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THE MARYLAND MECHANICS' LIEN LAW — ITS SCOPE AND EFFECT

By MITCHELL S. CUTLER* and LEONARD SHAPIRO**

In 1791 Maryland enacted the first mechanics' lien law in the United States.¹ This early act applied to the City of Washington and had been urged by Thomas Jefferson and James Madison to stimulate and encourage the rapid building of that city.² It gave a lien to "the undertaker, or workmen, employed by the person for whose use the house shall be built." Maryland's present mechanics' lien statute³ favors not only those who contract with the owner but also workmen, materialmen and other subcontractors who contract only with an intervening contractor who has dealt with the owner. The purpose of this article is to survey the current mechanics' lien law of Maryland with special emphasis on the rights of such subcontractors, using the term subcontractors broadly to include all those supplying work or materials to the general contractor or to another subcontractor. The following broad topics will be examined: the type of claims for which liens may be obtained; the classes of property to which liens will attach; loss of lien rights by waiver, estoppel or release; the procedural requirements of notice and filing; and the priority of mechanics' liens over other liens. Finally, certain reforms will be suggested.

Generally, the courts purport to construe the mechanics' lien laws most liberally on behalf of the subcontractor and materialmen, reasoning that the owner receives the benefit of the labor or materials supplied, that he controls the money, and that it should therefore be incumbent upon him to make the necessary appropriation on behalf of the subcontractor. If the owner pays out money to the general contractor without taking reasonable precautions to see that it is properly applied, then he, rather than the subcontractor, must bear the loss.⁴ Courts are reluctant to deny the subcontractor recovery of money owing to him for labor or materials supplied, primarily because they feel that he is unable to protect himself once he has delivered the materials or supplied the labor. Typically, the subcontractor has no contract with the owner of the land, while, at the same time, his contract with the builder often proves to be of no significant benefit.⁵

However, despite the tendency to interpret the mechanics' lien law in favor of subcontractors, the Maryland Court of Appeals has consistently held that a mechanics' lien exists only by virtue of the mechanics' lien statute and that no lien exists for anything that falls

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1. Ch. 45, § 10 [1791] MD. LAWS.

2. W. ROCKEL, *MECHANICS LIENS* § 1 (1909).

3. MD. ANN. CODE art. 63, §§ 1-52 (1968).

4. *Bounds v. Nuttle*, 181 Md. 400, 406, 30 A.2d 263, 266 (1943).

5. *See Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 507, 168 A.2d 385, 389 (1961).

outside the statutory provision.⁶ At times the court has emphasized that it has no power to extend the designs and requirements of the statute.⁷

NATURE OF THE DEBT FOR WHICH A LIEN
MAY BE OBTAINED

What Constitutes a "Building"?

The Maryland mechanics' lien statute provides:

Every building erected and every building repaired, rebuilt or improved to the extent of one fourth its value in Baltimore City and in any of the counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same, and for materials furnished for or about the same, including the drilling and installation of wells for the purpose of supplying water, the construction or installation of any swimming pools, the sodding, seeding or planting in or about the premises, of any shrubs, trees, plants, flowers or nursery products of any kind or description and the grading, filling, landscaping, and paving thereon.⁸

Determination of whether a claimant is entitled to a lien under this provision requires interpretation of the word "building" and of the phrase "debts contracted for work done for or about [the building], and for materials furnished for or about the same." In *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*,⁹ the Court of Appeals was faced with the claim of a contractor for a mechanics' lien for the construction of a swimming pool. At that time, the statute did not expressly include swimming pools. The court held that a swimming pool was not a "building" within the meaning of the statute and denied the claim. The somewhat vague definition of "building" advanced by the court was as follows: "Taken in its broadest sense ['building'] can mean only an erection intended for use and occupancy as a habitation, or for some purpose of trade, manufacture, ornament, or use, such as a house, store, or a church. . . . The word 'building' cannot be said to include every type of structure on land."¹⁰

In addition to dictionary references, the *Freeform* court relied on the fact that the legislature has repeatedly amended the statute to allow mechanics' liens for such things as grading and landscaping, inferring that if the legislature had intended to include a lien for swimming pool construction it would have so specified. The court's

6. In *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 302, 179 A.2d 683, 685 (1962), the Court of Appeals stated: "A mechanics' lien was unknown at common law, nor was it allowed in equity. . . . While it was said that a mechanics' lien rests upon an equitable basis, yet without the benefit of a statute a court of equity cannot assume jurisdiction."

7. *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 179 A.2d 683 (1962); *House v. Fissell*, 188 Md. 160, 51 A.2d 669 (1947); *Maryland Cas. Co. v. Lacios*, 121 Md. 686, 89 A. 323 (1913).

8. Md. ANN. CODE art. 63, § 1 (1968).

9. 228 Md. 297, 179 A.2d 683 (1962).

10. *Id.* at 301, 179 A.2d at 685.

suggestion that the legislature, by enumerating such things as grading and landscaping, was expanding the definition of "building" rather than the definition of "work done for or about," raises interesting questions. If the only work done is to dig a well, plant trees or lay out a road, and there is no structure of any kind on the land, can the contractor obtain a lien? The *Freeform* opinion suggests that he can, although the original intention of the legislature was probably that there must be a building against which the lien attaches.

In other jurisdictions, courts have interpreted the word "building" to include a floating wharf boat attached to the bank of a river¹¹ and a flume for the purpose of conveying water to a water wheel.¹² On the other hand, fencing, fenceposts and gates,¹³ a wall built around three sides of the stack of a furnace,¹⁴ and seats for use in a pleasure resort¹⁵ have all been found not to be included within the definition of "building." Under the definition of "building" stated by the Court of Appeals in *Freeform Pools*, which seems to require suitability for "use and occupancy," it would appear that among these examples only the wharf boat could be held to be a "building" under the Maryland statute.

"Work Done" or "Materials Furnished for or About" the Building

Assuming that a building is involved, the claimant must also show, to obtain a lien, that the work done or materials supplied were "for or about" the building. Clearly, all materials and labor incorporated into actual construction of the "building" are lienable items. Lienable work "about" the building, however, is arguably limited to those items expressly designated by the statute, although this interpretation would be contrary to the *Freeform Pools* rationale.

If the building has only been repaired, rebuilt or improved, the statute requires that it must be improved to the extent of one fourth of its value. If the value of the repairs or the materials furnished is shown to be less than one fourth of the value of the building, no lien will attach.¹⁶ If one of the specifically mentioned items, such as a well, is deemed itself to be a "building" for the purposes of the statute, then apparently the well driller would be entitled to a lien without any showing that the real estate has been enhanced in value, or that his work was intended to provide service for the proposed structure to be built on the property.

The Maryland Court of Appeals has twice suggested that a person who supplies materials for incorporation in a structure may have a lien even though his materials were not used.¹⁷ In both of these cases, however, the record did not reveal whether or not they had been used;

11. Galbreath, Stewart & Co. v. Davidson, 25 Ark. 490 (1869).

12. Derrickson v. Edwards, 29 N.J.L. 468 (Sup. Ct. 1865).

13. Canisius v. Merrill, 65 Ill. 67 (1872).

14. Truesdell v. Gay, 79 Mass. (13 Gray) 311 (1859).

15. Lothian v. Wood, 55 Cal. 163 (1880); Annot., 1912B Ann. Cas. 5.

16. Parker v. Tilghman V. Morgan, Inc., 170 Md. 7, 183 A. 224 (1936).

17. District Heights Apts. v. Noland Co., 202 Md. 43, 95 A.2d 90 (1953); Maryland Brick Co. v. Spilman, 76 Md. 337 (1892).

moreover, the chief issue was whether the claimant must show how much of his materials went into each particular building in a multi-structure project. If bricks have been delivered for a building, but the owner shows clearly that all of the bricks are still stacked and unused, it is still unclear whether or not the supplier will be entitled to a lien on the building, although the court in *District Heights Apartments v. Noland Company*¹⁸ implied that a lien can be obtained in such a situation.

A subcontractor will often include within his contract price costs which were not directly attributable to or incorporated in the physical structure. In *House v. Fissel*,¹⁹ the question arose whether a mechanics' lien would attach for payments of workmen's compensation and liability insurance premiums, for fuel used in trucks for hauling materials, for rental for storage of lumber, and for preparing building plans. The court granted the lien for the amount of the workmen's compensation and insurance premiums and concluded that although the gas and oil did not constitute "materials" within the meaning of the statute, their costs should be considered debts contracted "for or about" the building and, therefore, were also lienable items. The claim for storage of lumber and preparation of building plans was, however, denied.²⁰

In an earlier case, *Basshor v. Baltimore & Ohio Railway*,²¹ it was held that one who supplies to a materialman the machinery used to produce materials to be incorporated in a building is not entitled to a mechanics' lien. The court held that such machinery did not fall within the meaning of "materials furnished for or about" the building. However, in *Evans Marble Company v. International Trust Company*,²² the court was faced with a claim for a lien for the work of preparing stone off the building premises, and in addition, for the cost of erecting that stone. The court held that work done off the building site was lienable, and that the word "about" in the statute should be interpreted broadly to mean "concerning", "with regard to" or "touching". The problem of reconciling the foregoing language taken from *Evans Marble* with the holding of *Basshor* has not proved insurmountable. In *Basshor*, a machine was supplied to a materialman to enable him to produce materials which would be ultimately incorporated in the building structure. The machinery itself was never intended for incorporation within the structure. The *Basshor* court said that materials, within the meaning of the statute, meant such materials as ordinarily are used in the construction contemplated. Clearly, the machinery in that case could not qualify on those terms. Unlike *Basshor*, the contract in *Evans Marble* specifically referred to

18. 202 Md. 43, 95 A.2d 90 (1953).

19. 188 Md. 160, 51 A.2d 669 (1947). See also *Gill v. Mullan*, 140 Md. 1, 116 A. 563 (1922), where a lien was claimed for coal, lubricating oil, etc., used in the running of the claimant's steamshovel, as well as for depreciation of that shovel. The court concluded that, although the specific materials were not "materials furnished" within the meaning of the statute, the value of such articles can be considered lienable items to be included in the value of "work done."

20. But see *Caton Ridge, Inc. v. Bonnett*, 245 Md. 268, 225 A.2d 853 (1967).

21. 65 Md. 99, 3 A. 285 (1886).

22. 101 Md. 210, 60 A. 667 (1905).

the cutting of the stone, and it was reasonably clear that the ultimate use intended was the incorporation of the stone into the building structure. Thus, despite frequent reference to *Evans Marble* as holding that a lien can be obtained for work done entirely off the job site, the question of the attachment of a mechanics' lien for work done off the job site is still unsettled.

Two more recent decisions of the Maryland Court of Appeals have helped to clarify the problem. In *Giles & Ransome, Inc. v. First National Realty Corporation*,²³ the Maryland court was asked to rule that a mechanics' lien could be perfected by a lessor of equipment which had been leased to a subcontractor for purposes of earth-moving and grading. The questions presented to the court were (1) whether the leasing of earth-moving equipment to a grading subcontractor constituted "work done for or about" a building within the meaning of the mechanics' lien law, and (2) whether a lessor of equipment to a contractor or subcontractor fell within the class of persons entitled to a lien. In answering the first question, the court focused on the actual operation of the equipment, stating that the question would turn on whether the mechanics who operated the leased equipment were employed by the lessor or the lessee.²⁴ The court concluded that:

Since it is not disputed that the operators were employees of the subcontractor (who was the lessee), we think the lessor was not entitled to a lien either on the theory that the supplying of the equipment on a rental basis constituted "work done" or on the theory that the charges for the use of the equipment constituted a debt "contracted for work done." This is so because the lessor had done no work for or about the premises. In order for it to come within the plain meaning and obvious purpose of the statute it was necessary for it to have actually participated in the performance of the work done, and this necessitated something more than taking the equipment to the site of the job, keeping it in running order while it was there, and removing it when the grading was completed.

. . . .

We conclude that the rental of equipment without a mechanic to operate it is not a lienable item under the provisions of § 1 of Art. 63.²⁵

It is suggested that the conclusion reached in this case is inconsistent with the liberal interpretation heretofore given to the mechanics' lien law by the Maryland courts. The court distinguished *Gill v. Mullan*²⁶ and the *House* case, discussed above, by stating that in *Gill* the lienor

23. 238 Md. 203, 208 A.2d 582 (1965).

24. Several courts have permitted the attachment of a mechanics' lien for the leasing of equipment. See *Mann v. Schnarr*, 228 Ind. 654, 95 N.E.2d 138 (1950); *Timber Structures v. C.W.S. Grinding & Machine Works*, 191 Or. 231, 229 P.2d 623 (1951); *Harris, Inc. v. Cincinnati, New Orleans & T.P. Ry.*, 198 Tenn. 339, 280 S.W.2d 800 (1955). In addition, several states, such as Washington, California and Minnesota, have extended their statutes to include the leasing of equipment.

25. 238 Md. at 206-08, 208 A.2d at 584-85.

26. 140 Md. 1, 116 A. 563 (1922).

was a subcontractor and in *House* he was a general contractor. The court's holding seems to state a mere conclusion rather than to provide a satisfactory basis for denying the lien. It is submitted that "work done" or "debts contracted for work done", in order to be consistent with prior judicial decisions allowing a lien for the rental value of machinery supplied by a subcontractor, should include the leasing of equipment. The suggestion made by the court that a lessor, simply by supplying his own machine operators, can be transformed from an independent party into a subcontractor is of questionable wisdom in light of the fact that the court has previously recognized the practical difficulties of an all-encompassing lien law and has sought to establish more precise boundaries and standards for future decisions.²⁷

In another case decided by the Maryland Court of Appeals, *Caton Ridge, Inc. v. Bonnett*,²⁸ an architect was held entitled to a mechanics' lien for his combined effort in preparing the plans for and supervising the erection of a building. The question of the attachment of a lien solely for the preparation of plans was left unanswered,²⁹ since the court based its decision primarily on the fact that the contract, which provided for both the preparing of plans and the supervision of work, was indivisible. The compensation for both activities was provided for in a lump sum and could not practically be apportioned.

An interesting development in the *Giles & Ransome* case was the court's implicit suggestion that only those who *contracted* to supply materials or labor are within the class of persons entitled to a lien. The court stated that the provisions of Section 13 of the mechanics' lien statute³⁰ "make it apparent that a lessor of equipment to a contractor or subcontractor is not included within the class of persons entitled to a lien."³¹ Section 13 permits the owner to retain from the cost of a building amounts due persons who give proper notice under Sections 11 and 12,³² but apparently limits that right to cases in which the "contractor or builder of a building shall have purchased materials or contracted for work and the party with whom such contract was made shall have given notice. . . ." A narrow reading of this provision indicates that if the builder or contractor did not purchase materials from the claimant or contract for work with him, then the owner had no right to retain money for that claimant's benefit. Since

27. See also *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 228 Md. 297, 179 A.2d 683 (1962).

28. 245 Md. 268, 225 A.2d 853 (1967).

29. In *Morris J. Liebergott & Associates v. Investment Bldg. Corp.*, 249 Md. 584, 241 A.2d 138 (1968), the court reaffirmed its position that, in *Caton Ridge*, it did not decide whether an architect who only prepares plans and does not supervise work was entitled to a lien.

30. MD. ANN. CODE art. 63, § 13 (1968):

§ 13. Owner may retain from cost of building amount of which he has been notified.

In all cases in which a contractor or builder of a building shall have purchased materials or contracted for work and the party with whom such contract was made shall have given notice as required in §§ 11 and 12 to the owner of such building, it shall be lawful for the owner to retain from the cost of such building the amount which he may ascertain to be due to the party giving such notice; and in case any lien be laid by the party giving such notice and be also laid by the contractor or builder, the said contractor or builder shall receive only the difference between the amount due him and that due the person giving the notice.

31. 238 Md. at 208, 208 A.2d at 585.

32. MD. ANN. CODE art. 63, §§ 11, 12 (1968).

the right of retention is the essence of the mechanics' lien law, it would logically follow that the legislature did not intend that a supplier of material to a subcontractor be entitled to a lien, since he has no direct contract or dealings with the contractor. Under the same reasoning, it would appear that employees of a subcontractor would similarly not be entitled to a mechanics' lien. Such a case would arise if a subcontractor were paid by a contractor or owner, and the subcontractor subsequently failed to pay his employees. The owner might also argue that all moneys due had been paid to the necessary persons or firms in accordance with the second sentence of Section 1 of Article 63. However, because of the propensity of the Maryland courts to liberally construe the rights of lien claimants, it is unlikely that the narrow reading discussed above will be accepted. Thus, owners and builders will, without legislative relief, remain vulnerable to the possibility of double liability which has characterized the operation of the Maryland mechanics' lien law.

The Maryland Court of Appeals has held that, for the owner to be liable for the value of goods or labor furnished to the contractor, "an active and subsisting contract must be established between the owner and the contractor."³³ In *T. Dan Kolker, Inc. v. Shure*,³⁴ the court concluded that there is no requirement to establish a binding contract between the contractor and the materialman and that the absence of such a contract is no defense to a mechanics' lien claim. However, in *McLaughlin v. Reinhart*,³⁵ the court stated that the concept of the mechanics' lien "pre-supposes a contract, express or implied, . . . which existing, the law affixes a lien to secure the payment of the mechanic or material man, for what is done and furnished. The right to compensation must exist, or there can be no lien."³⁶ This statement has been interpreted to mean that, for a right to a lien to exist, there must be a contract, either express or implied, for doing that for which the statute gives the lien, and that the lien is designed to secure the compensation provided in that contract.³⁷

PROPERTY SUBJECT TO A MECHANICS' LIEN

Generally the lien attaches not only to the building but also to the land on which the building is erected.³⁸ A mechanics' lien may attach to any interest that is assignable, transferable, mortgageable, or subject to being sold under execution as a separate and distinct

33. *Greenway v. Turner*, 4 Md. 296 (1853).

34. 209 Md. 290, 297-98, 121 A.2d 223, 226-27 (1956):

[It is not] incumbent upon the claimant to establish the fact that there was an *express* antecedent contract made with respect to the exact quantity of work or materials to be done or furnished by him. In the absence of evidence of such express contract, the character of the account, the time within which the work was done or the materials were furnished, and the object of the work or materials, may afford proper grounds for the presumption that the work was done or the materials were furnished with reference to an understanding from the commencement that such work or materials should be done or furnished, if required by the builder. . . .

35. 54 Md. 71 (1880).

36. *Id.* at 76.

37. See *Evans Marble Co. v. International Trust Co.*, 101 Md. 210, 60 A. 667 (1905).

38. MD. ANN. CODE art. 63, §§ 4, 5 (1968).

entity,³⁹ and is not limited to estates held in fee simple. If the building is erected by a lessee or tenant, the statute provides that the lien "shall only apply to the extent of the interest of such lessee or tenant."⁴⁰

In addition to questions relating to the nature of the structure and the type of work or materials supplied, the character of the estate by which the parties hold the property can also serve to avoid the attachment of a mechanics' lien. In accord with the prevailing rule, Maryland recognizes that an interest of one spouse in an estate by the entirety is not subject to the individual debts of the other spouse. Noting that a tenant by the entirety in Maryland has no separate interest in the property which can be seized and sold on execution, and therefore made subject to a judgment lien against him alone, the court in *Blenard v. Blenard*⁴¹ held that a tenant by the entirety has no separate interest which can be subjected to a mechanics' lien for a debt which he has alone contracted. However, a mechanics' lien can and will attach to the individual interest of one or more tenants in common without affecting the interests of the other co-tenants. In *Dente v. Bullis*,⁴² Ulrich and Dente were tenants in common in fee simple of a large tract of land. Dente contracted with Bullis to construct a house on part of the property, for which Bullis later attempted to assert his mechanics' lien. Because Bullis failed to satisfy the statute by notifying Ulrich of his intention to claim a lien, the court held that Ulrich's interest as a tenant in common was not subject to the mechanics' lien. It did, however, permit the attachment of the lien as to Dente's interest, concluding that when materials are furnished on the contract of one tenant in common in possession, a lien can be entered against his interest in the premises. This holding conforms to the decisions on this issue in the majority of jurisdictions.

FORFEITURE OF LIEN RIGHTS

Despite the efforts of the legislature and the courts to protect laborers and materialmen by the creation and subsequent interpretation of the mechanics' lien law, it has been consistently held that a waiver by the contractor or subcontractor of his lien rights will preclude him from asserting them. In *Benson v. Borden*,⁴³ Judge Mitchell used the following language in discussing the difference between waiver and estoppel, which are often treated as synonymous:

While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. . . . Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge

39. See *McClintic-Marshall Co. v. Ford Motor Co.*, 254 Mich. 305, 236 N.W. 792 (1931).

40. MD. ANN. CODE art. 63, § 9 (1968). It is also interesting and important to note that the Maryland court has held that a materialman's lien will attach to specified building lots in spite of the fact that the owner of the lots upon which the houses were built had only an equitable interest. *Goldheim v. Clark*, 68 Md. 498, 13 A. 363 (1888).

41. 185 Md. 548, 45 A.2d 335 (1946).

42. 196 Md. 238, 76 A.2d 158 (1950).

43. 174 Md. 202, 198 A. 419 (1938).

and intention; estoppel may arise where there is no intent to mislead. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he causes his adversary to do. Waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position; an estoppel always involves this element. . . . Estoppel may carry the implication of fraud, waiver does not. A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel.⁴⁴

For the purposes of this article the principles of waiver, estoppel and release or satisfaction, will be discussed separately.

Waiver

In some jurisdictions, an owner of land can protect himself from a mechanics' lien by giving a promissory note to the subcontractor.⁴⁵ In those jurisdictions, the taking of the note serves as a waiver of the right to a mechanics' lien. The owner of the land takes the position that the note fully substitutes and replaces the original obligation which is the basis of the lien claim. However, in Maryland, the mechanics' lien statute provides that the granting of a credit or the receiving of notes or other securities does not constitute a waiver of a mechanics' lien unless such notes were received as payment or the lien was expressly waived.⁴⁶ The presumption seems to be that notes are taken as security for or evidence of the debt rather than as actual payment. In *Wix v. Bowling*,⁴⁷ notes were given by the owner of the property to the materialman, who in turn transferred the same notes to one of his suppliers. At maturity, the supplier accepted new notes from the owner with the knowledge and consent of the materialman-lienor. On the basis of these facts, the court held against the lien claimant, because his disposal of the note constituted a waiver of his lien.⁴⁸ The court stated:

[I]n the absence of an express agreement to the contrary, or some agreement inconsistent with the existence of a lien, the person having a lien does not waive it by taking notes for the amount due him, unless they are received as payment. . . . [T]he mere acceptance of the note of a debtor does not justify the presumption that it was received as payment of a pre-existing debt.

44. *Id.* at 219-20, 198 A. at 427.

45. In Indiana, Maine and Massachusetts, the taking of the notes evidently raises the presumption that they were given as payment, so as to waive the lien right. For an excellent discussion of waiver by the taking or negotiating of an unsecured note of the owner or contractor, see Annot., 91 A.L.R.2d 425 (1963).

46. MD. ANN. CODE art. 63, § 3 (1968) provides:

No person having such lien shall be considered as waiving the same by granting a credit or receiving notes or other securities, unless the same be received as payment or the lien be expressly waived, but the sole effect thereof shall be to prevent the institution of any proceedings to enforce said lien until the expiration of the time agreed upon.

47. 120 Md. 265, 87 A. 759 (1913).

48. *Id.* at 273, 87 A. at 762.

Nor would the transfer of the note by a person entitled to a lien for work done and materials furnished amount to a waiver of his lien. But where the claimant indorses the note to a third person, who, when the note comes due, with the knowledge and assent of the claimant . . . so disposes of the new note that it is beyond the control of and cannot be produced or satisfactorily accounted for by the claimant, the inference does arise that he regarded the note as payment of his claim, and that he waived his lien.⁴⁹

The court distinguished *Blake v. Pitcher*,⁵⁰ where the receipt of a promissory note for part of the purchase price of materials was held not to extinguish that portion of the claim covered by the note, on the grounds that: (1) the note was not given by the owner of the property, but instead by the contractor, and (2) no evidence was offered to show that the lien claimants had transferred or negotiated the note.⁵¹

Generally, the courts have held, pursuant to the terms of the statute, that the taking of security will not constitute a waiver. In *Maryland Brick Company v. Spilman*,⁵² Maryland Brick, the lienor, received three mortgages as collateral security for a debt. The court, discussing whether the receipt of the securities constituted a waiver of the lien right, observed that the testimony abundantly showed that the terms of sale included the giving of the mortgage as security only, and that nothing which transpired indicated either an express or implied waiver. The court concluded that a mechanics' lien will not be considered as waived unless the parties have "expressly agreed to such terms as are inconsistent with its existence and enforcement, in which case the lien is waived by the legal effect of such contract."⁵³ There is authority to the contrary, however. In *Pinning v. Skipper*,⁵⁴ the Pinnings contracted to supply sand, dig foundations and cellars, and grade the yards and pavements for property owned by Skipper. A provision of the contract stipulated that the Pinnings agreed to give to Skipper "a good lien bond as a bar against liens upon said houses or either of them," for work done or material furnished, or for labor or hire. As part of the consideration for the contract, the Pinnings did in fact give to Skipper their bond, conditioned on their performance of the terms of the contract. Holding that the agreement to take a mortgage to secure the price of the work constituted a waiver of the lien, the court said:

There may be some difficulty as to the construction and effect of this contract in other respects, but we find none in determining

49. *Id.*

50. 46 Md. 453 (1877).

51. A typical decision is *Frederick County Nat'l Bank v. Dunn*, 125 Md. 392, 398, 93 A. 984, 986 (1915), where the court stated: "There was some reference made in the briefs to the fact that Dunn had received a note of McIver for \$1,000 but that can in no way affect this controversy, as the proof fails to show that the note was received in payment of that amount."

52. 76 Md. 337, 25 A. 297 (1892).

53. *Id.* at 345, 25 A. at 299.

54. 71 Md. 347, 18 A. 659 (1889).

that it is utterly inconsistent with the enforcement of a mechanics' lien against either of these houses by the appellants. The stipulation that they would give a bond "as a bar against liens upon said houses, or either of them," and the giving of the bond conditioned for the faithful performance of their part of the contract, clearly, in our judgment, constitute in law a waiver of the lien sought to be enforced in this suit. The filing of this lien claim was a breach of the contract, and consequently of the condition of the accompanying bond.⁵⁵

The court also held that a breach of the contract by the owner does not revive the right to a lien which has been waived.⁵⁶

The waiver need not be made directly to the owner. A contract between a principal contractor and a subcontractor or materialman wherein the latter waived his rights to a mechanics' lien or agreed not to file a lien would be held valid and effective and would preclude the subcontractor from enforcing a lien.⁵⁷ However, there is judicial conflict as to whether a "no lien" provision in a contract between the principal contractor and the owner binds a subcontractor. The courts that have bound the subcontractor to such a waiver have required that the subcontractor have actual notice of the "no lien" provision.⁵⁸ The greater weight of authority, however, supports the position that the owner and principal contractor cannot, by a provision against liens in their contract, defeat the rights of subcontractors.⁵⁹ The issue has yet to be presented to the Court of Appeals of Maryland.

Estoppel

A subcontractor will also be denied his right to a lien if his conduct has been such as to estop him from claiming the right. As in the ordinary estoppel situation, the conduct of the subcontractor, upon which the owner relies, is the basis for denying the subcontractor his right to a lien, with each case turning on its own particular facts. In *Crane Company v. Onley*,⁶⁰ the owner offered to pay the subcontractor personally, whereupon the subcontractor told the owner that he could pay the amount due directly to the contractor. The court held that the subcontractor was estopped from subsequently perfecting his mechanics' lien right against the owner's property when the contractor

55. *Id.* at 350, 18 A. at 660. *Accord*, *Willison v. Douglas*, 66 Md. 99, 6 A. 530 (1886).

56. 71 Md. at 350-51, 18 A. at 661. *Accord*, *Jankoviak v. Butcher*, 22 Ill. App. 2d 126, 159 N.E.2d 377 (1959); *Mitchell v. Wrightstown Community Apts.*, 4 N.J. Super. 321, 67 A.2d 203 (1949); *Cummings v. Broadway-94th Street Realty Co.*, 233 N.Y. 407, 135 N.E. 832, *reargument denied*, 234 N.Y. 534, 138 N.E. 436 (1922).

57. *See Kennedy v. National Sur. Co.*, 111 Cal. App. 306, 295 P. 359 (1931); *Mintzes Contracting Co. v. County Wood Homes Corp.*, 202 N.Y.S.2d 359 (Sup. Ct. 1960).

58. *E.g.*, *Stein v. Pennsylvania Dock & Warehouse Co.*, 10 N.J. Misc. 568, 159 A. 683 (Cir. Ct. 1932).

59. *See* Annot., 76 A.L.R.2d 1087, 1098 (1961).

60. 194 Md. 43, 69 A.2d 903 (1949).

failed to pay him.⁶¹ After referring to Pomeroy's definition of equitable estoppel,⁶² the court stated:

According to the testimony, appellant by its voluntary action told Mr. Onley to pay Stark directly. Onley in good faith did exactly what appellant told him to do and relied upon the representation made to him by appellant. The appellant is thereby absolutely precluded both in law and in equity from asserting the mechanics' lien to which it might have otherwise been entitled.⁶³

In *J.F. Johnson Lumber Company v. Magruder*,⁶⁴ the appellee-owner relied on the statement of the appellant-materialman that he need not worry about requiring a completion bond from the builder because the appellant held him in high esteem and would give him all the credit he needed. The court pointed out that the owner had, by the express terms of his contract, the ability to protect himself by simply demanding that the contractor submit receipts or other evidence of payment showing that all labor and materials furnished for the building had been paid in full. The failure of the owner to so protect himself, in spite of the statements made by the appellant, precluded the invocation of the doctrine of equitable estoppel against the materialman's assertion of a lien. The court concluded, according to general equitable principles, that one who claims the benefit of an equitable estoppel must not only be free from fraud in the transaction, but he must also have acted to assert his rights; otherwise no equity will arise in his favor.⁶⁵ The court referred to *Bounds v. Nuttle*,⁶⁶ where responsibility for protecting against the potential attachment of a mechanics' lien was held to fall entirely on the owner, because he has ultimate control of the application of funds expended and because he receives the ultimate benefit. Thus, it seems, strong evidence is required to preclude a subcontractor's claim on the basis of estoppel.

61. See also *Dickerson Lumber Co. v. Herson*, 230 Md. 487, 187 A.2d 689 (1963) (failure to properly apply funds received estopped subsequent attempt to perfect materialman's lien right); *Goldman v. Brinton*, 90 Md. 259, 44 A. 1029 (1889) (lienor's conduct held to estop his perfecting the lien).

62. 2 J. POMEROY, EQUITY JURISPRUDENCE § 804 (4th ed. 1918):

[T]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

63. 194 Md. at 50, 69 A.2d at 907.

64. 218 Md. 440, 147 A.2d 208 (1958).

65. See *Reisterstown Lumber Co. v. Reider*, 224 Md. 499, 168 A.2d 385 (1961), where the statement of an officer of a lumber company to a homeowner as to the reliability of the contractor with whom the owner had previously contracted for construction of a home was similarly found not to estop the lumber company from asserting a lien for building materials furnished to the contractor. The court made reference to the owner's ability to withhold progress payments to the contractor for unpaid bills, as was similarly mentioned in *Johnson Lumber*. See also *Caltrider v. Weant*, 147 Md. 338, 128 A. 72 (1925).

66. 181 Md. 400, 30 A.2d 263 (1943).

Release or Satisfaction

Just as a subcontractor can be estopped from claiming a lien because of his conduct, an express release,⁶⁷ supported by consideration discharging the property from liens for work done and materials supplied either before or after its execution, will also serve to extinguish the subcontractor's right to the lien. However, in *Sodini v. Winter*,⁶⁸ an oral relinquishment of the right to a mechanics' lien, without consideration, was deemed ineffectual. In that case, the subcontractor said he would look solely to the contractor for payment, but this reliance on the contractor's credit alone was deemed insufficient to establish a release of the lien. Generally, for a release to be an effective protection for the owner, the language of release must be clear and unambiguous, since all ambiguities will be resolved against the owner of the land, and since, as indicated by *Sodini*, the release must be supported by valuable consideration. Moreover, the lien of the subcontractor will probably not be affected by an agreement between the subcontractor and the contractor compromising or adjusting their claim without the prior consent of the owner.⁶⁹

Payment to the subcontractor of the money owed him, which if unpaid would give rise to a lien right, will also serve to satisfy the statute.⁷⁰ However, where a subcontractor receives payments from the principal contractor without directions as to their application, he can, as against the owner, apply a part of the payments to an item for which he could not claim a lien.⁷¹ In *Bounds v. Nuttle*,⁷² the court went even further, stating that the subcontractor could apply the money to debts owed him by the principal contractor on other jobs, provided there was no contrary agreement or arrangement for the application of the money:

Contractors building a number of houses frequently have separate accounts with materialmen. The contractor can apply his money on any bill he owes. It does not have to be applied on the bill for the materials for the house from the contract for which he obtained it. The contractor's obligation to the owner is to finish and turn over the house without liens, but this does not prevent him from using his receipts from one contract to pay on another. Nor does it prevent the material man from having his lien, unless he agrees that it shall be done this way, in order

67. It is interesting to note that title company standard waiver forms have been held in the majority of cases to constitute only a release of priority by the subcontractor. In such cases the subcontractor is said to retain his lien right as against the owner. However, an Ohio court in *Kocher v. Ricketts*, 25 Ohio Op. 383, 49 N.E.2d 85 (Ct. App. 1942), has ruled that the waiver language in the title company form waived *all* rights to the lien held by the subcontractor and bound the subcontractor as against the owner. In *Perper v. Fayed*, 247 Md. 639, 234 A.2d 144 (1967), a waiver "in favor of . . . every party making a loan on said real estate" was held to be only a waiver of priority and not of the lien itself.

68. 32 Md. 130 (1870).

69. See *Yonkers Bldg. Supply Co. v. Petro Luciano & Sons*, 269 N.Y. 171, 199 N.E. 45 (1935).

70. See MD. ANN. CODE art. 63, § 1 (1968).

71. *Frederick County Nat'l Bank v. Dunn*, 125 Md. 392, 93 A. 984 (1915).

72. 181 Md. 400, 30 A.2d 263 (1943).

that he may get his other bills paid and may collect double from the owner. That, of course, would be a fraud.⁷³

Probably the best, though not usually the most practical, solution would be to make payments directly to the subcontractors.

NOTICE OF INTENTION TO CLAIM A LIEN

Unless the claimant's contract for work and/or materials is with the owner, the claimant must give notice to the owner of his intention to claim a lien within ninety days after furnishing the work or materials.⁷⁴ Failure to give the required notice within the stipulated time may deprive the subcontractor of his right to claim the lien.⁷⁵ However, the sending of the letter of notice by registered or certified mail within the required period,⁷⁶ may satisfy the notice requirement.⁷⁷

The purpose of the notice provision is to protect owners of property against possible double liability.⁷⁸ An owner who has received notice is permitted to retain, out of money payable to the builder, the amount claimed by the materialman.⁷⁹ No notice is required if the claimant has contracted with the owner himself⁸⁰ or with his agent. However, unless a contractual relationship is clearly shown,

73. *Id.* at 408, 30 A.2d at 267.

74. MD. ANN. CODE art. 63, § 11 (1968):

(a) *Generally.* — If the contract for furnishing such work or materials, or both, shall have been made with any architect or builder or any other person except the owner of the lot on which the building may be erected, or his agent, the person so doing work or furnishing materials, or both, shall not be entitled to a lien unless, within ninety days after furnishing the same, he or his agent shall give notice in writing to such owner or agent, if resident within the city or county, of his intention to claim such lien.

(b) *Property owned by husband and wife.* — For the purposes of notice in this section where property is owned by husband and wife, either jointly or as tenants by the entireties, and said husband and wife are not separated or divorced, then said notice above referred to shall be sufficient as to delivery if received by either husband or wife.

(c) *Notice to person whose name appears in assessment books.* — Notice given to the person appearing as taxpayer in the assessment books of the county where the lot is situated shall constitute sufficient notice to all actual owners.

75. MD. ANN. CODE art. 63, § 11(a) (1968). See *Montgomery County Bd. of Educ. ex rel. Carrier Corp. v. Glassman Constr. Co.*, 245 Md. 192, 225 A.2d 448 (1967).

76. *Cf.* MD. ANN. CODE art. 90, § 11(c) (1964). This statute deals with the analogous problem of notice of suit on payment bonds.

77. *Cf.* *Montgomery County Bd. of Educ. ex rel. Carrier Corp. v. Glassman Constr. Co.*, 245 Md. 192, 225 A.2d 448 (1967), involving notice under a labor and materials payment bond. *But see* *Jakenjo, Inc. v. Blizzard*, 221 Md. 46, 155 A.2d 661 (1959); *Bukowitz v. Maryland Lumber Co.*, 210 Md. 148, 122 A.2d 486 (1956).

78. *Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917 (4th Cir. 1959).

79. MD. ANN. CODE art. 63, § 13 (1968):

In all cases in which a contractor or builder of a building shall have purchased materials or contracted for work and the party with whom such contract was made shall have given notice as required in §§ 11 and 12 to the owner of such building, it shall be lawful for the owner to retain from the cost of such building the amount which he may ascertain to be due to the party giving such notice; and in case any lien be laid by the party giving such notice and be also laid by the contractor or builder, the said contractor or builder shall receive only the difference between the amount due him and that due the person giving the notice.

See *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959); *William Penn Supply Corp. v. Watterson*, 218 Md. 291, 146 A.2d 420 (1958).

80. *Wilhelm v. Roe*, 158 Md. 615, 149 A. 438 (1930); *First Nat'l Bank v. White*, 114 Md. 615, 79 A. 1085 (1911); *Rust v. Chisolm*, 57 Md. 376 (1882).

each tenant in common, owner, or part owner is entitled to receive, personally or through his agent, written notice of any intention to claim a lien.⁸¹ This rule was also applied to tenants by the entireties in *Bukowitz v. Maryland Lumber Company*,⁸² decided prior to the 1959 amendment which added Section 11(b) to Article 63. That amendment provides that where property is held by husband and wife either jointly or as tenants by the entireties, notice received by either spouse satisfies the requirement of the statute.⁸³ It is not clear, however, whether a claimant who has contracted with one tenant by the entireties must still give notice to the other. Perhaps the contract itself should constitute sufficient notice, in accordance with the general scheme of the statute.

The general requirement of Section 11 is that the notice of the intention of the subcontractor to claim a mechanics' lien must be filed "within ninety days after furnishing" the materials or doing the work.⁸⁴ Determining when the work or material has been "furnished" can be a difficult problem. In *G. Edgar Harr Sons v. Newton*,⁸⁵ the issue was whether the subcontractor Harr had filed timely notice of his intention to claim a lien. The court held that even though the majority of the work and materials is furnished more than 90 days before notice is given, the crucial date is the date of completion if the various undertakings were performed pursuant to one indivisible contract. In *United States v. Allied Contractors, Inc.*,⁸⁶ the United States District Court for the District of Maryland, construing the notice provision of the Miller Act,⁸⁷ which is very similar to that of the Maryland mechanics' lien law, held that in the absence of a continuing contract to furnish materials on a project, notice must be given within ninety days of furnishing material under each separate order. Clearly, where materials are furnished for separate and distinct purposes, or under different contracts, even though they are intended to be used by the contractor or builder in executing the same contract with the owner, the right to a lien must date from the time of furnishing the different

81. *Dente v. Bullis*, 196 Md. 238, 76 A.2d 158 (1950).

82. 210 Md. 148, 122 A.2d 486 (1956). The court found that no agency existed between the husband and wife and thus notice to the husband only was insufficient.

83. See also MD. ANN. CODE art. 63, § 10 (1968):

Where a building shall be erected on a lot of ground belonging to a married woman by her husband or some person by him employed the said lien shall not attach unless notice thereof be given to such married woman in writing within ninety days after doing such work or furnishing such materials, or both, as the case may be.

This section indicates a legislative purpose to require personal notice to the wife and negates any implication of agency arising out of the marital relationship itself.

84. As stated in *Bukowitz*, this "requirement of timely notice of intention must be at least substantially complied with." 210 Md. at 152, 122 A.2d at 488. In *Kenly ex rel. Otto v. Sisters of Charity*, 63 Md. 306, 309 (1885), the court said:

The foundation of the lien, in a case like the one before us, is the prior notice to be given to the owner. It is required for the protection of the owner, who is authorized to retain in his hands the amount due to the party giving the notice. It must be given in writing and served on the owner, or his agent, if they are resident of the city or county where the building is erected. If such notice cannot be given personally on account of absence, or other causes, the claimant may then place the notice on the building.

85. 220 Md. 618, 155 A.2d 480 (1959).

86. 171 F. Supp. 569 (D. Md. 1959).

87. 40 U.S.C. § 270(b) (1964).

parcels of materials, and not from the last item in the account. On the other hand, if all of the materials are furnished for the same general purpose, and if the various undertakings are so connected as to show that the parties contemplated that all of the deliveries form one continuous undertaking, the entire account should be treated as a single contract.⁸⁸ Occasionally goods will be delivered for the sole purpose of extending the time within which a claim for a lien may be filed or notice may be served on the owner. It is established, however, that the claimant cannot ". . . extend the time within which the lien may be filed by doing or furnishing small additional items under the guise of the original contract."⁸⁹ This principle also applies to the notice requirement of the statute.⁹⁰ However, in *Reisterstown Lumber Company v. Reeder*,⁹¹ the court examined the evidence and determined that the last delivery of materials was within the contemplation of the parties and was in fact made at the request of the owner and builder. Because, in that case, the delivery was made pursuant to an express clause in the contract which provided for the replacement of defective parts, the date of the last delivery was the date of completion, from which time the statutory period for notice began to run. In several other cases, the court has held that materials were not furnished for the purpose of extending the statutory time period, and thus the notice was held to be timely.⁹² Generally, if the furnishing of additional work or materials is necessary for the proper completion of the contract, the statutory period begins to run at that time, even if they are not furnished at the request of the owner.⁹³

The statute states that the subcontractor "shall give notice in writing to such owner or agent, if resident within the city or county, of his intention to claim such lien."⁹⁴ It has been held that oral notice is not sufficient⁹⁵ and that prior oral notice does not relieve the materialman from the obligation of stating the particulars of the claim in a subsequent written notice.⁹⁶ In *Mashkes v. Jakenjo, Inc.*,⁹⁷ the court indicated the degree of specificity required for adequate notice. In that case it was held that since the contract was for a single in-

88. *United States v. Allied Contractors, Inc.*, 171 F. Supp. 569, 577 (D. Md. 1959); *District Heights Apts. v. Noland Co.*, 202 Md. 43, 52, 95 A.2d 90, 94 (1953).

89. *See Reisterstown Lumber Co. v. Reeder*, 224 Md. 499, 507, 168 A.2d 385, 389 (1961).

90. *Greenway v. Turner*, 4 Md. 296 (1853). In *Brunt v. Farinholt-Meredith Co.*, 121 Md. 126, 88 A. 42 (1913), the court said that since notice was for the protection of the owner, it was important that the materialman not be permitted to extend the statutory time period within which he is required to give notice. *See also T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956); *District Heights Apts. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953).

91. 224 Md. 499, 168 A.2d 385 (1961).

92. *Mt. Airy Plumbing & Heating, Inc. v. Grey Dawn Dev. Co.*, 237 Md. 38, 205 A.2d 299 (1964); *Brosenne v. Warthen*, 226 Md. 168, 172 A.2d 485 (1961). *See T. Dan Kolker, Inc. v. Shure*, 209 Md. 290, 121 A.2d 223 (1956); *District Heights Apts. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953).

93. *Mt. Airy Plumbing & Heating, Inc. v. Grey Dawn Dev. Co.*, 237 Md. 38, 205 A.2d 299 (1964).

94. MD. ANN. CODE art. 63, § 11(a) (1968).

95. *Welch v. Humphrey*, 200 Md. 410, 90 A.2d 686 (1952).

96. The statute only requires that the claimant give notice in writing, and it does not specify the mode or manner, so long as it actually reaches the owner or his duly authorized agent. *Jakenjo, Inc. v. Blizzard*, 221 Md. 46, 155 A.2d 661 (1959).

97. 220 Md. 457, 154 A.2d 439 (1959) (per curiam).

divisible undertaking to do all the electrical work, written notice stating (1) that the work was done "as per plans and specifications" which were sufficiently identified so that the owner could have referred to them, and (2) that "all of which work done and materials supplied (including specified extras and deletions) has been furnished within ninety days last past" gave the owner adequate information and was a sufficient compliance with the requirements of Section 11 of the statute.

Apparently the exact time when the work was performed or the materials supplied need not be specified.⁹⁸ Although the manner of giving notice is not specified in the statute, it is clear that personal service is required.⁹⁹ The personal service requirement is complied with if the notice is actually received by the person sought to be charged or by his agent. In *Jakenjo, Inc. v. Blizzard*,¹⁰⁰ the court recognized that service by mail is not expressly authorized by the statute and that, therefore, mere proof of the mailing is probably not sufficient. However, where actual receipt is shown, it is immaterial whether such receipt is the result of delivery by the sheriff, or by a postman, or some other person. In the *Jakenjo* case, a registered letter had been sent by the subcontractor and was received by the secretary of the resident agent of the corporation; a prior letter sent to the corporation had been returned "unclaimed." The court concluded that service upon the agent of a resident agent was sufficient to satisfy the notice requirement.

In *Bukowits v. Maryland Lumber Company*,¹⁰¹ where a registered letter from a subcontractor was returned "refused," the court denied that such delivery satisfied the notice requirement. The court stated that nothing in the statute authorizes service by registered mail if the letter does not actually reach the intended recipient. Moreover, it was held in *William Penn Supply Corporation v. Watterson*,¹⁰² that the filing of a mechanics' lien within the period required for notice did not constitute constructive notice of intention to claim a lien. The court relied on Section 11, which specifically provides that a materialman is not entitled to a lien unless the required notice is given *in writing*.

Notice can be served on someone outside the city or county, despite statutory language suggesting the contrary.¹⁰³ The statutory language apparently was intended to indicate to the subcontractor that Section 12 offers an alternative means of giving notice when that which is required by Section 11 is impossible.¹⁰⁴ However, as stated

98. *G. Edgar Harr Sons v. Newton*, 220 Md. 618, 155 A.2d 480 (1959).

99. *Jakenjo, Inc. v. Blizzard*, 221 Md. 46, 155 A.2d 661 (1959).

100. *Id.*

101. 210 Md. 148, 122 A.2d 486 (1956).

102. 218 Md. 291, 146 A.2d 420 (1958).

103. *Jakenjo, Inc. v. Blizzard*, 221 Md. 46, 50-51, 155 A.2d 661, 664 (1959): "Certainly the requirement of Section 11, that notice be given to an owner or agent, 'if resident within the city or county,' does not preclude the giving of notice outside of the county or city, if the owner or agent can be reached."

104. MD. ANN. CODE art. 63, § 12 (1968):

If such notice cannot be given on account of absence or other causes, the claimant or his agent may, in the presence of a competent witness and within ninety days, place said notice upon the door or other front part of said building

in the *Jakenjo* case, "[S]ection 12 does not give a claimant an option, but is available only where it is shown that there is no owner or agent in the county where the work or materials are furnished, or there are other reasons why the notice could not be given personally."¹⁰⁵

The possibility of waiver of the notice requirement was discussed in *Welch v. Humphrey*,¹⁰⁶ where the court held that the preliminary notice may be waived by the owner, since the notice is required by the statute merely for the owner's benefit. However, the court stated that the notice requirement is waived only where the waiver has been clearly and unequivocally expressed by the owner.

FILING OF A MECHANICS' LIEN CLAIM

Once notice of intention has been given to the owner, the next step required to perfect the mechanics' lien is the filing of the claim. As the court stated in *Carson v. White*:¹⁰⁷

No mechanic has . . . a lien on the house which he has built or repaired, unless he has filed in the office of the clerk of Baltimore County Court a statement of his demand, and in that statement has given not only the sum due, but also the nature and kind of the work done, and the kind and amount of the materials furnished, and the time when the materials were furnished, and the work done.¹⁰⁸

and shall file a claim with the clerk of the circuit court for the county or the Circuit Court of Baltimore City, as the case may be, as hereinafter mentioned. Notice by posting according to this section shall be sufficient in all cases where the owner of the lot has died and his successors in title do not appear from the public records of the county.

105. 221 Md. at 50, 155 A.2d at 664. See also *Bounds v. Nuttle*, 181 Md. 400, 30 A.2d 263 (1943); *Hill v. Kaufman*, 98 Md. 247, 56 A. 783 (1904); *Kenly ex rel. Otto v. Sisters of Charity*, 63 Md. 306 (1885).

106. 200 Md. 410, 90 A.2d 686 (1958).

107. 6 Gill 17, 27 (Md. 1847).

108. This language is codified in MD. ANN. CODE art. 63, §§ 17-19, (1968):

§ 17. Claim to be filed.

Each person entitled to such lien shall file a claim or statement of his demand in the office of the clerk of the circuit court for the county or the Circuit Court of Baltimore City, as the case may be, and such claim or statement shall be redelivered by the clerk to the party filing the same after it has been recorded as provided in § 18.

§ 18. Mechanics' lien docket.

The clerks of the circuit courts for the several counties and the Circuit Court of Baltimore City shall each procure and keep a docket or book to be called "The Mechanics' Lien Docket," in which he shall record all designations or descriptions of lots or pieces of ground and all claims which may be filed by virtue of this article together with the day of filing the same and shall cause the names of the owner of the lot of ground and of the contractor, architect or builder, if such be named, and of the person claiming the lien under this law to be recorded therein. Said docket or book shall contain an index in which shall appear a reference to every lien so recorded, or the clerk at his discretion shall maintain a separate index of the liens so recorded.

§ 19. What claim must set forth.

Every such claim shall set forth: First, the name of the party claimant and of the owner or reputed owner of the building, and also of the contractor or architect, or builder, when the contract was made by the claimant with such contractor, architect or builder; second, the amount or sum claimed to be due and the nature or kind

Section 19 of Article 63 specifically enumerates what a claim must set forth; namely (1) the name of the party claimant and the owner or reputed owner of the building, and also of the contractor or architect; (2) the date of the contract between the claimant and the contractor; (3) the amount claimed, the nature or kind of work or materials furnished and the time when furnished; and (4) the locality of the building and such description as may be necessary to identify it. The claim must be filed with the clerk of the circuit court for the particular county or the clerk of the Circuit Court of Baltimore City, depending on where the work was done, within six months after ". . . the work has been finished or the materials furnished. . . ." ¹⁰⁹ There was some conflict of authority as to when "the work has been finished" for the purposes of the six-month statutory period. ¹¹⁰ However, the conflict has apparently been resolved by *Harrison v. Stouffer*, ¹¹¹ in which the court held that the words "the work has been finished" refer to the work for which a lien may be taken, and are not to be considered as synonymous with the completion of the building upon which the work was done.

Delivery problems similar to those that exist with respect to the notice provision have arisen with respect to the period within which the claim must be filed. Generally, as in the case of the notice requirement, if the work was necessary for the proper performance of the contract, the time period has been extended. ¹¹²

The statute requires that the claim separately designate the amount claimed for each building if materials were supplied for two or more buildings owned by the same person. ¹¹³ It is suggested that

of work or the kind and amount of materials furnished and the time when the materials were furnished or the work done; thirdly, the locality of the building and the number and size of the stories of the same, or such other matters of description as may be necessary to identify the same.

109. MD. ANN. CODE art. 63, § 23 (1968):

§ 23. Duration of lien; when claim must be filed.

Every such debt shall be a lien until after the expiration of six months after the work has been finished or the materials furnished, although no claim has been filed therefor, but no longer, unless a claim shall be filed at or before the expiration of that period.

110. Compare *Heath v. Tyler*, 44 Md. 312 (1876) with *Trustees of German Lutheran Evangelical St. Matthew's Congregation v. Heise*, 44 Md. 453 (1876).

111. 193 Md. 46, 65 A.2d 895 (1949).

112. The Court of Appeals, in *Clark Certified Concrete Co. v. Lindberg*, 216 Md. 576, 579, 141 A.2d 685, 686 (1958), said:

Where there are continuous deliveries [of materials] at a "going price", pursuant to an undertaking to supply materials as needed, a lien may be filed within six months from the delivery of the last item, provided such delivery is made in good faith and not as a subterfuge to toll the statute.

See also *Harrison v. Stouffer*, 193 Md. 46, 65 A.2d 895 (1949).

113. MD. ANN. CODE art. 63, § 21 (1968):

In every case in which one claim for materials shall be filed by the person preferring the same against two or more buildings owned by the same person, the person filing such joint claim shall at the same time designate the amount he claims to be due him on each of said buildings, otherwise such claim shall be postponed to other lien creditors; and the lien of such claimant shall not extend beyond the amount so designated as against other creditors having liens by judgment, mortgage or otherwise.

A failure to apportion a claim does not defeat the claim, but postpones it to other lien creditors. *Caltrider v. Isberg*, 148 Md. 657, 130 A. 53 (1925).

claims for work performed and materials furnished, if made by the same claimant, be similarly segregated, although failure to do so would not appear to deny the right to the lien so long as the contract price is set forth. The court has held that where a number of buildings are being constructed as part of a single project, the lien claimant need not specify how much of his materials went into each building.¹¹⁴

PREFERENCE OVER OTHER LIENS AND ENFORCEMENT

Section 15 of the statute specifically recognizes that mechanics' liens have priority over "all mortgages, judgments, liens and encumbrances which attach upon the said building or the ground covered thereby subsequently to the commencement thereof."¹¹⁵ Also, the court has held that a mechanics' lien has preference over a subsequently recorded deed of trust.¹¹⁶ However, in *Beehler v. Ijams*,¹¹⁷ where a deed creating a lease for ninety-nine years, renewable forever, was executed prior to, but recorded after, the commencement of a building, the court held that the mechanics' lien attached only to the leasehold interest. The recording was deemed to relate back to the date of the deed because of the timely nature of the recording.

The key to the question of preference is ascertaining the date of commencement of the building. In *Rupp v. Earl H. Cline & Sons, Inc.*,¹¹⁸ the court stated:

These cases make it clear that before there can be the *commencement of a building* which would give a mechanics' lien claimant a preference over a recorded mortgage there must be (i) a manifest commencement of some work or labor on the ground which everyone can readily see and recognize as the commencement of a building and (ii) the work done must have been begun with the intention and purpose then formed to continue the work until the completion of the building. If either of these elements is missing then there has been no "commencement of the building" within the meaning of § 15 of Art. 63.¹¹⁹

In *Brooks v. Lester*,¹²⁰ cited in the *Rupp* case, it was held that the commencement of a building is the first work, done on the ground

114. *District Heights Apts. v. Noland Co.*, 202 Md. 43, 95 A.2d 90 (1953); *Maryland Brick Co. v. Spilman*, 76 Md. 337, 25 A. 297 (1892).

115. MD. ANN. CODE art. 63, § 15 (1968):

§ 15. Preference over other liens.

The lien hereby given shall be preferred to all mortgages, judgments, liens and encumbrances which attach upon the said building or the ground covered thereby subsequently to the commencement thereof; and all the mortgages and liens other than liens which have attached thereto prior to the commencement of the said building and which by the laws of this State are required to be recorded shall be postponed to said lien, unless recorded prior to the commencement of said building.

116. *Rupp v. Earl H. Cline & Sons, Inc.*, 230 Md. 573, 577, 188 A.2d 146, 148 (1963): "[I]f any lienable work was done for or about the apartment site before the recording of the deed of trust which could be said to be the 'commencement of [the] building,' then the liens of the claimants would 'be preferred'."

117. 72 Md. 193, 19 A. 646 (1890).

118. 230 Md. 573, 188 A.2d 146 (1963).

119. *Id.* at 578, 188 A.2d at 149.

120. 36 Md. 65 (1872).

which is made the foundation of the building, which forms a part of the work suitable and necessary for its construction. On the other hand, in *Kelly v. Rosenstock*,¹²¹ the driving of stakes and a few hours of leveling the ground was held not to be a sufficient commencement of the building.

Perfecting the lien does not of itself entitle the claimant to recover. Section 28 of Article 63 requires the bringing of a proceeding in equity to enforce the lien within two years of filing.¹²² In *Gaybis v. Palm*,¹²³ decided under the then-existing Section 24 of Article 63, the court, in discussing the appropriate proceedings to recover under the lien, stated that the lienor must bring a bill in equity; if the bill is successful, the court will order the sale of the specific property by a court-appointed trustee. In all such cases, the proceedings are exclusively in rem, the subject matter being the lien upon a specific piece of property.

Provisions similar to those set forth in Section 24, which was repealed in 1962, are now set forth in the Maryland Rules.¹²⁴ These rules cover the nature of the action brought by the lien holder and the subsequent sale, payment and release of the lien. The court must determine the rights of those entitled to share in the proceeds of sale if the property subject to the mechanics' lien claim is sold under judgment, foreclosure, execution or any other court order.¹²⁵ In addition, Section 32 of Article 63 states that the mechanics' lien article is to be construed as a remedial law, thereby permitting necessary amendments to any proceeding concerning the filing or enforcement of mechanics' liens.¹²⁶

CONCLUSION

Perhaps the major defect in the Maryland mechanics' lien law is that it serves its purpose too well. It may go too far in the direction

121. 45 Md. 389 (1876).

122. MD. ANN. CODE art. 63, § 28 (1968):
§ 28. When lien expires.

The lien of every such debt for which a claim may have been filed according to the provisions of this article shall expire at the end of two years from the day on which it was filed, during which time the claimant may bring proceedings in equity to enforce a lien, and the owner of the property subject to the lien, or any other person interested therein, may bring proceedings in equity to compel the claimant to prove the validity of the lien or have it declared void and the expiration of such lien shall be stayed by the filing, within said two-year period, of any such proceeding in equity until the conclusion of such proceeding.

123. 201 Md. 78, 93 A.2d 269 (1952).

124. MD. R.P. BG 70-75.

125. MD. R.P. BG 74:

If all or any part of property against which a mechanics' lien claim is recorded shall be sold under judgment, foreclosure, execution or any other court order or by any trustee appointed by a court, before the extent of the mechanics' lien is determined, the court from which such execution issued, or which entered such judgment, passed such order or appointed such trustee, may determine the respective rights of the persons entitled to share in the proceeds of sale.

126. See also MD. ANN. CODE art. 63, § 33 (1968): "Nothing contained in this article shall be construed to affect the right of any person to whom any debt may be due for work done or materials furnished to maintain any personal action against the owner of the building or any other person liable therefor."

of protecting the supplier of work or materials to the detriment of the owner. An owner can, and frequently is, required to pay twice for the same materials and labor in spite of the fact that he himself is without fault. Contrary to statements contained in numerous decisions, it is not always possible for an owner to protect himself against a contractor's failure to make payment to a subcontractor. Indeed, in practice it is almost impossible. Many contractors and subcontractors have workers who must be paid on a weekly basis; it is simply too onerous to require an owner or general contractor to police the application of the money that he pays in good faith to the company with which he contracts. The law could be revised to provide that if payment to the general contractor is made in good faith, a second payment to the subcontractor or materialman should not be required. Such a revision would bring Maryland in line with many other states which have adopted comparable provisions. However, such a revision would also partially destroy the protection which the statute was designed to provide. It seems clear that the statute should at least be supplemented with provisions which would protect owners from suppliers who continue to furnish materials to contractors and subcontractors who are obviously in financial difficulty or who are long delinquent in paying bills. Many suppliers, knowing full well that they may recover from the owner through the lien device, continue to extend credit and to send materials to a job even though they know, or should know, that they may never receive payment from the contractor or subcontractor. In addition, home buyers should be protected from liens which are not filed at the time of settlement. Although this would reduce the amount of protection given to subcontractors and materialmen by the mechanics' lien statute, bona fide home buyers should not be required to assume responsibility for miscalculations on the part of builders or improvidence on the part of subcontractors and materialmen. This is, perhaps, the most pressing area requiring reform, and immediate remedial legislation should be enacted.

Originally, mechanics' lien laws were aimed at preserving the equities of parties in situations where it was difficult for the parties to protect themselves. It is submitted that owners and home buyers have similar equities which are not adequately protected under current law. The Legislature should undertake a substantial re-examination of the mechanics' lien law in order to weigh the equities of the owners, on the one hand, and of potential lien claimants, on the other.

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EDITORS' NOTE

With the recent decision of the Court of Appeals for the Second Circuit in the case of *Securities and Exchange Commission v. Texas Gulf Sulphur Company*, the issue of the legality and propriety of the use of inside information in securities transactions has finally crystallized. The far-reaching implications of that case and the problems which it leaves unresolved are considered in Jeremy S. Wiesen's article, *Disclosure Of Inside Information — Materiality And Texas Gulf Sulphur*. Mr. Wiesen's article presents a highly perceptive analysis of the intricate legal and economic issues which stem from private disclosures of material inside information. Of particular interest is Mr. Wiesen's thorough examination of the concept of materiality, which has emerged as the central factor in the rapidly developing law in this area. Because of the highly contemporary and controversial nature of its topic, Mr. Wiesen's article should be of great value and interest to the readers of the REVIEW.

The law of mechanics' liens has always been a topic of special concern for Maryland attorneys because of the local origin of the mechanics' lien and because of the complex, and often frustrating problems which have always attended the interpretation of the Maryland mechanics' lien statute. The REVIEW's current offering, *The Maryland Mechanics' Lien Law — Its Scope And Effect*, submitted by Mitchell S. Cutler and Leonard Shapiro, hopefully will resolve some of these problems and provide a valuable source of information for members of the bar.

An issue of compelling contemporary significance, the legality of the war in Vietnam, is the subject of Eric A. Belgrad's review of *Vietnam And International Law: An Analysis Of The Legality Of The U.S. Military Involvement*, a legal argument against the participation of the United States in the war prepared by the Consultative Council of the Lawyers Committee on American Policy Toward Vietnam. Professor Belgrad reaches the inescapable conclusion that the answer to the Vietnam dilemma lies in the consideration of practical political solutions rather than the debate of largely academic legal issues. A question of equal controversy is discussed in Edward Sofen's review of *Movies, Censorship, And The Law*, an analysis of the legality of methods of movie censorship written by Ira H. Carmen. Professor Sofen recognizes the contribution of the book to the thought surrounding this perplexing problem, but points out with clarity the questions which the book leaves unresolved.

After much deliberation, the Editorial Board of the REVIEW has, with this issue, eliminated the Recent Development from the REVIEW format. All student contributions will now be presented under the general heading, Notes and Comments. Behind the Board's decision was the recognition that the Recent Development, because of its brevity, was seriously limited as an analytical tool and of only marginal value as a vehicle for the reporting of useful legal information. The decision was made with an eye toward reducing the inflexibility of the REVIEW format by making the demands of the topic under consideration the only criterion for the length of a student article. Hopefully this new approach will provide an increased opportunity for good legal analysis and a greater degree of flexibility in the choice of topics for student treatment. Because this change in format marks a significant departure from prior REVIEW practice, any comment from the readers will be greatly appreciated. Among the first student articles to be published under the new format is an exhaustive work in the law of admiralty, *The Law Of Unseaworthiness And The Doctrine Of Instant Unseaworthiness*. The issue also contains student notes on the availability of subrogation in medical service plans and insurance policies and on the role of employers in group insurance plans.

The REVIEW is pleased to report the addition of Associate Professor Robert E. Hicks to the staff of the University of Maryland School of Law. During the current academic year, Professor Hicks will instruct first year students in Procedure and legal method during the fall term and will teach Administrative Law in the spring semester. The REVIEW would also like to congratulate Professor William G. Hall, Jr. on his promotion to Associate Dean and Professor and Professor Edward A. Tomlinson on his elevation to Associate Professor.