vr.* 549. Where machinery is of such a character that the common-law lien may be had upon it, doubts should not be so resolved as to hold the machinery to be also subject to the statutory lien. *Ib.* See *Arnett v. Finney*, 2 *Stew.* 309.

(d) A mechanics' lien takes priority upon the building over a prior mortgage upon the land. *Newark Lime Co. v. Morrison*, 2 *Beas.* 133. A purchase-money mortgage has preference over lien claims put upon the property by contract with the purchaser between the time of executing the contract and that of the conveyance. *Strong v. Van Deursen*, 8 *C. E. Gr.* 389. *Huber v. Diebold*, 10 *C. E. Gr.* 170. *Macintosh v. Thurston*, 10 *C. E. Gr.* 242. But not where a building was erected before the delivery of a mortgage given to take up a prior mortgage on the premises. *Kittredge v. Neumann*, 11 *C. E. Gr.* 195. A carpenter finished a house November 17th, 1842, and filed his claim January 17th, 1843. The owner in possession of the premises mortgaged them December 22d, 1842, to a person having no actual knowledge of the carpenter's lien. *Held*, that the lien was prior to the mortgage. *Van Dyme v. Vanness*, 1 *Hob. Ch.* 485. *Infra*, p. 2068, note (c). The written consent which, under the lien law, will bind the land of the owner for repairs contracted for by the tenant, must be absolute in its terms. *Hervey v. Goy*, 18 *Vr.* 163, reversing *S. C.*, 12 *Vr.* 39. Where the writing relied upon as the consent of the owner to the making of repairs by another contains a clause that the repairs shall not be at the expense of the owner, it is not consent within the meaning of this section. *Ib.* *Young v. Wilson*, 15 *Vr.* 161. *Dey v. Davis*, 18 *N. J. L. J.* 301. A purchase-money mortgage, under certain circumstances, is entitled to priority over a mechanics' lien, though given subsequent to the commencement of the building. *Clark v. Butler*, 5 *Stew.* 664.

9. That any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings, and curtilages whereon the same are erected, shall be subject to the lien created by this act; *provided always*, that in case said married woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located, a notice in writing, describing the property, and that she does not consent to the erection or repairing of such building or buildings on her lands, and that the same is being done against her wishes and consent, then, in such case, the building or buildings, and the curtilages whereon the same are erected, of any married woman, shall be free from the lien given by this act from the time she shall have filed a notice as aforesaid. (a) [See Sec. 28, *post*.]

Building on land of a married woman liable unless she file dissent in writing.
P. L. 1870, p. 65.

10. That the lien given by this act is hereby extended to all docks, wharves, and piers erected upon any navigable river in this state, and to the lots of land in front of which such docks, wharves, or piers may be erected, and to all the interest of the owner or owners of such land in the soil or waters of such navigable river in front of said lands, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners, in writing, for work done or materials furnished for or about the erection or filling in of said docks, wharves or piers. (b)

Lien to extend to docks and wharves.
P. L. 1871, p. 66.

II. Of the claim.

11. [Amended by Secs. 29 and 30, *post*.]

12. That every county clerk shall, at the expense of the county, provide a suitable, well-bound book, to be called the lien docket, in which he shall enter, upon the filing of any lien claim—first, the name of the owner of the building and land upon which the same is claimed; second, the name of the builder or person who contracted the debt; third, the description of said buildings and lands; and fourth, the amount claimed and by whom claimed; and said clerk shall make a proper index of the same, in the name of the owner of the land and building; and such clerk shall be entitled to twelve cents for filing each claim or contract, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien, claim, or contract. (c)

Lien docket.
P. L. 1853, p. 437, § 7.

13. [Amended by Secs. 36 and 40, *post*.]

14. That at any time before judgment on a lien claim, a justice of the supreme court, on the application of the claimant of such lien, and on reasonable notice to all parties interested, may order such lien claim to be amended, in matter of substance as well as in matter of form, whenever it shall appear to him that such amendment can be justly made; and whenever such amendment shall be ordered, the same shall be put in writing and signed by said justice, and shall be then filed in the office of the county clerk; and for his services under this section the said justice shall be entitled to a fee of five dollars. (d)

Lien claim may be amended.
Revision.

(a) That the mortgages of a vendor are purchase-money mortgages cannot avail if she does not file her dissent. *Kittredge v. Neumann*, 11 *C. E. Gr.* 195. Formerly the land of a married woman was not liable under a contract made by her husband. *Johnson v. Parker*, 3 *Dutch* 239. See *Eckert v. Reuter*, 4 *Vr.* 266. Land conveyed to a husband and wife is liable to the extent of the husband's interest for a debt contracted by him. *Washburn v. Burns*, 5 *Vr.* 18. A married woman has power to contract so as to give a lien on her land to the contractor, and if a contract made by her is filed it is not necessary that she should file her dissent in writing in order to exonerate her land from the lien of materialmen and workmen. *Neill v. Watson*, 15 *N. J. L.* 133. A contract made by a husband with reference to his wife's land held to be sufficient, in the absence of dissent, to protect the land from the lien of a materialman who was not a contractor. *Id.*

(b) See *Coddington v. Dry Dock Co.*, 2 *Vr.* 477, 5 *Dutch* 550.

(c) County clerks are not entitled to demand fees for searches not made by themselves or their assistants. *Lum v. McCarty*, 10 *Vr.* 287.

(d) This provision authorizing amendments is not retrospective, so as to apply to a claim filed before its enactment. *Freeland v. Bramhall*, 10 *Vr.* 1. A claim filed against several distinct buildings, without apportioning the claim, is amendable. *James v. Van Horn*, 10 *Vr.* 353. If a claimant, with full knowledge of the facts, files a lien claim and brings suit against the wrong person as builder, an amendment will not be allowed at the trial, substituting the name of the person who contracted the debt. *Bartley v. Smith*, 14 *Vr.* 321. The powers of amendment conferred on the courts do not enable them to restore the lien when it has been discharged by non-compliance with the mandate to indorse on the claim the time of issuing the summons. *Wheeler v. Almond*, 17 *Vr.* 161. Certainty to a common intent is all that is required in the matter of the particulars of a claim, and if more particularly is required an amendment will be permitted. *Williamson v. New Jersey Southern Ry. Co.*, 1 *Stew.* 296. See *Kline v. Outter*, 7 *Stew.* 329. *Durd v. Huff*, 17 *N. J. L.* 80.

Description of
curtilage may be
altered.
P. L. 1868, p. 369, § 2.
Amended.

Extent of curtilage.
P. L. 1863, p. 275, § 3.

Proceedings when
two or more
buildings are built
and constructed
by the same
person or persons.
P. L. 1873, p. 71.

Summons.
P. L. 1853, p. 437, § 8.

15. That at any time before the entry of final judgment in a suit under this act, it shall be lawful for a justice of the supreme court, upon the application of either the owner, builder or lien claimant, and upon reasonable notice to the others, to alter the description of the curtilage as set forth in the lien claim, and, in the form of a rule of court in the suit, to determine the true size and description of the curtilage; and in all subsequent proceedings in such suit, or in relation thereto, the curtilage so determined shall be treated as if the same had been described in the original lien claim; and such justice, for his services under this act, shall be entitled to a fee of two dollars, which shall be paid by the applicant, and may be taxed with the costs in such suit; *provided*, that the amendments authorized in this and in the next preceding section, shall not affect the rights of any bona fide purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments.

16. That when the curtilage or lot on which the building is erected shall not be surrounded by an inclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, but in no such case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the building for the cost of which the lien is claimed. (a)

17. That whenever any person or persons shall hereafter furnish any materials or perform any labor, for the erection and construction of two or more buildings, where such buildings are built and constructed by the same person or persons, it shall be lawful for the person or persons so furnishing such materials, or performing such labor, to divide and apportion the same among the said buildings, in proportion to the value of the materials furnished to, and the labor performed for each of said buildings, and to file with his, her or their lien claim therefor, a statement of the amount so apportioned to each building, in lieu of the bill of particulars required by the eleventh section of this act, which said lien claim when so filed may be enforced under the provisions of this act in the same manner as if said materials had been furnished and labor performed for each of said buildings separately; and if the person or persons who shall have furnished such materials or performed such labor, shall have released his or their lien claim against any one or more of such buildings, or if any one or more of such buildings shall have been built and constructed under a contract in writing duly filed, pursuant to this act, such release or such filing of a contract shall not affect or impair the lien or claim of such person or persons against the building or buildings not so released, or not so built and constructed by contract, nor the lots or curtilages whereon the same are erected.

III. Suit and proceedings to enforce claim.

18. That when a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit, in the circuit court of the county where such building is situated, which suit shall be commenced by summons against the builder and the owner of the land and building, (b) in the following or like form:

(a) What the curtilage included is a question of fact to be determined by the jury. *James v. Van Horn*, 10 Vr. 353. The limitation of the curtilage to half an acre applies to the case where there has been no designation of the curtilage by the owner, and where the means of designation by map do not exist and the lien claimant is left to designate the curtilage. *Gerard v. Birch*, 1 Steu. 317. In a collateral proceeding, the judgment on a mechanics' lien claim is conclusive as to the extent of the curtilage. *Id.* If the lien claim describes more land than is properly included in the lot or curtilage on which the building is erected, the lien for that reason is not invalid, but will be good on what properly belongs to the lot and curtilage, and is necessary to the enjoyment of the premises. *Derrickson v. Edwards*, 5 Dutch. 488. *Burd v. Huff*, 17 N. J. L. J. 30.

(b) The suit must be against both the builder and the owner. *Ayres v. Revere*, 1 Dutch. 474. *Macintosh v. Thurston*, 10 C. E. Gr. 242. *Sinnickson v. Lynch*, 1 Dutch. 317. A mortgagee is not an owner. *Tompkins v. Horton*, 10 C. E. Gr. 284. If the summons is only against the builder, where he is both builder and owner, it may be amended, but such defect is waived by his appearing and pleading that the house and land are not liable. *Cornell v. Matthews*, 3 Dutch. 522. The attorney may attest and seal the summons issued in an action on a lien claim. *James v. Van Horn*, 10 Vr. 354. Power to enforce the claim is vested exclusively in the circuit court of the county. Jurisdiction is given to no other tribunal. *Dairymple v. Ramsey*, 13 Steu. 497.

Summon A B, builder, and C D, owner (or if the owner contracted the debt, A B, builder and owner), to appear before the circuit court in and for the county of _____, at _____, in said county, on the _____ day of _____. That the said A B (the builder) may answer unto E F (claimant) of a plea (as in other cases of assumpsit, debt, or whatever the proper form of action for the debt may be), for which the said E F claims a building lien on a certain building and lands of said C D (describing the building and lands as in the claim on file).

And said summons shall be directed, tested, and made returnable, and may be served and returned in the same manner as other writs of summons; and such summons may be served upon the defendants, or either of them, in any county of this state, by the sheriff thereof, and for this purpose the same, or a duplicate thereof, may be issued to such sheriff; and if any defendant cannot be found in this state, it may be served upon him by affixing a copy thereof upon such building, and also by serving a copy on such defendant personally, or by leaving it at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this state, by affixing a copy on such building, and sending a copy by mail, directed to him at the post-office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building, and by inserting it for four weeks, once in each week, in some newspaper of this state, published or circulating in the county where such building is situate, either of which shall be legal service; and when an affidavit shall be made and filed of the facts, authorizing and constituting any such service, not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff.

Form of and
service.

19. That the declaration in such case shall, after reciting that both owner and builder were summoned, and how served, be against the builder, and in the same form as in other cases of assumpsit, covenant, debt, or as the case may be, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in said claim; and to said declaration a schedule may be annexed, and the practice, proceedings, and pleadings thereon shall be conducted, and the judgment entered, as in suits in said circuit court to recover money due on contract; and both or either of said defendants may, jointly or severally, have any defense or plea to the same that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner may plead that said house or land are not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with; and in case a verdict be rendered or judgment be given against the builder only, judgment shall be given for the landowner, with costs against the plaintiff; and in case judgment be given for the plaintiff, it shall be entered against the builder when he was actually served with the summons, generally, and with costs as in other cases; and when only legal service of the summons has been made, judgment against the owner and also against the builder, shall be specially for the debts and costs, to be made of the building and lands in the declaration described; and in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery. (a)

The declaration.
Ib., § 9.

Proceedings and
Judgment.

Defense and
special plea.

(a) The declaration must aver that the contract, or a duplicate thereof, was in writing, and filed in the clerk's office of the county where the building is situate. *Summerman v. Knowles*, 4 Vr. 202. The builder can only plead to the action; if the validity of the lien is contested it must be by the owner. *Tomlinson v. Degray*, 2 Dutch. 73. The plea that the premises are not liable to the debt does not put in issue the title to the property. *Cornell v. Matthews*, 3 Dutch. 522. *Washburn v. Burns*, 5 Vr. 18. If the declaration shows that the claim is not a lien on the premises, the owner may demur, and after the plaintiff has joined in demurrer, he cannot assign for error that the defend-

ant cannot demur to a declaration in a lien case. *Coddington v. Beebe*, 5 Dutch. 550. A judgment entered upon a defective lien gives it no priority in payment over other liens. *Morris County Bank v. Bockaway Co.*, 1 C. E. Gr. 150. A judgment may be entered against the building and land where there has been an actual service of the summons, and a special *feri facias* may be issued thereon. *Mutual Benefit Ins. Co. v. Rowand*, 11 C. E. Gr. 389. Where a lien claim was filed after the beginning of insolvency proceedings in chancery, it is not necessary to pursue such claim to judgment, unless so required by the court or receiver. *Demott v. Stockton Paperware Mfg. Co.*, 5 Stew. 124.

Errors in proceedings may be amended.
Revision.

Suit in case of death of builder or owner.
P. L. 1866, p. 1015.

When writ of fieri facias may issue.
P. L. 1853, p. 437, § 10.

When special.

Proceedings on special fieri facias.
Ib., § 11.

Title which passes to freeholder.

All lien claims concurrent.
Ib., § 14.

20. That it shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any suit or proceeding under this act, so that the merits of the controversy between the parties may be determined; and that said amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit. (a)

21. That in case of the death of the builder, the suit on the lien claim may be against his executors or administrators; and if the owner be dead, such suit may be against his heirs or devisees. (b)

22. That where judgment is entered generally against the builder, a writ or writs of fieri facias may issue thereon as in other cases, and when judgment shall be against the building and lands, a special writ of fieri facias may issue to make the amount recovered by sale of the building and lands; and when both a general and special judgment shall be given, both writs may be issued either separately or combined in one writ, and one may be issued after the return of the other for the whole or residue, as the case may require; and such judgments may be docketed in the supreme court, and execution had thereon as other judgments may be.

23. That under such special fieri facias, the sheriff or other officer shall advertise, sell, and convey said building and lot in the same manner as directed by law in case of lands levied upon for debt, and the deed given by such sheriff or other officer shall convey to the purchaser the estate which the owner had in the lands at the commencement of the building, or which he subsequently acquired, and also in the building, subject only to all mortgages and other incumbrances created and recorded, or registered prior to the said commencement of the building; and in case of gearing or machinery, the bringing of the same upon the premises shall be such commencement; and such prior incumbrances shall have priority to all subsequent builders' liens upon said lands and upon the erections thereon, except such as may be removable, as between landlord and tenant, which may be sold and removed by virtue of any building lien for the construction of the same, free from such prior incumbrances. (c)

24. That all lien claims for erecting the same building shall be concurrent liens upon the same and the land whereon the same is erected, and shall be paid pro rata out of the proceeds thereof, when sold by virtue of this act; and, for the purpose of distribution, the sheriff or other officer shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, or as shall be filed according to this act before petition filed in said court for distribution thereof, and among such only; but the amount paid to any claimant shall not be paid over to him until after his claim shall have been filed for three months; and if a caveat be filed against such claim by the owner, or by any claimant or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon; and such circuit courts shall have full power to adopt such rules of practice and pleading, and to make all orders necessary

(a) See *Bartley v. Smith*, 14 Vr. 322. *Wheeler v. Almond*, 17 Vr. 161.

(b) Where the premises have been conveyed between the time of beginning the building and that of filing the lien, the executors or administrators of the owner, at the time the lien is filed, are meant. *Robbins v. Bunn*, 5 Vr. 322.

(c) The excavation for the foundation is the commencement of the building. *Mutual Benefit Life Ins. Co. v. Rowand*, 11 C. E. Gr. 387. A change of ownership while the building is being erected does not make a new commencement. *Gordon v. Torrey*, 2 McCart. 112. In case of additions, &c., the statute refers to the time when they are commenced. *Whitenack v. Noe*, 3 Stock. 321, 327. A judgment general as against the owner and special as against the lands is paramount to all incumbrances put upon the premises after the commencement of the building. *Tompkins v. Horton*, 10 C. E. Gr. 384. A building is commenced when the permanent work upon the ground, whether of excavation or construction, has progressed so far as to inform reasonable observers that it is designed for the erection of a building. *Jacobus v. Mutual Benefit Life Ins. Co.*, 12 C. E. Gr. 604. A mortgage executed and acknowledged and put upon record by the mortgagor, in pursuance of a prior contract for a loan on such security, and afterwards delivered to the mortgagee when the mortgage money is advanced, will have priority in equity over liens of mechanics and materialmen for work and materials furnished, after the mortgage is recorded, for the erection of a building on the mortgaged premises, built by the mortgagor, which was commenced between the recording of the mortgage and its delivery, the mortgagee having no knowledge of the commencement of the building when he parted with his money. In equity the mortgage, when delivered, will

have relation to the agreement for the loan. *Ib.* A judgment under the mechanics' lien law against the owner of the land is conclusive as respects a subsequent mortgagee. *Ib.* Where an owner of land has commenced the erection of a building and then gives a mortgage on the premises, which is duly recorded, and then conveyed the property subject to the mortgage, if afterwards, the claimant of a mechanics' lien files his claim, making only the last purchaser defendant as owner, the mortgagee's estate is unaffected by the lien. *Ib.* The exception such as may be removable as between landlord and tenant, &c., applies only to such buildings erected by tenants on lands as are by law removable as between landlord and tenant. *Heidelbach v. Jacob*, 1 Stew. 544. A purchase-money mortgage, under certain circumstances, is entitled to priority over a mechanics' lien, though given subsequently to the commencement of the building. *Clark v. Butler*, 5 Stew. 664. *Bradley v. Byron*, 16 Stew. 396. Where the alterations were visibly commenced on the ground before the mortgages were given, claims therefor are prior liens to the mortgages. *Burd v. Huff*, 17 N. J. L. J. 80. For adjustment of priorities where there are mortgages or other incumbrances on the lands, see *Van Dyne v. Van Ness*, 1 Hal. Ch. 485. *Whitenack v. Noe*, 3 Stock. 321, 412. *Strong v. Van Deusen*, 3 C. E. Gr. 369. *Hueber v. Diebold*, 10 C. E. Gr. 170. *Macintosh v. Thurston*, 10 C. E. Gr. 242. *Mutual Benefit Life Ins. Co. v. Rowand*, 11 C. E. Gr. 389. *Kitredge v. Neumann*, 11 C. E. Gr. 195. *Lamb v. Cannon*, 9 Vr. 362. *Reeve v. Elmendorf*, 9 Vr. 125. *Ward v. Hague*, 10 C. E. Gr. 397. *Taylor v. La Bar*, 10 C. E. Gr. 222. *National Bank v. Sprague*, 5 C. E. Gr. 13. *Whitehead v. First Church of Newark*, 2 McCart. 135. *Williamson v. New Jersey Southern E. R. Co.*, 2 Stew. 316. *Supra*, p. 2064, note (b).

and proper to carry into effect the objects of this act, and to secure a proper disposition of the proceeds of sales to all persons entitled thereto by the provisions of this act. (a)

25. That where a summons has been issued and served in any way prescribed by this act, to enforce any building claim lien against any building and lands, all other suits commenced by summons subsequently issued, to enforce concurrent liens against the same building and lands, may be stayed by the claimant therein, or by order of the court, until judgment in such first suit, unless notice to enforce such other claim has been served, or a caveat has been filed against paying the same, as hereinbefore provided.

Subsequent suits stayed.
Ib., § 17.

IV. Discharge of land from lien.

26. That such land and building may be discharged from any lien created by this act:—(1) by payment and a receipt therefor, given by such claimant, which, when the same is executed in the presence of, and is attested by any officer entitled to take the acknowledgment of the execution of a deed, or when acknowledged or proved before such officer, shall be filed by such clerk, and the words “discharged by receipt” shall be entered by him in said lien docket, opposite the entry of said lien; (2) or by paying to said county clerk the amount of said claim; which amount said clerk shall pay over to said claimant; (3) by the expiration of the time limited for issuing a summons on such lien claim, without any summons being issued, or without notice thereof indorsed on said claim; (4) by filing an affidavit that a notice from the owner to the claimant, requiring such claimant to commence suit to enforce such lien in thirty days from the service of such notice; and the lapse of thirty days after such service without such suit being commenced, or without any entry of the time of issuing such summons being made on such claim. (b)

Modes of discharging lien.
Ib., § 13.

27. That any landowner desiring to contest any claim, and to free his house and land from the lien thereof, may pay to the county clerk the amount of such claim, with interest thereon, for six months after such payment, and twenty-five dollars in addition thereto, with notice to said clerk not to pay over the same until such claim be established by suit; which sum, or so much thereof as is necessary, shall be paid to such claimant upon his obtaining judgment against such buildings and lands, in the manner prescribed in this act, and said claim shall, from the payment of such money to such clerk, be a lien on said money, and said buildings and lands shall be discharged therefrom, and no execution shall issue against the same by virtue of such judgment; but if such suit is not commenced within the time at which the said lands would be discharged by the provisions of this act without suit, or in case judgment be given therein without being against said lands, said sums shall be repaid to him by said clerk, and if judgment be given against such lands for an amount less than that so deposited, then the surplus shall be returned by said clerk to said landowner.

Owner may pay money to county clerk.

V. Supplements.

Supplement.

Approved March 30, 1876. P. L. 1876, p. 66.

28. SEC. 1. That section nine of the act to which this is a supplement, and which section reads as follows:

“That any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings and curtilages whereon the same are erected shall be subject to the lien created by this act; *provided always*, that in case said married

(a) Upon distribution between lien claimants of the fund derived from sale of the premises, their judgments are conclusive of the amount due and the existence of the lien. *Hall v. Spaulding*, 11 Vr. 168. A court out of which a special *feri facias* on a mechanics' lien judgment has issued, will not order it to be set aside on the motion of a party who has purchased the prop-

erty covered by the mechanics' lien at a sale, under another special *feri facias*, on a judgment entered on a mechanics' lien filed by a different party upon the same premises. *Murphy v. Borden*, 20 Vr. 527.
(b) See *Wheeler v. Almond*, 17 Vr. 161.

woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located, a notice in writing, describing the property, and that she does not consent to the erection or repairing of such building or buildings on her lands, and that the same is being done against her wishes and consent, then, in such case, the building or buildings, and the curtilages whereon the same are erected, of any married woman, shall be free from the lien given by this act from the time she shall have filed a notice as aforesaid," be and the same is hereby amended by adding thereto the words: "and provided further, that nothing in this act contained shall be so construed as to make the lands of any person liable for any building or repairs not authorized by the owner, or built or done without the knowledge of the owner."

Act not to be construed to make lands of person liable for building not authorized by owner, &c.

Amendatory act.

P. L. 1877, p. 153.

Approved March 9, 1877.

29. SEC. 1. [This section, amending Sec. 11, *ante*, is amended by Sec. 30, *post*.]

Supplement.

P. L. 1878, p. 243.

Approved April 1, 1878.

30. SEC. 1. That the act entitled "An act to amend an act entitled 'An act to secure to mechanics and others payment for their labor and materials in erecting any building' [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-four," which act to amend was approved March ninth, one thousand eight hundred and seventy-seven [see Secs. 11 and 29, *ante*], and is as follows [see P. L. 1878, p. 243], be amended so as to read as follows:

Filing of lien claim. What to contain.

[That every person intending to claim a lien upon any building or lands by virtue of this act, shall, within one year(1)(a) after the labor is performed or the materials furnished for which such lien is claimed, file his or her claim in the office of the clerk of the county where such building is situate, which claim shall contain these matters:

Description of building.

I. A description of the building and of the lot or curtilage upon which the lien is claimed, and of its situation sufficient to identify the same;(b)

Name of owner, &c.

II. The name of the owner or owners of land or of the estate therein on which the lien is claimed;(c)

Name of person who contracted debt.

III. The name of the person who contracted the debt, or for whom, or at whose request the labor was performed or the materials furnished for which such lien is claimed, who shall be deemed the builder;(d)

Bill of particulars exhibiting amount and kind of labor, &c.

IV. A bill of particulars exhibiting the amount and kind of labor performed and of materials furnished, and the prices at which and times when the same was performed and furnished, and giving credit for all the payments made thereupon and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant, which statement, when the work or materials or both are furnished by contract, need not state the particulars of such labor or materials further than by stating, generally, that certain work therein stated was done by contract at a price mentioned; and such bill of particulars and statements shall be verified by the oath of the claimant or his agent in said matter, setting forth that the same is for labor done or materials furnished in the erection of the build-

(a) Where the contract is *entire*, the work is not done or the materials furnished until the contract is executed, and a lien can be filed at any time within one year thereafter. *Edwards v. Derrickson*, 4 *Dutch*. 39, 5 *Dutch*. 468. Taking notes for a mechanics' lien claim is no abandonment of the lien security, and if the notes are not paid at maturity, the claimant may enforce his lien in the same manner as if the notes had never been given. *Edwards v. Derrickson*, 4 *Dutch*. 39. The effect of giving the note is to suspend all right of action upon the account, *pro tanto*, until the maturity of the note. *Dey v. Anderson*, 10 *Vt.* 201. *McPherson v. Walton*, 15 *Stev.* 282.

(b) A lien claim cannot be filed on several buildings jointly without apportioning and designating the amount claimed on each one. *Morris County Bank v. Rockaway Co.*, 1 *C. E. Gr.*

150, 1 *McCart*. 189. What is a sufficient description of the premises or curtilage, and how much land may be included. *Edwards v. Derrickson*, 4 *Dutch*. 39, 5 *Dutch*. 468. *Van Duyn v. Vanness*, 1 *Hal. Ch.* 485.

(c) If the title of the property is changed while the building is being erected, the owner, at the time of filing the lien, is the proper one to be made a party. *Edwards v. Derrickson*, 4 *Dutch*. 39, 5 *Dutch*. 468. *Robbins v. Bunn*, 5 *Vt.* 522. But not where such conveyance was made as collateral security and the deed was only a mortgage. *Gordon v. Torrey*, 2 *McCart*. 112. The legal estate of the owner need not be set out. *Cornell v. Matthews*, 3 *Dutch*. 523.

(d) A lien claim cannot be amended by adding another claimant. *Vreeland v. Boyle*, 8 *Vt.* 346.

(1) By Sec. 40, *post*, the time for filing the lien has been changed from one year to "four months from the date of the last work done or materials furnished." The notes of decisions upon the original act have been retained, the principle upon which they were decided being still applicable.

ing in such claim described, at the times therein specified, and that the amount as claimed therein is justly due; and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any willful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim. (a)

Supplement.

Approved April 5, 1878. P. L. 1878, p. 322.

Preamble.

WHEREAS, By an act entitled "An act to amend an act entitled 'An act to secure to mechanics and others payment for their labor and materials in erecting any building,'" approved March ninth, one thousand eight hundred and seventy-seven, it was, among other things, enacted by the senate and general assembly of the state of New Jersey "that every person intending to claim a lien upon any building or lands by virtue of this act, shall, within one year after the labor is performed or the materials furnished for which such lien is claimed, file his claim in the office of the clerk in the county where such building is situate," which claim shall contain this matter among others:

"IV. In claims hereafter filed a true statement of the time of the commencement of the building for which said lien is claimed, the statement of which shall be conclusive as against the claimant."

And whereas, By a supplement to an act entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building," approved April first, eighteen hundred and seventy-eight, the aforesaid section four relating to the statement of the time of the commencement of the building was repealed; therefore,

31. SEC. 1. That all lien claims heretofore filed in this state without containing the matter so set out in section four aforesaid, relating to the statement of the time of the commencement of the building, be and the same are hereby made valid, legal and effectual to the extent that the said lien claims would have been valid, legal and effectual if the same had contained the said matter so set out in section four aforesaid, relating to the statement of the time of the commencement of the building as aforesaid.

Lien claims heretofore filed made legal and valid.

Supplement.

Approved March 4, 1879. P. L. 1879, p. 77.

Preamble.

WHEREAS, It is the practice of owners of lots or tracts of land to dispose of the same to a builder or builders, taking therefor a mortgage or mortgages in excess of the purchase-money price of said lot or tract of land, the mortgagee agreeing to pay such excess to the aforesaid builders, from time to time, as the building or buildings progress, such mortgages being known as advance money mortgages; therefore,

32. SEC. 1. That in all such transactions the building or buildings so erected shall be liable for the payment of any debt contracted and owing to any person or persons for labor performed or materials furnished for the erection and construction thereof, which debt shall be a lien on such building or buildings and on the land whereon they stand, including the lot or curtilage whereon the same are erected, and that the lien for labor performed or materials furnished for the erection and construction of any such building or buildings shall be a prior lien to the lien of any mortgage created on such building or buildings and lot or tract of ground to secure,

Lien for labor or materials, &c., to be a prior lien to mortgage created for advances used in construction.

(a) Where the date of the last article furnished, as stated in the bill of particulars, was more than a year before the summons was issued, the lien cannot be enforced, although the last article may have been furnished within the year. *Bement v. Trenton Locomotive Co.*, 3 Vr. 513. A statement that work was done between two given dates is not sufficient, and the kind of labor or materials and the price of each must appear. A charge including both labor and materials is erroneous. *Associates v. Davison*, 5 Dutch. 415. The time of commencing the building need not be stated. *Gordon v. Turrey*, 2 McCart. 112. That the amount set forth was for casings, blinds, &c., and materials furnished in the repairing, altering, erecting and finishing of the buildings described in the claim, is defective. *Whitnack v. Noe*, 3 Stock. 413. If the claim shows the work done, the time

when, that it was done by contract, the price stipulated and the amount due, it is sufficient. *Edwards v. Derrickson*, 4 Dutch. 39, 5 Dutch. 488. If the lien covers more land or buildings than the claimant is entitled to, it will not vitiate it. *Id.* *Whitnack v. Noe*, 3 Stock. 321. Where a claim stated that the work and material were done and furnished "within a year past," and the bill of particulars sufficiently particularized the amount and kind of labor and materials, stating the price and declaring that they were done and provided "up to the 21st of November last," and by contract—*Held*, a compliance with the act, in a case where the lien is claimed for work and materials done and provided by contract. Certainty to a common intent is all that is required in such a case. *Williamson v. New Jersey Southern Ry. Co.*, 1 Steu. 279; affirmed on this point, 2 Steu. 311.

Proviso.

either in whole or in part, any advances in money to be used in and about the construction of such building or buildings (except only so much of the amount of said mortgage as shall be for the purchase-money of the lot or tract of land whereon the said building or buildings shall be erected); *provided*, that nothing in this act shall interfere with a mortgage or mortgages to secure bona fide loans of money not advances as aforesaid, such bona fide loans to be paid in full, anything in this act to the contrary notwithstanding. [See Sec. 42, *post*.]

P. L. 1883, p. 24.

Lien extended to alterations.

Proviso.

33. SEC. 1. That the lien given by the act to which this is a supplement shall be and is hereby extended to all buildings of whatever description within this state, and to the lot or curtilage whereon the same are erected, for all debts contracted or owing to any person for work done or materials furnished in and for the alteration of any such building; *provided*, that work done or materials furnished under contract in and for such alterations shall be liable to the contractor alone, in the manner provided by the second section of said act. (*a*)

Supplement.

Approved February 8, 1883.

P. L. 1884, p. 260.

Mortgages to be made party to suit brought to enforce lien claim.

Summons to be served.

Declaration to recite service of defendants, and why made parties.

Defendants may jointly or severally defend or plead to declaration, &c.

Proceeds of sale under judgment, how distributed.

Supplement.

Approved April 25, 1884.

34. SEC. 1. That in any suit hereafter brought to enforce any lien created by the act to which this is a supplement, every person holding a mortgage of record against the property affected by said lien claim, whose mortgage would be cut off by a sale under said lien claim, shall be made party or parties defendant to said suit, and the summons therein shall set forth each of their names as defendants, and the said summons shall be served upon each of the defendants named therein in the same manner as to residents and non-residents respectively, as now provided for the service of summons in the act to which this is a supplement.

35. SEC. 2. That the declaration in such suit, in addition to reciting that the owner and builder were summoned and how served, shall in the same manner recite that each of the other defendants named in said summons was summoned and how served, and why he or they were made defendant or defendants, and each of said other defendants may jointly or severally have the same defense or pleas to the said declaration as are allowed to the owner under the provisions of said act, and a further plea that said lien claim is subject to the said defendant's lien, and the judgment in any such case shall determine the priority of the liens of the plaintiff and each of said defendants, and any judgment or proceeding under the same shall not affect the lien of any of said defendants whose lien shall be determined to be paramount to that of the plaintiff, and if the proceeds of the sale of the buildings or lands under any such judgment shall be more than sufficient to pay the judgment of said plaintiff, and any concurrent mechanics' lien claims entitled to payment out of the proceeds of said sale under the provisions of said act, any surplus shall be distributed by the court out of which the execution issued to the said defendants holding liens, subject to that of the plaintiff, according to the priority of their respective liens as determined in said judgment.

P. L. 1888, p. 423.

Supplement.

Approved April 16, 1888.

36. SEC. 1. [This section amends Sec. 13, *ante*, which is again amended by Sec. 40, *post*.]

(*a*) This act is constitutional. *Bradley & Currier Co. v. Lovington*, 25 Vr. 227. What are alterations and what additions, see *Updike v. Skillman*, 3 Dutch. 131. A cesspool rendered neces-

sary by a new bath-room, and its house connections, are alterations for which a claim may be made. *Burd v. Huff*, 17 N. J. L. J. 80. See *Griggs v. Stone*, 22 Vr. 551.

Supplement.

Approved March 14, 1895. P. L. 1895, p. 313.

37. SEC. 1. That section two of the act to which this is a supplement be and the same hereby is amended to read as follows :

[That whenever any building shall be erected in whole or in part by contract in writing, such building and the land whereon it stands shall be liable to the contractor alone for work done or materials furnished in pursuance of such contract; *provided*, said contract or a duplicate thereof, together with the specifications accompanying the same or a copy or copies thereof, be filed in the office of the clerk of the county in which such building is situate before such work done or materials furnished.] (a)

Building erected under contract and specifications filed, liable to contractor alone. Proviso.

38. SEC. 2. That section three of the act to which this is a supplement be and the same hereby is amended to read as follows :

[That whenever any master-workman or contractor shall, upon demand, refuse to pay any person who may have furnished materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer or materialman to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building shall thereupon be authorized to retain the amount so due and claimed by any such journeyman, laborer or materialman out of the amount owing by him or them to such master-workman or contractor, or that may thereafter become due from him or them to such master-workman or contractor for labor or materials used in the erection of such building, giving him written notice of such notice and demand; and if the same be not paid or settled by said master-workman or contractor, such owner or owners on being satisfied of the correctness of said demand shall pay the same, and the receipt of such journeyman, laborer or materialman for the same shall entitle such owner or owners to an allowance therefor in the settlement of accounts between him and such master-workman or contractor as so much paid on account.] (b)

Remedy of workmen and materialmen if contractor refuses to pay.

Owners to have allowance for amounts paid.

(a) Filing the contract only protects the building from work done or materials furnished on the contractor's account. A lien attaches for materials ordered or mechanics employed by the owner. *Mechanics' Association v. Albertson*, 3 C. E. Gr. 318. The employe of a contractor can proceed under the lien law for work done, unless the contract is in writing. *Van Pelt v. Hartough*, 2 Vr. 331. The contract, the filing of which, under the lien law, protects against the lien of other creditors, must be between parties who, in writing and not in form merely, hold towards each other the relation of contracting parties. It must be a real, not a fictitious bargain. *Young v. Wilson*, 15 Vr. 157. It is a perversion of the act to use it as a scheme to protect the contractor from the payment of his debts due materialmen. *Id.* A paper filed as a contract may serve as a consent in writing of the legal owner to erect the building when, by its terms, the expense is not to be borne by the licensee. *Id.* When a contract has been duly filed, a person furnishing labor or materials to the builder will not acquire a right to a lien by reason of the subsequent abandonment of that contract. *Willetts & Co. v. Earl*, 24 Vr. 270. The filing of a contract will not preclude liens for work done and materials furnished which were not in pursuance of such contract. *Id.* A filed contract, although signed by a person other than the owner, in the absence of fraud, will protect the land and building of the owner of the land from all claims except those of the contractor. *Earl v. Willetts*, 27 Vr. 334, reversing *S. C.*, 24 Vr. 270, on this point. Where a contract was duly filed, and after the building was completed the premises were *bona fide* conveyed by the owner to the contractor—*Held*, that a materialman has no lien on the premises for materials furnished in erecting a building thereon, and that a judgment recovered on such claim gives no greater right. *Scudder v. Hardden*, 4 Steu. 503.

(b) Where there were three classes of claims—(1) those for work done or materials furnished, for which the creditor made demand and gave notice; (2) similar claims for which the contractor drew orders on the owner, which on presentation were not accepted; (3) claims for debts due from the contractor other than for work or materials used on the building, and for which the contractor drew orders, which were presented but not accepted—*Held*, that claimants under the first class must be paid in the order and priority in which the demand and notice were given. Claimants under the second and third classes stand on the same footing, and are entitled to be paid *pro rata* out of the fund. But where the debtor pays the fund into court, neither class can claim priority over the other, and each creditor must be paid in the order in which his notice or order was presented. *Superintendent, &c., v. Heath*, 2 McCart. 22. *Kirtland v. Moore*, 13 Steu. 106. *Hall v. Baldwin*, 18 Steu. 558. *Lanigan v. Bradley & Currier Co.*, 5 Dick. 201. Notice by the workman operates as an assignment of the debt due from the

owner to the contractor to the extent of the amount due from the contractor to the workman. In a suit by the contractor against the owner, the owner cannot claim any deductions for the sums due the workman (for which he has given notice) unless the owner has made payment. *Wrightman v. Brenner*, 11 C. E. Gr. 489. *Shannon v. Mayor of Hoboken*, 10 Steu. 123. And an action cannot be maintained, when the owner has reasonable cause to dispute the claim of the person serving the notice. *Reeve v. Elmendorf*, 9 Vr. 125. The claimant must first verify it by a judgment against the contractor. *Id.* The owner may retain moneys due the contractor, if by the contract he is entitled so to do, until the completion of the building. *Id.* The mere disallowance by a contractor of the claim of a sub-contractor, will not prevent a suit by the latter against the owner on a notice served by him. A claim by a workman or materialman for more than has, in fact, been earned by him, is fatal. *Id.* When notice is given to an owner, he must hold, of any moneys which are then due, or which may thereafter become due to the contractor upon the contract, a sufficient amount to answer the notice. *Mayer v. Mutchler*, 31 Vr. 162, distinguishing *Craig v. Smith*, 8 Vr. 549. If the contractor, although the contract is never completely executed, is in a position which enables him to recover from the owner in an action either upon the contract or upon *quantum meruit* for contract work done, a notice will reach the amount so recoverable. *Id.* The owner is bound to retain moneys due, or to grow due, to the contractor, after having been served with notice by the materialman or workman of the non-payment of his claim. *Budd v. Trustees*, 22 Vr. 36. See *Burnett v. Jersey City*, 4 Steu. 341. The fact that a building upon which labor is done, or to which materials are furnished, is the property of a municipal corporation, and used or designed for public use, will not defeat an action brought by such laborer or materialman against the owner, under the third section. *Frank v. Chosen Freeholders*, 10 Vr. 347. Where, by a building contract, the materialmen agree to take in payment second mortgages upon some of the houses, and it does not appear that demand has been made for such mortgages, or that there is inability to give them, no action can be brought under the statute for a mechanics' lien. *Weaver & Pennock v. Demuth*, 11 Vr. 238. This section does not afford a remedy for one who has sold and delivered materials used in a building by a sub-contractor. *Carliste v. Knapp*, 22 Vr. 329. An order for a general debt of the contractor, accepted by the owner, is not entitled to priority of payment, where the balance due the contractor is insufficient to justify all the subsequent lien claimants. *McPherson v. Walton*, 15 Steu. 282. What amounts to an acceptance of an order by the owner. *Id.* A building contract provided for alterations, deviations or additions, and for the payment thereof. *Held*, that the holder of an order drawn by the builder on the owner for *extra work*, "and to charge the same to

Proceedings when owner disputes claim.

39. SEC. 3. That when a notice or notices shall be served upon such owner or owners by any journeyman, laborer or materialman, under the third section of the act to which this is a supplement, and notice thereof shall have been given by such owner or owners to the master-workman or contractor as required by said section, and said master-workman or contractor shall, within five days after receiving the notice aforesaid, notify in writing the journeyman, laborer or person who has furnished materials that he disputes his or their claim and requests him or them to establish the same by judgment, the owner shall not pay the claim until it is so established; *provided*, the master-workman or contractor shall notify him in writing that he has given the aforesaid notice to said journeyman, laborer or materialman.

Proviso:

40. SEC. 4. That section thirteen [see Secs. 13 and 36, *ante*] of the act to which this is a supplement be and the same hereby is amended to read as follows:

When claim must be filed and suit brought.

[That no debt shall be a lien by virtue of this act unless a claim is filed as hereinbefore provided within four months from the date of the last work done or materials furnished for which such debt is due; nor shall any lien be enforced by virtue of this act unless the summons in the suit for that purpose shall be issued within ninety days from the date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be indorsed on the claim by the clerk upon the sealing thereof, and if no such entry be made within four months from such last date, or if such claimant shall fail to prosecute his claim diligently within one year from the date of the issuing of such summons or such further time as the court may by order direct, such lien shall be discharged; *provided*, that the time in which such lien may be enforced by summons may be extended for any further period, not exceeding four months, by a written agreement for that purpose, signed by said landowner and said claimant and annexed to said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "extended" on the margin of the lien docket opposite such claim, and any claimant upon receiving written notice from the owner of the lands or building requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to be commenced within said thirty days.] (a)

Proviso.

When owner shall be liable notwithstanding payments made.

41. SEC. 5. That if the owner or owners of any building or other property which, by the act to which this is a supplement or the various supplements and amendments thereto, is made the subject of liens for or toward the construction, altering, repair or improvement of which labor or services have been performed or materials furnished by contract, duly filed, shall, for the purpose of avoiding the provisions of the act to which this is a supplement, or the various supplements and amendments thereto, or in advance of the terms of such contract, pay any money or other valuable thing on such contract, and the amount still due to the contractor, after such payment has been made, shall be insufficient to satisfy the notices served in conformity with the provisions of the act to which this is a supplement, or the various supplements or amendments thereto, such owner or owners shall be liable in the same manner as if no such payment had been made.

account of contract," was entitled to priority over another claimant, who held a subsequent order drawn expressly for extra work, and that such priority was not abandoned by the holder of the first order afterward proceeding thereon by notice to the owner, under section 3 of the mechanics' lien act. *Dunn v. Stokern*, 16 *Stew.* 401. Under supplementary proceedings against W., a judgment creditor, a receiver was appointed in pursuance to the statute. At the time of such appointment, W. was executing a building contract, the work being unfinished and the payment under the contract not yet due. *Held*, that the statute does not operate on such an inchoate right, and that the receiver acquired no title to the payment which subsequently became due after the work was completed. *Willison v. Salmon*, 18 *Stew.* 287. The effect of the notice is to work an assignment *pro tanto* of that which is due or to become due from the owner to the contractor from the time of the service of the notice. *Anderson v.*

Huff, 4 *Dick.* 349. If the payment to be given to the contractor for the building is land, such notice will fix a right in the workman or materialman who gives the notice to be paid from such land, which equity will enforce. *Id.*

(a) The failure of the county clerk to indorse on the lien claim the time of issuing the summons, does not avoid the writ, when neither the defendant nor third parties can be injured by the failure to indorse. *James v. Van Horn*, 10 *Vr.* 353. Such failure is not, between concurrent lien claims, ground for questioning the judgment rendered in the suit. As to them the statutory requirement is directory. *Hall v. Spaulding*, 11 *Vr.* 166. But, in *Wheeler v. Almond*, 17 *Vr.* 181, the court of errors and appeals held the provision that the time of issuing the summons shall be indorsed on the claim to be mandatory, and that in case of non-compliance with it the lien will be discharged.

42. SEC. 6. That every mortgage upon lands in this state shall have priority over any claim which may be filed in pursuance of the act to which this is a supplement, or the various supplements or amendments thereto, to the extent of the money actually advanced and paid by the mortgagee and applied to the erection of any new building upon the mortgaged lands or any alterations, repairs or additions to any building on said lands, provided such mortgage be recorded or registered before the filing of any such claim. [See Sec. 32, *ante*.]

Mortgages to have priority to the extent of money actually advanced, &c.

43. SEC. 7. That in all cases journeymen or laborers shall have priority and preference over any employers of labor, contractors or materialmen for the payment of wages, without reference to the date when said journeymen or laborers shall have filed the lien or served the notices provided for in the act to which this act is a supplement or the several supplements or amendments thereto.

Journeymen and laborers shall have priority over contractors and materialmen.

44. SEC. 8. That chapter two hundred and ninety-two of the laws of one thousand eight hundred and ninety, entitled "A supplement to an act entitled 'An act to secure to mechanics and others payment for their labor and materials in erecting any building,' approved March twenty-seventh, in the year of our Lord one thousand eight hundred and seventy-four," which supplement was approved June nineteenth, one thousand eight hundred and ninety, be and the same is hereby repealed.

Repealer.

45. SEC. 9. That an act entitled "An act to amend an act entitled 'A supplement to an act entitled 'An act to secure to mechanics and others payment for their labor and materials in erecting any building,' approved March twenty-seventh, in the year of our Lord one thousand eight hundred and seventy-four,' which supplement was approved June nineteenth, one thousand eight hundred and ninety,'" and which amendatory act was approved March twenty-ninth, one thousand eight hundred and ninety-two, be and the same is hereby repealed.

Repealer.

46. SEC. 10. That all acts and parts of acts inconsistent with this act are hereby repealed, and that this act shall take effect immediately.

Repealer.

A supplement to an act entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building," approved March twenty-seventh, one thousand eight hundred and seventy-four, for the purpose of extending the rights and remedies under said act to the labor performed and materials furnished to and for the removal of any building or buildings or part or parts of a building from one curtilage to that of another; and further, to extend the lien for such removal to the land or curtilage to which the said building, buildings or part or parts of a building shall be removed and located under the contract.

Approved March 17, 1893.

P. L. 1893, p. 385.

47. SEC. 1. That every building or part or parts of any building which shall hereafter be removed and shall be located upon some other lot or curtilage, and which shall, when removed, constitute a complete structure or a part of a structure upon the curtilage to which the same shall be removed, shall be liable for the payment of any debt contracted and owing to any person for labor performed or materials furnished in the removal of the same, which debt shall be a lien on such building so removed and the building to which the same shall be attached or incorporated and on the land whereon the building shall be removed, including the lot or curtilage whereon the same is located by such removal.

Debt contracted for removing building shall be a lien thereon.

48. SEC. 2. That all of the labor performed and materials furnished in erecting, constructing and repairing the foundation or superstructure, upon which such removed building shall be located upon or incorporated with some other building, shall be deemed and taken to be labor performed and materials furnished in the removal of the building.

What shall be deemed labor performed and materials furnished.

VI. Miscellaneous acts.

An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in public improvement in cities of this state.

P. L. 1891, p. 418.

Approved April 14, 1891.

Mechanics or materialmen under a contract with any city to have lien on money due or to grow due on said contract.

49. SEC. 1. That any person or persons who shall hereafter as laborer, mechanic, merchant or trader, in pursuance of, or in conformity with the terms of any contract for any public improvement made between any person or persons and any city in this state authorized by law to make contracts for the making of any public improvement, perform any labor or furnish any material toward the performance or completion of any such contract made with said city, on complying with the second section of this act, shall have a lien for the value of such labor or materials or either, upon the moneys in the control of the said city, due or to grow due under said contract with said city to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and par value of all such work and materials, to the extent of the amount due or to grow due under said contract, in favor of every person or persons who shall be employed or furnish materials to the person or persons with whom the said contract with said city is made, or the sub-contractors of said person or persons, their assigns or legal representatives; *provided*, that no city shall be required to pay a greater amount than the contract price or value of the work and materials furnished, when no specific contract is made in the performance of said work by the contractor.

Proviso.

Notices to be filed by claimants.

50. SEC. 2. That at any time before the whole work to be performed by the contractor for the city is completed or accepted by the city, and within fifteen days after the same is so completed or accepted, any claimant may file with the chairman or head of the department, council, board or bureau having charge of said work, and with the financial officer of said city, notices stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, from whom due, and if not due when it will be due, giving the amount of the demand after deducting all just credits and offsets, with the name of the person by whom employed, or to whom the materials were furnished; also a statement of the terms, time given, conditions of his contract, and also that the labor was performed or materials were furnished to the said contractor, and were actually performed or used in the execution and completion of the said contract with said city, but no variance as to the name of the contractor shall affect the validity of the said claim or lien.

And terms and conditions of contracts.

Claims to be entered in a "lien-book."

51. SEC. 3. That the financial officer of said city shall enter the claims in a book kept for that purpose by him, called the "lien-book;" such entry shall contain the name and residence of claimant, the name of the contractor, the amount and date of the filing and a brief designation of the contract upon which the claim is made.

When action to be commenced.

52. SEC. 4. That no lien provided for in this act shall be binding upon the property therein described, unless an action be commenced within ninety days from the filing of the same, and a notice of pendency of said action be filed with the financial officer of the city.

Lien to attach from time of filing claim.

53. SEC. 5. That the lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any funds which may be due or to grow due to said contractor from said city, under the contract against which the lien is filed.

Claim to be enforced by civil actions.

54. SEC. 6. That any claimant who has filed the notice mentioned in the second section of this act, may enforce his claim against the said fund therein designated and against the person or persons liable to the debt by a civil action; actions to determine or terminate said liens may be commenced by the contractor or said city in any court of competent jurisdiction.

- 55. SEC. 7.** That the plaintiff must make all parties who have filed claims, the contractor and the said city, parties defendant, and as to all parties against whom no personal claim is made, the plaintiff may, with the summons, serve a notice stating briefly the object of action, and that no personal claim is made; but all parties who have filed claims under this act may, by answer in such action, set forth the same, and the court in which the action is brought may decide as to the extent, justice and priority of the claims of all parties to the action.
- Who are to be made defendants.
Court to decide on priority of claims.
- 56. SEC. 8.** That the court in which the action is brought shall determine the validity of the lien, the amount due from the debtor to the contractor, under his contract, and from the contractor to the respective claimants, and shall render judgment, directing that the said city shall pay over to the claimants for the work done and the materials furnished in the execution of said contract or contracts, whose claims or liens it shall hold to be valid and just, in the order of their priority as determined by said court to the extent of the sum found due to said claimants from their contractor, so much of said funds or money which may be due from the said city to the contractor, under his contract, against which the lien is filed, as will satisfy their liens or claims, with interest and costs, to the extent of the amount due from said city to said contractor; the judgments rendered under this act may be enforced by execution and an appeal may be taken therefrom in the same time and manner as in civil actions.
- What judgment court to render.
- 57. SEC. 9.** That in case of successive liens or a number of liens in favor of different persons, their rights and priorities shall be determined as follows: persons standing in equal degrees as co-laborers, or various persons furnishing materials, shall have priority according to the date of the filing of their liens; when several lien notices are filed for the same demand, the judgment shall provide for the proper payments according to priority, so that under liens filed, double payments shall not be required.
- To be enforced by execution.
- 58. SEC. 10.** That when separate actions are commenced, the court in which the first action was brought may upon the application of said city consolidate them.
- How rights and priorities to be determined.
- 59. SEC. 11.** That costs in all actions shall rest in the discretion of the court and shall be awarded to or against the plaintiff or defendants, or any or either of them, as may be just.
- Separate actions may be consolidated.
- 60. SEC. 12.** That nothing contained in this act shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.
- Costs.
- 61. SEC. 13.** That the lien may be discharged as follows: first, by filing a certificate of the claimant or his successor in interest, duly acknowledged and proved, stating that the lien is discharged; second, by lapse of time, when ninety days have elapsed since the filing of the claim and no action shall have been commenced to enforce the claim; third, by satisfaction of any judgment that may be rendered in actions to foreclose said liens or claims.
- Act not to impair right to maintain other actions.
- 62. SEC. 14.** That the term "contractor" as used in this act, shall be construed as meaning the person with whom the contract with the said city is made, his assigns or legal representatives.
- How lien may be discharged.
- 63. SEC. 15.** That this act shall take effect immediately; but nothing herein contained shall affect the validity of any claims or liens upon moneys due or to grow due under contracts made by cities prior to its passage; all acts and parts of acts inconsistent with the terms of this act are hereby repealed.
- Construction of term "contractor."
- Act not to affect validity of claims or liens prior to its passage.
Repealer.

An act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in public improvements in cities, towns, townships and other municipalities in this state.

P. L. 1892, p. 369.

Approved March 30, 1892.

Mechanics or materialmen under a contract with any city, town, township, &c., to have lien on money due or to grow due on said contract.

64. SEC. 1. That any person or persons who shall hereafter as laborer, mechanic, merchant or trader, in pursuance of, or in conformity with the terms of any contract for any public improvement made between any person or persons and any city, town, township or other municipality in this state authorized by law to make contracts for the making of any public improvement, perform any labor or furnish any material toward the performance or completion of any such contract made with said city, town, township or other municipality, on complying with the second section of this act, shall have a lien for the value of such labor or materials or either, upon the moneys in the control of the said city, town, township or other municipality, due or to grow due under said contract with said city, town, township or other municipality, to the full value of such claim or demand, and these liens may be filed and become an absolute lien to the full and par value of all such work and materials, to the extent of the amount due or to grow due under said contract, in favor of every person or persons who shall be employed or furnish materials to the person or persons with whom the said contract with said city, town, township or other municipality is made, or the sub-contractor of said person or persons, their assigns or legal representatives; *provided*, that no city, town, township or other municipality shall be required to pay a greater amount than the contract price or value of the work and materials furnished, when no specific contract is made in the performance of said work by the contractor.

Proviso.

Notices to be filed by claimants.

65. SEC. 2. That at any time before the whole work to be performed by the contractor for any such city, town, township or other municipality is completed or accepted by said city, town, township or other municipality, and within fifteen days after the same is so completed or accepted, any claimant may file with the chairman or head of the department, council, board, bureau or commission having charge of said work, and with the financial officer of said city, town, township or other municipality, notices stating the residence of the claimant, verified by his oath or affirmation, stating the amount claimed, from whom due, and if not due, when it will be due, giving the amount of the demand after deducting all just credits and offsets, with the name of the person by whom employed, or to whom the materials were furnished; also a statement of the terms, time given, conditions of his contract, and also that the labor was performed or materials were furnished to the said contractor, and were actually performed or used in the execution and completion of the said contract with said city, town, township or other municipality, but no variance as to name of the contractor shall affect the validity of the said claim or lien.

And statement of terms and conditions of contracts.

Claims to be entered in a "lien-book."

66. SEC. 3. That the financial officer of said city, town, township or other municipality shall enter the claims in a book kept for that purpose by him called the "lien-book;" such entry shall contain the name and residence of the claimant, the name of the contractor, the amount and date of the filing, and a brief designation of the contract upon which the claim is made.

When action to be commenced.

67. SEC. 4. That no lien provided for in this act shall be binding upon the property therein described, unless an action be commenced within ninety days from the filing of the same, and a notice of pendency of said action be filed with the financial officer of said city, town, township or other municipality.

Lien to attach from time of filing claim.

68. SEC. 5. That the lien shall attach from the time of filing thereof to the extent of the liability of the contractor for the claim preferred upon any funds which may be due or to grow due to said contractor from said city, town, township or other municipality under the contract against which the lien is filed.

69. SEC. 6. That any claimant who has filed the notice mentioned in the second section of this act, may enforce his claim against the said fund therein designated and against the person or persons liable to the debt by a civil action; actions to determine or terminate said liens may be commenced by the contractor or said city, town, township or other municipality in any court of competent jurisdiction.

Claim to be enforced by civil actions.

70. SEC. 7. That the plaintiff must make all parties who have filed claims, the contractor and the said city, town, township or other municipality, parties defendant, and as to all parties against whom no personal claim is made, the plaintiff may, with the summons, serve a notice stating briefly the object of the action, and that no personal claim is made; but all parties who have filed claims under this act may, by answer in such action, set forth the same, and the court in which the action is brought may decide as to the extent, justice and priority of the claims of all parties to the action.

Who are to be made defendants.

71. SEC. 8. That the court in which the action is brought shall determine the validity of the lien, the amount due from the debtor to the contractor under his contract, and from the contractor to the respective claimants, and shall render judgment, directing that the said city, town, township or other municipality shall pay over to the claimants for the work done and the materials furnished in the execution of said contract or contracts, whose claims or liens it shall hold to be valid and just, in the order of their priority as determined by said court to the extent of the sum found due to said claimants from the contractor, so much of said funds or money which may be due from the said city, town, township or other municipality to the contractor, under his contract, against which the lien is filed, as will satisfy their liens or claims, with interest and costs, to the extent of the amount due from said city, town, township or other municipality to said contractor; the judgments rendered under this act may be enforced by execution and an appeal may be taken therefrom in the same time and manner as in civil actions.

Court to decide upon priority of claims.

What judgment court to render.

72. SEC. 9. That in case of a number of liens in favor of different persons, their rights and priorities shall be determined as follows: persons standing in equal degrees as co-laborers or persons furnishing materials shall have priority according to the date of the filing of their liens; but laborers shall have a lien prior to other liens, upon filing their notices any time before payments are due and made, when several lien notices are filed for the same demand, the judgment shall provide for the proper payments according to priority, so that under liens filed, double payments shall not be required.

To be enforced by execution.

How rights and priorities to be determined.

73. SEC. 10. That when separate actions are commenced, the court in which the first action was brought may upon the application of said city, town, township or other municipality consolidate them.

Separate actions may be consolidated.

74. SEC. 11. That costs in all actions shall rest in the discretion of the court and shall be awarded to or against the plaintiff or defendants, or any or either of them, as may be just.

Costs.

75. SEC. 12. That nothing contained in this act shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

Act not to impair right to maintain other actions.

76. SEC. 13. That the lien may be discharged as follows: first, by filing a certificate of the claimant or his successor in interest, duly acknowledged and proved, stating that the lien is discharged; second, by lapse of time, when ninety days have elapsed since the filing of the claim and no action shall have been commenced to enforce the claim; third, by satisfaction of any judgment that may be rendered in actions to foreclose said liens or claims.

How lien may be discharged.

77. SEC. 14. That the term "contractor" as used in this act, shall be construed as meaning the person with whom the contract with the said city, town, township or other municipality is made, his assigns or legal representatives.

Construction of term "contractor."

Act not to affect validity of claims or liens prior to its passage.

Repealer.

78. SEC. 15. That this act shall take effect immediately ; but nothing herein contained shall affect the validity of any claims or liens upon moneys due or to grow due under contracts made by cities, towns, townships or other municipalities in this state prior to its passage ; all acts and parts of acts inconsistent with the terms of this act are hereby repealed.

Medicine and Surgery.

1. Medical society, how constituted. Fellows.
2. Have authority to confer degree of doctor of medicine.
3. General powers of society.
4. Repealer.
5. Every person practicing to be a graduate of a medical college.
6. Amended by sections 10, 12 and 14.
7. Unlawful for person not qualified, to collect fees.
8. Penalty for offering for record diploma issued or obtained fraudulently.
9. Construction.
10. Amended by sections 12 and 14.
11. Physicians depositing copy of diploma within certain time not liable to fine, &c.
12. Amended by section 14.
13. County clerks to furnish state board of health with list of physicians.
14. Penalty for practicing without conforming to requirements of act.
15. Repealer.
16. Construction of term "homoeopathic."
17. Registered physician may practice in any part of the state.
18. All persons practicing midwifery to procure certificate from board.
19. Manner of procuring certificate for person now practicing.
20. Persons beginning practice to submit to examination.
21. Certificate to be filed with county clerk.
22. State board to hold examinations.
23. May refuse and revoke licenses.
24. Who regarded as practitioners.
25. Penalty for practicing midwifery without license.
26. Repealer.
27. State board of medical examiners. Term of office of members.
28. Organization and powers.
29. To hold meetings for examinations.
30. Persons desiring to practice to apply for license.
31. Manner of conducting examinations.
32. When board may refuse or revoke licenses.
33. Licensee shall file license or copy with county clerk.
34. Who to be regarded as practitioners.
35. Amended by section 39.
36. Penalty for violation of act.
37. Expenses of board, how paid.
38. Repealer.
39. To whom act not to apply.
40. Repealer.
41. Associations for pathological and anatomical study, &c. Formation.
42. What certificate shall set forth.
43. Shall be proved, acknowledged, recorded and filed.
44. Association to be a body politic and corporate.
45. Directors may make by-laws, &c.
46. Directors to receive no compensation.
47. Amount of property of association exempt from taxation.
48. Public officials may deliver dead bodies in their possession to authorized agent of association.
49. Association may employ a carrier.
50. No association allowed to receive any such dead body until bond be given with approved security.
51. Expenses shall be paid by association.
52. When board of distribution shall be appointed.
53. Lawful to receive bodies from any county in the state.
54. Penalty for failure to perform duties.
55. Repealer.

An act to re-organize the medical society of New Jersey.

P. L. 1864, p. 250.

Approved March 14, 1864.

WHEREAS, The medical society of New Jersey is approaching its centenary anniversary ; and *whereas*, the society, by petition, has expressed a desire to surrender all its special privileges and pecuniary immunities and to re-organize as nearly as possible upon the voluntary basis ; therefore,

1. That the medical society of the state of New Jersey, already incorporated by the style and name of "the medical society of New Jersey," shall continue to be a body corporate and politic, in fact and in name, and shall and may have and use a common seal, and alter the same at their pleasure ; and that the said society shall be composed of delegates (not less than three) chosen by and from each of the district or county societies, which now are, or which under the authority of the said society may be hereafter instituted ; the officers for the time being shall be ex-officio members of the said society independently of the authority of delegation ; and all persons who may have been or may hereafter be presidents of the society shall rank as fellows, and be entitled to all the privileges of delegated members. (a)

Society, how constituted.

Fellows.

(a) The medical society of New Jersey must judge of the qualification of its own members, and the supreme court cannot interfere upon the application of one claiming to be a member.

Watson v. Medical Society, 9 Vr. 377. See *State, Elder v. Medical Society*, 6 Vr. 200.