

NEW ZEALAND PROPERTY LAW AND EQUITY REFORM COMMITTEE

WAGES PROTECTION AND CONTRACTORS LIENS ACT, 1939

REPORT OF A COMMITTEE : CHAIRMAN ; D.F. DUGDALE

1965

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REPORT

The Hon. Minister of Justice,
WELLINGTON.

Sir,

1. CONSTITUTION AND TERMS OF REFERENCE -

By warrant under your hand dated 10 November 1964 (a copy of which is set out in Schedule A) you appointed the persons therein named to be a committee to enquire into and report on the subject therein set forth. On 24 March 1965 you appointed Mr D.S. Cox of Auckland to be an additional member of the committee. It is perhaps sensible to record the occupations of the various members of the committee. Mr Angus is a master builder and a director of firms merchanting builders' supplies. Mr Cox is a public accountant. Mr Skinner is President of the Federation of Labour and has had experience in carrying on business as a plumber. Messrs Barker, Dugdale and Stephens are solicitors, Mr Stephens being solicitor to the Ministry of Works.

2. SUBMISSIONS -

Before starting work we invited submissions from all professional and trade associations and trade unions whose members we thought would be concerned with the matters to be considered. In addition submissions were invited from the public by means of public notices in the press, and the setting up of the committee received some press publicity. In the result we received submissions from the persons, companies, firms and associations listed in Schedule B. In addition the Hon. Mr Justice Wilson who has an unrivalled practical experience in Liens Act litigation and is the author of the standard textbook on the subject took the trouble to prepare a lengthy memorandum for the committee, which was of the greatest assistance.

The Department of Justice made certain comparative and historical material available to us. We had before us in our deliberations the Queensland Contractors' and Workmens' Liens Act of 1906 and some of the Mechanics' Liens Acts of the Canadian Provinces.

3. HISTORY OF THE LEGISLATION -

The branch of the law now represented in New Zealand by Part II of the Wages Protection and Contractors' Liens Act 1939

has its origin in North America. Statutory provision for liens for master builders was enacted in Maryland in 1791 and analogous legislation was by the end of the nineteenth century widespread in the United States of America and the Canadian provinces. There is no equivalent legislation in the United Kingdom or the Australian States (although a not dissimilar legislative intent can be discerned in such Australian statutes as the South Australian Workmen's Liens Act and the Contractors Debts Act of New South Wales.) The Queensland Statute referred to above has been repealed as from 1 April 1964. The first New Zealand Statute was the Contractors' and Workmen's Liens Act of 1892. This Statute was drafted by a Queensland lawyer and based on the Ontario Statute and on several other Acts in force in different States of the United States of America. In the consolidation of 1908 the 1892 Statute was linked with certain industrial provisions under the name of the Wages Protection and Contractors' Liens Act 1908 and this somewhat unnatural conjunction was perpetuated in the 1939 Statute of the same name, the industrial provisions forming Part I of the Statute. Part I was repealed and reenacted in a separate statute (The Wages Protection Act) in 1964. Part II (which is the only part of the statute we are concerned with) was amended in 1940, 1951, 1952, 1958 and 1961.

4. OPERATION OF THE EXISTING STATUTE -

The scheme of the Act (expressed very broadly) is that contractors, subcontractors, suppliers of material and workmen are entitled to secure payment to them of the monies due to them under their contracts by way of a charge over the monies due under his contract to the contractor by whom they are employed or whom they supply and to any superior contractor and also (as a security for performance of the obligations of the owner of the land or chattel) to a lien over the land or chattel. To provide a fund against which the charges can operate the Act requires certain percentages of the contract price to be retained for a certain period out of the monies that would otherwise be payable for the work. On the claimant's giving the notice of charge prescribed by the Act, the owner and superior contractor must retain both the percentages that must be retained in any event and the amount claimed in the notice. If the owner and superior contractor fulfil their obligations as to retention then the total amount recoverable against them by claimants of charges may not exceed the amount such owner or superior contractor would have had to pay under his contract in any event. In the event of a deficiency the amounts recoverable by those claiming charges abate. As well as giving notice of charge the claimant must within sixty days after completion or abandonment of the head contract commence court proceedings.

Thus if A the owner of land contracts with B a builder to erect a building on such land, B enters into a subcontract with C a painter and C employs in the work one D, then D is entitled to a charge on monies due from B to C and from A to B, and to a lien on A's land. C is entitled to a charge on monies due from A to B and to a lien on A's land and B is entitled to a lien on A's land. A must retain out of the monies he pays B and B must retain out of the monies he pays C (i) the set percentage and (ii) the amount claimed in any notice of charge or so much thereof as he has not already paid over.

Three points as to the way the Act works in practice should be made clear at this stage.

- (i) Although the Act applies to work done both on land and chattels, and although there are a few reported cases in respect of work done on chattels, claims in respect of this type of work must be extremely rare. Certainly none had ever been encountered by any member of the committee.
- (ii) Although the Act provides for claims by workmen, such claims are extremely rare.
- (iii) Although the Act protects both head-contractors against the defaults of owners, and subcontractors against the defaults of head-contractors, the former situation though by no means unknown is relatively uncommon. In Wilson J.'s estimate claims of subcontractors (including in this term suppliers of materials) comprise not less than 95% of the total under the present statute.

In considering the statute therefore we have borne in mind that its commonest application by far is to claims by subcontractors (including suppliers of materials) arising out of the financial failure of master builders.

5. REPEAL OR RETENTION -

The first leg of the question posed to us was whether in the light of present day conditions Part II of the Act should be repealed. This question seemed to us having regard to the way the Act works in practice (described in the previous paragraph) to boil down to whether the law should continue to give subcontractors in the building trade a special protection of the sort given them by Part II of the Act.

The issue of repeal or retention was canvassed at length in the various submissions made to us. Various arguments advanced

to us in support of a complete repeal seemed to us not in fact to warrant such a conclusion. It was said that the present statute in its practical working can on occasion lead to odd results. We agree that this is so, and in a later part of this report detail many examples of such difficulties and our recommendations for resolving them. We think that the undesirable side-effects can be largely got rid of, so that the existence of anomalies in the present Act does not justify its complete repeal.

It was said that the present statute is fruitful of litigation, with consequent expense and delay in winding up of the estates of insolvent head contractors. We agree that this is so. Any body of law wholly statutory in origin and dealing with an insolvency situation is bound to give rise to litigation, for the English language is not such a perfect instrument that it is possible to devise a statute so precise that no-one can misunderstand or pretend to misunderstand it, and the knowledge that there is not enough money available to pay in full his client and all the other claimants clears a lawyer's mind wonderfully. Yet it is possible to devise a viable code of law dealing with insolvency and wholly statutory in origin - the law of bankruptcy and the provisions as to winding up in the Companies Act come within this category - so that while accepting that litigation is an inevitable part of the administration of the present Act or any successor, we do not regard this fact as a convincing argument for total repeal. We do regard this fact, however, as a reason for aiming at as lucid draftsmanship as possible and for trying to devise as speedy and simple a court procedure for determining questions arising under the Act as we are able.

It was suggested to us that the present statute does justice in allowing subcontractors on the financial failure of the head contractor to receive the benefit of their own work and materials. This may be just but there is no general rule of law giving creditors such a right; there are plenty of situations in which the proceeds of an asset supplied to an insolvent by creditor A are shared among both A and all the other creditors of the insolvent.

The crux of the matter lies in our opinion not in the matters already discussed but in two further issues. The first is most easily stated in the rhetorical question asked in more than one submission - "why should the law give subcontractors in the building trade a protection that others who give credit have to manage without?" The answer to this question supplies what to our minds are the principal reasons why the Act or something

like it should be retained. First a subcontractor who supplies, work and materials has in practice no alternative but to give credit. Whatever his theoretical freedom to enter into contracts only with those who will pay him in full in advance, in fact as conditions are and are likely to remain in the building industry a plumber say or painter has no alternative but to enter into contracts which require him to do some or all of the work contracted for before he receives any payment.

Secondly while it is a truism that anyone who elects to give credit must choose his debtor with care or take the consequences, experience shows that the financial failures of master builders so often occur suddenly and unexpectedly that subcontractors in the building trade may reasonably claim on this ground a special protection. Thirdly in other branches of commerce those giving credit have available to fall back on various aids to debt collection such as possessory liens, hire purchase agreements, debentures given by retailers to wholesalers and the like which are unavailable to subcontractors in the building trade who may therefore be regarded as entitled to analogous security.

The other point is this. It seems clear that because of the existence of the Act merchants of builders' supplies give credit to builders to whom otherwise they would not. Presumably if the Act were repealed such merchants would be more sparing with credit so that many undercapitalised builders would have to curtail or cease business. Mr Angus was unable to agree with the next step in the reasoning of the other members of the committee. In his view the weeding out of financially weaker builders is entirely desirable, and for this reason in particular he favours a complete repeal of the Act. The rest of the committee see the matter less clearly. In the absence of any precise information as to how extensive a building industry the national interest requires or as to the proportion of master builders that might be forced out of business in the changed circumstances in the building industry resulting from a repeal of the Act they do not see how they can responsibly recommend in respect of such an important sector of the economy what would be very much a leap in the dark.

Before leaving this subject it is desirable to say a word about the Queensland situation, for it may be argued that the fact that the legislature of that state decided totally to repeal its statute, similar in scope and purpose to ours, is some ground

for a like step being taken in this country. At the time of its repeal the Queensland Act was in any event in need of drastic overhaul. Stern v. J.A. Redpath and Sons Ltd [1950] N.Z.L.R. 50 was followed in Queensland but there had been no legislative change designed like our 1958 Amendment to do away with the difficulties resulting from this decision. Moreover in Stucoid v. Stadiums [1960] Q.S.R. 300 the High Court of Australia had adopted an interpretation of the expression "completion of the work" where it occurred in various places in the Queensland Act which overruled various Queensland Full Court decisions of very long standing and cast doubt on a large part of the body of Queensland case law interpreting the statute. Faced then with the need completely to recast the statute the Queensland legislature chose the alternative of cutting the Gordian knot and repealing the act in toto. It is not for us to comment on whether or not so ruthless and easy a solution was a proper one in the Queensland situation. It is sufficient for our purposes to observe that the New Zealand situation is, because our Act is in nothing like such an unsatisfactory state as was the Queensland one, completely distinguishable.

The majority of the committee (Mr Angus dissenting) are of the opinion therefore that the law should continue to give subcontractors in the building trade a special protection of the sort given them by Part II of the Act. While dissenting on this point Mr Angus agrees with the rest of the committee that if such special protection is to remain the provisions of the present statute should be altered in the respects indicated in the balance of this report.

6. THE SCHEME OF PROTECTION -

We gave careful thought to the question of whether the scheme of protection contained in the present statute (which scheme was described in one submission as "an ambulance at the bottom of the cliff rather than a fence at the top") could not be improved. Although various new schemes were suggested to us, and members of the committee themselves put forward schemes, none of the alternatives we considered seemed really workable in practice.

It was suggested to us that head contractors should be licensed and bonded in the same way as land agents and motor vehicle dealers. But we have no doubt that the objects of the statute can be achieved without adopting so manifestly inconvenient a course.

It was suggested to us that contractors should be required

to hold contract monies received by them in trust accounts. A contractor is not as the law now stands a trustee for his sub-contractors and his and their workmen of the contract monies he receives, and it seems to us that here again the objects of the statute can be achieved without doing such violence to the existing law of contract as the proposal under discussion envisages. In any event unless such trust accounts were audited the only practical result of such provision would be to enable the criminal prosecution in certain circumstances of bankrupt builders. It is true that provisions constituting the contract price a trust fund are contained in the Canadian statutes (see (1956) 34 C.B.R. 855) but those statutes have retention provisions substantially different from ours.

It was suggested to us that the consent of every subcontractor should be required to each progress payment made to the head contractor. But this would put too much power into the hands of disgruntled subcontractors.

It was suggested that the owner before making each progress payment after the first should be obliged to ensure that all subcontractors had received a proportionate part of the previous progress payment. But this would cast too great a burden on the owner.

We considered these and other schemes with care, but in the result concluded that the scheme of the present Act (amended as to details in the various respects we will suggest later in this report) was preferable to any suggested to us or which we ourselves could devise, comforting ourselves with the thought that the present scheme has the further advantage of being familiar to the tradesmen and professional men who are concerned with its operation.

7. DRAFT STATUTE -

Because of the intractable nature of the subject matter of this report it seemed to us that the most satisfactory way of making clear precisely what we proposed was to annex to our report a rough draft with new or altered provisions italicized of a statute designed to replace the existing Part II, and this is to be found in Schedule C. The words "rough draft" are precise, not mock-modest; none of the members of the committee claims any particular expertise as a draftsman and if our recommendations are adopted our draft will require considerable polishing at the hands of the Parliamentary Draftsman.

We have in preparing this draft tried to avoid change for

the sake of change for when a section in one form has been given a meaning by the Courts it seemed to us foolish to tinker with it merely to satisfy some nice notion of draftsmanship and thereby run the risk of it being contended or held that some change in substance was intended.

Referring then to this draft as we go along we proceed to explain in detail both the changes we recommend and the changes that were urged upon us and which we felt obliged to reject,

8. WHO MAY CLAIM -

Workers - It was suggested to us that as claims by workers are rare the provisions for claims by workers could be dropped. Workers it was suggested are sufficiently cared for by the various industrial statutes and awards and have in addition certain priorities under the Bankruptcy Act 1908 and on the winding up or receivership of companies so that they do not need any further protection. We reject this suggestion. We think that although workmen are usually paid out without their having formally to make claims under the Act, this is probably because it is so clearly and generally understood that the Act is there for them to invoke if they have to. Moreover if one class of claimant is to have protection then so must the workers lest the protected class exhaust the monies that would otherwise be available to pay the workers. This last consideration answers we think the contention that workers are sufficiently protected by their bankruptcy and Companies Act priorities; also of course invocation of the Liens Act is not invariably accompanied by the bankruptcy winding up or receivership of the party in default. Finally it would be in our view perverse to exclude workers from the benefits of a statute originally enacted with a view to assisting labourers and small contractors.

Material men - In this paragraph we adopt a convenient term from the Canadian statutes and describe those who supply material only (as distinct from work and materials) as material men. It can we think be not unfairly observed that the various arguments we have advanced in favour of retaining the statute, while true of those who supply work or work and materials, are not all true of material men. From this premise it can be argued that the Act should cease to protect material men. The answer to this contention is we think not dissimilar to one of the arguments we have adopted in relation to workers. If subcontractors other than material men are to be protected then so must the material men for otherwise the protected class might exhaust the monies

that would otherwise be available to pay the material men.

Commercial Bailors of Plant - It was urged upon us that no logical distinction can be drawn between the position of commercial bailors of plant (who at present have no claim under the Act - Baylis v. Wellington City Council [1957] N.Z.L.R. 836) and that of material men and other subcontractors so that such bailors should be given protection under the Act. While acknowledging the attractiveness as a matter of theory of this argument we prefer to approach the question pragmatically. In practice commercial bailors can and do require payments in advance, and their eggs are spread among many more baskets, and for these and other reasons the losses they suffer on the financial failure of any one head-contractor are small compared with those of material men and other subcontractors.

In these circumstances we decline to recommend the addition of such bailors to the classes of those entitled to claim under the Act.

In the result therefore we recommend no change to the classes of those entitled to claim under the Act. We do recommend a procedural change in that only subcontractors (described in our draft as "declared subcontractors") who have given a certain advance notice may claim, but this alteration is best discussed in conjunction with the scheme of procedure we advocate later in this report.

9. THE RIGHT TO A LIEN OR CHARGE -

At present the head contractor and every subcontractor and worker has a right to a lien on the employer's land and every subcontractor and worker has a right to a charge on the monies due to the head contractor and to every other contractor higher in the chain than the claimant. This leads to a multiplicity of liens and charges and to duplication, for the quantum of the head contractor's lien claim (for example) will include monies due from him to subcontractors who will probably also claim a lien in respect of such monies due to them from the head contractor, so that the total of lien claims will exceed the total in fact payable. For this reason it was suggested to us that only the head contractor should be entitled to a lien and that the right to a charge should exist only in respect of monies owing to the claimant's own employer. While we appreciate the force of this argument it seems to us (a) that insofar as the right to a lien is concerned the suggestion overlooks the fact that in most cases it is the head contractor who gets into financial difficulty

and (b) that in any event the procedural changes we suggest will overcome most of the difficulties said to result from the present system. We do not therefore recommend change in this respect.

A very real difficulty is the situation where notice of lien or charge is given by a contractor or subcontractor not because he has any genuine doubt as to the ability to meet his commitments of the person with whom he has contracted to do the work, but because he is involved in a dispute with that person as to the amount due to him or the quality of his workmanship, and hopes to exert pressure by means of giving the notice of lien or charge. There is no complete answer to this problem, but it will we think to some extent be met by the procedural changes we recommend, and by two further suggested alterations. One is a provision that liens shall (like charging orders under the Code of Civil Procedure) lapse after six months unless extended by the Court [s.24 (1) of our draft]. The other is the requirement that a statutory verifying declaration should be filed with the District Land Registrar on registration of every lien [s.23 (2) of our draft].

10. PROCEDURE FOR CONSENSUAL DISCHARGE OF LIENS -

The present procedure involves registration of a receipt (s.42) "acknowledging payment of the amount claimed". Usually the claimant does not recover the full amount claimed, and while in practice a form of receipt has been devised to cover the situation that District Land Registrars will accept clearly a less devious procedure is desirable. We recommend a form analogous to a discharge of caveat [s.23 of our draft].

11. THE RIGHT TO A LIEN ON CHATTELS -

This is so rarely invoked that we recommend the Act being altered to apply only to work done on land.

12. PROVISION AS TO CROP THRESHERS (s.47) -

This is so rarely if ever invoked that it should be dropped.

13. THE RETENTION AMOUNTS AND PERIOD -

The retention percentages were reviewed as recently as 1961 and we do not recommend any alteration.

The present retention period is 31 days. Although for various obvious reasons prompt payment to contractors is desirable this period of 31 days seems to us insufficiently long. Commercial practice is for accounts to be paid on the 20th of the

following month. If an account is sent in the first fortnight or so of the preceding month more than 31 days will elapse before the creditor is aware of a default in payment. The retention period should be 60 days.

14. PRIORITIES AMONG CLAIMANTS -

Section 26 provides for priorities roughly as follows -

- (i) Workers wages up to £50. 0. 0. for a period not exceeding three months.
- (ii) Other workers' wages.
- (iii) Contractors who have given notice within 30 days of completion of their work.
- (iv) Other contractors.

So far as workers are concerned if £50. 0. 0. was a suitable figure in 1939 it cannot be a suitable figure now. We recommend replacement of (i) and (ii) above by a provision simply giving workers priority for wages up to £150. 0. 0.

The existing provisions granting priority to contractors who give notice within 30 days of completion are among the most unsatisfactory of the existing statute. The time limit is unduly short for the same reasons as the 31 days retention period. It encourages the premature giving of notice of lien and charge and favours not so much the vigilant as the nervous. It can work considerable injustice in practice and indeed in practice is often waived by claimants entitled to its benefit. There should be no priorities as among claimants based on the time within which they gave notice [s.11 of our draft].

15. TIME FOR GIVING NOTICE OF LIEN OR CHARGE -

Because under the procedure we suggest later in this report notice of lien or charge will itself set Court proceedings in train, it is unnecessary to specify a time for commencing proceedings, but it is necessary to specify a time for giving notice of lien or charge.

What then should be the period for giving such notice, and in the case of subcontractors should it run from completion of the head contract or of the subcontract? Taking the second point first, we are clear that time should run from completion of the subcontract. Modern building contracts can extend over years. It is wrong that the subcontractor who does say structural steel work and may finish his work at the end of the first eighteen months of a head contract extending over three years should be able to commence proceedings at a time fixed in

relation to completion of the head contract and conversely that part of his contract price should be retained until after completion of the head contract, to satisfy possible claims by his subcontractors or workmen.

The period for giving notice should be 60 days from completion of the work done by the claimant, the period of 60 days being recommended for the same reasons as indicated in recommending a similar period as the liens retention period.

16. SHOULD THE ACT BIND THE CROWN -

We see no reason why the Act should not bind the Crown but with Crown Land remaining exempt from any right to lien. That is the present position with local bodies [s.30 of our draft].

17. SET OFF AGAINST RETENTION MONIES -

We think the law should be altered to provide that monies retained by an employer pursuant to his duty under the Act so to do should not be subject to any rights of counterclaim or set off the employer may have against the head contractor. The matter is discussed by North and Cleary JJ in their joint judgment in J.J. Craig Ltd v. Gillman Packaging Ltd [1962] N.Z.L.R. 210 at p. 217, 218. The addition to the Act we recommend is based on s.21 (6) of the British Columbian Statute. This change if adopted may mean that employers seek to retain larger amounts than those required by the Act and that architects cease as a matter of practice to treat the monies retained under the Act as a fund to ensure proper completion or maintenance by the builder. Be this as it may, the change we recommend seems to us essential for the proper fulfilment of the objects of the statute [s.17 (2) of our draft].

18. IDENTIFICATION OF MATERIALS -

We have considered the type of situation that arose in Ngapuna Timber Co. Ltd v. Ryan [1961] N.Z.L.R. 377 in which the claim of a supplier of timber to a builder failed because he could not relate particular timber to a particular one of the builder's contracts. We do not think any change in the law is called for. The principle that materials must have been supplied to a contractor for the purpose of a particular contract as distinct from a general supply unrelated to any particular contract to give rise to a claim under the Act seems both reasonable and necessary for the practical working of the Act, and becomes even more necessary if the procedural changes we recommend are adopted.

19. PROCEDURE -

Present procedure calls for each claimant to either

institute proceedings or to join himself to the proceedings already instituted. This leads to a multiplicity of actions, of which some may be in a Magistrate's Court some in the Supreme Court. It is usually necessary to consolidate the actions, and there is usually a lapse of time before anyone gets round to doing this. Delay for this and other reasons is a major problem in disposing of Court proceedings in the present working of the Act.

The alternative seems to us to be to designate one person to apply to the Court, with notice to interested parties, once notice of lien or charge is given. The only persons who are parties to all actions under the present procedure are the head contractor and the employer. In most cases it is the head contractor who is in difficulty so that it is unreal to designate him as the person to make the application. Therefore the application to the Court must be made by the employer. So that he will know who to join in the action only subcontractors (called "declared subcontractors") who have given a certain advance notice of the fact that they are subcontractors on the job [s.4 of our draft] should be entitled to rights under the Act. Under the scheme we recommend the employer on receiving notice of lien or charge is required to apply within a limited time to the Court with notice of the application to the head contractor and to all declared subcontractors. At this stage others served with notice of the application and wishing to claim may themselves give notice of their claims. There are provisions covering default by the owner and provisions making his costs on a solicitor-and-client basis a first charge on the fund. Because of the need for speed and to have all proceedings in one Court the Magistrates' Courts are given exclusive jurisdiction at first instance but subject to the usual rights of appeal to the Supreme Court and with power for Magistrates to state a case to the Supreme Court on questions of law. On the matter coming before the Magistrate he may dispose of it then and there, or treat the initial hearing as something roughly analogous to American pre-trial procedure or a summons for directions in the English Commercial Court. In the latter event at the initial hearing issues should be determined, any other affected parties (such as mortgagees) directed to be served, all other interlocutory matters such as discovery and orders for particulars disposed of and a firm date fixed for the final disposal of the matter. s.19 of our draft].

This scheme by substituting one application for a number

of separate actions and by its emphasis on speedy disposal seems to us preferable to existing procedures with the expense delay and injustice arising from delay that existing procedures result in. An expeditious procedure will solve a large proportion of the difficulties experienced in the working of the present statute. We do not say that the scheme we propose will work. That will depend on the Magistrates and on the legal profession. We do say however that the scheme provides a machinery that can work if bench and bar make the effort to ensure that it does.

We would add one further word about the limitation of the benefits of the Act to "declared subcontractors". This is necessary for the working of the scheme we propose but has in addition other advantages. One of the great difficulties in practice in trying to sort out liens problems, for example to organize in a hurry the completion of a building where a head contractor has abandoned the job, is to know just who the potential lien claimants are. The provisions we suggest will solve this problem. We have no doubt that tradesmen will get into the habit as a matter of routine of giving the owner the notice required by our draft statute to constitute them "declared subcontractors".

20. THE PURCHASE OF NEW BUILDINGS -

There are we believe considerable differences of opinion among lawyers as to the application of the Liens Act to the situation (common where for example houses have been built as a speculation) where land is sold on which a new building has been or is in the course of being erected. We think that the statute should clarify the situation. We believe that rights of lien claimants should not be defeated by a sale of the land. We have included in our draft a section containing rules intended to govern the position. [s.9 of our draft].

21. THE DEFINITION OF COMPLETION -

It is important having regard to the way the Act operates that the date of completion should be able to be ascertained in practice with reasonable certainty. For this reason we were exhorted to try and devise a better definition of completion. The only precise suggestions made to us were as follows -

- (a) That the definition of completion be amended to make it clear that "substantial completion" is sufficient. This did not seem to us an answer to the problem, for in practice it would be as difficult to decide what is "substantial completion" as it is now to decide what is

"completion".

- (b) That "substantial completion" be defined as some set percentage of the total work. This suggestion it seems to us might well necessitate involved quantity surveying to determine what was "substantial completion" in any given case and so create as many problems as it was designed to solve.
- (c) That the certificate of the architect or engineer as to completion be conclusive. The difficulty with this idea (apart from the fact that not all jobs have architects or engineers) is that architects and engineers might be tempted to withhold certificates of completion for such reasons unconnected with the purpose of the Act as ensuring maintenance or correction of alleged faulty work by the builder in the same way as they undoubtedly tend to use retention moneys for similar purposes at present.

None of the precise suggestions made to us, then, were acceptable. We do not know the complete answer to the problem and it may be that there is none.

We do however recommend additions to the definition of completion to provide that completion shall not be later than the date on which possession of the works is given or the date as at which the architect or engineer certifies the work to be completed or substantially completed. This addition to the definition will in most cases provide in the ascertainment of completion a precise terminus ad quem while leaving it free to any party to establish an earlier date of completion if he is able to do so. It will do away with the odd type of case where the return to the work by a contractor to perform some relatively trivial item has been held to delay "completion" within the meaning of the Act. Stern v. Taylor [1960] N.Z.L.R. 669 is an example of this unsatisfactory type of situation which the amendments we propose will do away with. [s.4 (4) (ii) of our draft].

We have inserted a provision enabling a single contract for work to be completed in sections if the contract price is apportioned among such sections to be treated for the purpose of the act as if there were a separate contract in respect of each section. This may prove of practical utility in the case of certain large contracts. [s.4 (4) of our draft].

22. MISCELLANEOUS CHANGES -

We suggest the following further miscellaneous changes -

Quantum meruit - We suggest certain alterations in the definition section to make it clear that a person making a claim on a quantum meruit basis is entitled to the benefits of the Act. [s.4 (2) of our draft].

Definition of "worker" - Because of the decisions of Christie J. at first instance in Stern v. J.A. Redpath and Sons Ltd [1949] N.Z.L.R. 60, 65 in which case the learned judge held that a subcontractor was a "worker" it seems desirable to amend the definition of "worker" to put it beyond doubt that a worker is a person employed under a contract of service. [s.4 (1) of our draft].

Sale Procedure - We suggest a somewhat more streamlined procedure than that provided in the present s.43. If the Court holds a claimant entitled to a lien and the judgment remains unsatisfied for one calendar month the party entitled may without further order of the Court apply to the Sheriff to conduct a sale as if it were a sale under a writ of sale pursuant to a judgment of the Supreme Court. [s.25 of our draft].

Sections 25 and 41 - We have recast these sections in an endeavour to make quite clear the status of a lien registered under the Land Transfer Act and the competing priorities of lien claimants and mortgagees. The effect of what we have drafted is that a notice of lien claim shall be an "instrument" within the meaning of the Land Transfer Act 1952 and registered as such. Priority will therefore by virtue of the Land Transfer Act 1952 s.37 depend on registration except in the two cases provided by the present s.25 (2) and (3). There is no provision for registration of liens affecting estates or interests not registered under the Land Transfer Act. They will be governed by the equitable rule *qui prior in tempore potior est jure*, and it is necessary in the statute only to specify the date when the lien is deemed to come into existence for the purpose of the rule. [ss 10 and 23 of our draft].

Removal of lien - We have included express provision for the Court to order the discharge of a lien registered against the interest in land of an employer who satisfies the Court that he is in a position to pay the amount due from him without the claimant's needing the security of a lien. [s.20 of our draft]

Priorities between competing headcontractors - Where (as

in the case of Williams v. Standard Insurance Co. Ltd [1962] N.Z.L.R. 969) there are two head contractors who do work on the same piece of land a fairer solution to the one adopted in Williams' case seems to us to be to provide that their claims shall abate inter se as if they were subcontractors and our draft provides accordingly. [s.11 (3) of our draft].

23. POSSESSORY LIEN ON CHATTELS

Nothing we have said so far applies to s.46 of the Act, which really has nothing to do with the other matters dealt with in Part II of the Act and for which a home has been found in the Act presumably for want of anywhere better. The common law provides that those who do work on chattels are entitled to a possessory lien, i.e. to retain the chattels until they are paid, but the common law made no provision for the workman to pay himself out by selling the chattel. Section 46 gives the workman this necessary power. We recommend no alteration to this section. It has been suggested by those whose business it is to repair motor vehicles that one who does work on a chattel and returns it to the owner before he is paid should be entitled if he is not duly paid to seize possession of the chattel. Such a suggestion seems to us completely undesirable. The whole tendency of modern law reform is to curb the rights of self-help of creditors - the Property Law Act 1952, s.92, the limitation on a landlord's power to distrain in the Tenancy Act 1955 and the limitations on rights to repossess chattels subject to hire-purchase agreements contained in the relevant United Kingdom and Australian legislation are examples of this tendency. We are not prepared to recommend a reversal of this process in the case of workmen's liens.

24. DATE OF COMMENCEMENT -

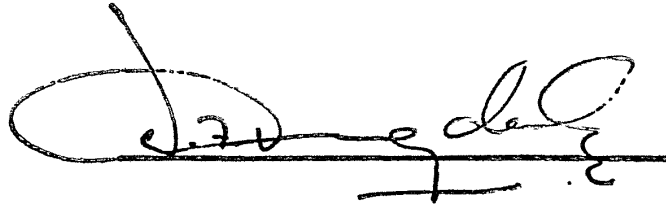
If our recommendations are adopted care will be necessary in fixing the commencement date of the new Act, in particular because if the Crown is to be bound the Ministry of Works and other departments will have to devise new forms of contract. If an Act along the lines we suggest is passed in 1966 it should not come into force before 1st April, 1967.

25. CONCLUSION -

We recommend the repeal of the existing statute and the passage of a new Act along the lines of our draft. We are satisfied that our proposals while doubtless falling short of perfection nevertheless represent a substantial improvement to the present Act.

We wish to conclude by recording the very real assistance

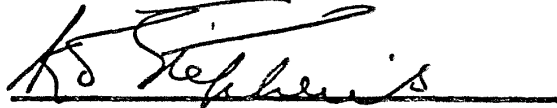
furnished us by the Secretary to the Committee Mrs M.A. Vennell, who is herself a solicitor. Her duties were not made easier by the fact that most of the Committee reside out of Wellington and all of the Committee have been heavily engaged with other commitments, and we are indebted to her for her help.



R. J. G. G. G.



D. S. G. G.





S C H E D U L E A

WARRANT OF APPOINTMENT

I hereby appoint -

Mr K.W. Angus of Wellington
Mr R.I. Barker of Auckland
Mr D.F. Dugdale of Auckland
Mr T.E. Skinner of Wellington
Mr K.O. Stephens of Wellington

to be a committee to inquire into and report on whether in the light of present day conditions Part II of the Wages Protection and Contractors Liens Act 1939 should be repealed, and if not, what changes in the law relating to contractors' and workmen's liens are necessary or desirable.

AND I further appoint Mr D.F. Dugdale to be Chairman of the committee.

Dated at Wellington this 10th day of November 1964.

(signed) J.R. Hanan
Minister of Justice

And on 24th day of March 1965 Mr Duncan S. Cox of Auckland was also appointed by the Minister of Justice to be a member of the committee.

S C H E D U L E B

The following is an alphabetically arranged list of the persons and bodies who in writing made submissions to the Committee. Those whose names are marked with an asterisk also appeared personally.

1. Air Hire Centre Ltd, Auckland
2. Auckland Builders Supply Merchants Group
Auckland Steel Supply Merchants Group
General and Drainage Contractors Supply Merchants Group
3. *Auckland Guild of Master Painters Decorators and Signwriters
(Inc.) - supported by
Auckland Provincial Plasterers and Fibrous Plasterers
Industrial Union of Employees, and the Auckland Building
Trades Subcontractors Association (Mr R.A. Waite)
4. Auckland Master Builders' Association Inc.
5. Cain Steel Industries Ltd, Auckland
6. Canterbury Sub-Contractors' Association
7. Mrs Margaret Lawson, Auckland
8. Luke, Cunningham and Clere, Solicitors, Wellington
9. Metal Trades Employers' Association of Wellington (Inc.)
and Industrial Union
10. New Zealand Associated General Contractors' Federation Inc.
11. New Zealand Electrical Contractors Federation Inc.
12. New Zealand Employers Federation (Inc.)
13. New Zealand Federated Master Painters, Decorators and
Signwriters Industrial Association of Employers.
14. *New Zealand Institute of Architects (Messrs W.G. Smith
and J.L. Mair)
15. New Zealand Institute of Engineers
16. New Zealand Joinery Manufacturers' Federation
17. New Zealand Law Society
18. New Zealand Master Builders' Federation Inc.
19. *New Zealand National Creditmen's Association (Wellington)
Ltd (Mr K.G. Sullivan)
20. New Zealand Reinforcing Steel Fabricators' Association Inc.
21. New Zealand Timber Merchants' Federation Inc.
22. Otago Sub-contractors' Association
23. Roberts Concrete Productions Ltd (In Receivership)
24. Wellington Industrial District Plasterers' and Fibrous
Plasterers' Industrial Union of Employers

S C H E D U L E C

Draft Contractors' Liens Bill

An Act to consolidate and amend Part II of the Wages Protection and Contractors' Liens Act 1939.

1. SHORT TITLE - This Act may be cited as the Contractors' Liens Act 1966.

2. COMMENCEMENT - This Act shall come into force on the first day of April 1967.

3. INTERPRETATION - (1) In this Act, unless the context otherwise requires, -

 "Charge" means a charge under this Act:

 "Contract price" means the amount of the consideration for the performance of any work under any contract or subcontract, express or implied, and whether the price is fixed by express agreement or not:

 "Contractor", as regards an employer, means a person who contracts directly with the employer to perform any work; as regards a subcontractor it means a person with whom the subcontractor contracts to perform any work; and "subcontractor" means a person who contracts with a contractor, or with another subcontractor, to perform any work:

 "Court" means a Magistrate's Court:

 "Declared subcontractor" means in relation to the subcontract in respect of which he was given notice a subcontractor who has given the notice to an employer provided by Section 4 of this Act.

 "Employer" means any person who contracts with another person for the performance of work by that other person, or at whose request, or on whose credit, or on whose behalf, with his privity or consent, work is done; and includes all persons claiming under him whose rights are acquired after the work is commenced; but a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer:

 "Lien" means a lien under this Act:

 "Owner" means the person to whom the land upon or in respect of which any work is to be done belongs; and,

in the case of land, includes a person having a limited estate or interest in the land:

"Work" includes any work or labour, whether skilled or unskilled, done or commenced by any person of any occupation in connection with -

- (a) The contraction, decoration, alteration or repair of any building or other structure upon land; or
- (b) The development or working of any mine, quarry, sandpit, drain, embankment, or other excavation in or upon any land; or
- (c) The placing, fixing, or erection of any materials, or of any plant or machinery, used or intended to be used for any of the purposes aforesaid; or
- (d) Any clearing, excavating, digging, drilling, tunnelling, filling, roadmaking, grading or ditching in upon or under any land - and also includes the supply of material used or brought on the premises to be used in connection with the work:

"Worker" means a person employed pursuant to a contract of service in doing work, whether his remuneration is to be according to time or by piecework, or at a fixed price, or otherwise.

References to the amount payable under any contract or subcontract shall be deemed to include all amounts that under the contract or subcontract are to be credited or allowed in complete or partial satisfaction of the contract price otherwise than upon payment in money; and references to the payment of any moneys in reduction of the contract price shall be deemed to include the making of any such credit or allowance.

(2) The definition of "contract price" in the previous subsection includes moneys recoverable on a quantum meruit basis and the definitions of "contractor" "subcontractor" and "employer" are hereby correspondingly extended.

(3) If a contract provides for the work to be completed in sections and apportions the contract price among such sections then the contract insofar as it applies to each section shall for the purposes of this Act be deemed to be a separate contract.

(4) (1) For the purposes of this Act the work specified in any contract or subcontract shall be deemed to be completed

when, with such variations, omissions, or deductions as have been duly authorised or agreed upon, it has been performed in accordance with the contract or subcontract, notwithstanding that the contractor or subcontractor may then or subsequently be employed in doing additional or extra work which is connected with or related to the work but is not specified in the contract or subcontract, or that he may be liable to rectify defects in the work discovered since the performance thereof and during any period of maintenance provided for by the contract or subcontract.

(ii) The date of completion of a contract shall not in any event be deemed to be later than the following dates or the earlier of them should both occur namely;

- (a) The date on which the employer or any person or persons claiming under him enters into possession of or utilises the whole or substantially the whole of the building or other improvements to the land created by the work, and
- (b) If the contract provides for an Architect registered pursuant to the provisions of the Architects Act, 1963 or an Engineer registered pursuant to the provisions of the Engineers Registration Act, 1924 to certify for the purpose of defining the rights and obligations of the parties to the contract as to the completion or substantial completion of the work then the date as at which such architect or engineer so certifies such work to have been completed or substantially completed.

(iii) References to the completion of the work specified in any contract shall be deemed to include the completion of the work either -

- (a) By the contractor; or
- (b) By any person authorised by the contractor; or
- (c) By any claimant who has given notice of a lien or charge in relation to the contract or to any subcontract under the contract:

References to the completion of the work specified in any subcontract let by a contractor shall be deemed to include the completion of the work either -

- (a) By the contractor; or
- (b) By the subcontractor; or

- (c) By any person authorised by the contractor or authorised by the subcontractor; or
- (d) By any claimant who has given notice of a lien or charge in relation to the contract or to the subcontract or to any other subcontract under the contract.

Declared subcontractors

4. SUBCONTRACTORS MAY GIVE NOTICE - Any subcontractor may within seven days of commencing to perform any work give notice in writing to the employer setting out his name and address for service a short description of the work he has contracted to perform and the name of the person with whom the contract for the performance of such work by such subcontractor has been made by such subcontractor.

Rights of Lien and Charge

5. LIENS AND CHARGES IN FAVOUR OF CONTRACTORS, SUBCONTRACTORS AND WORKERS - (1) Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land, the contractor and every declared subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land, and every declared subcontractor or worker employed by the contractor or by any subcontractor to do any part of the work shall be entitled to a charge on the moneys payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract.

(2) The lien or charge of the contractor or of a declared subcontractor shall be deemed to secure the payment in accordance with his contract or subcontract of all moneys that are payable or are to become payable to him for his work.

(3) The total amount recoverable under the liens and charges of the contractor and of the declared subcontractors and workers employed by the contractor or by any subcontractor shall not, except in the case of fraud, exceed the amount payable to the contractor under his contract.

(4) The total amount recoverable under the liens and charges of all claimants who are employed as declared subcontractors or

workers by any contractor or subcontractor shall not, except in the case of fraud, exceed the amount payable under his contract or subcontract to that contractor or subcontractor, as the case may be.

6. CERTAIN MONEYS DEEMED TO BE INCLUDED IN AMOUNT PAYABLE TO CONTRACTOR OR SUBCONTRACTOR - For the purposes of the lien and charge of any claimant who is employed as a declared subcontractor or worker by the contractor or by any subcontractor, the amount of money payable to the contractor or subcontractor by whom the claimant is employed, or to any superior contractor, under his contract or subcontract shall be deemed to include all moneys paid in reduction of the contract price to any person other than the claimant, unless the payments are made in good faith, and not for the purpose of defeating or impairing a claim to a lien or charge existing or arising under this Act, and are not made in contravention of section sixteen or section seventeen of this Act.

7. LIABILITY OF OWNER WHO IS NOT THE EMPLOYER - (1) Where any owner is not the employer, the estate or interest of the owner in the land upon or in respect of which the work is to be done shall be subject to lien or liability as if he were the employer, to the extent to which the owner has consented in writing that he should be liable for the contract price or that his estate or interest in the land should be liable.

(2) References in this Act except in Sections four, thirteen, fourteen and nineteen to the employer shall be deemed to include references to an owner who has consented to be liable as provided in subsection (1) of this section, and references to the liability of the employer under his contract shall be deemed to include references to the liability of the owner under this section.

8. ASSIGNMENTS, ATTACHMENTS, ETC., TO BE VOID AS AGAINST SUBCONTRACTORS' OR WORKERS' CHARGES - (1) No assignment, disposition or charge (whether legal or equitable) that is made or given by any contractor or subcontractor (otherwise than to his workers for wages due to them in respect of his contract or subcontract) of or upon any money payable or to become payable to him under his contract or subcontract shall have any force or effect at law or in equity as against the lien or charge of any declared subcontractor or worker.

(2) No money that is payable or is to become payable to any contractor or subcontractor under his contract or subcontract shall be capable of being attached, or of passing or being charged by operation of law (otherwise than under this Act) so as to

defeat or impair the lien or charge of any declared subcontractor or worker.

9. PROVISIONS WITH RESPECT TO PURCHASERS - (1) Where any person (in this section referred to as "the purchaser") contracts to acquire an estate or interest in land on which work has been or will pursuant to such contract be performed, and either the contract provides for title to such estate or interest to pass to the purchaser or his nominee or for possession of the whole or part of the land to be given to the purchaser or his nominee prior to the expiration of sixty days from and after completion of the work or in fact title to such estate or interest does pass to the purchaser or his nominee or possession of the whole or part of the land is given to the purchaser or his nominee prior to the expiration of sixty days from and after completion of the work, then this Act except for section four shall apply to such contract as if the purchaser were and had been from the commencement of the work an employer and the person with whom he had contracted (in this section referred to as "the vendor") were and had been from the commencement of the work a contractor and the contract price were the total amount payable by the purchaser pursuant to his contract and the persons contracting with the vendor to perform the work or any part thereof were declared subcontractors.

(2) The vendor shall hand to the purchaser within seven days' of the "settlement" of such contract -

- (i) The notices that have been served on him pursuant to section four and
- (ii) A list of those contractors who pursuant to the provisions of the previous subsection are to be treated as regards the purchaser as declared subcontractors and the purchaser shall forthwith give notice of his contract with the vendor to the persons who have so given notice pursuant to section four and to the contracts so listed.

10. PROVISIONS WITH RESPECT TO MORTGAGED LAND - (1) Notwithstanding anything to the contrary in the Land Transfer Act 1952 section thirty seven, a mortgage registered prior to a notice claiming a lien shall rank after the lien -

- (a) if the mortgagee is a party to the contract in respect of which the lien arises and
- (b) insofar as the mortgage secures money that is advanced after written notice of the lien claim or

of the registration of the notice claiming the lien against the title to the land has been given to the mortgagee or to any solicitor for the time being acting for the mortgagee in respect of the mortgage.

(2) There shall be implied in every mortgage a power for the mortgagee to pay the moneys necessary to secure the discharge of a lien ranking in priority to the mortgage, such amounts so paid to be added to and form part of the principal money secured by the mortgage and bear interest accordingly.

(3) In determining priority between a lien and a mortgage in any case not governed by either the Land Transfer Act 1952 section thirty seven or subsection (1) of this section, the lien shall be deemed to come into existence and attach to the estate or interest in land affected thereby on the date the notice claiming the same is served on the employer pursuant to the provisions of this Act.

11. PRIORITY OF LIENS AND CHARGES - (1) Liens and charges shall have priority in the following order -

- (a) The liens and charges of workers for wages, not exceeding one hundred and fifty pounds in the case of any worker:
- (b) The liens and charges of workers for wages insofar as they are not included in the last preceding paragraph, and the liens and charges of declared subcontractors:
- (c) The liens of contractors, -

so that the lien or charge of a declared subcontractor shall have priority over the lien or charge of the contractor with whom his contract is made.

(2) If the money available is insufficient to meet the claims of two or more claimants whose liens or charges have equal priority under this section, the claims shall rank equally between themselves and abate in equal proportions.

(3) If two or more contractors are entitled to a lien on the same piece of land their claims and the claims of those claiming under them shall rank and abate in the same manner as if such contractors were declared subcontractors employed by the same contractor and in such case any party may apply to the Court to have consolidated the proceedings in respect of each contract.

12. TRANSMISSION AND ASSIGNMENT OF LIENS AND CHARGES - (1) When upon the death or bankruptcy of the person entitled to a lien or charge, or otherwise by operation of law, the debt secured by a lien or charge passes to any other person, the right to the

lien or charge shall pass therewith.

(2) A lien or charge may be assigned together with the debt secured thereby.

Notice of Lien or Charge

13. NOTICE OF LIEN - (1) Every person entitled to claim a lien on any land shall within sixty days of the completion of the work done by him give notice to the employer specifying the amount and particulars of his claim, and stating that he requires the employer to take the necessary steps to see that it is paid or secured to the claimant.

(2) He shall also give notice of having made the claim to the owner (if the owner is not the employer), to the contractor or subcontractor (if any) by whom he is employed, to every superior contractor, and to every other person who to the knowledge of the claimant would, but for the claim, be entitled to receive any money payable to that contractor or subcontractor or to any superior contractor.

14. NOTICE OF CHARGE - (1) Every subcontractor or worker entitled to claim a charge on any money payable to his contractor or to a superior contractor shall within sixty days of the completion of the work done by him give notice to the employer and to any superior contractor by whom the money is payable, specifying the amount and particulars of his claim, and stating that he requires the employer or superior contractor, as the case may be, to take the necessary steps to see that it is paid or secured to the claimant.

(2) He shall also give notice of having made the claim to the contractor to whom the money is payable and to every other person who to the knowledge of the complainant would, but for the claim, be entitled to receive any money payable to that contractor.

15. FORM OF AND TIME FOR GIVING NOTICE OF LIEN OR CHARGE - (1) A notice of lien or charge shall be in one of the forms in the Schedule to this Act or to the like effect, but its validity shall not be affected by any inaccuracy or want of form, if the property or money sought to be charged and the amount of the claim can be ascertained with reasonable certainty from the notice.

(2) A notice of lien or charge may be given although the work is not completed, or the time for payment of the money payable by the owner or of the money sought to be charged or of the money claimed has not arrived.

(3) A right to a lien or charge shall be deemed to be

extinguished unless notice thereof is given within the time limited by sections thirteen, fourteen or nineteen of this Act.

Duties and Obligations of Employer or Superior Contractor

16. CONSEQUENCES OF NOTICE OF LIEN OR CHARGE: (1) When a notice of lien or charge is given to the employer or to a contractor by a claimant not employed by him it shall be the duty of the employer or contractor to retain in his hands, until the claim is satisfied or otherwise disposed of, a sufficient part of the money payable or to become payable by him under his contract to satisfy the claim of the claimant.

(2) Subject to the provisions of this Act, the employer or contractor shall in every such case be personally liable to pay to the claimant the amount of his claim, not exceeding the amount that he is required by this section to retain, in the same manner and to the same extent as if the claimant had been employed by him personally.

Duty to retain part of contract price

17 - (1) In addition to the amount (if any) that he is required by section sixteen of this Act to retain, every employer or contractor, whether or not he has received any notice of lien or charge, shall retain in his hands until the expiration of sixty days after the date of the completion or abandonment of the work specified in the contract or subcontract the following percentage of so much of the contract price as has become payable at any time since the making of the contract or subcontract, or would be so payable but for a provision inserted in the contract or subcontract to secure its retention in conformity with this Act, namely:

- (a) Ten per cent of the first hundred thousand pounds or part thereof:
- (b) Five per cent of the next four hundred thousand pounds or part thereof:
- (c) Two and one-half per cent of the next five hundred thousand pounds or part thereof:
- (d) One per cent of the next one million pounds or part thereof:
- (e) One quarter per cent of any amount in excess of two million pounds.

(2) Where a contractor or subcontractor is in breach of his obligations under his contract the amounts which employers and contractors are required by sections sixteen and seventeen (1) of this Act to retain shall not as against any claimant to a charge be applied by the employer or contractor to the completion of the contract or for the payment of damages for non-completion or in payment or satisfaction of any claims against the contractor or any subcontractor or for any other purpose and the entitlement of the claimant to charge to such moneys so retained shall not be defeated by any counterclaim set off or crossdemand by or on the part of the employer or subcontractor against the person from whom the moneys have been so retained.

Procedure to determine claims

18. JURISDICTION - (1) Only a Magistrate's Court presided over by a Magistrate shall have jurisdiction in respect of actions matters questions and disputes arising under this Act, but subject to the rights of appeal given by Part V of the Magistrate's Courts Act 1947.

(2) A Magistrate may state any question of law arising in the course of any proceedings under this Act in the form of a special case for the decision of the Supreme Court, and a decision of the Supreme Court or any special case so stated shall be deemed to be a judgment of that Court within the meaning of the Judicature Act 1908 section sixty six.

19. - (1) Within ten days of service on him of any notice of lien or charge the employer shall file in the Magistrate's Court exercising civil jurisdiction nearest to the land on which the work is being or has been done and shall serve on the owner if he is not the employer the contractor and all declared subcontractors copies of an application in the form prescribed in the schedule hereto.

(2) The date of hearing of such application shall be not less than fourteen clear days after service of copies of the application and affidavit on all persons entitled by virtue of subsection (1) so to be served.

(3) Any party so served who claims to be entitled in such proceedings to a lien or charge under this Act or to any judgment pursuant to subsection (8) of this section shall not less than five clear days before the date of hearing serve a notice setting out particulars of his claim and the facts on which he relies to support it on the employer and all persons entitled by virtue of subsection (1) to be served with copies of the application and

affidavit.

(4) Any person claiming to be interested in the land in respect of which a lien is claimed or in the money in respect of which a charge is claimed may intervene in any action to enforce the lien or charge. Every such person may intervene by filing in the Court and serving on all the other parties an affidavit stating the nature of his interest.

(5) The Court after hearing all persons required as aforesaid to be served and any worker who may enter an appearance and any person who may intervene pursuant to subsection (4) of this section shall determine the entitlement to a lien or charge or to judgment pursuant to subsection (8) of this section of any party and any other question that may arise either forthwith in a summary way on the initial date of hearing or on such adjourned date as it may fix.

(6) The Court if the proceedings are adjourned -

- (a) may direct the trial of any issue;
- (b) may direct the payment of moneys into Court;
- (c) if it appears that questions call for determination affecting any worker mortgagee or other person who is not required to be served and who has not entered an appearance shall direct service of proceedings on such person;
- (d) may order discovery;
- (e) may order the provision of further particulars of any claim or defence;
- (f) may make such interim order for the custody or preservation of any property concerned as the Court shall think necessary or desirable, but the Court shall not except in special circumstances make any such interlocutory order at any time other than the initial date of hearing.

(7) It shall be the duty of parties to proceedings under this Act and their solicitors and counsel to give to the Court and to other parties all such information and to take all such other steps as shall ensure the expeditious settling of issues and determination of proceedings under this Act.

(8) The Court may in proceedings under this Act give judgment in favour of any party against any other party for the amount due under any contract.

(9) Should the employer default in carrying out the obligations

imposed on him by subsection (1) of this section the contractor or any declared subcontractor may institute proceedings in the same manner mutatis mutandis as is provided by subsection (1) in the case of an employer.

(10) Should the employer without reasonable cause default in carrying out the obligations imposed on him by subsections (1) and (7) of this section then notwithstanding the provisions of section five subsection (4) of this Act the Court shall if the money available is insufficient to satisfy the charges of all those entitled to a charge on moneys payable by the employer require the employer to pay in addition to the amount limited by that section an amount as damages arising out of such default on the employer's part which shall in any event be not less than one per cent of the amount so limited by section five subsection (4) for each week or part thereof that such default subsists.

(11) A declaration by the Court that a claimant is entitled to a lien or charge shall entitle the claimant to apply without further order of the Court for sale of the land pursuant to section twenty five directing a sale of the land.

(12) Notwithstanding any provision of the Companies Act 1955 or the Bankruptcy Act 1908 to the contrary it shall not be necessary to obtain the leave of any Court before joining a company in liquidation or a bankrupt as a party to any proceedings under this section.

(13) The costs of the employer on a solicitor and client basis shall except where subsection (10) of this section applies or the Court otherwise orders be a first charge on the moneys held by him and subject to any charge under this Act.

20. COURT MAY DISCHARGE LIEN OR CHARGE ON TERMS - The Court may at any time discharge a lien upon any land or a charge upon any moneys if it is satisfied:

- (a) That the party primarily liable to the claimant is willing and able to fulfil his obligations to the claimant under his contract with the claimant or under this Act without resort to the land subject to the lien or the moneys subject to the charge; or
- (b) That the party entitled to the land or moneys is willing and able to fulfil his obligations under his contract with the person under whom the claimant claims and his obligations to the claimant under this Act without resort to the land subject to the lien or the moneys subject to the charge; or
- (c) That the applicant for the order of discharge is

prejudicially affected by the lien or charge;

or on any other ground, and may make such order subject to payment into Court of the amount claimed or on such other terms as it deems just.

21. VEXATIOUS NOTICE OF LIEN OR CHARGE - If any person vexatiously or without any reasonable grounds gives a notice of lien or charge, or registers any lien, he shall be liable to pay to any person prejudicially affected thereby such reasonable damages as he sustains in consequence thereof.

22. EFFECT OF PAYMENT UNDER ORDER OF COURT - All payments made by an employer, contractor, or subcontractor to any person pursuant to an order of the Court made under this Act shall be a sufficient discharge to the person making the payment of his liability to pay the money to the person who, but for the order, would have been entitled to receive the money from him.

23. REGISTRATION OF LIENS - (1) No estate or interest in land of which the owner is registered as proprietor pursuant to the provisions of the Land Transfer Act 1952 shall be affected by a lien unless the notice claiming the lien is registered as provided by this section.

(2) A copy of the notice claiming the lien verified by a declaration in the form in the Second Schedule hereto, shall be an "instrument" within the meaning of the Land Transfer Act 1952 and shall be registered in the same manner as is provided by that Act for the registration of instruments. Notice of the registration shall be given by the District Land Registrar by registered letter to the registered proprietor of the estate or interest in land affected by the lien claim and to every person entitled to a mortgage or encumbrance over the said estate or interest.

(3) A notice claiming a lien shall not be subject to stamp duty and no fee shall be charged for the registration thereof.

24. DISCHARGE OF LIEN - (1) A lien registered pursuant to the provisions of section twenty three of this Act shall be deemed to have lapsed six months from and after the date of registration thereof unless within such time the Court has on such terms as it may think fit ordered to the contrary.

(2) A lien may be discharged by the claimant thereof either as to the whole or any part of the land affected, or the consent of such claimant may be given to the registration of any particular dealing expressed to be made subject to the rights of the leinor.

(3) Such discharge in the form in the Schedule to this Act or an order of the Court discharging a lien may be registered in the

same manner as a notice claiming a lien.

25. SALE TO ENFORCE LIEN AFTER JUDGMENT - (1) If the Court holds any claimant entitled to a lien then if the owner of the land subject to the lien fails within one calendar month from and after the date of such judgment to pay the claimant the amount which he has been held to be obliged to pay such successful claimant may without further order of the Court apply to the Sheriff in the district in which the land is situated for a sale of such land.

(2) The Sheriff shall make such sale on delivery to him of a copy of the decision, certified by the Registrar of the Magistrate Court, which shall be a sufficient warrant and authority to the Sheriff to effect and complete the sale in the same manner and with the same powers and authorities (including those relating to the execution of transfers and other instruments) as if it were a sale under a writ of sale pursuant to a judgment of the Supreme Court.

Lien on Personal chattels

26. SPECIAL PROVISION FOR ENFORCING LIEN ON PERSONAL CHATTELS -

(1) Where a worker has done work upon a chattel in his possession so as thereby to be entitled to a lien on the chattel for any amount, and the amount to which he is entitled remains unpaid for not less than two months after it ought to have been paid, he may in addition to all other remedies provided by law, cause the chattel to be sold by auction.

(2) Not less than three weeks' notice of the sale shall be given to the owner of the chattel as provided in section twenty-seven of this Act if his address is known to the worker, and also (whether his address is known or not) by advertisement in a newspaper published in the locality in which the work was done, or if there is no newspaper published in that locality, in a newspaper circulating in the neighbourhood, stating in each case the name of the worker, the amount of the debt, a description of the chattel, the time and place of sale, and the name of the auctioneer. The advertisement need not specify the name of the owner.

(3) The proceeds of the sale shall be applied, firstly, in payment of the costs of advertising and sale and, secondly, in payment of the amount due under the lien, and any surplus shall, as soon as may be after the completion of the sale, be paid to the Registrar of the Magistrate's Court nearest to the place of sale, to be held by him for the benefit of the person entitled to it.

General Provisions

27. SERVICE OF NOTICES - (1) Except where otherwise specially provided, any notice required to be given to any person for the purposes of this Act (including any application or other document provided for by section nineteen) may be given by causing it to be delivered to that person, or to be left at his usual or last known place of abode or business or at any address specified by him for that purpose, or to be posted in a letter addressed to him at that place of abode or business or address.

(2) If any such notice application or other document is sent to any person by registered letter it shall be deemed to have been delivered to him when it would have been delivered in the ordinary course of post, and in proving the delivery it shall be sufficient to prove that the letter was properly addressed and posted.

(3) Documents to be served on the Crown shall be served

(a) by serving a copy on the Solicitor-General and

(b) by serving a copy on the officer in charge of the departmental office (if any) named or designated in the contract as the address at which documents under this Act shall be served.

28. SAVINGS OF OTHER REMEDIES - Except as otherwise expressly provided, nothing in this Act shall be construed to affect the right of any person to whom a debt is due for work done or materials supplied to maintain a personal action to recover the debt against any person liable for it; and the judgment (if any) obtained by the plaintiff in any such action shall not affect any lien or charge or other right to which he is entitled under this Act.

29. CERTAIN LANDS NOT AFFECTED - Nothing in this Act shall be deemed to create or give to any person any right or remedy against any land vested in the Crown or in any local authority or public body.

30. This Act shall apply to Maori land as defined in the Maori Affairs Act 1953 notwithstanding anything in that Act or any other Act expressed or implied to the contrary.

31. ACT TO BIND CROWN - Subject to the provisions of section twenty-nine of this Act this Act shall bind the Crown.

32. REPEALS AND SAVINGS - (1) The Wages Protection and Contractors' Liens Act 1939 and its amendments are hereby repealed.

(2) Subject to subsection four of this section all liens, charges, notices, orders, registers, registrations, records, instruments, and generally all acts of authority that originated under any

enactment hereby repealed, and are subsisting or in force on the commencement of this Act, shall enure for the purposes of this Act as fully and effectually as if they had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.

(3) All matters and proceedings commenced under any such enactment and pending or in progress on the commencement of this Act may be continued, completed, and enforced under this Act.

(4) All liens registered against any land pursuant to the provisions of the Wages Protection and Contractors Liens Act 1939 shall lapse at the expiry of six months from the coming into force of this Act unless within such time a Magistrate's Court orders to the contrary.

(5) Notwithstanding the provisions of subsection (1) the Wages Protection and Contractors' Liens Act 1939 and its amendments shall continue to apply and this Act shall not apply to contracts entered into before the commencement date and to subcontracts and contracts of employment for the performance of the work specified in such contracts.

SCHEDULE

FORMS

Section 4

(1) Notice by subcontractor

To C.D. of

Take notice that I have entered into a contract with E.F. to
carry out on (your) property at the following
work [Here give a short description of the nature of the work]

My address for service is:-

Dated this

day of

19

(For and on behalf of)

.....
(Signature of subcontractor)

Section 19

(4) Application to Magistrate's Court

In the Magistrate's Court
Held at

In the matter of the
Contractors' Liens Act 1966

I, C.D. of _____ hereby apply to the Magistrate's Court
at _____ pursuant to section 19 of the above Act for
an order determining the entitlement to the relief he seeks of
E.F. and any other claimant who may give the appropriate notice
under that section. A copy of the notice given by the said E.F.
is annexed hereto. The date and time of hearing are day
the _____ day of. 19 at _____ o'clock in the
noon.

The following information is given pursuant to my duty
under the said Act.

1. The land in question is
2. I am the owner of the following estate or interest in the
land. (or the owner of the land is G.H. and I am the employer
within the meaning of the said Act in the following circumstances).
3. The name and address of the head contractor are
4. The names and addresses for service of the declared
subcontractors are
5. The contract is (not completed, was completed on [date],
was abandoned on [date]).
6. The head contract price is £ _____ of which £ _____ has
been paid.
7. My interest in the said land is subject to a mortgage
securing a principal sum of £ _____ to H.I. of
The whole (or £ _____) of the principal sum has been paid and
the last payment to me on account of the principal sum was on
(date)
8. I bring the following additional relevant matters to the
attention of the Court -
9. I will serve this application on
10. My solicitor and address for service is

Dated this _____ day of _____ 19

.....
[signature of employee or his
solicitor]

To: The Registrar of the Magistrate's Court at

Section 23(3)

(5) Declaration on Registration of Lien

I, A.B. of do solemnly and sincerely declare that
I believe that I [or C.D. by whom I am employed] am justly
entitled to the amount claimed in the (annexed) (foregoing)
notice of claim of lien and that such of the matters referred
to in the said notice as are within my own knowledge are true
and the rest I believe to be true.

And I make etc.

- - - - -

Section 24

(6) Discharge of Lien

In the Matter of the Contractors'
Liens Act 1966

And

In the Matter of the notice claiming
lien registered in the Land Registry
Office at under No.

I E.F. of the claimant named in the
above-mentioned notice, hereby discharge the same [(where part
only of the land is to be discharged) as to the following land,
namely:-]

Dated this day of 19

.....
(claimant)

Witness:
Occupation:
Address: