Missouri Law Review

Volume 26
Issue 1 *January 1961*

Article 10

1961

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Recommended Citation

Donald E. Chaney, *Missouri Mechanics' Lien Statute--Is It Adequate, The* , 26 Mo. L. Rev. (1961)
Available at: https://scholarship.law.missouri.edu/mlr/vol26/iss1/10

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the *Ferriss* case? As to churches, such ordinances are not restrictive of the right to practice a particular religion but merely restrict the right of a church to build in a certain area and due to the obvious effect on property values, traffic, noise, and the like, the exercise of the zoning power appears to be proper. This construction can be easily extended to most other uses that fall within the class of quasi-public uses. Perhaps the better reasoned cases should support the validity of comprehensive zoning ordinances, establishing private residential districts, when churches or other quasi-public users seek admittance to an area so zoned.[46]

EVERETT A. OLSON, JR.

THE MISSOURI MECHANICS' LIEN STATUTE—IS IT ADEQUATE?

The mechanics' lien is a creation of statute; it is a device not recognized at common law.[1] The purpose of the mechanics' lien statutes is to create a lien favoring laborers and materialmen upon premises where benefit has been received by the owner through an increase in the property's value or an improvement in its condition because of the furnishing of labor and materials.[2] Without such a statutory provision, a materialman or laborer would merely be a general creditor of the owner, contractor, or subcontractor, as the case may be. According to some authorities the theory of these statutes is that the owner shall not be unjustly enriched at the expense of the laborer and materialman who ordinarily fail to provide by agreement for security for their own protection.[3]

Generally in the United States there are two classes of statutes creating mechanics' liens: (1) the New York system by which the right of laborers and materialmen depends upon and is limited by the existence of a debt due from the owner to the contractor—a derivative type lien;[4] and (2) the Pennsylvania system which gives a direct lien, sometimes said to have resulted from an agency created by statute and sometimes from an implied agency vested in the original contractor.[5] Missouri's statutes[6] fit more into the Pennsylvania system of a direct type lien. This distinction is important to note, because the result in a particular case may depend upon which theory the legislature has embodied in its particular statute.

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46. Church of Jesus Christ v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823 (Dist. Ct. App.), *appeal dismissed,* 338 U.S. 805 (1949).

1. Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128 (1891).
2. Colp v. First Baptist Church, 341 Ill. 73, 173 N.E. 67 (1930).
3. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1 (1920).
4. Baker Sand & Gravel Co. v. Rogers Plumbing & Heating Co., 228 Ala. 612, 154 So. 591 (1934); Rowley v. Salladin, 139 Conn. 642, 96 A.2d 219 (1953); Tice v. Moore, 82 Conn. 244, 73 Atl. 133 (1909); James B. Clow & Sons v. Goldstein, 147 Ill. App. 571 (1909); 4 AMERICAN LAW OF PROPERTY § 16.106F, notes 16-20 (1952); 3 TIFFANY, REAL PROPERTY § 669 (2d ed. 1920).
5. Tice v. Moore, *supra* note 4; Prince v. Neal-Millard Co., 124 Ga. 884, 53 S.E. 761 (1906); PHILLIPS, MECHANICS' LIENS § 57 (3rd ed. 1893).
6. §§ 429.010, .100, RSMo 1949.

One of the major problems of title examiners arising under the mechanics' lien laws, and one not expressly covered by the Missouri statute, is that of secondary payments by contractors to materialmen or subcontractors. This problem manifested itself in the case of *Herrman v. Daffin*,[7] where defendant owner, O, paid his contractor, C, the balance due on the construction cost of a home. C in turn paid a part of this money to plaintiff materialman, M. C was indebted to M for materials furnished on earlier jobs. M applied this payment to the older debts and then filed suit to foreclose a mechanic's lien on O's house. When O paid C he did not specify in any way that his payment was to be applied by C to the discharge of any possible mechanics' liens on the house of O. When C paid M he did not specify that the payment was to be credited to the part of his debt representing materials furnished for O's house. The jury found that the payment should have been so applied by M and judgment was entered for defendant owner. On appeal, *held*, affirmed. In the appellate court the decisive question was whether or not the plaintiff, M, had knowledge of the source of payment made to him by C. It was held that M had knowledge of facts which reasonably should have caused him to know or make inquiry as to the source of payment.

According to case law there are two basic methods to handle the problem of secondary payments by the contractor to the materialman or subcontractor. In jurisdictions such as Missouri, which have a mechanics' lien statute giving materialmen and subcontractors a *direct* lien on the improved property, the general rule applicable to payments by a debtor to his creditor is sometimes applied, and it is held that the materialman has a right to make the application to other debts and retain his lien.[8] However this rule of payment is designed for the two-party situation of debtor-creditor,[9] and when it is attempted to carry this rule over to the three-party situation of an owner who has paid his debts, a debtor-contractor, and a creditor-materialman, the courts tend to avoid the application of this payment rule.[10] Thus in the *Herrman* case the creditor-materialman was denied the right to apply the payment from his debtor-contractor to debts other than those incurred for the materials furnished to construct the owner's house, on the knowledge of source theory:

> The general rule in regard to application of payments is that the debtor has the right to specify the account to which the payment will be applied. If the debtor fails to specify, the creditor may make the application; and if neither debtor nor creditor exercise his prerogative, then the law will make the application as right and justice requires, usually to the credit of the oldest unsecured account. This general rule is applicable to payments made by a contractor to a materialman, but it is subject to the qualification that

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7. 302 S.W.2d 313 (Spr. Ct. App. 1957); noted, Esely, *Mechanic's Lien—Missouri—Application of Contractor's Payments by Materialman Where Source of Money Should Be Known*, 24 Mo. L. REV. 387 (1959).

8. Bounds v. Nuttle, 181 Md. 400, 30 A.2d 263 (Ct. App. 1943); Gourley v. Iverson Tool Co., 186 S.W.2d 726 (Tex. Civ. App. 1945).

9. Williams v. Willingham-Tift Lumber Co., 5 Ga. App. 533, 63 S.E. 584 (1909).

10. Williams v. Willingham-Tift Lumber Co., *supra* note 9; Herrman v. Daffin, *supra* note 7.

> if the materialman creditor knows or is chargeable with knowledge of the source of such payment, then (the majority rule is) it becomes the duty of the materialman to make the application in such manner and to such items as will give credit to and protect the rights of the person so supplying the credit.[11]

Another way for a court in a direct lien type state to avoid the debtor-creditor rule is to rely on a waiver theory. Thus in the Georgia case of *Williams v. Willingham-Tift Lumber Co.*,[12] the materialman furnished a contractor materials for the improvement of property belonging to different persons with knowledge of the separate contracts, and the contractor paid the owners' money to the materialman from time to time on account of materials so furnished. It was held to be incumbent upon the materialman to keep separate accounts, and to find out from the contractor on what contract the money was paid and to what account it should be applied. If he does not do so, but rather applies the money as a credit on a general account against the contractor, the materialman thereby *waives* his right to a lien on the owners' property, and must look alone to the contractor for payment. The court's reasons for this holding were stated as follows:

> What is here held is not in conflict with the general rule of law that a creditor has the right, in absence of directions by his debtor, to apply a payment on account to the oldest open item of the account. This is the rule as between the creditor and debtor. But, where the rights of third persons are involved, the law will make the credit according to principles of justice and equity. It will not permit the money of one man to be used in payment of the debt of another man, or declare a lien on the property of the man who has paid in full for all the material furnished to improve his property, and thus relieve from a lien the property of a man who still owes for the material that was used to improve his property.[13]

Therefore, the rule seems to boil down to this: The materialman-creditor may apply payments from the contractor-debtor to the oldest open account in the absence of instructions as to what debt the payment should be applied. However, if the rights of a third party-owner will be impaired, *the law* will make the credit as right and justice requires, usually to the account for materials supplied to the owner's project.[14]

In jurisdictions having the derivative type lien statute a different method of handling the secondary payments problem is followed, and here the problem is not so acute. In the Illinois case of *James B. Clow & Sons v. Goldstein*,[15] money re-

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11. Herrman v. Daffin, *supra* note 7, at 315, 316. This decision seems to follow 2 RESTATEMENT, CONTRACTS § 388 (1932).

12. *Supra* note 9.

13. *Supra* note 9, at 536, 63 S.E. at 585.

14. Herrman v. Daffin, *supra* note 7; Williams v. Willingham-Tift Lumber Co., *supra* note 9.

15. 147 Ill. App. 571 (1909). Ill. Laws 1895, § 22, now repealed, read as follows: "Every mechanic, workman or other person who shall in pursuance of the purposes of the original contract furnish any materials, . . . or perform services of labor for the contractor, shall be known under this act as a subcontractor, and shall have a lien for the value thereof, . . . in the same manner . . . on the same

ceived by the contractor from the owner for the purpose of purchasing materials for a job was paid to a materialman whom the contractor owed for prior jobs. The court held the materialman could not apply it to other jobs and claim a lien against the owner's property even though no direction was given as to application of the payment. The court said that it was manifest that if the materialman had been paid for the material which went into the owner's building there could be no lien, there being *no claim to support it.* The court further said that by equitable principles, the owner should not be compelled to pay the materialman more than once for goods bought by another, when no contractual relations existed between them, and no liability in law was incurred.

In the Connecticut case of *Rowley v. Salladin,*[16] the contractor was employed to construct a building on the owner's premises. The contractor abandoned the contract before it was substantially completed with no fault on the part of the owner so that nothing was due the contractor under the contract. The court held that a lien of a subcontractor for materials furnished to the contractor was not enforceable against the owner. The reason for this was that under Connecticut statute the subcontractor was subrogated to the rights of the contractor and when the contractor lost his rights by abandoning the contract with the owner, the subcontractor lost his rights also.

The effect of the derivative type statute is clear: If the owner pays the contractor and extinguishes his debts to the contractor, then the materialman or subcontractor cannot obtain a lien on the owner's property because the materialman's and subcontractor's rights are derived from those of the contractor and thus are extinguished when those of the contractor are extinguished. Theoretically the laborer's rights are the same as those of a materialman or subcontractor; practically the laborers are either paid or work ceases. Therefore the discussion to follow is directed primarily to the lien rights of the materialman and subcontractor.

The question arises as to what an owner can do to safeguard against the establishment of a mechanic's lien where his liability is determined, as in Missouri, by the direct lien type statute. One protective measure which the owner may adopt

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property and to the same extent as is herein provided for the contractor. . . ." In the case of Von Platen & Dick v. Winterbotham, 203 Ill. 198, 67 N.E. 843 (1903), this statutory provision was interpreted to mean that the lien of a subcontractor (which could include either a materialman or laborer) exists by virtue of the original contract between the owner and contractor. The statutory provision which replaced section 22 is now ILL. REV. STAT. ch. 82, § 21 (1957), and is worded somewhat differently but nevertheless receives the same interpretation as section 22. Irwin v. Cullerton Corp., 13 Ill. App. 2d 742, 141 N.E.2d 77 (1957).

16. 139 Conn. 642, 96 A.2d 219 (1953). The statutory provision applicable to the decision of the case is now CONN. GEN. STAT. REV. § 49-33 (1958). This provides: "No mechanics lien shall attach to any building or its appurtenances or to the land on which the same stands in favor of any subcontractor to a greater extent in the whole than the amount which the owner shall have agreed to pay to any person through whom such subcontractor claims . . . . Any such subcontractor shall be subrogated to the rights of the person through whom such subcontractor claims." It is suggested that the reader compare this and the Illinois statute, set out in note 14 *supra,* representing derivative type liens, with the Missouri statute, cited in note 6 *supra,* representing direct type liens.

is to make his check payable to both the contractor and materialman or subcontractor and thus utilize the cancelled check as an acknowledgement of payment and satisfaction of his debt to both parties.[17]

One of the most effective measures is for the owner to require the contractor to put up a bond to indemnify against mechanics' liens. There are certain features of bonds to secure building contracts of which one should be aware. The bond given by a contractor to protect the owner may either assume the form of an undertaking to complete the building if the contractor does not and to pay the labor and material claims if the contractor defaults in this respect, or, it may obligate the surety to save the owner harmless from all loss resulting from a breach by the contractor of any of the covenants of the building contract. In the former case it is an obligation to pay such a sum of money as is necessary to carry out in full all the terms of the building contract and to pay the laborers and materialmen, and in the latter it is an obligation to pay such damages as are ascertained to result from the default of the contractor, without regard to the specific performance of the contract. The obligation to pay labor and material claims is enforceable whether mechanics' liens representing such claims are perfected or not, whereas an obligation to save harmless from such claims becomes a liability only when these claims materialize into a lien upon the property.[18]

If the owner pays labor and material claims to prevent liens from being perfected, the sureties upon the bond to "save harmless from liens" or to turn the building over "free from liens for labor and material" will not be liable on the bond, because the owner has deprived himself of recourse to the bond, since by strict construction there has been no breach of the terms of the undertaking.[19] Furthermore the owner can not definitely prove that laborers or materialmen would have perfected their liens within the time limited by law, even if their claims had not been paid.

An owner should also be aware of the danger in changing small particulars of the original contract without consent from the surety. This matter should always be considered in the undertaking so that if the original contract is altered later, the owner will not lose the protection provided by the contractor's bond. The same problem exists as to changes in the contract of suretyship.[20]

If the instrument signed by the surety is materially altered by the obligee after he receives it, the surety is generally discharged. However if the alteration is not material it does not affect the surety's obligation. Neither will the alteration discharge the surety if he assents to it before or after it is made. It is not always clear when an alteration of a written contract is material enough to discharge the surety and thus a careful examination of the cases must be made to determine this factor.[21]

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17. Southwest Hardware & Lumber Co. v. Borgerson, 77 S.W.2d 195 (Spr. Ct. App. 1934).
18. STEARNS, LAW OF SURETYSHIP § 813 (5th ed. 1951).
19. Realty Sav. & Inv. Co. v. Washington Sav. & Bldg. Ass'n, 63 S.W.2d 167 (St. L. Ct. App. 1933); STEARNS, *supra* note 18.
20. SIMPSON, SURETYSHIP § 72 (1950).
21. *Ibid.*

Where, subsequent to the execution of the suretyship agreement, the principal and owner amend their agreement or enter into another agreement concerning the same subject-matter, it is generally said that the surety is discharged, though the terms of the later agreement differ very slightly from those of the first. However, the courts have not always been willing to follow this view to its logical conclusion, and the surety has been held liable in a variety of cases. But in most of the cases where the surety has been held liable, there appears to be a basis for the implication of a consent to remain bound notwithstanding the change. As stated before, it is the general rule that a surety is not discharged by a change if he assents to it either before or after it is made. Courts generally seem to adopt the view that a change does not discharge a compensated surety unless the change causes injury.[22]

The owner may also resort to such protective measures as obtaining a waiver from the materialman of his rights under the mechanics' lien law or obtaining receipted bills for all the materials purchased and used on the building project. Although either the waiver or the receipted bill is equally effective, the waiver is simpler as it involves one document as opposed to a file of documents in the case of receipted bills.[23]

In some states the right to a waiver is dependent upon statute, but this is not the situation in Missouri, where there is no statutory provision for a waiver. However, a waiver may be obtained by agreement of the parties or implied from the circumstances on possibly either a contractual or estoppel theory.[24] The chief problem presented in obtaining complete protection through either waivers or receipts is accounting for everything lienable that goes into the building project or getting receipts for everything lienable. An example of this difficulty would be that of an owner who gets waivers from his contractor, subcontractor, and materialman, on the materials going into the building project. Later other material not originally contemplated goes into the project and therefore is not covered by the waiver. Thus the problem is twofold, in that the owner must: (1) check his invoices to see what material is listed as going into his project; and (2) check his project to see if the listed materials actually did go into the project. If there is a discrepancy between his invoices and materials actually used then the possibility of a lien exists as to the unlisted material despite a previous waiver or receipted bill. Furthermore the owner has a problem of ascertaining how far down the line of subcontractors and materialmen he must go to obtain waivers or receipted bills. Under the Missouri statute it is at least theoretically possible for subcontractors and materialmen down to the producer of the raw materials to obtain a lien. An example of this would be the owner who gets waivers or receipts from the contractor who built his house and the lumberyard who supplied the lumber only to

22. *Ibid.*

23. As a practical matter, the solution to this problem sometimes lies in the selection or preparation of a good waiver form. An excellent form prepared by the Kansas City Title Insurance Co. is reprinted in PETERSON & ECKHARDT, MISSOURI PRACTICE, LEGAL FORMS § 955 (1960).

24. Moon v. Brown, 172 Mo. App. 516, 158 S.W. 79 (K.C. Ct. App. 1913).

have the mill which produced the lumber and sold it to the lumberyard file a lien because the lumberyard did not pay the mill. As a practical matter the owner cannot obtain waivers from all the possible materialmen and subcontractors, down to the original lumberman or the producer of the raw materials, and must content himself with stopping somewhere along this chain.

It has been suggested that the best protection for the owner is the careful selection of a reliable contractor.[25]

Perhaps what is most needed to protect the rights of the owner is a thorough revision of the Missouri mechanics' lien statute. The first mechanics' lien statute in this country was adopted by Maryland in 1791.[26] The basic purpose of this statute was to assist in building up the country by attracting laborers and craftsmen to the building field.[27] The first Missouri mechanics' lien statute was also adopted at a time when the state was a frontier, and thus it suited the needs of frontier growth and development by providing incentive to engage in the building industry.[28]

Today the situation is almost the reverse as there is no scarcity of labor in the building industry and the problem is how to provide this industry with full employment by adopting legislation which will attract people to buy and build their own homes.[29] The effect of mechanics' lien statutes, such as the one Missouri has now, is to make buying and building homes financially hazardous because of the potential double liability which will be imposed upon the home owner if he has not strictly complied with the technical provisions governing payments due, and to become due, during the construction process.[30] Another justification in granting less statutory protection to the mechanic is that it will discourage both materialmen and subcontractors from furnishing material and labor to contractors who are poor credit risks.

There are other revisions which need to be made in the Missouri statute. One deals with the time limit allowed contractors and subcontractors for the filing of a mechanic's lien. A mechanic's lien takes precedence over subsequent encumbrances. Therefore as long as the possibility exists that a mechanic's lien will be filed against the property, a mortgagee or bona fide purchaser of the property is in a secondary position, and thus with the statutory filing limit as long as it is the precarious position of the mortgagee is prolonged for a period longer than is necessary.[31] The position of the mortgagee is related somewhat to that of the owner in the *Herrman* case.

Another problem which deserves mention is the ambiguity which arises under the statute as to who is or is not an original contractor. The statute gives original contractors six months in which to file their mechanics' liens while journeymen

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25. See Esely, *supra* note 7.
26. Md. Acts 1791, ch. 45.
27. Stalling, *The Need for Special, Simplified Mechanics' Lien Acts Applicable to Home Construction,* 5 LAW & CONTEMPORARY PROB. 592 (1938).
28. Note, 17 U. KAN. CITY L. REV. 130, 131 (1949).
29. Stalling, *supra* note 27, at 592.
30. Stalling, *supra* note 27, at 592, 593.
31. *Supra* note 28, at 131.

and day laborers have sixty days and other persons (including materialmen) have four months to do so. In *Davidson v. Fisher*,[32] the court said that a materialman who deals directly with the owner has four months in which to file his lien. However in *E. C. Robinson Lumber Co. v. Baugher*,[33] the court applied what is considered the correct rule and held that a materialman who deals directly with the owner is an original contractor and thus has six months in which to file.[34]

Amendments to the present Missouri act would be of some value, but would not make the act satisfactory in at least one important area, viz., home construction. It has been suggested that there is need for a mechanics' lien statute which is specifically adapted to home construction.[35] Would the proposed Uniform Mechanics' Lien Act be an answer to the problem? The proposed Uniform Mechanics' Lien Act has not been accorded general acceptance by the states, and seems to be moulded from a compromise between the New York and Pennsylvania systems.[36] The Uniform Act reduces the possibility of double liability on the part of the home owner because lien claimants, except laborers, may recover only the balance of the contract price fixed by the contract of the contractor or subcontractor. Therefore the owner who has complied with the provisions of the lien act cannot be required to pay the same debt twice.[37] The Uniform Act requires that all persons, except laborers and others who contract directly with the owner, give the owner a written notice of intention to claim a lien. Such notice must be given not later than thirty days after construction begins or not later than the day the lienor's construction work is completed, whichever period is longer.[38] The owner, upon receipt of this notice, is required to hold enough money to pay off the lienor's debt. The lien may be filed at any time during the progress of the work, but not later than three months after final performance of labor or services by the lienor. Thus the Uniform Act forces subcontractors and materialmen to elect to exercise their rights of lien at a time prior to that when an owner usually pays the contractor.[39] This, of course, will inform the owner as to who will have a right to a lien against his property.

The Act has been criticized on the basis that it will not reduce the difficulties imposed by existing laws on the home owner because the causes underlying these difficulties have not been dealt with; but rather it has substituted new procedure moulded out of the old philosophy.[40] It has been suggested that what is needed is a procedure based on a philosophy which rejects the principle that in a field of

32. 258 S.W.2d 297, 304 (Spr. Ct. App. 1953).
33. 258 S.W.2d 259 (St. L. Ct. App. 1953).
34. Eckhardt, *Property*, 19 Mo. L. Rev. 335, at 341, 342 (1954). Professor Eckhardt goes into a more detailed discussion of this problem and suggests a thorough revision of the Missouri Mechanics' Lien Statute.
35. Stalling, *supra* note 27, at 595.
36. Cushman, *The Proposed Uniform Mechanics' Lien Law*, 80 U. Pa. L. Rev. 1083, 1085 (1932).
37. *Id.* at 1089; Proposed Uniform Mechanics' Lien Act § 2.
38. Cushman, *supra* note 36, at 1086; Proposed Uniform Mechanics' Lien Act § 4.
39. Cushman, *supra* note 36, at 1088; Proposed Uniform Mechanics' Lien Act § 17.
40. Stalling, *supra* note 27, at 596.

home construction it is essential for the construction industry to enjoy, at the expense of the home-owning group, a special protection of the extent and character usually granted.[41] As it is socially desirable to encourage the home-owning group, the laws should be designed to accomplish that purpose. Despite this, the home-owning group is subjected to mechanics' lien laws which make no distinctions, and which completely fail to reckon with the wide disparity between the ordinary small home-owner, unversed in legal technicalities, and the owners of commercial buildings who may reasonably be presumed to have knowledge of the legal requirements and are equipped to handle them in the ordinary course of business. The smallest home-owner, during the construction process, is thus subjected to the same technical and burdensome provisions as is the owner of the Empire State Building.[42] Therefore as the Uniform Act makes no distinction between the small home-owning group and the large commercial building group, and, like existing mechanics' lien laws, applies equally to all, it appears to be inadequate.

The question arises as to what form a mechanics' lien statute applicable to the construction of small homes should take. One authority in the field suggests that there are three paramount interests to consider: (1) the home owner, (2) the lender, and (3) the building industry.[43]

From the home owner's standpoint the possibility of being subjected to double liability, i.e., to the contractor and materialman or subcontractor, can be eliminated by limiting a right of lien only to persons to whom the owner is directly and legally committed. Also there should be a minimum amount set for which a lien can be obtained, e.g., in Pennsylvania no lien can be obtained for debts under one hundred dollars. Thus a statute limiting the owner's liability would place a premium on prompt payments as they could be made without any delay to investigate the extent of the contractor's debts to subcontractors and materialmen.[44]

In considering the position of the lender, it should be remembered that most people borrow the funds with which to finance the construction of their homes. Thus the lender, in many respects on a par with the owner, is justly entitled to some protection in order to keep down the cost of financing.[45]

As for the position of the building industry, i.e., contractor, subcontractor, and materialmen, it should be remembered that they have other available legal remedies besides the mechanics' lien, e.g., an action at law on the contract. However their right to a lien need not be eliminated completely, but merely restricted so that it can be brought to bear against only those to whom they are directly and legally committed.[46]

In conclusion, the General Assembly should take a long look at the present Missouri Mechanics' Lien Statute with a view toward clearing out the inequitable situations which may arise under the enactment.

DONALD E. CHANEY

41. *Ibid.*
42. *Ibid.*
43. Stalling, *supra* note 27, at 598.
44. *Id.* at 598, 599.
45. *Id.* at 599.
46. *Id.* at 599, 600.