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NOTES

MECHANICS' LIENS IN MONTANA

To give security to persons furnishing labor and materials for the improvement of realty, statutes very generally grant a so-called "mechanic's lien" against the property which has thus been enhanced in value. Attorneys are called upon frequently to deal with these statutes, and the problem of interpretation which their provisions raise deserves an attempt to synthesize the Montana law with respect to mechanics' liens. This Note will establish from the statutes and cases which persons are entitled to the lien, the scope of the lien given, the steps necessary to perfect it, and the degree of priority such lien has over conflicting liens, mortgages, and conveyances.

NATURE OF THE LIEN

The mechanic's lien is a creature of statute and is not a common law right. It is given to protect one who has enhanced the value of property through performing labor or furnishing materials by giving him a preferred claim against the property for the value of labor or materials which have become inseparably part of the building, mine or other property involved. This lien is independent of any personal remedy he might have. It is remedial in character and is said to rest upon a foundation of equity and natural justice. The Montana statute is contained in the Revised Codes of Montana, 1947, Title 45, Chapter 5.

GENERAL CONSTRUCTION

The Supreme Court of Montana has developed a definite policy for interpretation of the different sections of the mechanic's lien law. Section 45-502 specifies the steps necessary to perfect this lien. The steps set out are purely statutory and must be strictly followed since this chapter creates a new right. Allegations of compliance with the terms of section 45-502 are therefore jurisdictional in an action to enforce the lien. But once these various steps have been completed the statute will be further liberally construed since it is remedial in nature and rests upon broad principles of natural equity and commercial necessity.

PHILLIPS, MECHANICS' LIENS § 8 (2nd ed. 1883); 36 AM. JUR., Mechanics' Liens § 6 (1941); Merrigan v. English, 9 Mont. 113, 22 Pac. 454 (1889) (discussing the historical background of the Montana statute).

The common law lien was a right to retain possession, and the laborer or materialman was, by the nature of the subject of his work, thus precluded from this security device available to other workmen who enhanced the value of property by labor and materials. Fleming-Gilchrist Constr. Co. v. McGonigle, 338 Mo. 56, 89 S.W.2d 15, 107 A.L.R. 1003 (1935); McGlaunlin v. Wormser, 28 Mont. 177, 72 Pac. 428 (1903); Merrigan v. English, 9 Mont. 113, 22 Pac. 454 (1889); 36 AM. JUR., Mechanics' Liens § 3 (1941).

Mochon v. Sullivan, 1 Mont. 470 (1872).

Mochon v. Sullivan, 1 Mont. 470 (1872); 36 AM. JUR., Mechanics' Liens § 4 (1941).

McGlaunlin v. Wormser, 28 Mont. 177, 72 Pac. 428 (1903).

Ibid.

McGlaunlin v. Wormser, 28 Mont. 177, 72 Pac. 428 (1903); accord, Federal Land Bank v. Green, 108 Mont. 56, 90 P.2d 489 (1939); Rogers-Templeton Lumber Co. v. Welch, 63 Mont. 287, 203 Pac. 600 (1922); Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 Mont. 334, 188 Pac. 144 (1920); Crane & Ordway Co. v. Baatz, 53 Mont. 438, 164 Pac. 533 (1917); Stritzer-Spaberg Lumber Co. v. Edwards.
There are some principles applicable to mechanics’ liens which are independent of any particular words in the statute.

1. The lien must rest upon a contract debt made by the contractor directly or indirectly with the owner of the property unless the owner chooses to ratify what has been done or estops himself from questioning the lien. It is not sufficient that the work enhances the value of the property. The mechanic is bound by the contract he makes and cannot enforce a lien for items in derogation of that contract. However, if the contract between the owner and the principal contractor provides for a waiver of lien, the subcontractor is not bound by that waiver even if he had knowledge of the terms of the contract providing for the waiver unless he clearly assents to be bound by its terms.

2. A mechanic’s lien is assignable upon completion of the contract, but prior to that time, it is inchoate and not assignable. However, if a building contract is assigned before completion with the owner’s consent and the assignee completes the contract, then he is entitled to file and enforce a lien in his own name both for his own labor and materials and for those furnished by his assignor.

3. A person who can fulfill the requirements of the chapter dealing with mechanics’ liens may file a lien under it, notwithstanding the fact that he might also assert another type of lien.

PERSONS ENTITLED TO LIEN

Section 45-501 specifies the persons given the right to claim a mechanic’s lien. After listing eleven occupational groups which can qualify

50 Mont. 49, 144 Pac. 772 (1914); Ivanhoff v. Teale, 47 Mont. 115, 130 Pac. 972 (1913); Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413 (1904); Mochon v. Sullivan, 1 Mont. 470 (1872); Black v. Appoloonio, 1 Mont. 542 (1871).


McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. 428 (1903); Wortman v. Klein-schmidt, 12 Mont. 316, 30 Pac. 280 (1892).

Morin Lumber Co. v. Person, 110 Mont. 114, 99 P.2d 206 (1940); Miles v. Coutts, 20 Mont. 47, 49 Pac. 333 (1897).

Higby v. Hooper, 124 Mont. 331, 221 P.2d 1043 (1950); Morin Lumber Co. v. Person, 110 Mont. 114, 99 P.2d 206 (1940); Aikens v. Frank, 21 Mont. 192, 53 Pac. 538 (1898) (plaintiff, materialman, was a surety on contractor's bond against mechanics' liens and was held to be estopped).

Davis v. Bilsland, 85 U.S. 659 (1873); Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 489, 111 P.2d 267, 283 (1940); Mason v. Germaine, 1 Mont. 263 (1870).


Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 489, 111 P.2d 267, 277 (1940) (entitled to repairman's lien as well as mechanic's lien).

This section provides: "Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person, performing any work and labor upon, or furnishing any material, machinery or fixture for, any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, coal mine, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas, or water works or plant, or any improvements, upon complying with the provisions of this chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done or material is furnished."

The word "property" as used in the last clause of this section has the same meaning as "building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, coal
by furnishing labor or materials the provision continues, "and any other person performing any work and labor upon or furnishing any material. . . ."

The cases that have construed this section have determined that it includes, as those entitled to a lien, independent contractors and corporations as well as those listed in the statute. It also encompasses subcontractors, but how remote they may be and still claim the advantages given under this chapter is an undecided question. In Daignan v. Montana Club," the Montana Club contracted with one Wortman to erect the building in question. Wortman contracted with Harrison who in turn contracted with the Helena Co-operative, and this company contracted with the plaintiff. Thus the plaintiff was a subcontractor in the third degree. It was held that the plaintiff was entitled to a lien. This holding was based on 5th Div. Comp. Stat., 1887, sec. 1391, which provided:

All persons furnishing things or doing work, as provided by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner or proprietor, his agent or trustee.

The court went on to say that if it were the legislature, it would never enact such a law since it would lead to multiplicity of liens. There would be no limit to the number of persons who might claim a lien. This section was not contained in the codification of 1895 or thereafter. This case was followed in Eccleston v. Hetting, but under the same statute. Since the Eccleston case, no case has contested, on the ground of remoteness, the right of a subcontractor to have a lien. Numerous cases have allowed a subcontractor to recover, and one case allowed a subcontractor in the second degree to maintain an action on a mechanic's lien, but this particular point was not in issue.

mine, quartz lode, tunnel, city, or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas, or water works or plant, or any improvements; and is used in this section and the remaining sections of this chapter in order to avoid repeating the long list of terms just enumerated. Stritzel-Spaberg Lumber Co. v. Edwards, 50 Mont. 49, 144 Pac. 772 (1914).

The word "structure" as used in this section means something that is attached to the land under the rule of noscitur a sociis. Thus a "structure" to be lienable must be attached to the land at the time the labor is performed or materials used. Barnes v. Montana Lumber & Hardware Co., 67 Mont. 481, 216 Pac. 335 (1923) (a threshing machine is not a structure); Cascade Electric, Inc. v. Associated Creditors, Inc., 124 Mont. 370, 224 P.2d 146 (1950) (a platform merely laid upon the ground is not a structure). Section 67-209 provides in substance that a thing is affixed to the land when it is imbedded in the ground or permanently resting upon it or permanently attached by means of cement, plaster, nails, etc. "Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 111 P.2d 267, 280 (1940).

16 Mont. 189, 40 Pac. 294 (1895).
17 Mont. 88, 42 Pac. 105 (1895)."
The rights of subcontractors have been protected by statute in two different ways. Under the New York system, which prevailed in this state prior to 1887, a subcontractor obtains his lien by way of "equitable subrogation" from the contractor, accomplished by the subcontractor's giving notice to the owner of his claim and of the probable value of his services or materials. The owner is thereupon entitled to withhold from money due to the contractor an amount sufficient to meet the subcontractor's claim.

In 1887 the Montana statute was amended to embody the Pennsylvania system. This rule gives a lien to the subcontractor directly rather than by subrogation. It is based on the reasoning that by virtue of the statute the general contractor is created the agent of the owner for the purpose of hiring others, who thus have a lien directly against the property of the "principal." Under this system neither the amount in the original contract nor payment to the original contractor is a limitation upon or defense to the claim of a subcontractor, whereas under the New York system the subcontractor, claiming by subrogation, cannot recover more than is remaining due to the contractor from the owner. Thus, under the Pennsylvania system which now exists in this state the subcontractor has a direct lien for the reasonable value of his contribution to the improvements, and no notice to the owner is necessary.

In the case of Merrigan v. English, the owner contended that the statute was unconstitutional since it gave the plaintiff, a subcontractor, a lien on the premises, although the owner had no knowledge of his employment and had not given the contractor any authority to enter into a contract with the plaintiff. The basis of the constitutional attack was not stated by the court, but it appeared to be based on lack of due process under the statute. To this contention the Supreme Court of Montana replied that there is very little difference between an agency created by a statute and an implied agency. The owner, in contracting, does not contemplate that the contractor will do all the work, and he does contemplate that others will be employed. He also knows that the law gives these persons a lien. Therefore he makes the contract with full knowledge of the implied agency and of his liability. Also the owner obtains the benefits of the subcontractor's labor and can protect himself by exacting a bond. Hence the owner has notice, and there is no lack of due process.

LABOR AND FURNISHING OF MATERIALS

For a person to claim a lien under this chapter, the labor or materials furnished must have been expended on the building, structure, etc., itself, and not upon something else that produced it as a result. Thus a person acting as a general manager or agent of the lienee is not entitled to a lien, but a person who is hired to do supervisory work in connection with the construction is entitled to a lien.

[Merrigan v. English, 9 Mont. 113, 22 Pac. 454 (1889).]
[Ibid.]
[Smallhouse v. Kentucky and M. G. and S. M. Co., 2 Mont. 443 (1876).]
[Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 499, 111 P.2d 267, 281 (1940). This case distinguished the Smallhouse case, supra, note 22, on two different grounds. First, the claimant in the Smallhouse case was hired as a general manager and agent of the corporation, and he was actually the corporation at the place of the work by reason of the agency. His supervision was in-
Under our statute one may have a mechanic’s lien for labor performed in hauling items that will become part of the building if it is a constituent element of the main contract. A person performing architectural services which included such technical work as sampling of ore, metallurgical tests, preparation of mining plant specifications and making blue prints used in the construction of a quartz mill may claim a lien. A miner may claim a lien upon his employer’s interest for work performed in a mine; and a mechanic may claim a lien for labor performed in the exploitation and sampling of mining claims, such as in making repairs and alterations, building roads, cutting cordwood for fuel, keeping machinery in order, clearing away debris, and the like. One may also have a lien for labor performed in repairing tools and machinery if they are attached to the property.

It is not necessary that at the time of the sale of the material there be an understanding that the items will be used in a building, nor need they have been furnished upon the credit of that building. However, for material to be the basis of a lien under this section, the material must enter into the structure of the building and become affixed to it. The principle on which this statute is grounded is that the materialman who enhances the value of the real property by furnishing material which becomes a constituent part thereof shall have security for its value. Therefore, a stovepipe cover which is removed when the flue is used is not lienable, nor is coal oil for illuminating purposes, mica grease and oil for lubricating purposes, and gasoline used for fuel, since they do not enhance the value or become part of the machinery.

There is no decision of the Supreme Court of Montana defining the word “material” as used in the statute, but there is a case defining the word “material” as used in a surety’s bond against mechanics’ liens, which may be helpful in determining a proper definition. In Gary Hay & Grain Co. v. Carlson, the Supreme Court of Montana was called upon to construe a provision of a surety bond furnished to the state highway commission for the construction of a road. The bond was conditioned that the contractor should “pay all persons furnishing material or performing labor in and about the construction.” The issue concerned what the word “material” covered. The court held that it encompassed only that which had gone into

Incidental to his main task. Second, the statute under which the Smallhouse case was decided had been amended to include the words “foreman” and “engineer” alongside the words “workman” and “laborer.” (Code of Civil Procedure, 1895, § 2130.)


Id. at 494, 111 P.2d at 279.

McIntyre v. MacGinniss, 41 Mont. 87, 108 Pac. 353 (1910).


Id. at 488, 111 P.2d at 277.

A. M. Holter Hardware Co. v. Ontario Mining Co., 24 Mont. 198, 61 Pac. 8 (1900).

Missoula Mercantile Co. v. O’Donnell, 24 Mont. 65, 60 Pac. 594 (1900).

A. M. Holter Hardware Co. v. Ontario Mining Co., 24 Mont. 198, 61 Pac. 8 (1900). See also Barnes v. Montana Lumber & Hardware Co., 67 Mont. 451, 216 Pac. 335 (1923).

70 Mont. 111, 255 Pac. 722 (1927).
and become a part of the completed construction, such as gravel, piles to
hold fills, explosives used for moving rock, etc., and did not refer to sup-
plies, such as hay and grain to feed horses, oil and gas for trucks, or food-
stuffs consumed by laborers in construction camps when a mere convenience
and not a necessity.

Since fixtures are part of the building, the lien given by this section ex-
tends to them. Therefore a heating plant and steam pipes which ran
through a greenhouse, and easing in an oil well were fixtures to which the
lien extended.

PERFECTING THE LIEN

Section 45-502 deals with the perfection of the lien. This section is
most important to the attorney since failure to comply strictly with the
terms of this section prevents the lien from arising.

Section 45-502 provides for the time within which a lien claim must
be filed. Under this section the Supreme Court of Montana has determined
that if there is one contract the lien is enforceable for all the items of the
account, and the commencement of the running of time is from the delivery
of the last item, notwithstanding the fact that delivery is made upon dif-
ferent days. Where materials are delivered under separate and distinct
contracts, the lien should be filed within the time prescribed by the statute
after the last delivery under each of such contracts. Mere lapse of time
between furnishing part of the labor and materials and the completion of
the project, while an important circumstance, is not conclusive upon the
question of whether it falls under one or several contracts.

If the labor or material were furnished under an open account, it is
quite clear that under this statute the time for filing is ninety days after
the last item was furnished, and if the work be abandoned by the owner
of the premises, the time for filing commences to run from the time the
work ceased.

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a Bartholomew v. James, 76 Mont. 359, 246 Pac. 771 (1926).
b Ibid.
c Callendar v. Crossfield Oil Syndicate, 84 Mont. 263, 275 Pac. 273 (1929).
d McGlaunlin v. Wormser, 28 Mont. 177, 72 Pac. 428 (1903).
e The part of § 45-502 dealing with the time within which a lien must be filed pro-
vides: "Every person wishing to avail himself of the benefits of this chapter must
file with the county clerk of the county in which the property or premises men-
tioned in the preceding section is situated, and within ninety days after the ma-
terial or machinery aforesaid has been furnished or the work or labor performed
... and when there is an open account between the parties for labor, material, or
machinery, such lien may be filed within ninety days after the date of the last
items in such account, and include all items and charges contained therein, for
material or machinery furnished for or work performed on, the property on which
the lien is claimed."

f Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 486, 111
P.2d 267, 275 (1940); Helena Steam-Heating and Supply Co. v. Wells, 16 Mont.
65, 40 Pac. 78 (1895).
g Helena Steam-Heating and Supply Co. v. Wells, 16 Mont. 65, 40 Pac. 78 (1895).
h Bartholomew v. James, 76 Mont. 359, 246 Pac. 771 (1926).
i Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 487, 111
P.2d 267, 276 (1940); Rogers-Templeton Lumber Co. v. Welch, 63 Mont. 267, 208
Pac. 600 (1922).
improvement before the completion thereof, by the owner of the premises, without
fault on the part of the contractor, does not abrogate the right of the contractor,
laborers, and material men to mechanics' liens for the value of the work done and
the material furnished. In such case, the building or improvement is to be deemed
completed, so far as the rights of persons to assert liens is concerned."
In addition, section 45-502 provides that every lien claimant must file an account of the amount due and a description of the property to be charged, verified by affidavit.

The term "just and true account" as used in this section means that a person should honestly state his account. It does not mean the amount the court or jury would find due. A claim for a lien for a greater amount than a party shows himself entitled does not vitiate the lien if it was not accompanied by fraud. From this it follows that a claim which contains some non-liable items will also be upheld if it results from honest error. Further, it is not necessary that the claimant pay those who are employed by him in order to have a valid lien, since they may be paid by the owners, and the owner no wise prejudiced. If the claimant pays them, he simply adds that amount to his lien. Also under the lien law as it now stands, the owner in order to protect his property against liens should see that the subcontractors are paid.

There is no requirement that the account be itemized. All that the statute requires is that the lien contain "a just and true account of the amount due." (Emphasis added.) Further, section 45-503 does not require that the county clerk make an abstract containing an itemized account but rather just an abstract of the "amount thereof." It is also quite proper if the account is itemized.

Under section 45-502 the lien must contain:

. . . a correct description of the property to be charged with such lien . . . , but any error or mistake in the . . . description does not affect the validity of the lien, if the property can be identified by the description. . . .

As was previously mentioned, the lien given under section 45-501, is primarily upon the building, etc., and though section 45-504 extends this lien to the land in certain instances, the property to be described under section 45-502 is the building or improvement upon which the lien is

"This part of § 45-502 provides that every lien claimant must file "a just and true account of the amount due him, after allowing all credits, and containing a correct description of the property to be charged with such lien, verified by affidavit, but any error or mistake in the account or description does not affect the validity of the lien, if the property can be identified by that description; which paper containing the account, description, and affidavit is deemed the lien. . . ."

"Black v. Appolono, 1 Mont. 342 (1871) : "... all that our statute requires is, that a person wishing to avail himself of the benefits of it should honestly state his account. The term 'just and true' does not necessarily imply more than this. Neither does 'a just or true account' imply, necessarily, the exact account a jury or court might find due under the contract." See also McIntyre v. MacGinniss, 41 Mont. 87, 108 Pac. 353 (1910) ; Smith v. Sherman Mining Company, 12 Mont. 524, 31 Pac. 72 (1892).

"Smith v. Gunniss, 115 Mont. 362, 144 P.2d 168 (1943) ; Eskerstrand v. Wunder, 94 Mont. 77, 20 P.2d 622 (1933) ; Black v. Appolono, 1 Mont. 342 (1871).


"Cole v. Hunt, 123 Mont. 256, 211 P.2d 417 (1949). This section only requires that "The county clerk must indorse . . . and make an abstract . . . containing . . . the amount thereof. . . ." See also McIntyre v. MacGinniss, 41 Mont 87, 108 Pac. 353 (1910).

"Neuman v. Grant, 36 Mont. 77, 92 Pac. 43 (1907).

"See note 15 supra.

"See note 74 infra.
The purpose of giving a description of the improvement or building is to advise the owner or subsequent purchaser and encumbrancer of the existence of the lien. All that is necessary under this section is that the property be identified by the description. The Supreme Court of Montana has said that "any description which will enable one familiar with the locality to identify the property upon which the lien is claimed is sufficient." Thus a description of the building alone without the description of the land would be sufficient. Further, the claimant is not required to obtain a survey to locate the improvement, nor is he required to give the boundaries of the land. It is sufficient if the property can be identified by the name.

In determining the sufficiency of a description of an improvement under the above rule, a person may look to the entire contents of a lien, including the materials used in the building, to distinguish the building the lien is claimed upon from surrounding similar buildings. Ordinarily an inadequate description of the property cannot be reinforced by oral evidence, but if the description is ambiguous, it may be explained and the premises identified by oral evidence. The lien will also be upheld if, by rejecting the erroneous part of a description, enough will remain to identify the property.

When the description of the property in the lien is so uncertain and confusing that it is impossible for the court to ascertain whether any of the lands are subject to the lien, the lien is invalid.

-Midland Coal & Lumber Co. v. Ferguson, 61 Mont. 402, 202 Pac. 389 (1921); Johnson v. Erickson, 56 Mont. 550, 185 Pac. 1116 (1919); Stritzel-Spaberg Lumber Co. v. Edwards, 50 Mont. 49, 144 Pac. 772 (1914); Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413 (1904); Whiteside v. Lebcher, 7 Mont. 473, 17 Pac. 548 (1888).
-Smith v. Sherman Mining Co., 12 Mont. 524, 31 Pac. 72 (1892).
-Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 556, 77 Pac. 413, 416 (1904). The claim of lien described the building as "that certain two-story brick mill building," and described the property insufficiently. However, there was only one two-story brick building, and it was known as the paper mill of the defendants. Thus the court thought the description was sufficient. See also Continental Supply Co. v. White, 92 Mont. 254, 12 P.2d 569 (1932); Callender v. Crossfield Oil Syndicate, 84 Mont. 263, 275 Pac. 273 (1929); Dean v. Stewart, 49 Mont. 506, 143 Pac. 965 (1914); Ivanhoff v. Teale, 47 Mont. 115, 130 Pac. 972 (1913).
-Midland Coal & Lumber Co. v. Ferguson, 61 Mont. 402, 202 Pac. 389 (1921); Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413 (1904).
-Midland Coal & Lumber Co. v. Ferguson, 61 Mont. 402, 202 Pac. 389 (1921); Smith v. Sherman Mining Co., 12 Mont. 524, 31 Pac. 72 (1892).
-Federal Land Bank v. Green, 108 Mont. 56, 90 P.2d 489 (1939). Here the claim of lien described the property as "that certain frame building erected upon . . ." and then followed a legal description which, however, covered several frame buildings. The court held that the description was sufficient since a person familiar with the locality could identify the building because only those materials listed in the lien would be used in this particular building. Accord, Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 479, 111 P.2d 267, 272 (1940).
-Johnson v. Erickson, 56 Mont. 550, 185 Pac. 1116 (1919); Goodrich Lumber Co. v. Davis, 1 Mont. 76, 32 Pac. 252 (1888).
-Midland Coal & Lumber Co. v. Ferguson, 61 Mont. 402, 202 Pac. 389 (1921). The lien described the property as situated on the NE 1/4 of the NW 1/4 when in fact it was on the NW 1/4 of the NW 1/4. This, however, was the only building on the NW 1/4 and was quite generally known. The court said that if we reject the word "NE 1/4", the part that remains (NW 1/4) will be sufficient, if with the description of the building, one familiar with the locality can identify it. Accord, Johnson v. Erickson, 56 Mont. 550, 185 Pac. 1116 (1919).
-Ivanhoff v. Teale, 47 Mont. 115, 130 Pac. 972 (1913).
If one fails to establish a lien on the property because of non-observance of the statutory requirements, he cannot foreclose the lien. One can probably correct a faulty description by filing a new lien, but when the time for filing a lien has expired, it cannot be amended to remedy the faulty description since there is no statute authorizing the amendment of a mechanic's lien.\textsuperscript{a}

Section 45-502 also requires that the lien be "verified by affidavit;" and this section does not contain a clause protecting against errors in the affidavit as it does for the account and description. If the lien does not contain an affidavit or if the affidavit is materially defective, the lien is invalid.\textsuperscript{b} The affidavit must verify that the statement of account of the materials furnished is a just and true account, that they were furnished and delivered for the purpose of being used in the building, and that all the facts stated in the notice are true; and it must also verify the description.\textsuperscript{c}

The reason for the affidavit and the test of compliance was stated by the Supreme Court of Montana in Crane & Ordway Co. v. Baatz.\textsuperscript{d}

The purpose of the affidavit is clear enough. It is not merely to entitle the lien claim to record, but to furnish a sanction for it in such an oath as will subject the affiant to punishment for perjury if it be false in material particulars.

Section 45-503\textsuperscript{e} appears to prescribe the duties of the county clerk, but the Supreme Court of Montana has construed this section as determining what the lien must contain and as interpreting the previous section. Under this section the lien must contain "the name of the person against whose property the lien is filed." There is a conflict of decisions in this state whether the lien should contain the name of the record owner or the person for whose use and benefit the property is improved. It is important that this conflict be resolved since a lien failing to set forth "the name of the person against whose property the lien is filed" is fatally defective.\textsuperscript{f}

In Missoula Mercantile Co. v. O'Donnell,\textsuperscript{g} the Supreme Court of Montana, on motion for rehearing, concluded that under section 45-511, defining "owner" as any person "for whose use, benefit, or enjoyment any property, building . . . is constructed, repaired, or altered, is deemed the owner thereof . . . ," and under section 45-503, above, the name to be set forth in the claim of lien is the name of the owner of the interest to

\textsuperscript{a} Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 Mont. 334, 188 Pac. 144 (1920); Johnson v. Erickson, 56 Mont. 550, 185 Pac. 1116 (1919).

\textsuperscript{b} Crane & Ordway Co. v. Baatz, 53 Mont. 438, 164 Pac. 533 (1917).

\textsuperscript{c} Rogers-Templeton Lumber Co. v. Welch, 56 Mont. 321, 184 Pac. 838 (1919); Mills v. Olsen, 43 Mont. 129, 115 Pac. 33 (1911).

\textsuperscript{d} 53 Mont. 438, 444-45, 164 Pac. 533, 535 (1917).

\textsuperscript{e} This section provides: "The county clerk must indorse upon every lien the day of its filing, and make an abstract thereof in a book by him kept for that purpose, and properly indexed, containing the date of the filing, the name of the person holding the lien, the amount thereof, the name of the person against whose property the lien is filed, and the description of the property to be charged with same."

\textsuperscript{f} Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 Mont. 334, 188 Pac. 144 (1920); Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. 594 (1900).

\textsuperscript{g} 24 Mont. 65, 60 Pac. 594 (1900).

\textsuperscript{h} Revised Codes of Montana, 1947, § 45-511.
be affected by or charged with the lien. Further, the mention of the record owner is not sufficient unless the labor or material is for the benefit or use of his property or structure.

The court in *Blose v. Havre Oil & Gas Co.*, criticized this part of the ruling of the *O'Donnell* case by saying:

... the name which must appear in the claim in order to enable the county clerk to perform his duty is not necessarily that of "the person to whom such materials were furnished," but that of "the person against whose property the lien is filed." The lien affects the title of the owner at the time of filing, regardless of who owned the property at the time the contract was made or the lien attached; it is therefore the name of the owner at the time of the filing which must appear.

The reason given by the court for this rule was to insure the indexing of the lien in such a manner as to advise the owner, subsequent purchasers or encumbrancers, and parties examining the title of the existence of the lien. The *Blose* case, being later, would seem to control.

The *Blose* case also lays down the better rule since it is designed to inform subsequent purchasers and thus more fully carry out the purpose of filing. Further, the *O'Donnell* case relied heavily upon the definition of owner as given in section 45-511, but this section is not applicable to the question. Section 45-503 does not require the owner's name as defined in section 45-511 to be given, but rather "the name of the person against whose property the lien is filed." If the legislature had intended the word "owner" as defined by section 45-511 to be used, they would have used the word "owner;" but they set up an entirely different definition.

**THE SCOPE OF THE LIEN**

Section 45-504 tells the attorney what property is affected by the lien he has filed. This is important not only for foreclosure of the lien but for bargaining purposes as well.

Under the general rule in most states, the lien attaches to the particular lot or tract on which the labor was performed or the materials furnished, but the rule under our statute is narrower. Our statute, as was previously shown, gives the lien primarily upon the building, structure or improvement. This section extends the lien to the land in certain cases, however.

The first thing to be noted under this section is that a mechanic's lien does not attach to public property. Nor can a mechanic obtain a

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80Bartholomew v. James, 76 Mont. 359, 246 Pac. 771 (1926); Big Blackfoot Milling Co. v. Blue Bird Mining Co., 19 Mont. 454, 48 Pac. 778 (1897).
81This section provides: "The lien given extends to the lot or land upon which any such building, improvement, or structure is situated, to the extent of one acre, if outside of any town or city, or if within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien. . . ."
lien on quasi-public property such as an irrigation district." However, under the homestead law as it has been construed, a mechanic's lien may attach for both labor and material.

When the building is without a city or town, the lien extends to one acre. The one acre which is generally affected is the one of which the building or improvement is the geographical center. The fact that the description in the lien includes more than one acre of land does not affect the validity of the lien since all persons are charged with the knowledge that the statute gives a lien on the building and to a certain area around it, and this area can be determined by the court.

It was early decided by the supreme court of this state that the restriction to one acre of land is not applicable to lode mining claims, since a person complying with the statute has a lien upon a "quartz lode." The words referring to a lot or tract of land upon which a building, structure, or improvement is located does not specify an acre or interest in a lode mining claim. Therefore a lien claimant has a lien upon the entire mining claim.

The last part of section 45-504 provides that if a person owns less than a fee simple estate, only his interest is bound. The interest of the person which is bound by the lien is the interest he had at the time of the commencement of the work, and not a lesser interest caused by a collateral transaction to which the lien claimant was not a party. Therefore a lien against a contract purchaser affects only his equitable interest, and the lien cannot be impressed on the property interest of the vendor. This is so especially when the contract purchaser defaults and the contract provides for a forfeiture. However, a building, structure, or improvement erected thereon by the vendee can be removed by the claimant even if some injury results to the reality; but what may be removed is limited to the buildings, structures and improvements placed thereon by the vendee. This seems to be reasoned from the fact that a lien claimant of a lessee has a lien only on the building or structure erected upon the land by the lessee when the lease is forfeited.

When the building is repaired or remodeled by the vendee and he defaults in his contract, the owner's property interest is not affected by the lien; and the building may not be sold unless the owner has consented to the work either directly or indirectly, or ratified the work, or unless

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"Ackroyd v. Winston Bros. Co., 113 F.2d 657 (9th Cir. 1940).


"Bonner v. Minnir, 13 Mont. 269, 34 Pac. 30 (1893); Merrigan v. English, 9 Mont. 113, 22 Pac. 454 (1889).


"Dean v. Stewart, 49 Mont. 506, 143 Pac. 966 (1914); Western Iron Works v. Montana Pulp & Paper Co., 30 Mont. 550, 77 Pac. 413 (1904).

"McIntyre v. MacGinnis, 41 Mont. 87, 108 Pac. 353 (1910); Smith v. Sherman Mining Co., 12 Mont. 524, 31 Pac. 72 (1892).

"Soliri v. Fasso, 56 Mont. 400, 185 Pac. 322 (1919).

"Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 494, 111 P.2d 267, 279 (1940); Block v. Murray, 12 Mont. 545, 31 Pac. 550 (1892); Pelton v. Minah Consolidated Mining Co., 11 Mont. 231, 25 Pac. 316 (1881).

"Strizel-Spaberg Lumber Co. v. Edwards, 50 Mont. 49, 144 Pac. 772 (1914).

"Dewey Lumber Co. v. McQuirk, 96 Mont. 294, 30 P.2d 475 (1934); Stenberg v. Lennemann, 20 Mont. 457, 52 Pac. 84. (1898).
the work done can be severed without materially injuring the owner’s building.\textsuperscript{66}

**PRIORITY OF THE LIEN**

If the lien claimant furnishes material or performs labor prior to the execution of a mortgage on the property, he is entitled to a lien against both the building and the land prior to the mortgage. This is based on the last sentence of section 45-504.\textsuperscript{67}

The mechanic has priority over a mortgage placed on the premises after commencement of work under the principal contract. This is true notwithstanding the fact that the particular claimant was not employed until after the commencement of the structure,\textsuperscript{68} or furnished no labor or material until after the mortgage, so long as the building or structure is commenced by someone before the execution of the mortgage.\textsuperscript{69} Further, a temporary cessation of work does not prevent the operation of this section except where there has been a change of design or evidence of an intention to abandon prosecution of the work.\textsuperscript{70}

Section 45-505\textsuperscript{71} in effect gives the mechanic a lien upon the buildings and improvements erected thereon by him at the request of the lessee superior to the rights of the lessor upon forfeiture of the lease.

When the person against whom the lien is claimed is a lessee, the lessor’s interest in the property cannot be charged with the lien,\textsuperscript{72} but his interest can become subject to the lien if he consents in advance to the improvements either expressly or impliedly, or subsequently ratifies the acts.\textsuperscript{73}

From an examination of this section it is seen that it gives the right of removal to the claimant, but this section does not give the right of removal when a building, structure or improvement is repaired, remodeled,

\textsuperscript{66}Morin Lumber Co. v. Person, 110 Mont. 114, 99 P.2d 206 (1940) ; Dewey Lumber Co. v. McQuirk, 96 Mont. 294, 30 P.2d 475 (1934). Here it was held that merely because the work enhanced the value of the property it was not in itself sufficient. To hold otherwise would be to deprive the owner of his property without his fault, in other words “improving” the innocent owner out of his property without his consent. Cf. Federal Land Bank v. Green, 108 Mont. 56, 90 P.2d 489 (1939), where it was held that the giving of a mortgage by the owner does not reduce his interest in the property to less than a fee simple estate.

\textsuperscript{67}This section provides: “The liens for work or labor done, or material furnished, as specified in this chapter, shall be prior to and have precedence over any mortgage, encumbrance, or other lien made subsequent to the commencement of the work on any contract for the erection of such building, structure, or other improvement.” See Louis v. Theatorium Co., 69 Mont. 50, 222 Pac. 1062 (1923).


\textsuperscript{69}Merrigan v. English, 9 Mont. 113, 22 Pac. 454 (1889).

\textsuperscript{70}This section provides: “When the interest in the land, building, structure, or other improvement is a leasehold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the building, structures, and improvements put thereon by the persons charged with such lien, but the same may be sold to satisfy said lien, and may be removed within twenty days after the sale thereof by the purchaser.”

\textsuperscript{71}Continental Supply Co. v. White, 92 Mont. 254, 12 P.2d 569 (1932) (where it was held that a conveyance is to be regarded as an “encumbrance”).

\textsuperscript{72}Block v. Murray, 12 Mont. 545, 31 Pac. 550 (1892) ; Pelton v. Minah Consolidated Mining Co., 11 Mont. 281, 28 Pac. 310 (1891).

\textsuperscript{73}Morin Lumber Co. v. Person, 110 Mont. 114, 99 P.2d 206 (1940) ; Arnold v. Gensberger, 96 Mont. 358, 31 P.2d 296 (1934) (retaining benefits).
or improved unless the addition to the building or improvement can be removed without material injury thereto. Therefore if the lessee puts a new building, structure or improvement upon the land, the lien claimant may remove it, but this is not so when the materials or labor went into the repairing or remodeling of a building existing at the time of the lease. In such a situation the claimant has a lien only on the leasehold estate.

A lien for materials furnished to the lessee of the land and used to construct a building on the leased premises is not restricted as against the lessor to the precise materials furnished, but extends to the entire building. But if part of the building had been erected prior to the lease by the lessor, then the claimant's lien against the lessee must be restricted to the part erected by him if it can be removed without material damage. This rule has been extended to allow laborers inside a mine and material-men who furnish materials for the interior of the mine to have a lien upon structures placed upon the surface of the mine, although they cannot have a lien upon structures and improvements placed inside the mine that cannot be removed without material injury thereto. The reasoning is that if the lessee is operating the mine and structures on the surface as a unit, the mechanics and materialmen have a right to a lien on the entire interest and property of the lessee.

If the lease under which the lienee operated states that all improvements erected upon the property by the lessee immediately become the property of the lessor, this condition does not affect the right of a lien claimant to have a lien upon the improvement and remove the same.

It should also be noted that if a person is entitled to a lien upon the building, but also claims a lien upon the land, which he cannot subject thereto, the lien is not vitiataed.

Section 45-506 gives a lien claimant a superior right to improvements erected by him upon the land of a mortgagor over a mortgage executed prior to the commencement of the improvement. The lien acquired hereunder has priority over a prior mortgage only to the extent of the buildings, structures, or improvements erected upon the land, and

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Footnotes:

61Dewey Lumber Co. v. McQuirk, 96 Mont. 294, 30 P.2d 475 (1934); Stenberg v. Lienemann, 20 Mont. 457, 52 Pac. 84 (1898).
62Stenberg v. Lienemann, 20 Mont. 457, 52 Pac. 84 (1898).
63Stenberg v. Lienemann, 20 Mont. 457, 52 Pac. 84 (1898); Montana Lumber & Manufacturing Co. v. Obelisk Mining Concentrating Co., 15 Mont. 20, 37 Pac. 897 (1894).
65Caird Engineering Works v. Seven-Up Gold Mining Co., 111 Mont. 471, 495, 111 P.2d 267, 280 (1940); Montana Lumber & Manufacturing Co. v. Obelisk Mining Concentrating Co., 15 Mont. 20, 37 Pac. 897 (1894). In the latter case the court said: "The statute so providing is paramount to the conditions of the lease, and the lien which the statute creates is not destroyed by a provision of the lease to the effect that the improvements by way of buildings or mill for the reduction of ore shall inure to the lessor as soon as the same is placed on the premises."

106This section provides: "The liens attach to the buildings, structures, or improvements for which they were furnished or the work was done in preference to any prior lien, encumbrance, or mortgage upon the land upon which said buildings, structures, or improvements are erected; and any person enforcing such lien may sell the same under execution, and the purchaser may remove the property sold within a reasonable time thereafter."

67Grand Opera House Co. v. Maguire, 14 Mont. 558, 37 Pac. 607 (1894).
clearly does not give a lien preference to a prior mortgage as to the land.\textsuperscript{103} While the general rule is that a mortgage recorded prior to commencement of the work takes precedence over all liens for materials furnished, the Supreme Court of Montana in \textit{Interstate Lumber Co. v. Rider}\textsuperscript{103} said that our statute relaxes this rule to the extent of giving priority to liens for buildings, structures or other improvements \textit{erected} on the mortgaged lands:

The test of preference, under this type of statute, is whether there is a distinct and independent improvement, erected on the premises or merely repairs, extension or remodeling of an existing building or structure; if the first, the lien has preference; if the second, the priority of the mortgage lien continues unimpaired.\textsuperscript{104}

An attempt to go farther and deprive the mortgagee of anything which was covered by his mortgage when it was given would be unconstitutional in that it would be taking property without due process of law. Of course if the remodeling is such that it can be removed without material damage to the original building, the lien may attach to the improvement in preference to the prior mortgage.\textsuperscript{106}

Under this section, the purchaser at the execution sale may remove the building, structure, or improvement when it is determined under the above rules that the lien is prior to the mortgage as to the building, structure or improvement. The purchaser may remove the improvement even when it would involve great loss, such as when the improvement was made of brick or stone; and the mortgagee cannot complain, since he can protect himself by redeeming or by buying the improvement from the purchaser. Also the mortgage was not given when the improvements were upon it, and thus the mortgagee relied only on the land as security.\textsuperscript{108}

Section 45-506 provides that the purchaser may remove the property within a reasonable time after the sale. What is meant by a reasonable time was determined in \textit{Grand Opera House Co. v. Maguire}\textsuperscript{109} where the

\textsuperscript{103} Johnson v. Puritan Mining Co., 19 Mont. 30, 47 Pac. 337 (1896). In this case the court stated: "The mechanic, therefore, has a lien upon the land paramount to all right accruing after the commencement of his work, and what he puts upon the land paramount to all other claims, whether created before or after that time." The court then went on to say that our statutes, in thus giving a lien upon the building or improvements separate from the land, seem to wipe out the common law rule that buildings attach to the real estate.

\textsuperscript{106} Grand Opera House Co. v. Maguire, 14 Mont. 558, 37 Pac. 607 (1894). The facts of this case were that the plaintiff, mortgagee, was seeking to foreclose his mortgage which was made prior to the commencement of the improvement made by the defendant. Previous to this foreclosure action, the defendant had foreclosed his lien without joining the mortgagee and had purchased...
Supreme Court of Montana reasoned that the law not only provides that the lien attach to the buildings but also to whatever interest the proprietor might have in the land; and here the proprietor had a right of redemption and a right of occupancy of the premises until those rights were cut off by foreclosure of the prior mortgage. These rights the defendant obtained upon the foreclosure sale of the premises under his mechanic’s lien.

Therefore, having succeeded to the rights of the proprietor in the premises, the lienor would seem to be entitled to remain in possession, with the improvement, until the prior mortgagee, by foreclosure, cuts off that right of possession of the land.

If he is required to straightway remove the building he would still be at liberty to return and occupy the premises, because he had the proprietor’s right of possession and use of the land until the prior mortgage is foreclosed; . . . but, if he does not see fit to take advantage of the right of redemption from the mortgage, his possession ought to give way at the point where the proprietor’s right of possession would have ceased; and his right to the building being superior to the prior mortgage, it would seem that the reasonable time with which the purchaser under the lien foreclosure should remove the building would be prior to the time when he must yield possession of the land to the mortgagee under his foreclosure proceedings.

CONCLUSION

The mechanic’s lien is a purely statutory device designed to protect parties who have enhanced the value of property by performing labor thereon or furnishing materials therefor. Because this is a departure from the common law, compliance with the statute is strictly required to perfect the lien. Once perfection of the lien obtains, however, the remedial character of this legislation makes requisite a liberal interpretation of its provisions.

Mechanics or materialmen who have a lien on the improvement may extend the lien to the land only when the enhancement is requested or acquiesced in by one owning an interest in the land. As a security device, the lien has precedence over any subsequent mortgages on the land and priority even over prior mortgages as to an improvement erected on the land. The lien attaches to the property as of the time the prime contractor commences work and the lien of each subcontractor relates back to that time. The purchaser at the execution sale may remove the improvement and the lien may be foreclosed against the land. Thus it is that protection is afforded those who expend labor or materials on another’s property at the latter’s instance.

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the improvement at the foreclosure sale. In this foreclosure action the defendant is seeking to restrict the decree to the land alone. The mortgagee contended that the defendant lost his right to remove the building since he made no provisions in the lien foreclosure proceedings for the removal, and, also, the defendant remained in possession of the property and improvement for three years which was not a reasonable time.

109Id. at 564, 37 Pac. at 609.
109Id. at 565, 37 Pac. at 609.