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## Mechanic's Liens-Priority over Mortgages and Deeds of Trust

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## COMMENTS

### MECHANIC'S LIENS—PRIORITY OVER MORTGAGES AND DEEDS OF TRUST

#### I. INTRODUCTION

Real property is frequently burdened with the concurrent existence of a mechanic's lien and lien of a deed of trust or mortgage. This comment will examine the conflict between these two types of liens in a variety of factual situations.<sup>1</sup> In discussing the priorities involved in mechanic's liens and liens of deeds of trust or mortgages, it will be assumed that all liens have been properly recorded or perfected, and that priorities cannot therefore be altered by showing the invalidity of one of the liens.<sup>2</sup> The term "deed of trust" should be understood as being that type which is commonly used as a mortgage instrument in Missouri.

A mechanic's or materialman's lien on real estate, whether land or buildings, was unknown at common law or in equity.<sup>3</sup> Such liens are wholly creatures of statute,<sup>4</sup> based upon and justified by the principle that those who have contributed labor or materials to the improvement of property are entitled to look to that property for compensation.<sup>5</sup> Although the general rule is that statutes in derogation of the common law should be strictly construed,<sup>6</sup> Missouri courts have considered these statutes to be remedial in nature<sup>7</sup> and have held that they should be liberally construed to preserve the benefits intended to be conferred.<sup>8</sup>

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1. See generally Mo. Bar C.L.E., *Real Estate Practice*, § 9.12 at 169-72 (1972).

2. The myriad problems connected with the procedure of establishing valid mechanic's liens are beyond the scope of this comment. For more general discussions of the Missouri mechanic's lien statutes, see Mo. Bar C.L.E., *supra* note 1, Ch. 9; Chaney, *The Missouri Mechanic's Lien Statute—Is It Adequate?*, 26 Mo. L. REV. 53 (1961).

3. Doellner v. Rogers, 16 Mo. 340 (1852); W. ROCKEL, MECHANIC'S LIENS § 1 (1909).

4. Warde v. Nolde, 259 Mo. 285, 168 S.W. 596 (1914); Doellner v. Rogers, 16 Mo. 340 (1852); Herbert & Brooner Constr. Co. v. Golden, 499 S.W.2d 541 (Mo. App., D.K.C. 1973); Nelle Plbg. Co. v. Stefanic, 453 S.W.2d 636 (St. L. Mo. App. 1970); Putnam v. Heathman, 367 S.W.2d 823 (K.C. Mo. App. 1963).

5. Herbert & Brooner Constr. Co., v. Golden, 499 S.W.2d 541 (Mo. App., D.K.C. 1973); Putnam v. Heathman, 367 S.W.2d 823 (K.C. Mo. App. 1963); Continental Elec. Co. v. EBCO, Inc., 365 S.W.2d 746 (K.C. Mo. App. 1963).

6. See cases cited note 4 *supra*.

7. See, e.g., Sawyer & Austin Lbr. Co. v. Clarke, 172 Mo. 588, 73 S.W. 137 (1902); Putnam v. Heathman, 367 S.W.2d 823 (K.C. Mo. App. 1963).

8. Peerless Supply Co. v. Industrial Plbg. & Htg. Co., 460 S.W.2d 651 (Mo. 1970); Boyer Lbr., Inc. v. Blair, 510 S.W.2d 738 (Mo. App., D. St. L. 1974); Poore v. International Paper Co., 455 S.W.2d 13 (K.C. Mo. App. 1970); Nelle Plbg. Co. v. Stefanic, 453 S.W.2d 636 (St. L. Mo. App. 1970); Henges Co. v. Doctor's North-Roads Bldg., Inc., 409 S.W.2d 489 (St. L. Mo. App. 1966); Putnam v. Heathman, 367 S.W.2d 823 (K.C. Mo. App. 1963); Continental Elec. Co. v. EBCO, Inc., 365 S.W.2d 746 (K.C. Mo. App. 1963); Miners Lbr. Co. v. Miller, 117 S.W.2d

Chapter 429 of the Revised Statutes of Missouri contains the most recent enactment of Missouri's statutory liens against real estate.<sup>9</sup> The chapter establishes who is entitled to a lien and what property can be subjected to a lien. It also sets out the procedures for obtaining and satisfying a lien.<sup>10</sup> Section 429.010,<sup>11</sup> the basic provision, confers a right of lien upon a mechanic or materialman<sup>12</sup> as security for the materials and labor which he has furnished.<sup>13</sup> In construing this chapter, the decisions of other jurisdictions are of minimal value because mechanic's lien statutes vary greatly from state to state.<sup>14</sup>

## II. PRIORITY OF LIENS—STATUTORY BASIS

Sections 429.050 and 429.060, RSMo 1969, set out the basic rules governing priority between mechanic's liens and deeds of trust.<sup>15</sup> The first section provides:

The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished

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711 (St. L. Mo. App. 1938); *Waters v. Gallemore*, 41 S.W.2d 870 (K.C. Mo. App. 1931); *Leach v. Bopp*, 223 Mo. App. 254, 12 S.W.2d 512 (St. L. Ct. App. 1929); *Carroll Contracting Co. v. Newsome*, 201 Mo. App. 117, 210 S.W. 114 (St. L. Ct. App. 1918); *Powers & Boyd Cornice & Rfg. Co. v. Muir*, 146 Mo. App. 36, 123 S.W. 49 (St. L. Ct. App. 1909).

9. For a general discussion of the historical development of Missouri mechanic's lien law, see Brasher, *History of Mechanic's Lien Statutes*, 22 V.A.M.S. 267 (1952).

10. §§ 429.010-430, RSMo 1969. Many of the provisions in Chapter 429 relating to the procedure of mechanic's liens have been superseded by Supreme Court Rule 101, but there are no substantive changes in the rules. Mo. S. Cr. RULES 101.01-.21.

11. Section 429.010, RSMo 1969, was repealed by H.B. No. 1251, Act 74, 2d Reg. Sess. (1974), and a new § 429.010 enacted. The change in this section, providing for notice to the property owners of the mechanic's right to a lien and the availability of "lien waivers," does not directly affect priorities. However, failure to comply with the new notice requirements will prevent a valid mechanic's lien from arising.

12. Section 429.010, RSMo 1969, protects "every mechanic or other person," although the chapter is subtitled "Mechanic's and Materialman's Liens." Basically, the statute includes anyone who has contributed either labor or materials to the structure. Creason, *The Mechanic's Lien*, 1 K.C.L. REV. 4 (1932). A new section has recently been enacted which extends lien rights to licensed architects, engineers, and land surveyors, and also to persons hired for digging a well or demolishing a building. Section 429.013, RSMo 1976 Supp.

13. *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541 (Mo. App., D.K.C. 1973).

14. *Warde v. Nolde*, 259 Mo. 285, 168 S.W. 596 (1914).

15. These sections have passed relatively unchanged through the regular revisions of the Missouri statutes since their introduction in 1855. Section 429.050, RSMo 1969, is a verbatim re-enactment of § 10, RSMo 1855, with the addition of the proviso at the end by Mo. Laws 1909, at 659. Intervening revisions perpetuate the language. Section 429.060, RSMo 1969, is identical to § 6711, RSMo 1889, and intervening revisions, and similar in all relevant respects to the original version in § 8, RSMo 1855. Therefore, when examining the many cases spanning the long history of Missouri state laws which deal with priorities, it is not necessary to search for influences from changing statutes. A majority of the cases discussed in this comment refer in their discussions not to the current statute but to one of its predecessors. In discussing these cases, textual reference will be to the 1969 revision, rather than to the earlier compilation.

or the work was done, in preference to any prior lien or encumbrance or mortgage upon 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; provided, that nothing contained in this section shall be so construed as to allow any such sidewalk as is mentioned in sections 429.010 to 429.340 to be sold under execution or so removed.<sup>16</sup>

The latter section provides:

The lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges or other improvements, or the ground or either of them, subsequent to the commencement of such buildings or improvements.<sup>17</sup>

With the exception of certain variances which are discussed in detail later in this comment, three basic rules of priority can be derived from these sections:

1. If the effective date of the mechanic's lien is prior to the recording of the deed of trust, the mechanic's lien is superior on both the land and the building.<sup>18</sup>

2. If a deed of trust is given on land prior to the effective date of the mechanic's lien, the deed of trust is superior on the land and the mechanic's lien is superior on the constructed building.<sup>19</sup>

3. If a deed of trust is given on both land and an existing building, a subsequent mechanic's lien for an addition to, or repair of, the building is subordinate in all respects to the deed of trust.<sup>20</sup>

### III. TIME OF COMMENCEMENT OF LIEN

It is clear under each of the priority statutes that the effective date of the conflicting liens plays an important role in determining which lien is superior. In Missouri a mechanic's lien dates from the visible commencement of work on the building.<sup>21</sup> This applies to the liens of all

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16. § 429.050, RSMo 1969.

17. § 429.060, RSMo 1969.

18. See pt. IV of this comment.

19. See pt. V of this comment.

20. See text accompanying notes 60-68 *infra*.

21. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H. B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967); *Vasquez v. Village Center, Inc.*, 362 S.W.2d 588 (Mo. 1962); *Riverside Lbr. Co. v. Schafer*, 251 Mo. 539, 158 S.W. 340 (1913); *Reilly v. Hudson*, 62 Mo. 383 (1876); *Douglas v. St. Louis Zinc Co.*, 56 Mo. 388 (1874); *Kuhleman v. Schuler*, 35 Mo. 142 (1864); *Schaeffer v. Lohman*, 34 Mo. 68 (1863); *United Lbr. Co. v. Minmar Inv. Co.*, 472 S.W.2d 630 (St. L. Mo. App. 1971); *Gardner v. North Kansas City Alfalfa Mills*, 61 S.W.2d 374 (K.C. Mo. App. 1933); *Magill Lbr. Co. v. Carter*, 17 S.W.2d 581 (Spr. Mo. App. 1929); *Hammond v. Darlington*, 109 Mo. App. 333, 84 S.W. 446 (St. L. Ct. App. 1904); *Holland v. Cunliff*, 96 Mo. App. 67, 69 S.W. 737 (St. L. Ct. App. 1902). It is sometimes stated that the lien dates from the time of

mechanics, whether they started the foundation or finished the roof.<sup>22</sup> Although the lien dates from the time of commencement of work, it is incomplete and unenforceable<sup>23</sup> until the lien is filed in the proper office.<sup>24</sup> Once filed, the lien relates back to the time of the actual commencement of work<sup>25</sup> and cannot be cut off by a conveyance, mortgage, or other transfer by the owner of the building after the work is commenced.<sup>26</sup>

The time of commencement of work on the building has in the past been determined by applying the "first spade rule."<sup>27</sup> Under this rule actual operations performed on the ground for erection of the building must be visibly undertaken with the intention of continuing the work until the structure is completed.<sup>28</sup> If these requirements are met, the lien dates from the beginning of such work. The acts of visiting a building site, surveying, setting stakes, and cutting brush have been held insufficient to satisfy the first spade rule,<sup>29</sup> as have grading, excavating, and clearing.<sup>30</sup>

The enactment in 1971 of section 429.015,<sup>31</sup> which extends the right to a mechanic's lien to licensed architects, engineers, and surveyors, may cause the demise of the first spade rule. There have been no reported

the contract between the owner and mechanic. However, only the *right* to a lien arises at the time of contract; the lien relates back only so far as the commencement of the building or improvement. *Page v. Bettes*, 17 Mo. App. 366 (K.C. Ct. App. 1885).

22. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H. B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967); "The man who does the last of the painting or plumbing comes in *pari passu* with him who built the foundation wall." *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 459, 58 S.W.2d 995, 1003 (1932), *quoting from* *Hammond v. Darlington*, 109 Mo. App. 333, 343, 84 S.W. 446, 449 (St. L. Ct. App. 1904).

23. *Douglas v. St. Louis Zinc Co.*, 56 Mo. 388 (1874).

24. *Realty Sav. & Inv. Co. v. Washington Sav. & Bldg. Ass'n*, 63 S.W.2d 167 (St. L. Mo. App. 1933).

25. *Reilly v. Hudson*, 62 Mo. 383 (1876); *Allen v. Sales*, 56 Mo. 28 (1874); *Viti v. Dixon*, 12 Mo. 479 (1849); *Realty Sav. & Inv. Co. v. Washington Sav. & Bldg. Ass'n*, 63 S.W.2d 167 (St. L. Mo. App. 1933); *Creason, The Mechanic's Lien*, 1 K.C.L. REV. 4 (1932).

26. *Allen v. Sales*, 56 Mo. 28 (1874); *Douglas v. St. Louis Zinc Co.*, 56 Mo. 388 (1874).

27. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H. B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967); *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 955 (1932); *United Lbr. Co. v. Minmar Inv. Co.*, 472 S.W.2d 630 (St. L. Mo. App. 1971); *Gardner v. North Kansas City Alfalfa Mills*, 61 S.W.2d 374 (K.C. Mo. App. 1933); *Hammond v. Darlington*, 109 Mo. App. 333, 84 S.W. 446 (St. L. Ct. App. 1904); *Hydraulic Press Brick Co. v. Bormans*, 19 Mo. App. 664 (St. L. Ct. App. 1885); *Great Western Planing Mill Co. v. Bormans*, 19 Mo. App. 671 (St. L. Ct. App. 1885).

28. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H. B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967).

29. *H. B. Deal Constr. Co. v. Labor Discount Center Inc.*, 418 S.W.2d 940 (Mo. 1967).

30. *United Lbr. Co. v. Minmar Inv. Co.*, 472 S.W.2d 630 (St. L. Mo. App. 1971).

31. § 429.015, RSMo 1976 Supp. See note 12 *supra*.

decisions on this issue, but it is conceivable that the time of commencement of work, and thus the effective date of the lien, may be set back in time to the beginning of architectural plans, surveying of the land, or other similar work.<sup>32</sup> Such a determination would be consistent with the liberal construction courts have given the statutes in favor of mechanic's lien claimants.<sup>33</sup>

Such a change in the first spade rule, however, would mean that a potential mortgagee might not be aware of the commencement of work, and of the danger of a superior mechanic's lien arising, because no visible operations have been undertaken. The effect of applying the first spade rule has been to put prospective lenders on notice that there are in existence materialmen and laborers, and most likely others who may assert a prior interest in the property.<sup>34</sup> A potential lender will often prefer not to make a loan under these circumstances. Such notice would not be available to these lenders, at least not until visible construction had begun, if the time of commencement of work was antedated because of the impact of section 429.015. Therefore, retention of the first spade rule despite the new statute would seem preferable because of the inherent notice feature in the rule.

#### IV. INTERESTS ARISING SUBSEQUENT TO A MECHANIC'S LIEN

Section 429.060, RSMo 1969, applies to situations where the effective date of the mechanic's lien precedes that of the deed of trust. The operation of the section can be illustrated as follows: Assume that *A* has an acre of land on which he wishes to build a house. He contracts with *C* to build the house. After *C* has begun construction but before the structure is completed, *A* gives a deed of trust on both the land and house to *B* as security for a loan. *C* completes the house, but *A* has squandered the loan funds and is unable to pay *C*. *C* may assert a mechanic's lien against both the land and the completed house. *C*'s lien is superior to *B*'s deed of trust on the land as well as the house. In order to satisfy his claim for labor and materials supplied, *C* may have both the land house sold free of *B*'s interest.

Therefore, so long as the commencement of work on the building to which a mechanic's lien attaches precedes the attaching of any other lien or encumbrance to the building or land, the mechanic's lienholder is assured of protection. He has the first right to look to the building and the land as security for payment of the money owed him. The courts have unfalteringly followed the literal rule of section 429.060 in protecting

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32. Mo. Bar C.L.E., *Real Estate Practice*, § 9.11 at 169 (1972).

33. See cases cited note 8 *supra*.

34. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972). "The theory of this rule is that the fact of the improvement gives its own notice to all the world." *Id.* at 9, quoting from *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastics Ass'n*, 332 Mo. 440, 459, 58 S.W.2d 995, 1003 (1932).

that right.<sup>35</sup> A subsequent lender is powerless to impair the security of the mechanic's lien claimant by taking a deed of trust on the property.<sup>36</sup>

Even where a subcontractor begins work after a deed of trust is given, his lien will be held superior if work was commenced by the general contractor prior to the deed of trust.<sup>37</sup> By operation of the first spade rule,<sup>38</sup> the subcontractor's lien relates back to the commencement of work by the general contractor. The subcontractor creates his own security through his work on the building. He has a greater right to first proceeds from the sale of the building and land to satisfy his claim than does a mortgagee whose lien attaches after the building was begun.<sup>39</sup> Because the construction itself is deemed to give notice of the mechanic's lien to people subsequently dealing with the property, those persons should not rely on the real estate as security for payment of their loan.<sup>40</sup>

In *Drilling Service Co. v. Baebler*<sup>41</sup> it was argued that a deed of trust given after work had begun, with use of the proceeds being limited to a particular phase of the construction, was superior to mechanic's liens arising from work in later phases of construction. This argument was rejected. The latter construction was part of one continuing contract and related back to the turning of the first spade.<sup>42</sup> So long as the work is uninterrupted and is within the scope of the project as originally planned, the rule of section 429.060 applies. A lender who takes a deed of trust in financing the early stages of construction therefore runs the risk that his security will be impaired by later stages of the same construction.<sup>43</sup> Although this may seem to be a harsh result for the lender, the purpose is to secure

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35. *Schwartz v. Shelby Constr. Co.*, 338 S.W.2d 781 (Mo. 1960); *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 995 (1932); *Langdon v. Kleeman*, 278 Mo. 236, 211 S.W. 877 (1919); *Riverside Lbr. Co. v. Schaefer*, 251 Mo. 539, 158 S.W. 340 (1913); *General Fire Extinguisher Co. v. Schwartz Bros. Comm'n Co.*, 165 Mo. 171, 65 S.W. 318 (1901); *Landau v. Cottrill*, 159 Mo. 308, 60 S.W. 64 (1900); *St. Louis Flexicore, Inc. v. Lintzenich*, 414 S.W.2d 787 (St. L. Mo. App. 1967); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934); *Trippenusee v. Schmidt*, 52 S.W.2d 197 (K.C. Mo. App. 1932); *Waters v. Galle-more*, 41 S.W.2d 870 (K.C. Mo. App. 1930); *Stumbaugh v. Hall*, 30 S.W.2d 160 (K.C. Mo. App. 1930); *Redlon v. Badger Lbr. Co.*, 194 Mo. App. 650, 189 S.W. 589 (K.C. Ct. App. 1916); *McAdow v. Sturtevant*, 41 Mo. App. 220 (K.C. Ct. App. 1890); *Hydraulic Press Brick Co. v. Bormans*, 19 Mo. App. 664 (St. L. Ct. App. 1885); *Great Western Planing Mill Co. v. Bormans*, 19 Mo. App. 671 (St. L. Ct. App. 1885); *Page v. Bettles*, 17 Mo. App. 366 (K.C. Ct. App. 1885).

36. *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 995 (1932) (deed of trust given after completion of excavation and foundation held subordinate to mechanic's liens established for construction of building).

37. *Hydraulic Press Brick Co. v. Bormans*, 19 Mo. App. 664 (St. L. Ct. App. 1885).

38. See notes 27-35 and accompanying text *supra*.

39. *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 995 (1932).

40. See note 35 and accompanying text *supra*.

41. 484 S.W.2d 1 (Mo. 1972).

42. See pt. III of this comment.

43. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1, 12 (Mo. 1972).

to the holders of mechanic's liens the rights afforded them under the statute.<sup>44</sup>

Lender-mortgagees cannot avoid subordination to mechanic's liens for subsequent labor or materials by attempting to stop work and prevent completion of a structure in the course of construction. In *Joplin Cement Co. v. Greene County Building and Loan Association*<sup>45</sup> a mortgage on land and a partially completed building was taken as security for a loan, and the proceeds were used to pay off all bills for material and labor to the current point of construction. The mortgagee then told all the materialmen that there were no more funds and that they should not furnish any more material. They refused to do this, however, and they later filed mechanic's liens for the subsequent work and materials. Their liens were held superior to the mortgage lien because the work was part of one entire contract and, therefore, prior in time.<sup>46</sup> The court observed the rule that a mortgagee has no right to prevent the owner from dealing with his property as he chooses unless there has been a default, a condition of the mortgage broken, or special agreement to the contrary.<sup>47</sup> It should be noted that if the owner in this situation had let the work be abandoned and then had given a mortgage on the property, the mechanic's liens established after work resumed under a *new* contract would be inferior to the mortgage lien on the land.<sup>48</sup>

No distinction need be made under section 429.060 between totally new construction and repairs. So long as the effective date of the mechanic's lien precedes the deed of trust, the mechanic's lien will be superior. The distinction between new construction and repairs is important only in determining priorities under section 429.050.<sup>49</sup>

## V. INTERESTS ARISING PRIOR TO A MECHANIC'S LIEN

### A. *Deeds of Trust in General*

Where a deed of trust has been given on land prior to the effective date of the mechanic's lien, section 429.050, RSMo 1969, determines the relative priorities. The operation of the section can be illustrated by the following hypothetical. Assume that *A* owns an acre of land which is subject to a deed of trust in favor of *B*. *A* contracts with *C* for the erection of a house on the land, and *C* thereafter builds the house. If *A* does not pay *C* the contract price, *C* may assert a mechanic's lien against the newly-

44. *Id.*

45. 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934).

46. *Id.*

47. *Id.*; cf. *Schulenberg v. Hayden*, 146 Mo. 583, 48 S.W. 472 (1898); *Matterson v. The West End Narrow Gauge Ry.*, 72 Mo. 342 (1880).

48. *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934) (dictum); *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 995 (1932); *Hardner v. North Kansas City Alfalfa Mills*, 61 S.W.2d 374 (K.C. Mo. App. 1933); *May v. Mode*, 142 Mo. App. 656, 123 S.W. 523 (St. L. Ct. App. 1909).

49. See pt. V, § A of this comment.



constructed house. Although *B*'s deed of trust has priority on the land, it is inferior to *C*'s lien on the house. *C* may have the house sold under execution, and the purchaser may remove the house within a reasonable time, free of any interest of *B*.

Thus, for purposes of determining priority of claims, section 429.050 separates the land from the buildings located thereon. Although many problems have arisen in the application of this section, it is still possible to state one generalization from which all determinations of priority begin: when a new structure is built on land already subject to a deed of trust, a mechanic's lien for the work and materials furnished is a prior claim on the building, but it is subordinate to the deed of trust on the land.<sup>50</sup> The statute entitles the mechanic's lienor to have the building sold separately from the land,<sup>51</sup> after which it may be removed<sup>52</sup> by the purchaser within a reasonable time.<sup>53</sup>

The statutory remedy of sale and removal, however, will obviously be impractical in most instances.<sup>54</sup> Such a procedure will be useful only where the building is of a type that would allow it to be easily removed without significant diminution in its value, such as a porcelain steel farm silo. In most cases, however, it is likely that removal not only would be very costly, but would also substantially decrease the value of the structure. These factors will discourage prospective purchasers at the execution sale.

What probably happens in practice is that the mechanic's lienor almost always opts to have the building and the land sold together subject to the mortgage lien. This procedure would not adversely affect the mortgage in any way. The basic statutory provision on mechanic's liens, section 429.010, confers a lien upon both the building and the land,<sup>55</sup> thus pro-

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50. *Sawyer-Austin Lbr. Co. v. Clark*, 172 Mo. 588, 73 S.W. 137 (1903); *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279 (1877); *Smith v. Phelps*, 63 Mo. 585 (1876); *Reilly v. Hudson*, 62 Mo. 383 (1876); *Crandell v. Cooper*, 62 Mo. 478 (1876); *Seibel v. Siemon*, 52 Mo. 363 (1873); *Samuels v. Shelton*, 48 Mo. 444 (1871); *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541 (Mo. App., D.K.C. 1973); *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *McAdow v. Sturtevant*, 41 Mo. App. 220 (K.C. Ct. App. 1890); *Dugan v. Scott*, 37 Mo. App. 663 (K.C. Ct. App. 1889); *Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454 (St. L. Ct. App. 1885).

51. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Sawyer-Austin Lbr. Co. v. Clark*, 172 Mo. 588, 73 S.W. 137 (1903); *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279 (1877); *Reilly v. Hudson*, 62 Mo. 383 (1876); *Crandell v. Cooper*, 62 Mo. 478 (1876); *Seibel v. Siemon*, 52 Mo. 363 (1873); *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *Dugan v. Scott*, 37 Mo. App. 663 (K.C. Ct. App. 1889).

52. Cases cited note 51 *supra*.

53. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Kansas City Hotel Co. v. Sauer*, 65 Mo. 288 (1877); *Samuels v. Shelton*, 48 Mo. 444 (1871).

54. "The right to have a judicial sale of the improvement only, which may have to be removed from the land, is obviously of doubtful value in many cases." Mo. Bar C.L.E., *Real Estate Practice* § 9.12 at 170-71 (1972).

55. Section 429.010, RSMo 1969, provides in part: "Every mechanic . . . shall have . . . a lien upon such building, erection or improvements, and upon the land . . . on which the same are situated."

viding a statutory basis for selling both subject to the mortgage. By pursuing the remedy suggested here, the lienholder would seem to be merely waiving his rights under section 429.050. Although no case can be found where this procedure has been approved, there appears to be nothing in section 429.050 to prevent it from being used.

There is, however, language in *Fleming-Gilchrist Construction Co. v. McGonigle*<sup>56</sup> which suggests that sale and removal is the exclusive remedy where the mechanic's lien is superior on the building but not on the land. However, that case involved a request by the mechanic's lienors to sell the previously mortgaged land along with the building, with a pro rata distribution of the proceeds in proportion to the value of the land and the building. The court held that they were not entitled to such a remedy.<sup>57</sup> The court's statement that section 429.050 is "the only remedy which is given for such a situation,"<sup>58</sup> should be construed as applying to just that situation—i.e., where the mechanic's lienors are attempting to compel a premature foreclosure of the prior deed of trust on the land. Section 429.010 assures that a mechanic's lien extends to both the building and the land, and the lienholder should always be able to waive his priority on the building and have both the land and building sold subject to the deed of trust to satisfy his junior interest in both.

When dealing with the general rule of section 429.050, Missouri case law envisions all work as being in either one of two separate categories: (1) totally new construction, or (2) repairs or additions to an existing structure.<sup>59</sup> If the mechanic is merely contributing to repairs or additions to an existing structure, his lien is inferior to a prior mortgage on the land and building.<sup>60</sup> Conversely, if the contractor is erecting a new building on land subject to a prior deed of trust, the general rule for priority is applicable and his mechanic's lien will take precedence on the building.<sup>61</sup>

56. 338 Mo. 56, 89 S.W.2d 15 (1935).

57. See also, *Gold Lumber Co. v. Baker*, 225 Mo. App. 849, 36 S.W.2d 130 (K.C. Ct. App. 1931).

58. 338 Mo. at 66, 89 S.W.2d at 20.

59. Missouri cases often use the term "improvement" when referring to a mere addition or repair to an existing structure. This is to be contrasted with the use of the word in § 429.050, RSMo 1969, which has been traditionally interpreted to refer only to new independent structures on the land. See, e.g., *May v. Mode*, 142 Mo. App. 656, 123 S.W. 523, (St. L. Ct. App. 1909); *Haeussler v. Thomas*, 4 Mo. App. 463 (St. L. Ct. App. 1877) [adopted from *Gerchell & Techenor v. Allen*, 34 Ia. 559 (1872), interpreting a similar statute].

60. *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *May v. Mode*, 142 Mo. App. 656, 123 S.W. 523 (St. L. Ct. App. 1909); *Reed v. Lambertson*, 53 Mo. App. 76 (St. L. Ct. App. 1893); *Dugan v. Scott*, 37 Mo. App. 662 (K.C. Ct. App. 1889); *Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454 (St. L. Ct. App. 1885); *Haeussler v. Thomas*, 4 Mo. App. 463 (St. L. Ct. App. 1877); cf. *Schulenberg v. Hayden*, 146 Mo. 583, 48 S.W. 472 (1898).

61. *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *Elliott & Barry Eng'r Co. v. Baker*, 134 Mo. App. 95, 114 S.W. 71 (St. L. Ct. App. 1908); *Reed v. Lambertson*, 53 Mo. App. 76 (St. L. Ct. App. 1893). Whether work is new construction or only repair is a question of fact for the jury. *Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454 (St. L. Ct. App. 1885).

The basis for this distinction was set out long ago in *Haeussler v. Thomas*<sup>62</sup>:

If the building is completed before a mortgage is given, the mortgagee has as much right to rely on the building as on the land. Any separation of buildings and land must, at this stage, be at the expense of the mortgagee who has bought and paid for his prior lien. But where the mechanic builds a new building, here is property on which the prior mortgagee did not rely, and so, in favor of the mechanic, the statute does away with the rule that makes the building follow the land and, *quoad hoc*, separates the two . . . .<sup>63</sup>

Where a new building has been erected, its removal leaves the holder of a prior mortgage on the land in his original position. He can show no harm resulting from the separation of the building from the land.<sup>64</sup> But where a mortgage is taken on land improved with a completed structure (or with a partially-completed building which is not then under construction),<sup>65</sup> the rights of the mortgagee become vested in both the land and the building. He cannot be required to subordinate his lien to the lien of a mechanic who subsequently repairs or makes additions to the building, because no means are afforded for separating the two interests in the building, and because the rights of the mortgagee were vested before those of the lienholder came into existence.<sup>66</sup> The original security of the mortgagee may not be impaired by later acts of the owner or persons acting at his behest. The mechanic's lienor, however, should be able to have both the land and building sold together subject to the prior mortgage, because this would not affect the mortgagee's security.<sup>67</sup>

It is often very difficult to determine whether a materialman or mechanic is contributing to the completion of a structure then in the process of construction, thereby gaining the favored status accorded new construction, or whether he is merely repairing or adding to a finished structure. To qualify as new construction the work must result in a new and separate structure instead of a portion of an existing one, or serve to complete an otherwise incomplete building instead of merely to repair or replace a part of it.<sup>68</sup> Work done in completion of a building upon which construction had been abandoned, however, will not result in a

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62. 4 Mo. App. 463 (St. L. Ct. App. 1877).

63. *Id.* at 467.

64. *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510, 515 (Mo. App., D.K.C. 1972). This statement may be more accurate in theory than in fact. Removal of a building may decrease the value of the land because of certain aftereffects, such as cut trees or excavation.

65. See text accompanying notes 69-72 *infra*.

66. *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510, 515 (Mo. App., D.K.C. 1972); *Haeussler v. Thomas*, 4 Mo. App. 463, 467 (St. L. Ct. App. 1877).

67. See note 55 and accompanying text, *supra*.

68. *Elliott & Barry Eng'r Co. v. Baker*, 134 Mo. App. 95, 98, 114 S.W. 71, 73 (St. L. Ct. App. 1908). "The word 'repairs,' . . . signifies articles used to replace others which are worn out or unsatisfactory, as well as repairs in the sense of patchwork on decayed or worn parts of a building." *Id.*

prior lien for the new work if a deed of trust had been recorded before the construction recommenced.

In *May v. Mode*<sup>69</sup> a deed of trust and note were given on a tract of land and a partially completed building. Work on the building had been stopped at the owner's request, and proceeds from the loan were used to pay for the land and previous construction. Work was then resumed, but materialmen and laborers who were employed to complete the building were not paid. They subsequently established mechanic's liens and claimed priority, asserting that their work completed the building and related back to the commencement of the original construction. The court followed *Haeussler* in applying section 429.050 to new construction only.<sup>70</sup> The work done after the deed of trust was not new construction because:

[T]he addition to or completion of the building was done *under a distinct contract made and entered into after the work done under the original contract had ceased and after that contract had been abandoned*. As shown by the evidence in the case, before the new contract was made or the new work done, the deed of trust under which defendants claim was placed upon the property. At that time the property consisted both of the lot and of the building, so far as the building had then been erected, and the presumption of law is that the mortgagee loaned his money and took the deed of trust on the faith of the lot and improvements as they then were.<sup>71</sup>

The deed of trust, therefore, was held to have priority on both the land and the building.<sup>72</sup>

The question arises whether severable improvements which are installed in an existing structure are to be treated as distinct construction or as mere additions in regard to lien priority. When machinery or other easily removable materials are put into an already completed building, it must first be determined whether they are lienable at all. Suppliers of such materials do have the alternative of taking the necessary steps to perfect a security interest under Article Nine of the Uniform Commercial Code.<sup>73</sup> The furnishing of such materials, though, generally cannot give rise to a mechanic's lien claim unless they become a part of the realty,<sup>74</sup> and this is to be determined primarily by the intention of the

69. 142 Mo. App. 656, 123 S.W. 523 (St. L. Ct. App. 1909). See also *Fehlber v. Mode*, 142 Mo. App. 675, 123 S.W. 528 (St. L. Ct. App. 1909) (companion case).

70. 142 Mo. App. 656, 659, 123 S.W. 523, 526 (St. L. Ct. App. 1909).

71. *Id.* at 659, 123 S.W. at 527 (emphasis added).

72. *May v. Mode*, 142 Mo. App. 656, 123 S.W. 523 (St. L. Ct. App. 1909).

73. Article Nine generally deals only with personal property, but certain fixtures are exceptions to this rule. Section 400.9-313, RSMo 1969, which concerns the priority of security interests in fixtures, states that the rules of the section "do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like." More easily removable materials, however, such as machinery, can be the subject of an Article Nine security interest even though they may also qualify as lienable fixtures. See generally J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 924-38.

74. *Banner Iron Works v. Aetna Iron Works*, 143 Mo. App. 1, 122 S.W. 762

owner of the property.<sup>75</sup> If the owner intends that machines should become permanent fixtures in the building, then they can become the subject of a mechanic's lien.<sup>76</sup> The fact that an installed apparatus could be easily disconnected does not of itself make it nonlienable.<sup>77</sup>

Once the material furnished for an existing building has been determined to be a lienable fixture, the lien which arises from it will be held subordinate to a prior deed of trust. The lien does not attach to the installed material itself, but rather to the entire property (the land and the building) for the value of the material.<sup>78</sup> There is no separate and distinct construction to which the lien can attach free of the deed of trust because the fixture has become a part of the encumbered real estate; it had to in order to become lienable in the first place. Therefore, the lien which arises from the installment of such apparatus in an existing, completed building falls into the less-favored category of repairs and additions. Furthermore, it has been held that material does not become a separate and distinct structure, and therefore new construction, merely because it is possible to remove it without causing substantial damage.<sup>79</sup> It should be remembered, however, that if the material furnished enters into the *completion* of an unfinished building which has been under continuous construction, the mechanic's lien takes precedence as to the building over a mortgage given prior to its construction.<sup>80</sup>

Several cases deal with the special problem of repairs following destruction by fire. In *Schulenberg v. Hayden*<sup>81</sup> fire destroyed two-thirds of a house. After rebuilding the house, materialmen and laborers claimed priority for their mechanic's liens over an earlier deed of trust on both the land and building. The court held the deed of trust to be superior, basing its decision not upon the priority statutes but upon the contract rights of the parties.<sup>82</sup> The mortgagee's rights in the land and building became vested upon his receipt of the deed of trust and could not later be impaired by acts of the owner or third parties. The court rejected the alternative of allowing the mechanic's lien priority to the extent that the reconstruction increased the value of the house above its value before

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(St. L. Ct. App. 1909); *Carrol v. Shooting the Chutes Co.*, 85 Mo. App. 563 (St. L. Ct. App. 1900).

75. *Progress Press-Brick & Mach. Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 501, 52 S.W. 401 (1899); *Security Stove & Mfg. Co. v. Stevens*, 222 Mo. App. 1029, 9 S.W.2d 808 (K.C. Ct. App. 1928).

76. *Drew's Hdw. & Appl. Co. v. Willis Housing Projects*, 268 S.W.2d 596 (K.C. Mo. App. 1954).

77. *Security Stove & Mfg. Co. v. Stevens*, 222 Mo. App. 1029, 9 S.W.2d 808 (K.C. Ct. App. 1928).

78. *Elliott & Barry Eng'r Co. v. Baker*, 134 Mo. App. 95, 114 S.W. 71 (St. L. Ct. App. 1908).

79. *Id.* (newly installed heating unit replacing an old furnace, although able to be separated from the building, held to be a repair).

80. *Hall v. Mullanphy Planing Mill Co.*, 16 Mo. App. 454 (St. L. Ct. App. 1885).

81. 146 Mo. 583, 48 S.W. 472 (1898).

82. *Id.* at 593-96, 48 S.W. at 474-75.

the fire. Such a rule, it was stated, would lead to endless confusion and would require a sale of the whole and division of the proceeds to separate the interests of the mortgagee and the mechanic's lienor.<sup>83</sup> The same result could have been reached by simply declaring the reconstruction to have been a repair, in which case the general rule of section 429.050 would apply to give the deed of trust priority. In a later case involving reconstruction of a partially destroyed building, *Davidson v. Fisher*,<sup>84</sup> the repair rationale was used in holding the deed of trust superior.<sup>85</sup>

*Jones Lumber Co. v. Snyder*<sup>86</sup> reached a contrary result where all of the house except the foundation was destroyed by fire. When a new house was built upon the old foundation, a mechanic's lien for the work was given priority on the new house over a prior deed of trust.<sup>87</sup> The land and the foundation, however, remained subject to the deed of trust. *Schulenberg* was distinguished on the ground that the priority of the mechanic's lien would not impair the security which the holders of the deed of trust had before the new dwelling was constructed, since the latter could be removed from the foundation and the premises left in the same situation as they were before it was erected.<sup>88</sup>

In *Lowry-Miller Lumber Co. v. Dean*<sup>89</sup> the court spoke of the possibility of separating the relative interests of the mortgagee and mechanic's lienors where the salvaged remains of a mortgaged house partially destroyed by fire were used in the construction of a new house.<sup>90</sup> The house was held to be new construction rather than repair, and the mechanic's liens were thus given priority, but only to the extent that the value of the house exceeded the value of salvaged lumber from the old house.<sup>91</sup> The court noted that the mortgagee's lien on the salvage was a prior lien and could not be displaced by the construction of a new house without his consent.<sup>92</sup>

The court in *Fleming-Gilchrist Construction v. McGonigle*,<sup>93</sup> however, indicated that it may be permissible to order sale of the land and building together free and clear of the mortgage lien where the mortgage

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83. *Id.*

84. 258 S.W.2d 297 (Spr. Mo. App. 1953).

85. The contractor in these situations can protect himself by securing the express consent of the mortgagee to subordinate the deed of trust before beginning work. See *Schulenberg v. Hayden*, 146 Mo. App. 583, 595, 48 S.W. 472, 474 (1898).

86. 221 Mo. App. 1227, 300 S.W. 850 (K.C. Ct. App. 1927).

87. See also *Gold Lbr. Co. v. Baker*, 225 Mo. App. 849, 36 S.W.2d 130 (K.C. Ct. App. 1931).

88. *Jones Lbr. Co. v. Snyder*, 221 Mo. App. 1227, 1229, 300 S.W. 850, 852 (K.C. Ct. App. 1927).

89. 225 Mo. App. 299, 29 S.W.2d 736 (K.C. Ct. App. 1930). See also *Orear v. Dierks*, 188 Mo. App. 729, 176 S.W. 467 (K.C. Ct. App. 1915).

90. This portion of the opinion was dictum, since that remedy had not been sought in the pleadings.

91. 225 Mo. App. 299, 304-06, 29 S.W.2d 736, 739-40 (K.C. Ct. App. 1930).

92. *Id.* at 306, 29 S.W.2d at 740. The same result would have followed if the lumber had been removed or sold to a third party. See *Long v. Kisse*, 223 Mo. App. 996, 24 S.W.2d 693 (St. L. Ct. App. 1930) (similar distinction drawn).

93. 338 Mo. 56, 89 S.W.2d 15 (1935).

is due and subject to foreclosure at the time of the mechanic's lienor's sale of the building. Such a procedure would be allowed only if the prior mortgage is first paid out of the proceeds and all mechanic's lien claimants so agree. The mechanic's lienors, however, could not be forced to accept such an arrangement.<sup>94</sup> Such a remedy for enforcement of a lien must be viewed with some caution, however, because Missouri courts are reluctant to allow any plan for enforcement of priority of mechanic's liens not expressly authorized by statute.<sup>95</sup>

The general rule of section 429.050 is expressly not applicable to a newly constructed sidewalk.<sup>96</sup> Section 429.020, RSMo 1969,<sup>97</sup> provides for the establishment of a lien on the lot or tract where materialmen or laborers construct a sidewalk, water line, or similar improvement. Where a deed of trust precedes the attachment of such a mechanic's lien, the deed of trust has priority as to both the property and the sidewalk, because the sidewalk cannot be separately sold and removed.<sup>98</sup> There being no right to enforce the lien separately against the sidewalk, it cannot have priority over an antecedent deed of trust.<sup>99</sup> The lienholder, however, should be able to have all the property sold subject to the mortgage, because his lien extends to the entire lot. No Missouri court has yet decided whether a mechanic's lien on a sidewalk is superior to the subsequent deed of trust on the land on which the sidewalk rests, but the general rule of section 429.060 should give priority to the mechanic's lien in that situation.

### B. Purchase Money Deeds of Trust

A purchase money mortgage or deed of trust<sup>100</sup> is a mortgage given on real property as security for the payment of the purchase price for that property. The mortgage is ordinarily given contemporaneously with the purchaser's acquisition of legal title to the property or as part of the same transaction.<sup>101</sup> In determining whether a certain transaction

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94. *Id.* at 68, 89 S.W.2d at 21.

95. *See, e.g.,* Wilson v. Lubke, 176 Mo. 210, 75 S.W. 602 (1903); Ambrose Mfg. Co. v. Gapen, 22 Mo. App. 397 (K.C. Ct. App. 1886). *See also*, Annot., 107 A.L.R. 1012 (1937).

96. *See* text accompanying note 16 *supra*.

97. Section 429.020, RSMo 1969, provides:

Every mechanic or other person who shall do or perform any work or labor upon or furnish any material for the construction of any street, curb, sidewalk, sewer line, water line, or other pipe line in front of, adjacent to, along or adjoining any lot, tract or parcel of land in any town, city or village, under or by virtue of any contract with the owner or proprietor of such lot, tract or parcel of land, or his agent, trustee, contractor or subcontractor, shall, upon complying with the provisions of section 429.010 to 429.340, have a lien upon such lot, tract, or parcel of land for his work or labor done, or material furnished.

98. Hunter v. Masner, 202 S.W. 261 (K.C. Mo. App. 1918).

99. *Id.* at 262.

100. For a general discussion of priorities of purchase money mortgages see Annot., 73 A.L.R.2d 1407 (1960).

101. Annot., 73 A.L.R.2d 1407 (1960).

involves a purchase money mortgage, no distinction is generally made between a mortgage given the vendor and one given a third party lender.<sup>102</sup> The real test is whether the proceeds of the loan secured by the mortgage are to be used as purchase money.<sup>103</sup>

In general, questions of priority between mechanic's liens and purchase money mortgages are resolved in the same manner as if a non-purchase money mortgage were involved. The taking of a purchase money deed of trust for land and buildings already subject to a mechanic's lien is controlled by section 429.060. The purchase money deed of trust is subsequent in time to the mechanic's lien and is therefore subordinate, both as to the land and the buildings.<sup>104</sup> Section 429.050 applies to the situation where a building is constructed after a purchase of land in which a purchase money mortgage was given. Because the purchase money deed of trust arose prior to the effective date of the mechanic's lien, it has priority as to the land; the mechanic's lien, however, is superior on the building. Where repairs on an existing building are made after purchase, the purchase money mortgage is superior to the mechanic's lien on both the building and the land.<sup>105</sup>

It is in the situation where work is begun on a building under direction of a prospective purchaser of the property, or of a vendee under a contract of sale, that the general rules of priority do not necessarily apply. The cases have uniformly held that a contractor cannot establish a mechanic's lien on property unless he is under contract with a person having sufficient interest in the property to subject it to a mechanic's lien.<sup>106</sup> If the person contracting for work has neither legal nor equitable title, he cannot subject the property to a mechanic's lien.<sup>107</sup> A contractor cannot assert a claim against a greater interest in the property than that possessed by the person who hired him.<sup>108</sup>

For a mechanic's lien to attach it is not necessary that the person contracting for the construction work be the absolute owner in fee. He must simply be the owner of the estate sought to be charged with the lien.<sup>109</sup> There is no doubt that an equitable title is a sufficient founda-

102. *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 1068, 34 S.W.2d 529, 532 (Spr. Ct. App. 1931).

103. *Id.*

104. See pt. IV of this comment.

105. See pt. V, § A of this comment.

106. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Russell v. Grant*, 122 Mo. 161, 26 S.W. 958 (1894); *Jefferson Lbr. Co. v. Robinson*, 121 S.W.2d 209 (St. L. Mo. App. 1938); *Lyvers v. Rutherford*, 230 Mo. App. 921, 80 S.W.2d 729 (St. L. Ct. App. 1935); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 34 S.W.2d 529 (Spr. Ct. App. 1931); *Steininger v. Raeman*, 28 Mo. App. 594 (St. L. Ct. App. 1888).

107. *Steininger v. Raeman*, 28 Mo. App. 594 (St. L. Ct. App. 1888).

108. *Bridwell v. Clark*, 39 Mo. 170 (1866) (overruled on other points); cf. *Mid-West Eng'r & Constr. Co. v. Campagna*, 397 S.W.2d 616 (Mo. 1965) (lessee's ability when acting as agent of lessor to subject property to mechanic's lien).

109. *Wilson v. Lubke*, 176 Mo. 210, 211, 75 S.W. 602, 603 (1903); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 1068, 34



tion to sustain a mechanic's lien.<sup>110</sup> Therefore, a vendee under an executory contract of sale can subject the property to a lien by arranging for construction on the land, because under the doctrine of equitable conversion he is deemed to be the owner of equitable title.<sup>111</sup> Such a lien, however, is not superior to a purchase money mortgage given for the purchase of the lot upon which the building was erected, even though the mortgage was given after the construction was commenced.<sup>112</sup> While the lien against the equitable interest in land held under a contract of purchase is capable of attaching to the legal title,<sup>113</sup> the effective date of the lien will relate back only to the time that the vendee who contracted for the work acquired legal title.<sup>114</sup> Because the giving of a purchase money mortgage and the receiving of the deed are regarded as a single transaction with instantaneous seizin,<sup>115</sup> the lien of the mortgage arises at the same time as the mechanic's lien. The general rule is that a purchase money mortgage takes precedence over all other liens attaching contemporaneously with or subsequent to the passing of legal title to the vendee.<sup>116</sup> Legal title, therefore, comes into the vendee's hands burdened with the mortgage.<sup>117</sup> The mortgage lien cannot be postponed or dis-

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S.W.2d 529, 532 (Spr. Ct. App. 1931). See *Sawyer-Austin Lbr. Co. v. Clark*, 172 Mo. 588, 73 S.W. 137 (1903).

110. See *Sawyer-Austin Lbr. Co. v. Clark*, 172 Mo. 588, 590, 73 S.W. 137, 139 (1903); *Lyvers v. Rutherford*, 250 Mo. App. 921, 929, 80 S.W.2d 729, 735 (St. L. Ct. App. 1935); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 885, 74 S.W.2d 250, 251 (Spr. Ct. App. 1934); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 1067, 34 S.W.2d 529, 532 (Spr. Ct. App. 1931). See also Annot., 95 A.L.R. 1085, 1095 (1935). It is not entirely clear what the mechanic's lienor is entitled to for such a lien on equitable ownership. Presumably, the statutes on enforcement and satisfaction of mechanic's liens apply as they do for any other lien. The absence of case law and other commentary on this matter suggests that such liens are not often enforced by execution sale because of practical reasons.

111. On the doctrine of equitable conversion in general see D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 2.3 at 40-41 (1973); Stone, *Equitable Conversion by Contract*, 13 COLUM. L. REV. 369 (1913).

112. *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 885, 74 S.W.2d 250, 251 (Spr. Ct. App. 1934).

113. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 34 S.W.2d 529 (Spr. Ct. App. 1931); *H. B. McCray Lbr. Co. v. Standard Constr. Co.*, 285 S.W. 104 (K.C. Mo. App. 1926).

In this context the Missouri cases do not appear to distinguish between long-term and short-term contracts for the sale of real estate.

114. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 224 Mo. App. 1064, 34 S.W.2d 529 (Spr. Ct. App. 1931).

115. *Russell v. Grant*, 122 Mo. 161, 26 S.W. 958 (1894).

116. *Woodward v. Householder*, 315 Mo. 1155, 289 S.W. 571 (1926); *Demeter v. Wilcox*, 115 Mo. 634, 22 S.W. 613 (1893); *Rogers v. Tucher*, 94 Mo. 346, 7 S.W. 414 (1888); *Morris v. Page*, 31 Mo. 315 (1861); Annots., 73 A.L.R.2d 1407 (1960), 72 A.L.R. 1516 (1931).

117. *Steininger v. Raeman*, 28 Mo. App. 594, (St. L. Ct. App. 1888).

placed<sup>118</sup> by any act of the vendee done prior to passage of title.<sup>119</sup> The purchase money mortgage is superior as to the land and any buildings purchased in the transaction with proceeds from the mortgage.<sup>120</sup>

A simple example can illustrate the operation of this rule. *B* contracts to buy a lot from *S*. *B*, without the consent or knowledge of *S*, then contracts with *M* for a house to be built on the lot. *M* begins construction and later asserts a mechanic's lien for his work. The sale is then closed, with *S* giving *B* a general warranty deed and *B* giving *S* a note for the purchase price, secured by a purchase money deed of trust. Because this is viewed as a single transaction, *M*'s mechanic's lien attaches to the legal title in the land simultaneously with the mortgage lien. The mechanic's lien is subordinate to the lien of *S*'s purchase money deed of trust to the extent that the proceeds from the loan were used to pay for the lot.<sup>121</sup> The mechanic's lien, however, has priority on the house being built by *M*.<sup>122</sup>

A purchase money mortgagee who requires or consents to the improvement, however, may lose his priority on the land by application of the waiver doctrine.<sup>123</sup>

### C. After-Acquired Property

It is possible that a lender may attempt to bolster his security by inserting an after-acquired property clause in the security instrument.

118. *Id.*; *Russell v. Grant*, 122 Mo. 161, 26 S.W. 958 (1894).

119. *Steininger v. Raeman*, 28 Mo. App. 594 (St. L. Ct. App. 1888). If the opposite rule were followed and the mechanic's lien were held superior to the purchase money mortgage, the mortgagee would be in the anomalous position of giving money which would allow the mechanic's lienor to establish his lien. The mortgagee would get no security except what would amount to a second mortgage.

120. *Sweet Lbr. Co. v. E.L. Lane, Inc.*, 513 S.W.2d 365 (Mo. En Banc 1974) (dictum); *Schroeter Bros. Hdw. Co. v. Croatian "Sokol" Gymnastic Ass'n*, 332 Mo. 440, 58 S.W.2d 995 (1932); *Lyvers v. Rutherford*, 230 Mo. App. 921, 80 S.W.2d 729 (St. L. Ct. App. 1935); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934).

121. *Lee & Boutell Co. v. C.A. Brockett Cement Co.*, 341 Mo. 95, 112, 106 S.W.2d 451, 457 (1937); *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934).

122. *Wilson v. Lubke*, 176 Mo. 210, 75 S.W. 602 (1903); *Joplin Cement Co. v. Greene County Bldg. & Loan Ass'n*, 228 Mo. App. 883, 74 S.W.2d 250 (Spr. Ct. App. 1934). In *Wilson* a deed of trust covering a city lot was given by the buyer of the lot. The underlying note was for the price of the lot plus a larger sum advanced to finance the building of a house on the lot. The buyer-mortgagor then defaulted on the deed of trust and failed to pay for the construction costs. The deed of trust was held to have priority on the land, but the mechanic's lien established for construction of the house was accorded priority on the house. A comparable result was reached on similar facts in the *Joplin Cement Co.* case, where a deed of trust securing a \$4000 loan, of which \$615 was used to purchase a lot and the balance for building a house, was given in the course of purchasing the lot. The deed of trust was given priority only to the extent that the proceeds were used for the purchase of the real estate. The mechanic's lien was held to be superior on the house.

123. See pt. VI of this comment.

The effect of such a clause is to include as security any property in a specified class later obtained by the borrower.<sup>124</sup> When property is subjected to a mortgage lien by operation of such a clause, a possible conflict of priority arises if the property is also burdened with a mechanic's lien. The presence of an after-acquired property clause, however, should not alter the basic rules of priority discussed earlier. Even without such a clause, subsequent improvements on mortgaged land will be subject to the lien of the mortgage under the doctrine of accession.<sup>125</sup> Because the inclusion of an after-acquired property clause will not provide the mortgagee with any more security than he would have had without it, the normal rules of priority should govern.

*Hall v. Mullanphy Planing Mill Co.*<sup>126</sup> indicates that Missouri courts will follow this approach. In *Hall* machinery was supplied and attached to a building then burdened with a deed of trust containing an after-acquired property clause. The mortgage claimed a prior lien on the machinery as security under this clause, while the supplier claimed a superior mechanic's lien against the building on the ground that the machinery was furnished for completion of the unfinished building. The court held that if the supplier were entitled to a lien, it would attach when the machinery was furnished and would be superior on the building. A mortgage lien can attach to property only in the condition in which it comes into the mortgagor's possession, and the machinery in *Hall* came into the mortgagor's possession burdened with a mechanic's lien. To hold otherwise, the court reasoned, would be to allow contracts of third parties to deprive mechanic's lienors of rights provided by statute.<sup>127</sup> Thus, a deed of trust containing an after-acquired property clause will come under the rule of section 429.050 just like any other deed of trust—i.e., a mechanic's lien arising subsequent to a deed of trust takes priority on the building where the work performed was to complete construction of it.<sup>128</sup>

Where property subject to a mechanic's lien is sold to a purchaser whose existing mortgage contains an after-acquired property clause, the mortgage is treated as a subsequent encumbrance under section 429.060 and the mechanic's lien is given priority. This result would also be reached under the rule that a conveyance of property subject to a mechanic's lien does not affect the rights of the mechanic's lienor.<sup>129</sup>

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124. After-acquired property clauses can cover new accessions to the property described in the mortgage and after-acquired other realty as well. See generally G. OSBORNE, MORTGAGES §§ 37-41 (2d ed. 1970).

125. See 3 G. GLENN, MORTGAGES 1450 (1943), which states:

[I]f the mortgagor brings upon the premises a thing which by its very nature becomes a part of the land by virtue of the law of real property, the mortgagee may enjoy the resulting benefit without the need of an after-acquired property clause.

126. 16 Mo. App. 454 (St. L. Ct. App. 1885).

127. *Id.* at 459.

128. See pt. V, § A of this comment.

129. *Douglas v. St. Louis Zinc Co.*, 56 Mo. 388 (1874); *Waters v. Gallemore*,

#### D. Mortgages to Secure Future Advances

A mortgage or deed of trust to secure future advances<sup>130</sup> is often used to secure construction loans, with installments being advanced to the mortgagor or contractor as the work progresses.<sup>131</sup> Under such an arrangement the mortgagee will look to the building which is to be erected, as well as to the land, for his security. This will inevitably lead to competing interests, because mechanics and materialmen involved in the construction will also rely on the building for their security. In states where the matter is not expressly determined by statute, there are many different factors which affect the priority of mechanic's liens in relation to advances made under a previously executed mortgage. These factors include whether the advances are obligatory or optional, whether there is notice or knowledge of the other claimant's right, and the use to which the loan proceeds are put.<sup>132</sup>

The leading case in Missouri dealing with the problem of priorities between mortgages to secure future advances and mechanic's liens is *H. B. Deal Construction Co. v. Labor Discount Center, Inc.*<sup>133</sup> The construction loan to the owner in that case involved a method for disbursing advances whereby the contractor received construction funds from the lender by requesting them when needed. By the time the tenth request for funds was made, there was no balance remaining to complete the job because of costly change orders by the owner as the work progressed. The general contractor and nine other claimants subsequently filed mechanic's liens and sought to have them declared superior to the prior lien of the deed of trust which secured the construction loan. The supreme court simply applied section 429.050, which directs that a mechanic's lien on a newly-completed building be given preference to a prior lien of a deed of trust on the land, and held the mechanic's liens to be superior as to the building.<sup>134</sup>

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41 S.W.2d 840 (K.C. Mo. App. 1931); *Tull v. Fletcher*, 196 Mo. App. 573, 196 S.W. 436 (K.C. Ct. App. 1917).

130. See generally Blackburn, *Mortgages to Secure Future Advances*, 22 Mo. L. REV. 209 (1956).

131. A typical mortgage to secure future advance operates in the following manner: X insurance company agrees to loan Y company \$100,000 to build an office building. The agreement provides that 10 per cent of the money will be paid to the contractors as each 10 per cent of the building is completed. Y gives a deed of trust to X to secure the \$100,000 loan. When the first 10 per cent of the building is completed, X pays the contractors \$10,000. When the second 10 per cent is completed, X pays the contractors another \$10,000. This process continues, ideally, until the building is completed and costs of construction paid. It should be noted, however, that where the mortgagee advances the funds in such a manner, he may be held to have waived the priority of his lien over subsequent mechanic's liens. See note 150 and accompanying text *infra*.

132. See Annot., 80 A.L.R.2d 179 (1961).

133. 418 S.W.2d 940 (Mo. 1967).

134. 418 S.W.2d at 952. The mechanic's liens in *Deal* were also given preference on the land over the deed of trust, because the mortgagee was held to have waived its priority by actively participating in dealings with the contractors. *Id.* at 952-54. See pt. VI of this comment.

The lender-mortgagee in *Deal* argued that section 429.050 does not apply where the lender is legally obligated to disburse the proceeds of the construction loan, and where the mortgage is taken not only on the land, but also with the expectation that the building being constructed will provide the major portion of the security for the loan. The court flatly rejected this argument, stating that section 429.050 is plainly written to encompass *all* prior liens, encumbrances, or mortgages.<sup>135</sup> The effect of the *Deal* decision is that a construction loan tied to a mortgage to secure future advances will be treated as any other loan and mortgage in Missouri, being governed by the priority rules in sections 429.050 and 429.060, RSMo 1969.

This rule is obviously quite disadvantageous to the construction lender because his mortgage will always be subordinate to a mechanic's lien as to the building erected. A mortgagee's only real protection, absent legislative change, is to see that no mechanic's lien claims are filed against the secured property.<sup>136</sup> But if the mortgagee participates too actively in the construction of the building, he may lose his right to priority on the land as well, through application of the doctrine of waiver.<sup>137</sup> It is therefore necessary to exercise extreme caution when taking a deed of trust to secure a construction loan.

A mortgage to secure future advances may also be given for purposes other than the procuring of a construction loan. For instance, a mortgage may be given for future advances which are to be used generally in the mortgagor's business. Also, a mortgage may provide for such future advances as are necessary to protect the mortgagee's interest or to preserve the value of the security.<sup>138</sup> It could be argued that such mortgages be given priority on the building because the advances under them would not be used for a purpose which invites potential mechanic's lien claims. The unequivocal language in *Deal*, though, indicates that all mortgages to secure future advances will be treated in the same manner as was the construction loan there.<sup>139</sup> This would seem to follow because where

135. 418 S.W.2d 952-54. The court cited with approval the language from *Drake Lbr. Co. v. Paget Mortgage Co.*, 203 Ore. 66, 89, 274 P.2d 804, 814 (1954): Our statute makes no exception, but manifestly refers to all prior recorded mortgages, whether given for future advances to aid in construction or not. We are not at liberty to import exceptions into the statutes because of possibilities conjured up by counsel that the expectations of a mortgagee concerning the security which he is receiving will be disappointed.

136. Other than investigating the parties involved in the loan and construction carefully, the construction lender mortgagee may protect himself at the outset by insisting upon a performance and payment bond, and by requiring that loan disbursements be arranged by a title company that is willing to insure each disbursement against mechanic's lien claims. For a comprehensive discussion of precautions for the construction lender to follow, both prior to the loan and throughout the construction period, see R. KRATOVIL, *MODERN MORTGAGE LAW AND PRACTICE* §§ 212-14 (1972).

137. See pt. VI of this comment.

138. See, e.g., *Realty Sav. & Inv. Co. v. Washington Sav. & Bldg. Ass'n*, 63 S.W.2d 167 (St. L. Mo. App. 1933).

139. See note 135 and accompanying text *supra*.

advances are made for general purposes the mortgagee is not relying on having any further security. Section 429.050 is to be applied without exception, giving preference on the building to a mechanic's lien over any prior deed of trust on the land.

## VI. WAIVER OF PRIORITY

Although the rules controlling priorities between mechanic's liens and deeds of trust are quite comprehensive and leave few results to speculation, it is very important to remember that almost any of the seemingly inflexible rules is subject to modification by the doctrine of waiver. Either the mechanic's lien claimant or the mortgagee may expressly or impliedly waive his right to priority.

Although a waiver of the priority of a mechanic's lien over a deed of trust may be created by implication, it more frequently arises by mutual agreement.<sup>140</sup> The mechanic's lienor may by contract waive either his right to claim and enforce a lien<sup>141</sup> or his right to priority.<sup>142</sup> To be valid, the intention to waive must be clearly manifested<sup>143</sup> and must be supported by consideration or have induced a detrimental change of position in reliance upon the waiver.<sup>144</sup> There will be no discussion of waiver by a mechanic's lienor in this comment.<sup>145</sup> Because it is ordinarily a contractual arrangement, there is only a limited chance that it will have an unforeseen effect on priorities.

The major impact of the doctrine comes from waiver of priority by the mortgagee. Certain types of conduct by the mortgagee may be held to be an implied waiver, causing the mortgage lien to be subordinated to an otherwise inferior mechanic's lien. Where a mechanic's lien is already preferred as to the building, such a waiver will result in the lien taking precedence on the mortgaged land as well.<sup>146</sup>

Merely consenting or failing to object to improvement or repair of property is insufficient evidence upon which to find waiver of a mort-

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140. *Langdon v. Kleeman*, 278 Mo. 236, 211 S.W. 877 (1919).

141. *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541 (Mo. App., D.K.C. 1973); *Early v. Atchison T. & S.F. Ry.*, 167 Mo. App. 252, 149 S.W. 1170 (St. L. Ct. App. 1912).

142. *Herbert & Brooner Constr. Co. v. Golden*, 499 S.W.2d 541 (Mo. App., D.K.C. 1973).

143. *Id.*; *Berger v. McBride & Son Builders, Inc.*, 447 S.W.2d 18 (St. L. Mo. App. 1969).

144. *St. Louis Flexicore, Inc. v. Lintzenich*, 414 S.W.2d 787 (St. L. Mo. App. 1967); *Giammarino v. J.W. Caldwel Constr. Co.*, 72 S.W.2d 159, 160 (St. L. Mo. App. 1934); *Center Creek Mining Co. v. Cegne*, 164 Mo. App. 492, 147 S.W. 148 (Spr. Ct. App. 1912).

145. See generally *Mid-West Eng'r & Constr. Co. v. Campagna*, 397 S.W.2d 616 (Mo. 1965); *Chaney, The Missouri Mechanic's Lien Statute—Is It Adequate?*, 26 Mo. L. REV. 53 (1961).

146. *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940, 952-54 (Mo. 1967).

gagee's right to priority.<sup>147</sup> Waiver is essentially a matter of intention.<sup>148</sup> There need not, however, be an express declaration by the mortgagee that his lien shall be subordinated. Waiver may be inferred from his acts, deeds, and omissions.<sup>149</sup> Such acts or omissions, however, "must be so manifestly consistent with and indicative of an intention to relinquish the particular right or benefit that no other reasonable explanation . . . is possible."<sup>150</sup> Knowledgeable consent to the acts relating to the new construction on the encumbered property is a vital element, without which there can be no waiver.<sup>151</sup>

A waiver of priority will be found when the mortgagee has induced the furnishing of labor and materials for the work involved.<sup>152</sup> This may be done by providing the funds for the work performed,<sup>153</sup> and by otherwise actively participating in the project.<sup>154</sup> In *Trout's Investment, Inc. v. Davis*<sup>155</sup> the mortgagee made the crucial mistake of exercising control over the loan funds by closely monitoring the account in which they were placed, with knowledge that the unpaid bills for materials and labor would become lienable.<sup>156</sup> Of perhaps more significance, the mortgagee made representations and assurances to the contractors that there would be sufficient funds to pay the bills, and that everything would be "fine."<sup>157</sup> Other cases have held that active involvement in setting the cost of the work to be done, or agreement as to such cost, is enough participation to support a finding of waiver.<sup>158</sup>

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147. *Magidson v. Stern*, 235 Mo. App. 1039, 148 S.W.2d 144 (St. L. Ct. App. 1941); *Bovard v. Owen*, 30 S.W.2d 154 (K.C. Mo. App. 1930).

148. *Langdon v. Kleeman*, 278 Mo. 236, 211 S.W. 877 (1919); *Bovard v. Owen*, 30 S.W.2d 154 (K.C. Mo. App. 1930).

149. *Id.*

150. *Bovard v. Owen*, 30 S.W.2d 154, 156 (K.C. Mo. App. 1930).

151. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *Lee & Boutell Co. v. C.A. Brockett Cement Co.*, 341 Mo. 95, 106 S.W.2d 451 (1937); *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *Jefferson Co. Lbr. Co. v. Robinson*, 121 S.W.2d 209 (St. L. Mo. App. 1938); *Lyvers v. Rutherford*, 230 Mo. App. 921, 80 S.W.2d 729 (St. L. Ct. App. 1935).

152. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967); *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510 (Mo. App., D.K.C. 1972); *Magidson v. Stern*, 235 Mo. App. 1039, 148 S.W.2d 144 (St. L. Ct. App. 1941); *Lyvers v. Rutherford*, 230 Mo. App. 921, 80 S.W.2d 729 (St. L. Ct. App. 1935); *Compton v. Conrad*, 203 Mo. App. 211, 209 S.W. 288 (Spr. Ct. App. 1919).

153. *Magidson v. Stern*, 235 Mo. App. 1039, 148 S.W.2d 144 (St. L. Ct. App. 1941).

154. *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967).

155. 482 S.W.2d 510 (Mo. App., D.K.C. 1972).

156. *Id.* at 516-18; cf. *Drilling Serv. Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972); *H.B. Deal Constr. Co. v. Labor Discount Center, Inc.*, 418 S.W.2d 940 (Mo. 1967).

157. *Trout's Inv., Inc. v. Davis*, 482 S.W.2d 510, 516 (Mo. App., D.K.C. 1972).

158. *Jefferson Co. Lbr. Co. v. Robinson*, 121 S.W.2d 209 (St. L. Mo. App. 1938); *Lyvers v. Rutherford*, 230 Mo. App. 921, 80 S.W.2d 729 (St. L. Ct. App. 1935).

### VIII. CONCLUSION

The rules for priority between deeds of trust and mechanic's liens in Missouri are found in sections 429.050 and 429.060, RSMo 1969. Both sections have remained essentially unchanged throughout the last century, and no new developments appear imminent. Missouri courts have consistently favored a literal interpretation of these statutes, and the rules of interpretation which have evolved have become relatively settled. Consequently, one armed with a basic understanding of the rules can often predict with confidence which party is entitled to priority in a given situation. It is important, however, to have total command of all relevant facts, particularly the sequence in which all liens were established and whether labor and materials were furnished for the completion of new construction or only for repairs or additions to an existing structure. In addition, it must be remembered that the statutory scheme was intended to be highly favorable to mechanic's liens. Mortgagees can be assured of having the protection they desire only if they are aware of all the dangers in advance.

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