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Mortgages - Priorities between Mortgages and Mechanics' Liens

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MORTGAGES—PRIORITIES BETWEEN MORTGAGES AND MECHANICS' LIENS

Since they are of statutory origin, mechanics' liens must be classified and treated upon a different basis than other common liens, which owe at least a large part of their existence to the rules of the common law and equity. The rules governing the priorities of such liens are in many respects similar to those followed with regard to mortgages and other contractual liens. However, for various reasons, the rules as to the priorities given to mechanics liens are sufficiently different to bear separate study. It is the purpose of this note to inquire into the particular question of priorities between mechanics' liens and mortgages, though necessarily in rather brief fashion. Although the inquiry has not been limited to Missouri statutes and cases, they have been considered somewhat more in detail than those from other jurisdictions.

Before entering into the discussion proper, it should be pointed out that while cases have been cited with considerably more freedom than statutes in the footnotes, the rules adduced from the cases are meaningless unless the statutes under which the cases were decided are considered as well. It should also be noted that the statutes have been changed with considerable frequency and that the statutes under which many of the cases cited were decided are not now in force in the respective jurisdictions.

It is not within the scope of a discussion as limited as this to examine many situations which are related to the matter of priorities. In the first place, it is assumed in each case that the mortgage in question is properly executed and given for a valuable consideration; that the mechanics' lien claimants are entitled to their liens; and that the liens are properly filed and perfected in accordance with the statutes. The absence of any one of these elements may very seriously affect the value of a lien, but the consideration of the effect of such absence does not belong in a discussion of priorities proper.

For similar reasons, any questions of marshalling assets after priorities are determined, will not be considered. Later in the note, it will be necessary to go into some situations which appear to be concerned with marshalling, but which are valuable for principles of priority. They will be considered solely from that standpoint.

Waiver of liens by contract, estoppel, and other special circumstances must also be dismissed with scant attention. A few cases which are rather

typical are to be found in the footnote.[1] These are merely illustrative, and in no way complete, however.

I. *Accrual of Mechanics' Liens*

In Missouri, if the lien is properly filed according to the terms of section 3161, R. S. 12, it accrues and is treated as dating from the commencement of the work on the building or improvement. This is provided for in section 3163, R. S. 1929. The entire question of accrual of liens is statutory and the wording and interpretation of such statutes vary in the various states. Generally speaking, the liens are treated as in Missouri, i. e. if the lien is filed in proper time, it relates back to some earlier date, either the commencement of work on the building or improvement, or the commencement of the particular work for which the lien is claimed. These statutes, and the interpretations which the several courts have given to them, being local matters, cannot here be treated in further detail. It should be noted, however, that in some states, rather different rules exist. Thus in Vermont, a lien is not effective until the filing of notice of lien.[2] In Kentucky, a lien is

1. Thus in *Compton v. Conrad,* 203 Mo. App. 211, 209 S. W. 288 (1919) an agreement to hold a mortgagee harmless as against mechanics' liens served to estop a contractor from claiming a lien. (But compare *Mellon v. St. Louis Union Trust Co.,* 140 C. C. A. 567, 225 F. 693 (1915) where a bond against mechanics' liens on the part of subcontractors was not enough to estop the general contractor from claiming his lien.) Ordinarily the mere fact that the mortgagee knows that the mortgage is for the purpose of making improvements and that the money advanced is to pay off laborers and materialmen will not serve to displace an otherwise prior mortgage. *Picklesimer v. Smith,* 164 Ga. 600, 139 S. E. 72 (1927); *Hoagland v. Lowe,* 39 Neb. 397, 58 N. W. 197 (1894). But the circumstances may be such that it can be said that the erection is a joint enterprise on the part of the mortgagee and mortgagor. In such case a mechanics' lien may displace an otherwise prior mortgage. *Nunemaker v. Kulhavy,* 197 Iowa 962, 196 N. W. 1007 (1924). Cf. *Shearer v. Wilder,* 56 Kan. 252, 43 Pac. 224 (1896). A somewhat comparable situation is presented in *Bassett v. Menage,* 52 Minn. 121, 53 N. W. 1064 (1892) where the mortgagee contracted to do the work in question himself, the mortgage being the consideration therefor. He permitted liens to accrue and for this reason his mortgage was forced to give way to the liens, the mortgagee being primarily liable to pay such claims as between himself and the mortgagor. A statute may provide that a mortgagee must notify the mechanics' lienor of the existence of the mortgage within a certain time after he knows that the work is being done or he will be subject to the liens. See: *Fuquay v. Stickney,* 41 Cal. 583 (1871). In Missouri, where the mortgagee has to be a party to a suit to enforce a lien on his interest, the failure to join the assignee of a mortgage in such suit is not a waiver of rights against him where the assignment was not of record and its existence was unknown to the lienor. *Langdon v. Kleeman,* 278 Mo. 236, 211 S. W. 871 (1919); *Redlon v. Lumber Co.,* 194 Mo. App. 650, 189 S. W. 589 (1916). In *Keane v. Watson Co.,* 149 Wash. 424, 271 Pac. 73 (1928), the mortgagee being a corporation which was in effect one and the same corporation as the mortgagor, it was held that the ordinary rule giving the mortgage priority could not be insisted upon.

2. Section 2811, *Vermont General Laws* (1917); *Hinckley etc. Iron Co. v. Jones,* 51 Vt. 240 (1878).

effective as to the owner at the commencement of work, but filing of a notice, or actual notice of a claim of lien is necessary to protect it against bona fide purchasers and mortgagees.[3] In Ohio, filing is necessary in order that a lien may accrue as against a title registered under the Torrens system.[4] (In none of these cases does the filing relate back to any previous date.) In Louisiana, the Civil Code (Article 3274) provided that a builder's privilege or lien should not accrue until filing of a proper notice. But recently (by Act No. 298 of 1926) the law has been changed to bring it into practical conformity with the more generally adopted practice.[5] Finally, in Florida, the lien must be filed before it can properly be said to have accrued, although a taker by way of mortgage during the construction of the building, etc., for which the lien is claimed, does so with notice of the lien and his interest is subject thereto.[6] Aside from these exceptions, the liens relate back to some earlier date when filed after the completion of the work.

If there is a cessation in the work on the project, or if such a change is made in the purpose of the building being erected, so that it can be said that it is in effect a different structure, liens for later work will not relate back to the commencement of the building, etc., but only to the commencement of such later work.[7] In general, however, the cases are not unduly strict on the point of what constitutes a cessation of work or a change in purpose, and are inclined to permit the lien to relate back to as early a date as pos-

3. Section 2463,*Ky. Stats.* (Carroll, 1915); *Clay Products Co. v. Trust Co.,* 223 Ky. 694, 4 S. W. (2d) 737 (1928); *Lumber Co. v. Cunningham,* 216 Ky. 298, 288 S. W. 334 (1927); *Ideal etc. Co. v. Underhill,* 213 Ky. 741, 281 S. W. 988 (1926); *Voss v. Loan and Bldg. Ass'n,* 167 Ky. 231, 180 S. W. 368 (1915); *Ichenhauser Co. v. Landrum's Assignee,* 153 Ky. 316, 155 S. W. 738 (1913); *Trust Co. v. Young,* 131 Ky. 771, 115 S. W. 780 (1909); *Scheas v. Boston and Paris,* 125 Ky. 535, 101 S. W. 942 (1907); *Harris' Assignee v. Stark,* 24 Ky. Law 103, 68 S. W. 8 (1902); *Foushee v. Grigsby,* 75 Ky. (12 Bush) 75 (1896).

4. Section 8572-68, *Ohio General Code* (Page, 1926); *Becker v. Wilson,* 165 N. E. 108 (Ohio App. 1929).

5. Cases under Civil Code.

American Brewing Co. v. Artigues, 147 La. 155, 84 So. 571 (1920); *Allen Wadley Lumber Co. v. Huddleston,* 123 La. 522, 49 So. 160 (1909); *Succession of Lenel,* 34 La. Ann. 868 (1882).

Cases under Act No. 298 of 1926.

Cox v. Rockhold, 128 So. 702 (La. App. 1930); *Lawrence v. Wright,* 124 So. 697 (La. App. 1929).

6. *Van Eepoel v. Milk Co.,* 120 So. 841 (Fla. 1929); *Peoples' Bank v. Bridge and Iron Co.,* 113 So. 680 (Fla. 1927); *Peoples' Bank v. Arbuckle,* 82 Fla. 479, 90 So. 458 (1921); *Axtell v. Hardware Co.,* 59 Fla. 430, 52 So. 710 (1910); *Bond Lumber Co. v. Masland,* 45 Fla. 188, 34 So. 245 (1903).

7. *Norris' Appeal,* 30 Pa. St. 122 (1858); See: *American Fire Ins. Co. v. Pringle,* 2 Serg. and R. (Pa.) 138 (1815); *Basset v. Swartz,* 17 R. I. 215, 21 Atl. 352 (1891). Cf. *Stumbaugh v. Hall,* 30 S. W. (2d) 160 (Mo. App. 1930); *May v. Mode,* 142 Mo. App. 656, 123 S. W. 523 (1909).

sible.[8] The basis of this rule seems to be that the construction of the building is notice to all who deal with the property that liens may accrue at the time of commencement of construction for work yet to be done. However, when construction is entirely stopped or the plans are so changed as to make a substantially different building out of it, people who deal with the property do not have to assume that persons who later do work thereon may have liens which will relate back to the first work done. Such reasoning does not apply to the case where construction is carried on continuously, and even though the lienor is paid in full for earlier items furnished on a running account, his lien will accrue as of the earliest possible time.[9] Of course, the rule would be different in the case of a settlement during the course of construction involving a waiver of liens theretofore accrued.

II. *Where Priority is Given Mechanics' Liens.*

(a). *In general*

The general rule is that mechanics' liens take priority with mortgages according to time. Statutes on the subject are frequent, however. In Missouri, under the terms of section 3163, R. S. 1929 and cases decided thereunder, such a lien is expressly made prior to all other encumbrances attaching to the real estate subsequent to the accrual of the lien.[10] The converse, i. e. that a mechanics' lien is inferior to a prior mortgage alone seems well established. In Missouri, this proposition seems tacitly admitted by the wording of section 3159, R. S. 1929, which gives the lienor a preference on the building erected as opposed to the land, even though there is a prior encumbrance on the latter. Further, the cases fully bear out this position.[11] It seems to be the only inference admissable in the face of sections 3163 and 3159 above. In addition, as a matter of policy, a contrary result does not seem at all desirable as it would permit the mortgagor to improve the mortgagee out of much of his security.

8. *Shaunghnessy v. Isenberg,* 213 Mass. 159, 99 N. E. 975 (1912); *Haxtun Steam Heating Co. v. Gordon,* 7 N. D. 246, 50 N. W. 708 (1891). Cf. *Erdman v. Moore,* 58 N. J. L. 445, 33 Atl. 958 (1896).

9. *People's Bank v. Arbuckle,* 82 Fla. 479, 90 So. 458 (1921); *Fields v. Gold Mining Co.,* 25 Utah 76, 69 Pac. 528 (1902).

10. *Langdon v. Kleeman, supra* note 1; *General Fire Ext. Co. v. Schwartz, etc. Co.,* 165 Mo. 171, 65 S. W. 318 (1901); *Reilly v. Hudson,* 62 Mo. 383 (1876); *Dubois v. Wilson,* 21 Mo. 214 (1855); *Stumbaugh v. Hall, supra* note 7; *Redlon v. Lumber Co. supra* note 7; *Nold v. Ozenberger,* 152 Mo. App. 439, 153 S. W. 349 (1911); *Hydraulic Press Brick Co. v. Bormans,* 19 Mo. App. 664 (1885).

11. *Crandall v. Cooper,* 62 Mo. 478 (1876); *United Iron Works v. Sleepy Hollow etc. Co.,* 198 Mo. App. 562, 198 S. W. 443 (1917). Cf. *Bridewell v. Clark,* 39 Mo. 170 (1866). See also cases cited infra, note 70. Citations from other states upon the proposition stated in the text are obtainable in large numbers in the digests and encyclopedias, but it is not thought desirable to encumber this discussion with them.

Notwithstanding the simplicity of the general rule just set out, there are a great many rather complicated propositions which must now be considered in order that the whole picture may be seen.

(b). *Proceeds of Mortgage Uses to Pay Potential Lienors*

It has been urged, at times, that if the proceeds of a mortgage, subsequent to a mechanics' lien in point of time, are used to pay off contractors and other potential lienors, the mortgage is entitled to equality with the mechanics' lien, at least in so far as the money advanced was used for such purposes. There is respectable authority both ways upon this point.[12] In the face of the clear statement in section 3163, R. S. 1929 on the subject of priorities, it is hard to see how the fact that a mortgage was given in payment of the claims of a contractor, or that the proceeds thereof went to that destination, can give it equality with or priority to a mechanics' lien accruing at an earlier date. There appear to be no Missouri cases upon the point, but the statute heretofore mentioned so specifically establishes the priority of these liens as against ". . . all other encumbrances which may be attached . . ." to the property subsequent to the attaching of the lien, that the result mentioned seems the only one possible in this state. As a matter of policy, it would seem that the other result is preferable. By statute in New Jersey, a mortgagee whose lien attaches after a mechanics' lien accrues, but before the filing thereof, is still preferred to the extent of the money actually advanced and traceable into the building.[13] Somewhat similar statutes exist

12. As holding that the destination of the proceeds of the mortgage is of no importance, see: *Continental etc. Bank v. Const. Co.*, 126 C. C. A. 64, 208 F. 976 (C. C. A. Idaho 1913); *Sears v. Borelli*, 80 Conn. 372, 68 Atl. 979 (1908); *Interstate B. and L. Ass'n v. Ayers*, 177 Ill. 9, 52 N. E. 342 (1898); *Rust v. Indiana Flooring Co.*, 145 S. E. 321 (Va. 1928); and cases cited. See: *Howard v. Fiske*, 86 Colo. 493, 506, 283 Pac. 1042 (1929).

As holding that the mortgagee should be protected when the proceeds of the mortgage go to pay potential leniors, see: *Joralmon v. McPhee*, 31 Colo. 261, 71 Pac. 419 (1903); *Nunemaker v. Kulhavy*, 197 Iowa 962, 196 N. W. 1009 (1924); *Ward v. Yarnelle*, 173 Ind. 535, 91 N. E. 7 (1910). This last case apparently overruled *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266 (1896), which held that the fact a mortgage was given to satisfy a contractor's bill made no difference as to its priority. Cf. *Ustruck v. Home Ass'n*, 166 Minn. 183, 207 N. W. 324 (1926). Note on the facts: *Bank of Italy v. Mac Gill*, 93 Cal. App. 228, 269 Pac. 566 (1928), holding that the taking of a mortgage by a contractor did not necessarily amount to a displacement of the priority to which he was entitled as a mechanics' lienor absent a clear showing of waiver.

13. 3 N. J. COMP. ST. (1910) p. 3303; *Lincoln Material Co. v. Const. Co.*, 150 Atl. 829 (N .J. 1930). See: *John Murtland Inc. v. Empire Trust Co.*, 39 F. (2d) 341 (C. C. A. N. J. 1930); *13th Ward B. & L. Ass'n v. Konter*, 105 N. J. Eq. 338, 147 Atl. 809 (1929).

in Ohio.[14] In the absence of such a statute, however, a court would be going far to attain a similar result in Missouri.[15]

(c). *Attempts to Give Mechanics' Liens Priority to All Other Liens.*

Although, as mentioned, the general rule is that a prior mortgage is prior in right, in several states it has been attempted to subject all mortgages, prior as well as subsequent, to the liens of mechanics. Such statutes have not met with much favor. In the Minnesota case of *Meyer v. Berlandi,*[16] such a statute was held unconstitutional as depriving the mortgagee of his property, i. e. his prior vested rights, without due process of law. This decision was answered in *Gleissner v. Hughes,*[17] a Louisiana case decided under the old Civil Code provision heretofore mentioned. In the latter case it was held that the mortgagee took his interest subject to the statute and if the statute provided for a divestment, the mortgagee could not complain. These appear to be the only cases directly upon this point. It would not seem that there is any serious constitutional objection to the legislature attempting to insure payment to mechanics and builders in this fashion. It would seem to be a deprivation of property, but a proper exercise of the police power, and consequently valid, at least as to mortgagees whose rights accrued after the statute became effective. The constitutionality of a statute which gives a mechanics' lienor priority upon buildings and improvements, as opposed to the land, does not seem to have been seriously questioned in any court.[18] If such statutes can be sustained, it is hard to see why the legislature cannot go somewhat farther. The insuring of payment to workmen, etc., would seem to be a proper police purpose. However, the question is largely academic at present, as so few states have statutes of the type under discussion.

In some states where such statutes exist, their validity does not seem to have been questioned. Nevertheless, they have had a rather unfriendly reception at the hands of the courts. Thus, in Georgia, the letter of the statute gives mechanics' liens priority over all mortgages,[19] but in practical effect the statute has meant little, as an absolute deed in the nature of security

14. Section 8321-1 OHIO GENERAL CODE (Page 1926). See: *Rider v. Crobaugh,* 100 Oh. St. 88, 125 N. E. 130 (1919).

15. On the other hand, the mere fact that a mortgage prior in time is given to secure the payment of bills for materials, etc. does not serve to lower it to the rank of mechanics' liens. *Harper and Reynolds Co. v. Lumber Co.,* 51 Cal. App. 74, 196 Pac. 97 (1921). A very strong contention that the giving of a mortgage in such a case was a constructive fraud on the later lienors was overruled by the court.

16. 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777 (1888).

17. 153 La. 133, 95 So. 529 (1923).

18. See discussion and notes infra pp. 23-24.

19. Section 3352-3 *Georgia Code* (Michie, 1926).

for a debt is given priority over all mechanics' liens of which the taker has no notice (actual or record).[20] And in Washington, though the statute reads: "no mortgage, deed of trust or conveyance shall take precedence over said lien", it was held that the statute would be treated as referring to subsequent mortgages and liens alone.[21] It was stated that if the legislature meant anything broader it was necessary to use clearer and more definite language! Such decisions tend to show that the policy of displacement of prior mortgage liens in favor of later mechanics' liens is looked upon with disfavor and statutes as broad as those just discussed are avoided in one way or another. However, a decidedly different attitude seems to prevail when the statute provides for priority to the lienor on the buildings and improvements alone. This will be considered in detail later in the note.

(d). *Failure to Advance the Full Sum Under the Prior of Two Earlier Mortgages.*

Suppose there is a building mortgage given to A and then a second mortgage is given to B for the purchase price of the realty. Later, work is done and materials furnished for which liens are claimed. All the funds under the first mortgage have not been advanced. If they had been, all the claims for work, etc., could have been satisfied. In the case of *Andersonian Inv. Co. v. Jones,*[22] where the facts were substantially those just set out, the Supreme Court of Washington held that the lienors were entitled to come in ahead of the second mortgage. This was on the theory that had all the money been advanced under the first mortgage, these liens would have been satisfied, and that they are entitled to similar treatment, even though the funds under the first mortgage were not advanced. This is a very peculiar doctrine, to say the least. It is hard to see how a mechanics' lienor is entitled to a priority a mortgagee would have had had he properly advanced funds to satisfy the lien. Of course, the second mortgagee is in no worse position than he would have been in had the full amount been advanced under the first mortgage. But such a sum was not in fact advanced. It seems to be an application of the maxim "Equity regards that as done which ought to be done" with a vengeance and ignores the true state of the facts.

(e). *Effect of the Recording Acts.*

The question of whether a mechanics' lien is within the recording acts, i. e. whether it is to be treated as superior to a prior unrecorded mortgage

20. *Picklesimer v. Smith,* 164 Ga. 600, 139 S. E. 73 (1927); *Guaranty etc. Co. v. Athens Eng. Co.,* 152 Ga. 596, 110 S. E. 873 (1922); *Oglethorpe S. & L. Ass'n v. Morgan,* 149 Ga. 787, 103 S. E. 528 (1920); *Milner v. Wellhouse,* 148 Ga. 491, 96 S. E. 566 (1918); *Lumber Co. v. Martin,* 132 Ga. 491, 64 S. E. 484 (1909).

21. *Fitch v. Applegate,* 24 Wash. 25, 64 Pac. 147 (1901).

22. 104 Wash. 142, 176 Pac. 17 (1918).

has never been squarely decided in Missouri. In other jurisdictions, the cases are in conflict. Of course, if the mechanics' lien act specifically provides for priority over unrecorded mortgages, the question is settled.[23] But there is no such statute in several states, among which is Missouri. There is a line of cases holding that the lienor is not protected by the recording acts, absent an express provision in the statutes.[24] But it should be noted that all these cases were decided under recording statutes similar to that set forth in *Fletcher v. Kelly*[25] which provides that "no instrument affecting real estate is of any validity, *against subsequent purchasers for a valuable consideration, without notice,* unless recorded . . ." (Italics the author's). The holding is uniform that a mechanics' lienor is not such a subsequent purchaser for a valuable consideration, without notice.[26] But if the statute specifically protects creditors, it would seem that recordation is necessary against these liens.[27] Thus in the Missouri case of *Landreth Machinery Co. v. Roney,*[28] the conditional sales recording statute (section 3125, R. S. 1929), which specifically protects creditors, was held to protect a mechanics' lienor.

The real property recording statutes (sections 3038, 40, 41, R. S. 1929) do not mention creditors specifically. But section 3041 provides:

> "No such instrument in writing shall be valid, except as between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

A similar statute exists in Tennessee[29] and the import of the Arkansas statute is the same.[30] In both of the latter states there are decisions in which

23. As examples of typical statutes, see: Section 1186, CALIFORNIA CODE OF CIVIL PROC. (Deering, 1923); Ch. 254, Sec. 2, MASSACHUSETTS GENERAL LAWS (1921); Section 8493, MINNESOTA GENERAL STATUTES (1923); Section 8321 OHIO GENERAL CODE (Page 1926). The California statutes cited have been copied in several Western states.

24. *Munie v. Rose,* 4 Cal. 173 (1854) (But note the present California code provision, *supra* note 23); *Fletcher v. Kelly,* 88 Iowa 475, 55 N. W. 474 (1893); *Oliver v. Davy,* 34 Minn. 292, 25 N. W. 629 (1885); *Miller v. Stoddard,* 50 Minn. 272, 52 N. W. 895 (1895) (But note the present Minnesota statute, cited *supra* note 23); *Matthwig v. Mann,* 96 Wis. 213, 71 N. W. 105 (1897). See: *Bradford v. Anderson.* 60 Neb. 368, 83 N. W. 173 (1900).

25. 88 Iowa 475, 55 N. W. 474 (1893).

26. Although this seems well established as a general proposition in Iowa, cf. *Meisner v. Savings Bank,* 198 Iowa 16, 199 N. W. 414 (1924) holding that if a prior mortgage is fraudulently withheld from the record to aid the mortgagor's credit, the mechanics' lienors are entitled to priority.

27. *McLaughlin v. Green,* 48 Miss. 175 (1873). In *Thielman v. Carr,* 75 Ill. 385 (1874) and *Gause v. Const. Co.,* 188 Ill. App. 130 (1914) the court held recordation essential, the only apparent ground being the provision protecting creditors, found in the recording acts (Ch. 30, Sec. 33, ILL. REV. STATS. (Cahill).

28. 185 Mo. App. 494, 171 S. W. 681 (1914).

29. Section 3671, SHANNON'S CODE (1918).

30. Section 7381 CRAWFORD AND MOSES' DIGEST (1921).

the rule is laid down that recording is required to insure the priority of an earlier mortgage.[31] The case of *O'Neill v. Amusement Co.*[32] is the only one which goes into the problem to any extent. It is there held that a recording act making instruments void, except as between the parties, when not on record protects every one who is a stranger to the transaction, including mechanics' lienors. The court also held that the word mortgage as used in priority statutes similar to section 3163, R. S. 1929, refers only to a valid, i. e. a recorded mortgage and therefore that mechanics' lienors are protected.

In Missouri, there seems to be an entire absence of direct case authority upon this point. There seems to be what one might best term a tendency in the cases to say that recording is necessary. The only statement which approaches the proposition directly is in *Riverside Lumber Co. v. Schaefer,*[33] where the court said:

> "It is settled that at the time (the lien accrued) that the mechanics' lien had precedence over the mortgage for the reason that the appellant (lienor) began to furnish materials for the building Sept. 19, 1905, and the mortgage was placed on record October 5 of the same year."

No cases were cited for this stand and the consideration of this proposition was not essential to the disposition of the case. Nothwithstanding this dearth of direct authority, it would seem that the statute quoted above (section 3041, R. S. 1929) is broad enough to protect a mechanics' lienor and that a mortgage, unrecorded at the accrual of the lien, is inferior thereto in this state. Of course, if there is actual notice of the existence of the prior mortgage, record is not necessary under the specific terms of section 3041 as quoted above.

(f). *Priorities as to Equitable Mortgages.*

A problem which in some respects resembles the one just considered was presented in the New York case of *Payne v. Wilson.*[35] There a prior equitable mortgagee—the holder of a specifically enforceable contract to give a mortgage—was contesting with a subsequent mechanics' lienor. The

31. *Ferguson Lumber Co. v. Scriber,* 162 Ark. 349, 258 S. W. 353 (1924); *O'Neill v. Amusement Co.,* 119 Ark. 455, 178 S. W. 406 (1915); *Thomas v. Setliffe,* 28 S. W. (2d) 344 (Tenn. 1930); *Kingsport Brick Co. v. Bostwick,* 145 Tenn. 19, 235 S. W. 70 (1921); *Electric Light Co. v. Gas. Co.,* 99 Tenn. (15 Pickle) 371 (1897).

32. *Supra,* note 31.

33. 251 Mo. 539, 158 S. W. 340 (1913).

34. *United Iron Works v. Sleepy Hollow etc. Co.,* 198 Mo. App. 562, 198 S. W. 443 (1917) contains what amounts to an intimation that record is essential, but no more. The great bulk of the Missouri cases are silent upon this point.

35. 74 N. Y. 348 (1878).

equitable mortgagee was permitted to prevail on the ground that the lienor was not a bona fide taker so as to cut off prior equities. There is a dearth of additional authority upon this point, caused, no doubt, by the infrequency of attempts to enforce equitable mortgages in this country. In *Cook v. Wilson,*[36] an Arkansas case, the equitable mortgagee was postponed to the lienor, the court apparently holding that the equity, not being recorded, could not be prior to a mechanics' lien under recording statutes as interpreted in the O'Neill case above. The case of *Iowa Loan and Trust Co. v. Plewe*[37] holds that whatever equitable lien there may be between the parties, such a lien is not valid as to other lienors. In other words, an actual legal mortgage seems to be necessary in the eyes of the court. It is not within the scope of this note to go into the details of the law of equitable mortgages. Suffice it to say that these cases present the principal questions upon which priority depends. First, assuming that the equitable mortgage is valid, is the lienor a bona fide holder of a legal interest so as to cut it off? Next, is the equitable mortgage recordable? If it is not, its absence from the record is not a bar to a claim of priority. Finally, is the court going to recognize an equitable mortgage at all except as between the parties? Unfortunately, the answers, other than as shown by the decisions cited above, must be left to a more detailed study of the problem than this.

(g). *Where Mechanics' Liens Accrue Before and After the Effective Date of the Mortgage.*

This situation is one which cannot arise in Missouri, because of the terms of section 3163, R. S. 1929, which provides that all mechanics' liens on property accrue upon the commencement of the building or improvement thereon. Therefore all liens accrue at one and the same time. It has caused sufficient trouble in other states, however, to be worthy of some mention here. In a state where liens may accrue at several times, liens in favor of A and B arise. Then the owner mortgages to C and subsequently liens in favor of D and E arise. In the earlier cases upon the subject, *Choteau v. Thompson,*[38] an Ohio case, and *Crowell v. Gilmore,*[39] a California case, the rule was laid down that A and B should be preferred, then C should be taken care of, and finally that D and E should share pro rata in what remained. In neither of these states was there a statute providing for equality between lienors at the time the cases were decided. Both courts felt, however, that the principle of equality was contained in the mechanics' lien law, but further

36. 152 Ark. 590, 239 S. W. 750 (1922).
37. 202 Iowa 79, 209 N. W. 399 (1926).
38. 2 Ohio St. 114 (1853).
39. 18 Cal. 370 (1868).

felt that such principle should not go so far as to prejudice A and B by ranking them below C, or to prejudice C by ranking him below D and E, as a result of putting these liens on a parity with those of A and B. Such a result appears to be quite proper and seems to be the best way out of a rather difficult situation. Equality was provided between A and B on the one hand and D and E on the other. The difficulty that has arisen in the cases has come when there has been an express statute providing for equality of liens. There is one line of cases[40] which holds that the fullest effect that can reasonably be given to such an equality statute is to attain the result of the cases mentioned above. In other words, notwithstanding a statute providing for equality among all liens, or among all liens of certain classes, the rights of the mortgagee must be respected. Consequently A and B have been given first preference, then C his interest, and finally D and E share ratably. The courts seem properly impressed with the idea that after all A's and B's liens accrued before the mortgage and C's and D's accrued thereafter. Had there been no prior liens, D and E would have been subject to the mortgage. Consequently the equality statute should not go so far as to change substantive rights when there are two fundamentally different classes of liens.

The Supreme Court of Minnesota holds to a different view, however. In *Gardner v. Leck*[41] the position just urged was rejected and all the lienors were preferred. The court stressed the existence of the equality statute and seemed to hold that it overrode the specific provisions as to the separate accrual of the various liens. The court disapproved of the system adopted in *Finlayson v. Crooks,*[42] an earlier case in the same court, in which the amount of A's and B's claims were first set aside, then C satisfied, the remainder being added to the amount first set aside and shared in by all the lienors equally. This scheme would seem to be open to the objection expressed in the Gardner case, that it did not respect and preserve the rights of A and B. But the doctrine adopted thoroughly disregarded C's rights. If there is anything to the idea that a mortgagor should not be able to improve his mortgagee out of his security, the theory of the Gardner case seems bad. In the final analysis, there is a conflict between the equality principle on the one hand and the actual priority of the mortgage to the later liens on the other. One of the principles has to yield and it would seem best that the

40. *Pacific etc. Loan Co. v. Dubois,* 11 Idaho 319, 83 Pac. 513 (1905); *Ward v. Yarnelle,* 173 Ind. 535, 91 N. E. 7 (1910); *Henry and Coatesworth Co. v. Bond,* 37 Neb. 207, 55 N. W. 643 (1893); *Meister v. J. Meister Inc.,* 103 N. J. Eq. 78, 142 Atl. 312 (1928).

41. 52 Minn. 522, 54 N. W. 746 (1893).

42. 47 Minn. 74, 49 N. W. 398 (1891).

one giving equality should make way to protect the substantial rights of the mortgagee.

II. *Where Priority is Given the Mortgage.*

(a). *In General.*

As heretofore pointed out, the usual position taken by the courts is that a mortgage which takes effect prior to the accrual of a mechanics' lien is prior thereto.[43] But again there are many special circumstances and situations which require special treatment.

(b). *Subrogation of a Later Mortgagee to the Rights of an Earlier.*

In certain cases, a mortgage effective after the date of accrual of the lien will be preferred, notwithstanding that fact. The first case is where there has been a prior mortgage which has been discharged and the later mortgagee is given the rights of the earlier in so far as priority is concerned. Sometimes the courts refer to it as subrogation, and while that is not exactly correct, perhaps, in view of the traditional meaning of the word, it is a convenient designation for what has been done in these cases and therefore the term will be applied to that idea in the present discussion. Generally speaking, the courts are inclined to be chary of the doctrine. If the transaction creating the later mortgage is simply a renewal of a prior mortgage, or a change in form for convenience sake, given to the same party, the second mortgage is quite generally subrogated to the priorities of the first.[44] This seems to be so even though the second mortgage may be for a larger sum than the first, the subrogation, however, extending only to the sum secured by the earlier mortgage.[45] However, the strong authority of the Supreme Judical Court of Massachusetts is opposed to such a theory even in the case where a new mortgage is given to the same mortgagee, covering the same debt.[46] In the case just cited, however, the new mortgage was for a sum substantially larger than the old. It may, therefore, not be entirely opposed to the cases cited above, though the language tends to show that the court would not vary its decision if the second mortgage was merely a renewal, once the first mortgage was discharged.

When the case presents a situation where there is more than a strict renewal, or something very close thereto, the courts generally do not favor

43. See cases cited *supra,* note 11.

44. *Parker v. Tout,* 207 Cal. 590, 279 Pac. 431 (1929); *Nunemaker v. Kulhavy,* 197 Iowa 962, 196 N. W. 1009 (1924); *Capital Lumbering Co. v. Ryan,* 34 Ore. 73, 54 Pac. 1093 (1898).

45. *Parker v. Tout, supra,* note 44; *Nunemaker v. Kulhavy, supra,* note 44.

46. *Easton v. Brown,* 170 Mass. 311, 49 N. E. 433 (1898).

the doctrine. Thus it has been denied in the case of a mortgage to the same mortgagee which in fact did not amount to a renewal,[47] and in the case of a mortgage to another party, the proceeds of which, at least in part, went to satisfy the earlier mortgage.[48] The Supreme Court of Alabama, however, has allowed subrogation in this last situation.[49] It would seem that when the second mortgage is a separate and independent affair and not a real renewal of the same lien that the ordinary rules of priority should be applied and the intervening mechanics' lien preferred. The mere fact that the later mortgagee furnished funds to discharge a prior mortgage should place him in no better position than a mortgagee who supplies funds for the erection of a building, whose lien, as we have seen, is not protected on that ground alone, if his mortgage is in fact subsequent to the accrual of the mechanics' lien. Especially is this so in a state such as Missouri where the statute expressly prefers mechanics' liens to subsequently attaching mortgages. It would appear that the statute should be applied with some strictness except in very strong cases where there are substantial reasons to say that they are not within the statute. The renewal cases appear to be about the only ones where these last mentioned considerations are present.

(c). *Subsequent Purchase Money Mortgages.*

The second situation arises when the lien has accrued while the lienee has but an equity in the property. Subsequently the property is deeded to him and a mortgage for the purchase price given as a part of the same transaction. In the usual case, the subsequent purchase money mortgage is treated as prior.[50] The theory is variously expressed. Some courts lay much

47. *Badger Coal and Lbr. Co. v. Olsen,* 50 Utah 307, 167 Pac. 680 (1917).

48. *Howard v. Fisher,* 86 Colo. 493, 283 Pac. 1042 (1928); *Union Central Life Ins. Co. v. Lbr. Co.,* 51 S. D. 197, 212 N. W. 876 (1927).

49. *First Ave. Coal and Lbr. Co. v. King,* 143 Ala. 438, 69 So. 549 (1915).

50. *Wilson v. Lubke,* 176 Mo. 210, 75 S. W. 602 (1903); *Russell v. Grant,* 122 Mo. 161, 26 S. W. 958 (1894); *Steininger v. Raeman,* 28 Mo. App. 594 (1888); *Birmingham B. & L. Ass'n v. Boggs,* 116 Ala. 587, 22 So. 852 (1897); *Weinstein v. Brick Co.,* 91 Conn. 165, 99 Atl. 488 (1916); *Hillhouse v. Pratt,* 74 Conn. 113, 49 Atl. 905 (1901); *Middleton Sav. Bank v. Fellowes,* 42 Conn. 36 (1875); *Thorpe v. Durham,* 45 Iowa 192 (1876); *Bond v. Westine,* 128 Kan. 370, 278 Pac. 12 (1929); *Mo. Valley Lbr. Co. v. Reid,* 4 Kan. App. 4, 45 Pac. 722 (1896); *U. S. B. & L. Ass'n v. Thompson,* 19 Ky. Law 424, 41 S. W. 5 (1897); *Saunders v. Bennett,* 160 Mass. 48, 35 N. E. 111 (1893); *Perkins v. Davis,* 120 Mass. 408 (1876); *Thaxter v. Williams,* 31 Mass (14 Pick.) 49 (1833); *Moody v. Tschabold,* 52 Minn 51, 53 N. W. 1023 (1892); *Oliver v. Davy,* 34 Minn. 292, 25 N. W. 629 (1885); *Franklin Soc. v. Thornton,* 85 N. J. Eq. 525, 96 Atl. (1915); *N. J. Bldg. etc. Co. v. Bachelor,* 54 N. J. Eq. 600, 35 Atl. 745 (1896); *Gibbs v. Grant,* 29 N. J. Eq. 419 ((1878); *Lamb v. Cannon,* 38 N. J. L. 362 (1876); *Strong v. Van. Duersen,* 23 N. J. Eq. 369 (1871); *Golner v. Bede,* 11 Ohio App. 137 (1919); *Pac. Spruce Co. v. Cement Co.,* 286 Pac. 520, 289 Pac. 486 (Ore. 1930); *Campbell and Pharo's Appeal,* 36 Pa. St. 247 (1860). See *Western Tie etc. Co. v. Campbell,* 193 Ark.

stress upon the idea that the grantee-mortgagee has but an instantaneous seisin in fee, which is not enough for the mechanics' lien to attach to. Others say the vendor's rights are substantially the same after the transaction as before, there being a change in form alone. The idea which the courts seem to be attempting to convey is that the net result of the transaction is to give the grantee-mortgagor a mortgagor's interest in the property and nothing more. This seems quite proper. Whether the lien can attach to the equity of a purchaser under a land contract is of no importance here.[51] If it cannot, after the transaction there is nothing greater than a mortgagor's interest for the lien to attach to. If, on the other hand, the lien can attach to the equity, it will not be allowed to expand and cover the fee when, after all, all the grantee-mortgagor got out of the transaction was an equity of redemption.

The Supreme Court of Kansas in the case of *Thomas v. Hoge*[52] seemed to deny the validity of the doctrine just set out as applied to a mortgage to other than the vendor. But the general attitude of the courts, including those in Missouri, is that the mere fact that the mortgage is given to a third party makes no difference if in fact the mortgage is an integral part of the same transaction which passes title to the grantee-mortgagor.[53] This is apparently the view of the Kansas courts today.[54] If the mortgage is not a part of the same transaction, however, but is entirely separate, it is held that the

570, 169 S. W. 253 (1914). Cf. *Wendler v. Lambeth,* 163 Mo. 428, 63 S. W. 684 (1901); *Rogers v. Tucker,* 94 Mo. 306, 7 S. W. 414 (1887); *Elsberry v. Trust Co.,* 220 Mo. App. 239, 282 S. W. 1054 (1926). In *Franklin Soc. v. Thornton, supra,* the purchase money mortgage was treated as prior to the mechanics' lien in all respects, the court holding that it was the first of the two liens to attach to interest of the grantee upon the transfer of the title to him.

Due to the peculiar statute in Georgia (Sections 3352-3, GEORGIA CODE, Michie, 1926), purchase money mortgages are held to be inferior to mechanics' liens. See: *Bradley v. Cassells,* 117 Ga. 517, 43 S. E. 857 (1903); *Tanner v. Bell,* 61 Ga. 584 (1878); *Baisden & Co. v. Holmes-Harisfield Co.* 4 Ga. App. 122, 60 S. E. 1031 (1908).

The case of *Hardy v. Frey,* 49 Cal. App. 551, 196 Pac. 82 (1920) presents an excellent set of facts for the application of the usual doctrine of purchase money mortgages, but the court apparently did not even consider it.

51. As tending to show that liens may attach to a purchaser's equity, see: *Lumber Co. v. Clark,* 172 Mo. 588, 73 S. W. 137 (1903); *O'Leary v. Roe,* 45 Mo. App. 567 (1891); *Jodd v. Duncan,* 9 Mo. App. 417 (1880).

52. 58 Kan. 166, 48 Pac. 844 (1897).

53. *Russell v. Grant, supra,* note 50; *Steininger v. Raeman, supra,* note 50; *Birmingham B. & L. Ass'n v. Boggs, supra,* note 50; *Middletown Savings Bank v. Fellowes, supra,* note 50; *Bond v. Westine, supra,* note 50; *N. J. Bldg. etc. Co. v .Bachelor, supra,* note 50; *Campbell and Pharo's Appeal, supra,* note 50.

54. *Bond v. Westine, supra,* note 50.

ordinary priority rules apply and that the liens take precedence.[55] The same result is obtained where for some reason or other the vendor's interest has been subjugated to the lien prior to the passage of the title and the giving of the mortgage.[56] In such a case, the vendor can gain nothing by the transaction. The same rule has been applied where the mortgagee is a third party,[57] upon the idea that his rights are no better than the vendor's. The explanation is apparently that the mortgagee gets his rights to priority by subrogation to the vendor, and if the vendor has no rights as against the lienor, there is nothing to be subrogated to. Such a theory may be subject to some question, but the result seems proper, for if the entire title to the property, including the interest of the vendor, is subject to the lien, the mortgagee can hardly be permitted to take free and clear of it, absent any reason to estop the lienor from claiming as against him.

It has been urged in at least one case that the requirement of recording should postpone purchase money mortgages to prior accruing mechanics' liens. In *Rochford v. Rochford*[58], a Massachusetts case, the idea was rejected, at least if the mortgage was recorded as soon as the deed, or very shortly thereafter. This seems quite proper, as the fact that there is not record title in the lienee on the accrual of the lien should be notice of any and all infirmities thereafter appearing. If the deed is recorded and the mortgage is not, when the lien accrues, and record is necssary, it would seem quite proper to hold that the lien ranks the mortgage.[59] But this is clearly distinguishable from the case where both deed and mortgage are subsequent in time to the lien, which is the principal situation under discussion.

Suppose the mortgage given by the grantee as part of the same transaction by which he obtained title is for a larger sum than the purchase price alone. In such a case, the Missouri court, in *Wilson v. Lubke,*[60] apparently held that the priority extended to all the money advanced. There is author-

55. *Welmore v. Marsh,* 81 Iowa 677, 47 N. W. 1021 (1891); *Osborne v. Barnes,* 179 Mass. 597, 61 N. E. 276 (1901); *Ansley v. Pasahro,* 22 Neb. 662, 35 N. W. 885 (1888); *Schultze v. Alamo etc. Co.,* 2 Tex. Civ. App. 236, 21 S. W. 160 (1893).

56. *Avery v. Clark,* 87 Cal. 619, 25 Pac. 919 (1891); *White v. Kinsella,* 95 Kan. 466, 148 Pac. 607 (1915); *Shearer v. Wilder,* 56 Kan. 252, 43 Pac. 224 (1896); *Carew v. Stubbs,* 155 Mass. 549, 30 N. E. 219 (1892); *McCausland v. Land Co.,* 51 Minn. 246, 53 N. W. 464 (1892); *Haupt Lbr. Co. v. Westman,* 19 Minn. 397, 52 N. W. 33 (1892); *Kittridge v. Neumann,* 26 N. J. Eq. 195 (1875); *Eastern and Western Lbr. Co. v. Williams,* 276 Pac. 257 (Ore. 1929); *Schram v. Manary,* 123 Ore. 354, 260 Pac. 214 (1927); *Mutual S. & L. Ass'n v. Johnson,* 279 Pac. 108 (Wash. 1929). Cf. *Botsford v. R. R.,* 41 Conn. 454 (1874); *Everest v. Lbr. Co.,* 60 Okla. 171, 159 Pac. 910 (1916).

57. *Finlayson v. Crooks,* 47 Minn. 74, 49 N. W. 398 (1891).

58. 188 Mass. 108, 74 N. E. 291 (1905).

59. *Thomas v. Setliffe,* 28 S. W. (2d) 344 (Tenn. 1930).

60. 176 Mo. 210, 75 S. W. 602 (1903).

ity contra, holding that the priority extends to the part representing the purchase price, and no farther.[61] Although in a sense the property comes to the purchaser charged with the full amount of the mortgage, which seems to be the basis of the Missouri decision, after all, it does seem somewhat hard upon the lienors to apply the doctrine to the surplus over and above the amount used to meet the purchase price. It seems quite correct to say that the purchaser would get nothing for the lien to attach to but for the part of the mortgage representing the purchase price, but such considerations are not present in the case of money advanced for other purposes. Although the Missouri decision is sustainable, as pointed out, it does not seem to be the most desirable result.

Similar considerations intervene when there is another mortgage given as part of the deed transaction, as well as the purchase money mortgage. The general holding seems to be that priority over mechanics' liens accruing at an earlier date is reserved to the purchase money mortgage alone and that the other mortgagee must permit the liens to come in first.[62] But if the other mortgage is contemplated from the first and mentioned in the land contract, it has been held that both mortgages are to be preferred.[63] In this latter case, it can be said that it is contemplated that the title should come to the purchaser charged with the liens of both mortgages. This general problem resembles that mentioned in the last paragraph. It can be said in any case that the only interest the mortgagor ever acquires is subject to both mortgages. However, it seems that the rule of the cases is not unjust, and from a practical standpoint it seems preferable. The mechanics' liens having already accrued, there must be some notice to such a mortgagee that liens may attach. He is in no worse shape than the ordinary mortgagee taking after accrual of liens. The considerations which present themselves for favoring the purchase money mortgagee are almost entirely absent when it comes to a mortgage of this character. Of course, it seems quite proper to hold that where such mortgage is specifically provided for in the land contract, that it should take priority with the purchase money lien. In such a case it can well be said that the mortgagee acquires substantial rights as of the date of the contract which are not present in the other case. The difference is not great, but it appears substantial.

61. *Bond v. Westine,* 128 Kan. 370, 278 Pac. 12 (1929); *N. J. Bldg. etc. Co. v. Bachelor,* 54 N. J. Eq. 600, 35 Atl. 745 (1896).

62. *Malmgren v. Phinney,* 50 Minn. 457, 52 N. W. 915 (1892); *Ohio Sav. Ass'n v. Bell,* 25 Ohio App. 84, 158 N. E. 548 (1926).

63. *Magnesite Products Co. v. Binsmiller,* 207 Iowa 1303, 224 N. W. 514 (1929); *Getto v. Friend,* 46 Kan. 24, 26 Pac. 473 (1891); *Mackintosh v. Thurston,* 25 N. J. Eq. 242 (1874).

(d). *Mortgages for Future Advances.*

The next question to be considered involves the problem of prior mortgages for future advances. If the advances are obligatory on the mortgagee it is, for all practical purposes, just as if the money were advanced at the time of the execution of the mortgage and the mortgage takes priority from the date of execution or record as the case may be.[64] There are a few cases, in which the facts are not clear, which appear to cover all advance money mortgages and which seem to hold that all such mortgages date from execution or record.[65] But as a matter of fact, in so far as the facts of the cases can be ascertained, they all involve obligatory advances, and therefore are not authority for more than the proposition already advanced.

When the advances are optional with the mortgagee, on the other hand, the cases quite uniformly allow priority only to the extent of advances actually made at the time of the accrual of the lien, or when notice of the lien is given to the mortgagee.[66] In the case of a mortgage to secure a bond issue, the bonds being sold after the date of the mortgage, the rule is to give prior-

64. *Smith v. Trust Co.*, 205 Cal. 496, 271 Pac. 878 (1928); *Fickling v. Jackman*, 203 Cal. 658, 265 Pac. 810 (1928); *Valley Lbr. Co. v. Wright*, 2 Cal. App. 288, 84 Pac. 58 (1905); *Boise Payette Lbr. Co. v. Winward*, 276 Pac. 971 (Idaho, 1929); *Whelen v. Exchange Trust Co.*, 214 Mass. 121, 100 N. E. 1095 (1913); *Erickson v. Ireland*, 134 Minn. 156, 158 N. W. 918 (1916); *Platt v. Griffiths*, 27 N. J. Eq. 207 (1876); *Taylor v. LaBar*, 25 N. J. Eq. 222 (1874); *Blackmar v. Sharpe*, 23 R. I. 412, 50 Atl. 852 (1901); *Kingsport Brick Co. v. Bostwick*, 145 Tenn. 19, 235 S. W. 70 (1921). See: *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398 (1891). Cf. *Picklesimer v. Smith*, 164 Ga. 600, 139 S. E. 72 (1927); *Peaslee v. Evans*, 82 N. H. 313, 133 Atl. 448 (1926). In this last case, there was a statute making mortgages for future advances void, but it was held that a mortgage providing for obligatory advances was not within the terms of this statute.

65. *Richards v. Waldron*, 20 D. C. (9 Mackey) 585 (1892); *Creigh Sons and Co. v. Jones*, 103 Neb. 706, 173 N. W. 687 (1919); *Moroney's Appeal*, 24 Pa. St. 372 (1855); *Home S. & L. Ass'n v. Burton*, 20 Wash. 688, 56 Pac. 940 (1899); *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277, 39 N. W. 588 (1888).

66. *Superior Lbr. Co. v. Nat'l Bank of Commerce*, 176 Ark. 300, 2 S. W. (2d) 1093 (1928); *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641 (1888); *S. & L. Soc. v. Barrett*, 106 Cal. 514, 39 Pac. 922 (1895); *W. A. Fuller Co. v. McClure*, 48 Cal. App. 185, 191 Pac. 1027 (1920); *Gray v. McClellan*, 214 Mass. 92, 100 N. E. 1093 (1913); *Ackerman v. Hunsicker*, 85 N. Y. 43 (1881); *Home S. & L. Ass'n v. Sullivan*, 140 Okla. 300, 284 Pac. 30 (1929). Cf. *Martsolf v. Barnwell*, 15 Kan. 612 (1875). In this case it is not exactly clear what the character of the agreement as to the advances was, but apparently it was that they were to be optional with the mortgagee. The view of the court in this case upon the accrual of mechanics' liens is worthy of note. *Allen Co. v. Emerton*, 108 Me. 221, 79 Atl. 905 (1911) where the language seems broad enough to cover obligatory as well as optional advances, but where the facts appear to present the case of optional advances.

ity as of the date of the mortgage.[67] Though not strictly a case of obligatory advances, and, in fact, much closer to the optional advance cases on the facts, strong reasons of a practical nature support this result. To require every one who buys a bond secured by a mortgage on real estate to take subject to all mechanics' liens which may have accrued up to its issuance and sale, and therefore to put each bond or group of bonds on a different level with respect to priority, is practically to destroy the market for such security. The rule as laid down seems quite in accord with the general methods of doing business and appears quite proper.

It is impossible in a discussion as limited as this to go into many questions involving the priorities of advance money mortgages. One of these is whether notice to the mortgagee who has an option to make advances is required in order that later advances should be subject to the mechanics' lien. But to consider such questions here is to go too deeply into the field of advance money mortgages and would be beyond the reasonable bounds of this discussion. To avoid such a result, the subject must be dismissed in this rather cursory fashion.

IV. *Where the Mechanics' Lien Is Given Priority Upon the Buildings and the Mortgage Upon the Land.*

(a). *In General*

The last large problem is that which involves the construction and application of statutes such as section 3159, R. S. 1929. Our statute reads:

> "The lien for the things aforesaid . . . shall attach to the buildings, erections or improvements for which they were furnished . . . in preference to any prior lien or encumbrance or mortgage on the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such buildings, erections or improvements sold under execution, and the purchaser may remove the same within a reasonable time thereafter . . ."

At various times similar statutes have been in force in other jurisdictions, so that it is not necessary to rely upon the Missouri case law alone in interpreting the statute. It should be noted, however, that some of the

67. *Clafin v. R. R.*, 8 F. 118 (C. C. S. C. 1881); *Landers etc. Co. v. Holding Co.*, 171 Minn. 445, 214 N. W. 503 (1927); *Central Trust Co v. Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595 (1894). But see: *Guaranty T. & T. Co. v. Thompson*, 113 So. 117 (Fla. 1927).

statutes vary somewhat from the one just set out, which may cause considerable difference in the results attained in the cases.

Although it has several times been urged that such a statute is unconstitutional, the uniform holding in those cases where the question has been thought worthy of discussion, is that the statute is perfectly valid.[68] The usual stand taken seems to be that there is no infringement of a vested right as a result of the operation of such a statute in that all it does is to restrict the mortgagee's security to what it was before the work was done on the improvement, etc. It is interesting to compare these views with those expressed in *Meyer v. Berlandi*,[69] heretofore noted. In the last analysis, it would seem that there is about as great an interference with vested rights in the one case as in the other. True, all that this sort of a statute does is to keep the common law rule of accession to the realty from applying as to a mechanics' lienor. But all the other statute does is to subject an interest to a defeasance upon condition. Both change the rules of the common law, under which the prior mortgagee would have a fully vested right to the land and all subsequent erections thereon. It seems that if one statute is bad, the other should be also. This presents a very interesting question, but this discussion is too long now without devolution into the field of Constitutional Law, so that this aspect of the statute must be dismissed with this mention.

Generally speaking, the statute, where in force, is received with some favor and applied with considerable liberality, at least where there is a separate building or erection upon which the lien is claimed.[70] Nothwithstanding this general tendency, the rule is such a departure from the ordinary, that the courts will not adopt it without specific statutory authority.[71]

68. *Wimberly v. Mayberry*, 94 Ala. 240, 10 So. 157 (1891); *Stockwell v. Carpenter*, 27 Iowa 119 (1869); *Newark Lime etc. Co. v. Morrison*, 13 N. J. Eq. 133 (1860).

69. 39 Minn. 438, 40 N. W. 513, *supra*, note 15.

70. *Wilson v. Lubke*, 176 Mo. 210, 75 S. W. 602 (1903); *Lumber Co. v. Clark*, 172 Mo. 588, 73 S. W. 137 (1903); *Crandall v. Cooper*, 62 Mo. 478 (1876); *Nold v. Ozenberger*, 152 Mo. App. 439, 153 S. W. 349 (1911); *McAdow v. Sturtevant*, 41 Mo. App. 220 (1890); *Chauncey v. Dyke Bros.*, 55 C. C. A. 519, 119 F. 1 (Ark. 1902); *Vesuvius Lbr. Co. v. Ala. Mtge. etc. Co.*, 203 Ala. 93, 82 So. 107 (1919); *Turner v. Robbins*, 78 Ala. 592 (1885); *Jarvis v. State Bank*, 22 Colo. 309, 45 Pac. 505 (1886); *B. & L. Ass'n v. Coburn*, 150 Ind. 684, 50 N. E. 885 (1898); *Carriger v. Mackey*, 15 Ind. App. 392, 44 N. E. 266 (1896); *McLaughlin v. Green*, 48 Miss. 175 (1873); *Otley v. Haviland*, 36 Miss. 19 (1858); *Laird-Norton Co. v. Herker*, 6 S. D. 509, 62 N. W. 104 (1895). See: *Louis v. Theatorium Co.*, 69 Mont. 50, 222 Pac. 1062 (1923). Cf. *Hicks v. Scofield*, 121 Mo. 381, 25 S. W. 955 (1894); *Joralmon v. McPhee*, 31 Colo. 26, 91 Pac. 419 (1903).

71. *United Iron Works v. Sleepy Hollow etc. Co.*, 198 Mo. App. 562, 198 S. W. 443 (1917); *Woolridge v. Torgrimson*, 229 N. W. 805 (N. D. 1930); *Inverarity v. Stowell*, 10 Ore. 261 (1882).

(b). *Application of the Statute*

The interpretation adopted by most courts is that when the statute speaks of improvements, etc., what is meant is a separate building or structure and not mere improvements or repairs to an existing structure. But a great deal of confusion exists, the rules being different in the different states. To get the whole picture, it would seem to be necessary to go through the decisions by states. That method will be here adopted.

In Missouri, the rule is clear that a separate and distinct building or erection is required and the lien is not prior when simply for repairs, etc.[72] Work done toward completion of a building in the course of erection when the mortgage was given, but on which work had completely stopped at that time is not work on such a separate improvement as to justify the statutory priority.[73] In this connection, it is interesting to compare *Atkinson v. Colorado Title and Trust Co.*[74] where it was held that work done on an uncompleted structure on which construction was stopped at the date of the mortgage was work done on an "entire structure," that being the term used in the Colorado statute.

In this state a judgment for a severance and a separate sale will be ordered no matter if the building is reasonably capable of severance or not.[75] Furthermore severance seems to be regarded as the sole and exclusive method of enforcement of the statutory priority, at least before maturity of the obligation secured by the mortgage.[76]

In Iowa, prior to 1875, the statute was almost identical with that now in force in Missouri. While it was in force, the rule was that the lien was prior only in the case of a separate improvement, i. e. more than mere repairs or improvements to an old structure, and that the statutory remedy of removal was the only one given.[77]. No allowance was made for any system of pro-rating the proceeds of a sale between the mortgagee and the lienor. Since 1875, a pro rata scheme, covering certain cases, has been in effect due

72. *Engineering Co. v. Baker,* 134 Mo. App. 95, 114 S. W. 71 (1908); *Reed v. Lambertson,* 53 Mo. App. 76 (1893); *Dugan v. Scott,* 37 Mo. App. 663 (1889); *Hall v. Mfg. Co.,* 22 Mo. App. 33 (1886) (same case *sub nomine Hall v. Planing Mill Co.,* 16 Mo. App. 454 (1885); *Haeussler v. Thomas,* 4 Mo. App. 463 (1877).

73. *Stumbaugh v. Hall,* 30 S. W. (2d) 160 (Mo. App. 1930); *May v. Mode,* 142 Mo. App. 656, 123 S. W. 523 (1909).

74. 59 Colo. 528, 151 Pac. 457 (1915).

75. *Ambrose Mfg. Co. v. Gapen,* 22 Mo. App. 397 (1886).

76. *Gold Lumber Co. v. Baker,* 36 S. W. (2d) 130 (Mo. App. 1931). But cf. *Smith v. Phelps,* 63 Mo. 585 (1876); *Ambrose Mfg. Co. v. Gapen, supra,* note 75.

77. *Conrad v. Starr,* 50 Iowa 470 (1879); *O'Brien v. Pettis,* 42 Iowa 293 (1875); *Getchell v. Allen,* 34 Iowa 559 (1872). See: *Tower v. Moore,* 104 Iowa 345, 73 N. W. 823 (1898).

to a statutory change.[78] The case of *James River Lumber Co. v. Dennis,*[79] decided in North Dakota, while a similar statute was in force, is in accord with the Missouri and earlier Iowa view.

In Arkansas, the rule appears to be much the same, for in *Imboden v. Citizens' Bank*[80] the court held that repairs, etc., were not covered by the terms of such a statute and also that severance was the only remedy, at least where the building is reasonably severable. What the rule would be on a showing that the building is not reasonably severable is not clear.

In Montana, as in Missouri, a decree for severance will be given, no matter if the building be so constructed as not to be capable of satisfactory removal.[81] But the improvement must be capable of some sort of severance. Thus the digging of a shaft for a mine is not such an improvement as will justify the application of the priority statute.[82] There is an intimation in this last case that some sort of severance is the sole remedy and that any system of prorating will not be allowed.

In Indiana the priority applies only to work upon separate and distinct erections, etc., but apparently the courts do not feel that severance and removal is the sole remedy. Thus in *Ward v. Yarnelle*[83] a sale was ordered and the proceeds prorated, though the court insisted that the lien be claimed upon a separate structure in order for the special priority statute to operate.

In Virginia, a somewhat similar result is attained as a result of the statutes. The statutory division is not exactly prorating, but is similar thereto. Apparently the rule is that the priority applies only to those cases where there is a separate building or improvement for which the lien is claimed.[84] There is no provision for separate sale at all in the Virginia statute.

Statutes in force in Illinois also provide for a pro rata basis of distribution and apply as well to repairs, etc., as to separate and distinct improve-

78. Section 6516, IOWA CODE (1919); *Green v. Sexton,* 196 Iowa 1086, 196 N. W. 27 (1923); *Tower v. Moore, supra,* note 77; *Kiene v. Hodge,* 90 Iowa 212, 57 N. W. 717 (1894); *Miller v. Seal,* 71 Iowa 392, 32 N. W. 391 (1887); *Carter v. Broadwell,* 66 Iowa 662, 24 N. W. 265 (1885); *German Bank v. Schloth,* 59 Iowa 316, 13 N. W. 314 (1882). Cf. *Sheperdson Bros. v. Johnson,* 60 Iowa 239, 14 N. W. 302 (1882).

79. 3 N. D. 470, 57 N. W. 343 (1893).

80. 163 Ark. 615, 260 S. W. 734 (1924).

81. *Grand Opera House Co. v. McGuire,* 14 Mont. 558, 37 Pac. 607 (1894).

82. *Johnson v. Mining and Milling Co.,* 19 Mont. 30, 47 Pac. 337 (1896).

83. 173 Ind. 535, 91 N. E. 7 (1910).

84. Section 6436, VA. CODE (1919); *Rust v. Indiana Flooring Co.,* 145 S. E. 321 (Va. 1928); *Fidelity L. & T. Co. v. Dennis,* 93 Va. 504, 25 S. E. 546 (1896).

ments. Here again there is no provison for severance and separate sale of the improvements.[85]

By section 10193, Oregon Laws, repairs and similar improvements are specifically included in the rule as to priorities. Though the statute specifically mentions a right of severance and removal, there is at least an intimation in the case of *Allen v. Rowe*[86] that the remedy is not exclusive, but that in a propr case there can be some sort of an adjustment by a sale and a pro rata distribution of the proceeds. The case mentioned is not directly in point, but does present a similar situation, and so may be considered as some authority on the proposition with which we are concerned.

The problem has been particularly perplexing in the states of Alabama and Texas. The leading case in the former state is *Wimberly v. Mayberry,*[87] which is frequently cited in the cases on this problem from other jurisdictions In Alabama the statute at the time of this decision specifically covered repairs as well as separate improvements, and though the wording of the statute has been changed somewhat since then, upon revision of the statutes, the rule is apparently the same today.[88] The Wimberly case held that in the case of repairs, the lienor could come into equity and have a sale of the property ordered, even though the prior mortgage on the property was not yet due, the mortgagee sharing in the proceeds upon a pro rata basis. The lienor's share is determined by the amount that the value of the premises was increased by the repairs, etc. This result was attacked and the problem reconsidered in a good many later cases in this state. While there has been some tendency to criticize the Wimberly case, the rule has never been seriously departed from.[89] The question of an improvement which is separate and amounts to more than repairs has not been considered from this angle in a very satisfactory fashion. There is a good deal of language which would tend to show that the sole remedy is by way of removal where there is a separate and distinct erection. Thus in *Pilcher v. E. R. Porter Co.,*[90] the court takes up the case of a separate erection, where the

85. Ch. 82, Sec. 16, ILL. REV. STAT. (Cahill); *Bradley v. Simpson,* 93 Ill. 93 (1879); *Croskey v. Mfg. Co.,* 48 Ill. 481 (1868); *Smith v. Moore,* 26 Ill. 392 (1861); *Gaty v. Casey,* 15 Ill. 189 (1853); *Abhau v. Grassie,* 191 Ill. App. 579 (1915).

86. 19 Ore. 188, 23 Pac. 701 (1890).

87. 94 Ala. 240, 10 So. 108 (1891).

88. See: *Magnolia Land Co. v. Malone Inv. Co.,* 202 Ala. 157, 79 So. 641 (1918); *Jefferson County, etc. Bank v. Barbour,* 191 Ala. 238, 68 So. 43 (1915).

89. *Becker Roofing Co. v. Wysinger,* 220 Ala. 276, 124 So. 858 (1929); *Pilcher v. E. R. Porter Co.*, 208 Ala. 202, 94 So. 72 (1922); *Magnolia Land Co. v. Malone Inv. Co., supra,* note 88; *First Ave. Coal and Lbr. Co. v. King,* 193 Ala. 438, 69 So. 549 (1915); *Jefferson County etc. Bank v. Barbour, supra,* note 88; *Climax Lbr. Co. v. Bay City Machine Works,* 163 Ala. 654, 50 So. 935 (1909).

90. *Supra,* note 89.

remedy is removal, and contrasts it with the case of repairs, etc., where the remedy is a sale and prorating of the proceeds. Considerable distinction is drawn between the case where the lien is claimed for a new structure and when claimed for repairs. In so far as the writer has been able to find, it does not appear that relief other than a severance and removal has ever been asked for in the case of a new erection in this state. The language of the cases would tend to show, however, that such remedy is exclusive.

The Texas cases are in great confusion. There the statute is almost identical with ours, but the courts never seem to have seen fit to restrict its operation to separate buildings, etc.[91] There are two lines of cases on the point, the one holding that the sole remedy of the lienor is to remove the impsovement, and if it be not separable, that the lien priority is gone,[92] the other holding that an equitable decree ordering sale and adjusting priorities on a pro rata basis is proper.[93] As a matter of fact, the cases in the first group are all cases where in fact the improvements were but repairs, etc., while in the latter group of cases, the improvements were separate erections. The cases in one group were never referred to in considering the other until in *Morrison v. State Trust Co.*[94] one of the courts of civil appeals reviewed all the cases. There they were distinguished on the basis that the cases allowing a sale and a pro rata division of the proceeds were all cases where the lienor put in evidence facts tending to show the comparative value of the premises before and after the work was done. The court seemed to say that absent such a showing, the improvement must in fact be separable in order for the lienor to obtain priority. The distinction pointed out, upon the facts, was rejected by the court. This would seem to be an explanation for the cases, though one not considered in the decisions, as far as can be discovered. This case did a good deal to clear up the situation in that it at least recognized the existence of two lines of authority, but unfortunately it was reversed on writ of error on another ground.[95] Consequently its value is doubtful, to

91. See for instance, *Morrison v. State Trust Co.*, 274 S. W. 341 (Tex. Civ. App. 1925). Also cases cited *infra*, note 92.

92. *Vaughan Lumber Co. v. Martin*, 98 Tex. 80, 81 S. W. 1 (1904); same case, *sub nomine Martin v. Texas Briquette etc. Co.*, 77 S. W. 651 (Tex. Civ. App. 1903); *McCallen v. Mogul P. & R. Co.* 257 S. W. 918 (Tex. Civ. App. 1923); *Mogul P. & R. Co. v. Pump Co.*, 244 S. W. 213 (Tex. Civ. App. 1922); *Quinn v. Dickinson*, 146 S. W. 993 (Tex. Civ. App. 1912); *Watson v. Markham*, 33 Tex. Civ. App. 476, 77 S. W. 650 (1903); *Citizens' Natl. Bank v. Strauss*, 29 Tex. Civ. App. 407, 69 S. W. 86.

93. *Land Mortgage Bank v. Quanah Hotel Co.*, 89 Tex. 332, 34 S. W. 730 (1896); *Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160 (1898); *Morrison v. State Trust Co., supra*, note 91.

94. *Supra*, note 91.

95. *State Trust Co. v. Morrison*, 282 S. W. 214 (Tex. Comm. App. 1926).

say the least. Naturally any attempt to deduce a rule from this state of the authorities is futile.

This completes a review of the decisions in states having priority statutes such as section 2159, R. S. 1929. It is easy to see that it is impossible to adduce any rule of general application. But before discussion any conclusions which may be drawn from these decisions, there is one more problem which ought to be considered.

This presents the application of the statute in its most extreme form. It is shown particularly in the recent case of *Lowry-Miller Lumber Co. v. Dean.*[96] The facts are these: A tract of land has a house on it and is mortgaged. The house burns, and all that is left, including the foundation, is torn down and a new house is built, using the old materials in part. These old materials were subject to the mortgage. The solution of the controversy between the lienor and mortgagee was that the lien of the mortgage was prior as to the salvage used in the new house and the lien was prior as to the new part of the house. The lienor was therefore required to pay the mortgagee for the value of the salvage and he was then given his right to remove.

There are a few other cases which should be considered in this same connection. First of all, *Schulenberg v. Hayden.*[97] There a building was only partly destroyed by fire and was rebuilt, leaving at least part of the old walls, etc., in place. Here the separate improvement rule was followed and it was held that the work done on this property did not come within that category, and therefore the mortgagee was given priority. In *Jones Lumber Co. v. Snyder*[98] and *Barton Lumber Co. v. Caraway,*[99] the opposite situation was present, i. e. the house was completely burned and rebuilt entirely out of new materials (though on the old foundation in the Jones case). Here it was held that the separate improvement rule was satisfied and so priority was given to the lienor.

Finally we have the cases of *Long v. Kissee*[100] and *Morrilton Lumber Co. v. Groom,*[101] in which old buildings on mortgaged land were torn down and new buildings erected, partly out of old materials. The Springfield Court of Appeals and the Supreme Court of Arkansas both gave priority to the mortgage. The Arkansas court added to the separate improvement rule the qualification that the new improvement must be built entirely out of materials not covered by the mortgage. The Long case was decided on the

96. 29 S. W. (2d) 736 (Mo. App. 1930).
97. 146 Mo. 583, 48 S. W. 472 (1898).
98. 221 Mo. App. 1227, 300 S. W. 850 (1927).
99. 178 Ark. 1034, 13 S. W. (2d) 586 (1929).
100. 24 S. W. (2d) 693 (Mo. App. 1930).
101. 176 Ark. 520, 3 S. W. (2d) 293 (1928).

basis that if the lumber in the building torn down remained subject to the mortgage, the rule of the Schulenberg case applied. The Kansas City Court of Appeals in the Dean case recognized the interest of the mortgagee in the lumber that remained of the old house, but attempted to steer a middle course.

These cases tend to show the strictness with which the Missouri courts apply the statute. Of course, it is a very unworkable sort of thing at best. But it is on the statute books and must be given some effect. On the other hand, the rights of the mortgagee, who is really a prior lienholder must be considered and respected. In the long run, a result such as that obtained in the Dean case is probably the best that can be obtained. In that case the property could not be sold and the proceeds prorated, even if our courts permitted such a result, as the mortgage had already been foreclosed before suit was brought to enforce the mechanics' lien. Granting that the Schulenberg case is correct—that is, that the separate improvement rule is right—the Long and Green cases even then do not seem proper, and it seems to the writer that the Dean case could well have been decided giving the materialman full priority on the building. It is true that the mortgagee's lien properly ought to cover the materials taken from the old building. But so also does such lien cover new materials which are paid for upon the doctrine of accession. In such a case, the mortgage lien may well attach before the materials are used in the building. Yet it has never been urged that this should give the mortgagee priority. The difference between the cases does not seem to be enough on which to base a distinction. The lienor has worked on or furnished material toward the erection of a new and separate building. Therefore, it would seem quite reasonable to say that the lien should be prior as to the whole improvement. At least an attempt should be made to strike a balance as in the Dean case. That does not do violence to the rule of the Schulenberg case as to separate improvements, because here there is a separate improvement, in no very great degree distinguishable from an entirely new building built of materials partly paid for.

Before closing, it would seem worth while to discuss the possibility of a judgment ordering a sale of the entire property and a distribution of the proceeds on a pro rata basis, and the advisability of adopting such a course. As has been pointed out, this is an approved method in several states, though in no state which has a statute which reads as ours does. From many aspects, such a result would seem to be a practical solution of a very difficult and perplexing problem. But it has been expressly disapproved in Missouri, at least where the mortgage indebtedness is not yet due and payable.[102] Of course, a premature sale may prove to be a detriment to the

102. *Gold Lumber Co. v. Baker*, 36 S. W. (2d) 130 (Mo. App. 1931).

mortgagee. But to restrict the remedy to severance is to destroy the priority of the lien in the case of erections of a permanent character. Perhaps the statute giving such priority is unwise. But it is upon the books, and the effectiveness of it should not seem to depend on the character of structure erected, which is the practical result of the present state of the law. Furthermore, removal may do far greater harm to the mortgagee than a sale of the property as a whole and a pro rata distribution of the proceeds.

The one case directly in point in Missouri assigns as one of the principal reasons for refusing a sale and prorating, the fact that the note secured by the mortgage was not yet due and that a sale would prejudice the rights of the mortgagee by cutting the time of his loan. It may be that this case would not be a barrier to a pro rata distribution when the mortgage debt is due and payable. However, much of the language of the decision is used to demonstrate that there is no such remedy at all in the Missouri system. Therefore it would seem to be some authority to the effect that this method of procedure is proper under no circumstances.

There are many more interesting problems which arise in connection with the questions touched upon, but which cannot be treated here. The main purpose of the present discussion has been to present the chief problems which are developed in the cases and to attempt to present some fairly workable and consistent solutions. No attempt has been made to the consistent or even logical. Consistency and logic are virtually impossible in a branch of the law which is based so largely upon statutes as the one under discussion is. Practical considerations seem the most important. For these reasons here must of necessity be many anomalous situations and a well ordered and consistent presentation of the subject is an impossibility.

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