BUILDERS' LIEN ACT

Paper prepared by

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THE BUILDERS' LIEN ACT

I

INTRODUCTION

In November, 1967, His Honour Chief Judge Nelles V. Buchanan (Retired) produced his report based on the public inquiry of which he was The Commissioner into "The Adequacy of the Provisions of the Mechanics' Lien Act 1960" (S.A. 1960, c. 64, as amended).

The new Builders' Lien Act (R.S.A. 1970, c. 35, as amended) was the result.

Since its passage difficulties have been experienced in the operation of some of the sections of the Act and these have been further compounded by the effect of certain judicial decisions.

The Institute of Law Research and Reform in its Small Projects Report 17, of June 1975, singled out some of the problems. These are discussed in this memorandum.

The Report invited submissions and there had also been various comments made on problems with the Builders' Lien Act prior to the publication of the Report. These include:

An opinion from Mr. E. Mirth, Barrister and Solicitor, with Reynolds, Agrios & Mirth, Edmonton.

A Submission from the Builders' Lien Act and Design & Liaison Committee of the Alberta Construction Association, submitted by R. Shortreed, P. Eng., Manager, Calgary Region, of Reid, Crowther & Partners Limited, Consulting Engineers and Planners and Chairman of the Committee. The Committee has representatives from APEGGA, the Alberta Construction Association, and the Alberta Architects Association. The Committee's report was written by W. Donald Goodfellow, Barrister and Solicitor, with Goodfellow, Mackenzie, Calgary.

A paper and recommendations of the Canadian Bar Association, Real Estate Subsection (Edmonton) at its meeting of January 9th, 1974. Subject: some amendments to the Builders' Lien Act (R.S.A. 1970, c. 35). The subcommittee presenting the paper was E. Mirth, J. Stratton, A Hewitt.

A submission by Ernest A. Hutchinson, Barrister & Solicitor, with Mackimmie, Mathews, Calgary.

A Submission by David T. Ellis, President, Mortgage Loans Association of Alberta.

A Submission by John G. McNiven, Barrister & Solicitor.

II

SECTIONS 32 AND 35

1. Driden v. Sieber, [1974] 1 W.W.R. 165, rev'd on appeal, [1974] 3 W.W.R. 388

(1) Registration of a Certificate of lis pendens

Section 32 requires a person who has registered a lien to bring an action within 180 days to realize upon the lien and to file a certificate of lis pendens in the Land Titles Office. Failure to do so results in the lien ceasing to exist. Section 35(1) empowers the court to order the cancellation of the registration of a lien where the person against whom the claim is made has paid the amount of the claim into court. The two sections appear in Appendix A.

The first question is whether a certificate of lis pendens needs to be filed when money has been paid into court. This question has been resolved in Driden v. Sieber.

In this case, Driden was a principal contractor who made a subcontract with Sieber. The latter registered a lien. Driden paid the amount of Sieber's claim into court in order to clear the title. Sieber did not bring an

action within 180 days of the date of the registration of the lien, nor did he file a certificate of lis pendens against the owner's title in respect of his lien claim. Driden applied to have the money in court paid back out to it on the grounds that Sieber had failed to comply with the provisions of s. 32 of The Builders' Lien Act and that therefore the lien had ceased to exist. Sieber contended that the provisions of the Act no longer applied because of the payment into court pursuant to a court order which directed that the lien be discharged and cancelled at the Land Titles Office.

At trial, Shannon J. held that Driden was entitled to the money since Sieber had failed to comply with the provisions of The Builder's Lien Act in not bringing an action in time. He found that taking the Act as a whole, builders' liens have an existence independent of their registration at the Land Titles Office, and that a court order cancelling registration of a lien does not have the effect of also cancelling the lien itself, nor does the lien cease to exist because money is paid into court. To succeed on his lien claim, a lienholder must take the steps required by s. 32 even where money to satisfy the claim is paid into court.

By way of dictum, Shannon J. referred to a situation which was not before him, namely, one where a lien claimant commenced an action in time but failed to file a certificate of lis pendens. He pointed out the absurdity of requiring a plaintiff to file a certificate of lis pendens which once again encumbered the title, when payment into court has been made for the very purpose of clearing the title so that transactions with respect to the land can proceed without further reference to the lien. Such a requirement frustrates the purpose of the statute, as evidenced by sections 18 and 35.

Sieber appealed.

The Appellate Division held that when money is paid into court, s. 32 does not apply.

With respect to the lis pendens issue, Mr. Justice McDermid said:

> Turning to Section 32, I think this must be interpreted as applying to liens which still are registered and not to a lien the registration of which has been cancelled by the Court pursuant to S. 35. If this is not the interpretation, then the requirement that a lis pendens be filed would be quite contrary to the whole purpose of S. 35, i.e., to remove a registered lien so that the land may now be dealt with.

Mr. E. Mirth, Barrister and Solicitor, with Reynolds, Agrios & Mirth, Edmonton, wrote:

> Insofar as the lis pendens requirement is concerned the decision of his Lordship is supported both by principle and authority. The function of the lis pendens is to flag the owner's title with the fact that the lien is still a live charge upon the land. It operates in respect of and bears relevance only to the land title. Once the lien ceases to have any further bearing upon the land it makes little sense to require the flagging of the title. That principle has been recognized recently in the British Columbia courts: Alcock Downing & Wright Ltd. v. A.B.A. Plumbing and Heating Contractors Ltd. (1972) 23 D.L.R. (3d) 728, affirmed (1972) 29 D.L.R. (3d) 251, a case in which the lien claimant had commenced an action but had failed to file a lis pendens. See also Northern Electric Co. Ltd. v. Frank Warkentin Electric Ltd. (1972) 27 D.L.R. (3d) 519 (Man. C.A.) where, referring to a situation in which monies had

been paid into Court to discharge liens but the lis pendens had somehow been left on title, Mr. Justice Dickson (Freedman, C.J., concurring) held that the lis pendens had no relationship to or bearing on the priority of various lien claimants in respect of the title to the lands. Note also Earl F. Wakefield Company v. Oil City Petroleums (Leduc) Ltd. (1959) 29 W.W.R. 638 where the Privy Council held that once monies had replaced the lands (in this case minerals) as security for a mechanic's lien there was no further need to renew the lien at land titles.

Although it is now clear from the judgment of the Appellate Division that a certicate of lis pendens need not be filed when money is paid into court, the Act is not explicit.

The Ontario Act deals with this problem in section 25(3) of The Mechanics' Lien Act (R.S.O. 1970, c. 267, as amended), which reads:

> 25. (3) Notwithstanding sections 22 and 23, where an order to vacate the registration of a lien is made under clause a or b of subsection 2, the lien does not cease to exist for the reason that no certificate of action is registered.

Section 22 requires that a certificate of lis pendens be filed upon an action being commenced. Section 23 provides that a registered lien will cease to exist if an action is not begun within 90 days of the completion of the work and a certificate filed.

Section 25(2) allows payment into court of the amount of the lien claim (see Appendix B for the full text of the Ontario sections).

In Alberta this may be adapted as follows:

32(5) Notwithstanding subsection (1)(b) where the court has ordered payment into court pursuant to section 35(1)(a), the lien does not cease to exist for the reason that no certificate of lis pendens is registered.

The Small Projects Report #17 said that the Institute thought it would help to make it clear in the Act that the lis pendens is not necessary. The argument to the contrary would be that the amendment is made unnecessary by the decision of the Appellate Division in Driden v. Sieber.

QUESTION NO. 1

THE QUESTION FOR THE BOARD IS WHETHER THE ACT SHOULD BE AMENDED BY ADDING SECTION 32(5) AS PROPOSED ABOVE.

It should also be considered whether any amendment should cover the situation where payment into court has been made pursuant to section 18, also resulting in removal of the liens from the land. Section 18, which is set forth in Appendix A, provides for the payment into court of a "lien fund" (the statutory hold-back plus any other unadvanced money). As is the case in which a payment into court has been made under section 35, the lien claimant is met with an obstacle when he later attempts to register a certificate of lis pendens.

Since the order granting payment in has been registered against the title the lien has been discharged and is thus no longer registered. The lien claimant therefore cannot comply with the mandatory provisions of section 32(1)(b) as there is nothing to register the certificate against.

If section 18 is also to be covered, the amendment would then read:

> 32(5) Notwithstanding subsection (1)(b), where the court has ordered payment into court pursuant to section 18 (2)(b) or section 35(1)(a), the lien does not cease to exist for the reason that no certificate of lis pendens is registered.

QUESTION No. 2

THIS QUESTION FOR THE BOARD IS WHETHER ANY AMENDMENT TO THE ACT SHOULD INCLUDE REFERENCE TO SECTION 18 AND WHETHER SECTION 32(5) AS PROPOSED ABOVE SHOULD BE ADDED.

III

COMMENCEMENT OF AN ACTION WITHIN 180 DAYS

A wider question arises from the Appellate Division's decision in Driden v. Sieber One consequence of the ruling that section 32 does not apply once payment into court has been made, is that the lienholder is relieved of the duty to take proceedings within 180 days from the registration of the lien. It is not clear from the judgment whether this is simply because the operation of the whole of section 32 is excluded from a section 35 situation, or whether a section 35 application is an "action" by which a lien may be realized under section 32. (See below).

Mr. Justice McDermid posed the question (p. 321):

> Now if ss. 35 and 36 do not apply, does the lienholder have any duty to proceed to have his claim determined? There is nothing in s. 35 which sets out the procedure to be followed after the money is paid into court.

(Mr. Justice McDermid may have meant to refer to sections 36 and 37, rather than 35 and 36. These are reproduced in Appendix A.)

He did not go on to deal with the 180 day limitation problem but determined that the procedure to be followed should be decided by reference to analogous provisions of the Act.

The question is whether the Act should be changed so as to require the lien holder to bring an action within 180

days of registration, notwithstanding payment into court.

The argument that the lien claimant not be so obliged rests on the assumption that the 180-day limitation period is only for the purpose of speeding up the process of clearing liens off the title. Therefore, once the title is cleared by payment into court, the urgency is gone and the lien holder should then only be subject to a normal 6-year limitation period in which to bring an action. Further, the policy consideration behind the general lapsing provision is that the owner should be able to deal with his land unless the lien claimant diligently proceeds, and that this provision reduces the effectiveness of blackmail by the lien holder.

These policy considerations are less strong when all that is held up is a sum of money. The lien claimant is then virtually in the same position as he would have been under any contract. He no longer has any special statutory rights to a charge against land and it can be argued that he should not be treated any differently from any other creditor seeking to enforce a contractual obligation. Nevertheless, it should be borne in mind that the owner's money remains tied up in court until the claim is disposed of, and that imposes a hardship upon him if the claim proves to be unfounded.

However, the majority of those who have written on the subject do not favour doing away with the 180-day requirement.

In its Report No. 17 on Small Projects, June, 1975, the Institute of Law Research and Reform pointed out that "the general policy of the Act is to require disputes to be settled promptly, and one can argue that the claimant

should be held to the obligation to bring action within 180 days, notwithstanding payment into court." (p. 15). The Institute went on to indicate that in the absence of any obligation "there could be two sets of actions, those relating to the monies in court and those relating to the land" (p. 15) and tentatively recommended that a 180-day requirement operate notwithstanding payment into court.

His Honour Retired Chief Judge Buchanan in his Inquiry Report (op. cit.) enunciated "the principle that lien holders who desire to take advantage of their security should be required to act promptly. There is no justification for permitting a lien, once registered, to continue for six years and for placing the onus on some person other than the lienholder to serve a notice . . . " (at p. 94). Although he was speaking in the context of service of notice to a lienholder to commence proceedings and of the lienholder's ability to renew a lien for longer than 6 years - the old sections 34, 35 and 36 of the 1960 Mechanics' Lien Act (S.A. 1960, c. 64) - the statement is apposite here. He could now tie up a potentially large sum of money already paid into court for up to six years.

In his letter to the Institute of March 4, 1977, Mr. R. Shortreed, Manager, Calgary Region of Reid, Crowther & Partners Limited and Chairman of the Design Construction Liaison Committee, a joint Committee of architects and engineers' associations, and the construction association, pointed out the problems the construction industry is having with The Builders' Lien Act. He attached a letter from W. Donald Goodfellow, Barrister and Solicitor, of Goodfellow, MacKenzie, in Calgary to Purvis, Johnston and Company, Barristers and Solicitors of Edmonton, dated August 23rd, 1976. Mr. Goodfellow outlined the recommendations of the Committee which, inter alia, refer to the problem caused by the Driden v. Sieber decision.

The letter said that the effect "appear[s] to be contrary to the intention of the Act which was to speed up the disposition of these matters.

> It is true that the procedure usually followed by the Courts is to direct an issue once monies are paid into Court requiring the claimant to commence legal proceedings within a specified period of time or the monies are paid back to the person paying the monies into Court. However if the Court does not contain such direction, then presumably the person would be able to commence those legal proceedings within 6 years from the date of the cause of action arising.
>
> I would suggest that an express provision be included in The Builders' Lien Act stating that even if monies are paid into Court pursuant to Section 18(2) or Section 35, the monies are still subject to the provisions of The Builders' Lien Act, therefore necessiting legal proceedings to be commenced within 180 days. I would suggest however that the requirement of filing a Certificate of Lis Pendens within the same period of time be dispensed with if in fact the monies are paid into Court and replace the security of the land.

Mr. David T. Ellis, President, Mortgage Loans Association of Alberta in a letter of September 11th, 1972 to Hon. C. Mervin Leitch, then the Attorney General and Provincial Secretary of Alberta, stated that

> Under the old Act there was no requirement that an action be commenced to enforce a lien, apart from the ordinary provisions of the Limitation of Actions Act. The philosophy of the new Act is that lienholders should be required to pursue their claims by legal action, rather than sitting back and doing nothing for a long time to the embarrassment of the owner and mortgagee. (p. 2)

If payment into court is regarded merely as an exchange of money security for land, the fact that the lien attaches to an alternative security should not derogate from the

philosophy of the Act as embodied in s. 32. It would work both to the advantage of the owner and the lien claimant to have these claims settled expeditiously. Although the owner may now deal with the land, he may have also to encroach on his credit to raise the amount of the payment in, which could be a considerable sum. He would not wish to have this tied up for up to six years especially if the lien claim is frivolous. (This raises the question of whether the Act should include a provision by which the owner may serve notice on the lien claimant to take proceedings without prior service of a statement of claim by the lien claimant (see s. 38(3) in Appendix A--this is not discussed in this memorandum)

The lien claimant's business would benefit from swift processing of his claim and payment out of the money in court. Since the court may order payment in of an amount sufficient to cover costs, there would be no more prejudice to a lien claimant here than in a s. 32 action, and indeed why should he receive a benefit merely because his lien security has been substituted. This position cannot be said to be identical to any other unpaid creditor under a contract to whom the six years limitation period would apply.

Payment in gives the owner a means of clearing his title and the lien claimant a fast way and guaranteed sum on which to realize his lien. There would then be no reason why the latter should not be required to bring such an action within 180 days.

QUESTION NO. 3

IF PAYMENT INTO COURT IS MADE UNDER SECTION 35, OR SECTION 18, SHOULD THIS LIEN CLAIMANT BE REQUIRED TO COMMENCE AN ACTION WITHIN 180 DAYS OF REGISTRATION OF THE CLAIM FOR LIEN?

IV

WHETHER AN APPLICATION UNDER s. 35 IS AN "ACTION" AS CONTEMPLATED IN s. 32

In its Report No. 17, Small Projects, June 1975, the Institute of Law Research and Reform, Alberta, points to another problem arising from Driden v. Sieber. At p. 16:

> Another point that arose in Driden is this. Sieber the lienholder argued that Driden's payment into court under section 35 was an action in which a lien may be realized under section 32. The Appellate Division seems to have rejected this argument. We tentatively agree that payment in should not be treated as a lien action and that the Act be amended to make this clear.

Mr. Justice McDermid held that the words "an action . . . in which the lien may be realized upon under the Act" in s. 32 "were inserted to make it clear that where one lienholder commences an action and other lienholders pursuant to s. 37 or s. 38 become parties to the proceedings, the liens of such lienholders do not cease to exist." (p. 371).

However, he went on to suggest that in the absence of express provisions as to procedure in s. 35, provisions in analogous sections should be followed. He found that "the proper procedure to be followed is for the applicant, at the same time as the money is paid into court, to ask the court to settle the issue to be decided and direct who should be the plaintiff and who should be the defendant . . . There should be a direction by the court as to procedure when the application to pay the moneys into court is made."

His Lordship contemplated that "section 39, which provides for a pretrial application would apply after there has been a direction as to the issue and who is to be plaintiff and who defendant. It might even if (sic) that all these matters could be settled in the same application." (pp. 371-72)(My underlining).

If by "application" His Lordship meant the application to make payment in under s. 35, it could be said that he was treating this as an "action" under s. 32. On the other hand, he contemplated a direction by the court at the time of the s. 35 application as to who will be the plaintiff and who the defendant. Thus he may have envisaged a future "action" to be commenced by the lienholder to establish his claim.

Mr. E. Mirth in his opinion felt that this decision has added "unknown complications" to what had previously been accepted as the "relatively simple and limited operations of s. 35", namely, to clear liens off the title. He cited in support the decision in The Pedlar People Limited v. McMahon Plastering Company Limited (1960), 33 W.W.R. 47, where Mr. Justice Riley held as follows (p. 47):

> The intention of the legislature in enacting sec. 31 of The Mechanics' Lien Act, R.S.A. 1955, ch. 197, [the equivalent of the present s. 35] is perfectly clear; a procedure was laid down to permit liens to be removed from the title pending litigation over the validity of the liens, thus enabling the owner to free the property from the liens upon adequate security being given. To suggest that once the security is given and the liens removed, the parties to the proceedings are to be conclusively held to have admitted the validity of the lien is in direct conflict with the concept of 'security' being the section [sic] enabling the court to vacate the lien upon directing security for or payment into court of the amount of the lien. In other words, I am of the opinion that the mere payment of the security into court in no way prejudices McMahon Plastering or the bank in questioning the lien as invalid and they still have the same rights so to contend as if the security had not been paid into court.

and by the decision of the British Columbia Court of Appeal, in Nanaimo Contractors Ltd. v. Patterson and Patterson (1964),

48 W.W.R. 600, wherein Davey J.A. said (at p. 602) the following:

> With reference to contrary opinion, it seems clear to me from the very language of sec. 33 [equivalent to our s. 35] as well as judgments of this court in Re Mechanics' Lien Act (1914), 5 W.W.R. 1318 (sub nom, Walsh v. Mason) 19 B.C.R. 48, 26 W.L.R. 942, and Nixon v. Summer, [1937] 4 D.L.R. 806, and the judgment of Riley, J., in Pedlar People Ltd. v. McMahon Plastering Co. (1960), 33 W.W.R. 47 (Alta.), that the security provided under sec. 33 is merely a substitution for the security afforded by the lien under the Act. It neither adds to nor subtracts from the substantive rights of the claimant and owner inter se, and it remains for the claimant to establish his right to the lien and the quantum of it; the owner retains all his defences to the claim. Whatever rights other lien holders may have to participate in the security provided under sec. 33 is a matter between the rival claimants and cannot per se extend to the owner's liability under the Act.

See also Laguna Holdings Ltd. v. Plempe, [1972] 1 W.W.R. 211 (B.C. Cty. Ct.).

Now the Driden case would force the owner who wishes to make a payment into court to ensure also that the issues are determined and that he obtains directions as to procedure to trial. As well this forces the lien claimant to trial of an action because of the substituted security.

Mr. Mirth continued:

> I have always conceived s. 35 as merely providing a means of replacing the form of the security for a lien, and doing no more. There is nothing in the replacement of the security that changes the state of urgency, the relationship of the parties, their obligations to each other, or the need to carry the lien claims on to trial. Even in s. 18 there is no suggestion

> that on an application on originating notice to pay monies into court there have to be issues directed and tried. The only distinction between an application under s. 18(2)(b) and an application under s. 35(1)(a) is that the funds to be paid in represent a "lien fund", and not simply a readily-determinable sum equal to the amount of a registered lien. When subsection (5) of s. 18 speaks of determination by the court or trial of an issue it does so in reference only to the amount of the lien fund--the sum to be paid into court.

This question of whether a s. 35 application is an "action" under s. 32 is intricately bound up with the question of what is the correct procedure to be followed. Resolution of the latter will also clarify the "action" issue, which is therefore deferred until the following section.

V

PROCEDURE TO BE FOLLOWED ON AN APPLICATION TO MAKE PAYMENT INTO COURT UNDER SECTION 35--ALTERNATIVES

The Act is silent on this point. In the judgment in Driden McDermid J.A. pointed out that

> It would have been better if the Legislature had spelled out the procedure to be followed where moneys were paid into court under s. 35, but since it has not done so the procedure to be followed must be described by reference to analogous provisions of the Act.

His Lordship considered that "the proper procedure to be followed is for the applicant, at the same time as the money is paid into court, to ask thecourt to settle the sum to be decided and direct who should be the plaintiff and who should be the defendant." (at p. 371), and that there should also be "A directio by the Court as to the procedure when the application to pay the moneys into court is made." (at p. 372). One such analogous provision may be found in section 18 which provides for a trial to be directed. However, this is only to determine the amount of the lien fund to be paid in. The Appellate Division considered the procedure under a section 39 pretrial application in connection with the enforcement of a lien as a possible analogy. Sections 18 and 39 appear in Appendix A.

The Appellate Division also stated that the intention of the Act is to provide proceedings of a summary character whose enforcement is to be at the least expense.

The questions which arise are:

1) Who should be served in the payment in proceedings?

2) Should the Act specify any other steps to be taken by the person paying in?

3) Should the Act provide for a procedure which does not follow the Appellate Division's suggestion?

Report 17 said that "we doubt that the person paying in should have to apply for directions" and asked "what procedures, if any, should s. 35 spell out in connection with payment in?" (at p. 17).

Mr. Mirth, in his opinion, wrote:

> Since the Driden decision is one of a high-level court, I believe it should be the subject of legislative amendment to set the rules back to a method of operation that has to my knowledge, until Driden, been followed for some time. Section 35 of the 1970 Act is virtually the same as s. 38 of the 1960 Act, and until the Driden decision it has not been a common practice to have issues directed on applications to pay monies into court unless the facts that came forward made issue-direction desirable (e.g., dispute over the amount to be paid into Court or the parties wished to ask for direction of issues on the lien claim itself), and even then the issues were normally directed to be tried in a lien action to be commenced. Indeed many owner applications made purely for the purpose of clearing title and freeing the flow of mortgage monies have to my knowledge been made ex parte, with service being dispensed with. I offer no comment on whether or not that is a proper procedure; but the practice has been followed and accepted by some Judges for some time.

Before a procedure can be laid down, it has to be decided upon whom the onus should fall to bring a lien claim to trial. The general purpose of the Act would seem to indicate that it should be upon the lien claimant. It must therefore be asked whether substitution of the security by the owner should change this situation. It seems clear that payment in of the amount of t lien claim by the owner in no way presumes any admission on his part that he is liable to the lien claimant for all or any of the

paid in. A trial of the issue is still required to establish the validity of the claim and the quantum.

Suggestions as to procedure on a s. 35 application range fro on the one hand an ex parte application by the owner to pay in with full responsibility still on the lien claimant to bring an action, in ignorance of the substituted security; to, on the other, an onus shift onto the owner to institute the action by applying to the court for directions as to parties and to settle the issue and to request the court to determine procedure when he makes payment in. There are various gradations in between.

The following alternatives have been suggested:

1) When the owner applies to make payment into court, he should at the same time ask the court to settle the issue to be decided and direct who should be plaintiff and who should be defendant. There should also be a direction by the court as to procedure (Supreme Court of Alberta, Appellate Division, in Driden v. Sieber). This would constitute the "action" required by s. 32.

2) The applicant may make payment into court under s. 35 ex parte in order to clear his title. No further steps need be taken by him. Other provisions of the Act apply, with the exception of lis pendens. There would be a notation on the title that the lien registration had been cancelled by reason of the payment in. This would not be an "action" under s. 32.

3) A subsection could be added to s. 35 to the effect that notwithstanding the payment of money into court or the removal of liens from the landtitle, all provisions of the Act as to proceedings upon the liens discharged (other than the requirement of a lis pendens) should continue to apply to the lien. Further, that the application to pay money into court or to remove the lien upon other proper grounds is not an "action" within the meaning of s. 32(1)(a). Ss. 32 & 36-39 would then continue to apply (Mr. E. Mirth).

Notice of payment in could go to the registered lien claimant. Should it also go to any other interested parties and if so, to whom? Should the lien claimant have an opportunity to, or must he, establish the validity and quantum of his claim at the time of the s. 35 application? This would avoid multiplicity of actions but there may be prejudice to either side with regard to preparation of its case. Time periods would have to be worked out.

4) The applicant wishing to make payment in could obtain a certificate from the Clerk's Office that such payment had been made. The Registrar of Land Titles would then be required to accept the certificate and give notice to whomever had an interest according to the Land Titles Office records. All other provisions of the Act (save lis pendens) would continue to apply. The application would not be an "action" within the meaning of s. 32 (Mr. W. F. McLean, Q.C., the then Deputy Attorney General).

5) A s. 35 application may be made on notice to the lien claimants affected, all other provision, save lis pendens, of the Act to apply. (Note: s. 35(2) of the Act may have to be amended if this suggestion is followed. The problem of s. 35(2) is dealt with separately below.) The application is not an "action" within the meaning of s. 32.

6) A s. 35 application automatically initiates an "action . . . in whichthe lien may be realised upon" under s. 32 of the Act. It could act like the old s. 34 of the 1960 Mechanics' Lien Act, as a notice to take proceedings to prove lien. The lienholder would then have a certain number of days to issue a statement of claim. Notice would be sent to those lienholders whose claims had been covered by the payment in (Cave, s. 35(2)).

This problem does not appear to have been covered by any of the other provincial statutes. A sample follows:

Ontario

In Ontario a lien claimant has 90 days after completion of the work or after the materials have been placed or furnished to commence an action on a registered lien (s. 23). Registration may be effected before or during the performance of the contract or within 37 days after completion or abandonment, otherwise the lien expires (s. 21). A certificate of lis pendens must be filed and an appointment for trial of the action taken out by the lien claimant within 2 years of the registration of the certificate or there may be an ex parte application to vacate the certificate and discharge the lien by the owner.

Payment into court may be made of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants, plus costs (s. 25). The same section also provides that in this case, no certificate of lis pendens needs to be registered.

An action to enforce a lien is commenced by statement of claim which must be served within 30 days after it is filed (s. 29). Thereafter a motion may be made by the lien claimant or any other interested party to speed up the time for trial of the action (s. 29(6)).

There is no express provision dealing with the procedure to be followed after payment into court is made; nor is the 90-day time limit on commencing an action on a registered lien made expressly applicable even after payment in (see the Mechanics' Lien Act, R.S.O. 1970, c. 26, as amended. Relevant sections are set out in Appendix B.)

British Columbia

The time for registration of the lien is within 31 days after the contract has been completed or abandoned (s. 23). Enforcement of a registered lien must be begun within one year of the date of registration and a certificate of lis pendens must be filed (s. 26(1)) but the owner has an option to send a notice to require commencement of an action within 21 days after mailing of the notice to the lien claimant (s. 26(2)).

Payment in may be made (s. 33) but there is no mention of dispensing with the lis pendens requirement, nor of any other procedure in this connection. (See the Mechanics' Lien Act, R.S.B.C. 1960, c. 238, as amended. Relevant sections are set out in Appendix C.)

Manitoba

Thirty days after completion of the contract is given for the registration of claim (s. 20) and 2 years after registration is the time limit within which an action must be commenced and a certificate of lis pendens filed (s. 22). Notice to commence an action may be given at any time after 30 days have expired since registration of the lien (s. 23). Payment into court is allow to vacate the registration of the lien (s. 25) without more being said concerning procedure or the dispensing with lis pendens. (See The Mechancis' Lien Act, R.S.M. 1970, c. M80, as amended. Relevant sections are set out in Appendix D.)

It would seem therefore that no help may be gained from other builders' or mechanics' liens legislation in Canada. However, a decision for Alberta would be helpful because of the problem thrown up by the Driden case and the attendant confusion and possibly undesirable consequences.

Section 18 of the Alberta Act does not go far enough really to solve the problem. The owner may apply on originating notice of motion to pay the lien fund (15% hold back plus any unadvanced money) into court and this discharges him from any liability in respect of all registered liens. There is provision in subsection (5) for the court to determine the proper amount of the lien fund at the time of this application or at trial. Section 18, however, like section 35, does not expressly provide the means by which the action on the validity of the lien is brought to trial after such an application. Although it talks of determining the amount of the lien fund at the trial of the action, the section is silent as to who should bring this action and by what method. Notice of a s. 18 application, however, is dealt with by providing that notice "shall be served upon all persons who by the records of the Land Titles Office appear to have an interest in the land in question and upon such other persons as the court may direct." (s. 37(1)). (Section 18 only deals with registered claims.)

It may therefore be considered desirable to make the procedure to be laid down following a s. 35 application, also applicable to an application under s. 18.

QUESTION NO. 4:

1) SHOULD THE ACT LAY DOWN A PROCEDURE TO BE FOLLOWED UPON AN APPLICATION MADE UNDER SECTION 35?

2) SHOULD THIS SAME PROCEDURE APPLY UNDER SECTION 18?

3) SHOULD AN APPLICATION MADE UNDER EITHER SECTION 35 OR SECTION 18 BE AN "ACTION" UNDER SECTION 32?

Finally, it may be useful to provide express procedure again for payments out against of the money on nonfulfillment of the requirements to bring the matter to trial.

The comparable Ontario section reads:

> 25(6) Where money has been paid into court or a bond deposited in court pursuant to an order under subsection 2, the judge or, in the Judicial District of York, the master, may, upon such notice to the parties as he may require, order the money to be paid out to the persons entitled thereto or the delivery up of the bond for cancellation, as the case may be.

There is no express provision in the British Columbia Act which deals with this point; nor in the Manitoba legislation.

The procedure should outline who may apply for payment out--presumably only the person making the payment in in the first place, although there may be some problem with receivers which should be covered--to whom notice should be sent, if any, and to whom application should be made--the court, the clerk, etc

QUESTION NO. 5

SHOULD THE ACT LAY DOWN A PROCEDURE BY WHICH MONEY IN COURT IS PAID OUT ON NONFULFILLMENT OF ANY COMMENCEMENT OF ACTION REQUIREMENTS.

VI
SUBSTANTIAL PERFORMANCE

Glenway v. Knobloch [1972] 6 W.W.R. 513

The new Builder's Lien Act embodied the concept of substantial performance or substantial completion. "Completion of the contract" is defined in s. 2(1)(a) as

> ...substantial performance, not necessarily total performance, of the contract,

Sections 2(2) and 2(3) outline how it is to be determined that there has been substantial performance, ie, where the building is being used or is ready for use and is completed to a certain value. The text of these sections is set forth in Appendix E.

This was the recommendation of the Buchanan Report and replaced the provisions under the old Mechanics' Lien Act in which a lien claimant had 35 or 120 days from the date of last services or delivery of materials to file a lien. This allowed even a very insignificant amount of work to revive a defunct right to register a lien, or extended the time on an existing right. The concept of substantial performance was introduced in order to free the flow of money in construction projects by providing that amounts of work trifling in the context of the contract as a whole, peformed after the main body of the work was completed, would not revive or extend lien rights. Owners and mortgagees would no longer be inhibited from releasing money into the chain until the very last nail was struck. Previously, there had been long delays in the release of holdback money "by owners financing at the expense of the unpaid in the construction chain, delays allegedly based on failure to complete, the "failure"

often relating to trifles" (Buchanan Report, p. 50).

Unfortunately the act does not consistently incorporate the substantial performance concept but provides various times from which the time will begin to run within which a lien must be registered. The substantive section is s. 30:

> **30.** (1) A lien in favour of a contractor or a sub-contractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or sub-contract, as the case may be, and within 35 days after completion or abandonment.
>
> (2) A claim of lien for materials may be registered at any time during the furnishing of the materials and within 35 days after the last of the materials is furnished.
>
> (3) A lien for the performance of services may be registered at any time during the performance of the services and within 35 days after the performance of the services is completed.
>
> (4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and within 35 days after the completion of the work.
>
> (5) Where, in respect of work done on or material furnished for an improvement,
>
> (*a*) something is improperly done, or
>
> (*b*) something that should have been done is not done,
>
> at the time when the thing should have been done and if at a later date the thing improperly done is put right or the thing not done is done, the doing of the thing at the later date shall not be deemed to be the completion of the work or the furnishing of the last materials so as to enable a person to extend the time limited by this section for registering a lien. [1970, c. 14, s. 30]

The problems were anticipated by Mr. W. H. Hurlburt in his excellent and scholarly note in (1971) IX Alta. Rev. 407 at pages 420-21, and his concern has been fully borne out as evidenced by the Appellate Division's decision in Glenway which has in Mr. E. Mirth words "render[ed] the substantial completion concept an almost completely ineffective and useless one", (at page 11 of his Opinion). The problem is compounded by the court's statement that s. 2(2) "does no more than create a rebutable presumption in cases to which it is applicable", (Glenway case at page 525).

Report 17 stated the facts of Glenway as follows:

> Glenway had a subcontract to supply doors and windows for some $5,300.00. They were put in during the summer. Then in December there were small items: one for $14.00 for weather strip and final adjustment of doors and the other of $20.36 for two window panes which had broken. Glenway then registered a lien within 35 days. The Chambers judge held that the registration was too late. Glenway appealed and its appeal was allowed. Mr. Justice Kane held that the "substantial performance" provision did not apply. The contract was not within subsection (1). It was either for materials or services or both and the lien was registrable within 35 days of the furnishing of the last materials and performance of the last services.
>
> Mr. Justice Clement held that as a subcontractor Glenway was within subsection (1) even though it subcontract was for the supply of materials. Thus the concept of "substantial performance" applies. However Mr. Justice Clement held that this provision merely creates a rebuttable presumption and that on the facts Glenway had rebutted it. Thus the lien was registered in time. Chief Justice Smith concurred with both judgments.

The problem arises because of the failure of the act to relate the substantial performance subsection in section 2 to all of the specific types of contracts and subcontracts mentioned in section 30. Although section 30(1) uses the term "completion of...the contract", as is defined in section 2(2), none of the other subsections do. There are therefore different times from which the lien period runs for different types of contracts. The result is great uncertainty in the operation of section 30. It is very difficult for lien claimants to know under which subsection category their contract falls, and thus within which period of time they must register their lien. The reasons for judgment in Glenway serve only to increase the uncertainty.

The owner is also put in difficult position. As was pointed out by a Mr. E. Mirth:

> The owner is required by section 15(2) to retain a holdback of 15% for "the time limited by section 30". If section 30 contains more than one time limitation, the owner must holdback for the longer of the periods, if he wished to be safe. In addition, if section 30(1) does not apply to a contract that entails the supply of either work or materials (as Kane, J.A., suggested in Glenway Supply) then in virtually all cases the period to which the owner must have regard in making his holdback is 35 days after the last nail is driven, since few (if any) contracts would lack both work and material. In short, the substantial completion provisions would be largely meaningless.

He went on to say:

> ...following Mr. Justice Kane's view [that the contract in Glenway was for both services and materials and was governed by subsection (2) and (3) or subsection (2) or subsection (3) of section 30 and that section 30(1) did not apply] the owner can feel reasonably sure of the need to holdback for 35 days after the last nail is driven in virtually all cases. He might puzzle over the function of the "substantial completion" provision in section 2, but he could be sure that no shorter holdback would be safe. On the other hand, under the view taken by Mr. Justice Clement [that a contract for the supply of both materials and services fell under section 30(1) to which substantial completion applies. However, this is merely a rebutable presumption] the owner would have first to determine whether or not his prime contract is of mixed or pure nature relative to materials and/or services before deciding what would be his proper holdback period. That could be difficult in a case when nearly all the effort is services but some few materials are supplied (or vice versa). In practice the owner, even on the Clement approach, would be likely to take the cautious route and retain his holdback for the longer period, especially since he knows that subtrades who are purely material men or laborers can lien

> property at any time during the longer period. Again, the practical usefulness of sections 2(1)(a), 2(2) and 2(3) is lost and the aim expressed by Chief Judge Buchanan frustrated.

It seems clear from Glenway that there are at least two types of lien periods contemplated in section 30. Report 17 gave a tentative opinion that "the "substantial performance" concept is sound and that the act should be amended so as to revitalise it" (at page 19). This would give effect to the general aim expressed in the Buchanan Report of speeding up the flow of money in the construction chain by forcing the lien claimant to act promptly to enforce his lien rights.

On the assumption that the substantial performance concept should be effective changes to the act are necessary. Mr. E. Mirth was of the opinion that the following changes were imperative:

1) Section 2(1)(a) should refer to both contracts and subcontracts. The subsection might then read:

> Section 2(1)(a) "completion of the contract" or "completion of the work" means substantial performance, not necessarily total performance, of the contract; and is applicable to both contracts and subcontracts.

2) Since there is the possiblity of subtrades having lien periods extending beyond the prime contract lien period under the substantial performance concept, sections 15(2) and 18(1) should state their own time period rather than referring to section 30. The subsections might then read"

> Section 15(2). Irrespective of whether a contract provides for installment payments or payment on

completion of the contract an owner liable on the contract under which a lien may arise shall, when making payment thereunder, retain for 35 days after completion or abandonment of the contract, or completion of the work an amount equal to 15% of the value of the work acutally done.

Section 18(1). Upon the expiration of 35 days after the completion or abandonment of the contract or completion of the work, payment of the lien fund may be validy made so as to discharge every lien in respect thereof unless, in the mean time, the statement of lien has been registered.

3) Section 30 should use the term "completion of the contract or subcontract" throughout. The section might then read:

Section 30(1). A lien in favour of a contractor or a subcontractor in cases not otherwise provided for, may be registered at any time up to the completion or abandonment of the contract or subcontract, as the case may be, and within 35 days after completion or abandonment.

Section 30(2). A claim of lien for materials only may be registered at any time during the furnishing of the materials and within 35 days after completion or abandonment of the contract or subcontract.

Section 30(3). A lien for the performance of services only may be registered at any time during the performance of the services and within 35 days after completion or abandonment of the contract or subcontract.

Mr. Mirth wondered whether subsection (2) and (3) were really needed since subsection (1) covers all situations well enough. If they are retained he felt they should be

limited as above. Report 17 stated its tentative opinion "that subsection (1) should be made a general provision covering all contracts and subcontracts and that subsection (2) and (3) be repealed" (at page 20). However, Report 17 excluded a laborer's lien for wages from such a new section 30(1).

The section might then read:

> Section 30(1). A lien in favour of a contractor or subcontractor for the furnishing of materials or the performance of services, or for the furnishing of materials and the performance of services, may be registered at any time up to the completion or abandonment of the contract or subcontract, as the case may be, and within 35 days after completion or abandonment.

QUESTION NO. 1

> THE QUESTION FOR THE BOARD IS WHETHER IT SHOULD BE MADE CLEAR IN THE ACT THAT SUBSTANTIAL PERFORMANCE APPLIES BOTH TO CONTRACTS AND SUBCONTRACTS, AND SHOULD SECTIONS 15 AND 18 BE AMMENDED AS PROPOSED ABOVE.
>
> SECONDLY, SHOULD SECTIONS 30 BE REVISED TO EMBODY UNIFORMILY THE SUBSTANTIAL PERFORMANCE CONCEPT.
>
> THIRDLY, SHOULD SECTION 30(1) BE A GENERAL PROVISION COVERING ALL CONTRACTS AND SUB-CONTRACTS.

Report 17 asked whether the substantial performance rule should apply to a laborer's lien for wages and offered the opinion that if the rule is sound there should be no exceptions to it, although the concept may be inappropriate in this case. Mr. Mirth felt that laborers should be treated like any other contractor or subcontractor, and to create exceptions to the substantial performance concept would be "an unnecessary and an undesirable complication". There would be problems in

relating all the parts of the act to both the concept and the exception. He went on

> Although wage earners are often retained on a specific job on a day by day basis and therefore may have some difficulty determining when their contracts or work are substantial complete, the same problem would apply to a materialman who fills orders as they come (and not on a project-contract basis), or subcontractor who does work on a warehouse on a (tenant-bay-at-a-time) basis. They may or may not end up supplying or finishing the whole project. There are probably many instances in the construction industry where work is done or materials supplied without any firm parameters outlining the full extent of the subtrade's or materials man's involvement. I think this problem, though, be it for the wage earner or anyone else, is part of the general problem of applying the substantial completion concept in practice, ie, is a problem that goes to the acceptability or workability of the substantial completion concept itself. That is, the reason for excepting wage earners might apply to other persons as well; if one exception is allowed others should be too; and once the logical exception are made the whole scheme would have to fall apart for want of certainty and uniformity.

However, Mr. Mirth believed that there would be no problem for the owner in computing the holdback retention period, as long as this is tied to prime contracts, in allowing an exception for wage earners where the laborer contracts with a subcontractor. He felt the problem would only be theoretical, rather than practical, even where the labourer is directly employed by the owner since the owner either pays the labourer or not - there are no subcontractors involved. However, as already mentioned, Mr. Mirth preferred to avoid exceptions.

This would not interfere with the priority to a labourer's claim under Section 10 (see Appendix E for the

full text). In the definition section of the Act section 2(b) defines contractor to exclude a labourer. The proposed section 30(1) above would therefore not include a labourer's lien. To avoid this exception, either the definition section should be revised, or section 30 could treat a labourer's lien under a separate subsection to which the substantial performance concept applies. The section might read:

> A lien for wages may be registered at any time up to the completion of the work for which the wages are claimed and within 35 days after completion of the work.

The definition section 2(1)(a) would make substantial performance applicable to "completion of the contract or subcontract" and "completion of the work". The Buchanan Report pointed out what it considered to be a surprising piece of evidence presented not only in Alberta but also in Ontario, Manitoba, and British Columbia. It was also confirmed in the Thompson Report, a similiar inquiry held into the operation of the Saskatchewan Mechanics' Liens Act. The evidence was that laborers were not resorting to the provisions of the Mechanics' Liens Acts to any great extent in order to seek relief. Instead, they were using apparently "more efficient methods of bringing employers to time, notably collection departments of the various Departments of Labor." (at page 34) There was no submission to the Institute as to whether this situation had changed.

QUESTION NO. 2

> THE QUESTION FOR THE BOARD IS WHETHER THERE SHOULD BE AN EXCEPTION IN THE ACT TO THE SUBSTANTIAL PERFORMANCE CONCEPT FOR LABORERS' LIENS FOR WAGES.
>
> IF NOT, SHOULD SECTION 30 BE AMMENDED AS PROPOSED ABOVE.

To make the substantial performance concept effective, not only would the above changes be necessary but the second major finding of the Appellate Division in Glenway needs to be specifically denied. This was that the presumption stated in section 2(2) is rebuttable. As such it makes reliance on the substantial performance concept hazardous at best, and any cautious owner faced with this uncertainty would be wise to hold back payment until the last nail is driven. Again the concept is rendered useless and its purpose defeated.

Mr. Mirth pointed out that the case law has shown that whether a presumption raised by a statute is conclusive or rebuttable

> is a matter to be determined by reference to the whole statute and its intent and sensible operation. Considered in the light of the obvious intent of speeding the flow of moneys, the use of a precise percentage formula, and the general need for irrebuttability to make the concept usable, the intent of the new section 2(2) must surely have been that 'deemed' means 'conclusively deemed'.

Report 17 agreed that the presumption should be conclusive. This may be effected by the following amendment to section 2(2).

> Section 2(2)(c). Evidence of the conditions set out in subsections (a) and (b) above shall be conclusive of substantial performance.

QUESTION NO. 3

> THE QUESTION FOR THE BOARD IS WHETHER THE ACT SHOULD BE AMENDED BY ADDING TO SECTION 2 AS PROPOSED ABOVE.

Mr. Mirth also thought that it might be useful to define "contract" and "subcontract" although he also felt that they

might already be sufficiently explained in the definitions for "contractor" and "subcontractor".

QUESTION NO. 4

> THE QUESTION FOR THE BOARD IS WHETHER THERE SHOULD BE FURTHER DEFINITION OF THE TERMS 'CONTRACT' AND 'SUBCONTRACT'.

Given that the substantial performance concept is fully adopted, Report 17 echoed Mr. Mirth's view that there may be problems for the finishing subtrades, eg landscapers, pavers, and wage earners working at the very end of the project. In terms of the total project, the work may be substantially complete in the sense that the section 2(2) tests are met. The owner is therefore entitled to release the holdback money 36 days later. However, the landscaper, for instance, may only have substantially performed his contract after the expiry of the owner's 35 day period. He would be entitled to file a lien yet there would be no "lien fund" to attach since the owner would have already validly released it. Mr. Mirth continued:

> ...in normal practice, the owner is likely to hold back at least the value of unfinished work notwithstanding occupancy and use of the building and therefore maintain some sort of 'lien fund'; but the subcontractor doing the finishing of final work is entirely at the owner's mercy in that regard. (at page 18 of his Opinion)

Nevertheless, both Mr. Mirth and Dean W.F. Bowker, Q.C. felt that the advantages of the substantial performance concept outweighed any prejudice to the finishing trades. Report 17's tentative opinion was in favour of the substantial performance policy "even though the result may be that the subcontractors or wage earners whose liens arise near the completion of the main contract might lose the benefit of the holdback" (at page 21).

Section 16

Section 16, which is reproduced in Appendix E, provides for payment by the owner of 15% of a subcontract price where a certificate is issued by the supervisor to the effect that the subcontract has been completed. This allows early payment of part of the holdback on subcontract work done in the early part of the project and thus speeds up the flow of funds. In effect, the holdback on a particular subcontract can be released 36 days after the work is completed and certified, so that for instance, the excavating subcontractor could expect full payment at that time rather than 36 days after the building is in use.

However, after the Glenway decision the confusion in the operation of the substantial performance concept has made section 16 "virtually unuseable", in Mr. Mirth's words. He went on "When added to the confusion of the terms 'contract' and 'subcontract' to be found in section 16, the existence of two kinds of completion in section 30 has made the issue of architect's certificates under section 16 virtually impossible to obtain." (at page 19 of his Opinion)

Both Mr. Mirth and Report 17 agreed that release of the portion of the holdback under section 16 should be allowed after substantial performance of the contract. This would be in keeping with the substantial performance policy expressed elsewhere in the Act.

This may be accomplished simply by relating the subcontract which "has been completed" in section 16(2) to the definition section so that "completed" means substantially performed, or by adding a specific subsection to section 16 expressed to be without limitation on the generality of the operation of the definition section. Mr. Mirth felt either would suffice.

QUESTION NO. 5

THE QUESTION FOR THE BOARD IS WHETHER PAYMENT UNDER SECTION 16 SHOULD BE ALLOWED AFTER SUBSTANTIAL PERFORMANCE OF THE SUBCONTRACT; AND, IF SO, WHETHER A SPECIFIC SUBSECTION SHOULD BE ADDED TO SECTION 16.

Report 17 also felt that the effect of payment under section 16 is not clear. As drafted, the section extinguishes the lien only of the person to whom payment is made, which payment would do anyway. It may be that it was intended also to extinguish the liens of those claiming under the subcontractor but the wording of section 16(5) would not necessarily lead to that conclusion. If the substantial performance concept is to be related not only to the main contract, but also to all the individual subcontracts, then logically it would seem that the concept should progress all the way down the contractual chain. Lien periods would then exist and expire parallel to the progress of the project. This would be in keeping with the general intent to speed up the release of money through the chain and would make the operation of section 16 effective in aiding the release of funds.

Those claiming under the subcontractor would have to watch carefully to know when their lien might expire, but it would be an anomalous situation where the subcontractor's lien period would expire 36 days after certification of substantial performance, whereas his subcontractor could register a lien at any time within 36 days of substantial performance of the project as a whole.

Report 17 felt that "the section should operation to extinguish the lien not only as the contractor or subcontractor to whom the payment is made, but also the liens of those claiming under him". (at page 22). Mr. Mirth suggested

an amendment to the section to say "so far as concerns any lien thereunder of that subcontractor or anyone claiming under or in respect of that subcontractor." He also felt that "If section 16 is to be modified, I think it would be worthwhile correcting its confusion of 'contract' and 'subcontract'. Eg, the word "contract" should be "subcontract" in the second and third line of subsection 3, the fourth last line of subsection 4, in subsection 6(b) and in the fourth last line of subsection 6." Section 16(5) would also have to amended in so far as it refers to section 30, subsections (1), (2), (3) and (4), in accordance with the board's decision on that section above.

QUESTION NO. 6

THE QUESTION FOR THE BOARD IS WHETHER SECTION 16 SHOULD OPERATE TO EXTINGUISH NOT ONLY THE LIEN OF THE CONTRACTOR OR SUBCONTRACTOR TO WHOM PAYMENT IS MADE, BUT ALSO THE LIENS OF THOSE CLAIMING UNDER HIM.

SECTION 38(3)

Section 38(3), which is reproduced in Appendix F, allows a party who has been served with a statement of claim to serve a lienholder with notice to prove his lien. It does not say, however, that he can do so where a statement of claim is issued but not served.

Under the 1960 Mechanics' Lien Act, s. 34 allowed a notice to be served on a registered lienholder to take proceedings on the lien without the necessity of the lienholder first initiating any action. Failure to proceed within 30 days resulted in the lien ceasing to exist.

The Buchanan Report found that s. 34, with s. 35 and s. 36, offended against the principle that lienholders be required to act promptly to take advantage of their security. This was because a lien claimant had six years in which to commence an action, and even then had the possibility of extending this time. It was felt that there was no justification for placing the onus on some person other than the lienholder to serve notice under s. 34(1) when it was desired to have an action commenced. As a result, the Report recommended that the lienholder be required to commence proceedings within 90 days of registration of the lien and to bring the matter to trial within 2 years of the date of registration of a certificate of lis pendens (see the Buchanan Report pp. 94-96). The ability of the owner to force an action was deleted. In the present Builders' Lien Act the time given to a lien holder to commence an action was extended to 180 days under s. 32, and a limited power was given to parties to force an action as outlined above under s. 38(3).

Mr. Goodfellow, in his letter referred to above, dealt with this point and felt that "it would appear feasible that a section similar to section 34 of the Mechanics' Lien Act

be incorporated into the Builders' Lien Act."

The Canadian Bar Association Real Estate subsection (Ed (Edmonton) paper on the Builders' Lien Act felt that the old s. 34 provision "was frequently of use and value to persons, be they owners or other contractors, who wishes to move a reluctant claimant into action or to 'put his money where his mouth is'." and that by its deletion from the new Act its usefulness was lost. Despite the Buchanan Report's fears the committee felt that there were and still are times when s. 34 expedited, rather than delayed, matters. Section 34 could effectively force exposure of frivolous or blackmailing liens and would, in fact, further the principle that lien holders be required to act promptly. As a result the committee recommended the reinstatement of such a provision which it felt would be "widely accepted by the profession as being desirable, yet would not present any real prejudice to the sincere lien claimant."

This recommendation was also echoed in Mr. David Ellis' letter to the Honourable C. Mervin Leitch, referred to above. He felt it would be useful to enable an owner to force a lienholder's hand in a shorter period than 180 days.

Such a recommendation is, however, a policy question which goes beyond the suggestion which Report #17 considered sound, that "section 38(3) be amended so that it will apply at any time following the issue of the statement of claim" (at p. 22), i.e., without the necessity of prior service. The suggestion was made because the operation of s. 38(3) was considered unfair to other parties in a situation where a lien claimant has issued a statement of claim but refrained from serving it for tactical reasons.

Mr. Mirth, in his Opinion, agreed that the necessity for service of the statement of claim created an "undesirable

potential condition precedent to serving a notice to prove lien." (at p. 21). He considered that:

> The legislative draftsman may have been thinking in using the phrase, of those other lien claimants who are made parties by mere service and without being named. But parties such as the owner, a mortgagee or another encumbrancer may have at least as much interest in the proceedings as other lien claimants and may never be formerly served with the statement of claim. It would be better for the subsection to say "any party, whether named as a defendant or not, may file. . . .
>
> THE QUESTION FOR THE BOARD IS WHETHER SECTION 38(3) SHOULD BE AMENDED AS PROPOSED ABOVE.

Mr. W. H. Hurlburt, Q.C., has raised the question of whether or not the right to serve such a notice should be dependent on there being an action on foot, and he wondered whether Mr. Mirth proposal would have the effect of restoring the old s. 34 situation "in more stringent form by the back-door" in seeming derogation of the policy embodied in the new Act.

SECTION 40(2) AND 40 (3)

Section 40 authorizes any party to an action to apply to the court for appointment of a receiver. The receiver is given power to borrow and mortgage and any such mortgage funds advanced take priority over all liens existing at the date of the appointment of the receiver. However, the operation of the section is again subject to the condition precedent that there must first be service of a statement of claim.

Report 17 described a case which indicated the problems with this section which is reproduced in Appendix G.

> The owner of the building became bankrupt before the building was completed. A number of liens had been filed. The trustee in bankruptcy required funds to protect the building from weather and vandalism. Accordingly he applied to the mortgagee to advance funds to protect the security. The mortgageee wanted assurance that any advance would have priority over the liens. Section 40(2) and (3) provides for this situation, but only where a statement of claim has been issued. In the case brought to our attention, no action had been started. The trustee in bankruptcy was compelled to apply under the Judicature Act for an order appointing himself as receiver to receive the funds from the mortgagee. It was then necessary to persuade the lienholders to give priority to the mortgage.

The Report also referred to a Manitoba Case, College Housing Coop. v. Baxter, [1975] 1 W.W.R. 311, reversed on appeal (1976) 57 D.L.R. (3d) 1. The Court of Appeal had held that the court of Queen's Bench had inherent jurisdiction to make an order appointing a receiver of the balance of the mortgage money with priority over the registered liens in order to preserve property. This was not in conflict with the provisions of the Mechanics' Lien Act. The Supreme Court of Canada, however, held that the power of the Queen's Bench to appoint a receiver does not include the power to

make an order contrary to "the unambiguous expression of the legislative will" (at p. 4), that is to give priority to mortgage moneys advanced after registration of a lien in the face of the s. 11(1) provision giving priority to the lien. The court cannot alter statutory priorities.

Mr. John G. McNiven, Barrister & Solicitor, with Gill, Cook, Calgary, who was faced with the problem set out above, has suggested that the Act be amended "to provide, in effect, that any person interested, including a Trustee in Bankruptcy, might apply to the court for an order along the lines contained in section 40(2) and (3) of the Builders' Lien Act, without having to wait for an action to be started."

THE QUESTION FOR THE BOARD IS WHETHER SECTION 40 OF THE ACT SHOULD BE AMENDED AS PROPOSED.

40. (1) At any time after service of the statement of claim, any party may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver upon such terms and upon the giving of such security or without security as the court considers appropriate.

(2) At any time after service of the statement of claim, any party may apply to the court for the appointment of a trustee and the court may, upon the giving of such security or without security as the court considers appropriate, appoint a trustee

(*a*) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(*b*) with power upon approval of the court to complete or partially complete the improvement.

(3) Mortgage moneys advanced to the trustee as the result of any of the powers conferred upon him under this section take priority over all liens existing at the date of the appointment of the trustee.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest. [1970, c. 14, s. 40]

38. (1) The time within which a defendant may file a statement of defence or demand of notice is the period limited for the filing of defence by the Alberta Rules of Court.

(2) A party not named as a defendant is not required to file a statement of defence.

(3) At any time following service of the statement of claim upon him, a party may file with the clerk of the court and serve upon any lienholder a notice to prove lien in the prescribed form.

(4) A lienholder served with a notice to prove lien shall, within 15 days of the service of the notice upon him, file in the office of the clerk of the court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(5) A lienholder upon whom a notice to prove lien is served and who does not file his affidavit

(*a*) within 15 days of the service of the notice, or

(*b*) within such further period as the court may order on application upon notice,

loses his lien.

(6) Any party to the action may examine the lienholder upon his affidavit filed pursuant to this section.

[1970, c. 14, s. 38]

APPENDIX A

The Builders' Lien Act (R.S.A. 1970, c. 35, as amended).

Section 18

18. (1) Upon the expiration of the time limited by section 30, payment of the lien fund may be validly made so as to discharge every lien in respect thereof unless, in the meantime, a statement of lien has been registered.

(2) Where a statement of lien has been registered, the owner or a mortgagee authorized by the owner to disburse the moneys secured by a mortgage may,

(*a*) by interlocutory application in any proceedings that have been commenced to enforce a lien, or

(*b*) on application by originating notice of motion,

pay into court the amount of the lien fund.

(3) On an application under subsection (2), notice shall be given as provided in section 37, subsection (1).

(4) Payment into court ordered under subsection (2) discharges the owner from any liability in respect of liens and

(*a*) the money when paid into court stands in the place of the land, and

(*b*) the order shall provide that the liens be removed from the title to the land concerned.

(5) On an application under subsection (2), the court

(*a*) may hear and receive such evidence, by affidavit or *viva voce* or otherwise, as it considers necessary in order to determine the proper amount of the lien fund to be paid into court,

(*b*) may direct the trial of an issue to determine the amount of the lien fund to be paid into court, and

(*c*) may refuse the application if it is of the opinion that the determination of the amount of the lien fund should be made at the trial of the action.

[1970, c. 14, s. 18]

Section 32

32. (1) A lien that has been registered ceases to exist unless, within 180 days from the date of registration thereof,

(*a*) an action is commenced to realize upon the lien or in which the lien may be realized upon under this Act, and

(*b*) a certificate of *lis pendens* in the prescribed form is registered in the appropriate land titles office.

(2) The clerk of the court in which an action is begun may grant a certificate of *lis pendens* to any lienholder who is a party to the proceedings.

(3) Any lienholder who is a party to the proceedings may cause a certificate of *lis pendens* to be registered in the appropriate land titles office.

(4) Upon receiving

(*a*) a certificate under the seal of the clerk of the court stating that proceedings for which a certificate of *lis pendens* was granted are discontinued, or

(*b*) a withdrawal of a certificate of *lis pendens* signed by the person on whose behalf the certificate was registered,

the Registrar shall cancel registration of the certificate of *lis pendens*. [1970, c. 14, s. 32]

Section 35

35. (1) The court may, upon application by originating notice,

(*a*) order that the registration of a lien be cancelled upon the giving of security for or the payment into court of the amount of the claim and such costs as the court may fix, or

(*b*) order that the registration of a lien be cancelled on any proper ground.

(2) Money paid into court replaces the land discharged and is subject to the claim of all persons for liens to the same extent as if the money had been realized by a sale of the land in an action to enforce the lien.

[1970, c. 14, s. 35]

Enforcement of Lien

Section 36

36. (1) Proceedings to enforce a lien shall be commenced by statement of claim.

(2) Lienholders shall not be named as defendants.

(3) Where the party issuing the statement of claim is not the contractor, the statement of claim shall name as defendants

(*a*) the owner,

(*b*) the contractor, and

(*c*) the holder of any prior registered encumbrance.

(4) Where the person issuing the statement of claim is the contractor, he shall name as defendants

(*a*) the owner, and

(*b*) the holder of any prior registered encumbrance.

(5) In this section, "prior registered encumbrance" does not include a lien.

(6) The procedure in adjudicating upon the claims shall be of a summary character, so far as is possible, having regard to the amount and nature of the liens in question and the enforcement thereof at the least expense.

[1970, c. 14, s. 36]

Section 37

37. (1) The statement of claim shall be served upon all persons who by the records of the land titles office appear to have an interest in the land in question and upon such other persons as the court may direct.

(2) All persons, including lienholders, served with a statement of claim are parties to the proceedings.

[1970, c. 14, s. 37]

Section 38

38. (1) The time within which a defendant may file a statement of defence or demand of notice is the period limited for the filing of defence by the Alberta Rules of Court.

(2) A party not named as a defendant is not required to file a statement of defence.

(3) At any time following service of the statement of claim upon him, a party may file with the clerk of the court and serve upon any lienholder a notice to prove lien in the prescribed form.

(4) A lienholder served with a notice to prove lien shall, within 15 days of the service of the notice upon him, file in

the office of the clerk of the court in which the proceedings were commenced an affidavit providing detailed particulars of his lien.

(5) A lienholder upon whom a notice to prove lien is served and who does not file his affidavit

(*a*) within 15 days of the service of the notice, or

(*b*) within such further period as the court may order on application upon notice,

loses his lien.

(6) Any party to the action may examine the lienholder upon his affidavit filed pursuant to this section.

[1970, c. 14, s. 38]

Section 39

39. (1) At any time following the expiry of the time limited for defence, the plaintiff may, and before setting the action down for trial the plaintiff shall, make a pre-trial application.

(2) The plaintiff shall serve notice of the pre-trial application upon all other parties to the proceedings, at least 10 days before the date of the application.

(3) Upon the hearing of the pre-trial application,

(*a*) if no defence has been filed and no notice to prove lien has been filed and served, the court may declare the liens valid and make such further judgment or order as the court considers appropriate,

(*b*) if defence has been filed, the court may give judgment declaring valid any liens in respect of which no notice to prove lien has been filed,

(*c*) the court may consider the affidavits filed upon service of notice to prove lien and the transcript of any examination thereon, and may

(i) determine summarily the validity of the liens concerned,

(ii) hear evidence *viva voce*, and

(iii) direct that at the trial of the action any particular issue or issues arising on the application be determined,

(*d*) the court may make such further order or direction as the court considers necessary or desirable including, *inter alia*, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,

(*e*) the court may order that any lienholder or other party be given the carriage of the proceedings, and

(*f*) the court may order that examinations for discovery be held, but no examinations for discovery shall be held without an order of the court.

APPENDIX B

The Mechanics' Lien Act (R.S.O. 1970, c. 267, as amended).

Section 21

21.—(1) A claim for lien by a contractor or subcontractor in cases not otherwise provided for may be registered before or during the performance of the contract or of the subcontract or within thirty-seven days after the completion or abandonment of the contract or of the subcontract, as the case may be.

(2) A claim for lien for materials may be registered before or during the placing or furnishing thereof, or within thirty-seven days after the placing or furnishing of the last material so placed or furnished.

(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty-seven days after the completion of the service.

(4) A claim for lien for wages may be registered at any time during the doing of the work for which the wages are claimed or within thirty-seven days after the last work was done for which the lien is claimed.

EXPIRY AND DISCHARGE

Section 22

22.—(1) Every lien for which a claim is not registered ceases to exist on the expiration of the time limited in section 21 for the registration thereof.

(2) Upon an action under this Act being commenced, a certificate thereof shall be registered in the registry office in which the claim for lien is registered. 1968-69, c. 65, s. 22 (1, 2).

(3) Where a certificate of action has been registered for two years or more in the registry office and no appointment has been taken out for the trial of the action, the judge or, in the Judicial District of York, the master, may, upon the application *ex parte* of any interested person, make an order vacating the certificate of action and discharging all liens depending thereon. 1969-69, c. 65, s. 22 (3); 1970, c. 41, s. 1, *amended*.

(4) This section does not apply to liens which, by virtue of subsection 2 of section 5, do not attach to the land.

Section 23

23.—(1) Every lien for which a claim is registered ceases to exist on the expiration of ninety days after the work has been completed or the materials have been placed or furnished, or after the expiry of the period of credit, where such period is mentioned in the registered claim for lien, unless in the meantime an action is commenced to realize the claim or in which a subsisting claim may be realized, and a certificate is registered as provided by section 22.

Section 25

25.—(1) A claim for lien may be discharged by the registration of a receipt acknowledging payment,

(*a*) where made by a lien claimant that is not a corporation, signed by the lien claimant or his agent duly authorized in writing and vertified by affidavit; or

(*b*) where made by a lien claimant that is a corporation sealed with its corporate seal. 1968-69, c. 65, s. 25 (1).

(2) Upon application, the judge or, in the Judicial District of York, the master, may, at any time,

(*a*) allow security for or payment into court of the amount of the claim of the lien claimant and the amount of the claims of any other subsisting lien claimants together with such costs as he may fix, and thereupon order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated;

(*b*) upon any other proper ground, order that the registration of the claim for lien or liens and the registration of the certificate of action, if any, be vacated; or

(*c*) upon proper grounds, dismiss the action. 1968-69, c. 65, s. 25, (2); 1970, c. 41, s. 2 (1), *amended*.

(3) Notwithstanding sections 22 and 23, where an order to vacate the registration of a lien is made under clause *a* or *b* of subsection 2, the lien does not cease to exist for the reason that no certificate of action is registered.

(4) Any money so paid into court, or any bond or other security for securing the like amount and satisfactory to the judge or officer, takes the place of the property discharged and is subject to the claims of every person who has at the time of the application a subsisting claim for lien or given notice of the claim under subsection 6 of section 11 or section 14 to the same extent as

if the money, bond or other security was realized by a sale of the property in an action to enforce the lien, but such amount as the judge or officer finds to be owing to the person whose lien has been so vacated is a first charge upon the money, bond or other security.

(5) Where the certificate required by section 22 or 23 has not been registered within the prescribed time and an application is made to vacate the registration of a claim for lien after the time for registration of the certificate, the order vacating the lien may be made *ex parte* upon production of a certificate of search under *The Land Titles Act* or of a registrar's abstract under *The Registry Act*, as the case may be, together with a certified copy of the registered claim for lien. 1968-69, c. 65, s. 25 (3-5).

(6) Where money has been paid into court or a bond deposited in court pursuant to an order under subsection 2, the judge or, in the Judicial District of York, the master, may, upon such notice to the parties as he may require, order the money to be paid out to the persons entitled thereto or the delivery up of the bond for cancellation, as the case may be. 1968-69, c. 65, s. 25 (6); 1970, c. 41, s. 2 (2), *amended*.

(7) An order discharging a claim for lien or vacating a certificate of action shall be registered by registering the order or a certificate thereof, under the seal of the court, that includes a description of the land as required by *The Land Titles Act* or *The Registry Act* and the regulations thereunder, as the case may be, and a reference to the registration number of every registered claim for lien and certificate of action affected thereby. 1968-69, c. 65, s. 25 (7).

ACTIONS

Section 29

29.—(1) A claim for lien is enforceable in an action in the Supreme Court.

(2) An action under this section shall be commenced by filing a statement of claim in the office of the local registrar of the Supreme Court in the county or district in which the land or part thereof is situate.

(3) The statement of claim shall be served within thirty days after it is filed, but the judge having jurisdiction to try the action or, in the Judicial District of York, the master, may extend the time for service.

(4) The time for delivering the statement of defence in the action shall be the same as for entering an appearance in an action in the Supreme Court.

(5) It is not necessary to make any lien claimants parties defendant to the action, but all lien claimants served with the notice of trial shall for all purposes be deemed to be parties to the action.

(6) After the commencement of the action, any lien claimant or other person interested may apply to the judge having jurisdiction to try the action or, in the Judicial District of York, a judge of the Supreme Court, to speed the trial of the action. 1968-69, c. 65, s. 29, *amended*.

APPENDIX C

The Mechanics' Lien Act (R.S.B.C. 1960, c. 238, as amended)

Section 23 **23.** (1) A claim of lien of a contractor or sub-contractor may be filed as in this Act provided at any time after the contract or sub-contract has been made, but not later than thirty-one days after the contract of the contractor has been completed, abandoned, or otherwise determined.

(2) A claim of lien for materials supplied may be filed as in this Act provided at any time after the contract to supply the materials has been made, but not later than thirty-one days after the improvement to which the material has been supplied has been completed or abandoned, or the contract for the construction or making of the improvement otherwise determined, except in the case of a contract to supply materials in respect of a mine or quarry, in which case the claim of lien shall be filed not later than sixty days after the materials have been supplied, placed, or furnished to the mine or quarry.

(3) A claim of lien of a workman may be filed as in this Act provided at any time during the performance of the work, but not later than thirty-one days after the last work has been done by him for which the lien is claimed, except for a lien claimed in respect of a mine or quarry, when the time hereinbefore mentioned shall be sixty days; but no workman shall be held to have ceased work on an improvement until the completion of the same if he has in the meantime been employed upon any other work by the same contractor.

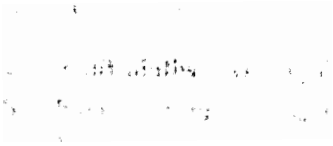
(4) Every lien in respect of which a claim of lien is not filed as in this Act provided shall absolutely cease to exist on the expiration of the time herein limited for the filing thereof. 1956, c. 27, s. 23.

Section 26

26. (1) In every case in respect of which an affidavit of claim of lien has been filed, an action to enforce the same shall be commenced and a certificate of lis pendens in respect thereof registered in the Land Registry Office and in the Mining Recorder's office in which the duplicate or certified copy of the affidavit has been filed not later than one year from the date of filing of the claim of lien.

(2) Notwithstanding subsection (1), an owner may, after the filing of an affidavit of claim of lien, send to the claimant a notice in writing to commence an action to enforce the lien and to register in the Land Registry Office and in the Mining Recorder's office aforesaid a certificate of lis pendens in respect thereto within twenty-one days from the mailing of the notice. The said notice shall be substantially in the Form 2 set out in the Schedule, and shall be sent by registered mail, postage prepaid, addressed to the claimant at the address for service given in the affidavit of claim of lien. In the event that no address for service is given in the affidavit of claim of lien, the notice, addressed to the claimant, shall be mailed to the claimant at his last-known address, and if the same is not known, then to general delivery of the principal post office of the city in which the Land Registry Office is situate.

(3) A notice sent in the manner hereinbefore prescribed shall be deemed to have been given by the owner and to have been received by the claimant in the ordinary course of the mails. 1956, c. 27, s. 26.



Section 33

33. (1) Any person against whose property a claim of lien has been filed under this Act may apply to have the claim of lien cancelled upon payment of the claim, or sufficient security for the payment thereof being given. The Judge hearing the application may order the cancellation of the claim of lien, either in whole or in part, upon payment, or upon the giving of security, by the party against whose property the claim of lien is registered, in an amount satisfactory to the Judge, and upon such terms (if any) as the Judge may see fit to impose.

(2) The Registrar or the Mining Recorder in whose office a claim of lien is filed shall, on production of such order or an office copy thereof, file the same and cause the claim of lien to be cancelled as to the property affected by such order. 1956, c. 27, s. 33.

APPENDIX D

The Mechanics' Lien Act (R.S.M. 1970, c. M-80, as amended)

Section 20

Time within which claim may be registered.

20(1) A claim for lien by a contractor or sub-contractor may, in cases not otherwise provided for, be registered before or during the performance of the contract or of the sub-contract, as the case may be, or within thirty days after the completion of the contract or of the sub-contract, as the case may be.

Note: Lien of contractor under The Builders' and Workmen's Act.

Claim for materials.

20(2) A claim for lien for materials may be registered before or during the furnishing or placing thereof, or within thirty days after the furnishing or placing of the last material so furnished or placed.

Claim for services.

20(3) A claim for lien for services may be registered at any time during the performance of the service or within thirty days after the completion of the service.

Claim for wages.

20(4) A claim for lien for wages may be registered at any time during the performance of the work for which the wages are claimed, or within thirty days after the last day's work for which the lien is claimed.

Am. R.S.M., c. 157, s. 20; am.

DETERMINATION OF LIEN

Liens to cease if not registered within time fixed by Act.

Section 21

21 Every lien that is not duly registered under this Act ceases to exist on the expiration of the time hereinbefore limited for the registration thereof.

R.S.M., c. 157, s. 21; am.

When lien to cease if registered and not proceeded upon.

Section 22

22 Every lien that has been duly registered under this Act ceases to exist after the expiration of two years after the work or service has been completed or materials have been furnished or placed, or the expiry of the period of credit, where that period is mentioned in the claim of lien registered, unless in the meantime an action is commenced to realize the claim under this Act or an action is commenced in which the claim may be realized under this Act, and a certificate of lis pendens in respect thereof, issued from the court in which the action is brought, according to Form No. 5 in the Schedule, is registered in the proper land titles office.

R.S.M., c. 157, s. 22; am.

Notice of lienholder to commence action.

Section 23

23(1) Any person having or claiming a mortgage or charge upon, or claiming any right, title, or interest in and to, any property in respect of which a claim of lien is registered as hereinbefore provided may, at any time after thirty days have expired since the registration of the lien, require the district registrar to notify the lienholder by a notice in writing that unless an action to realize the claim of lien, or in which the claim of lien may be realized, is commenced and a certificate to that effect is registered in the proper land titles office within thirty days from the date of the mailing of the notice, the lien shall cease to exist.

Form of notice.

23(2) The notice to which reference is made in subsection (1) shall be in Form No. 6 in the Schedule and shall be forwarded by registered mail, postage prepaid at the expense of the claimant, to the address for service of the lienholder.

Am.

Form of certificate.

23(3) The certificate to which reference is made in subsection (1) shall be in Form No. 5 in the Schedule and shall be signed by the clerk of the court in which the action is commenced.

Am.

Loss of lien.

23(4) Where an action is not so commenced and the certificate so registered within thirty days from the date of the mailing of the notice, the lien shall thereupon cease to exist.

Am.

When registrar to vacate lien.

23(5) The district registrar thereupon shall vacate the registration of the lien unless, prior to the expiration of the thirty days, there is registered in the land titles office an order of a judge extending the time for commencing the action.

Am.

Vacating lien after discontinued or unsuccessful action.

23(6) Where a certificate that an action has been commenced to realize a claim for lien, in Form No. 5 in the Schedule, has been registered against any land, a certificate of the clerk of the court in which the action was begun

(a) that the action has been discontinued; or

(b) that the action has been dismissed or otherwise finally disposed of, in so far as the land affected by the lien or the several liens involved in the action is concerned, and that no appeal from the dismissal or disposal has been entered and that the time limited for an appeal therefrom has expired;

may be registered, and where registered the certificate discharges and removes every lien or claim for lien or lis pendens which was sought to be enforced or dealt with in the action.

Am. R.S.M., c. 157, s. 23; am.

DISCHARGE OF LIEN

Discharge of lien.

Section 25

25(1) A lien may be discharged by the registration of a discharge signed by the claimant or his agent duly authorized in writing; and the fee for registration thereof is the same as that for registering a claim of lien.

R. & S., S.M., 1960, c. 39, s. 2.
Note: Fee provided for by sec. 18.

Security or payment into court and vacating lien thereon.

25(2) Upon application, a judge may receive security or payment into court in lieu of the amount of the claim, and may thereupon vacate the registration of the lien.

Vacating registration on other grounds.

25(3) The judge may vacate the registration upon any other ground.

R.S.M., c. 157, s. 25.