

112. SEC. 2. That the annual expense of draining said lands shall be assessed by commissioners of assessments or other persons authorized and empowered to perform those duties in any town or city, upon the said lands so drained and upon all the lands of said town or city, according to the special benefit received by said lands, together with five per centum additional for the costs and expenses of making such assessment and collecting the same, two per centum to be paid to the persons making, and three per centum to the person or persons collecting the same.

Annual expense to be assessed on lands specially benefited.

113. SEC. 3. That should the annual amount of the consideration money of said contract exceed the amount assessed upon the real estate specially benefited thereby, such excess shall be borne by and paid out of the contingent fund of said town or city, or shall be added to the annual tax levy of said town or city, and be assessed and collected the same as taxes are collected and assessed in said city.

If contract exceeds amount assessed for benefits, excess paid out of contingent fund.

114. SEC. 4. That the said assessment shall be made at the same time as the annual assessment for taxes is made in the said town or city in which said meadow or swamp lands are situate, and by the corporate authorities of which said contract has been made; and that on or before the last day of making such annual assessment of taxes, the said commissioners of assessment shall file, in each and every year, an assessment map of such assessment in the office of the clerk of said town or city.

When assessment shall be made.

115. SEC. 5. That said assessment shall be collected at the same time and in the same manner and by the same person or persons, as the same shall be collected by the city or town in which said meadow or swamp lands may be situate, and by the corporate authorities of which said contract has been made.

Time and mode of collecting assessment.

116. SEC. 6. That said assessment shall be a lien upon all real estate which shall be assessed for benefits specially arising from the drainage of said meadow and swamp lands, and shall be sold in the same manner and at the same time as lands are now, or hereafter may be, sold for the non-payment of taxes in the said town or city in which any said meadow or swamp lands may be situate.

Assessment to be a lien.

VI. Limitation of assessments.

An act to limit assessments for the drainage of wet or overflowed lands.

Approved April 2, 1868. P. L. 1868, p. 733.

117. SEC. 1. In all cases where any assessment on lands is authorized to be made for the costs and expenses of drainage of wet or overflowed lands, by any commissioner or commissioners appointed by any court, or by any justice or judge thereof, by or under any general or special law of this state heretofore enacted, said general and special acts shall be so construed and enforced that in all cases the assessments on any lands or premises provided for in and by such act or acts shall be made with reference to the benefits, and shall in no case be greater than the benefits resulting from said drainage under the act authorizing the same.

Assessments for cost of drainage not to exceed benefits.

118. SEC. 2. All special and general laws heretofore enacted, providing for the drainage of any wet or overflowed lands, whereby commissioners may be appointed as aforesaid, be and the same are hereby modified and amended so as to conform to the provisions of the first section of this act, and shall be so considered and construed in all courts of law and equity, the same as if this was a supplement to such act.

All general or special acts amended to conform to this act.

Mechanics Lien.

I. OF THE LIEN.

1. Debts contracted in erection of a building to be a lien.
2. Building erected under contract filed, liable to contractor alone.
3. Remedy of workmen and material men if contractor refuses to pay.
4. Estate of persons erecting buildings alone liable, unless owner consent in writing.
5. Additions and fixed machinery to be considered a building.
6. Construction of the words in the preceding section.
7. Extended to repairs of fixed machinery, &c.
8. Extended to repairs on buildings.

9. Building on land of married woman liable unless she dissent in writing.
10. Lien extended to docks and wharves.

II. OF THE CLAIM.

11. Claim to be filed. What claim must contain.
12. Lien docket.
13. When claim must be filed and suit brought.
14. Lien claim may be amended.
15. Description of curtilage may be altered.
16. Extent of curtilage.
17. Proceeding in case of the erection of two or more buildings by same person.

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18. Summons. Mode of service and return.
19. Pleadings, proceedings and judgment.
20. Errors in proceedings may be amended.
21. Suit in case of death of builder or owner.
22. When writ of fieri facias; when special writ.
23. Proceedings on special fieri facias.
24. All lien claims concurrent.
25. Subsequent suit stayed.

IV. DISCHARGE OF LAND FROM LIEN.

26. Modes of discharging lien.
27. Owner may pay money to county clerk.
28. Act not to be construed to make lands of person liable for building, &c., not authorized by owner.

- P. L. 1853, p. 437.
" 1855, p. 211.
" 1859, p. 451.
" 1860, p. 689.
" 1863, p. 275.
" 1866, p. 1015.
" 1868, p. 369.
" 1870, p. 65.
" 1871, p. 66.
" 1873, p. 71.

An act to secure to mechanics and others payment for their labor and materials in erecting any building.

Revision—Approved March 27, 1874.

I. Of the lien.

Debts contracted in erection of building to be a lien.

P. L. 1853, p. 437, § 1.

Building erected under contract filed liable to contractor alone.
Ib. § 2.

P. L. 1863, p. 275.

Remedy of workmen and material men if contractor refuses to pay.

P. L. 1853, p. 437, § 3.

Amended.

1. That every building, hereafter erected or built within this state, shall be liable for the payment of any debt contracted and owing to any person (a) for labor performed or materials furnished, (b) for the erection and construction thereof, which debt shall be a lien on such building, and on the land whereon it stands, including the lot or curtilage whereon the same is erected.

2. That when any building shall be erected in whole or in part by contract in writing, such building, and the land whereon it stands, shall be liable to the contractor alone, for work done or materials furnished in pursuance of such contract; *provided*, such contract, or a duplicate thereof, be filed in the office of the clerk of the county in which such building is situate, before such work done or materials furnished. (c)

3. That whenever any master workman or contractor shall, upon demand, refuse to pay any person who may have furnished materials used in the erection of any such house or other building, or any journeyman or laborer employed by him in the erecting or constructing any building, the money or wages due to him, it shall be the duty of such journeyman or laborer, or material man, to give notice in writing to the owner or owners of such building of such refusal, and of the amount due to him or them and so demanded, and the owner or owners of such building shall thereupon be authorized to retain the amount so due, and claimed by any such journeyman, laborer, or material man, out of the amount owing by him or them to such master workman or contractor, giving him written notice of such notice and demand; and if the same be not paid or settled by said master workman or contractor, such owner or owners, on being satisfied of the correctness of such demand, shall pay the same, and the receipt of such journeyman, laborer, or material man for the same, shall entitle such owner or owners to an allowance therefor, in the settlement of accounts between him and such master workman or contractor, as so much paid on account. (d)

(a) An architect who draws the plans and superintends the construction of a building may have a lien, *Mutual &c. Ins. Co. v. Rowand*, 11 C. E. Gr. 389.

(b) If the materials were furnished for the building, it does not affect the lien that they were not used in that building, *Morris County Bank v. Rockaway Manufacturing Co.*, 1 McCart. 189.

(c) Filing the contract only protects the building from work done or materials furnished on the contractor's account. A lien attaches for materials ordered or mechanics employed by the owner, *Mechanics Assn. v. Albertson*, 8 C. E. Gr. 318. The employee of a contractor can proceed under the lien law for work done, unless the contract is in writing, *Van Pelt v. Hartough*, 2 Vr. 331. If resort must be had to the specifications, to ascertain what part of a building is erected by contract, they must be filed, *Ayres v. Revere*, 1 Dutch. 474. But not where the builder is to do all the work and furnish all the materials, *Babbitt v. Condon*, 3 Dutch. 154. *Budd v. Lucky*, 4 Dutch. 484.

(d) Where there were three classes of claims, (1) those for work done or materials furnished, for which the creditor made demand and gave notice; (2) similar claims for

which the contractor drew orders on the owner, which on presentation were not accepted; (3) claims for debts due from the contractor other than for work or materials used on the building, and for which the contractor drew orders, which were presented but not accepted. *Held*, that claimants under the first class must be paid in the order and priority in which the demand and notice were given. Claimants under the second and third classes stand on the same footing and are entitled to be paid *pro rata* out of the fund. But where the debtor pays the fund into court, neither class can claim priority over the other, and each creditor must be paid in the order in which his notice or order was presented, *Superintendent &c. v. Heath*, 2 McCart. 22. Notice by the workman operates as an assignment of the debt due from the owner to the contractor to the extent of the amount due from the contractor to the workman. In a suit by the contractor against the owner, the owner cannot claim any deductions for the sums due the workman (for which he has given notice) unless the owner has made payment, *Wightman v. Brenner*, 11 C. E. Gr. 489. There must be a debt due from the owner to the contractor at the time the notice is given, *Craig v. Smith*, 8 Vr. 549. And an

4. That if any building be erected by a tenant or other person than the owner of the land, then only the building and the estate of such tenant, or other person so erecting such building, shall be subject to the lien created by this act and the other provisions thereof, unless such building be erected by the consent of the owner of such lands in writing, which writing may be acknowledged or proved and recorded, as deeds are, and when so acknowledged or proved and recorded, the record thereof and copies of the same, duly certified, shall be evidence in like manner.(a)

Estate of person erecting building alone liable, unless owner consent in writing. *Ib.* § 4.

5. That any addition erected to a former building, and any fixed machinery or gearing, or other fixtures for manufacturing purposes, shall be considered a building for the purposes of this act; but no building shall be subject to the provisions of this act, for any debt contracted for alterations made therein.(b)

Additions and fixed machinery to be considered a building. *Ib.* § 5.

6. That the words, "fixtures for manufacturing purposes," as used in the next preceding section, shall be construed to include any building, erection, or construction, of whatever description, attached or annexed, or intended to be attached or annexed, to any land or tenement, and designed to be used in the building or repairing of vessels, whether the same be permanently attached to the freehold, or so built as to be removed from place to place, and only temporarily attached to the land and whether the same be intended and designed for use on land or water.

Construction of the words in preceding section.

P. L. 1860, p. 689.

7. That the lien given by this act is hereby extended to all mills and manufactories, of whatever description, within this state, and to the lots of land or curtilages whereon the same are erected, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners in writing, for work done or materials furnished for or about the repairing of any fixed machinery, or gearing, or other fixtures for manufacturing purposes, on the same.

Extended to repairs of fixed machinery, &c.

P. L. 1855, p. 211.

8. That the lien given by this act shall be and is hereby extended to all buildings, of whatever description, within this state, and to the lots of land and curtilages whereon the same are erected, for all debts contracted by the owner or owners thereof, or by any other person, with the consent of such owner or owners in writing, for work done or materials furnished for or about the repairing of such buildings or any of them; *provided also*, that said lien shall not be valid against a *bona fide* purchaser or mortgagee before said lien is filed in the office of the clerk of the county.(c)

Extended to repairs on buildings.

P. L. 1859, p. 451.

9. That any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings, and curtilages whereon the same are erected, shall be subject to the lien created by this act; *provided always*, that in case said married woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located, a notice in writing, describing the property, and that she does not consent to the erection or repairing of such building or buildings on her lands, and that the same is being done against her wishes and consent, then, in such case, the building or buildings, and the curtilages whereon the same are erected, of any married woman, shall

Building on land of a married woman liable unless she file dissent in writing.

P. L. 1870, p. 65.

action can not be maintained, when the owner has reasonable cause to dispute the claim of the person serving the notice. *Reeve v. Elmendorf*, 9 Vr. 125. The claimant must first verify it by a judgment against the contractor. *Ibid.* The owner may retain moneys due the contractor, if by the contract he is entitled so to do, until the completion of the building. *Ibid.* The mere *disallowance* by a contractor of the claim of a sub-contractor, will not prevent a suit by the latter against the owner, on a notice served by him. A claim by a workman or materialman for more than has in fact been earned by him, is fatal. *Ibid.*

(a) A lien cannot be enforced either against the land or building, unless the consent be *in writing*, although the owner furnishes the money to build the house. *Babbitt v. Condon*, 3 Dutch. 154. An agreement by the owner to furnish the funds for erecting the building is not such consent. *Macintosh v. Thurston*, 10 C. E. Gr. 242. Nor, where the vendor agrees to advance the funds and deliver the deed after the buildings are finished, *Associates, &c. v. Davison*, 5 Dutch. 415. A contract in writing to convey the land is not such consent. *National Bank v. Sprague*, 5 C. E. Gr. 13. An assertion made by the owner of the title to the builder "that the latter would be safe in going on," is not a contract. *Strong v. Van Deursen*, 8 C. E. Gr. 369.

(b) A *piazza* is an addition, folding doors are not, nor a garret converted into bed rooms. *Whitemack v. Noe*, 3 Stock. 321, 413. A new foundation for a steam engine, built

because the old one was insufficient, is an addition. *Dunnell v. Henderson*, 8 C. E. Gr. 174. Adding to the height, extending the depth or increasing the interior accommodations of a building are *alterations*, not additions. *Uptake v. Skillman*, 3 Dutch. 181. *Combs v. Lippincott*, 6 Vr. 481. See *State, Perrine v. Parker*, 5 Vr. 352. A *fixture* must be one attached to a building, not a dock floating on the water. *Coddington v. Dry Dock Co.*, 2 Vr. 477; 5 Dutch. 550. A *flume* built of wood and leading the water from a dam to the wheel inside the mill is a *fixture*. *Edwards v. Derrickson*, 4 Dutch. 39; 5 Dutch. 468. See *Sherer v. Collins*, 2 Harr. 181, 183.

(c) A mechanic's lien takes priority upon the *building* over a prior mortgage upon the land. *Newark Lime Co. v. Morrison*, 2 Beas. 133. A purchase money mortgage has preference over lien claims put upon the property by contract with the purchaser, between the time of executing the contract and that of the conveyance. *Strong v. Van Deursen*, 8 C. E. Gr. 369. *Huber v. Diebold*, 10 C. E. Gr. 170. *Macintosh v. Thurston*, 10 C. E. Gr. 242. But not where a building was erected before the delivery of a mortgage given to take up a prior mortgage on the premises. *Kittredge v. Neumann*, 11 C. E. Gr. 195. A carpenter finished a house Nov. 17, 1842, and filed his claim Jan. 17, 1843. The owner in possession of the premises mortgaged them Dec. 22, 1842 to a person having no actual knowledge of the carpenter's lien. *Held*, that the lien was prior to the mortgage. *Van Dyne v. Vanness*, 1 Hal. Ch. 485. *Infra*, p. 673, note (c).

be free from the lien given by this act from the time she shall have filed a notice as aforesaid.(a) (See *Sec. 28, post*).

Lien to extend to docks and wharves.

P. L. 1871, p. 66.

10. That the lien given by this act is hereby extended to all docks, wharves, and piers erected upon any navigable river in this state, and to the lots of land in front of which such docks, wharves, or piers may be erected, and to all the interest of the owner or owners of such land in the soil or waters of such navigable river in front of said lands, for all debts contracted by the owner or owners thereof, or by any other person with the consent of such owner or owners, in writing, for work done or materials furnished for or about the erection or filling in of said docks, wharves or piers.(b)

II. Of the claim.

Claim to be filed.

P. L. 1853, p. 437, § 6.

11. That every person intending to claim a lien upon any building or lands by virtue of this act, shall, within one year(c) after the labor is performed, or the materials furnished, for which such lien is claimed, file his claim in the office of the clerk of the county where such building is situate, which claim shall contain these matters:

What such claim must contain.

I. A description of the building, and of the lot or curtilage upon which the lien is claimed, and of its situation sufficient to identify the same.(d)

II. The name of the owner or owners of land or of the estate therein on which the lien is claimed.(e)

III. The name of the person who contracted the debt, or for whom, or at whose request the labor was performed or the materials furnished for which such lien is claimed, who shall be deemed the builder.(g)

IV. A bill of particulars, exhibiting the amount and kind of labor performed, and of materials furnished, and the prices at which, and times when the same was performed and furnished, and giving credit for all the payments made thereupon, and deductions that ought to be made therefrom, and exhibiting the balance justly due to such claimant; which statement, when the work or materials, or both, are furnished by contract, need not state the particulars of such labor or materials, further than by stating generally that certain work therein stated was done by contract at a price mentioned; and such bill of particulars and statements shall be verified by the oath of the claimant, or his agent in said matter, setting forth that the same is for labor done or materials furnished in the erection of the building in such claim described, at the times therein specified, and that the amount as claimed therein is justly due; and when such claim shall not be filed in the manner or within the time aforesaid, or if the bill of particulars shall contain any wilful or fraudulent misstatement of the matters above directed to be inserted therein, the building or lands shall be free from all lien for the matters in such claim.(h)

Lien docket.

lb. § 7.

12. That every county clerk shall, at the expense of the county, provide a suitable, well-bound book, to be called the lien docket, in which he shall enter, upon the filing of any lien claim—first, the name of the owner of the building and land upon which the same is claimed; second, the name of the builder or person who contracted the debt; third, the description of said buildings and lands; and fourth, the amount claimed and by whom claimed; and said clerk shall make a proper index of the same, in the name of the owner of the land and building; and such clerk shall be enti-

(a) That the mortgages of a vendor are purchase money mortgages cannot avail if she does not file her dissent, *Kilbredge v. Neumann*, 11 *C. E. Gr.* 195. Formerly the land of a married woman was not liable under a contract made by her husband, *Johnson v. Parker*, 3 *Dutch.* 239. See *Eckert v. Reuter*, 4 *Vr.* 266. Land conveyed to a husband and wife is liable to the extent of the husband's interest for a debt contracted by him, *Washburn v. Burns*, 5 *Vr.* 18.

(b) See *Coddington v. Dry Dock Co.*, 2 *Vr.* 477; 5 *Dutch.* 550. (c) Where the contract is entire, the work is not done or the materials furnished until the contract is executed, and a lien can be filed at any time within one year thereafter, *Edwards v. Derrickson*, 4 *Dutch.* 39; 5 *Dutch.* 468.

(d) A lien claim cannot be filed on several buildings jointly without apportioning and designating the amount claimed on each one, *Morris County Bank v. Rockaway Co.*, 1 *C. E. Gr.* 150; 1 *McCart.* 189. What is a sufficient description of the premises or curtilage, and how much land may be included, *Edwards v. Derrickson*, 4 *Dutch.* 39; 5 *Dutch.* 468. *Van Dyne v. Vanness*, 1 *Hal. Ch.* 485.

(e) If the title of the property is changed while the building is being erected the owner at the time of filing the lien is the proper one to be made a party, *Edwards v. Derrickson*, 4 *Dutch.* 39; 5 *Dutch.* 468. *Robbins v. Bunn*, 5 *Vr.* 322. But not where such conveyance was made as collateral secur-

ity and the deed was only a mortgage, *Gordon v. Torrey*, 2 *McCart.* 112. The legal estate of the owner need not be set out, *Cornell v. Matthews*, 3 *Dutch.* 523.

(g) A lien claim cannot be amended by adding another claimant, *Vreeland v. Boyle*, 8 *Vr.* 346.

(h) Where the date of the last article furnished as stated in the bill of particulars was more than a year before the summons was issued, the lien cannot be enforced, although the last article may have been furnished within the year, *Bement v. Trenton Locomotive Co.*, 3 *Vr.* 513. A statement that work was done between two given dates, is not sufficient, and the kind of labor or materials, and the price of each, must appear. A charge including both labor and materials is erroneous, *Associates v. Dawson*, 5 *Dutch.* 415. The time of commencing the building need not be stated, *Gordon v. Torrey*, 2 *McCart.* 112. That the amount set forth was for casings, blinds, &c., and materials furnished in the repairing, altering, erecting and finishing of the buildings described in the claim, is defective, *Whitenack v. Noe*, 3 *Stock.* 413. If the claim shows the work done, the time when, that it was done by contract, the price stipulated and the amount due, it is sufficient, *Edwards v. Derrickson*, 4 *Dutch.* 39; 5 *Dutch.* 468. If the lien covers more land or buildings than the claimant is entitled to, it will not vitiate it, *Ibid.* *Whitenack v. Noe*, 3 *Stock.* 321.

tled to twelve cents for filing each claim or contract, and at the rate of eight cents per folio for such entry made in the lien docket, and six cents for every search in the office for such lien, claim, or contract.

13. That no debt shall be a lien by virtue of this act, unless a claim is filed as hereinbefore provided, within one year from the furnishing the materials or performing the labor for which such debt is due, and such part of any claim filed as may be for work or materials furnished more than one year before the filing of the same, shall not be recovered against the building or land by virtue of this act, nor shall any lien be enforced by virtue of this act, unless the summons in the suit for that purpose shall be issued within one year from the date of the last work done or materials furnished in such claim; and the time of issuing such summons shall be endorsed on the claim by the clerk, upon the sealing thereof; and if no such entry be made within one year from such last date, such lien shall be discharged; *provided*, that the time in which such lien may be enforced by summons may be extended for any further period not exceeding one year, by a written agreement for that purpose, signed by said land owner and said claimant, and annexed to said claim on file before such time herein limited therefor shall have expired, in which case the county clerk shall enter the word "extended" on the margin of the lien docket opposite such claim; and any claimant, upon receiving written notice from the owner of the land or buildings requiring him to commence suit on such claim within thirty days from the receipt of such notice, shall only enforce such lien by suit to be commenced within said thirty days. (a)

When claim must be filed and suit brought.
Ib. § 12.

14. That at any time before judgment on a lien claim, a justice of the supreme court, on the application of the claimant of such lien, and on reasonable notice to all parties interested, may order such lien claim to be amended, in matter of substance as well as in matter of form, whenever it shall appear to him that such amendment can be justly made; and whenever such amendment shall be ordered, the same shall be put in writing and signed by said justice, and shall be then filed in the office of the county clerk; and for his services under this section the said justice shall be entitled to a fee of five dollars.

Lien claim may be amended.
Revision.

15. That at any time before the entry of final judgment in a suit under this act, it shall be lawful for a justice of the supreme court, upon the application of either the owner, builder or lien claimant, and upon reasonable notice to the others, to alter the description of the curtilage as set forth in the lien claim, and, in the form of a rule of court in the suit, to determine the true size and description of the curtilage; and in all subsequent proceedings in such suit, or in relation thereto, the curtilage so determined shall be treated as if the same had been described in the original lien claim; and such justice, for his services under this act, shall be entitled to a fee of two dollars, which shall be paid by the applicant, and may be taxed with the costs in such suit; *provided*, that the amendments authorized in this and in the next preceding section, shall not affect the rights of any *bona fide* purchaser or mortgagee, acquired between the time of filing the original lien claim and that of filing said amendments.

Description of curtilage may be altered.
P. L. 1863, p. 369, § 2.
Amended.

16. That when the curtilage or lot on which the building is erected shall not be surrounded by an enclosure separating it from adjoining lands of the same owner, then the lot on which the building lien shall extend, shall be such tract as in the place of its location is usually known and designated as a building lot, and bounded by the lines laid down for its boundaries on any map made for the sale of it or on file in any public office, to lay out in lots the tract including it, and in cases where no such map exists, such lot may be designated by the claimant in the lien claim, but in no such case shall the same exceed half an acre, or include any building not used and occupied with, or intended to be used and occupied with, the building for the cost of which the lien is claimed.

Extent of curtilage.
P. L. 1863, p. 275, § 3.

17. That whenever any person or persons shall hereafter furnish any materials or perform any labor, for the erection and construction of two or more buildings, where such buildings are built and constructed by the same person or persons, it shall be lawful for the person or persons so furnishing such materials, or performing such labor, to divide and apportion the same among the said buildings, in proportion to the value

Proceedings when two or more buildings are built and constructed by the same person or persons.
P. L. 1873, p. 71.

(a) The statute cannot be evaded by proving that the article was *delivered* within the year, *Bement v. Trenton Locomotive Co.*, 2 Vr. 246; 3 Vr. 513.

of the materials furnished to, and the labor performed for each of said buildings, and to file with his, her or their lien claim therefor, a statement of the amount so apportioned to each building, in lieu of the bill of particulars required by the eleventh section of this act, which said lien claim when so filed may be enforced under the provisions of this act in the same manner as if said materials had been furnished and labor performed for each of said buildings separately; and if the person or persons who shall have furnished such materials or performed such labor, shall have released his or their lien claim against any one or more of such buildings, or if any one or more of such buildings shall have been built and constructed under a contract in writing duly filed, pursuant to this act, such release or such filing of a contract shall not affect or impair the lien or claim of such person or persons against the building or buildings not so released, or not so built and constructed by contract, nor the lots or curtilages whereon the same are erected.

III. Suit and proceedings to enforce claim.

Summons.

P. L. 1853, p. 437,
§ 8.

18. That when a claim is filed agreeably to the provisions of this act, upon any lien created thereby, the same may be enforced by suit, in the circuit court of the county where such building is situated, which suit shall be commenced by summons against the builder and the owner of the land and building, (a) in the following or like form:

Summon A B, builder, and C D, owner, (or if the owner contracted the debt), A B, builder and owner, to appear before the circuit court in and for the county of _____, at _____, in said county, on the _____ day of _____. That the said A. B., (the builder) may answer unto E. F., (claimant) of a plea, (as in other cases of assumpsit, debt, or whatever the proper form of action for the debt may be), for which the said E. F. claims a building lien on a certain building and lands of said C. D., (describing the building and lands as in the claim on file).

Form of and service.

And said summons shall be directed, tested, and made returnable, and may be served and returned in the same manner as other writs of summons; and such summons may be served upon the defendants, or either of them, in any county of this state, by the sheriff thereof, and for this purpose the same, or a duplicate thereof, may be issued to such sheriff; and if any defendant cannot be found in this state, it may be served upon him by affixing a copy thereof upon such building, and also by serving a copy on such defendant personally, or by leaving it at his residence ten days before its return, which shall be deemed actual service, or in case such defendant resides out of this state, by affixing a copy on such building, and sending a copy by mail, directed to him at the post office nearest his residence, or in case his residence is not known to the plaintiff, then by affixing a copy to such building, and by inserting it for four weeks, once in each week, in some newspaper of this state, published or circulating in the county where such building is situate, either of which shall be legal service: and when an affidavit shall be made and filed of the facts, authorizing and constituting any such service, not made by a sheriff or officer, the suit may proceed against the party so served as if such summons had been returned served by the sheriff.

The declaration. Ib. § 9.

19. That the declaration in such case shall, after reciting that both owner and builder were summoned, and how served, be against the builder, and in the same form as in other cases of assumpsit, covenant, debt, or as the case may be, and shall conclude with an averment that said debt is, by virtue of the provisions of this act, a lien upon such building and lot, describing the same as in said claim; and to said declaration a schedule may be annexed, and the practice, proceedings, and pleadings thereon shall be conducted, and the judgment entered, as in suits in said circuit court to recover money due on contract; and both or either of said defendants may, jointly or severally, have any defence or plea to the same that might be had by the builder to any action on said contract without this act; and in addition thereto, the owner may plead that said house or land are

Proceedings and judgment.

Defence and special plea

(a) The suit must be against both the builder and the owner, *Ayres v. Revere*, 1 *Dutch*. 474. *Macintosh v. Thurston*, 10 *C. E. Gr.* 242. *Sinnickson v. Lynch*, 1 *Dutch*. 317. A mortgagee is not an owner, *Tompkins v. Horton*, 10 *C. E. Gr.* 284. If the summons is only against the builder, where he is

both builder and owner, it may be amended, but such defect is waived by his appearing and pleading that the house and land are not liable, *Cornell v. Matthews*, 3 *Dutch*. 522.

not liable to said debt, and in such case it shall be necessary for the plaintiff, to entitle him to judgment against the house and lands, to prove that the provisions of this act, requisite to constitute such lien, have been complied with; and in case a verdict be rendered or judgment be given against the builder only, judgment shall be given for the land owner, with costs against the plaintiff; and in case judgment be given for the plaintiff, it shall be entered against the builder when he was actually served with the summons, generally, and with costs as in other cases; and when only legal service of the summons has been made, judgment against the owner and also against the builder, shall be specially for the debts and costs, to be made of the building and lands in the declaration described; and in case no general judgment is given against the builder, such proceedings or recovery shall be no bar to any suit for the debt, except for the part thereof actually made under such recovery.(a)

20. That it shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any suit or proceeding under this act, so that the merits of the controversy between the parties may be determined; and that said amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit.

Errors in proceedings may be amended.
Revision.

21. That in case of the death of the builder, the suit on the lien claim may be against his executors or administrators; and if the owner be dead, such suit may be against his heirs or devisees.(b)

Suit in case of death of builder or owner.
P. L. 1866, p. 1015.

22. That where judgment is entered generally against the builder, a writ or writs of *feri facias* may issue thereon as in other cases; and when judgment shall be against the building and lands, a special writ of *feri facias* may issue to make the amount recovered by sale of the building and lands; and when both a general and special judgment shall be given, both writs may be issued either separately or combined in one writ, and one may be issued after the return of the other for the whole or residue, as the case may require; and such judgments may be docketed in the supreme court, and execution had thereon as other judgments may be.

When writ of *feri facias* may issue.

P. L. 1853, p. 497,
§ 10.

When special.

23. That under such special *feri facias*, the sheriff or other officer shall advertise, sell, and convey said building and lot in the same manner as directed by law in case of lands levied upon for debt, and the deed given by such sheriff or other officer shall convey to the purchaser the estate which the owner had in the lands at the commencement of the building, or which he subsequently acquired, and also in the building, subject only to all mortgages and other encumbrances created and recorded, or registered prior to the said commencement of the building; and in case of gearing or machinery, the bringing of the same upon the premises shall be such commencement; and such prior encumbrances shall have priority to all subsequent builders' liens upon said lands and upon the erections thereon, except such as may be removable, as between landlord and tenant, which may be sold and removed by virtue of any building lien for the construction of the same, free from such prior encumbrances.(c)

Proceedings on special *feri facias*.

Ib. § 11.

Title which passes to freeholder.

24. That all lien claims for erecting the same building shall be concurrent liens upon the same and the land whereon the same is erected, and shall be paid *pro rata* out of the proceeds thereof, when sold by virtue of this act; and, for the purpose of distribution, the sheriff or other officer

All lien claims concurrent.

Ib. § 14.

(a) The declaration must aver that the contract or a duplicate thereof, was in writing, and filed in the clerk's office of the county where the building is situate, *Summerman v. Knowles*, 4 Vr. 202. The builder can only plead to the action; if the validity of the lien is contested it must be by the owner, *Tomlinson v. Degraw*, 2 Dutch. 78. The plea that the premises are not liable to the debt does not put in issue the title to the property, *Cornell v. Matthews*, 3 Dutch. 522. *Washburn v. Burns*, 5 Vr. 18. If the declaration shows that the claim is not a lien on the premises the owner may demur, and after the plaintiff has joined in demurrer he cannot assign for error that the defendant cannot demur to a declaration in a lien case, *Coddington v. Beebe*, 5 Dutch. 550. A judgment entered upon a defective lien gives it no priority in payment over other liens, *Morris County Bank v. Rockaway Co.*, 1 C. E. Gr. 150. A judgment may be entered against the building and land where there has been an actual service of the summons and a special *feri facias* may be issued thereon, *Mutual Benefit Ins. Co. v. Rowand*, 11 C. E. Gr. 389.

(b) Where the premises have been conveyed between the time of beginning the building and that of filing the lien, the executors or administrators of the owner

at the time the lien is filed, are meant, *Robbins v. Bunn*, 5 Vr. 322.

(c) The excavation for the foundation is the commencement of the building, *Mutual Benefit Life Ins. Co. v. Rowand*, 11 C. E. Gr. 387; affirmed July, 1876. A change of ownership while the building is being erected does not make a new commencement, *Gordon v. Torrey*, 2 McCart. 112. In case of additions, &c., the statute refers to the time when they are commenced, *Whitenack v. Noe*, 3 Stock. 321, 327. A judgment general as against the owner and special as against the lands is paramount to all encumbrances put upon the premises after the commencement of the building, *Tompkins v. Horton*, 10 C. E. Gr. 284. For adjustment of priorities where there are mortgages or other encumbrances on the lands, see *Van Dyne v. Vanness*, 1 Hal. Ch. 485. *Whitenack v. Noe*, 3 Stock. 321, 413. *Strong v. Van Deursen*, 8 C. E. Gr. 369. *Hueber v. Diebold*, 10 C. E. Gr. 170. *Macintosh v. Thurston*, 10 C. E. Gr. 242. *Mutual Benefit Life Ins. Co. v. Rowand*, 11 C. E. Gr. 389. *Kittredge v. Neumann*, 11 C. E. Gr. 195. *Lamb v. Cannon*, 9 Vr. 362. *Reeve v. Elmendorf*, 9 Vr. 125. *Ward v. Hague*, 10 C. E. Gr. 397. *Taylor v. La Bar*, 10 C. E. Gr. 222. *National Bank v. Sprague*, 5 C. E. Gr. 13. *Whitehead v. First Church of Newark*, 2 McCart. 135. *Supra*, p. 669, note(a).

shall pay such proceeds to the clerk of said circuit court, to be by said court distributed among such claims filed, or as shall be filed according to this act before petition filed in said court for distribution thereof, and among such only; but the amount paid to any claimant shall not be paid over to him until after his claim shall have been filed for three months; and if a *caveat* be filed against such claim by the owner, or by any claimant or claimants owning together one-third of the lien claims filed against such building, then not until such claim shall have been established by a special judgment thereon; and such circuit courts shall have full power to adopt such rules of practice and pleading, and to make all orders necessary and proper to carry into effect the objects of this act, and to secure a proper disposition of the proceeds of sales to all persons entitled thereto by the provisions of this act.

Subsequent suits stayed.
Ib. § 17.

25. That where a summons has been issued and served in any way prescribed by this act, to enforce any building claim lien against any building and lands, all other suits commenced by summons subsequently issued, to enforce concurrent liens against the same building and lands, may be stayed by the claimant therein, or by order of the court, until judgment in such first suit, unless notice to enforce such other claim has been served, or a *caveat* has been filed against paying the same, as herein-before provided.

IV. Discharge of land from lien.

Modes of discharging lien.
Ib. § 13.

26. That such land and building may be discharged from any lien created by this act:—(1) by payment and a receipt therefor, given by such claimant, which, when the same is executed in the presence of, and is attested by any officer entitled to take the acknowledgment of the execution of a deed, or when acknowledged or proved before such officer, shall be filed by such clerk, and the words "discharged by receipt" shall be entered by him in said lien docket, opposite the entry of said lien; (2) or by paying to said county clerk the amount of said claim; which amount said clerk shall pay over to said claimant; (3) by the expiration of the time limited for issuing a summons on such lien claim, without any summons being issued, or without notice thereof endorsed on said claim; (4) by filing an affidavit that a notice from the owner to the claimant, requiring such claimant to commence suit to enforce such lien in thirty days from the service of such notice; and the lapse of thirty days after such service without such suit being commenced, or without any entry of the time of issuing such summons being made on such claim.

Owner may pay money to county clerk.

27. That any land owner desiring to contest any claim, and to free his house and land from the lien thereof, may pay to the county clerk the amount of such claim, with interest thereon, for six months after such payment, and twenty-five dollars in addition thereto, with notice to said clerk not to pay over the same until such claim be established by suit; which sum, or so much thereof as is necessary, shall be paid to such claimant upon his obtaining judgment against such buildings and lands, in the manner prescribed in this act, and said claim shall, from the payment of such money to such clerk, be a lien on said money, and said buildings and lands shall be discharged therefrom, and no execution shall issue against the same by virtue of such judgment; but if such suit is not commenced within the time at which the said lands would be discharged by the provisions of this act without suit, or in case judgment be given therein without being against said lands, said sums shall be repaid to him by said clerk, and if judgment be given against such lands for an amount less than that so deposited, then the surplus shall be returned by said clerk to said land owner.

Supplement.

Approved March 30, 1876.

P. L. 1876, p. 66.

28. SEC. 1. That section nine of the act to which this is a supplement, and which section reads as follows:

Section amended.

"9. That any married woman, upon whose lands any building or buildings shall hereafter be erected or repaired, or whereon any fixtures shall be put, shall be taken as consenting to the same, and such building or buildings, and curtilages whereon the same are erected shall be subject

to the lien created by this act; *provided always*, that in case said married woman shall cause to be filed in the clerk's office of the county wherein such building or buildings are located, a notice in writing, describing the property, and that she does not consent to the erection or repairing of such building or buildings on her lands, and that the same is being done against her wishes and consent, then, in such case, the building or buildings, and the curtilages whereon the same are erected, of any married woman, shall be free from the lien given by this act from the time she shall have filed a notice as aforesaid," be and the same is hereby amended by adding thereto the words: "*and provided further*, that nothing in this act contained shall be so construed as to make the lands of any person liable for any building or repairs not authorized by the owner, or built or done without the knowledge of the owner."

Act not to be construed to make lands of person liable for building not authorized by owner, &c.

Medical Society.

1. Society, how constituted. Fellows.
2. Have authority to confer degree of Doctor of Medicine.
3. General powers of society.
4. Repealer.

An act to reorganize the medical society of New Jersey.

Approved March 14, 1864. P. L. 1864, p. 250.

WHEREAS, The medical society of New Jersey is approaching its centenary anniversary; *and whereas*, the society, by petition, has expressed a desire to surrender all its special privileges and pecuniary immunities, and to reorganize as nearly as possible upon the voluntary basis; therefore,

1. That the medical society of the state of New Jersey, already incorporated by the style and name of "The Medical Society of New Jersey," shall continue to be a body corporate and politic, in fact and in name, and shall and may have and use a common seal, and alter the same at their pleasure; and that the said society shall be composed of delegates (not less than three) chosen by and from each of the district or county societies, which now are, or which under the authority of the said society may be hereafter instituted; the officers for the time being, shall be *ex officio* members of the said society independently of the authority of delegation; and all persons who may have been or may hereafter be presidents of the society, shall rank as fellows, and be entitled to all the privileges of delegated members. (a)

Society, how constituted.

2. That the society shall have the authority to confer the degree of doctor of medicine, under such rules and regulations as they may adopt, which degree shall be deemed sufficient evidence of a regularly educated and qualified practitioner of the healing art; and hereafter no one shall be admitted to membership in any district or county society having connection with this society, unless he shall have received the said degree of doctor of medicine, or been admitted *ad eardem*, from some other medical authorities which this society shall deem proper to recognize; *provided*, that this act shall not be so construed as to prevent any county or district society from admitting to membership any respectable practitioner who shall have previously to the passage of this act, received the degree of doctor of medicine from any college or university recognized by, or in affiliation with the body known as "The American Medical Association."

Fellows.

Have authority to confer degree of doctor of medicine.

Proviso.

3. That this society shall have power to prescribe the duties of its officers and members, fix their compensation, assess from time to time an annuity upon the district and county societies in the ratio of their membership respectively, and adopt such rules and regulations for the due management of the concerns of this and the several district societies as may be deemed necessary; *provided*, the same be not contrary to the laws of this state; and may hold any estate, real and personal, the annual income of which shall not exceed one thousand dollars.

General powers of society.

4. That this act shall be considered a public act, and shall take effect on

Repealer.

(a) The Medical Society of New Jersey must judge of the qualification of its own members and the supreme court cannot interfere upon the application of one claiming to

be a member, *Watson v. Medical Society*, 9 Vr. 377. See *State, Elder v. Medical Society*, 6 Vr. 200.