Study H-820 February 11, 2000

Second Supplement to Memorandum 2000-9

Mechanic's Liens (Materials Submitted at February 2000 Meeting)

The attached materials were submitted to the Commission at the February 11, 2000, meeting:

Exhibit p.

1. Letter from Ellen Gallagher, Staff Counsel, Contractors State License Board (Feb. 10, 2000) 1
2. *Mechanics Lien Law Comments,* prepared by Keith Honda, Chief of Staff, Office of Assemblyman Mike Honda (Feb. 10, 2000) 5

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

State of California Department of Consumer Affairs

CONTRACTORS STATE LICENSE BOARD
9821 BUSINESS PARK DRIVE / P.O. BOX 26000
SACRAMENTO, CALIFORNIA 95826

February 10, 2000

Mr. Stan Ulrich
Assistant Executive Secretary
California law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, California 94303

Dear Mr. Ulrich:

Re: **Mechanics' Liens**

Thank you for the opportunity to participate in this discussion. Last year, Assemblyman Honda's proposed constitutional amendment and related recovery fund triggered a welcome review of mechanics' liens within the Contractors State License Board (CSLB), particularly as mechanics' liens relate to home improvement. This new review by the California Law Revision Commission is also welcome. CSLB is encouraged that some system- wide solutions may emerge out of the discussions.

How big is the problem?

Sam Abdulaziz suggests that the problem of mechanics' liens may not be very great. He is right. Before we work on a solution, we ought to find out how big the problem is.

Last year, in response to one of CSLB's proposals regarding mechanics' liens, the Institute of Heating and Air Conditioning Industries Inc. conducted a survey of its membership. The survey inquired whether, in the past 20 years, any member had ever foreclosed on an owner occupied single family residence. Fifty-one (51) members responded to the survey. Only two (2) stated that they had ever gone to foreclosure. Lest we conclude that liens are not a problem, the survey did not ask how the member was ultimately paid. A number of the survey respondents commented that, even though they did not foreclose, the lien right was very valuable to get the property owner to pay. The members did not disclose whether the lien was filed because the homeowner failed to pay the contractor or the contractor failed to pay the subcontractor. In other words, we do not know if the owner paid twice.

CSLB's Closed Complaint Review.

CSLB sought information from within its own files. This approach is not without problems. CSLB does not track statistics specific to mechanics' liens. The filing of a mechanics' lien by itself is not a cause for discipline. In our complaint statistics, mechanics' liens can be disguised as, among other things, a violation of the prohibition against diversions of funds, situations where a contractor has committed a technical contract violation (by failing to provide unconditional releases), bankruptcies which result in case closures, or situations where the subcontractor or material supplier complains about non-payment.

In order to gather information, CSLB is conducting a review of its closed complaint files. As of now, 274 cases have been reviewed. Our preliminary data concludes that twenty-six of these cases involved liens and/or issues of non-payment.

Bear in mind: This is not a review of open cases that would allow us to ask questions regarding liens and non-payment. It is a review of closed complaints. We surveyed whether information about liens is included in the file. In any number of cases, liens could have been filed but not mentioned within the complaint or investigation.

Of the 26 cases:

- Two (2) cases involved unpaid laborers. Both filed liens. Both cases resulted in accusations against the contractors. Our records did not disclose whether the property owner paid twice.

- Two (2) cases involved contractors who filed liens for non-payment. CSLB found that the liens were proper; the owners had not paid the contractor.

- Five (5) cases involved unpaid material suppliers. In two (2) cases, liens were reported. In one of the two cases, the homeowner paid twice. As a result of these five cases, three accusations were filed.

- One (1) case involved an equipment renter. No lien was reported. The case was closed for insufficient evidence.

- Sixteen (16) cases involved unpaid subcontractors. Ten of the complaints came from the subcontractors themselves. Six of the these cases involved reported liens. One homeowner paid twice.

Until we have reviewed the entire pool of complaints, CSLB staff hesitates to make statements about how small or large the problem is. We expect to finish the closed complaint review this month and then tabulate the results. We need to analyze the data. If these lien claims rarely result in a homeowner paying twice, revision of California lien law might be unwarranted. If, however, lien claims often lead to substantial financial injury, revision might be required.

Home Improvement Protection Plan (HIPP)

Last year, Senator Polanco requested that the CSLB identify and address problems that lead to financial injury of California consumers at the hands of licensed contractors. The CSLB identified home improvement projects as providing significant risk of financial injury. HIPP is a starting point to address this risk.[1]
Stan Ulrich

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[1] HIPP also includes a proposal to address injury caused by a contractor's failure to carry Commercial General Liability Insurance and a proposal to fingerprint all applicants and licensees.

HIPP does little to change substantive CSLB law. Instead, HIPP aims to provide better consumer protection by providing better information to consumers.

The proposed Mechanics' Lien Warning would replace the present Notice to Owner. The Warning covers the same ground as the Notice to Owners but is more direct, and user friendly. The idea is simple. By informing homeowners of the importance of making sure the subcontractors and material suppliers are paid, and by paying only as progress is made, the consumer not only reduces the risk of mechanics' liens but also reduces losses from contractor bankruptcy.

Likewise, the proposed changes to Business & Professions Code section 7159 use the home improvement contract itself to provide needed information to the consumer. For example, the new contract form would require the contractor to tell the consumer about the amount of down payment allowed. This may reduce situations where the contractor takes an illegal down payment. In regard to mechanics' lien prevention, the contract itself would provide warning to the consumer not to make the next payment until the contractor provides unconditional releases from the contractor and from all the potential lien claimants.

It is debatable whether better information can rebut consumers' apparently strong need to trust the contractor regardless of any showing that the contractor is a good credit risk. The Board continues to search for ways to break down consumer denial.

Please note: For those who are following HIPP. The version of HIPP that was sent to the Legislative Counsel's office did not include changes brought to the January 18 Board meeting, nor did it include changes staff made after working with CSLB Enforcement and other interested parties. A window of opportunity to make the changes occurred this week and staff was able to get about half the new changes into the Legislative Counsel. The rest will have to wait for amendments.

Revisions to HIPP based on the California Law Review Commission's (CLRC) Mandate

Before the CLRC was asked to review mechanics' lien law, HIPP included a revision of the Preliminary Notice. When the Board learned that the CLRC was going to review the issue, the Board dropped proposed changes to the Preliminary Notice. Since CRLC does not intend to report until January of 2001, staff will consult with the Board to put this revision back into HIPP.

The original version of the new Preliminary Notice proposed changed the timing of the notice from 20 days to 5 days. This was a response to new reports that contractors were completing jobs and being paid before the Preliminary Notices were even in the mail. The timing change has been dropped as too big a solution for too small a problem.

More important than the timing change, the proposal offered changes to the text of the notice to give consumers more user-friendly information about liens. Since the consumers is usually given the Preliminary Notice in time to withhold payment, allowing the potential lien claimant to provide more useful information might prevent a consumer from making a mistaken payment.

Recovery Fund as a Solution to Mechanics' Liens

Last year, the Board reviewed Assemblyman Honda's proposed solution to address mechanics' liens that were filed even though the homeowner paid in full. The proposal included a constitutional amendment precluding would be lien claimants from perfecting liens when the homeowner could demonstrate that the contractor had been paid in full. The proposal balanced this loss of lien rights with a recovery fund.

The Contractors State License Board was very wary of a recovery fund. The Board felt that it was another instance of "good" contractors paying for dishonest and incompetent contractors' mistakes. Most of the Board's discussion involved the recovery fund.

James Acret's New Proposal

It is my understanding that James Acret's new proposal does not require a recovery fund. Instead, the legislature would curtail the lien rights of subcontractor and material suppliers on the same reasoning as the lien law prohibits an unlicensed contractor from perfecting lien rights. The change can be considered to be merely procedural. The Board has not reviewed this proposal or any other new proposal.

Thank you for the opportunity to participate in this process. If you have any questions, please call me at 916-255-4116.

Sincerely yours,

Ellen Gallagher, Staff Counsel
Contractors State License Board

LAW REVISION COMMISSION: MECHANICS LIEN LAW
COMMENTS

DRAFT

FEBRUARY 10, 2000

Submitted By:
Office of Assemblymember Mike Honda

Prepared by:
Keith Honda, Chief of Staff

TABLE OF CONTENTS

I. INTRODUCTION
II. THE PROBLEM
III. MECHANIC'S LIEN RIGHTS ARE SUBJECT TO REASONABLE REGULATIONS
IV. THE INTENT OF THE FRAMERS: THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1879
V. PLACING LIMITS ON PROPERTY OWNER LIABILITY: A LEGISLATIVE PROPOSAL
VI. THE LEGISLATIVE COUNSEL OPINION (#13279 DATED MAY 11, 1999)
VII. CONCLUSION

I. INTRODUCTION

This memorandum is submitted for the consideration as the Law Revision Commission deliberates revisions to California's mechanic's lien laws. This memorandum addresses the availability of a statutory defense of full payment under the California Constitution. What follows is a brief description of the problem, arguments made by Mr. James Acret, a review of the Debates and Proceedings of the Constitutional Convention of 1879, and a legislative solution proposed by Mr. Acret. This memorandum concludes that the California Legislature may constitutionally enact a statute granting a defense to a mechanic's lien based on full payment.

II. THE PROBLEM

What follows is a description of a typical home improvement transaction where the problems with the mechanic's liens arise. A homeowner enters into a contract with a prime contractor to complete a work of improvement. A prime contractor hires laborers, subcontractors, and purchases supplies from a material supplier. Each of these transactions is governed by contract. The homeowner pays the prime contractor, but the prime contractor fails to pay the laborers, subcontractors, and material suppliers.

The victims here at this first stage are the laborers, subcontractors, and material suppliers who are not paid. They are victimized by a breach of contract - the prime contractor does not honor his or her contracts with the laborers, subcontractors, or material suppliers.

Under our current law each party, who has not been paid by the prime contractor, has the right to collect from the homeowner - via a mechanic's lien, even though the homeowner has no contract with them. This right to collect from the homeowner makes sense when the homeowner hasn't paid the prime contractor - the homeowner is at fault for breach of contract. However, it doesn't make sense if the homeowner hasn't done anything wrong and has paid the prime contractor in-full. The homeowner cannot defend against a lien claim based on the fact that he or she already paid the prime contractor.

The victim here at this second stage is the innocent homeowner, who is obligated to accept the obligations of the prime contractor, because the prime contractor did not honor his or her contracts with the laborers, subcontractor, or material suppliers. The homeowner is victimized here, not by a broken promise - but by operation of mechanics' lien laws. It is important to recognize at this point that the sole person at fault in this situation is the unscrupulous prime contractor. Neither homeowner, laborer, subcontractor, nor material supplier is at fault having met their obligations under applicable contracts.

Under California's current mechanic's lien laws, the homeowner assumes all of the risk associated with a prime contractor's failure to honor his or her contracts with subcontractors and material suppliers.

III. MECHANIC'S LIEN RIGHTS ARE SUBJECT TO REASONABLE REGULATIONS

In a letter dated August 25, 1999 (Attachment 1), Mr. James Acret, from the law firm of Thelen, Reid, & Priest, LLP proposed a solution to the problem outlined in Section II. Mr. Acret is a highly regarded expert in construction law.[1] In his expert

[1] Mr. James Acret has practiced construction law since 1957, and has handled scores of trials, mediations, and arbitrations representing contractors, owners, architects, engineers, developers and sureties. Mr. Acret is the author of the CEB book Attorney's Guide to California Construction Contracts and Disputes, now in its third edition. He was a member of the committee that rewrote the California Mechanics Lien Law in 1969. He also wrote the classic California Construction Law Manual,

opinion, Mr. Acret argues that providing homeowners with a defense of full payment does not conflict with the Constitution.

> The California Constitution provides that mechanics, contractors, artisans, and suppliers shall have a lien upon the property which they improve and that the legislature shall provide for the speed and efficient enforcement of such liens. This provision of our Constitution does not prevent the legislature from establishing defenses to mechanics lien claims in support of public policy. An example of such policy is the legislation that prohibits unlicensed contractors from enforcing a claim of mechanics lien even for the value of work properly performed. The legislature could likewise prevent the enforcement of lien claims against homeowners who have already paid for work and materials supplied to their projects.
>
> The fairness of this proposal is easily supported. Merchants who advance credit assume the risk of nonpayment. Only in the construction industry is a merchant who makes a bad credit decision (by extending credit to an unworthy contractor) protected. It is unfair to extend such protection at the expense of an innocent homeowner who has fulfilled all contractual obligations to pay for improvements. In such cases, it should be the merchant, and not the homeowner, that takes the loss.

In a letter dated February 02, 2000 (Attachment 2), Mr. Acret provides additional examples where the legislature has

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now in its fifth edition, published by West Group, and edits a monthly construction industry newsletter, also published by West Group: California Construction Law Reporter. Mr. Acret is also an experienced construction industry arbitrator and mediator, and serves on the Large Complex Case Panel of the American Arbitration Association.

Mr. Acret is also the author of the following books published by West Group and BNI: Acret's California Construction Laws Annotated; Architects and Engineers: Their Professional Responsibilities (Third Edition); Construction Litigation Handbook (Second Edition); Construction Arbitration Handbook (Second Edition); Construction Law Digests; Construction Industry Form Book (Second Edition); California Construction Law Digests; California Construction Law Manual, Contractors Edition; Acret's Construction Industry Guide to Mechanics Liens, Stop Notices and; Payment Bonds; Acret's California Public Construction Contract Law Manual; National Construction Law Manual; A Simplified Guide to Construction Law; California Public Contract Code Annotated.

balanced the rights of lien holders and the rights of homeowners in favor of homeowners.

> For example, the legislature has provided that the mechanic's lien right does not apply against a landowner who has posted and recorded a notice of non-responsibility for tenant improvements. The worked performed increases the value of the owner's land and yet the legislature has determined that the land should not be subject to a mechanic's lien claim.
>
> As another example, the interest of a beneficiary under a deed of trust in land is not subject to the claim of mechanics lien as long as the deed of trust was recorded before the commencement of the work of improvement. Finally, public property is not subjected to the mechanic's lien right.
>
> In each of these cases, the legislature has made a policy decision that the constitutional right to a mechanic's lien should yield to the legitimate interests of property owners.
>
> In one case, the legislature decided that a property owner should be protected against liens for work ordered by a tenant even though construction ordered by the tenant is just as valuable as any other construction. In another case, the legislature decided that it was more important to encourage construction financing by institutional lenders that to protect mechanic's lien rights. In the last case, the legislature simply decided that public agencies should be exempt from mechanic's lien claims.

Mr. Acret draws the following conclusion.

> So we know that the legislature has the power to curtail mechanic's lien rights against homeowners who have paid their bills, and protect the claimant by substituting stop notice rights against construction fund in the hands of the homeowners. The legislature has already established those stop notice rights. Claimants have the same stop notice rights against homeowners as they have against public agencies. The legislature curtailed mechanic's lien rights against public property and against construction lenders, and substituted stop notice rights. The legislature may, and should, do the same for homeowners.

Is Mr. Acret's position consistent with the intent of the framers of the Constitution? Did the framers of the Constitution intend to prohibit the legislature from enacting a statute providing a defense to mechanic's liens based on full payment?

IV. THE INTENT OF THE FRAMERS: THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1879

In assessing the intent of the framers, it is instructive to review the proceedings of the Constitutional Convention of 1879. The record directly addresses the issue of the defense of full payment. The delegates of the California Constitutional Convention of 1879 specifically considered an amendment which if approved would have eliminated by constitutional provision the defense of full payment. The issue was debated on February 17th and 19th in 1879 (Attachment 3).

The original version of Section 15 read as follows:

> SEC.15 Mechanics, material-men, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of said liens."

The amendment to then Section 15 was offered by Mr. Barbour:

> SEC. 15 Mechanics, artisans, laborers, material-men, and miners, shall have liens upon the building, structure, mine, or other improvement upon which they have performed labor or supplied material, for the value of the work done or material furnished, and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens, making such building, structure, mine, or other improvement, and the owner thereof, responsible for such liens, **notwithstanding any payment** settlement, or contract made by him with contractors or subcontractors before such liens have been paid. (emphasis added.)

In support of his amendment on February 17th he stated, "The object of this amendment is to correct this evil [discharging of liens by payment to the contractor], by making the contractor an agent of the owner, so that when the lien is filed the owner cannot come forward and say that I have paid it." [Debates and Proceedings at page 1393.]

Mr. Farrell supported Mr. Barbour's amendment with the following statement, "If we place this responsibility upon the owner, he will take it upon himself to know that the contractors are responsible parties, and he will see that the mechanics and laboring men are paid as they go along." [Debates and Proceedings at page 1394.] [2]

The amendment was considered for vote two days later. On this date, Mr. Barbour stated very clearly the intent of his amendment, "We want a declaration in the Constitution that no payment by the owner or his agent shall work to discharge a lien." [Debates and Proceedings at page 1418.]

Speaking in opposition, Mr. Shafter addressed the issue of privity of contract, "Now there is no contract between the owner of the building and the laborers, none whatsoever; he has a contract with the contractor, it begins and ends with him; he has nothing to do with the persons the contractor employs, this thing is all wrong." [Debates and Proceedings at page 1417.]

Also speaking in opposition, Mr. Cross raised concerns of property rights, "It [the amended section] does not secure the laboring man as well as current provisions of the Code, and yet, while it does not do that it opens the door for a possibility that a man's property may be taken from him without his consent or default in anyway." [Debates and Proceedings at page 1417.]

The amendment was soundly defeated (on a vote of 76 against and 39 in favor) and the attempt to abolish the defense of full payment was rejected. [Debates and Proceedings at page 1419.] The current language in the California Constitution does not reflect the amendments offered by Mr. Barbour.

It is important to note that delegates opposing the amendment stated very clearly that the Constitutional provisions should remain "simple" and that the details for "enforcement" should be decided by the Legislature. On this point, Mr. Cross stated, "I think it is much better to have a simple provision in here that the Legislature shall provide by law for securing mechanics and the material-men, by giving them liens upon the property." [Debates and Proceedings at page 1417.] Mr. McFarland stated, "We have not room in the Constitution to go into details,

[2] Although the amendment was ultimately rejected, the argument made by Mr. Farrell made in 1879 continues to be made by construction industry today. In a letter dated February 03, 1999, Gordon Hunt stated, at page 11, "It is by virtue of the vehicle of the Preliminary Notice that the owner has knowledge of the potential lien and stop notice claimants and can take steps to see to it that they are paid during the progress of the job."

and it is much better to say that the Legislature shall pass a lien law than to undertake to enact a lien law in the Constitution." [Debates and Proceedings at page 1417.]

Wholly consistent with the arguments of Mr. Acret, the delegates clearly left the decision regarding the enforcement of liens for the legislature to determine by statute. In rejecting the amendment, the delegates preserved the right of Legislature to enact reasonable regulations limiting mechanic's liens, including statutes that grant homeowners a defense based on full payment. When viewed within the context of the Debates and Proceedings, the very system that is now in place was in fact rejected by the delegates of the Constitution Convention.

V. PLACING LIMITS ON PROPERTY OWNER LIABILITY: A LEGISLATIVE PROPOSAL

In his letter dated August 25, 1999 (Attachment 1), Mr. Acret recommends a legislative proposal granting homeowners the right to defend against a mechanic's lien if full payment was made and limiting their liability to the unpaid contract price:

1. A lien claimant other than an original contractor dealing directly with the owner of a home improvement project may not enforce a claim of mechanics lien if:
    a) the original contract price established by the owner and the original contractor represents a good faith evaluation of the value of the work to be performed and the equipment and materials to be supplied under the original contract, and
    b) the owner has paid to or for the original contractor the original contract price as established by the contract documents including any signed change orders.
2. If the owner has paid part, but not all of the original contract price, the amount of all mechanics lien claims shall not exceed the difference between the original contract price and the amounts paid by the owner in good faith to or for the original contractor.

In support of this proposed legislation Mr. Acret concludes:

> Under this proposed legislation, when a merchant decides to extend credit to a contractor for a home improvement project, the merchant rather than the homeowner will bear the risk that the original

contractor, having been paid, will unlawfully divert funds from the project.

VI. THE LEGISLATIVE COUNSEL OPINION (#13279 DATED MAY 11, 1999)

The Office of the Legislative Counsel of California issued an opinion on May 11, 1999 (Attachment 4).[3] This opinion responded to the following question:

> Would a statute be unconstitutional if it provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on or furnished material for, that work of improvement?

The Legislative Counsel answered the question in the affirmative. The opinion appears to attempt to distinguish existing statutory requirements from a statute that provides the defense of full payment.

> The conditions precedent to the enforcement of a mechanics' lien are set forth in the law (Art. 3 (commencing with Section 3114), Ch. 2, Title 15, Pt. 4, Div. 3). In accordance with the above principles a claimants failure to comply with these statutory requirements, including that of timely recordation of a claim of a lien (see Sec. 3115), may preclude the claimant from recovering under his or her constitutional right to a mechanics' lien, and may be asserted defensively by an owner against whom a claim is made or an action filed.
>
> However, on the other hand, we think that a statute that provides the owner of residential real property with a defense against a mechanics' lien by a subcontractor whenever the owner pays a contractor in full would effectively deny the subcontractor the right to enjoy the benefits of the lien because a payment in full to the contractor does not necessarily protect the subcontractor's right to be paid.

The Legislative Counsel opinion draws a distinction between statutes that establish a condition precedent and those that do not. Legislative Counsel finds that those defenses which are

[3] The opinion was issued on the same day, a few hours after, ACA 5 and AB 742 were heard in the Assembly Judiciary Committee.

based on an inability on the part of a lien claimant to satisfy a condition precedent are constitutional. Those defenses that are not conditions precedent are not constitutional, because they deny the lien claimant his or her rights to be paid.

The Legislative Counsel's opinion fails in two important respects. First, the opinion does not consider the intent of the framers. Section IV has established that the framers of the Constitution considered and rejected a provisions which would have prohibited a statutory defense of full payment.

Furthermore, the Legislative Counsel's opinion erroneously focuses on the significance of a condition precedent. If the Legislative Counsel's opinion was correct, other statutes governing mechanic's liens in California would also be unconstitutional. These statutes deny mechanic's liens and cannot be characterized as conditions precedent.

Under the Legislative Counsel analysis a Civil Code Sections 3094, 3109 and 3156 would also be unconstitutional. Section 3094 provides a defense to mechanic's lien for homeowners who post and record a notice of non-responsibility. In order to qualify for a the a lien claim, the homeowner is only required post and record the notice within 10 days of learning of the unauthorized work of improvement. A homeowner satisfying the requirements of Section 394 is rewarded with a defense against lien claims. The posting and recording requirement is indistinguishable from the requirements of the Acret proposal presented in Section V. Under the Acret proposal the homeowner qualifies for the defense if he or she pays-in-full.

If the Legislative Counsel opinion were correct Civil Code Sections 3109 and 3156 would also be unconstitutional. Civil Code Section 3109 flatly declares that statutes contained in Chapter 2 of the Civil Code shall not apply to public works. Civil Code Section 3156 similarly exempts public works from the statutes contained in Chapter 3. Essentially these statutes prohibit mechanic's lien remedies in public works.

Clearly, each of these statutes is constitutional. Each of these examples underscore the fact that the Legislature was granted the power to determine who shall be subject to mechanic's liens and under what conditions they shall be enforced. The power of the Legislature is not limited to the setting of conditions precedent. The Legislature may exempt certain entities from mechanic's liens and may choose to provide additional protection in the form of specific defenses for innocent parties.

The analysis and conclusions of the Legislative Counsel are inconsistent with existing law and the intent of the framers of the Constitution.

VII. CONCLUSION

The problems associated with mechanic's liens were not unknown the framers of Constitution. Concerns regarding privity and fairness to property owners were raised at the Constitutional Convention of 1879. The specific issue of a statutory defense was debated by the delegates. The record of the Debates and Proceedings grants clear authorization to the Legislature to enact statutes which provide for a defense for homeowners based on full payment.

The proposed legislation provided by Mr. Acret, is a solution that is consistent with the intent of the framers of the Constitution and the existing statutory scheme. The Acret proposal is operationally indistinguishable from Civil Code Section 3094. Both Section 3094 and the Acret proposal provide a defense to property owners who are innocent and meet the requirements of law (by either posting and recording a notice or meeting their contractual obligations).

The Acret proposal removes the unnecessary harshness of the current mechanic's lien scheme and restores the balance between the rights of the lien claimants and the rights of innocent homeowners.

Of Counsel

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August 25, 1999

The Honorable Assemblymember
Keith M. Honda
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Thank you for giving me the opportunity to review the bill that would establish the home improvement lien protection fund. I am much in sympathy with the intention of the bill, but I believe it would be more feasible to achieve its objective by announcing the policy of the legislature to protect homeowners from the risk of double payment by establishing payment to the original contractor as a legitimate defense to a mechanics lien claim.

The essentials could be established by legislation that would include the following provisions:

1. A lien claimant other than an original contractor dealing directly with the owner of a home improvement project may not enforce a claim of mechanics lien if:

    a) the original contract price established by the owner and the original contractor represents a good faith evaluation of the value of the work to be performed and the equipment and materials to be supplied under the original contract, and

    b) the owner has paid to or for the original contractor the original contract price as established by the contract documents including any signed change orders.

2. If the owner has paid part, but not all of the original contract price, the amount of all mechanics lien claims shall not exceed the difference between the original contract price and the amounts paid by the owner in good faith to or for the original contractor.

The California Constitution provides that mechanics, contractors, artisans, and suppliers shall have a lien upon the property which they improve and that the legislature shall provide for the speedy and efficient enforcement of such liens. This provision of our Constitution does not

prevent the legislature from establishing defenses to mechanics lien claims in support of public policy. An example of such policy is legislation that prohibits unlicensed contractors from enforcing a claim of mechanics lien even for the value of work properly performed. The legislature could likewise prevent the enforcement of lien claims against homeowners who have already paid for the work and materials supplied to their projects.

The fairness of this proposal is easily supported. Merchants who advance credit assume the risk of nonpayment. Only in the construction industry is a merchant who makes a bad credit decision (by extending credit to an unworthy contractor) protected. It is unfair to extend such protection at the expense of an innocent homeowner who has fulfilled all contractual obligations to pay for improvements. In such cases, it should be the merchant, and not the homeowner, that takes the loss.

Under this proposed legislation, when a merchant decides to extend credit to a contractor for a home improvement project, the merchant, rather than the homeowner, will bear the risk that the original contractor, having been paid, will unlawfully divert funds from the project.

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February 2, 2000

Keith Honda
Chief of Staff
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I was pleased to receive your e-mail and to notice your desire to be "pointed in the right direction". What follows is my personal opinion of "the right direction".

Under the present state of law, mechanics liens can be enforced against homeowners who have already paid in full for their home improvements. How can this occur? It occurs because a prime contractor or a subcontractor doesn't pay its bills. Thus the debt of the prime contractor or the subcontractor is transferred to the owner. Such an outcome is the very definition of injustice!

The injustice lies in the fact that a person who unwisely grants credit should be the one to suffer the loss when the debtor doesn't pay up. This is the ordinary and proper outcome of any business transaction. The injudicious creditor should not be able to collect its money from an innocent third party – especially an innocent homeowner!

A lot of issues will be easily resolved if we have a proper understanding of the "constitutional right" to a mechanics lien. Like all constitutional rights, the mechanics lien right is subject to reasonable regulation. The right to a mechanics lien is not absolute. The legislature can regulate that right.

For example, the legislature has provided that the mechanics lien right does not apply against a landowner who has posted and recorded a notice of nonresponsibility for tenant improvements. The work performed increases the value of the owner's land and yet the legislature has determined that the land should not be subject to a mechanics lien claim!

As another example, the interest of a beneficiary under a deed of trust in land is not subject to a claim of mechanics lien as long as the deed of trust was recorded before the commencement of the work of improvement. Finally, public property is not subject to the mechanics lien right.

In each of these cases, the legislature has made a policy decision that the constitutional right to a mechanics lien should yield to legitimate interests of property owners.

In one case, the legislature decided that a property owner should be protected against liens for work ordered by a tenant even though construction ordered by a tenant is just as valuable as any other construction. In another case, the legislature decided that it was more important to encourage construction financing by institutional lenders than to protect mechanics lien rights. In the last case, the legislature simply decided that public agencies should be exempt from mechanics lien claims.

In all these cases the argument could be made that the legislature trenched upon a constitutional right but the power of the legislature to balance those competing interests has never been doubted. The legislature has amended the mechanics lien statute over and over again, literally at every session, to fine-tune rights and remedies between mechanics lien claimants, owners, and lenders.

The legislature provided substitute remedies. For tenant improvements, the law provides a mechanics lien claim against the structure but not against the land. In the case of construction lenders, the legislature provides stop notice rights as a substitute for mechanics lien rights. In the case of public improvements, the legislature provides stop notice rights and payment bond rights.

The mechanics lien statute establishes stop notices as an ancillary remedy. A stop notice is similar to an attachment or a garnishment: it is a claim against construction funds in the hands of an owner or construction lender.

So we know that the legislature has the power to curtail mechanics lien rights against homeowners who have paid their bills, and protect the claimant by substituting stop notice rights against construction funds in the hands of the homeowner. The legislature has already established those stop notice rights. Claimants have the same stop notice rights against homeowners as they have against public agencies. The legislature curtailed mechanics lien rights against public property and against construction lenders, and substituted stop notice rights. The legislature may, and should, do the same for homeowners.

The failure of a prime contractor or a subcontractor to pay may be because of a legitimate dispute or simply because the prime contractor or the subcontractor is insolvent or a deadbeat. There is simply no justification for transferring the financial responsibility for such disputes to the homeowner.

The mechanics lien right against homeowners should be restricted to cases in which there is direct contractual relationship between a claimant and the homeowner. This would mean that the mechanics lien claim would serve as security only for debts directly incurred by the homeowner and not for debts incurred by the prime contractor and subcontractors.

The creation of a contractor's recovery fund is a wholly bad idea. In the legislative, as well as in the medical profession, the motto should be "first, do no harm." There is no obvious justification for shifting to contractors in general the losses caused by unwise extensions of credit. The idea would create a whole new bureaucracy to plague the construction industry. Claimants and homeowners would have to present a whole panoply of construction disputes to a state hearing officer who would be authorized to decide whether or not the owner made full payment to the prime contractor. The expense, inconvenience, and futility would be unconscionable!

If the imperatives of politics make it necessary to pander, we may resort to the $7,500 bond already required of all licensed contractors. The coverage of the bond can be expanded to include coverage for a claimant who has no mechanics lien rights on a residential construction project. Claimants may object that a $7,500 bond isn't big enough. The answer is that they can protect themselves by exercising their stop notice rights or, even better, by rejecting poor credit risks.

JAMES ACRET

JA:ll

MR. WYATT. No, sir, not exactly; I say they should not be allowed perpetuities beyond legislative control.

MR. ESTEE. Eleemosynary institutions do not make purchases, they are simply charitable institutions, and our proposition is, that no perpetuities shall be granted except to that class of institutions. This is allowed everywhere in the world, and I hope California will not be an exception to the rule. I hope that in California, whenever any citizen who has no heirs; whenever any citizen whose heirs are unworthy of his confidence, dies, he shall be permitted to give his property to eleemosynary institutions and direct its use; that is the reason I most earnestly oppose the amendment. I believe the old section is correct; it reads exactly as the new one does. I claim that charitable grants should be encouraged as much as possible. Allow those who choose to give to charitable institutions the power to do so; give them the broadest latitude. Let them not be circumscribed in their liberality, and when you do that you are only responding to the broad and liberal sentiments of the people of this State.

MR. VACQUEREL. Mr. Chairman: I am in favor of this amendment. I deny the right of any man on this floor to legislate forever. It is all very well to talk about charity. Let us be charitable with what we possess, and not with what we do not possess. What suits us to-day, might not suit the people fifty years from now. Have we a right to legislate for them? I deny it. Let us legislate for the present generation, and not until the resurrection.

MR. HILBORN. Mr. Chairman: I am in favor of the section as it stands; first, because it is the old Constitution; second, because I can see no reason why we should discourage wealthy men who are so disposed from leaving their money to charitable institutions. They would never do it if we give the Legislature power to get at that money, and either confiscate it or divert it from the purpose for which it was given.

MR. SHAFTER. Mr. Chairman: I am in favor of this section as it stands. There is a misunderstanding with some. It does not apply to children of families; but only the exception is made so as to allow these gifts to be made for charitable purposes. Why not? If a man wants to leave ten thousand dollars to one of these institutions, why should we step in and say he shall not do it? And of course he won't do it when he knows that the endowment is liable to be diverted at any time.

THE CHAIRMAN. The question is on the adoption of the amendment of the gentleman from San Francisco, Mr. O'Sullivan.

Lost.

MR. BEERSTECHER. Mr. Chairman: I offer an amendment.

THE SECRETARY read:

"Add to the section: 'Nor shall primogeniture or entailments ever prevail in this State.'"

MR. BEERSTECHER. Mr. Chairman: Now this amendment in no wise affects eleemosynary institutions. It does not prevent any one who may see fit from donating or devising property to them.

MR. TULLY. I rise to a point of order. That is the same thing just voted down.

THE CHAIRMAN. The point of order is well taken.

MR. WYATT. If it would do any good—but we have never yet been able to overrule the decision of the Chair.

MR. VACQUEREL. I move to amend by adding, "no perpetuities shall ever be allowed in this State."

THE CHAIRMAN. The question is on the amendment.

Lost.

BRIBERY AND ITS PENALTIES.

THE CHAIRMAN. The Secretary will read section ten.

THE SECRETARY read:

"SEC. 10. Every person shall be disqualified from holding any office of profit in this State who shall have been convicted of having given or offered a bribe to procure his election or appointment."

No amendment.

THE SECRETARY read section eleven:

"SEC. 11. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

MR. HAGER. I move to amend by striking out the word "hereafter," in the second line. Let it apply to all who have been convicted as well.

MR. ESTEE. That includes members of this Convention. [Laughter.]

MR. AYERS. That would leave it unequal. I move to strike out the words, "those who shall hereafter be," and insert "persons."

Adopted.

ABSENCE FROM THE STATE.

THE CHAIRMAN. The Secretary will read section twelve.

THE SECRETARY read:

"SEC. 12. Absence from this State, on business of the State or of the United States, shall not affect the question of residence of any person."

THE CHAIRMAN. There being no amendment, the Secretary will read section thirteen.

PLURALITY OF VOTES.

THE SECRETARY read:

"SEC. 13. A plurality of the votes given at any election shall constitute a choice, where not otherwise directed in this Constitution."

THE CHAIRMAN. There being no amendment, the Secretary will read section fourteen.

A STATE BOARD OF HEALTH.

THE SECRETARY read:

"SEC. 14. The Legislature shall provide, by law, for the maintenance and efficiency of a State Board of Health."

THE CHAIRMAN. There being no amendment, the Secretary will read section fifteen.

MECHANICS' LIENS.

THE SECRETARY read:

"SEC. 15. Mechanics, material-men, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of said liens."

MR. MORELAND. Mr. Chairman: I offer a substitute for section fifteen.

THE SECRETARY read:

"SEC. 15. Mechanics, laborers, artisans, and material-men of every class, shall have a lien upon the article manufactured or repaired by them, for the value of their labor done thereon, or material furnished therefor. The land upon which any building, improvement, or structure is constructed, and a convenient space about the same, may also be subject to such liens. The Legislature, at its first session, shall provide for the proper enforcement of such lien."

MR. BARBOUR. Mr. Chairman: I offer an amendment to the amendment.

THE SECRETARY read:

"SEC. 15. Mechanics, artisans, laborers, material-men, and miners, shall have liens upon the building, structure, mine, or other improvement upon which they have performed labor or supplied material, for the value of the work done or material furnished, and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens, making such building, structure, mine, or other improvement, and the owner thereof, responsible for such liens, notwithstanding any payment, settlement, or contract made by him with contractors or subcontractors before such liens have been paid."

REMARKS OF MR. BARBOUR.

MR. BARBOUR. Mr. Chairman: The amendment is the minority report of the Committee on Miscellaneous Subjects. The section as reported, like the amendment proposed by the gentleman from Sonoma, does not strike at the question that affects mechanics and laboring men in this matter. To all intents the constitutional provision, and the enactments of the Legislature have been of no value to them, and it is a fact that most of them have preferred to lose their debts rather than endeavor to enforce the law. The Legislature has passed laws, but the artisans have been deprived of the benefit on account of collusion between the owner and the contractor. Whenever the artisan attempted to apply his lien, he was forestalled by the fact that a payment had been made by the owner. The object of this amendment is to correct that evil, by making the contractor the agent of the owner, so that when the lien is filed the owner cannot come forward and say I have paid it. The decisions were to the effect that a payment discharges a lien, so the hands of the artisans were tied. That is the reason the mechanics of the State want this provision. It is one that no Court can get around. Of course, if you could prove that these payments to the contractor were not made in good faith that would vitiate it, but that is a hard thing to do. The fact is they are not generally made in good faith, but the thing is to prove it. The fact is, that two thirds of the contracts in the city of San Francisco for the erection of buildings have been taken by the contractor with the intention of defrauding the workmen who do the work. Now, so far as the owner is concerned, he has a perfect means of protecting himself, because the owner need make no payment until he is presented with proof that the sub-contractors, laboring men, and material-men are all paid. This amendment is intended to reach directly that evil.

MR. INMAN. Mr. Chairman: Though I possibly could stand that section as it now stands, the amendment is too much. It gives a lien on the land. I am entirely opposed to it.

REMARKS OF MR. MORELAND.

MR. MORELAND. Mr. Chairman: I have not had time to examine the amendment offered by the gentleman from San Francisco, but it seems to me that most of it is matter that can be regulated by law. The amendment which I have introduced differs with the section reported by the committee in two respects. First, it extends the lien to the land on which the building is constructed, and a convenient place about the same. That is what the law is at present. To give mechanics a lien upon the house itself, would be of but little avail. They must have a lien upon the ground in order to benefit them much. They could take the house away, but it is not worth much after it is moved. That is the principal difference between my amendment and the original section. The other respect in which it differs is, that it provides that the Legislature, at its first session, shall provide for the proper enforcement of it.

MR. CAPLES. You say you would give a lien upon the land. Suppose A, who resides in New York, leases a piece of land in San Francisco to B, for a term of years, and B lets a contract to build a house, and a lien is filed on that house and on the land.

MR. MORELAND. That can all be provided for by law, as it is provided for at this time.

MR. HILBORN. This will not protect all classes of laborers. If we are going to protect any, it seems to me we should include them all. If a man helps to drive a band of cattle or sheep, he ought to have a lien on them until he is paid his wages. It should not be confined to mechanics alone.

SPEECH OF MR. FARRELL.

Mr. FARRELL. Mr. Chairman: This question is one of no ordinary importance. I hope it will receive at the hands of this Convention that careful consideration which its importance demands. I believe this class of citizens should receive this protection. I know from my own personal experience as an artisan, and the experience of the vast army of builders, mechanics, and material-men of the city which I in part represent, that the passage of this amendment as proposed by Mr. Barbour will be to these people one of the best arguments in favor of the adoption of this Constitution. Mr. Chairman, if this Convention adjourns without granting this much needed relief, it will be almost fatal to the instrument which we are framing. Gentlemen have stood upon this floor and demanded the taxation of mortgages and the restriction of corporations; and now we insist on a proper consideration of the industrial and mechanical interests. We are only asking the Convention to protect the laboring man and mechanic from thieving contractors and scoundrelly owners, who connive to swindle the workman out of his wages. This is the most important provision that has been before the Convention. These laboring men and mechanics have been the victims of swindling contractors long enough. I am opposed to the section introduced by the committee, and also to the amendment of the gentleman from Sonoma. We want to have some responsibility attached to the owner. We want to make the owner responsible for all the debts on the building until it is completed, so that the sub-contractors and material-men will receive their money. If we place this responsibility upon the owner, he will take it upon himself to know that the contractors are responsible parties, and he will see that the mechanics and laboring men are paid as they go along.

REMARKS OF MR. ESTEE.

Mr. ESTEE. Mr. Chairman: I am opposed to this idea of making the owner responsible, unless there is a clause in there providing that such claim or lien shall be filed with the County Recorder within sixty days after the completion of such building or furnishing of such material. Without that, it will leave a lien upon the property forever. That is what I object to.

Mr. BARBOUR. That will do no harm. I will accept that amendment.

Mr. ESTEE. I shall support the amendment if that is put in. That is all I object to. Then the owner need not pay for his building until the end of sixty days. That is all right. I think this whole matter is in the nature of legislative enactment; yet, if it will accomplish the purpose of protecting laboring men and mechanics, who are dependent upon their daily earnings for their daily bread, I am willing, as far as I am concerned, for it to go into the Constitution. It can do no harm if properly guarded, and it may do some good. The owners will have sixty days in which to look round and see whether these bills for labor and material are all settled or not.

REMARKS OF MR. DUDLEY.

Mr. DUDLEY, of Solano. Mr. Chairman: I understand a part of the reasons which may be urged for making mechanics preferred creditors, but why they should be preferred to the man who furnishes money to pay laborers is more than I can understand. The section reported by the committee is better than the amendment. I understand why the workman should be a preferred creditor, but I don't understand why the lumberman should be a preferred creditor. There has been no good reason urged here why he should stand on any better ground than any other creditor. Certainly lumber dealers are capable of looking out for their own interests. If they are not satisfied as to the solvency of the creditor then let them get security. I hope the amendment will be voted down, and the words "material-men," stricken out.

REMARKS OF MR. BEERSTECHER.

Mr. BEERSTECHER. Mr. Chairman: I think an examination of the laws of other States will show that they nearly all include material-men, as well as mechanics and laborers. Now, sir, the gentleman says, he cannot see why material-men should be included, why he should have a lien for the lumber which he furnishes, when the man who furnishes the money has not. The man who furnishes money, in nine hundred and ninety-nine cases out of a thousand, always takes security before he furnishes the money. The money, in nine hundred and ninety-nine cases out of a thousand, is furnished on mortgage, and the man who borrows money generally takes sufficient to construct the building. Whereas, he goes to the material-man and orders material as he needs it. If there is any reason why the mechanic should have a lien, there is the same reason why the material-man should have a lien. Mr. Inman says, he is not in favor of having a lien upon the land. I allow that argument to go for what it is worth, coming from a farmer. Now, sir, I desire that mechanics, laborers, and material-men should have a good and sufficient lien; one that can not be overturned and set aside by the decision of any Court in this State. The report of the majority amounts to nothing. But the amendment of Mr. Barbour as amended by Mr. Estee, means something. It says that the material-man and the laborer shall have his coin, notwithstanding any collusive contract that may exist between the man erecting the building and the owner; and that they shall have a right to have this lien enforced within a limited time.

SPEECH OF MR. WELLIN.

Mr. WELLIN. Mr. Chairman: I am in hopes that the amendment presented by Mr. Barbour will be adopted by this Convention. We have been called upon from time to time to adopt measures for other interests in this State. The farmer has been protected by having his growing crops exempted from taxation; the railroad companies have been looked after; those who deposit their money in banks have received some protection, and now we, as working men, ask some protection. We ask what is just and fair. Now, I will give a sample of the way business has been conducted in San Francisco: In eighteen hundred and seventy-six, a man named Irwin entered into a contract with a man named Flood, to build six houses in San Francisco, for the sum of fifteen thousand dollars. The work, when finished, cost twenty-five thousand dollars, and the laboring men, material-men, and sub-contractors lost on that piece of work over ten thousand dollars. The gentleman from Solano wants to know what reason there is for including material-men. There is one reason why they should all be protected. It is one of the easiest things in the world for the owner of the property, when he lets a contract for building, to get security of the contractor that he will pay the bills. I have had experience in building for over twenty-five years, and I have seen a great deal of this swindling. There is no opportunity for a man who applies for a job on a building to know whether the man he is working for is good pay or not. He simply goes to work there, supposing that the business will be carried on honestly, and that he will get his pay. The owner, by conniving with the contractor, make a contract at thirty or forty per cent. less than it is worth, and then divide the difference between themselves, and cheat the laborers out of their labor. All we ask is some protection against this kind of thing. Look at the maritime rules. Let a man go to work on a ship, and that ship must pay for every dollar before it can leave. The same is true as to material. We are perfectly willing to accept the amendment of the gentleman from San Francisco, Mr. Estee. We only want what is right.

THE PREVIOUS QUESTION.

Mr. SWING. Mr. President: I move the previous question.

Seconded by Messrs. Biggs, McFarland, Tully, and Larue.

The CHAIRMAN. The question is: Shall the main question be now put?

Carried.

The CHAIRMAN. The question is on the adoption of the amendment to the amendment offered by the gentleman from San Francisco, Mr. Barbour.

Division was called for and the amendment adopted, by a vote of 51 ayes to 33 noes.

IN RELATION TO INSURANCE.

The CHAIRMAN. The Secretary will read section sixteen.

The SECRETARY read:

"SEC. 16. The amount named in either a fire or marine insurance policy shall be deemed to be the true value of the property insured, for insurance purposes."

Mr. WEBSTER. Mr. Chairman: I offer an amendment.

The SECRETARY read:

"Strike out the words, 'deemed to be,' where they occur in the second line."

The CHAIRMAN. The question is on the amendment.

Mr. WEBSTER. Mr. Chairman: It occurs to me that these words are superfluous. By striking out these words it will read: "The amount named in either a fire or marine insurance policy shall be the true value of the property insured, for insurance purposes." It occurs to me that they mean nothing, or else they mean just what the section does without them.

REMARKS OF MR. CAMPBELL.

Mr. CAMPBELL. Mr. Chairman: I think this section ought to be stricken out entirely, and I so move. If this section is adopted it will lead necessarily to very great frauds. It proposes to establish an arbitrary rule, that, for instance, if I insure a quantity of goods for ten thousand dollars, that the goods shall be deemed to be worth that amount. It shuts out all inquiry in order to get at their true value. Now it is necessary to insure property constantly which the insurer has not seen and cannot see; which he has no opportunity to examine. Take property that is at sea. The insured party is the only one who knows what the value is, and he has the means of ascertaining precisely what it is. Then again, take an insurance on a stock of goods in a store. It is impossible for the insurer to examine these goods, examine every portion of them. They necessarily have to go upon a general estimate of their value, and even then they are liable to be imposed upon, for the stock of goods is constantly fluctuating. If he keeps a proper set of books, and they are preserved, there is no difficulty in telling what have been destroyed. But if you pass a section of this kind, it will open the door to wholesale frauds. The opportunities for fraud will be greatly increased in the case of personal property. For these reasons I move to strike out the section.

REMARKS OF MR. FILCHER.

Mr. FILCHER. Mr. Chairman: I hope the section will pass. There is not one solitary question that has ever come up before this Convention that is more important than the one under consideration. If there is one question that the people of California are interested in, it is this one. I have known instances in Auburn where men have insured for years, and paid in insurance a large amount, and when the property was destroyed they could not get anywhere near what it was insured for, without going into a lawsuit with a powerful corporation. Now, if we pay these companies their rates on a certain amount, that amount should be paid. If it stands there twenty years without loss, they are getting four per cent. on the money. If the property is insured for ten thousand dollars, it ought to be paid accordingly. That is the principle of life insurance. If a man dies he is paid the amount of his policy. People are always browbeaten, and threatened with a lawsuit unless they submit to the arbitrary reduction of the adjuster. They come and insure my house for one thousand dollars, and so long as it stands they collect rates on the valuation of one thousand dollars. But it burns down, and then the adjuster comes along and says, I will pay you five hundred dollars, and I have to take it or go to law with the chances in

BRIBERY AND SUFFRAGE.

THE PRESIDENT. The Secretary will read the amendment of the Committee of the Whole to section eleven.

THE SECRETARY read:

"SEC. 11. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

MR. O'SULLIVAN. I move to amend by adding after "forgery," the word "malfeasance."

MR. VAN DYKE. Is not that a high crime, covered by the present section?

MR. O'SULLIVAN. Yes, but this defines it in the Constitution.

Division was called for, and the amendment was adopted by a vote of 46 ayes to 37 noes.

THE PRESIDENT. The question is on concurring with the amendment of the Committee of the Whole as amended.

Concurred in.

MECHANICS' LIENS.

THE PRESIDENT. The Secretary will read section fifteen.

THE SECRETARY read:

"SEC. 15. Mechanics, artisans, laborers, material-men, and miners shall have liens upon the building, structure, mine, or other improvement upon which they have performed labor or supplied material, for the value of the work done or material furnished. And the Legislature shall provide by law for the speedy and efficient enforcement of such liens, making such building, structure, mine, or other improvement, and the owner thereof, responsible for such liens notwithstanding any payment, settlement, or contract made by him with contractors or subcontractors before such liens have been paid; provided, that such claim of lien shall be filed in the office of the County Recorder within sixty days after the completion of such building, structure, or work, or the furnishing of such material."

MR. HERRINGTON. Mr. President: I offer an amendment.

THE SECRETARY read:

"Strike out the word 'liens,' in line seven, and insert 'value of work done, or material furnished.'"

MR. HERRINGTON. This is to correct the reading of the section. I suppose of course it is intended to make the building responsible for the labor and material, not for the lien.

REMARKS OF MR. MCFARLAND.

MR. MCFARLAND. Mr. President: I suppose it is hardly worth while for me to say anything about this section. I simply want to call attention to the fact, that under this section no man can make a contract to build a house. If he does, he cannot pay a cent of money on it until sixty days after the completion of the contract. It will be unsafe for any man to let a contract to build a house, unless he provides in the first place that not a cent of money shall be paid until sixty days after the completion of the building. I think it is much better to let this matter rest with the Legislature, where provisions can be made in detail. The owner cannot know what is going on. He wants to make a contract on the best terms, and he cannot get as good terms for credit as he can for cash. We have not room in the Constitution to go into details, and it is much better to say that the Legislature shall pass a lien law than to undertake to enact a lien law in the Constitution.

REMARKS OF MR. CROSS.

MR. CROSS. Mr. President: I am anxious that every man who labors or furnishes material should have the best lien that the law can give him. I am also anxious that the man who owns property shall not have it taken away from him without his consent or knowledge, and in some reasonable way. I oppose this section for the reason that it accomplishes neither of its purposes. It does not secure the laboring man as well as the present provisions of the Code, and yet, while it does not do that, it opens the door for a possibility that a man's property may be taken from him without his consent or default in any way. Now, there are a large class of cases in which the men who do work and furnish material will have no security whatever, except the personal security of the person who employs them. This is not Constitution making, it is Constitution tinkering. Let us do some Constitution making, and stop this tinkering. I think it is much better to have a simple provision in here that the Legislature shall provide by law for securing mechanics and material-men, by giving them liens upon the property. This section will not help them to get their pay. It will have the opposite effect in a large number of cases. I cannot support this amended section, because I believe it is not as good as the present provision of the Code. The Legislature has been trying for a number of sessions to make a perfect lien law, and they have now a very good one on the statute books. I do not want to go backward and put in a Constitutional lien law that will be imperfect.

REMARKS OF MR. SHAFTER.

MR. SHAFTER. Mr. President: I agree with Mr. Cross, that the Legislature, for the last fifteen years, in answer to the demands of mechanics and laboring men, has been trying to make a good lien law. At every session, the mechanics of San Francisco send a man here for the purpose of getting the lien law in good position; the result has been confusion worse confounded all the time. This whole thing is infirm in principle; they want to make the man who is going to build a house, the insurer for the fulfillment of a contract with a third person. Now, there is no contract between the owner of a building and the laborers, none whatever; he has a contract with the contractor, it begins and ends with him, he has nothing to do with the persons whom the contractor employs; this thing is all wrong. Now, this is not as good a lien law as the present law on the statute books, as has been pointed out by the gentleman from Nevada, while it is likely to work great wrong and injustice in many instances. There is no lien on the real estate whatever, it is expressly confined to the building or mine. The owner is made liable personally for the payment of all the labor and material furnished, though he has no control over the laborers, and nothing to say in the purchase of the materials; this provision makes him personally responsible—it is a fraud; at all events it ought to be confined to the amount of material and labor furnished. Now, how is the contractor to work? He must pay his men from day to day, and yet he cannot receive a dollar until sixty days after the completion of the contract. There is no man in his senses, who will take a contract under any such terms. There is no man in his senses, who will undertake to put up a building under such a law. Now, I am opposed to it. If gentlemen will get up something reasonable that will protect the laboring man and not destroy other interests, I will support it, but not this thing.

REMARKS OF MR. WELLIN.

MR. WELLIN. Mr. President: I am much pleased to find the gentleman from Marin coming over to our side to help us, but I am afraid the kind of help he offers will not do us much good. Now, I wish to offer an amendment to make it include the land belonging to such building, structure, mine, or improvement. That will obviate some of the objections raised. I will ask Mr. Barbour to accept the amendment.

THE PRESIDENT. The gentleman cannot accept it.

MR. WELLIN. It is rather foolish to go over the same arguments that were gone over in the Committee of the Whole. The gentleman says that this will injure the workingmen. Well, I as one of them know what they want in order to protect themselves. It may be that frauds will occur on the other side. I am in favor of guarding against them also. But it must be remembered that wealthy men always have the means of protecting themselves. It is an easy matter for them to require and obtain security that will secure them against loss. There is no danger of trouble so long as the contractor is compelled to deal honestly with the workmen. I want to call attention to the fact that the same kind of a law as this has applied to ship building for two hundred years, and there has been no complaint of wrong done by reason of it. The ship cannot leave the harbor till every plank is paid for. She could not go on to the dock to buy supplies till the work has been paid for. But if this section is not as perfect as it ought to be, then it would come with much better grace if these gentlemen would come forward and give us the benefit of their legal knowledge. I would be glad to have gentlemen like Judge Shafter give us the benefit of his knowledge and experience. All we ask is just what is fair and right, and we shall not be satisfied unless we get it. I can assure you that it will make a vast difference in the vote on the Constitution whether this section is put in or not.

REMARKS OF MR. WATERS.

MR. WATERS. Mr. President: There are three propositions involved in this. In the first place you must consider whether section fifteen, as reported by the committee, is better than the statute which exists to-day, or not. If not, whether section fifteen, as amended by the Committee of the Whole, is better than section fifteen, as reported by the committee. Now, I think if these Workingmen will pay a little more attention to the lawyers, and give the lawyers a little more credit for honesty, they will arrive at better conclusions on this question. Now, the statute as it stands to-day, not only gives the mechanic a lien upon the structure, but upon sufficient land around it to make it convenient to use the structure. That is the law to-day. You will find it in section eleven hundred and eighty-five of the Code of Civil Procedure. Now, the section reported by the committee gives the mechanic a lien upon the property. Not only a lien upon the structure, but upon the land itself. It reads, as follows:

"SEC. 15. Mechanics, material-men, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of said liens."

Now, the section which the Workingmen themselves have offered, reads as follows:

"SEC. 15. Mechanics, artisans, laborers, material-men, and miners shall have liens upon the building, structure, mine, or other improvement upon which they have performed labor or supplied material, for the value of the work done or material furnished. And the Legislature shall provide by law for the speedy and efficient enforcement of such liens, making such building, structure, mine, or other improvement, and the owner thereof, responsible for such liens notwithstanding any payment, settlement, or contract made by him with contractors or subcontractors before such liens have been paid; provided, that such claim of lien shall be filed in the office of the County Recorder within sixty days after the completion of such building, structure, or work, of the furnishing of such material."

I say section fifteen, as reported, is better than the statute, because it gives a lien upon the whole property. The section gives them a lien upon the whole property, and if the building is pulled down or destroyed, the lien still holds good. That is what the mechanics want. I myself think it goes too far, but the other does not go far enough.

REMARKS OF MR. VAN DYKE.

MR. VAN DYKE. Mr. President: I am in favor of the amendment suggested by the gentleman from Santa Clara, Mr. Herrington—that is, that the property shall be liable for the value of the labor and material

put upon it. I would then be in favor of striking out, in line six, "and the owners thereof," making the property responsible for the material which goes into it and the labor bestowed upon it. Now, sir, I am in favor of a declaration in this Constitution in favor of a live lien law. I think it is just as necessary as a declaration in favor of homesteads. It is true that the Legislature can provide for a lien law without such a declaration. Nevertheless, all the modern Constitutions come up to the demands of the times and put this declaration in. Several of the new Constitutions have declared in favor of a lien law. I refer you to the Constitutions of North Carolina, Georgia, and Texas. I think we should not adjourn without putting in a similar declaration here. They do not go into details. It has been said here that the Legislature has been tinkering at this every session. I am aware of that. But the lien laws have been evaded and rendered useless by construction, and have been practically frittered away. The present lien law is of no practical benefit whatever. It was intended when passed, in eighteen hundred and sixty-eight, to be of some value. The Codes went into effect and stripped it of all its value. An effort was made in eighteen hundred and seventy-four to restore it, but still the Supreme Court have construed it to be dependent upon the contract. The result is that the owner colludes with the contractor, and the laborer finds there is nothing due on the contract. For all the benefits that flow from it the law might as well be abolished. The laboring men are thus often swindled out of their just compensation, and under the present state of things there is no help for it. I am in favor of a law after the style of the United States maritime law, which is just to all concerned. That law has existed for centuries. But I am not willing to go to the extreme of holding the owner personally liable beyond the value of the work done or the material furnished, which is amply secured by a lien on the property. It is a singular fact that the lien law in this country had its origin in Washington, at the time that city was selected as the site for the national capital. It was recommended by Thomas Jefferson, for the purpose of securing parties who did the building the value of what was put into the building. It is a principle founded in justice. It is just and proper that the laborer should be paid for his services, and that the man who furnishes material should have a lien upon the property.

REMARKS OF MR. BARBOUR.

MR. BARBOUR. Mr. President: None of the objections to this section reach to the great question involved. Gentlemen seem to desire to destroy the utility of this section. One gentleman remarked that we should determine whether this section is better than the present statute. I admit that the present statute, so far as it is possible to judge from the proper meaning and interpretation of language, is as good a thing as mechanics could ask for. But on account of the construction put upon it by the Courts, it is not worth the paper it is written on. We want a declaration in the Constitution that no payment by the owner or his agent shall work a discharge of a lien. That is what we want in the Constitution. Now, all these objections are technical objections. These gentlemen must have been educated in a technical school. Now, they object because we do not include the land. You cannot hold the farmer's land if the building should be burned down before it has been delivered to him. There is no intention here to make a Code in the Constitution. The intention is to put in a declaration here, that the lien shall be valid notwithstanding any contracts made. Is not that a plain enough proposition? If gentlemen are in favor of a lien law, let them say so. If they are opposed to it, let them vote against it. That is all there is about it. The intention is to give to the laboring men a lien similar to that which the United States gives to her seamen, by which they can rely upon the ship for their wages. The theory of a mechanics' lien law is that he has performed labor upon a structure and improved its value. It contemplates that a man who has put his labor into a thing and increased its value, on that thing he has a lien until his services are paid for.

REMARKS OF MR. MCCALLUM.

MR. McCALLUM. Mr. President: I offered a proposition, number four hundred and seven, which seems to be the framework of this proposition. That proposition was referred to the Legislative Committee and was rejected. The same proposition, and others, were referred to the Committee on Miscellaneous Subjects, which reported this section fifteen which, perhaps it is proper to say, is the lien law petitioned for by the mechanics, as shown by their petitions now on file. After I saw these petitions I did not deem it my duty to go behind them. I find, however, that the minority of that committee have reported proposition four hundred and seven, with some amendments, which has been adopted by the Committee of the Whole. Now, the amendments have not improved the proposition materially. The better course will be not to adopt the recommendation of the Committee of the Whole, leaving section fifteen stand, and then amend that section. In eighteen hundred and sixty-eight a mechanic's lien law was passed, which gave satisfaction; that law had provisions similar to the law which passed in eighteen hundred and seventy-four, which held that the contractor should be held to be the agent of the owner; and had that law been valid, no better law for the mechanics could be wanted, but the Supreme Court, disregarding the last section, say that the owner who pays the contractor in accordance with his contract, in the absence of any fraud or collusion, who, still being held liable, would be a violation of the contract. That would be impairing the obligations of a contract. Now, my own judgment would be, to take section one thousand one hundred and eighty-three of the Code, which enumerates other improvements besides those mentioned, and provides for a lien upon sufficient land for the use of the building. Now, I propose to vote against this amendment of the Committee of the Whole, in the hopes that section fifteen may be amended and made effective.

THE PREVIOUS QUESTION.

MR. BIGGS. Mr. President: I am a fair mechanic myself; I have cut some timber, I know something about it, therefore I move the previous question.

Seconded by Messrs. McConnell, Davis, Estes, and Brown.

THE PRESIDENT. The question is: Shall the main question be now put?

Division was called for, and the Convention refused to order the previous question by a vote of 43 ayes to 50 noes.

REMARKS OF MR. HAGER.

MR. HAGER. Mr. President: I think the amendment adopted by the Committee of the Whole is imperfect. I don't know when it can be said that a mine is complete. This is a lien on the mine, building, etc., and is good for sixty days after it is completed. But this would be a very uncertain thing. Now, I had some experience in this matter when we were building the University. The contractor would have to wait until the expiration of the time allowed by law before he could get his money. He was subjected to great inconvenience. The laborers could not get their money because the contractor could not pay, and so they, themselves, were the sufferers by it. Now, I knew a case where a man put up a barn. He thought it was all right, and paid the full amount to the contractor. Afterwards a lien was filed for the full value of the building. The result was that there was a lawsuit, and the claimant took possession of the building. The owner was so indignant that he let it be sold, and built another barn. There ought to be some certainty about these liens, as well to the man who owns the property as to the man who does the work. Now, as to a mine. When can you say that a mine is finished? The work is continuous. Now, we should say here that there shall be a lien law; but as to the details, that should be left to the Legislature, so that when any mistake is made it can be corrected.

REMARKS OF MR. FARRELL.

MR. FARRELL. Mr. President: I was in hopes that this section would be adopted, as reported by the Committee of the Whole. I have no objections to the Herrington amendment, but, sir, I do object to this mode of offering amendments for the purpose of tearing this section to pieces. Now, sir, the principal object of this section is to place some responsibility upon the owner of the property. As the matter stands now there is no responsibility upon his part at all. He takes no interest in it so long as the building is completed and turned over to him. The responsibility for the whole matter is left in the hands of the architect. This will place such a responsibility upon the owner that he will take an interest in the matter, and see that the bills are paid. Before he makes a final settlement he can require the contractor to hand in receipted bills for all work done and material furnished. I hope the section will stand.

THE PRESIDENT. The question is on the adoption of the amendment to the amendment offered by the gentleman from Santa Clara, Mr. Herrington.

Adopted.

MR. VAN DYKE. Mr. President: I offer an amendment.

THE SECRETARY read:

"Strike out the words, 'and the owners thereof,' in line seven, and in line eight strike out 'him,' and insert 'the owner.'"

MR. VAN DYKE. This is something like the maritime law. It holds the property for what is put into it. I wish to rest this upon the same basis as the Pennsylvania lien law. It is founded upon the maritime law. Now, the contractor engages men. These men have a personal claim against him, but not against the owner. They have a lien on the property. That is the proper manner in which to construct a lien law. I hope that amendment will be adopted. I do not see the justice of holding the owner responsible personally.

MR. JONES. Mr. President: If we are to adopt anything I desire that it shall be made practicable as far as possible, and I want to remove what I consider fatal objections. The amendment offered by the gentleman from Alameda goes further to remove such objections than any other measure. I hope it will be adopted, for without it the section goes to an unreasonable extent—far beyond what any reasonable man ought to ask.

THE PRESIDENT. The question is on the adoption of the amendment of the gentleman from Alameda.

Division was called for, and the amendment was adopted by a vote of 45 ayes to 38 noes.

MR. AYERS. Mr. President: I offer an amendment.

THE SECRETARY read:

"Insert before 'building,' in line two, the word 'crop.'"

MR. AYERS. Mr. President: There have been efforts made here to protect laborers and artisans to the utmost extent of constitutional power. I now propose to protect those who work on ranches, that they may have a lien upon the crops which their labor helps to produce. It is as just as any of the others, and I hope it will be adopted.

THE PREVIOUS QUESTION.

MR. MURPHY. Mr. President: I move the previous question.

Seconded by Messrs. Hunter, Tully, Weller, and Tuttle.

THE PRESIDENT. The question is: Shall the main question be now put?

Carried—ayes, 57; noes, 32.

THE PRESIDENT. The question is on the adoption of the amendment of the gentleman from Los Angeles.

The ayes and noes were demanded by Messrs. Estes, Ayers, Hilborn, Barton, and Prouty.

The roll was called, and the amendment rejected by the following vote:

AYES.

Ayers,	Freud,	Murphy,
Barton,	Garvey,	Nelson,
Beerstecher,	Herold,	O'Sullivan,
Blackmer,	Herrington,	Pulliam,
Boggs,	Hilborn,	Ringgold,
Boucher,	Hitchcock,	Shafter,
Burt,	Jones,	Smith, of San Francisco,
Caples,	Kleine,	Sweasey,
Chapman,	Larkin,	Swenson,
Cross,	Mansfield,	Vacquerel,
Crouch,	Martin, of Santa Cruz,	West,
Dowling,	McConnell,	Wickes,
Filcher,	McFarland,	Wilson, of Tehama,
Freeman,	Mills,	Mr. President—42.

NOES.

Andrews,	Howard, of Mariposa,	Rolfe,
Barbour,	Huestis,	Schell,
Barry,	Hunter,	Schomp,
Bell,	Inman,	Shurtleff,
Biggs,	Joyce,	Smith, of Santa Clara,
Campbell,	Kelley,	Smith, of 4th District,
Casserly,	Kenny,	Stedman,
Condon,	Lampson,	Stevenson,
Davis,	Larue,	Stuart,
Dean,	Lavigne,	Swing,
Doyle,	McCallum,	Thompson,
Dunlap,	McComas,	Tinnin,
Estee,	McNutt,	Tully,
Estey,	Moffat,	Turner,
Farrell,	Moreland,	Tuttle,
Glascock,	Morse,	Van Dyke,
Gorman,	Nason,	Walker, of Marin,
Grace,	Neunaber,	Walker, of Tuolumne,
Hager,	Ohleyer,	Waters,
Hall,	Porter,	Webster,
Harrison,	Prouty,	Weller,
Harvey,	Reed,	Wellin,
Heiskell,	Reynolds,	White,
Holmes,	Rhodes,	Wyatt—72.

THE PRESIDENT. The question is upon concurring with the amendment of the Committee of the Whole, as amended.

The ayes and noes were demanded by Messrs. Barbour, Grace, Doyle, West, and Kelley.

The roll was called, and the Convention refused to concur by the following vote:

AYES.

Barbour,	Herrington,	Ringgold,
Barton,	Hunter,	Shurtleff,
Beerstecher,	Inman,	Smith, of San Francisco,
Bell,	Johnson,	Stedman,
Biggs,	Joyce,	Thompson,
Condon,	Kenny,	Vacquerel,
Estee,	Kleine,	Van Dyke,
Farrell,	Larkin,	Walker, of Marin,
Freud,	Lavigne,	Walker, of Tuolumne,
Garvey,	Nelson,	Webster,
Gorman,	Neunaber,	Wellin,
Grace,	O'Sullivan,	White,
Harrison,	Reynolds,	Wyatt—39.

NOES.

Andrews,	Heiskell,	Prouty,
Ayers,	Herold,	Pulliam,
Barry,	Hilborn,	Reed,
Blackmer,	Hitchcock,	Rhodes,
Boggs,	Holmes,	Rolfe,
Boucher,	Howard, of Mariposa,	Schell,
Burt,	Huestis,	Schomp,
Campbell,	Jones,	Shafter,
Caples,	Kelley,	Smith, of Santa Clara,
Casserly,	Lampson,	Smith, of 4th District,
Chapman,	Larue,	Stevenson,
Charles,	Mansfield,	Stuart,
Cross,	Martin, of Santa Cruz,	Sweasey,
Crouch,	McCallum,	Swenson,
Davis,	McComas,	Swing,
Dean,	McConnell,	Tinnin,
Dowling,	McFarland,	Tully,
Doyle,	Mills,	Turner,
Dunlap,	Moffat,	Tuttle,
Estey,	Moreland,	Waters,
Filcher,	Morse,	Weller,
Freeman,	Murphy,	West,
Glascock,	Nason,	Wickes,
Hager,	Ohleyer,	Wilson, of Tehama,
Hall,	Porter,	Mr. President—76.
Harvey,		

IN RELATION TO INSURANCE.

THE PRESIDENT. The question is on concurring with the Committee of the Whole in striking out section sixteen. The Secretary will read.

THE SECRETARY read:

"SEC. 16. The amount named in either a fire or marine insurance policy shall be deemed to be the true value of the property insured, for insurance purposes."

REMARKS OF MR. TINNIN.

MR. TINNIN. Mr. President: I hope that will not be stricken out. That is one thing that is settled in all commercial affairs, and that is that the principal is responsible for the acts of an agent. If an insurance company sends out an agent to solicit insurance, and takes the money of an individual, I say the company should be responsible for the risk paid for. It has been the custom of insurance companies in this State to send out agents to solicit business, and obtain money from persons, and when the property is destroyed pay them perhaps thirty per cent. of the value of the property destroyed. I say it is an outrage, and I am in favor of adopting this section.

REMARKS OF MR. FILCHER.

MR. FILCHER. Mr. President: In addition to what has been said by the gentleman, I wish to say that I believe it is in the interest of the people of this State to adopt this section. We have been trying to protect the people against other combinations of capital, and yet, when we come to protecting them from the encroachments and swindles of these insurance companies, we are met with a refusal. Now, in regard to the objections urged the other day against this section, that it would encourage the destruction of property for the sake of the insurance, it seems to me the reverse would be the result. Now, it holds to reason, that insurance companies govern their actions according to the law, and if they knew that they would be compelled to pay the full amount of the policy on the destruction of the property, that very fact would induce them to adopt a system of self-protection, and take smaller risks than they do at present. Certainly, they would lay down the rule that property should not be taken for more than two thirds of the actual value. They would govern themselves accordingly. Now, sir, the rule at present seems to be this: The agents are paid a certain percentage, and it is to their interest to get all the money they can. That is an incentive for them to place a high valuation on a piece of property. Now, no man pays a premium on a policy, unless he believes he will receive the amount of that policy. But no sooner is the property destroyed than they begin to search for evidence to show that the property was not worth that amount; and whether they establish the fact or not, they nevertheless throw the homeless man into a controversy which he is not able to carry on with a powerful corporation, and he is compelled to take what the company offers him. I say that this provision is right and just, and ought to be adopted in the interest of the people of this State.

REMARKS OF MR. ESTEE.

MR. ESTEE. Mr. President: I am surprised that a gentleman of so much intelligence as the gentleman from Placer should get up here and advocate such a proposition as this. It is not in the interest of the poor man; it is not in the interest of the rich man, or of any other human being, because it is absolutely ridiculous. I propose to vote against it. Let us see what the result would be. When the property is large there are always two or three policies. Now which one of them is going to be the one? Now what is my friend going to do with this class of cases? Here I have a warehouse full of grain. I ship grain out of it every day. When it was full I got an insurance policy on it. I have insured it for ten thousand dollars, and they agree to pay ten thousand dollars if it is destroyed. Now I ship the grain away, day after day, until there is only one ton left. Now, if that one ton of grain should burn up, the insurance company, under this provision, would have to pay me ten thousand dollars for that one ton of grain. In other words, there would be a premium of nine thousand nine hundred and fifty dollars for me to burn up that grain. It would be putting a premium on dishonesty everywhere. It would be no protection to honest men; it would be an actual premium on crime, on incendiarism. I don't think we can afford to do it. For one I will support no such monstrous proposition. Insurance companies are just like everybody else. I make a bargain with them and, if there is no deception, in ninety-nine cases out of one hundred they pay me in full. But the trouble mostly arises in the insurance of stores. You have a store in the country, and when you get in a stock of goods have it insured. The stock probably runs down, and when low a fire occurs. Now, there is always a question of fact to be determined, as to what the value of the goods is. The owner is not entitled, by any rule of law or justice, to the full amount of that policy unless the goods are there. He is entitled to be paid for just what he lost and no more.

ADJOURNMENT.

MR. McCALLUM. Mr. President: As there is a thin house, I think it would be well to hold an evening session. I will offer the following:

Resolved, That when this Convention adjourns, it adjourn until seven o'clock this evening.

As there is some little difficulty in getting a full vote here, I call for the ayes and noes.

MR. WALKER, of Tuolumne. I move we do now adjourn.

The ayes and noes were demanded by Messrs. Freud, McCallum, Doyle, White, and Condon.

The roll was called, and the motion prevailed by the following vote:

AYES.

Ayers,	Cross,	Hager,
Barton,	Crouch,	Hall,
Beerstecher,	Dowling,	Harvey,
Blackmer,	Doyle,	Heiskell,
Boggs,	Dunlap,	Herold,
Brown,	Estey,	Hitchcock,
Burt,	Filcher,	Holmes,
Campbell,	Freeman,	Jones,
Casserly,	Garvey,	Kleine,
Charles,	Grace,	Larue,

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Sacramento, California
May 11, 1999

Honorable Mike Honda
5155 State Capitol

Mechanics' Liens - #13279

Dear Mr. Honda:

QUESTION

Would a statute be unconstitutional if it provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on, or furnished material for, that work of improvement?

OPINION

A statute that provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on, or furnished material for, that work of improvement would be unconstitutional.

ANALYSIS

Section 3 of Article XIV of the California Constitution provides as follows:

> "SEC. 3. Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

Thus, the right of mechanics, materialmen, and others, to a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor or materials, is guaranteed by the California Constitution, and the Legislature is charged with the mode and manner of the enforcement of this right (Diamond M. Co. v. Sanitary F. Co. (1925) 70 Cal.App. 695, 701). Every law that the Legislature enacts to enforce these liens must be subordinate to and in consonance with that provision of the California Constitution (Ibid.).

The legislative implementation of this constitutional provision is contained in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code.[1] The statutes provide for liens and the enforcement thereof by the classes of persons named in the California Constitution, as well as others (see Sec. 3110). All such liens generally are described and known as "mechanics' liens."

In regard to the question presented, nothing in Section 3 of Article XIV of the California Constitution empowers the Legislature to revoke the right, entirely or in particular circumstances, from any member of a class the Constitution expressly protects (Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Assn. (1992) 5 Cal.App.4th 1264, 1270; hereafter Parsons). Thus, the Legislature, in carrying out its constitutional mandate pursuant to Section 3 of Article XIV of the California Constitution, may not effectively deny a member of a protected class the benefits of an otherwise valid lien by forbidding its enforcement against the property of a preferred person or entity (Ibid.).

While the Legislature may not deny a lien right of those protected by the California Constitution, the Legislature retains its plenary power to reasonably regulate and provide for the exercise of this right, the manner of its exercise, the time when it attached, and the time within which and the persons against whom it could be enforced (Borcher Bros. v. Buckeye Incubator Co. (1963) 59 Cal.2d 234, 238; hereafter Borcher Bros.).[2]

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[1] All further section references are to the Civil Code, unless otherwise specified.

[2] The California Court of Appeal, in Parsons, criticized the use by the California Supreme Court of the phrase "the persons against whom it could be enforced," as follows:

> "The phrase ... contained in Borchers seems to have originated in Barr Lumber Co. v. Shaffer [citations omitted]. However, it does not appear in the case, Ferger v. Gearhart [citations omitted], cited by Barr as authority for the

In Borcher Bros., the California Supreme Court considered the constitutionality of a state statute that required every person, other than one under direct contract with the owner or one who performed actual labor for wages, who furnished labor, service equipment or material for which a lien could have been claimed to provide the owner with a 15-day preliminary notice before filing the lien. The plaintiff complained that it unfairly discriminated between laborers and material suppliers even though they were both within the protected class. The Court upheld the statutory distinction as neither arbitrary nor unreasonable after it provided the following explanation, at pages 238-240:

> "The constitutional mandate of article XIV, section 15,[3] is a two-way street, requiring a balancing of the interests of both lien claimants and property owners. First, this argument could appropriately be presented to the Legislature and not to the courts. Second, in carrying out this constitutional mandate, the Legislature has the duty of balancing the interests of lien claimants and property owners.
>
> "From the point of view of lien claimants, the words 'speedy and efficient' must obviously be interpreted to mean that the Legislature should arrange for them to receive their money as soon as possible after supplying the labor or materials.
>
> "On the other hand, the property owner also has an interest which must be protected. From his standpoint, the words 'speedy and efficient' should be interpreted to mean that his title should be cleared as soon as possible, so that it will have some marketability. [footnote omitted.]

> proposition. None of these cases, Ferger, Barr, Borchers or Coast Central, explains the notion further or provides an example of its application. The point was not material to the holding in any of those cases."

[3] Section 15 of Article XX is the predecessor of Section 3 of Article XIV, which was adopted by the voters June 8, 1976.

"The Legislature has the task of balancing these two adverse interests in carrying out its duty under article XX, section 15, of the Constitution. In *Alta Building Material Co.* v. *Cameron*, 202 Cal.App.2d 299, 303-305 [20 Cal. Rptr. 713], the court correctly stated: 'While the essential purpose of the mechanics' lien statutes is to protect those who have performed labor or furnished material towards the improvement of the property of another [citation], inherent in this concept is a recognition also of the rights of the owner of the benefited property. It has been stated that the lien laws are for the protection of property owners as well as lien claimants [citation] and that our laws relating to mechanics' liens result from the desire of the Legislature to adjust the respective rights of lien claimants with those of the owners of property improved by their labor and material. [Citation.] As stated in *Diamond Match Co.* v. *Sanitary Fruit Co.*, 70 Cal.App. 695 [234 P.322], at 701: '[I]t is no less the duty of the legislature, in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws. The liens which are filed under the lien law against property, as a general rule, grow out of contracts which are made by and between lien claimants and persons (contractors) other than the owner of the property so affected, and such liens may be filed and so become a charge against property without the owner having actual knowledge thereof.'

". . . . . .

"The section does not require a pre-lien notice by those under direct contract with the owner or those who perform actual labor for wages on the property. The logical reason for this distinction is that the owner would in the usual situation be apprised of potential claims by way of lien in connection with those with whom he contracts directly, as well as those who perform actual labor for wages on the property.

> "However, as to materials furnished or labor *supplied* [i.e., labor performed elsewhere than on the property] by persons not under direct contract with the owner, it may be difficult, if not impossible, for the owner to be so apprised and the clear purpose of section 1193 is to give the owner 15 days' notice in such a situation that his property is to be 'embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied.' [Citation.]
>
> "Furthermore, the average uninformed laborer would not, as a practical matter, have the same opportunity to comply with a notice requirement as material supplier would.
>
> "It thus appears that the legislative classification in the present case was neither arbitrary nor unreasonable and that the notice requirement of section 1193 of the Code of Civil Procedure is constitutional."

The conditions precedent to the enforcement of a mechanics' lien are set forth in the law (Art. 3 (commencing with Section 3114), Ch. 2, Title 15, Pt. 4, Div. 3). In accordance with the above principles a claimant's failure to comply with these statutory requirements, including that of timely recordation of a claim of lien (see Sec. 3115), may preclude the claimant from recovering under his or her constitutional right to a mechanics' lien, and may be asserted defensively by an owner against whom a claim is made or an action filed.[4]

However, on the other hand, we think that a statute that provides the owner of residential real property with a defense against a mechanics' lien by a subcontractor whenever the owner pays a contractor in full would effectively deny the subcontractor the right to enjoy the benefits of the lien because a payment in full to the contractor does not necessarily protect the subcontractor's right to be paid.

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[4] See, generally, California Mechanics' Liens and Other Remedies, CEB, 1972 Ed. & 1982 Supp., Secs. 2.1, 2.6; and 44 Cal. Jur. 3d, Mechanics' Liens, Secs. 62, 102, 116.

Thus, in our opinion a statute that provides the owner of residential real property who pays a contractor in full for a work of improvement on the property with a defense against a mechanics' lien filed by a subcontractor who has bestowed labor on, or furnished material for, that work of improvement would be unconstitutional.

Very truly yours,

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JGZ:dsc