

Chapter 87

Statutory Liens

Chapter 87

LAW REVIEW CITATIONS: 39 OLR 127.

87.005 to 87.075

LAW REVIEW CITATIONS: 41 OLR 11; 3 WLJ 73-151.

87.005

NOTES OF DECISIONS

1. Improvement
2. Agent of the owner

1. Improvement

A lien may attach to an improvement that comes within the term "structure". Poles connected by wires, forming an electrical transmission line, *Forbes v. Willamette Falls Elec. Co.*, (1890) 19 Or 61, 23 P 670, 20 Am St Rep 793; mining mills and tramways, *Watson v. Noonday Min. Co.*, (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994; garages, driveways, walks and retaining walls, *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363; railroads, *George v. Ore. Ry.*, (1926) 118 Or 502, 247 P 780; Giant Powder Co. v. Ore. Pac. Ry., (1890) 42 Fed 470, 8 LRA 700; *Ban v. Columbia So. R. Co.*, (1902) 54 CCA 407, 117 Fed 21; portable sawmill, *McFeron v. Doyens*, (1911) 59 Or 366, 116 P 1063.

The scope of the term "structure" may be ascertained by reference to the doctrine of *noscitur a sociis*. *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363; *Giant Powder Co. v. Ore. Pac. Ry.*, (1890) 42 Fed 470, 8 LRA 700.

A sawmill may be subjected to a lien for labor performed upon a breakwater and dam attached thereto. *Willamette Falls Trans. & Milling Co. v. Remick*, (1855) 1 Or 169.

A church building may be subjected to a lien. *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 44 P 390.

"Structure" does not include a mine. *Watson v. Noonday Min. Co.*, (1899) 37 Or 287, 55 P 867, 58 P 36, 60 P 994.

The words "building or other improvement" include not only the dwelling house but also the garage, driveway, walks and retaining walls. *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363.

2. Agent of the owner

The original contractor is made the special or statutory and not the general or common-law agent of the owner, by this section. *Fitch v. Howitt*, (1898) 32 Or 396, 54 P 192; *Beach v. Stamper*, (1903) 44 Or 4, 74 P 208; *Smith v. Wilcox*, (1903) 44 Or 323, 74 P 708, 75 P 710; *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

The contractor for the erection of a building is the owner's agent for the employment of a subcontractor, who is thus placed in privity with the owner. *Smith v. Wilcox*, (1904) 44 Or 323, 74 P 708, 75 P 710; *Andersen v. Turpin*, (1943) 172 Or 420, 142 P2d 999.

Where a lease requires the lessee to erect a building or make improvements which are to revert to the lessor at the end of the term, the lessee becomes the contractor and statutory agent of the lessor. *Oregon Lbr. & Fuel Co. v.*

Nolan, (1915) 75 Or 69, 143 P 935, 146 P 474; *Myers v. Strowbridge Estate Co.*, (1916) 82 Or 29, 160 P 135; *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268; *Lorenz v. Pilsener Brewing Co.*, (1938) 159 Or 552, 81 P2d 104.

A lessee covenanting to make all necessary repairs at his own expense, or to keep the premises in good condition and repair, is not an agent of the lessor so as to make the lessor's interest lienable. *Wilson v. Gevurtz*, (1917) 83 Or 91, 163 P 86, LRA 1916D, 575; *Williams v. Sharpe*, (1928) 125 Or 379, 265 P 793.

A vendee in possession under an executory contract of sale is not a contractor or agent of the vendor so as to bind the vendor for labor or materials. *Williams v. Sharpe*, (1928) 125 Or 379, 265 P 793; *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119; *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

Every contractor in charge of construction is the agent of the owner for the purpose of binding him for the value of labor and material used in the structure. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1.

A retail dealer selling to a contractor is not a statutory agent so as to give the wholesaler a lien. *Fisher v. Tomlinson*, (1901) 40 Or 111, 60 P 390, 66 P 696.

A provision in a contract for the sale of realty authorizing the purchaser to keep all buildings and appurtenances thereon in good condition and repair did not constitute him the vendor's agent for procuring the digging of a drainage ditch. *Dyer v. Thrift*, (1928) 124 Or 249, 264 P 428.

Lien claimant was entitled to allege and prove that the husband ordering materials acted on his own behalf and also as common-law agent for his wife. *Heacock v. Loder*, (1923) 106 Or 323, 211 P 950; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712.

An architect employed only to make plans for a contingent compensation was not such an agent as could make a binding contract on the owner. *Litherland v. Cohn Real Estate Co.*, (1909) 54 Or 71, 100 P 1, 102 P 303.

Where the lienor contracted with the wife and the husband's knowledge and consent constituted ratification, wife was husband's common-law agent. *Beach v. Cooper*, (1928) 125 Or 256, 266 P 633.

Contract vendees were agents of vendor where the vendees were required under the contract to construct buildings and improvements. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

FURTHER CITATIONS: *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313.

LAW REVIEW CITATIONS: 37 OLR 80.

87.010

NOTES OF DECISIONS

1. In general
2. Construction
3. Perfection and assignment of lien
4. Persons entitled to lien

5. Labor and materials giving rise to a lien
6. Public property as subject to lien
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8. Contract with owner or agent
 - (1) Who are owners
 - (2) Contractual liability
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1. In general

The right to a mechanic's lien is a privilege conferred by statute, and to claim its benefits one must show a substantial compliance with the requirements of the statute. *Allen v. Rowe*, (1890) 19 Or 188, 23 P 901; *Pilz v. Killingsworth*, (1891) 20 Or 432, 435, 26 P 305; *Gordon v. Deal*, (1892) 23 Or 153, 31 P 287; *Rankin v. Malarkey*, (1893) 23 Or 593, 32 P 620, 34 P 816; *Boise-Payette Lbr. Co. v. Dominican Sisters*, (1921) 102 Or 314, 202 P 554; *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363; *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1; *Andersen v. Turpin*, (1943) 172 Or 420, 142 P2d 999; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712; *J. W. Copeland Yards v. Taranoff*, (1964) 238 Or 167, 392 P2d 259; *Lemire v. McCollum*, (1967) 246 Or 418, 425 P2d 755.

The right to a lien is in derogation of the common law, and one claiming the benefit of the statute must bring himself clearly within its terms. *Pilz v. Killingsworth*, (1891) 20 Or 432, 26 P 305; *Gordon v. Deal*, (1892) 23 Or 153, 31 P 287; *Boise-Payette Lbr. Co. v. Dominican Sisters*, (1921) 102 Or 314, 202 P 554; *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

Requirements of the statute are a condition precedent to perfection of a lien and must be complied with before a lien attaches. *Rankin v. Malarkey*, (1893) 23 Or 593, 32 P 620, 34 P 816; *Curtis v. Sestanovich*, (1894) 26 Or 107, 37 P 67.

This section was not repealed in respect of work on railroads by ORS 87.235 to 87.260. *Giant Powder Co. v. Ore. W. Ry.*, (1911) 59 Or 236, 117 P 279, Ann Cas 1913C, 93; *Ban v. Columbia So. R. Co.*, (1902) 54 CCA 407, 117 Fed 21.

Resort to the lien is a convenient substitute for the giving of a mortgage or other security and the lien is to be considered and enforced as such. *In re Coulter*, (1871) 2 Sawy 42, Fed Cas No. 3276.

The security given by the statute is not obnoxious to the letter, spirit or policy of the Bankruptcy Act, as it works no injustice to other creditors. *Id.*

The rule that a building erected by the owner of the freehold becomes a part of it as soon as annexed was not changed by the lien Act of 1874. *Inverarity v. Stowell*, (1882) 10 Or 261.

The right of preserving and enforcing a mechanic's lien is not an interest in land. *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95.

The remedy of an unpaid materialman was to claim a lien and create an obligation under the contractor's bond, rather than sue on the bond. *Pankey v. Nat. Sur. Co.*, (1925) 115 Or 648, 239 P 808.

2. Construction

The object and purpose of the Mechanic's Lien Act is to protect and secure the claims of those who by labor and material have enhanced the value of property and to effect this, the statute should be liberally construed. *Pilz v. Killingsworth*, (1921) 20 Or 432, 26 P 305; *Gordon v. Deal*, (1892) 23 Or 153, 31 P 287; *Sarchet v. Legg*, (1911) 60 Or 213, 118 P 203; *Schade v. Alton*, (1912) 61 Or 187, 121 P 898; *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313; *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712; *Lemire*

v. McCollum, (1967) 246 Or 418, 425 P2d 755; *Robison v. Thatcher*, (1969) 252 Or 603, 451 P2d 863.

The courts cannot by construction dispense with any of the statutory requirements for the obtaining of a mechanic's lien against a building. *Rankin v. Malarkey*, (1893) 23 Or 593, 32 P 620, 34 P 816.

A strict construction of the law is proper in determining those entitled to its benefits. *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

A strict construction is called for when it is sought to use the statute for the taking of property without due process of law. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1933) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

3. Perfection and assignment of lien

The right to assert and perfect a lien is a personal privilege, and an assignment before perfection transfers only the chose in action. *Brown v. Harper*, (1870) 4 Or 89; *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

Once perfected, a lien is assignable. *Brown v. Harper*, (1870) 4 Or 89; *Collins v. Heckart*, (1928) 127 Or 34, 270 P 907; *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

A writing stating "We hereby assign and deliver... our claim," supported by testimony of both assignor and assignee was a sufficient assignment. *Nottingham v. McKendrick*, (1901) 38 Or 495, 57 P 195, 63 P 822.

An oral assignment of the debt operates as an assignment of the lien. *McFeron v. Doyens*, (1911) 59 Or 366, 116 P 1063.

The assignee acquires all the rights to which the assignors were entitled. *Collins v. Heckart*, (1928) 127 Or 34, 270 P 907.

4. Persons entitled to lien

A manufacturer or wholesaler who sells building materials to a retailer acting as a materialman, is not entitled to a lien on the building in which the materials are finally used following their purchase by the contractor-owner. *Fisher v. Tomlinson*, (1901) 40 Or 111, 60 P 390, 66 P 696.

A subcontractor is entitled to a lien only when he connects himself with the owner through the original contract. *Crane Co. v. Erie Heating Co.*, (1910) 57 Or 410, 112 P 430.

A contractor who has wilfully failed in any respect or negligently failed in any material respect cannot enforce a lien. *Pippy v. Winslow*, (1912) 62 Or 219, 125 P 298.

A contractor who has substantially performed a contract changed from time to time by the owner, with only inadvertent and unintentional omissions not due to bad faith or impairing the structure and which may be paid for by deduction from the contract price, is entitled to foreclose his lien. *Id.*

A subcontractor "in the second degree" who furnishes labor or material is entitled to a lien. *Zanello & Son v. Portland Cent. Heating Co.*, (1914) 70 Or 69, 139 P 572.

Where a wholesaler furnishes a retail dealer who is also the contractor, materials to be used and which are used in a particular structure, he is entitled to a lien. *Peerless Pac. Co. v. Rogers*, (1916) 81 Or 51, 158 P 271.

A contractor or subcontractor employing the labor of others in the erection of a building is entitled to a lien for such labor. *Christman v. Salway*, (1922) 103 Or 666, 206 P 541.

Although an original contractor was personally liable for labor and materials, he was entitled to a lien for lienable items of material and labor he purchased for the work. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

The administrator of the estate of a deceased mechanic is not entitled to a lien for labor performed by the decedent. *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

The administrator of an estate may be entitled to a lien

for labor performed after death of the decedent pursuant to a new contract entered into with the owner of the property. *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

A contractor who wilfully abandons construction is not entitled to a lien. *Bradfield v. Bollier*, (1942) 169 Or 425, 128 P2d 942.

A default of payment by the owner justifies refusal of a contractor to complete his contract and entitles him to a lien for the work done even though there is no substantial completion of the building. *Gabriel v. Corkum*, (1948) 183 Or 679, 196 P2d 437.

An architect was not entitled to a lien for the preparation of preliminary studies, drawings and specifications, and the superintending and directing of construction where the items were lumped in one charge without separation of the lienable from the nonlienable. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

Where an infant failed to plead or prove emancipation, he was without contractual capacity and could not maintain a lien. *Potter v. Davidson*, (1933) 143 Or 101, 20 P2d 409, 21 P2d 785.

5. Labor and materials giving rise to a lien

Material and work in connecting removable fixtures to the freehold are not lienable. *Patterson v. Gallagher*, (1894) 25 Or 227, 35 P 454, 42 Am St Rep 794; *Ward v. Town Tavern*, (1951) 191 Or 1, 228 P2d 216.

There cannot be a lien unless the material forms a part of, or is consumed in the construction of the building or structure. *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 164, 44 P 390; *Allen v. Elwert*, (1896) 29 Or 428, 44 P 823, 48 P 54; *Fitch v. Howitt*, (1898) 32 Or 396, 52 P 192; *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271; *State v. Johnson Contract Co.*, (1927) 120 Or 633, 253 P 520.

Transportation and use of tools in raising and lowering of a building is not the furnishing of materials so as to give a lien, although the owner agreed to pay a reasonable price therefor. *Allen v. Elwert*, (1896) 29 Or 428, 44 P 823, 48 P 54; *Johnson v. Hightsman*, (1933) 143 Or 114, 21 P2d 786.

Moving a building gives a lien for labor performed, if such moving was in furtherance of a general plan for alteration and repair of the building. *Allen v. Elwert*, (1896) 29 Or 428, 44 P 823, 48 P 54; *Janoe & Bushnell, Inc. v. Jordan*, (1957) 210 Or 243, 310 P2d 310.

The presumption is that lienable material furnished was used in the construction of a building, and the burden of proof is on the owner to show otherwise. *Fitch v. Howitt*, (1898) 32 Or 396, 52 P 192; *Kollock & Co. v. Leyde*, (1915) 77 Or 569, 151 P 733; *Northwest Lbr. & Fuel Co. v. Plantz*, (1928) 126 Or 69, 268 P 763.

Allowance may be made for normal waste. *Fitch v. Howitt*, (1898) 32 Or 396, 52 P 192; *West Side Lbr. & Shingle Co. v. Herald*, (1913) 64 Or 210, 128 P 1006.

Drilling of a water well is a service for which a lien may be obtained. *Roberts v. Gerlinger*, (1928) 124 Or 461, 263 P 916; *West v. Wilson*, (1931) 136 Or 262, 297 P 847.

Under a former statute, a mechanic was allowed a lien for his entire compensation where he both performed manual labor and acted as an overseer or assistant superintendent. *Willamette Falls Trans. & Milling Co. v. Remick*, (1855) 1 Or 169.

Work and materials used in erecting a pole line for transmission of electricity give rise to a lien. *Forbes v. Willamette Falls Elec. Co.*, (1890) 19 Or 61, 23 P 670, 20 Am St Rep 793.

The word "material" includes giant powder furnished for the construction of a railway. *Giant Powder Co. v. Ore. Pac. Ry.*, (1890) 42 Fed 470, 8 LRA 700.

The right to a lien proceeds upon the theory that the work and material for which the lien is sought have in-

creased the value of the building by becoming a part thereof. *Patterson v. Gallagher*, (1894) 25 Or 227, 35 P 454, 42 Am St Rep 794.

A person employed on a salary to do any work required of him is not entitled to a lien for services in construction of a house unless he can segregate the lienable services from the others. *Getty v. Ames*, (1897) 30 Or 573, 48 P 355, 60 Am St Rep 835.

Wainscoting of walls, veneering and installation of doors give rise to a lien. *Matthiesen v. Arata*, (1897) 32 Or 342, 50 P 1015, 67 Am St Rep 535.

Installation of electric wiring and connections is a lienable service. *Rowen v. Alladio*, (1908) 51 Or 121, 93 P 929.

Charges for furnishing of tools and equipment and for office expenses were not lienable under a contract in which the contractor agreed to assume these expenses. *Stewart v. Spalding*, (1914) 71 Or 310, 141 P 1127.

The lien must be either for labor or materials or for both. Id.

Crude materials furnished for the manufacture of something to be used in a particular structure are lienable. *Hume v. Seattle Dock Co.*, (1914) 68 Or 477, 137 P 752, 50 LRA(NS) 153.

Board and expenses constituting a part of reasonable compensation paid for labor and materials are lienable. *Barr v. World Keepfresh Co.*, (1915) 77 Or 95, 150 P 747.

Work done on a road a mile from the dam contracted for does not give a right to any lien. *Hoskins v. Powder Land & Irr. Co.*, (1918) 90 Or 217, 176 P 124.

The right to the lien does not arise from the special contract for the work or material, but arises from the work performed or the material furnished. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

A subcontractor's lien will not be defeated by defects in work due to improper materials furnished by and directed to be used by the contractor. *Davis v. Bertschinger*, (1925) 116 Or 127, 241 P 53.

A lien may be had for lumber used in construction of a sidewalk, since the amendment of 1917. *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313.

Supplying a part of an old house, moving it and placing it on a foundation, are lienable acts. *Johnson v. Hightsman*, (1933) 143 Or 114, 21 P2d 786.

A lien attaches for labor on materials used in the structure in question even though there is no lien on the materials. *Timber Structures v. C.W.S. Grinding & Mach. Works*, (1951) 191 Or 231, 229 P2d 623, 25 ALR2d 1358.

Labor, within the meaning of this section, includes acts performed by labor saving devices. Id.

Payroll taxes and insurance covering liability to laborers are lienable items. *Mathis v. Thunderbird Village, Inc.*, (1964) 236 Or 425, 389 P2d 343.

Board and expenses constituting a part of the reasonable compensation paid for labor and materials are lienable. Id.

Overhead expenses of a subcontractor are lienable items for an original contractor on a cost plus contract. Id.

Excavation of a basement is lienable work. *Robison v. Thatcher*, (1969) 252 Or 603, 451 P2d 863.

Where a part of the material used in the structure was thereafter torn out and other material substituted, a lien was allowed for the removed material. *Dailey v. Cremen*, (1916) 80 Or 183, 156 P 797.

Rentals for horses, truck and tools not used by lien claimants but rented to the contractor for railroad bed construction were not lienable. *George v. Ore., Calif. & E. Ry. Co.*, (1926) 118 Or 502, 247 P 780.

A workman is entitled to a lien for wages representing his labor, but not for wages representing labor performed by others which he fraudulently agreed he should receive. *Sparhawk v. Stevens*, (1939) 162 Or 375, 91 P2d 1116.

Cost of equipment rental, by reason of the owners prior conduct, was an item of materials and labor. *Mathis v.*

Thunderbird Village, Inc., (1964) 236 Or 425, 389 P2d 343.

The appliances became part of the realty and were lienable. Builders Appliance Supply Co. v. A.R. John Constr. Co., (1969) 253 Or 582, 455 P2d 615.

6. Public property as subject to lien

Public property exempt from sale on execution is not subject to mechanics' liens. **Schoolhouse**, Portland Lbr. & Mfg. Co. v. Sch. Dist. 1, (1886) 13 Or 283, 10 P 350; **bridge**, Bank of Idaho v. Malheur County, (1897) 30 Or 420, 45 P 781, 35 LRA 141.

The property of a quasi-public corporation affected with a public use and necessary to the performance thereof is not, as a general rule, subject to a mechanic's lien. **Benbow v. The James Johns**, (1910) 56 Or 554, 108 P 634.

A lien on a boat constructed for use as a public ferry was valid where it attached prior to such use. *Id.*

7. Coverage of more than a single improvement

Furnishing of material used in the erection of several structures may give a single lien against all of them, if the structures have a common purpose or connected use. **Willamette Falls Co. v. Remick**, (1855) 1 Or 170; **Willamette Steam Mills Co. v. Shea**, (1893) 24 Or 40, 32 P 759; **East Side Mill Co. v. Wilcox**, (1914) 69 Or 266, 138 P 843.

The lien is ordinarily confined to the particular structure for which the labor was furnished or the material supplied. **Dalles Lbr. & Mfg. Co. v. Wasco Woolen Mfg. Co.**, (1869) 3 Or 527; **Kezartee v. Marks**, (1888) 15 Or 529, 16 P 407; **Colonial Trust Co. v. Vale-Ore. Irr. Co.**, (1920) 265 Fed 393.

A single lien may extend to a number of structures if the labor was performed and the materials furnished under a single entire contract. **Willamette Mills Co. v. Shea**, (1893) 24 Or 40, 32 P 759; **Crane Co. v. Erie Heating Co.**, (1910) 57 Or 410, 112 P 430; **Warrenton Lbr. Co. v. Smith**, (1926) 117 Or 530, 245 P 313; **Schram v. Manary**, (1927) 123 Or 354, 260 P 214, 262 P 263; **Dimitre Elec. Co. v. Paget**, (1944) 175 Or 72, 151 P2d 630; **Colonial Trust Co. v. Vale-Ore. Irr. Co.**, (1920) 265 Fed 393; **Warner v. Fordham**, (1967) 246 Or 200, 424 P2d 673.

There cannot be a single lien on a number of buildings constructed under individual contracts. **Crane Co. v. Erie Heating Co.**, (1910) 57 Or 410, 112 P 430; **Dimitre Elec. Co. v. Paget**, (1944) 175 Or 72, 151 P2d 630.

A subcontractor operating under an entire contract with the contractor cannot have a lien on several houses for a lump sum claim if the arrangement between the owner and the contractor is founded on a separate contract for each house. **Beach v. Stamper**, (1903) 44 Or 4, 74 P 208, 102 Am St Rep 597.

There is no reason why a lien should not attach to non-contiguous lots the improvement of which is embraced in a single contract. **Warner v. Fordham**, (1967) 246 Or 200, 424 P2d 673.

A single lien was maintainable for materials and labor furnished for a house, garage, walks, driveway and retaining walls all on the same property, constructed partly under contract with the owner and partly under contract with the original contractor. **McCormack v. Bertschinger**, (1925) 115 Or 250, 237 P 363.

8. Contract with owner or agent

One claiming a lien on a building or improvement must show a contract with the owner or his agent whereby he furnished the labor or material. **Wilcox v. Keith**, (1871) 3 Or 372; **Sellwood Lbr. Co. v. Monnell**, (1894) 26 Or 267, 38 P 66; **Cross v. Tscharnig**, (1895) 27 Or 49, 39 P 540; **Litherland v. Cohn Real Estate Co.**, (1909) 54 Or 71, 100 P 1, 102 P 303; **Equitable Sav. & Loan Assn. v. Hewitt**, (1910) 55 Or 329, 106 P 447; **Pacific Spruce Corp. v. Ore. Portland Cement Co.**, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507; **Potter v. Davidson**, (1933) 143 Or 101, 20 P2d

409, 21 P2d 785; **Gabriel Powder & Supply Co. v. Thompson**, (1940) 163 Or 623, 97 P2d 182; **Lemire v. McCollum**, (1967) 246 Or 418, 425 P2d 755.

(1) **Who are owners.** The term "owner" is not limited to the owner of the fee but includes ownership of a lesser estate which may be subject to a lien. **Vendee in possession under a sales contract**, **Schram v. Manary**, (1927) 123 Or 354, 260 P 214, 262 P 263; **Randolph v. Christensen**, (1928) 124 Or 661, 265 P 797; **Barr v. Lynch**, (1940) 163 Or 607, 97 P2d 185; **tenant in common**, **Shea v. Peters**, (1928) 126 Or 76, 268 P 989.

(2) **Contractual liability.** See also cases on judgments under ORS 87.060.

The statutory agent may bind the property benefited only for the reasonable value of the materials and labor employed. **Fitch v. Howitt**, (1898) 32 Or 396, 52 P 192; **Beach v. Stamper**, (1903) 44 Or 4, 74 P 208, 102 Am St Rep 597; **Quackenbush v. Artesian Land Co.**, (1905) 47 Or 303, 83 P 787; **Christman v. Salway**, (1922) 103 Or 666, 205 P 541; **State v. Montag Co.**, (1930) 132 Or 587, 286 P 995; **Barr v. Lynch**, (1940) 163 Or 607, 97 P2d 185.

If the contracts are made with the owner or his common-law agent, the amount of the liens are determined by the contract price. **Christman v. Salway**, (1922) 103 Or 666, 205 P 541; **State v. Montag Co.**, (1930) 132 Or 587, 286 P 995.

A contractor acting as agent of the owner cannot make a contract with a subcontractor that is broader than his own. **Beach v. Stamper**, (1903) 44 Or 4, 74 P 208, 102 Am St Rep 597.

The right to a lien is based on the agency created by the statute, limited by the scope and terms of the original contract. **Smith v. Wilcox**, (1904) 44 Or 323, 74 P 708, 75 P 710.

But the statutory agent may not determine the value of such materials or labor. **Quackenbush v. Artesian Land Co.**, (1905) 47 Or 303, 83 P 787.

Though the labor and materials are furnished partly under a contract with the owner and partly under a contract with the original contractor a single lien may be claimed. **McCormack v. Bertschinger**, (1925) 115 Or 250, 237 P 363.

The establishment of a lien does not warrant a personal judgment against the owner where there is no contractual relationship between him and the lienor. **Schram v. Manary**, (1927) 123 Or 354, 260 P 214, 262 P 263.

The inclusion of an item for casualty insurance in a contractor's claim does not render the claim unreasonable. **Paget v. Peters**, (1930) 133 Or 608, 286 P 983, 289 P 1119.

The right to a lien for the reasonable value of labor performed under an entire contract to furnish both labor and material for a lump sum, made with the owner's statutory agent, was not defeated by loss of the lien for material. **Christman v. Salway**, (1922) 103 Or 666, 205 P 541.

Where part of work was performed under contract with owner and part under separate contract with original contractor, a lien claimant was not entitled to a personal judgment against the owner in addition to foreclosure and sale. **McCormack v. Bertschinger**, (1925) 115 Or 250, 237 P 363. **Distinguished in** **Beach v. Cooper**, (1928) 125 Or 256, 266 P 633. Where the contract was made with the owner through his common-law agent, lienor was entitled to personal judgment for the reasonable value of the labor and material against the owner but not against the agent.

An original contractor, not being a common-law agent of the owner, was personally liable for materials and labor, and had no authority to bind the owner personally but only to incur obligations that might be the basis of a lien against the improvement or building. **Tait & Co. v. Stryker**, (1926) 117 Or 338, 243 P 104.

9. Waiver of right to claim lien

A waiver of all claims for materials furnished and used

in certain buildings is equivalent to a waiver of the lien. *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574.

The right may be waived by express agreement or by neglecting to perfect the lien within the statutory time. *Id.*

Waiver by an agent authorized to conduct the principal's business and to file liens for him is binding on the principal. *Id.*

A change in the plans and specifications is not such an abandonment of a contract waiving the contractor's right to a lien as will restore the right thereto. *Gray v. Jones*, (1905) 47 Or 40, 81 P 813.

A materialman or laborer must have assented to or at least have had notice of a stipulation in the original contract, to lose his right of lien. *Hume v. Seattle Dock Co.*, (1914) 68 Or 477, 137 P 752, 50 LRA(NS) 153. *But see Myers v. Strowbridge Estate Co.*, (1916) 82 Or 29, 160 P 135.

One furnishing labor or material cannot lose his right to a lien except by his contract or by his acts constituting an estoppel. *Zanello & Son v. Portland Cent. Heating Co.*, (1914) 70 Or 69, 139 P 572.

Lessor and lessee, his statutory agent and contractor, could not contract away materialmen's rights to liens without their assent, nor did the lessor's posting of notice under ORS 87.030 have any effect. *Oregon Lbr. & Fuel Co. v. Nolan*, (1915) 75 Or 69, 143 P 935, 146 P 474.

Notice under ORS 87.030 does not constitute information that an original contractor had stipulated that no lien should attach and does not affect the matter of a waiver. *Myers v. Strowbridge Estate Co.*, (1916) 82 Or 29, 160 P 135.

Knowledge alone by a subcontractor that the original contractor has waived his lien is not a waiver by the subcontractor of his right to a lien unless he has also agreed to be bound by that waiver. *Id.*

Where the parties have contracted for a specific lien on the property, the lien allowed by statute on that property for the same debt is waived whether or not the specific lien is actually given. *Spaulding Logging Co. v. Ryckman*, (1932) 139 Or 230, 6 P2d 25.

The intent of the language relied upon to constitute a waiver should be reasonably clear. *Nelson v. Cohen*, (1938) 160 Or 336, 84 P2d 658.

Where the materialman or laborer had neither assented to nor had notice of a stipulation in the original contract, he did not lose his right to a lien. *Hume v. Seattle Dock Co.*, (1914) 68 Or 477, 137 P 752, 50 LRA(NS) 153; *Zanello & Son v. Portland Cent. Heating Co.*, (1914) 70 Or 69, 139 P 572; *St. Johns Lbr. Co. v. Pritz*, (1915) 75 Or 286, 146 P 483, 146 P 486.

A stipulation by an original contractor to complete the contract free from "any and all liens," without discrimination between the claim of the original contractor and that of subcontractors, mechanics and laborers, constituted a waiver of the contractor's right to a lien. *Gray v. Jones*, (1905) 47 Or 40, 81 P 813.

A stipulation in a contractor's bond to complete the contract free from mechanics' liens did not waive the contractor's right to a lien. *Maynard v. Lange*, (1914) 71 Or 560, 143 P 648, Ann Cas 1916E, 547.

Evidence was insufficient to show notice to materialman of a contract stipulation between owner and original contractor against all liens. *St. Johns Lbr. Co. v. Pritz*, (1915) 75 Or 286, 146 P 483, 146 P 486.

A contractor's agreement not to permit any lien or encumbrance whatsoever to attach to the structure was insufficient to constitute a waiver of his right to a lien. *Nelson v. Cohen*, (1938) 160 Or 336, 84 P2d 658.

10. Lien on city lot

The statute refers to what is commonly known as a city lot and not to a tract of rural land even though it be within

the limits of a city. *Pilz v. Killingsworth*, (1891) 20 Or 432, 26 P 305.

Services of laborers employed by a contractor must be regarded as having been rendered at the request of the owner. *Id.*

FURTHER CITATIONS: *Tantum v. Cherry*, (1885) 12 Or 135, 6 P 715; *Whittier, Fuller & Co. v. Blakely*, (1886) 13 Or 546, 11 P 305; *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1; *Sattler v. Knapp*, (1912) 60 Or 466, 120 P 2; *Chenoweth v. Spencer*, (1913) 64 Or 540, 131 P 302, Ann Cas 1914D, 678; *Mokler v. Doun*, (1928) 125 Or 595, 268 P 55; *Stark-Davis Co. v. Fellows*, (1929) 129 Or 281, 277 P 110, 64 ALR 271; *Pearcy v. Columbia Corp.*, (1943) 173 Or 1, 143 P2d 913, 149 ALR 1378; *Otness v. Ore. Livestock Coop.*, (1957) 209 Or 513, 307 P2d 320; *Culver v. Rendahl*, (1957) 211 Or 682, 318 P2d 275; *Mercer Steel Co. v. Park Constr. Co.*, (1966) 242 Or 596, 411 P2d 262; *Feris v. Balcom*, (1967) 249 Or 343, 432 P2d 684; *Thelin v. Taylor*, (1967) 248 Or 149, 432 P2d 791; *Olson v. Roop*, (1970) 255 Or 368, 467 P2d 437; *Benj. Franklin Fed. Sav. & Loan Assn. v. Hallmark, Inc.*, (1971) 257 Or 436, 479 P2d 740.

ATTY. GEN. OPINIONS: Lien for eradication of pests by Oregon State Board of Horticulture, 1926-28, p 50.

LAW REVIEW CITATIONS: 9 OLR 521; 12 OLR 81, 352; 29 OLR 308; 37 OLR 81; 41 OLR 25.

87.015

NOTES OF DECISIONS

1. In general
2. Interests subject to lien
3. "Convenient space"

1. In general

The statute contemplates a lien on the building primarily. *Cross v. Tscharnig*, (1895) 27 Or 49, 39 P 540; *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

The lien upon the land is only an incident of the lien upon the structure, for the latter's convenient use and occupation. *Chenoweth v. Spencer*, (1913) 64 Or 540, 543, 131 P 302, Ann Cas 1914D, 678.

ORS 87.030 does not modify nor in any manner affect the extent or character of the lien upon the land given by this section. *Id.*

2. Interests subject to lien

Where one other than the owner of land requests improvements, a lien does not attach to the land unless the owner has knowledge and fails to give notice of nonliability under ORS 87.030. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

Where a negotiating purchaser begins improvements without the owner's knowledge or consent, a lien does not attach to the land until the purchaser takes title. *Id.*

A lien may extend to after-acquired interests enlarging the estate to which a lien has already attached, if the equity of a third party has not intervened. *Randolph v. Christensen*, (1928) 124 Or 661, 265 P 787; *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257; *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Where lien claims filed against a bridge before it was accepted by the county would have also attached by virtue of this section to the public road of which it was a part, the liens never attached to the bridge since the road was exempt from execution. *Idaho v. Malheur County*, (1896) 30 Or 420, 45 P 781, 35 LRA 141.

There was no lien on the land where the building being built by the contract vendee was destroyed by fire. *Cheno-*

weth v. Spencer, (1913) 64 Or 540, 131 P 302, Ann Cas 1914D, 678.

The lien attached to the land when the owner of the building, after construction commenced, acquired title to the land. Lemire v. McCollum, (1967) 246 Or 418, 425 P2d 755.

3. "Convenient space"

A "convenient space" is such space as is reasonably necessary to furnish access to, from and around the structure so that it may conveniently be used for the purposes for which it was intended. Drake v. Riley, (1932) 139 Or 172, 9 P2d 130; Livesay v. Lee Hing, (1932) 139 Or 450, 9 P2d 133, 84 ALR 118; Erne v. Goshen Veneer, Inc., (1968) 249 Or 357, 437 P2d 479.

The land deemed necessary for convenient use must be sufficiently described with reference to the building to allow the court to decree foreclosure and sale of a specific plot. Lorenz Co. v. Gray, (1931) 136 Or 605, 298 P 222, 300 P 949.

The extent of the space that may be convenient must be determined by the circuit court at time of foreclosure from competent evidence. Livesay v. Lee Hing, (1932) 139 Or 450, 9 P2d 133, 84 ALR 118.

FURTHER CITATIONS: Oregon Lbr. & Fuel Co. v. Nolan, (1915) 75 Or 69, 143 P 935, 146 P 474; Myers v. Strowbridge Estate Co., (1916) 82 Or 29, 160 P 135; McCormack v. Bertschinger, (1925) 115 Or 250, 237 P 363; Schram v. Manary, (1928) 123 Or 354, 260 P 214, 262 P 263; Dyer v. Thrift, (1928) 124 Or 249, 264 P 428; Lorenz v. Pilsener Brewing Co., (1938) 159 Or 552, 81 P2d 104; Warner v. Fordham, (1967) 246 Or 200, 424 P2d 673.

LAW REVIEW CITATIONS: 9 OLR 521; 29 OLR 308.

87.020

NOTES OF DECISIONS

1. Notice of deliveries

(1) Notice dependent upon person to whom materials are furnished

(2) Sufficiency and proof of notice

2. List of materials and prices

1. Notice of deliveries

Giving of the required notice is a condition precedent to attachment of a lien. Auld v. Starbard, (1918) 89 Or 284, 173 P 664; Johnson v. Alm, (1927) 121 Or 285, 254 P 803; J. W. Copeland Yards v. Taranoff, (1964) 238 Or 167, 392 P2d 259.

Prior to the 1967 amendment, although a claim for materials by one not an original contractor was nonlienable for failure to give the owner a notice, a lien for the reasonable value of labor was recoverable though performed under entire, unapportionable contracts for labor and materials. Christman v. Salway, (1922) 103 Or 666, 205 P 541; Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185.

Where a lien claimant fails to give notice to the owner, he is not entitled to a lien for materials although the owner had knowledge of the delivery and failed to post notice of nonliability as prescribed by ORS 87.030. Schram v. Manary, (1927) 123 Or 354, 260 P 214, 262 P 263; Edmiston v. Kiersted, (1932) 140 Or 299, 12 P2d 299; Lorenz v. Pilsener Brewing Co., (1938) 159 Or 552, 81 P2d 104; Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185. But claimant is entitled to a lien for the reasonable value of labor. Schram v. Manary, supra; Barr v. Lynch, supra.

Compliance with the requirement of notice contained in this section is indispensable to creation of a lien, in the absence of a waiver or an estoppel. Pankey v. Ore., Calif. & E. Ry., (1929) 129 Or 292, 276 P 277.

Notice is necessary even if owner has actual notice of delivery. Lakeview Drilling Co. v. Stark, (1957) 210 Or 306, 310 P2d 627. Overruling dicta in Randolph v. Christensen, (1928) 124 Or 661, 265 P 797.

The notice required is to be made within the time limited before the first delivery. J. W. Copeland Yards v. Taranoff, (1964) 238 Or 167, 392 P2d 259. Overruling Nicolai-Neppach Co. v. Poore, (1926) 120 Or 163, 251 P 268.

Prior to the 1967 amendment, where a claim for materials was nonlienable for failure to give notice, the whole lien claim including labor and materials not segregated failed. Johnson v. Alm, (1927) 121 Or 285, 254 P 803.

(1) Notice dependent upon person to whom materials are furnished. When the materials are furnished directly to the owner or his common-law agent, the provision requiring notice does not apply. Boise-Payette Lbr. Co. v. Dominican Sisters, (1921) 102 Or 314, 202 P 554; Nicolai-Neppach Co. v. Poore, (1926) 120 Or 163, 251 P 268; Beach v. Cooper, (1928) 125 Or 256, 266 P 633; Lorenz Co. v. Gray, (1931) 136 Or 605, 298 P 222, 300 P 949; Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185; Drake Lbr. Co. v. Lindquist, (1946) 179 Or 402, 170 P2d 712; Drake Lbr. Co. v. Paget Mtg. Co., (1954) 203 Or 66, 274 P2d 804.

There can be no lien for material furnished at the instance of the contractor in charge where he is not a common-law but only a statutory agent, unless the notice is given as prescribed by the statute. Boise-Payette Lbr. Co. v. Dominican Sisters, (1921) 102 Or 314, 202 P 554; Johnson v. Alm, (1927) 121 Or 285, 254 P 803; Struntz Planing Mill Co. v. Paget, (1928) 123 Or 651, 262 P 263, 263 P 389; Pankey v. Ore., Calif. & E. Ry., (1929) 129 Or 292, 276 P 277.

Whenever the requisition for materials is not received from the owner or his common-law agent, the statutory notice is required. Nicolai-Neppach Co. v. Poore, (1926) 120 Or 163, 251 P 268; Randolph v. Christensen, (1928) 124 Or 661, 265 P 797; Shea v. Peters, (1928) 126 Or 76, 268 P 989; Lorenz v. Pilsener Brewing Co., (1938) 159 Or 552, 81 P2d 104; Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185; Gabriel Powder & Supply Co. v. Thompson, (1940) 163 Or 623, 97 P2d 182.

One furnishing supplies to a contract vendee of land is not entitled to a lien on the vendor's interest therein unless he gives the vendor the notice required by this section. **Furnished by materialman**, Schram v. Manary, (1927) 123 Or 354, 260 P 214, 262 P 263; Edmiston v. Kiersted, (1932) 140 Or 299, 12 P2d 299; **by vendee's original contractor**, Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185.

A vendee in possession under a sales contract is an owner and not entitled to notice before his interest may be attached. Schram v. Manary, (1927) 123 Or 354, 260 P 214, 262 P 263; Randolph v. Christensen, (1928) 124 Or 661, 265 P 797; Barr v. Lynch, (1940) 163 Or 607, 97 P2d 185.

A tenant in common of land who has himself ordered the material for its improvement is not entitled to the statutory notice. Shea v. Peters, (1928) 126 Or 76, 268 P 989.

A tenant in common of land who took no part in ordering material must be given the requisite notice if his interest is to be subjected to a lien. Id.

No notice need be given a vendor to bind a vendee's interest in a building where the vendee goes into possession and as owner begins construction. Paget v. Peters, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Where a lessee is under a duty to improve the property, those who deal with him become subcontractors and must give the owner notice of their delivery of material. Lorenz v. Pilsener Brewing Co., (1938) 159 Or 552, 81 P2d 104.

An assignee of the vendee of the original purchase contract who thereafter sold under a new contract and retained title for security purposes, being in the nature of a mortgagee, was not entitled to notice. Randolph v. Christensen, (1928) 124 Or 661, 265 P 797.

Where the contract was made directly with the wife of

the owner of the property with his knowledge and consent, the statutory notice was not required. *Beach v. Cooper*, (1928) 125 Or 256, 266 P 633.

Holder of an unrecorded contract to purchase who afterwards became owner was not entitled to notice where record owner had been duly notified. *Copeland Yards v. Sheridan*, (1931) 136 Or 37, 296 P 838, 297 P 837.

(2) **Sufficiency and proof of notice.** If the statutory purpose of the notice is fulfilled and the owner is not misled, the notice is adequate. *H. D. Fowler Co. v. Medical Research Foundation*, (1964) 238 Or 316, 393 P2d 657; *State ex rel. Nilsen v. Hoff*, (1970) 3 Or App 398, 474 P2d 11.

The manner of giving the notice is not governed by ORS 16.780 and 16.790. *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268.

A lien is nonenforceable if the lien notice commingled lienable and nonlienable items. *Ward v. Town Tavern*, (1951) 191 Or 1, 228 P2d 216.

Mailing of the notice to the address given in the last directory in which the owner's name appeared was sufficient where the owner knew the work was being done. *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268.

A notice not directed to the owner, not sent by the lien claimant or anyone in his behalf and containing an insufficient description of the property, was inadequate. *Struntz Planing Mill Co. v. Paget*, (1928) 123 Or 651, 262 P 263, 263 P 389.

Prior to 1939 amendment, testimony that notices were addressed to the owner, mailed and delivered to his office was sufficient to show notice was given. *Mokler v. Doun*, (1928) 125 Or 595, 269 P 55.

Prior to 1939 amendment requiring personal delivery and receipt or registration, where owner did not receive the notice, a mailing of notice was established by testimony of witness that he mailed it according to custom and by submission of purported copy into evidence. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

2. List of materials and prices

The data to which the owner is entitled by virtue of this statute are intended to enable him to determine whether the claim is just and should be paid or whether he should submit to litigation. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Failure of the claimant to furnish a statement of the prices charged to a person purchasing the property after commencement of a foreclosure suit does not defeat the right to recover attorney's fees and costs. *Id.*

A mistake in statement will not render a lien void when it is evident that no fraud was intended and no prejudice resulted to the defendant. *State ex rel. Nilsen v. Hoff*, (1970) 3 Or App 398, 474 P2d 11.

FURTHER CITATIONS: *School Dist. 4 v. Settergren*, (1965) 240 Or 146, 400 P2d 559; *Benj. Franklin Fed. Sav. & Loan Assn. v. Hallmark, Inc.*, (1971) 257 Or 436, 479 P2d 740.

87.025

NOTES OF DECISIONS

1. In general
2. Priority of liens over subsequent encumbrances
3. Priority of liens over unrecorded encumbrances
4. Priority as to the improvement
5. Substitute encumbrances

1. In general

A lien on the building relates back to the date that work on it commenced. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507; *Colonial Trust Co. v. Vale-Ore. Irr. Co.*, (1920) 265 Fed 393.

By lumping in the lien items which are entitled to priority with those which are not, lienor loses priority to a mortgage lien of that portion of the lien which is for labor. *Benj. Franklin Fed. Sav. & Loan Assn. v. Hallmark, Inc.*, (1971) 257 Or 436, 479 P2d 740; *Brown v. Farrell*, (1971) 258 Or 348, 483 P2d 453.

Mortgages made concurrently with deeds, but before construction of building had commenced, had priority to the land over mechanics' liens. *Smith v. Wilkins*, (1901) 38 Or 583, 64 P 760.

This section refers to liens not upon the improvement alone but also upon both the improvement and the land. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

Subsection (3) covers the priority between a mortgage and a lien for materials whether the materials are furnished directly to the owner or a contractor. *Benj. Franklin Fed. Sav. & Loan Assn. v. Hallmark, Inc.*, (1971) 257 Or 436, 479 P2d 740.

Lien for work done on an entire contract did not relate back because of unrelated work previously done by others so as to take precedence of a mortgage recorded before claimant commenced work. *Colonial Trust Co. v. Vale-Ore. Irr. Co.*, (1920) 265 Fed 393.

A lien for work and materials for a building begun by a negotiating purchaser could relate back against the land only to the time when the purchaser acquired title, where the owner had no knowledge of the work until after he had conveyed. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

2. Priority of liens over subsequent encumbrances. A mortgage on land taken after commencement of a building thereon is subordinate to liens for material used in the construction of the building. *Inman v. Henderson*, (1896) 29 Or 116, 120, 45 P 300; *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 170, 44 P 390; *Schram v. Manary*, (1927) 123 Or 354, 260 P 214, 262 P 263; *Dement v. Eastes*, (1928) 124 Or 170, 264 P 348; *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

Where mortgage is executed after commencement of construction but lien claims are not filed within statutory time, an agreement between the owner and the lienor to extend the time of filing cannot affect the mortgagee's interests. *Inman v. Henderson*, (1896) 29 Or 116, 45 P 300.

A lien on land for work done at the request of a person negotiating for its purchase, but without the consent or knowledge of the landowner, is inferior to a subsequent purchase money mortgage executed by the purchaser simultaneously with the owner's deed. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

A lien claimant who asserts no lien on land covered by a mortgage which is subsequent to his lien cannot complain of a decree foreclosing the mortgage against the land. *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

Priority of liens over subsequent mortgage was not limited to the improvement and the interest of contract vendees at time of contract where notices of intent to claim lien were given vendor and vendees. *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257.

A mortgage executed after construction had commenced and after mortgagor had full title was not a purchase money mortgage entitled to priority over mechanics' liens to the extent the mortgage secured money advanced to pay the purchase price, where the mortgage was not intended as part of the transaction conveying to the mortgagor. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Where the lien claimant had contracted for a second mortgage lien to be given on his demand and he made no demand, that part of the lien not thereby waived was inferior to a mortgage thereafter given by a third party who

had relied on the contract. *Spaulding Logging Co. v. Ryckman*, (1932) 139 Or 230, 6 P2d 25.

3. Priority of liens over unrecorded encumbrances

A mechanic's lien is superior to an encumbrance unrecorded at the time the building or structure was commenced or the materials therefor commenced to be furnished. *Allen v. Rowe*, (1890) 19 Or 188, 23 P 901; *Schram v. Manary*, (1927) 123 Or 354, 260 P 214, 262 P 263; *Block v. Love*, (1931) 136 Or 685, 1 P2d 588.

A mechanic's lien against a contract vendee in possession under a subsequent unrecorded contract was superior to a lien for the purchase price held by the assignee of the vendee of the original contract, who was not entitled to notice under ORS 87.020. *Randolph v. Christensen*, (1928) 124 Or 661, 265 P 797.

A materialman's lien for materials furnished a contract vendee in possession under an unrecorded contract was junior to the purchase price claim of the vendor not given notice under ORS 87.020. *Edmiston v. Kiersted*, (1932) 140 Or 299, 12 P2d 299.

4. Priority as to the improvement

A lien for material or labor has precedence as to a building over a mortgage in existence at the time construction commenced. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1; *Smith v. Wilkins*, (1901) 38 Or 583, 64 P 760; *Drake Lbr. Co. v. Paget Mtg. Co.*, (1954) 203 Or 66, 274 P2d 804.

Priority extends only to those structures, additions or repairs as are severable from the land or permanent buildings without diminishing the value as of the time the prior mortgage was recorded. *Bratzel v. Stafford*, (1932) 140 Or 661, 14 P2d 454, 16 P2d 991; *Residential Fin. Co. v. Larkin*, (1935) 149 Or 410, 40 P2d 1008.

A lien for material and labor furnished in the alteration or repair of a building, commenced and made subsequent to recording of mortgage on building and land, did not take precedence over mortgage. *Otness v. Oregon Livestock Coop.*, (1957) 209 Or 513, 307 P2d 320.

5. Substitute encumbrances

A new mortgage executed prior to the filing of mechanics' liens as a substitute or renewal in part or whole for an old mortgage, which was entitled to priority because in existence when work began, is subrogated to the priority. *Capital Lbr. Co. v. Ryan*, (1898) 34 Or 73, 54 P 1093; *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454.

ATTY. GEN. OPINIONS: Priority over prior unrecorded contract or deed, 1926-28, p 50.

LAW REVIEW CITATIONS: 9 OLR 521; 12 OLR 81, 352; 29 OLR 308; 39 OLR 63.

87.030

NOTES OF DECISIONS

1. In general
2. Constitutionality
3. Knowledge requiring notice
4. Who must give notice
5. Effect of notice
6. Proof of notice
7. Failure to post notice
8. Time and manner of posting

1. In general

This section does not modify or affect the extent or character of the lien provided by ORS 87.015, but is designed to subject the interest of the owner of the land to the lien

where no notice is given, without imposing all the liabilities of the one having the building constructed. *Chenoweth v. Spencer*, (1913) 64 Or 540, 131 P 302, Ann Cas 1914D, 678.

2. Constitutionality

This section was not unconstitutional on the ground that it permits a lien to attach without the consent of the owner. *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454.

3. Knowledge requiring notice

Knowledge of the owner must exist and be shown as a fact. *Allen v. Rowe*, (1890) 19 Or 188, 23 P 901; *Cross v. Tscharnig*, (1895) 27 Or 51, 39 P 540; *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

Insertion of the owner's name in the notice filed under H 3673 [ORS 87.035] is not enough to reach his title. *Allen v. Rowe*, (1890) 19 Or 188, 23 P 901.

The complaint must allege the owner's knowledge as a condition precedent to proof. *Hunter v. Cordon*, (1898) 32 Or 443, 52 P 182.

The knowledge must be of a decree similar to that present in an estoppel in pais. *Dyer v. Thrift*, (1928) 124 Or 249, 264 P 428.

4. Who must give notice

A lien may attach to the lessor's interest for work ordered by the lessee, notwithstanding notice of nonresponsibility, if the lease in effect makes the lessee the lessor's agent. *Oregon Lbr. & Fuel Co. v. Nolan*, (1915) 75 Or 69, 74, 143 P 935, 146 P 474; *Myers v. Strowbridge Estate Co.*, (1916) 82 Or 29, 41, 160 P 135; *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268.

A vendor must post notice of nonliability where he has knowledge of construction by the vendee in possession. *Schram v. Manary*, (1927) 123 Or 354, 260 P 214, 262 P 263; *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185; *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

A mortgagee is not required to give any notice, though he knows of the erection of a building on the mortgaged property, since he is not "a person having or claiming any interest in the land." *Capital Lbr. Co. v. Ryan*, (1898) 34 Or 73, 79, 54 P 1093.

The owner of land upon which a building is erected by another cannot avoid the effect of his failure to give the statutory notice on the ground that the "owner" referred to in the statute is the owner of the building. *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454.

A lessor must post notice of nonliability where he has knowledge of construction by the lessee. *Marshall v. Cardinell*, (1905) 46 Or 410, 80 P 652.

The owner need not post a notice in the absence of some knowledge that work is being performed on the property. *Williams v. Sharpe*, (1928) 125 Or 379, 265 P 793.

Where the vendor had no knowledge of the vendee's construction until after he had parted with title, no lien attached to his interest. *Pacific Spruce Corp. v. Ore. Portland Cement Co.*, (1930) 133 Or 223, 286 P 520, 289 P 489, 72 ALR 1507.

5. Effect of notice

Where notice is duly posted, even though prior to construction or knowledge of construction, a lien does not attach to the owner's interest in the land. *Wilson v. Gevurtz*, (1917) 83 Or 91, 163 P 86, LRA 1917D, 575; *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Posting of notice is of no effect where the owner has contracted for the improvement. *St. Johns Lbr. Co. v. Pritz*, (1915) 75 Or 286, 146 P 483, 146 P 486; *Myers v. Strowbridge Estate Co.*, (1916) 82 Or 29, 160 P 135.

6. Proof of notice

A notice posted in good faith is presumed to have remained a sufficient length of time to impart knowledge to the persons it was intended to affect. *Marshall v. Cardinell*, (1905) 46 Or 410, 80 P 652.

After the claimant has established knowledge, the owner has the burden of proving the posting of notice of nonresponsibility within the required time. *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

7. Failure to post notice

Where a lien claimant failed to give necessary notice of delivery under OLR 10191 [ORS 87.020], even though the owner failed to post notice of nonresponsibility within three days after obtaining knowledge of work, claimant was not entitled to a lien for materials. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541; *Schram v. Manary*, (1927) 123 Or 354, 260 P 214, 262 P 263; *Edmiston v. Kiersted*, (1932) 140 Or 299, 12 P2d 299; *Lorenz v. Pilsener Brewing Co.*, (1938) 159 Or 552, 81 P2d 104; *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185. But claimant was entitled to a lien for the reasonable value of labor. *Christman v. Salway*, supra; *Schram v. Manary*, supra; *Barr v. Lynch*, supra.

Failure to give the notice after knowledge that the work is being done makes the owner responsible. *Roberts v. Gerlinger*, (1928) 124 Or 461, 263 P 916; *Randolph v. Christensen*, (1928) 124 Or 661, 265 P 797; *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

If the building was destroyed before completion, a mechanic takes no lien upon the land even though the owner failed to give the required notice. *Chenoweth v. Spencer*, (1913) 64 Or 540, 131 P 302, Ann Cas 1914D, 678.

Where a lessor has actual or constructive knowledge of construction or repairs by the lessee and fails to give notice, a lien may attach to his interest in the property. *Dailey v. Cremen*, (1916) 80 Or 183, 156 P 797. But see *Edmiston v. Kiersted*, (1932) 140 Or 299, 12 P2d 299.

Although the individual interest in the land of a member of a partnership improving the land might otherwise be nonlienable, a lien attaches where no notice is given under this section. *Shea v. Peters*, (1928) 126 Or 76, 268 P 989.

Where mailing of notice of deliveries under ORS 87.020 was established but owners never received notice, a lien attached with failure to post notice of disclaimer, as the owners had personal knowledge of the work. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

8. Time and manner of posting

Posting the notice in a little side recess of a building on the land is not a compliance with the section. *Nottingham v. McKendrick*, (1900) 38 Or 495, 57 P 195, 63 P 822.

A notice posted on the front of a building on a public street, so as to be readily observed by persons entering the building both by the stairway and on the first floor is in a "conspicuous place." *Marshall v. Cardinell*, (1905) 46 Or 410, 80 P 652.

A posting of notice immediately after receipt of notice of delivery under ORS 87.020 but not within three days of knowledge of the work does not defeat a lien for materials. *Gabriel Powder & Supply Co. v. Thompson*, (1940) 163 Or 623, 97 P2d 182.

A notice posted on the wall at a point easily visible from the sidewalk was posted in a "conspicuous place." *Wilson v. Gevurtz*, (1917) 83 Or 91, 163 P 86, LRA 1917D, 575.

Posting of notice several weeks after the vendor had knowledge of improvements made at the request of the contract vendee did not bar the right of a claimant to enforce his lien on the vendor's interest. *Schram v. Manary*, (1927) 123 Or 354, 260 P 214, 262 P 263.

LAW REVIEW CITATIONS: 9 OLR 521; 12 OLR 81; 29 OLR 308.

87.035**NOTES OF DECISIONS**

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1. In general

To be valid the claim filed must show a substantial compliance with this section and may not dispense with any of its essential requirements. *Nicolai Bros. Co. v. Van Friedagh*, (1892) 23 Or 149, 31 P 288; *Gordon v. Deal*, (1892) 23 Or 153, 31 P 287; *Rankin v. Malarkey*, (1893) 23 Or 593, 32 P 620, 34 P 816; *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313; *Van Lydegraf v. Tyler*, (1929) 128 Or 236, 271 P 740, 273 P 719.

The court cannot eliminate or substitute words or supply omissions in the language of the lien claim, although the Mechanic's Lien Act is to be liberally construed. *Barton v. Rose*, (1906) 48 Or 235, 85 P 1009; *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

A claim was valid where no third party interests intervened, although only part of the filing fee was paid at the time of filing, the balance being paid and the instrument recorded after expiration of the time for filing. *Spaulding Logging Co. v. Ryckman*, (1932) 139 Or 230, 6 P2d 25.

The administrator of a deceased mechanic cannot obtain a lien for work performed by the deceased, if the latter filed no lien notice. *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

An assignee of a mechanic's unpaid account cannot file a lien notice and thus obtain a lien. *Id.*

When the right to a lien has been clearly established, the law will be liberally interpreted toward accomplishing the purpose of its enactment. *Anderson v. Chambliss*, (1953) 199 Or 400, 262 P2d 298.

The right to a lien being purely statutory, a claimant must in the first instance bring himself clearly within the terms of the statute. *Id.*

2. When lien attaches

The lien attaches upon the filing of the claim. *Goodale v. Coffee*, (1893) 24 Or 346, 33 P 990.

The lien attaches when the materials are first placed on the premises or when the first work begins, but it remains inchoate until a claim therefor is filed, when it relates back to the commencement of the structure. *Henry v. Hand*, (1899) 36 Or 492, 497, 59 P 330. But see *Johnson v. Tucker*, (1917) 85 Or 464, 167 P 787; *Auld v. Starbard*, (1918) 89 Or 284, 173 P 664. A lien originates but does not attach at the time labor or materials are furnished; it attaches only when proper notice is filed and it then relates back to the beginning of the work.

No lien is created until work has been performed or materials supplied and the required notice filed. *Phillips v. Graves*, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

3. Time for filing generally

An agreement between the owner and the claimant to extend the time for filing claims by furnishing additional articles after completion is not binding on a mortgagee who was not a party. *Inman v. Henderson*, (1896) 29 Or 116, 120, 45 P 300.

A failure to perfect the mechanic's lien within the statutory time constitutes a waiver thereof. *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574.

Under a prior similar statute the time within which to file a lien was reckoned by excluding the first and including the last day of the period prescribed. *Horn v. United States Min. Co.*, (1905) 47 Or 124, 81 P 1009.

Work performed or material furnished pursuant to separate and distinct contracts cannot be tacked together in order to extend the time for filing the claim. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

A claim based on a continuing contract may be filed within the period dating from the time the last item of work or material was furnished. *Spaeth v. Beckett*, (1935) 150 Or 111, 41 P2d 1064, 97 ALR 771.

Efforts of a purported lienor who returns to the building after apparent completion of the work and removal of tools, and performs trifling work will not be deemed original construction to extend the period for filing, especially when the interests of an innocent owner may be affected. *Christenson v. Behrens*, (1962) 231 Or 458, 372 P2d 494. **Distinguished in** *Mathis v. Thunderbird Village, Inc.*, (1964) 236 Or 425, 389 P2d 343.

4. Filing of original contractor's claim

(1) Who are original contractors. An "original contractor" is one who furnishes labor, or labor and materials under an express or implied contract direct with the owner or his common-law agent. *Bernard v. Hassan*, (1911) 60 Or 62, 118 P 201; *Shea v. Peters*, (1928) 126 Or 76, 268 P 989; *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406; *Prouty Lbr. & Box Co. v. McGuirk*, (1937) 156 Or 418, 66 P2d 481, 68 P2d 473; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712; *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185.

A claimant furnishing material at the request of a member of partnership for the erection of a house on land in which the member is a tenant in common, is an original contractor. *Shea v. Peters*, (1928) 126 Or 76, 268 P 989.

The meaning of "original contractor" is to be determined by construing this section in pari materia with OC 51-110 [ORS 87.065]. *Prouty Lbr. & Box Co. v. McGuirk*, (1937) 156 Or 418, 66 P2d 481, 68 P2d 473.

A contractor performing work for a lessee under a duty to improve the leasehold is, in effect, a subcontractor. *Lorenz v. Pilsener Brewing Co.*, (1938) 159 Or 552, 81 P2d 104.

A stone mason who worked on an hourly basis for an indefinite time, under the direction of the owner, was not an original contractor or a subcontractor. *Bennett v. Bruchou*, (1939) 163 Or 175, 96 P2d 762.

(2) Time for filing. The act of a city inspector in delaying issuance of his certificate does not extend the time for the contractor to file his lien after completion of his contract. *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079.

The time in which an original contractor must file his claim begins to run from the completion of his contract and not from the completion of the building. *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079.

A statement in the claim of an original contractor that 30 days had not elapsed since completion of the building was fatal to the validity of the lien. *Equitable Sav. & Loan Co. v. Hewitt*, (1910) 55 Or 329, 106 P 447. **Distinguished in** *Dailey v. Cremen*, (1916) 80 Or 183, 193, 156 P 797. A claim showing that it was filed within 60 days after completion of the contract is not voided by a statement therein

that not less than 60 days had expired from completion of the "building."

Filing of the claim within 60 days after completion of the contract is a prerequisite to attachment of a contractor's lien. *Bernard v. Hassan*, (1911) 60 Or 62, 64, 118 P 201.

A failure to file the claim within the prescribed time after completion of the contract works a loss of the lien. *Block v. Love*, (1931) 136 Or 685, 1 P2d 588.

An original contractor is not entitled to file his claim of lien until his contract has been completed. *Id.*

The filing of a contractor's claim prior to substantial performance of the contract is premature and ineffective to create a lien in his favor. *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 694.

To state a cause it is not necessary literally to state that the contract was completed on a certain date. *Mathis v. Thunderbird Village, Inc.*, (1964) 236 Or 425, 389 P2d 343.

(3) Completion of contract. Replacement of defective workmanship or material after acceptance of a structure constitutes repairs, not omissions, and does not extend the time for filing. *Avery v. Butler*, (1897) 30 Or 287, 47 P 706; *Sarchet v. Legg*, (1911) 60 Or 213, 118 P 203; *Fox & Co. v. Roman Catholic Bishop*, (1923) 107 Or 557, 215 P 178.

After substantial completion of a contract a contractor may not postpone the date from which the time of filing runs by the performance of trifling matters or by repairing defects. **Altering and supporting pipes for plumbing**, *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079; **installation of electric switch and pipe**, *Sarchet v. Legg*, (1911) 60 Or 213, 118 P 203; **uncovering sewer pipe for city inspection**, *Schade v. Alton*, (1912) 61 Or 187, 121 P 898; **installing electric switches and replacing defective woodwork**, *Fox & Co. v. Roman Catholic Bishop*, (1923) 107 Or 557, 215 P 178.

Substantial performance of a building contract permits only inadvertent and unintentional omissions and deviations which are not due to bad faith, do not impair the structure as a whole, can be conveniently remedied and may without injustice be paid for by deductions from the contract price. *Pippy v. Winslow*, (1912) 62 Or 219, 125 P 278; *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 694.

An original contractor's completion of a contract to build a building corresponds in time with the completion of the building. *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079.

A building is completed when the contractor has substantially complied with his contract. *Fox & Co. v. Roman Catholic Bishop*, (1923) 107 Or 557, 215 P 178.

When a material and substantial requirement of the contract has been omitted, there is no completion within the meaning of the statute until it has been supplied. *Stark-Davis Co. v. Wilson*, (1926) 119 Or 308, 248 P 1095.

A structure may be said to be completed when the last work demanded by the contract is done, even though there is a period of idleness between the time of commencement and that time. *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

Where work is done at the owner's request under a claim that it is required by contract, the owner is estopped to assert that the contract had already been completed. *Id.*

Gratuitous work by the contractor does not indicate that the contract had not previously been fully performed. *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 696.

A default of payment by the owner justifies refusal of a contractor to complete his contract and entitles him to a lien for the work done even though there is no substantial completion of the building. *Gabriel v. Corkum*, (1948) 183 Or 679, 196 P2d 437.

Failure to complete a minor part of the work because the owner has failed to perform his obligation does not prevent application of the doctrine of substantial performance. *Pippy v. Winslow*, (1912) 62 Or 219, 125 P 98. **Distinguished in** *Mathis v. Thunderbird Village, Inc.*, (1964) 236 Or 425, 389 P2d 343.

The notice of completion is neither the exclusive or conclusive test for deciding when completion of a structure has occurred. *Dallas Lbr. & Supply Co. v. Phillips*, (1968) 249 Or 58, 436 P2d 739.

Where important items of the building were omitted and both the owner and builder regarded the house as incomplete the house was not substantially complete as of date the owner occupied. *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257.

Contractor had substantially performed his contract at time of filing and filing was not premature although minor repair jobs were left to be done and certain measurements were not according to specifications because of owner's changes in plans. *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 696.

A complaint to foreclose a lien, which failed to allege completion of the contract and the date thereof or good cause for failure of completion, failed to state a cause of suit and was fatally defective. *Anderson v. Chambliss*, (1953) 199 Or 400, 262 P2d 298.

5. Filing of claims of persons not original contractors

Persons other than contractors may file their claims either within the period allowed after completion of the structure or within the period allowed after they have ceased to work or to furnish material. *Ainslie & Co. v. Kohn*, (1888) 16 Or 363, 19 P 97; *Curtis v. Sestanovich*, (1894) 26 Or 107, 37 P 67; *Fitch v. Howitt*, (1898) 32 Or 396, 52 P 192; *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079; *Wills v. Zanello*, (1911) 59 Or 291, 117 P 291; *Stark-Davis Co. v. Wilson*, (1926) 119 Or 308, 248 P 1095; *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268; *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257; *State ex rel. Nilsen v. Hoff*, (1970) 3 Or App 398, 474 P2d 11.

One who merely furnishes materials to be used in construction or repair whether direct to the owner or to someone else, is a materialman and not an original contractor and must file his claims within the statutory period. *Inman v. Henderson*, (1896) 29 Or 116, 45 P 300; *Heacock Sash & Door Co. v. Weatherford*, (1931) 135 Or 153, 294 P 344; *Bennet v. Bruchou*, (1939) 163 Or 175, 96 P2d 762; *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712. *Contra*, *Livesay v. Lee Hing*, (1932) 139 Or 450, 9 P2d 133.

Unreasonable delay in the performance of trifling matters which could and should have been done at an earlier time will not postpone the date from which the time allowed by statute begins to run. *Mercer Steel Co. v. Park Constr. Co.*, (1966) 242 Or 596, 411 P2d 262; *Brown v. Farrell*, (1971) 258 Or 348, 483 P2d 453.

A claim filed by a materialman after the furnishing of the material and before completion of the building cannot be said to be premature. *Wills v. Zanello*, (1911) 59 Or 291, 117 P 291.

A materialman furnishing supplies for several structures under a single contract may file his claim within the statutory period after furnishing the last item of materials. *Nicolai-Neppach Co. v. Poore*, (1926) 120 Or 163, 251 P 268.

Filing of claim within statutory period was not proved by mere testimony of claimant that he filed, where he did not produce notices or explain their contents or absence. *Van Lydegraf v. Tyler*, (1929) 128 Or 236, 271 P 740, 273 P 719.

A contractor performing work for a lessee under a duty to improve the leasehold is, in effect, a subcontractor and must file his claim within the statutory period. *Lorenz v. Pilsener Brewing Co.*, (1938) 159 Or 552, 81 P2d 104.

Prior to the 1961 amendment, where the 30th day fell on Sunday, the claimant had the following day in which to file notice. *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185.

Under the mechanics lien statute a subcontractor can file his claim within 45 days after he has ceased working, re-

gardless of whether or not the general contractor has completed his entire contract. *State ex rel. Konen Constr. Co. v. United States Fid. & Guar. Co.*, (1963) 234 Or 554, 380 P2d 795.

6. Filing where an abandonment

In order for an abandonment to be equivalent to completion, there must be a cessation of work with intent on the part of the owner and contractor to cease operations permanently or for an indefinite period. *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257; *Stark-Davis Co. v. Fellows*, (1929) 129 Or 281, 277 P 110, 64 ALR 271.

Cessation of work for lack of money but without any intention of permanent cessation is not such an abandonment as amounts to a completion. *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257; *Stark-Davis Co. v. Fellows*, (1929) 129 Or 281, 277 P 110, 64 ALR 271; *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

Permanent abandonment of the project or cancellation of the claimant's contract by the owner is equivalent to completion, in so far as the time for filing a contractor's claim is concerned. *Block v. Love*, (1931) 136 Or 685, 1 P2d 588; *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

If the work is not completed, one who furnished materials for it may file his claim within the statutory period after its permanent abandonment. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130; *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104; *Bennet v. Bruchou*, (1939) 163 Or 175, 96 P2d 762; *Barr v. Lynch*, (1940) 163 Or 607, 97 P2d 185.

Suspension of work by the original contractor does not amount to an abandonment such as starts running the time for filing of materialmen's claims, if work is thereafter resumed by another contractor under a new contract. *Pacific Coast Steel Co. v. Uhrbrand & Leurick Constr. Co.*, (1929) 130 Or 225, 279 P 848.

Suspension of work is not abandonment. *Eastern & W. Lbr. Co. v. Henderson*, (1929) 129 Or 102, 275 P 677.

A contractor who wilfully abandons construction is not entitled to a lien. *Bradfield v. Bollier*, (1942) 169 Or 425, 128 P2d 942.

Permanent abandonment of work within 30 days of filing of claim was established. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

7. Form and contents of claim generally

An express statement that the amount specified "is due over and above all just credits and offsets" is not required. *Whittier v. Blakely*, (1886) 13 Or 546, 11 P 305; *Kezartee v. Marks*, (1888) 15 Or 529, 16 P 407.

The fact that the claim designates the contractor as a copartnership instead of a corporation is not fatal if nobody was misled thereby. *Eastern & W. Lbr. Co. v. Williams*, (1929) 129 Or 1, 276 P 257; *Eastern & W. Lbr. Co. v. Henderson*, (1929) 129 Or 102, 275 P 677.

The claim must show that the claimant did something to benefit the structure in respect of which the lien is sought to be imposed. *Rankin v. Malarkey*, (1893) 23 Or 593, 32 P 620, 34 P 816; *Dillon v. Hart*, (1893) 25 Or 49, 34 P 817; *Leick v. Beers*, (1896) 28 Or 483, 43 P 658; *Getty v. Ames*, (1897) 30 Or 573, 48 P 355, 60 Am St Rep 835; *Barton v. Rose*, (1906) 48 Or 235, 85 P 1009.

If labor and materials are furnished for several structures under a single contract, one notice of lien is sufficient. *Willamette Steam Mills Co. v. Shea*, (1893) 24 Or 40, 32 P 759; *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313.

The contractual relation between the lien claimant and the owner need not be stated in the claim, as that relation is in fact established by H 3669 [ORS 87.020]. *Osborn v. Logus*, (1895) 28 Or 302, 318, 37 P 456, 38 P 190, 42 P 997; *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712.

The date of completion of the building need not be stated

if the lien notice is in fact filed after completion within the required time. *Curtis v. Sestanovich*, (1894) 26 Or 107, 37 P 67.

A notice that complies with all the requirements of the section need not further state that the materials furnished were actually used in the building. *Allen v. Elwert*, (1896) 29 Or 428, 44 P 824, 48 P 54.

Notice claiming a lien "in alteration and repair of certain electric wiring and fixing and in making connections in and about the building" indicated work in and about the building sufficient to establish a lien. *Rowen v. Alladio*, (1908) 50 Or 121, 93 P 929.

A claim that makes a prima facie showing of a right to a lien is sufficient if uncontroverted. *Id.*

A claim is not objectionable because it is in the form of an affidavit if sufficient in other respects. *McFeron v. Doyens*, (1911) 59 Or 366, 116 P 1063.

The fact that extra labor and material were furnished for the structure in question must be stated in the claim. *Hoskins v. Powder Land & Irr. Co.*, (1918) 90 Or 217, 176 P 124.

The claim is not required to state that it is filed within the statutory period. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

The claim of an original contractor may embrace items of labor or material that have been supplied him by subcontractors. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

The contract need not be described in the claim. *Collins v. Heckart*, (1928) 127 Or 34, 270 P 907.

Neither the date of commencement of work or delivery of material, nor date of completion of work or of last delivery, nor the date of completion of the building need be stated in the notice: *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Where third parties rely on a lien notice as fixing the time within which suit must be brought, the fact and length of credit given must be stated in the notice to extend the time under OC 51-107 [ORS 87.055]. *Allen v. Roufs*, (1934) 146 Or 451, 30 P2d 766.

This section does not contemplate credits and offsets that do not arise out of the same transaction. *Brown v. Farrell*, (1971) 258 Or 348, 483 P2d 453.

A claim of lien complied with the statute where it contained a true statement of the claimant's demand, the name of the owner or reputed owner, the name of the person to whom the materials were furnished and a description of the property to be charged. *Drake Lbr. Co. v. Lindquist*, (1946) 179 Or 402, 170 P2d 712.

The notice was sufficient although it understated the amount due. *Johnston v. The Abby, Inc.*, (1968) 251 Or 330, 445 P2d 596.

8. Statement of demand

(1) **Generally.** Itemization is not necessitated by the requirement that the claim contain a true statement of the demand. *Ainslie & Co. v. Kohn*, (1888) 16 Or 363, 19 P 97; *Curtis v. Sestanovich*, (1894) 26 Or 107, 37 P 67; *St. John's Lbr. Co. v. Pritz*, (1915) 75 Or 286, 290, 146 P 483; *Zanello & Son v. Portland Cent. Heating Co.*, (1914) 70 Or 69, 139 P 572; *St. John's Lbr. Co. v. Pritz*, supra, overruling *East Side Mill v. Wilcox*, (1913) 69 Or 266, 138 P 843.

Where the amount demanded is correctly stated in the claim, an itemized account inadvertently omitting a charge or credit to either party is superfluous and does not invalidate the lien. *Chamberlain v. Hibbard*, (1894) 26 Or 428, 38 P 437.

Items of labor and material in the sale and installation of an oil burner need not be segregated if the labor was merely incidental to the sale. *Eastern & W. Lbr. Co. v. Henderson*, (1929) 129 Or 102, 275 P 677.

Failure to segregate charges for work and material does

not render a claim invalid. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

A statement of account which refers to the materials furnished by invoice number does not invalidate the lien because it does not describe the kind nor give the quantity. *Drake v. Riley*, (1932) 139 Or 172, 9 P2d 130.

A recital of only the balance due and not the aggregate amount and the amount paid, which balance constituted a true statement of demand at time of filing, complied with the statute. *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363.

Where the statements of account clearly segregate charges for extra items from charges for principal service, though portions of the lien notices united the charges, the lien notices were valid. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

A mere mistake in statement will not necessarily render the whole lien void when it is evident that no fraud was intended and no prejudice resulted to the defendant. *Mercer Steel Co. v. Park Constr. Co.*, (1966) 242 Or 596, 411 P2d 262.

(2) **Truth of statement.** An honest mistake as to the amount due, not made wilfully, negligently or carelessly but in an honest belief of its correctness, will not vitiate the lien. *Nicolai Bros. Co. v. Van Fridagh*, (1892) 23 Or 149, 31 P 288; *Rowland v. Harmon*, (1893) 24 Or 529, 34 P 357; *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 170, 44 P 390; *Allen v. Elwert*, (1896) 29 Or 428, 432, 44 P 823, 824, 48 P 54; *Fitch v. Howitt*, (1898) 32 Or 396, 409, 52 P 192; *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454; *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1; *Hume v. Seattle Dock Co.*, (1914) 68 Or 477, 137 P 752, 50 LRA(NS) 153; *Stewart v. Spalding*, (1914) 71 Or 310, 141 P 1127. Nor can the owner be prejudiced. *Davis v. Bertschinger*, (1925) 116 Or 127, 241 P 53.

A wilfully false claim is a nullity. *Stewart v. Spalding*, (1914) 71 Or 310, 141 P 1127; *West v. Wilson*, (1931) 136 Or 262, 297 P 847.

A claimant who puts on record a statement which he knows to be untrue, or which by the exercise of a reasonable diligence he could have known to be untrue, obtains no lien. *Nicolai Bros. Co. v. Van Fridagh*, (1892) 23 Or 149, 31 P 288; *Equitable Sav. & Loan Assn. v. Hewitt*, (1910) 55 Or 329, 106 P 447; *Davis v. Bertschinger*, (1925) 116 Or 127, 241 P 53; *Drake Lbr. Co. v. Paget Mtg. Co.*, (1954) 203 Or 66, 274 P2d 804.

Inclusion in a materialman's claim of an item for labor performed is not fatal to the claim if the item clearly appears to be surplusage. *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313.

Inclusion of unused material on the notice does not defeat a lien if an excusable error. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

The fact that the notice of lien claimed a larger amount than that found by the court will not destroy lien for the amount actually due, unless there be a fraudulent intent in filing the same, which must be proved and will not be presumed. *Brown v. Farrell*, (1971) 258 Or 348, 483 P2d 453.

A trivial discrepancy should not invalidate an otherwise valid lien. *Id.*

(3) **Lump sum statements.** A claim for a lump sum mingling lienable and nonlienable items so as not to be separable, invalidates the lien. *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 44 P 390; *Allen v. Elwert*, (1896) 29 Or 428, 44 P 823, 48 P 54; *Getty v. Ames*, (1897) 30 Or 573, 48 P 355, 60 Am St Rep 835; *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574; *Stewart v. Spalding*, (1914) 71 Or 310, 141 P 1127; *Barr v. World Keepfresh Co.*, (1915) 77 Or 95, 150 P 747; *Christman v. Salway*, (1922) 103 Or 666, 205 P 541; *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104; *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313; *Johnson v. Alm*, (1927) 121 Or 285, 254 P 803;

Phillips v. Graves, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

A claim containing lienable and nonlienable items will support a lien for the lienable items if they are readily separable and if the nonlienable items were inserted in good faith. **Itemized statement in claim**, Harrisburg Lbr. Co. v. Washburn, (1896) 29 Or 150, 44 P 390; **separately charged items**, Allen v. Elwert, (1896) 29 Or 428, 44 P 823, 48 P 54; Christman v. Salway, (1922) 103 Or 666, 205 P 541; Warren-ton Lbr. Co. v. Smith, (1926) 117 Or 530, 245 P 313; **susceptible of segregation**, Cochran v. Baker, (1899) 34 Or 555, 52 P 520, 56 P 641.

The court may not use oral evidence to separate lienable and nonlienable items lumped in one statement of claim. Harrisburg Lbr. Co. v. Washburn, (1896) 29 Or 150, 44 P 390; Barr v. World Keepfresh Co., (1915) 77 Or 95, 150 P 747; Christman v. Salway, (1922) 103 Or 666, 205 P 541; Phillips v. Graves, (1932) 139 Or 336, 9 P2d 490, 83 ALR 1.

A court cannot from extrinsic evidence apportion the charge or contract price between lienable and nonlienable items. Allen v. Elwert, (1896) 29 Or 428, 44 P 823, 48 P 54; Getty v. Ames, (1897) 30 Or 573, 48 P 355, 60 Am St Rep 835; Stewart v. Spalding, (1914) 71 Or 310, 141 P 1127; McCormack v. Bertschinger, (1925) 115 Or 250, 237 P 363.

A claim in which lienable and nonlienable items are merged in a lumping sum is not a "true statement." Stewart v. Spalding, (1914) 71 Or 310, 325, 141 P 1127.

A claim uniting claims for materials used in a house and for a fence was invalid as separate claims should have been made for each particular structure. Kezartee v. Marks & Co., (1888) 15 Or 529, 16 P 407. **But see** Willamette Steam Mills Co. v. Shea, (1893) 24 Or 40, 32 P 759; McCormack v. Bertschinger, (1925) 115 Or 250, 237 P 363.

A single claim for labor and materials furnished in the construction of a house, a garage and a driveway was not invalid because the amount claimed was a lump sum not segregated for each different structure. McCormack v. Bertschinger, (1925) 115 Or 250, 237 P 363.

9. Designation of owner or reputed owner

The name of the owner or reputed owner of the building or improvement or land must be stated in the notice; if not, the lien is invalid as to the unnamed owner's interest. Kezartee v. Marks, (1888) 15 Or 529, 16 P 407; Gordon v. Deal, (1892) 23 Or 153, 31 P 287.

The notice of lien should state the name of the owner at the time the notice of lien is filed although such person may have been only the equitable owner at the time the construction contract was made. Willamette Lbr. Co. v. McLeod, (1895) 27 Or 272, 40 P 93; Paget v. Peters, (1930) 133 Or 608, 286 P 983, 289 P 1119.

Names of the owners of the structure and of the land are sufficiently described in a claim which alleges that "said real estate reputed to be owned by one E.R.H. and said building reputed to be owned by one G.M.R." Allen v. Rowe, (1890) 19 Or 188, 190, 23 P 901.

A claim which recited that the materials were actually under the direction of one who "was in legal possession of said premises under a contract of purchase and bond for a deed from" a certain company sufficiently stated the owner of the building. Kezartee v. Marks, (1888) 15 Or 529, 16 P 407. **Distinguished in** Gordon v. Deal, (1892) 23 Or 153, 31 P 287. A claim naming the owner of the land and alleging the leasing of the "property" by another designated as lessee did not state the name of the owner of the building.

A claim which stated that the building on which the lien is claimed was erected for a designated person upon real property owned by him, sufficiently showed that person to be the owner of the building and was a sufficient statement of ownership. Curtis v. Sestanovich, (1894) 26 Or 107, 37 P 67.

10. Name of employer or recipient of material

The claim must show directly or by necessary inference that the claimant furnished labor or material to a designated person. Rankin v. Malarkey, (1893) 23 Or 593, 32 P 620, 34 P 816; Rowland v. Harmon, (1893) 24 Or 529, 34 P 357; Dillon v. Hart, (1893) 25 Or 49, 34 P 817; Leick v. Beers, (1896) 28 Or 483, 43 P 658; Getty v. Ames, (1897) 30 Or 573, 574, 48 P 355, 60 Am St Rep 835.

A recital that the claimant furnished materials used in constructing a certain building, and "that the materials so furnished to said S. and used in said building consisted of -----," sufficiently stated that the materials were furnished to S. Curtis v. Sestanovich, (1894) 26 Or 107, 37 P 67.

Designation of the parties to whom material was furnished as "J. W. Holm and brother," where the owner's contract with the contractor was signed "C.N. Holmes & Company," was immaterial if no one was misled. Osborn v. Logus, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997.

A claim stating who owned the land and building and that material was furnished at the instance of the contract vendee, was invalid as to the owner's interest as it did not state that the material was furnished at his request or with his knowledge. Cross v. Tscharnig, (1895) 27 Or 49, 39 P 540.

Name of the person to whom the material was furnished was sufficiently shown by a claim which stated that "N. & Co. have by virtue of a contract with M., a contractor with T., lessee of the building hereinafter described, under a lease with D. for the furnishing of material," furnished material for the erection of the described building. Nottingham v. McKendrick, (1901) 38 Or 495, 57 P 195, 63 P 822.

A claim that "B has by virtue of a contract with R in the erection, material furnished and labor of a certain house, the ground belonging to R's wife, R causing the house to be erected, etc." did not state to whom materials were furnished. Barton v. Rose, (1906) 48 Or 235, 85 P 1009.

Evidence showed claimant performed work at his own instance and not by employment. Potter v. Davidson, (1933) 143 Or 101, 20 P2d 409, 21 P2d 785.

A claim stating that materials were furnished and used at specified premises at the instance of a named person, designated as the contractor and agent of a named owner, sufficiently stated to whom the materials were furnished. Winters v. Falls Lbr. Co., (1934) 146 Or 592, 31 P2d 177.

11. Description of property

So long as the description of the structure is sufficient to identify it with reasonable certainty the description is sufficient. Kezartee v. Marks, (1888) 15 Or 529, 16 P 407; McFeron v. Doyens, (1911) 59 Or 366, 116 P 1063.

The claim must describe the property upon which a lien is sought. Morehouse v. Collins, (1892) 23 Or 138, 31 P 295; Hendy Mach. Works v. Pac. Cable Constr. Co., (1893) 24 Or 152, 33 P 403.

A claimant of a lien on railroad property may limit his claim to the portion of the road for which the labor or material was furnished. Giant Powder Co. v. Ore. Pac. Ry., (1890) 42 Fed 470, 8 LRA 700.

If the incorrect portion of a description may be rejected and enough remains so that one familiar with the locality may identify the premises with reasonable certainty, and claims of third persons are not involved, the description is sufficient. Kollock & Co. v. Leyde, (1915) 77 Or 569, 143 P 621, 151 P 733.

Lien failed where notice described property by reference to date and record of deed, and complaint described it by metes and bounds but no evidence was introduced to show they were the same. Morehouse v. Collins, (1892) 23 Or 138, 31 P 295.

No lien was enforceable where the claim of lien described

lots in "Carters Addition" and the complaint alleged and proof was taken of a lien on the "Market Street Addition." *Hendy Mach. Works v. Pac. Cable Constr. Co.*, (1893) 24 Or 152, 33 P 403.

A notice which described a church as situated in an addition that did not exist was sufficient where the name of the town was accurately given and it was the only church of that name therein. *Harrisburg Lbr. Co. v. Washburn*, (1896) 29 Or 150, 44 P 390.

A notice giving the name of the store building, county, state, lot numbers, addition and city and stating an intention to claim a lien on not only the building, erections and superstructures but the land together with a convenient space about the structures, was sufficient to include the store building and sidewalk. *Warrenton Lbr. Co. v. Smith*, (1926) 117 Or 530, 245 P 313.

12. Verification

A claim signed by the party and verified by his oath is sufficient. *Kezartee v. Marks*, (1888) 15 Or 529, 16 P 407; *Christman v. Salway*, (1922) 103 Or 666, 668, 205 P 541.

No particular form of verification is required. *Ainslie & Co. v. Kohn*, (1888) 16 Or 363, 19 P 97.

The verification does not have to be signed by the party making it where a notarial seal and signature attests that the party did verify the claim. *Id.*

The claim of a corporation is sufficiently verified if sworn to by the secretary. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1.

A claim is not void because the jurat commences in the name of the president of the claimant corporation and is signed in the name of the corporation followed by the president's name. *Paget v. Peters*, (1930) 133 Or 608, 286 P 983, 289 P 1119.

An unverified claim is fatally defective. *Lorenz Co. v. Gray*, (1931) 136 Or 605, 298 P 222, 300 P 949.

A claim was not verified where the notary public failed to sign the jurat of the affidavit, although the official seal contained his name. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

A description was defective which failed to mention the building, the county or state in which the property was situated or whether the township was north or south of the base line. *Lorenz Co. v. Gray*, (1931) 136 Or 605, 298 P 222, 300 P 949.

FURTHER CITATIONS: *Ritchey v. Risley*, (1870) 3 Or 184; *Runey v. Rea*, (1879) 7 Or 130; *Mattheisen v. Arata*, (1897) 32 Or 342, 52 P 1015, 67 Am St Rep 535; *Bohn v. Wilson*, (1909) 53 Or 490, 101 P 202; *Boyer v. Dawson*, (1956) 207 Or 211, 293 P2d 739, 295 P2d 159; *Smith v. DeKraay*, (1959) 217 Or 436, 342 P2d 784; *Hill v. G & W Dev. Corp.*, (1961) 228 Or 93, 363 P2d 763.

LAW REVIEW CITATIONS: 9 OLR 521; 11 OLR 111; 12 OLR 352; 29 OLR 308; 39 OLR 55.

87.040

LAW REVIEW CITATIONS: 29 OLR 308.

87.045

NOTES OF DECISIONS

See also cases under ORS 87.035.

LAW REVIEW CITATIONS: 29 OLR 308.

87.050

NOTES OF DECISIONS

The fact that the claim duly filed is not recorded until

after the expiration of the time allowed for filing does not defeat it. *Spaulding Logging Co. v. Ryckman*, (1932) 139 Or 230, 6 P2d 25.

FURTHER CITATIONS: *Stuart v. Camp Carson Min. & Power Co.*, (1917) 84 Or 702, 708, 165 P 359.

87.055

NOTES OF DECISIONS

1. In general
2. Credit transaction
3. What is commencement of suit

1. In general

Unless a lienholder commences an action within the prescribed period, his lien expires. *Coggan v. Reeves*, (1871) 3 Or 275; *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574; *Otness v. Oregon Livestock Coop.*, (1957) 209 Or 513, 307 P2d 320.

The purpose of this section is to continue a lien for at least six months and to give the parties the right to prolong it for two years, based on the assumption that a lien is binding from the time of filing. *Henry v. Hand*, (1899) 36 Or 492, 59 P 330.

A former statute, substantially the same as ORS 87.285, did not change or amend this section so as to also require service of summons within the six months period. *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

The word "month" means calendar month, so a suit filed within six calendar months after filing of the lien is timely. *Id.*

This section is not a statute of limitations which is waived if not pleaded, but is a statute limiting the duration of the lien. *Fleshman v. Whiteside*, (1934) 148 Or 73, 34 P2d 648, 93 ALR 1456.

2. Credit transaction

Where payment is in instalments not all falling due within six months of filing, suit may still be brought within that period. Where brought afterwards, no recovery may be had as to instalments due more than six months before suit. *Capital Lbr. Co. v. Ryan*, (1898) 34 Or 73, 54 P 1093.

The word "credit" refers to a period of grace or extension of time for payment. *Fleshman v. Whiteside*, (1934) 148 Or 73, 34 P2d 648, 93 ALR 1456.

A payment reducing the indebtedness is not a "credit" extending the time for suit. *Id.*

Suit brought over six months after filing was not timely where the fact and length of an alleged credit was not stated in the lien notice upon which third parties had relied. *Allen v. Roufs*, (1934) 146 Or 451, 30 P2d 766.

3. What is commencement of suit

Filing of an answer by a defendant lien holder in an action on another lien avoids the bar of the statute, even though the answer is not served on the owner. *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 68, 56 P 271, 76 Am St Rep 454; *Byrd v. Cooper*, (1914) 69 Or 406, 139 P 104.

Under prior statute, an answer of the holder of a mechanic's lien filed in a suit to foreclose a mortgage, setting up his interest in the premises, was not regarded as the equivalent of a suit to foreclose the lien. *Coggan v. Reeves*, (1871) 3 Or 275.

Filing claim with a receiver based upon the lien does not excuse compliance with this section. *Otness v. Oregon Livestock Coop.*, (1957) 209 Or 513, 307 P2d 320.

Filing of a cross-complaint avoids the bar of this section, even though the cross-complaint is not received by plaintiff until after the period. *Brown v. Farrell*, (1971) 258 Or 348, 483 P2d 453.

There can be no decree against an owner who was not

made a party to the original suit before expiration of the statutory period, even though he was made a party to a cross-complaint filed by one of the original defendants within that period. *Byrd v. Cooper*, (1914) 69 Or 406, 139 P 104.

Where the original complaint stated a cause of suit and was brought within the statutory period, an amended complaint filed subsequent to the statutory period did not begin a new suit but related back to the original, and was timely. *Anderson v. Turpin*, (1943) 172 Or 420, 142 P2d 999.

Even though the original complaint did not state a cause of suit, an amended complaint filed after the statutory period had run related back to the original complaint and was timely. *Drake Lbr. Co. v. Paget Mtg. Co.*, (1954) 203 Or 66, 274 P2d 804.

FURTHER CITATIONS: *James A.C. Tait & Co. v. Diamond Corp.*, (1961) 228 Or 602, 365 P2d 883.

ATTY. GEN. OPINIONS: Validity of lien of state agency where district attorney fails to sue for foreclosure within six months, 1922-24, p 793.

LAW REVIEW CITATIONS: 29 OLR 308.

87.060

NOTES OF DECISIONS

1. In general
2. Parties to suit
3. Parties to appeal
4. Allegations and proof generally
5. Burden of proof
6. Variance
7. Judgment; interest; execution
8. Attorney's fees
9. Review

1. In general

The requirement that mechanic's lien cases have preference upon the calendar of the court and shall be tried without unnecessary delay applies to the circuit court only and not to the Supreme Court. *Hand Mfg. Co. v. Marks*, (1900) 36 Or 523, 52 P 512, 53 P 1072, 59 P 549.

A defendant who has pleaded a tender and asserted his willingness to pay any amount reasonably due will not be heard thereafter to assert that he was merely an agent of his codefendants. *Dessinger v. Gevurtz*, (1914) 69 Or 304, 138 P 210.

A claim that is void cannot be enforced. *West v. Wilson*, (1931) 136 Or 262, 297 P 847.

Where lien claimant had filed his lien under H 3673 [ORS 87.035] and included the description of the property in his affidavit for an order of service of summons by publication on the absent defendants, the court had jurisdiction of the property. *Goodale v. Coffee*, (1893) 24 Or 346, 33 P 990.

2. Parties to suit

Junior judgment or mortgage lienholders are not indispensable parties, and the only effect of not joining them with the owner is that the decree does not bind them nor cut off their right of redemption. *Gaines v. Childers*, (1901) 38 Or 200, 63 P 487; *Erne v. Goshen Veneer, Inc.*, (1968) 249 Or 357, 437 P2d 479.

The manifest object of that part of the statute which relates to the joinder of parties is to save the owner of the property all expense possible. *Goodale v. Coffee*, (1893) 24 Or 346, 33 P 990.

Parties personally liable are necessary parties in that interested parties may require their inclusion so as to conclude the controversy by one proceeding; but if beyond the jurisdiction of the court, their absence does not defeat the

lien. *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997.

All lien holders are necessary parties in that they may be brought in by interested parties so as to conclude the controversy by one proceeding. *Id.*

No particular importance is to be given to "shall" and "may" as used with respect to who are to be made parties; rather, general practice should be followed. *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997.

The owner is an indispensable party; a decree without him is a nullity. *Id.*

"All other persons interested" may be brought in if deemed necessary. *Id.*

Objection to nonjoinder of the contractor who is not an indispensable party must be made by demurrer or answer, otherwise it will be deemed to have been waived. *Id.*

The original contractor is not a necessary party to a foreclosure suit unless a personal decree is sought against him by the owner. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1.

An owner is not made a party to plaintiff's suit by the fact that he is made a party to a cross-complaint filed by another defendant. *Byrd v. Cooper*, (1914) 69 Or 406, 139 P 104.

Judgment and general creditors were necessary parties defendant in a suit to foreclose liens against an allegedly insolvent corporation. *Home Mtg. Co. v. Sitka Spruce Pulp & Paper Co.*, (1934) 148 Or 502, 36 P2d 1038.

An original contractor was not a necessary but only a proper party to a suit to foreclose mechanics' liens against the owner, although the contractor had abandoned the work and was allegedly overpaid. *George v. Ore., Calif. & E. Ry.*, (1926) 118 Or 502, 247 P 780.

Failure to name certain defendants in the complaint was cured by answer. *Lorenz Co. v. Gray*, (1931) 136 Or 605, 298 P 222, 300 P 949.

3. Parties to appeal

A contractor is not an adverse or a necessary party to an appeal if no personal judgment is sought against him by the owner. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1; *Hand Mfg. Co. v. Marks*, (1900) 36 Or 523, 52 P 512, 53 P 1072, 59 P 549.

Lien claimants are adverse parties where the property against which the lien is sought to be enforced is insufficient to pay claims in full; and as adverse parties such claimants must be served with notice of appeal. *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997.

Original contractors named as defendants who were not served with summons and did not appear at the trial were not adverse parties to an appeal by the lien claimant who should have been given notice of appeal. *Id.*

4. Allegations and proof generally

That the owner knew of the furnishing of the labor or material must be averred and proved whenever they were not furnished to him directly. *Allen v. Rowe*, (1890) 19 Or 188, 23 P 901; *Hunter v. Cordon*, (1898) 32 Or 443, 52 P 182.

That the notice contained all the statutory requisites, was in proper form, verified, and that it was filed within the time allowed by law must appear from the complaint and not be alleged as a conclusion of law. *Piltz v. Killingsworth*, (1891) 20 Or 432, 26 P 305; *Bohn v. Wilson*, (1909) 53 Or 490, 101 P 202.

An original contractor must allege the completion of the contract within 60 days of the filing of the lien notice under ORS 87.035 or allege facts excusing performance. *Bernard v. Hassan*, (1911) 60 Or 62, 118 P 201; *Lorenz Co. v. Gray*, (1931) 136 Or 605, 298 P 222, 300 P 949; *Anderson v. Chambliss*, (1953) 199 Or 400, 262 P2d 298. *Anderson v. Chambliss*, supra, distinguished in *Hill v. G & W Dev. Corp.*, (1961) 228 Or 93, 363 P2d 763.

Under former statute, when and where the labor or material was furnished must be stated in the complaint. *Willamette Falls Co. v. Smith*, (1855) 1 Or 171.

Under former statute, the time when the building was commenced should be averred in the complaint, if it is desired to enforce the lien from that date. *Kendall v. McFarland*, (1872) 4 Or 292.

Under a prior similar statute, a complaint was defective which failed to state where the statutory notice of lien was filed. *Dalles Lbr. & Mfg. Co. v. Wasco Woolen Mfg. Co.*, (1896) 3 Or 527.

The rule that requires the complaint to show that the lien notice contained all the statutory requirements is sufficiently complied with by pleading the notice in haec verba or by attaching a copy as an exhibit. *Matthiesen v. Arata*, (1897) 32 Or 342, 50 P 1015, 67 Am St Rep 535.

An original contractor must allege filing of claim under LOL 7420 [ORS 87.035] within 60 days of completion of the contract and not completion of the building. *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079.

An averment that plaintiff filed "his verified claim" in substance alleges that the claim was verified by himself, or at least is sufficient after answer to admit in proof the claim as actually filed, if so verified. *Bohn v. Wilson*, (1909) 53 Or 490, 101 P 202.

Although not necessary to state date of completion of a building in the notice if filed in fact within the required time after completion, failure also to state in the complaint the completion of the contract and a filing within the statutory period means failure to state a cause of action. *Bernard v. Hassan*, (1911) 60 Or 62, 118 P 201.

That extra labor is furnished for the structure in question must be averred. *Hoskins v. Powder Land & Irr. Co.*, (1918) 90 Or 217, 176 P 124.

A claimant who fails to allege and prove timely filing of his claim is not entitled to a decree of foreclosure. *Christman v. Salway*, (1922) 103 Or 666, 205 P 541.

Every fact essential to the existence of a valid lien must be alleged in the complaint. *Id.*

The plaintiff must allege and prove not only that he furnished labor or materials but also that he filed a proper lien notice within the statutory period. *Van Lydegraf v. Tyler*, (1929) 128 Or 236, 271 P 740, 273 P 719.

Persons other than an original contractor must allege completion of alteration or repair, or cessation of labor or furnishing of materials as within the statutory period. An allegation of work done or material furnished between certain dates is insufficient. *Lorenz Co. v. Gray*, (1931) 136 Or 605, 298 P 222, 300 P 949.

Giving of the statutory notice of the delivery of materials need not be alleged if they were furnished directly to the owner. *Id.*

Allegations in the complaint of "the construction of the building" may state, at least by inference, completion of the contract. *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 694.

In the absence of demurrer if allegations of the complaint state sufficient facts to inform defendant of the fair and reasonable intentment thereof, the allegations are sufficient. *Hill v. G & W Dev. Corp.*, (1961) 228 Or 93, 363 P2d 763.

Allegations that the claim of lien showed that defendant was the owner of certain land and that plaintiff delivered materials to him through the contractor were sufficient to show that the claim stated that the defendant was the owner of the building, after the answer had been filed. *Bohn v. Wilson*, (1909) 53 Or 490, 101 P 202.

The evidence did not show that the costs were reasonable and not excessive. *Farris v. McCracken*, (1969) 253 Or 273, 453 P2d 932.

5. Burden of proof

The burden of proof is on the contractor to show a substantial compliance with the contract as modified and changed from time to time. *Adams v. MacKenzie*, (1911) 59 Or 89, 114 P 460; *Pippy v. Winslow*, (1912) 62 Or 219, 125 P 298.

The proof must show that the land described in the notice is the same as that described in the complaint. *Morehouse v. Collins*, (1892) 23 Or 138, 31 P 295.

It may be presumed that lienable material furnished was used in the construction of the building and the burden of proof is on the owner to show otherwise. *Fitch v. Howitt*, (1898) 32 Or 396, 52 P 192.

The burden of proving that there was no unnecessary delay in completion rests on the claimant, whenever the issue arises. *Coffey v. Smith*, (1908) 52 Or 538, 97 P 1079.

6. Variance

A variance between facts as alleged in the complaint and as stated in the claim of lien under ORS 87.035 may be fatal to the enforcement of the lien. **Description of land**, *Hendy v. Pac. Cable Co.*, (1893) 24 Or 152, 33 P 403; **terms of contract**, *Graf v. Petry*, (1926) 118 Or 513, 247 P 315; **due date of sum**, *Allen v. Roufs*, (1934) 146 Or 451, 30 P2d 766.

There is not fatal variance between an allegation that the materials were delivered to the original contractor after their purchase by the owner and a recital in the claim of lien that they were delivered at the request of the original contractor. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

Where there is a material variance between the lien notice made a part of the complaint and the allegations the former controls. *Birkemeier v. Knobel*, (1935) 149 Or 292, 40 P2d 694.

Circuit court's allowance of amendment of complaint at variance with the notice of lien incorporated into complaint was not an abuse of power. *Id.*

7. Judgment; interest; execution

See also cases on contract liability under ORS 87.020.

A lien may be enforced against the improvement where the person ordering the improvement had no interest in the land. *Kezartee v. Marks*, (1888) 15 Or 529, 16 P 407; *McFeron v. Doyens*, (1911) 59 Or 366, 116 P 1063.

Execution may be issued on a judgment foreclosing a mechanic's lien. *Kendall v. McFarland*, (1872) 4 Or 292.

The claimant is entitled to interest upon his claim from the date of filing notice. *Forbes v. Willamette Falls Elec. Co.*, (1890) 19 Or 61, 23 P 670, 20 Am St Rep 793.

A decree in excess of the amount for which the lien was allowed is beyond the power of a court of equity to render. *Allen v. Elwert*, (1896) 29 Or 428, 446, 44 P 823, 48 P 54.

A decree can be rendered against the owner of property in excess of the contract price of the improvements made thereon. *Watson v. Noonday Min. Co.*, (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994.

A lien claimant who takes no part in an appeal prosecuted by another claimant is not entitled to enlargement of the relief granted him when the cause is sent back to the trial court after a reversal. *Smith v. Wilkins*, (1901) 38 Or 583, 64 P 760.

Judgment against the contractor personally and for foreclosure of the lien against the property may be warranted in an action by a materialman who supplied the contractor. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

A plaintiff who failed to show that his lien notices were filed within the statutory time may have judgment for the value of work performed and material supplied, but is not entitled to a decree of foreclosure nor to recover his attorney's fees and filing fees. *Van Lydegraf v. Tyler*, (1929) 128 Or 236, 271 P 740, 273 P 719.

The judgment in a materialman's suit properly preserved

for the contractor the amount of a judgment theretofore procured by the contractor in an attachment action against the owner. *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

An original contractor was entitled to a lien for labor and materials furnished by other persons and used by him where said others had waived their individual rights to liens and could hold the contractor personally liable. *Id.*

8. Attorney's fees

The Supreme Court will not modify an allowance for attorney's fees made by the trial court if reasonable or sustained by the testimony. *Forbes v. Willamette Falls Elec. Co.*, (1890) 19 Or 61, 63, 23 P 670, 20 Am St Rep 793; *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454.

An allowance for attorney's fees can be made only on competent testimony where the allegation of reasonableness is denied. *Sattler v. Knapp*, (1912) 60 Or 466, 120 P 2; *Livesay v. Lee Hing*, (1932) 139 Or 450, 9 P2d 133, 84 ALR 118.

The provision allowing reasonable attorney's fees was not unconstitutional as denying equal protection of the laws to owners by granting one litigant a privilege not granted to the other. *Title Guar. & Trust Co. v. Wrenn*, (1899) 35 Or 62, 56 P 271, 76 Am St Rep 454.

A plaintiff, who alleges and proves by competent uncontradicted testimony that the attorney's fee he seeks is reasonable, is entitled to the full amount thereof. *McInnis v. Buchanan*, (1909) 53 Or 533, 99 P 929.

An allowance for preparing, verifying and filing the claim will be presumed on appeal to have been made in compliance with the statute, in the absence of any showing to the contrary. *George v. Ore., Calif. & E. Ry.*, (1926) 118 Or 502, 247 P 780.

This section contemplates that generally the award of attorney's fees covers fees for an appeal. *In re Irwin*, (1939) 162 Or 221, 91 P2d 518.

A contractor who defrauded the owner was awarded only a minimum attorney's fee. *Sparhawk v. Stevens*, (1939) 162 Or 375, 91 P2d 1116.

Where claimant's lien was invalid but personal judgment was allowed, claimant was not entitled to inclusion of cost of preparing and filing lien claim or attorney's fees as part of the judgment. *Dimitre Elec. Co. v. Paget*, (1944) 174 Or 72, 151 P2d 630.

9. Review

The Supreme Court may accept the finding of the trial court that the notice required by OL 10191 [ORS 87.020] was duly given, although such finding is not binding in an equitable case. *Mokler v. Doun*, (1928) 125 Or 595, 268 P 55.

FURTHER CITATIONS: *State v. Ganong*, (1919) 93 Or 440, 184 P 233; *Mehlig v. Farrier*, (1961) 226 Or 140, 359 P2d 431.

ATTY. GEN. OPINIONS: Foreclosure of lien by state agency for eradication of pests, 1926-28, p 50; place of foreclosure suit on land in two counties, 1928-30, p 550.

LAW REVIEW CITATIONS: 29 OLR 308.

87.065

NOTES OF DECISIONS

It is the duty of the owner to see that whatever payments are made to the contractor before the expiration of the statutory period after completion are distributed among the laborers and materialmen, otherwise he may be compelled to pay a second time. *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574.

This section enables a lien claimant in some circumstances to collect the whole amount from the owner regardless of what has already been paid. *Ban v. Columbia So. R. Co.*, (1902) 54 CCA 407, 117 Fed 21.

This section should be construed in pari materia with OC 51-105 [ORS 87.035] in determining the meaning of the expression "original contractor." *Prouty Lbr. & Box Co. v. McGuirk*, (1937) 156 Or 418, 66 P2d 481, 68 P2d 473.

Owner's payment to the contractor in reliance upon a waiver by a materialman was a sufficient consideration to support the waiver, although it did not by its terms require any payment by the contractor. *Hughes v. Lansing*, (1898) 34 Or 118, 55 P 95, 75 Am St Rep 574.

FURTHER CITATIONS: *Watson v. Noonday Min. Co.*, (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994; *Tait & Co. v. Stryker*, (1926) 117 Or 338, 243 P 104.

LAW REVIEW CITATIONS: 29 OLR 308; 41 OLR 25.

87.070

NOTES OF DECISIONS

The contractor may be a necessary party when the owner seeks to recover from him payment made in excess of the contract price. *Cooper Mfg. Co. v. Delahunt*, (1900) 36 Or 402, 51 P 649, 60 P 1.

FURTHER CITATIONS: *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; *West v. Wilson*, (1931) 136 Or 262, 297 P 847.

LAW REVIEW CITATIONS: 41 OLR 25.

87.075

NOTES OF DECISIONS

The exemption accorded by this section is absolute and the material owner is not required to make a timely claim thereof before sale in order to avail himself of the exemption. *California Trojan Powder Co. v. Wadhams & Co.*, (1917) 85 Or 307, 309, 166 P 759.

LAW REVIEW CITATIONS: 29 OLR 308.

87.080

NOTES OF DECISIONS

This statute is declaratory of the common law and must be interpreted in accordance with its principles. *McDermid v. Foster & Co.*, (1887) 14 Or 417, 12 P 813.

Actual possession of the chattel is indispensable to attachment of a lien, in the absence of agreement to the contrary. *Id.*

A person employed to cut and stack wheat has no such possession of the wheat as will entitle him to a lien thereon. *Id.*

Foreclosure proceedings under this statute are in derogation of the common law and must be substantially complied with or the lien will fail. *Tulloch v. Cockrum*, (1925) 115 Or 601, 236 P 1045.

Where lien claimant retains possession he may foreclose according to this section or by suit, but not by advertisement and sale under OL 10277 [ORS 87.110]. *Id.*

Actual knowledge is not equivalent to statutory notice. *Id.*

Failure to give the debtor statutory notice invalidated the lien where debtor had no actual knowledge of the lien. *Id.*

LAW REVIEW CITATIONS: 23 OLR 281.

ATTY. GEN. OPINIONS: Foreclosure of lien, 1926-28, p 578;

larceny of automobile from lien claimant, 1930-32, p 33; issuance of new certificate of title to purchaser of automobile at foreclosure sale for labor and material furnished at request of one who acquired possession from the purchaser under a conditional sales contract, 1930-32, p 157; foreclosure of liens for both labor and storage on automobile still in lienor's possession, 1936-38, p 362; priority over chattel mortgage lien, 1938-40, p 160.

87.085

NOTES OF DECISIONS

1. In general
2. Lienable work
3. Request for labor and material
4. Possession of lien claimant
5. Work under single contract
6. Reasonable worth
7. Duration of lien

1. In general

This legislation should be construed so as to give it effect as reasonably intended by the legislature. *Hiner v. Pitts*, (1918) 89 Or 602, 175 P 133; *Tulloch v. Cockrum*, (1925) 115 Or 601, 175 P 133.

A claimant under this statute must show a substantial compliance with all of the essential requirements of the statute. *Duby v. Hicks*, (1922) 105 Or 27, 209 P 156; *Coast Eng. & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

The statute is to be interpreted in accordance with the principles of the common law. *Ross v. Spaniol*, (1927) 122 Or 424, 251 P 900, 259 P 430; *Hann v. Handy*, (1950) 189 Or 32, 217 P2d 763.

Lien claimants must strictly comply with the statute. *Covey Motor Car Co. v. Kliks*, (1924) 111 Or 394, 225 P 1097.

This enactment should be liberally construed. *Coast Eng. & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

The statute was intended to preserve the right to a lien existing at common law without the necessity of the lienor retaining possession of the chattel until compensated for his work, and to extend the right to a lien in the cases mentioned not existing at common law. *Ross v. Spaniol*, (1927) 122 Or 424, 251 P 900, 259 P 430.

In order to be entitled to a lien, it is necessary to have shown substantial performance of the contract. *Koch v. Rice*, (1951) 193 Or 102, 237 P2d 494.

2. Lienable work

The right of lien rests on doing of labor and furnishing materials. *Hiner v. Pitts*, (1918) 89 Or 602, 175 P 133.

The removal of solid tires from a large truck and the supplying of and replacement by new pneumatic tires, tubes, wheels and hubs, involving technical skills and calculations, was not a mere sale of personal property. *Fletcher v. So. Ore. Truck Co.*, (1929) 128 Or 353, 273 P 329.

This section accords no lien upon mill machinery for work done on the building in which the machinery was to be installed. *Johnson v. Brizendine*, (1933) 141 Or 477, 18 P2d 247.

3. Request for labor and material

The phrase "lawful possessor" refers to one authorized by the statute to have the work done, and not to the person contracting to do the repairs. *Ross v. Spaniol*, (1927) 122 Or 424, 251 P 900, 259 P 430.

The statute contemplates a request of the actual owner or one so entrusted with possession for purposes other than repair as to have apparent authority to contract for repair with others. *Id.*

The possession of the person making the request must

be lawful, and if the possession is that of one not the owner, to be lawful it must not be inconsistent with the rights of the owner. *Id.*

The agency expressed by this section is the same as that at common law. *Hann v. Handy*, (1950) 189 Or 32, 217 P2d 763.

Where the conditional buyer of an automobile transferred it without the seller's consent as required by the contract, the transferee was not a lawful possessor entitling one furnishing repairs at his request to a lien on the automobile. *Goodrich Silvertown Stores v. Collins*, (1941) 167 Or 40, 115 P2d 332.

Where defendant contracted for the purchase and installation of refrigerated display cases and the supplier employed claimant to do electrical work, evidence showed the supplier to be an independent contractor and not the agent of defendant. *Hann v. Handy*, (1950) 189 Or 32, 217 P2d 763.

4. Possession of lien claimant

The possession involved in removing and replacing tires on a car is of sufficient duration to entitle the tire merchant to a lien. *Courts v. Clark*, (1917) 84 Or 179, 181, 164 P 714; *Fletcher v. So. Ore. Truck Co.*, (1929) 128 Or 353, 273 P 329.

Where a person contracting for repair of a chattel receives possession only for the purpose of repair, a lien for the work is personal to him and does not extend to his employees, who are neither creditors nor in privity of contract with the owners and have mere custody. *Ross v. Spaniol*, (1927) 122 Or 424, 251 P 900, 259 P 430.

Although claimants had only a qualified possession by their keeping an engine, used by the owner, in running order under a contract to keep it in repair until a job was completed and then to make an overhaul, all work performed till mutual termination of the contract was lienable. *Hiner v. Pitts*, (1918) 89 Or 602, 175 P 133.

Claimant was entitled to a lien for the repair of caterpillar tractors and trailer although only a part was brought to him for repair. *Coast Eng. & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

The qualified possession had by lien claimant while installing machinery in a mill was sufficient to support a claim for a lien. *Johnson v. Brizendine*, (1933) 141 Or 477, 18 P2d 247.

5. Work under single contract

When the claim in a lump sum covers both lienable and nonlienable items, such as charges for labor and material expended on real property, the lien so claimed is invalid. *George H. Buckler Co. v. Am. Metallic Chem. Corp.*, (1958) 214 Or 639, 332 P2d 614.

All work performed at intervals under a contract to keep an engine running until a job was completed and then to make an overhaul was performed under a single contract and was lienable. *Hiner v. Pitts*, (1918) 89 Or 602, 175 P 133.

Lien claimant was entitled to one lien on all three articles without segregation of repairs and materials for each article where work was performed on all three as a unit at the same time for the same reputed owner under one contract, although several parties owned the articles. *Coast Eng. & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

6. Reasonable worth

Testimony of plaintiff, an experienced garage man, establishing in effect the reasonable worth of each item of charge, made without objection from and apparently understood by opposing counsel in the trial court, could not later be objected to in the Supreme Court. *Gyllenberg v. Heriza*, (1928) 127 Or 481, 272 P 674.

7. Duration of lien

The one-year period is a limitation upon the time within which foreclosure proceeding must be commenced. *Fletcher Tire Co. v. Mahler*, (1933) 144 Or 409, 24 P2d 1028.

FURTHER CITATIONS: *Pierce Arrow Co. v. Irwin*, (1917) 86 Or 683, 169 P 129; *McCann v. Ore. Scenic Trips Co.*, (1922) 105 Or 213, 209 P 483.

LAW REVIEW CITATIONS: 12 OLR 247; 21 OLR 108; 23 OLR 282.

87.090

NOTES OF DECISIONS

1. In general
2. Time for filing
3. Place of filing
4. Description of chattel
5. Place of performance of work
6. Statement of claim

1. In general

There can be no right to a lien unless the lien notice contains the prescribed statements. *Duby v. Hicks*, (1922) 105 Or 27, 209 P 156.

An interest sufficient to sustain a lien may exist in persons other than the actual owner. *Timber Tractor Co. v. Gravel Corp.*, (1967) 247 Or 345, 429 P2d 564.

There was no evidence of ownership or possession on the part of defendant sufficient to support a lien naming defendant as the owner or reputed owner. *Timber Tractor Co. v. Gravel Corp.*, (1967) 247 Or 345, 429 P2d 564. **Distinguished in** *Lew Williams Cadillac, Inc. v. Goldman*, (1969) 254 Or 286, 459 P2d 882.

A lien is sufficient as against the interests of all actual owners, if it names as the owner or reputed owner authorizing the work, one who authorized the work and who either had an actual interest in the vehicle or had its lawful possession which was not inconsistent with the rights of the owner. *Lew Williams Cadillac, Inc. v. Goldman*, (1969) 254 Or 286, 459 P2d 882.

2. Time for filing

There was no "delivery" when an automobile was "borrowed" by the owner before testing and then returned so that further work could be done. *Pierce Arrow Co. v. Irwin*, (1917) 86 Or 683, 169 P 129.

No allegation that the notice was filed within 60 days after the chattel was delivered to the owner or reputed owner is required in the notice. *Gyllenberg v. Heriza*, (1928) 127 Or 481, 272 P 674.

The date of delivery, where work was performed under an abrogable contract to repair a donkey engine on the job whenever it broke down, was that date on which actual abrogation took place. *Hiner v. Pitts*, (1918) 89 Or 602, 175 P 133.

3. Place of filing

The notice need not be filed in a county to which the chattel was removed after the work was done. *Covey Motor Car Co. v. Kliks*, (1924) 111 Or 394, 225 P 1097.

4. Description of chattel

The sufficiency of the description must be determined by construing the notice as a whole. *Fletcher v. So. Ore. Truck Co.*, (1929) 128 Or 353, 273 P 329.

In determining the sufficiency of the description the court may consider that the notice is designed to affect persons identified with the business under which the lien may arise. *Id.*

An exact or faultless description is not required, but it

must be sufficient to identify the chattel. *Coast Engine & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

A notice alleging that "storage, labor and skill" were expended on "Cadillac license 104209, motor 2293," and that the statutory time had not elapsed since work was done on "said Cadillac automobile" sufficiently described the chattel. *Covey Motor Car Co. v. Kliks*, (1924) 111 Or 394, 225 P 1097.

The chattels were sufficiently described by designating them as two Holt caterpillar logging trailers (about 10-ton capacity) and one Holt caterpillar tractor owned by defendant. *Coast Engine & Mach. Works v. Barbee*, (1929) 130 Or 159, 279 P 264.

A notice claiming a lien upon one 1926 White motor 11829 was sufficient to describe the property in view of other recitals showing that the sum claimed was for the installation and supplying of tires, tubes, hubs and wheels. *Fletcher v. So. Ore. Truck Co.*, (1929) 128 Or 353, 273 P 329.

5. Place of performance of work

No cause of suit for a lien was stated where neither the complaint nor the notice of lien stated that the labor and materials were furnished in the county where the notice was filed. *McCann v. Ore. Scenic Trips Co.*, (1922) 105 Or 213, 209 P 483; *Burns v. La Fontaine*, (1924) 112 Or 194, 229 P 369.

The heading "Portland, Oregon" on a statement of account in a notice of lien made a part of the complaint was a sufficient allegation that the work was done in Multnomah County. *Covey Motor Car Co. v. Kliks*, (1924) 111 Or 394, 225 P 1097.

6. Statement of claim

A valid lien notice must disclose that a debt does exist, and must show the amount for which the lien is claimed. *Duby v. Hicks*, (1922) 105 Or 27, 209 P 156.

Where the nonlienable items are separately stated and may be rejected the claim for lienable items is valid. *Burns v. LaFontaine*, (1924) 112 Or 194, 229 P 369.

Joinder of nonlienable with lienable items in a single charge invalidates a lien if the nonlienable items are incapable of segregation without the aid of extrinsic evidence. *Johnson v. Brizendine*, (1933) 141 Or 477, 18 P2d 247.

An honest mistake as to the date of an account where work was performed a short time before or after the erroneous date and the owner was not prejudiced does not invalidate a lien. *Gyllenberg v. Heriza*, (1928) 127 Or 481, 272 P 674.

FURTHER CITATIONS: *Williams v. Intl. Harvester Co.*, (1943) 172 Or 270, 288, 141 P2d 837.

LAW REVIEW CITATIONS: 12 OLR 247; 23 OLR 282.

87.100

NOTES OF DECISIONS**1. Possession**

A person who is in "lawful possession" of a chattel is one who has been entrusted by the owner with apparent authority to contract for its repair. *Ross v. Spaniol*, (1927) 122 Or 424, 251 P 900, 259 P 430.

A lien is sufficient as against the interests of all actual owners, if it names as the owner or reputed owner authorizing the work, one who authorized the work and who either had an actual interest in the vehicle or had its lawful possession which was not inconsistent with the rights of the owner. *Lew Williams Cadillac, Inc. v. Goldman*, (1969) 254 Or 286, 459 P2d 882.

Where the conditional buyer of an automobile transferred it without the seller's consent as required by contract, the transferee was not purchasing the automobile or in lawful

possession within this section. *Goodrich Silvertown Stores v. Collins*, (1941) 167 Or 40, 115 P2d 332.

2. Priority

A conditional seller repossessing a truck takes it subject to any lien that may be claimed for accrued charges covering work done prior to the repossession. *Ponsler v. Wilson*, (1933) 144 Or 337, 24 P2d 26.

A lien for repair of a motor vehicle is inferior to a valid chattel mortgage that was on record when the claimant performed the work or furnished the materials, if the automobile was not retained by plaintiff. *Ford v. Bates*, (1935) 150 Or 672, 47 P2d 951.

Actual, continuous and exclusive possession by the lien claimant, his agent or servant, is necessary to preserve the priority of his lien over that of a prior chattel mortgage. *Yellow Mfg. Acceptance Corp. v. Bristol*, (1951) 193 Or 24, 236 P2d 939.

Mechanic's priority over chattel mortgage was lost on surrendering of possession to the mortgagor; nor could he complain because not notified of the private sale, fairly and honestly conducted, held according to the mortgage terms, which netted less than the mortgage debt and extinguished his lien. *Gordan v. United Fin. Corp.*, (1942) 168 Or 149, 121 P2d 938.

FURTHER CITATIONS: *Timber Tractor Co. v. Gravel Corp.*, (1967) 247 Or 345, 429 P2d 564.

ATTY. GEN. OPINIONS: Priority as to chattel mortgage, 1938-40, p 160, 1940-42, p 476.

LAW REVIEW CITATIONS: 21 OLR 111.

87.105

ATTY. GEN. OPINIONS: Authority of clerk to charge for attesting release of chattel liens, 1922-24, p 802.

87.110

NOTES OF DECISIONS

1. In general
2. Time to commence proceeding
3. Advertisement and sale
4. Complaint in suit
5. Abandonment of suit
6. Decree
7. Review

1. In general

Where lien claimant retains possession he may foreclose by suit or according to OL 10226 [ORS 87.080], but not by advertisement and sale. *Tulloch v. Cockrum*, (1925) 115 Or 601, 236 P 1045; *Williams v. Intl. Harvester Co.*, (1943) 172 Or 270, 141 P2d 837.

Neither procedure authorized by this section is exclusive, but one supplements the other. *Fletcher Tire Co. v. Mahler*, (1933) 144 Or 409, 24 P2d 1028.

Procedures authorized by this section are exclusive and the holder of a lien has no authority to take possession personally and arbitrarily of the property to enforce his lien. *Daly v. Wolfard Bros.*, (1955) 204 Or 241, 261 P2d 679, 262 P2d 917, 282 P2d 627.

2. Time to commence proceedings

Foreclosure proceedings must be commenced within one year after the work is performed or the materials furnished, but need not be brought to final adjudication within one year. *Fletcher Tire Co. v. Mahler*, (1933) 144 Or 409, 24 P2d 1028.

3. Advertisement and sale

Actual knowledge of the lien on the part of the owner is not the equivalent of statutory notice. *Tulloch v. Cockrum*, (1925) 115 Or 601, 236 P 1045.

The owner of the chattel is not required to serve the sheriff with a verified denial, if he was not served with a copy of the lien nor a bill of particulars. *Id.*

4. Complaint in suit

A person seeking to enforce a lien on an automobile must allege and prove a substantial compliance with all the essential requirements of the statute. *Duby v. Hicks*, (1922) 105 Or 27, 209 P 156.

Filing of the notice within the 60 day period must be averred, otherwise the complaint is insufficient. *Burns v. La Fontaine*, (1924) 112 Or 194, 229 P 369.

Where neither the complaint nor the notice of lien stated that the labor or materials were furnished in the county where the notice was filed, no cause of suit for a lien was stated. *McCann v. Ore. Scenic Trips Co.*, (1922) 105 Or 213, 209 P 483; *Burns v. La Fontaine*, (1924) 112 Or 194, 229 P 369.

Where from the allegations it appeared that the lien notice failed to state the amount for which a lien was claimed or that the claimant was entitled to a lien for any amount, and the defect was not cured by other allegations or by introduction of the original or certified copy of the lien notice, the complaint failed to state a cause of suit. *Duby v. Hicks*, (1922) 105 Or 27, 209 P 156.

Failure to allege that the sheriff in taking possession of the chattel delivered to the person in possession a certified copy of the lien notice and an itemized bill of particulars was a mere irregularity which defendant waived by filing an answer and going to trial upon the merits. *Columbia Auto Works v. Yates*, (1945) 176 Or 295, 156 P2d 561.

There was no fatal variance where the notice of lien recited in the complaint and the complaint named different persons as the owner when both were "owners" as defined by ORS 87.100. *Lew Williams Cadillac, Inc. v. Goldman*, (1969) 254 Or 286, 459 P2d 882.

5. Abandonment of suit

The forwarding of lien notices to sheriffs of other counties to which the chattel had been removed did not constitute an abandonment of the original, pending proceedings but a continuation thereof. *Fletcher Tire Co. v. Mahler*, (1933) 144 Or 409, 24 P2d 1028.

6. Decree

Dismissal without prejudice of a suit brought under this section does not bar prosecution of a subsequent suit. *Fletcher v. So. Ore. Truck Co.*, (1930) 132 Or 338, 285 P 813.

A personal judgment cannot be rendered unless there is a contractual relation between the lienor and the defendants. *Lew Williams Cadillac, Inc. v. Goldman*, (1969) 254 Or 286, 459 P2d 882.

An alternative decree for the return of the chattel for sale or if not returned at all or if depreciated, for personal judgment, was proper where defendant, with conditional vendor, had repossessed and resold the chattel with knowledge of the claimed lien. *Ponsler v. Wilson*, (1933) 144 Or 337, 24 P2d 26.

7. Review

The finding as to knowledge of the lien, and the proceedings to foreclose it, is final and conclusive on appeal when the evidence is in conflict. *Tulloch v. Cockrum*, (1925) 115 Or 601, 236 P 1045.

Defendant could not object for the first time on appeal to bill of particulars not being certified, especially where

he was not shown to be the record owner. *Gyllenberg v. Heriza*, (1928) 127 Or 481, 272 P 674.

ATTY. GEN. OPINIONS: Foreclosure where claimant keeps possession, 1926-28, p 578; foreclosure where possession has been surrendered, 1936-38, p 362, 1938-40, p 160; sheriff's duties upon foreclosure by advertisement and sale, 1940-42, p 476.

LAW REVIEW CITATIONS: 23 OLR 282.

87.120

CASE CITATIONS: *Wakehouse v. Wetzel*, (1968) 250 Or 391, 443 P2d 227.

87.125

NOTES OF DECISIONS

1. In general
2. Construction of statute
3. When lien attaches
4. Waiver or destruction of lien
5. Lienable work

1. In general

The loggers' lien law was taken from the statutes of Washington. *North Pac. Lbr. Co. v. Lang*, (1895) 28 Or 246, 42 P 799, 52 Am St Rep 780; *Feris v. Balcom*, (1967) 249 Or 343, 432 P2d 684, app. dis., 390 US 458, 88 S Ct 1197, 20 L Ed 2d 28.

This section was intended to provide security to the logger while LOL 7462 [ORS 87.130] was designed to protect the operatives in the mill. *Day v. Green*, (1912) 63 Or 293, 127 P 772; *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41.

Possession of the logs at the time the work is being performed, or their retention thereafter, is not essential to the validity of the lien given herein. *McKinley v. Tice*, (1929) 129 Or 190, 276 P 1110.

2. Construction of statute

The statute is remedial and should be liberally construed in the interest of the laborer. *Day v. Green*, (1912) 63 Or 293, 127 P 772; *Shultz v. Shively*, (1914) 72 Or 450, 153 P 1115.

The statute should be strictly construed as to the manner in which enforced and in determining to what cases the statute is to be applied, but after compliance it should be liberally construed in favor of those entitled to a lien. *McKinley v. Tice*, (1929) 129 Or 190, 276 P 1110.

The statute applies to those who directly perform the labor and not those who employ others to do it. *Feris v. Balcom*, (1967) 249 Or 343, 432 P2d 684, app. dis., 390 US 458, 88 S Ct 1197, 20 L Ed 2d 28.

3. When lien attaches

The lien is created from the time the work begins, not from the time of completion, and filing of notice is only a means of continuing it. *Fischer v. Cone Lbr. Co.*, (1907) 49 Or 277, 89 P 737; *Day v. Green*, (1912) 63 Or 293, 127 P 772.

4. Waiver or destruction of lien

The lien herein accorded may be enforced not only against the logs worked on but also against the lumber into which they may be manufactured so long as it can be traced and identified. *Day v. Green*, (1912) 63 Or 293, 298, 127 P 772; *Shultz v. Shively*, (1914) 72 Or 450, 455, 143 P 1115; *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41; *Nightingale v. Taylor*, (1920) 97 Or 506, 192 P 652.

Silence on learning of the sale of logs does not constitute

assent to waive the lien and look to the proceeds from the sale; there must be an express or implied intent to waive the lien. *Fischer v. Cone Lbr. Co.*, (1907) 49 Or 277, 89 P 737.

A sawing of the logs into lumber does not destroy the lien as the subject matter of the lien still exists although identity is rendered difficult or impossible. *Id.*

5. Lienable work

A person who hauls cordwood from the forest to market is entitled to a lien thereon, having assisted in "obtaining or securing" the wood. *Weissenfels v. Schaffer*, (1921) 99 Or 228, 195 P 362. **Distinguished in**, *Wilson v. Clark*, (1970) 255 Or 116, 464 P2d 683.

An employe of a contractor is entitled to a lien for work done during the time of the contractor's employment, but not after receipt of notice that such employment has terminated. *Spratt v. Brown-Petzel Lbr. Co.*, (1922) 105 Or 672, 210 P 700.

A claim for work done over a period of six months is invalid if there is nothing on the face of the claim from which the work done within the six month period can be segregated from the rest of the work. *McKinley v. Tice*, (1929) 129 Or 190, 276 P 1110.

A scaler is not entitled to invoke the benefits of this section. *Kidder v. Nekoma Lbr. Co.*, (1952) 196 Or 409, 249 P2d 754.

The word "labor" does not include a claim for rent of equipment to the logger. *Wilson v. Clark*, (1970) 255 Or 116, 464 P2d 683.

The words "shall assist in" do not extend the lien to one who has not contributed work or labor. *Id.*

FURTHER CITATIONS: *Diamond Nat. Corp. v. Lee*, (1964) 333 F2d 517.

87.130

NOTES OF DECISIONS

This section is remedial and should be liberally construed in the interest of the laborer. *Day v. Green*, (1912) 63 Or 293, 127 P 772; *Shultz v. Shively*, (1914) 72 Or 450, 143 P 1115; *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41.

This section was intended to provide protection to mill operatives while LOL 7462 [ORS 87.125] was designed to protect loggers. *Day v. Green*, (1913) 63 Or 293, 127 P 772; *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41.

The lien given by this section is personal so that any assignment thereof before recordation of the lien carries only the chose in action and not the lien. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234.

Laborers performing work in, around and about a lumber mill in some manner connected with and incidental to the conversion of timber into lumber, are entitled to a lien under this section. *Id.*

A laborer has no lien upon lumber which had been hauled 12 miles from the yard wherein it was manufactured. *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41.

The lien herein accorded is limited to the lumber manufactured and endures only so long as it remains in the millyard. *Nightingale v. Taylor*, (1920) 97 Or 506, 192 P 652.

FURTHER CITATIONS: *Brown v. Comstock, Brown & Alm Co.*, (1921) 101 Or 418, 200 P 900.

87.135

NOTES OF DECISIONS

1. In general

2. Statement of demand
3. Description of property

1. In general

The lien expires unless the notice herein required is timely filed. *Fischer v. Cone Lbr. Co.*, (1907) 49 Or 277, 89 P 737.

The form given in the statute is not mandatory. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234.

All statutory requirements must be complied with in order for a lien to attach. *Id.*

2. Statement of demand

A claim that lumps lienable and nonlienable items in such manner that they cannot be segregated will not support a lien. *Spratt v. Brown-Petzel Lbr. Co.*, (1922) 105 Or 672, 210 P 700; *McKinley v. Tice*, (1929) 129 Or 190, 276 P 1110.

A joint or dual claim for services in cutting logs and in manufacturing lumber, if permissible at all, would be required to show the amount and value of the labor spent on each. *First Nat. Bank v. Wegener*, (1919) 94 Or 318, 181 P 990, 186 P 41.

A combined or lump lien for logging and manufacturing timber, or for stumping and either or both of the former, cannot be enforced without a segregation of the items constituting the lien and a specification of the amount of each. *Nightingale v. Taylor*, (1920) 97 Or 506, 192 P 652.

Inclusion in a lien filed by a contractor of amounts due others employed by him who also worked on the logs renders the claim invalid. *McKinley v. Tice*, (1929) 129 Or 190, 276 P 1110.

Extrinsic evidence is not admissible to segregate lienable from nonlienable items. *Id.*

Where the notice described both lienable lumber at the mill and nonlienable lumber at the railroad the latter reference was mere surplusage and did not invalidate lien claims which clearly specified the character of labor and contract price therefor, although the amount of labor performed on each group of lumber was not separately stated. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234.

3. Description of property

Any description together with the testimony at the trial that would enable a stranger to locate the property by the use of reasonable diligence is sufficient. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234; *Shultz v. Shively* (1914) 72 Or 450, 143 P 1115.

Designation of logs by mark appears to be contemplated by the statute, but such designation is not always essential, the matter depending upon the circumstances. *Id.*

Oral evidence is admissible to aid the description in the complaint. *Shultz v. Shively*, (1914) 72 Or 450, 143 P 1115.

Unmarked lumber was sufficiently described as being at a certain millyard where there were no other logs in the vicinity and the property could easily have been found. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234.

A notice describing the lien as upon lumber manufactured from logs upon which the claimant had a lien was sufficient to continue the lien where most of the logs had been manufactured into lumber before expiration of the 30-day period. *Day v. Green*, (1912) 63 Or 293, 127 P 772.

A description stating that so many feet of logs were taken to defendant's millyard marked or branded with "U.S.," a part of which were located at the millyard as logs and others as ties, bridge and mining timbers and other lumber, was sufficient. *Shultz v. Shively*, (1914) 72 Or 450, 143 P 1115.

Description that so many feet of merchantable logs without mark or brand were lying in Marion County along a donkey road leading from government land to a certain railroad track, was insufficient. *Id.*

NOTES OF DECISIONS

1. In general

The assignee of the claim before the lien is perfected takes only the debt but the assignee after the lien is perfected takes the lien as well. *Loud v. Gold Ray Realty Co.*, (1914) 72 Or 155, 142 P 785.

2. Application of terms

The word "labor" means actual physical toil with the hands and muscles and does not include the work of a superintendent or manager. *Durkheimer v. Copperopolis Copper Co.*, (1909) 55 Or 37, 104 P 895; *Stuart v. Camp Carson Min. Co.*, (1917) 84 Or 702, 165 P 359.

The holder of an irrevocable exclusive license to work a mine, who by his expenditures has acquired an interest entitling him to possession, is a lessee. *Stinson v. Hardy*, (1895) 27 Or 584, 41 P 116.

Electricity furnished to a mine for illumination or for power constitutes "supplies." *Grants Pass Trust Co. v. Enterprise Min. Co.*, (1911) 58 Or 174, 113 P 859, 34 LRA(NS) 395.

3. Services covered

A mine foreman who saw that the work of mining was done, framed timbers, helped the men, took part in the erection of the mill and generally assisted in the furtherance of work, was not precluded from obtaining a miner's lien. *Washburn v. Inter-Mountain Min. Co.*, (1910) 56 Or 578, 109 P 382, Ann Cas 1912C, 357.

Work done upon a wagon road is a lienable item. *Heisler v. Hamilton Mammoth Mines Co.*, (1924) 110 Or 403, 223 P 735.

Location work is within this section. *Jackson v. Brown*, (1925) 116 Or 343, 241 P 59.

4. Property subject

Mining claims on which minerals have not been found are within this section. *Williams v. Toledo Coal Co.*, (1894) 25 Or 426, 36 P 159, 42 Am St Rep 799.

A lien may be claimed on a group of mining claims if they are worked as one mine, whether or not they are contiguous. *Jackson v. Brown*, (1925) 116 Or 343, 241 P 59.

Where a stamp mill was purchased by a mining company under a conditional sale contract and permanently affixed to the freehold at the mines, the conditional sales agreement not recorded was subject to miners' liens. *Washburn v. Inter-Mountain Min. Co.*, (1910) 56 Or 578, 109 P 382, 384, Ann Cas 1912C, 357.

It is not necessary that the proof show that the labor for which the lien is claimed was done on the mill or building to subject them to the lien. *Id.*

FURTHER CITATIONS: *Watson v. Noonday Min. Co.*, (1900) 37 Or 287, 55 P 867, 58 P 36, 60 P 994; *Lewis v. Beeman*, (1905) 46 Or 311, 80 P 417; *Escott v. Crescent Coal & Nav. Co.*, (1910) 56 Or 190, 106 P 452; *Warner v. Fordham*, (1967) 246 Or 200, 424 P2d 673.

NOTES OF DECISIONS

1. In general

Filing a claim within the time prescribed is a condition precedent to the preservation by the laborer of his inchoate right of lien arising from the performance of the work. *Horn v. United States Min. Co.*, (1905) 47 Or 124, 81 P 1009.

2. Time limit

The time within which to file a lien is reckoned by excluding the last day of service in the mine and including

the last day of the period prescribed. *Horn v. United States Min. Co.*, (1905) 47 Or 124, 81 P 1009.

3. Statement of demand

A lump sum account containing both lienable and non-lienable items unsegregated will not support a lien. *Williams v. Toledo Coal Co.*, (1894) 25 Or 426, 36 P 159, 42 Am St Rep 799.

A statement not giving credit for a conceded payment is fatally defective, even though unimportant in amount. *Lewis v. Beeman*, (1905) 46 Or 311, 80 P 417.

Segregation of demands for overtime work is not necessary in a lien notice. *Haines Commercial Co. v. Grabill*, (1915) 78 Or 375, 152 P 877.

Inclusion of nonlienable items does vitiate a claim where they are separately stated. *Heisler v. Hamilton Mammoth Mines Co.*, (1924) 110 Or 403, 223 P 735.

Lien claimant for labor cannot include amount paid by him for locator's labor. *Jackson v. Brown*, (1925) 116 Or 343, 241 P 59.

4. Name of owner

A statement that the person against whom the lien is claimed is the owner and reputed owner, or, in the alternative, that a designated person is the owner or reputed owner is sufficient. *Bishop v. Henry*, (1917) 84 Or 389, 395, 165 P 237.

5. Description of property

The lien notice need not state that the labor has been done on a mill or building on the mine to subject them to the lien. *Washburn v. Inter-Mountain Min. Co.*, (1910) 56 Or 578, 109 P 382, Ann Cas 1912C, 357.

Inclusion of nonlienable property where done in good faith and without misleading defendants did not vitiate the lien notice. *Jackson v. Brown*, (1925) 116 Or 343, 241 P 59.

6. Verification

An affidavit that the affiant caused the notice to be prepared at the request of the claimant and that he had personal knowledge of the facts set forth in the lien and knew them to be true, was a sufficient verification. *Loud v. Gold Ray Realty Co.*, (1914) 72 Or 155, 161, 142 P 785.

87.155

NOTES OF DECISIONS

Recording a claim of lien for work on mines, directly and indirectly indexed in the same book in which mechanics' liens were recorded, is sufficient. *Stuart v. Camp Carson Min. Co.*, (1917) 84 Or 702, 165 P 359.

87.160

NOTES OF DECISIONS

The running of the statute of limitations against an action to foreclose a mining lien is not suspended by the absence of the defendant from the state. *Burns v. White Swan Min. Co.*, (1899) 35 Or 305, 57 P 637.

Suits for the foreclosure of mining liens are commenced when the complaint is filed. *Id.*

The right to file a proper lien for mining supplies furnished, after a futile attempt to file a lien, continued until the expiration of the time allowed to file the original lien. *Grants Pass Trust Co. v. Enterprise Min. Co.*, (1911) 58 Or 174, 113 P 859, 34 LRA(NS) 395.

Where material is furnished to the owner of a mine prior to the execution of a mortgage on such mine, the lien arising from the furnishing of the material is preferred over the mortgage though the lien was not filed until after the suit to foreclose the mortgage was instituted. *Id.*

The mortgagee of a mortgage executed subsequent to

1907 is not deprived of his property right without due process of law because his lien is postponed to the liens of laborers and materialmen. *Haines Commercial Co. v. Grabill*, (1915) 78 Or 375, 152 P 877.

ATTY. GEN. OPINIONS: Effect of 1929 amendment on liability of mine for lessee's debts, 1930-32, p 108.

87.165

NOTES OF DECISIONS

1. In general

Oral evidence is not admissible to separate unsegregated lienable and nonlienable items in a lump sum account. *Williams v. Toledo Coal Co.*, (1894) 25 Or 426, 36 P 159, 42 Am St Rep 799.

The burden is on lien claimants of leased property to show, as against the owners, that no payments have been made on account of their liens since they were filed. *Lewis v. Beeman*, (1905) 46 Or 311, 80 P 417.

A sufficiently certain decree, in a suit to foreclose miners' liens, can be rendered by referring to the volume and page of the records of mining claims as specified in the lease and notice of lease. *Id.*

The evidence need not show that the labor has been done on a mill or building on the mine to subject them to the lien. *Washburn v. Inter-Mountain Min. Co.*, (1910) 56 Or 578, 109 P 382, Ann Cas 1912C, 357.

Where mines and a stamp mill could not be sold separately without depreciation, the owner of the mill was not entitled to compel a sale of the mines in satisfaction of the claims before a sale of the mill. *Id.*

A personal judgment cannot be rendered against the owner of a mine in an action to foreclose liens for labor and materials against the owner and a lessee operating the property. *Haines Commercial Co. v. Grabill*, (1915) 78 Or 375, 152 P 877.

Interest is not allowable on foreclosure of a lien for work on mines. *Stuart v. Camp Carson Min. Co.*, (1917) 84 Or 702, 165 P 359.

Failure of a lien in foreclosure proceedings does not necessarily involve the validity of defendant's indebtedness to claimants. *Id.*

2. Attorney's fees

Where numerous liens are foreclosed together, attorney's fees may be allowed for all claims in the aggregate or singly. *Bishop v. Henry*, (1917) 84 Or 389, 165 P 237.

An attorney fee was property allowed in a lump sum, although founded on several claims for mining liens assigned to plaintiff. *Stuart v. Camp Carson Min. Co.*, (1917) 84 Or 702, 165 P 359.

The amount prayed for as an attorney's fee cannot be added to the amount of the lien so as to give a federal court jurisdiction. *Swofford v. Cornucopia Mines of Ore.*, (1905) 140 Fed 957.

3. Proper parties

The lessees are proper though not necessary parties in an action against the lessors to foreclose miners' liens. *Lewis v. Beeman*, (1905) 46 Or 311, 80 P 417.

FURTHER CITATIONS: *Askren v. Squire*, (1896) 29 Or 228, 45 P 779.

87.235

NOTES OF DECISIONS

This enactment did not by implication repeal LOL 7416 [ORS 87.010] in so far as the latter gives a lien upon railroads. *Giant Powder Co. v. Ore. W. R. Co.*, (1911) 59

Or 236, 117 P 279, Ann Cas 1913C, 93; *Ban v. Columbia So. Ry.*, (1902) 54 CCA 407, 117 Fed 21.

The lien may attach to property of a railroad company, although a public service corporation. *Giant Powder Co. v. Ore. W. R. Co.*, (1911) 59 Or 236, 117 P 279, Ann Cas 1913C, 93; *George v. Ore., Calif. & E. Ry.*, (1926) 118 Or 502, 247 P 780.

The lien attaches only for the amount due the principal contractor at the time of service of the notice. *Coleman v. Oregonian R. Co.*, (1894) 25 Or 286, 35 P 656.

A judgment creditor of the contractor who has garnished the company for the amount due the latter is entitled to priority over the subsequent claim of a subcontractor. *Id.*

This section gives a lien on railroads in favor of one who furnishes materials therefor. *Giant Powder Co. v. Ore. W. R. Co.*, (1911) 59 Or 236, 117 P 279, Ann Cas 1913C, 93.

Public policy favors enforcement of a lien against an entire railroad rather than a part. *George v. Ore., Calif. & E. Ry.*, (1926) 118 Or 502, 247 P 780.

The decree may include rolling stock among the property subjected to the lien. *Id.*

FURTHER CITATIONS: *Wilson v. Clark*, (1970) 255 Or 116, 464 P2d 683.

87.240

NOTES OF DECISIONS

The lien can be acquired only by giving the notice required by this section; until then the claimant is only a general creditor. *Coleman v. Oregonian R. Co.*, (1894) 25 Or 286, 35 P 656.

87.250

NOTES OF DECISIONS

A plaintiff who files an action at law to recover a debt after dismissal of an action to foreclose a lien securing it thereby waives his right to appeal from the decree of dismissal. *Ehrman v. Astoria Ry.*, (1894) 26 Or 377, 8 P 306.

87.265

NOTES OF DECISIONS

1. Under former similar statute

(1) **Construction.** The statute, being in derogation of the common law, must be strictly construed and strictly complied with. *Thornton v. Hallam*, (1913) 64 Or 233, 129 P 1046. **Contra**, a statute creating a lien is remedial in nature and should be liberally construed in favor of those it is intended to benefit. *Craig v. Crystal Realty Co.*, (1918) 89 Or 25, 173 P 322.

(2) **Definitions.** The term "clearing land" has significance according to the locality. *Craig v. Crystal Realty Co.*, (1918) 89 Or 25, 173 P 322.

"Clearing" includes not only removal and destruction of sagebrush but also the breaking up of the roots by plowing or otherwise. *Id.*

(3) **General right to lien.** When the statute formerly required that the work be requested by "the owner or person in the lawful possession," a contractor's request was insufficient to create a lien. *Thornton v. Hallam*, (1913) 64 Or 233, 129 P 1046; *Yasui v. Hallam*, (1913) 64 Or 366, 130 P 638.

No lien can be sustained on a particular tract of land for clearing done with reference to a different tract. *Thornton v. Hallam*, (1913) 64 Or 233, 239, 129 P 1046.

But ratification by the owner's agent subjected the property to a lien. *Craig v. Crystal Realty Co.*, (1918) 89 Or 25, 173 P 322.

(4) **Knowledge and notice.** There must be a degree of

knowledge similar to that present in an estoppel in pais. *Dyer v. Thrift*, (1928) 124 Or 249, 264 P 428.

The fact that the claimant had notice of the owner's intention to disclaim liability for material furnished the contractor does not in itself prevent a lien, but justifies a close scrutiny of the record before establishing the lien. *Mather, Inc. v. Elwert*, (1933) 145 Or 347, 27 P2d 888.

Vendor did not have knowledge of work so as to give contractor a lien on vendor's estate where contract vendee in possession sent vendor a circular letter and showed him blueprints, both based on vendee's hopes and intentions of developing the property, of which claimant's work was a small part. *Dyer v. Thrift*, (1928) 124 Or 249, 264 P 428.

Timely posting of notice by owner was established. *Mather, Inc. v. Elwert*, (1933) 145 Or 347, 27 P2d 888.

LAW REVIEW CITATIONS: 37 OLR 81.

87.270

NOTES OF DECISIONS

1. Under former similar statute

Description of property which did not close was insufficient. *Thornton v. Hallam*, (1913) 64 Or 233, 129 P 1046.

A notice of lien must substantially comply with the statute to be valid. *Craig v. Crystal Realty Co.*, (1918) 89 Or 25, 173 P 322.

Completion of a contract dates from the time that omissions are supplied by the lien claimant at the request of the owner. *Id.*

87.285

NOTES OF DECISIONS

A prior similar section neither changed nor amended OC 51-107 [ORS 87.055]. *Shea v. Graves*, (1933) 142 Or 503, 19 P2d 406.

87.294

NOTES OF DECISIONS

A former similar statute was construed as a whole and effect given to all parts when reasonably possible. *Nickelsen v. Kilbuck*, (1933) 145 Or 203, 26 P2d 828.

Under former similar statute, any proceeds included all proceeds realized from the sale of a crop against which a different kind of a lien was claimed, referring to gross and not net proceeds. *Id.*

Only under the conditions specified in a former similar statute could a lien on proceeds be acquired and complaint was required to contain sufficient allegations of compliance with those conditions. *Paulk v. Van Cleve*, (1957) 210 Or 218, 309 P2d 176.

87.300

NOTES OF DECISIONS

Making the lien herein provided for superior to a common-law factor's lien was not beyond the power of the legislature. *Nickelsen v. Kilbuck*, (1933) 145 Or 203, 26 P2d 828.

87.325

NOTES OF DECISIONS

1. In general

This legislation was not repealed or amended by enactment of LOL 7484 and 7485 [ORS 87.330 and 87.335]. *Lydell v. First Bank of Joseph*, (1913) 65 Or 243, 132 P 518.

A person having the right of possession of personal property for the satisfaction of a lien may bring an action of

replevin to regain the possession. *Stilwell v. McDonald*, (1921) 100 Or 673, 198 P 567.

Complaint in lien claimant's action to replevin cattle was insufficient to support a judgment where description of cattle was indefinite. *Id.*

2. Persons entitled to lien

A servant cannot acquire a lien under this section for depasturing or feeding his master's cattle. *Bailey v. Davis*, (1890) 19 Or 217, 23 P 881; *Lydell v. First Bank of Joseph*, (1913) 65 Or 243, 132 P 518.

An agister cannot claim a lien on stock of which he is a part owner. *Sharp v. Johnson*, (1900) 38 Or 246, 63 P 485, 84 Am St Rep 788.

An agister has no lien except by statute or special agreement; nor does he come within the policy of law covering innkeepers as he is not bound to receive and keep all animals brought to him. *Id.*

This statute gives a lien to agisters of cattle and sheep. *Lydell v. First Bank of Joseph*, (1913) 65 Or 243, 132 P 518.

3. Acts within statute

Paying another for taking care of stock does not entitle the payor to a lien. *Sharp v. Johnson*, (1900) 38 Or 246, 63 P 485, 84 Am St Rep 788.

Caring for sheep distrained for injuring realty may give a right to a common-law lien. *Hall v. Marshall*, (1933) 145 Or 221, 27 P2d 193.

4. Waiver of lien

A person may by contract waive his right to the lien given by the statute. *Stilwell v. Johnson*, (1921) 100 Or 673, 198 P 567.

87.330

NOTES OF DECISIONS

The statute being remedial should be construed liberally. *Lydell v. First Bank of Joseph*, (1913) 65 Or 243, 132 P 518.

The lien here given accrues to a camp tender whose duties are to carry provisions to the camp, including salt for the sheep, to select camping places and feeding grounds and to be "boss" of the camps. *Id.*

The right to a lien was not lost by a change in identity of the flock by natural increase or sale, nor by the removal of the flock from the custody of one placed in charge by lien claimant without his consent. *Id.*

ATTY. GEN. OPINIONS: Priority over other liens, 1920-22, p 46.

LAW REVIEW CITATIONS: 1 OLR 33.

87.370

CASE CITATIONS: *Lambert v. Stupek*, (1964) 237 Or 498, 392 P2d 255.

87.375

NOTES OF DECISIONS

A statute creating a lien is remedial in nature and should be liberally construed in favor of those for whose benefit it was enacted. *Pearcy v. Columbia Growers & Packing Corp.*, (1943) 173 Or 1, 143 P2d 913, 149 ALR 1378; *Lambert v. Stupek*, (1964) 237 Or 498, 392 P2d 259.

Anyone claiming a lien must show substantial compliance with the statutory requirements. *Pearcy v. Columbia Growers & Packing Corp.*, (1943) 173 Or 1, 143 P2d 913, 149 ALR 1378.

The right of lien is limited to the agreed price or reason-

able value of the nursery stock, without cost of labor for setting and planting. *Id.*

87.380

NOTES OF DECISIONS

The time of filing is computed from the date of furnishing stock and not from the performance of the contract. *Pearcy v. Columbia Growers & Packing Corp.*, (1943) 173 Or 1, 143 P2d 913, 149 ALR 1378.

Where delivery extends over a period of time, the time for filing notice commences from the date of the last bona fide delivery. *Id.*

An agreement to replace trees failing to live during the first year did not extend the time of filing. *Id.*

If lienable and nonlienable items are segregated in the notice so that each can be determined from the notice itself the lien is enforceable to the extent of the lienable items. *Lambert v. Stupek*, (1964) 237 Or 498, 392 P2d 259.

87.495

NOTES OF DECISIONS

1. In general

A clause in a contract for legal services, which provides that the client shall not settle or dismiss the proceeding prior to the rendition of judgment, is against public policy and void. *Jackson v. Stearns*, (1906) 48 Or 25, 84 P 798, 5 LRA(NS) 390.

The court may set aside a collusive dismissal in which the client participated and permit the attorney to proceed in the name of his client to ascertain what sum, if any, is due for his services, but will not enjoin dismissal of the proceeding collusively settled by the client. *Id.*

In the absence of agreement, the attorney formerly had no lien on the cause of action prior to the rendition of judgment. *Stearns v. Wollenberg*, (1908) 51 OR 88, 92 P 1079, 14 LRA(NS) 1095.

This section does not give an attorney such an interest in litigation as to allow him to appeal to the Supreme Court "on behalf of himself and his client" in furtherance of his interest in a contingent fee, over the honest objection of his client. *In re Grimes Estate*, (1942) 170 Or 204, 131 P2d 448.

ORS 9.360 and 9.370 do not supply a method for the enforcement of an attorney's charging lien. *Crawford v. Crane*, (1955) 204 Or 60, 282 P2d 348.

This lien existed at common law. *Lee v. Lee*, (1971) 5 Or App 74, 482 P2d 745.

2. Property subject to lien

A lien does not attach to money specially deposited with the attorney to be used as cash bail for the client and to be returned as soon as that purpose shall be accomplished. *State v. Lucas*, (1893) 24 Or 168, 33 P 538.

A lien against a judgment in a law action for services rendered therein extends to a decree obtained in a supplemental suit intended to set aside conveyances by the debtor and subject the property to payment of the judgment. *Stoddard v. Lord*, (1900) 36 Or 412, 414, 59 P 710.

Property belonging to the estate of a decedent is not subject to a lien to secure the compensation of the attorney for the executor or administrator thereof. *Waite v. Willis*, (1902) 42 Or 288, 70 P 1034.

A fund in court created from property of an insolvent cannot be subjected to a lien of an attorney employed by the insolvent to resist claims of creditors. *Ford v. Gilbert*, (1904) 44 Or 259, 75 P 138.

No lien can attach to papers or moneys in the possession of the client if the client has no title to them. *Mott v. Guardian Bldg. & Loan Assn.*, (1932) 140 Or 489, 14 P2d 447.

The proceeds of a foreclosure sale of mortgaged property may be subjected to the lien of the mortgagor's attorney upon reversal of the foreclosure decree. *Niedermeyer, Inc. v. Fehl*, (1936) 153 Or 656, 57 P2d 1086.

Performance of services by an attorney pursuant to an oral contract by which his client was to convey land in payment was not sufficient part performance to allow specific performance of the contract. *Farrin v. Matthews*, (1912) 62 Or 517, 124 P 675.

Widow's attorney was not entitled to a lien on decedent husband's estate still in administration for services for unsuccessfully trying to establish a partnership between decedent and his son. *Hadley v. Hadley*, (1914) 73 Or 179, 144 P 80.

The client had assigned his interest in the claim paid by the check, so attorney's lien did not attach. *Taylor v. Pearl*, (1968) 249 Or 611, 439 P2d 7.

FURTHER CITATIONS: *Henderson v. State Tax Comm.*, (1963) 1 OTR 390; *Taylor v. Pearl*, (1966) 244 Or 81, 415 P2d 757.

ATTY. GEN. OPINIONS: Collection of amount of lien from clerk of court, 1938-40, p 614.

LAW REVIEW CITATIONS: 14 OLR 536; 19 OLR 197.

87.500

NOTES OF DECISIONS

The lien given warehousemen by the statute is waived by denying the plaintiff's ownership of the goods in an action to recover their possession. *Wyatt v. Henderson*, (1897) 31 Or 48, 48 P 790.

The claimant must prove that his charges are reasonable, and cannot rely upon the contract price. *Brown v. Truax*, (1911) 58 Or 572, 115 P 597.

FURTHER CITATIONS: *Williams v. Intl. Harvester Co.*, (1943) 172 Or 270, 141 P2d 837.

87.505

NOTES OF DECISIONS

Possessory lien for storage failed where period exceeded five months and notice of sale was not made according to this section but according to OCLA 67-606 [ORS 87.110]. *Williams v. Intl. Harvester Co.*, (1943) 172 Or 270, 141 P2d 837.

87.515

NOTES OF DECISIONS

A claim for services rendered a decedent under an oral agreement should be presented to the administrator before foreclosure. *Brown v. Truax*, (1911) 58 Or 572, 115 P 597.

ATTY. GEN. OPINIONS: Necessity of returning property to owner before foreclosure, 1926-28, p 578; foreclosure of liens for labor and storage where claimant has retained possession, 1936-38, p 362.

LAW REVIEW CITATIONS: 39 OLR 127.

87.525

NOTES OF DECISIONS

The lien is accorded as an indemnity for the extraordinary liabilities imposed upon innkeepers. *Cook v. Kane*, (1886) 13 Or 482, 11 P 226, 57 Am Rep 28.

The lien attaches to the property of third persons received on the faith of the innkeeping relation. Id.

FURTHER CITATIONS: *Smith v. Chipman*, (1960) 220 Or 188, 348 P2d 441.

87.530

CASE CITATIONS: *Smith v. Chipman*, (1960) 220 Or 188, 348 P2d 441.

87.535

NOTES OF DECISIONS

This section does not abrogate the landlord's common-law remedy of distraint. *Smith v. Chipman*, (1960) 220 Or 188, 348 P2d 441.

FURTHER CITATIONS: *Kimbrough v. Smith*, (1970) 255 Or 123, 464 P2d 696.

87.610

LAW REVIEW CITATIONS: 47 OLR 268.

87.615

NOTES OF DECISIONS

The lien of the landowner attaches only to the specific properties enumerated in the statute and not to lumber manufactured from them. *Alderson v. Lee*, (1908) 52 Or 92, 96 P 234. But see *Day v. Green*, (1912) 63 Or 293, 127 P 772.

The statute should be liberally construed. *Day v. Green*, (1912) 63 Or 293, 127 P 772.

A landowner who permits logs to be rafted away from his property without payment loses his lien thereon. *West Shore Lbr. Co. v. Hollenbeck*, (1913) 68 Or 332, 136 P 671.

FURTHER CITATIONS: *Johnson v. Shasta View Lbr. & Box Co.*, (1929) 129 Or 469, 278 P 588.

LAW REVIEW CITATIONS: 47 OLR 268.

87.620

LAW REVIEW CITATIONS: 47 OLR 268.

87.645

NOTES OF DECISIONS

An appeal may be dismissed for failure of the appellant to make the principal defendant a party thereto. *Johnson v. Shasta View Lbr. & Box Co.*, (1929) 129 Or 469, 278 P 588.

Failure of complaint to allege that lien notice was filed within the statutory period after cessation of work was cured by a copy of the notice of lien stating this fact set out in the body of the complaint. *Fischer v. Cone Lbr. Co.*, (1907) 49 Or 277, 89 P 737.

Evidence was held to be insufficient to show that plaintiff had become a member of a copartnership which has agreed to save the defendant harmless from all liens. *Wisdom v. Arnold*, (1919) 90 Or 601, 177 P 958.

86.660

NOTES OF DECISIONS

The requirement that a judgment be rendered in favor of each person having a lien is mandatory. *Johnson v. Shasta View Lbr. & Box Co.*, (1929) 129 Or 469, 278 P 588.

87.675

NOTES OF DECISIONS

The remedy here given is for an injury to the lien and not for an injury to any other right in the property. *Fischer v. Cone Lbr. Co.*, (1907) 49 Or 277, 89 P 737.

An assignment of a lien carries with it the right to the remedy given by this section, although the alleged injury was committed before the assignment. *Id.*

Facts showing the validity of the lien alleged to have been lost need not be set out in a complaint which avers that the lien was duly foreclosed in a suit instituted for that purpose, since its validity is presumably established. *Willett v. Kinney*, (1909) 54 Or 594, 104 P 719.

Absence of plaintiff's consent to the defendants' acts is sufficiently set forth by an allegation that defendants, fraudulently confederating to defraud plaintiff out of his lien security, removed all of the logs and rendered them impossible of identification. *Id.*

The burden of proof rests on the plaintiff to reasonably

show his right of recovery, and he must have a preponderance of evidence to recover. *Id.*

This statute provides the only remedy available to a lien claimant when the logs upon which the lien is sought to be enforced are lost by commingling. *Day v. Green*, (1912) 63 Or 293, 127 P 772.

This section should be liberally construed to the end that each class of laborer should be fully protected in obtaining wages for labor performed upon the logs or lumber. *Id.*

A court of equity having acquired jurisdiction of a foreclosure suit may enter a decree for damages against a defendant who has injured or destroyed any of the property covered by the lien, or has rendered its identification difficult. *Shultz v. Shively*, (1914) 72 Or 450, 461, 143 P 1115.

87.910 to 87.915

LAW REVIEW CITATIONS: 3 WLJ 76, 80.