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Chapter 178.

Mortgages of Personal Property. Liens. Pledges.

Mortgages of Personal Property.

Sec. 1. Mortgages of personal property; record. — No mortgage of personal property shall be valid against a trustee in bankruptcy or an assignee in insolvency of the mortgagor, or against an assignee under a general assignment for the benefit of the creditors of the mortgagor, or against any person other than the mortgagor, unless and until possession of such property is delivered to the mortgagee within 20 days from the date written in said mortgage, or, when undated, then from the date of execution and delivery of the same, and unless such possession is retained by the mortgagee, or unless and until the mortgage or a memorandum thereof is recorded within the said period of 20 days in the office of the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides when the mortgage is given, or registry of deeds as hereinafter provided. When all mortgagors reside without the state, the mortgage or a memorandum thereof shall be so recorded in the office of the register of deeds in the registry district where the property is when the mortgage is made; but if a part of the mortgagors reside in the state, then in the cities, towns or plantations so organized in which such mortgagors reside when the mortgage is given. If any mortgagor resides in an unorganized place, the mortgage or a memorandum thereof shall be so recorded in the office of the register of deeds for the registry district in which such unincorporated place is located. A mortgage or a memorandum thereof made by a corporation shall be so recorded in the city, town or plantation where it has its established place of business, and, if said corporation has no established place of business in the state, or said place of business is in an unorganized place in the state, then in the office of the register of deeds for the registry district in which such property is when the mortgage is made. Such chattel mortgages or the memorandums thereof need not be acknowledged for presentation for record. If possession is taken or said mortgage or a memorandum thereof is recorded subsequent to said period of 20 days, it shall be valid against mortgages, assignments and bills of sale executed and delivered subsequent to the making of said record, and also

against attachments made subsequent thereto, based upon causes of action arising subsequent thereto, and also against trustees in bankruptcy and common law assignees, so far as relates to claims accruing subsequent thereto.

A statement signed by the party to be bound, describing the parties and the personal property mortgaged and stating the date of the mortgage, the amount remaining unpaid, the terms of payment, whether it is to secure future advances, whether it is to cover after-acquired property and that it is a memorandum of a mortgage of personal property shall constitute a memorandum within the meaning of this section. The recording of such a memorandum shall make effective all the terms of the mortgage as effectively as if said mortgage had been recorded in full. (R. S. c. 164, § 1. 1953, c. 180.)

I. General Consideration.

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A. In General.

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I. GENERAL CONSIDERATION.

History of section.—See Peaks v. Smith, 104 Me. 315, 71 A. 884; Hayden v. Russell, 119 Me. 38, 109 A. 485.

The purpose of registry of a mortgage is to give notice to creditors of the mortgagor, and subsequent purchasers of the mortgaged property, so that they may know the kind, the situation and value thereof, when the goods are suffered to remain with the mortgagor, and to be treated as his own. Morrill v. Sanford, 49 Me. 566.

The object of this section was to protect the respective rights of mortgagor and mortgagee and to give notice to the public, so that a creditor, seeking to enforce his rights, might know where and to whom to apply for the purpose of ascertaining such facts as he might deem necessary for the prudent enforcement of his claims. Knight v. Nichols, 34 Me. 208, overruled on another point in Shaw v. Wilshire, 65 Me. 485.

The purpose of this section clearly is that all persons may have notice of the mortgage, of the property mortgaged, and of the character and extent of the incumbrance created. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

The purpose of taking possession and retaining it, or of recording, is to give notice to creditors and subsequent purchasers. Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

The object to be obtained is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. Cadwallader v. Clifton R. Shaw, Inc., 127 Me. 172, 142 A. 580.

Before this section notice was left to be inferred from delivery of the property, and retaining its possession. This section was designed, in the absence of such delivery and possession, to give at least equal and perhaps greater notoriety by means of the record. Morrill v. Sanford, 49 Me. 566.

Section is strictly construed.—This section, relating to the effect of recording chattel mortgages in this state, has always been construed strictly. Hayden v. Russell, 119 Me. 38, 109 A. 485.

The recording statute is strictly construed. Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

To secure the notice it is designed to give.—This section must receive such a construction, within the fair meaning of its words, as will best secure the notice it is designed to give. Morrill v. Sanford, 49 Me. 566.

The words "mortgagee" and "mortgagor," as used in this section, must be regarded as including the plural as well as the singular number. Morrill v. Sanford, 49 Me. 566.

This section does not declare what shall make a valid mortgage, but that no mortgage shall be valid, except between

the parties, unless possession is delivered to and retained by the mortgagee, or the mortgage is recorded. Mitchell v. Cunningham, 29 Me. 376.

Possession by mortgagor of chattel is not inconsistent with mortgage.—It has been repeatedly held in this state that the possession by the mortgagor of a personal chattel is not inconsistent with the mortgage, and that it is not conclusive proof of fraud. Indeed, the provisions of this section by which the rights of the mortgagee, when out of possession, are protected, if the mortgage has been recorded, are conclusive as to this question. Googins v. Gilmore, 47 Me. 9.

Mortgage of after-acquired property.—This section is not in conflict with the equitable doctrine that actual possession of after-acquired property taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is equivalent to a voluntary delivery by the mortgagor, and if such possession is retained, it makes good the mortgagee's lien as against an attaching creditor. Burrill v. Whitcomb, 100 Me. 286, 61 A. 678.

As to mortgage of after-acquired property of railroad company, see Morrill v. Noyes, 56 Me. 458.

Applied in Handley v. Howe, 22 Me. 560; Holmes v. Sprowl, 31 Me. 73; Gushee v. Robinson, 40 Me. 412; Chapin v. Cram, 40 Me. 561; Penney v. Earle, 87 Me. 167, 32 A. 879; Campbell v. Atherton, 92 Me. 66, 42 A. 232.

Quoted in Beeman v. Lawton, 37 Me. 543.

Cited in Emerson Co. v. Proctor, 97 Me. 360, 54 A. 849.

II. INSTRUMENTS TO WHICH SECTION APPLIES.

Cross reference.—See note to c. 119, § 9, re difference between chattel mortgage and conditional sale.

Substance, intent, design and effect of instrument are to be regarded.—In construing this section, which requires all mortgages of personal property exceeding thirty dollars to be recorded, it is the substance, intent, design and effect of the instrument, and not its form merely, which is to be regarded. Shaw v. Wilshire, 65 Me. 485.

An equitable mortgage is within the requirements of this section and should be recorded in order to make it valid as against a subsequent purchaser. Shaw v. Wilshire, 65 Me. 485.

To shut out the claim of a subsequent mortgagee, an equitable mortgage must be recorded, the same as a legal one. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

No mortgage of personal property is valid except between the parties thereto unless recorded in accordance with the provisions of this section. This is true even if the mortgage of personal property be an equitable as distinguished from a legal mortgage. Mac Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A. (2d) 460.

Court will not give effect of recorded mortgage to unrecorded instrument intended for security only.—The court cannot sanction what would amount to a palpable evasion of this section by giving the effect of a duly recorded mortgage to an unrecorded instrument which the grantee himself declares was intended for security only. It would open a wide door to fraud and deprive purchasers of the protection which this statute was designed to afford. Shaw v. Wilshire, 65 Me. 485, overruling Knight v. Nichols, 34 Me. 208.

Nor will court permit such instrument to take effect as absolute conveyance.—The court is not at liberty to permit transactions which are confessedly designed by the parties to operate only as mortgages and to which they intend to give no other force or effect, when not recorded in conformity with the requirements of this section, to take effect as absolute conveyances as against subsequent purchasers, merely because their form only partially represents their acknowledged purpose. Shaw v. Wilshire, 65 Me. 485.

Contract in form of conditional sale held to constitute equitable mortgage.—When a borrower seeks to secure his loan by executing a contract in the form of a conditional sale from the lender to himself of property which he, the borrower, already owns, the contract constitutes an equitable mortgage. The same, although in form a conditional sale, partakes more of the nature of a mortgage, and must be recorded in the manner prescribed by this section. Mac Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A. (2d) 460.

The cancellation or partial or entire payment of mortgages is not required to be recorded. Smith v. Smith, 24 Me. 555.

This section does not apply to the recording of a Holmes note. Delaval Separator Co. v. Jones, 117 Me. 95, 102 A. 968.

Nor does it apply to a vendor's lien reserved in a contract of sale.—See Sawyer v. Fisher, 32 Me. 28.

A delivery of personal property to one as collateral security, where there is no written conveyance of it, cannot be recorded and cannot be regarded as a mortgage. Day v. Swift, 48 Me. 368.

Mortgage of vessel.—This section does not apply to property in vessels which are duly registered or enrolled according to the laws of the United States, for the state legislature has no authority, directly or indirectly, to add to or dispense with the requirements of an act of congress providing for recording the conveyances of vessels. Wood v. Stockwell, 55 Me. 76.

As to mortgages of vessels, see also Foster v. Perkins, 42 Me. 168; Perkins v. Emerson, 59 Me. 319.

III. REQUISITES AND SUFFICIENCY OF RECORDING.

A. In General.

Cross reference.—See also § 2 and note.

To be effective record must be made as section requires.—The record is deemed to be a substitute for delivery and possession of the mortgaged property. To have such effect, however, it must appear to have been made as this section requires. Morrill v. Sanford, 49 Me. 566.

It is the mortgage itself which this section requires to be recorded. There is no provision in this section for recording anything else. There is no provision for the recording of a memorandum or certificate of a mortgage. Mac Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A. (2d) 460.

The record of a document entitled "Certificate to be Recorded" is not sufficient under this section, where such document, though signed by the mortgagor, does not constitute the actual mortgage. Mac Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A. (2d) 460.

The question is not whether enough of the contract has been placed on record to give notice of the equitable mortgage but whether the equitable mortgage itself has been recorded. The record of the "Certificate" was not a record of the contract and therefore it does not afford constructive notice thereof, and is not valid against the defendant who was not one of the original parties thereto. Mac Motor Sales, Inc. v. Pate, 148, Me. 72, 90 A. (2d) 460.

Schedule referred to in and made part of mortgage must be recorded.—A schedule enumerating the property covered by a mortgage, which schedule is referred to in the mortgage as a part of the same, must, equally with the mortgage, be recorded in the town clerk's office, to give effectual notice to the public. If the mortgage is recorded, and the schedule thus referred to is not, this is not a sufficient compliance with the provisions of this section. Sawyer v. Pennell, 19 Me. 167.

Description of property should be so specific as to enable all interested to identify it.—One design of this section in requiring that mortgages of personal property should be recorded is that creditors of the mortgagor may have full opportunity to know the kind, the situation and value thereof, as well as the debt intended to be secured, when the goods are suffered to remain with the mortgagor and to be treated as his own. To protect such an object, the description should be so specific as to enable all interested to identify the property, aided by the inquiries which itself would direct. Sawyer v. Pennell, 19 Me. 167.

But specific enumeration of property is not essential to validity of mortgage.—The case of Sawyer v. Pennell, 19 Me. 167, shows that when a mortgage, if wholly recorded, would disclose a specific enumeration as well as the value of the property, it is essential that such information should be conveyed by the record; but it is not essential to the validity of a mortgage that such information should be disclosed in any manner. Wolfe v. Dorr, 24 Me. 104.

Description of property held sufficient.—A mortgage of personal property may be valid, although the property is described therein but as "said store (standing on land of another) and all the goods, wares and merchandise in and about the same." Wolfe v. Dorr, 24 Me. 104.

Mistake in date of mortgage rendering recording ineffectual.—Where a mortgage was dated 29th November, 1854, but was by mistake recorded as a mortgage dated 29th March, 1854, the mistake rendered it ineffectual to defeat the title of one who purchased the property in July, 1855. Stedman v. Perkins, 42 Me. 130.

Mortgage by mistake dated prior to note secured thereby.—Where a mortgage and the note secured thereby are made and delivered at the same time, the mortgage is valid, though by mistake dated a year prior to the date of the note. By the record of such a mortgage, third parties proposing to purchase the property therein described are at least constructively notified of the lien. Partridge v. Swazey, 46 Me. 414.

Undated mortgage.—If a mortgage be made of all the property "now in the shop occupied by me in said B." and is without date, parol evidence is admissible to show the day of the execution and delivery of the instrument; the description is sufficient to convey the property, and if such mortgage is duly recorded, it is a sufficient compliance with the provisions of

this section. Burditt v. Hunt, 25 Me. 419.

Mistake in date of mortgage of crop.—Notice of the mortgage of a crop to be planted in 1899 is not notice of a mortgage of a crop planted or to be planted in 1900. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

B. Place of Recording.

This section requires a mortgage of personal property to be recorded but once, and that at the place of residence of the mortgagor. The mortgage being thus recorded, the rights of the mortgagee will be protected and enforced throughout the state. Barrows v. Turner, 50 Me. 127.

It need not be again recorded if mortgagor moves to another town.—If a mortgage of personal property has been recorded in the town in which the mortgagor resided at the time, and he afterwards removes to another town, taking the property with him, this section does not require the mortgage to be again recorded in the town to which he has removed. Barrows v. Turner, 50 Me. 127.

But it must be recorded in each town where any one of several mortgagors resides.—Where there are two or more joint mortgagors of personal property, residing in different towns, the record of the mortgage required by this section is incomplete until it is recorded in each of the towns in which the mortgagors reside. Rich v. Roberts, 48 Me. 548. See Rich v. Roberts, 50 Me. 395; Morrill v. Sanford, 49 Me. 566.

If the mortgagor was not a resident of the town where the mortgage was recorded, the record is not constructive notice of the existence of the mortgage. It was a mere nullity as against a subsequent purchaser. Martin v. Green, 117 Me. 138, 102 A. 977.

Delivery or recording in proper place must be shown by affirmative evidence.—This section requires either that possession of personal property mortgaged shall be delivered to and retained by the mortgagee or that the mortgage shall be recorded in the town where the mortgagor resides. In the absence of affirmative evidence showing one or the other of these facts, the validity of the mortgage, although recorded, is not established as against a subsequent purchaser. Horton v. Wright, 113 Me. 439, 94 A. 883.

And record does not establish validity where residence of mortgagor is not shown.—This section requires that a mortgage of personal property shall be recorded in the records of the town in which the mortgagor resides; if a case discloses nothing as to the residence of the mortgagor, the validity of the mortgage, though recorded, is not established. Bither v. Buswell, 51 Me. 601.

The record of the mortgage did not establish its validity, because it was not shown that the mortgagor resided in the town where the mortgage was recorded, and the mortgage itself was silent on the point. Horton v. Wright, 113 Me. 439, 94 A. 883.

Mortgage properly excluded from case.—In an action of trover against an officer for attaching the outfit of a circus company, it appeared that the plaintiff claimed title to it by virtue of two mortgages, one made in Biddeford, and the other in Boston. There being no evidence that when the mortgage was made in Biddeford the mortgagor resided within the state, or that the property had been delivered to and retained by the mortgagee, or that the property was then in Biddeford, the burden of proof was on the plaintiff to show that the property was in Biddeford when the mortgage was made. Upon the plaintiff failing to do so, the court correctly excluded the mortgage from the case and the jury were properly instructed to disregard it. Stirk v. Hamilton, 83 Me. 524, 22 A. 391.

When mortgagor resides in unorganized place.—As to recordation under earlier form of section when mortgagor resided in unorganized place, see Peaks v. Smith, 104 Me. 315, 71 A. 884.

IV. EFFECT OF RECORD.

Formerly mortgage was inoperative against attaching creditors unless accompanied by delivery.—Prior to this section, mortgages of moveables were inoperative against attaching creditors, unless accompanied by a delivery of the property mortgaged, either actually or symbolically. Goodenow v. Dunn, 21 Me. 86.

The clause of this section relating to possession is simply declaratory of the common law, while that relating to record provides an equivalent therefor not previously authorized. Peaks v. Smith, 104 Me. 315, 71 A. 884; Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

The recording is made by this section equivalent to a delivery and retention of possession. And a mortgage of personal property, if recorded, is effectual against third persons without a formal delivery of it. Mitchell v. Cunningham, 29 Me. 376.

The recording of a mortgage is tantamount to a delivery of the property, and the statute itself, providing for the record-

ing of the mortgage of personal property, has made the record equivalent to the delivery of possession of personal property mortgaged to the mortgagee, and the retention by him afterwards. Andrews v. Marshall, 48 Me. 26.

And mortgage is effectual without formal delivery of property.—If a mortgage of personal property is recorded, it becomes effectual, being otherwise valid, without a formal delivery of the property. It is not perceived, that a delivery of the same property mortgaged subsequently, while the former mortgage exists, becomes more necessary. Smith v. Smith, 24 Me. 555.

Although mortgagee resides out of state.—The registry of a mortgage of personal property under our statutes is equivalent to possession of the property by the mortgagees, although they reside out of the state. This section makes no distinction between citizen mortgagees, and those who are not. Foster v. Perkins, 42 Me. 168.

But recording of mortgage without knowledge of mortgagee does not amount to delivery.—The recording of a mortgage at the instance of the mortgagor, and without the knowledge or assent of the mortgagee, will not amount to a delivery of it, and though made effectual by the subsequent ratification of the mortgagee, it cannot affect the rights which another mortgagee acquired by a prior ratification of a mortgage to him of the same property, made and recorded at the same time. Oxnard v. Blake, 45 Me. 602.

And recorded mortgage made without knowledge of creditor is inoperative until ratified.—A mortgage of personal property, made by a debtor to secure a creditor without his knowledge, although recorded, is inoperative, until it is approved or assented to by such creditor. Oxnard v. Blake, 45 Me. 602.

Where a debtor, at the same time, executes and causes to be recorded separate and independent mortgages of the same property to several of his creditors, without the knowledge of any of them, that mortgage which is soonest ratified will first have effect, and the others, becoming operative by subsequent ratification, will be subject to it. Oxnard v. Blake, 45 Me. 602.

The mere record of a valid mortgage gives constructive notice to all. All are presumed to know its contents, for anyone interested can obtain knowledge by examining the record. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

But a record is not constructive notice of more than the record itself discloses. Third persons are chargeable with notice of no more than they can ascertain from the record or from being put upon their inquiry by the record. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

Recordation does not date back to date of mortgage and give it priority over intervening liens.—Until the mortgagee takes and retains possession or records the mortgage, it is not valid against any person other than the mortgagor; such is the provision of this section. The section further provides that if he performs one of these two conditions within twenty days after the date written in the mortgage it is a valid mortgage, but the registration does not date back to the date of the mortgage so as to give it priority over intervening titles or liens. Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

Effect of recording or taking possession after twenty days.—If a chattel mortgage is recorded or possession taken subsequent to twenty days, as provided by this section, it is not valid against attachments made subsequent thereto, based upon causes of action arising prior thereto. Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

If the "mortgage is recorded or possession taken subsequent to said period of twenty days it shall be valid against attachments made subsequent thereto, based upon causes of action arising subsequent thereto." Such attaching creditors are the exception under this section. The mortgage is valid as to such attaching creditors, and the mortgagee is protected. Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

Recorded mortgage does not convey absolute title to mortgagee.—An executed mortgage, even when recorded as provided by this section, does not convey the absolute title to the mortgagee. Ramsdell v. Tewksbury, 73 Me. 197.

But passes title so far as to enable him to maintain action against officer attaching goods.—In the case of a fraudulent mortgage of chattels executed and completed, the record of the mortgage is equivalent to a delivery of the goods, and passes the title to the mortgagee so far as to enable him to maintain an action against an officer for the value of goods attached and sold at private sale without any account having been kept, though sold with the assent of the mortgagor in whose possession the goods were found when attached. Andrews v. Marshall, 48 Me. 26.

V. EFFECT OF FAILURE TO RECORD.

Mortgagee must either take and keep

possession or record mortgage.—The mortgagee is given the option either to take and keep possession or to record the mortgage. The two methods are distinct. One or the other is indispensable as against third parties. Peaks v. Smith, 104 Me. 315, 71 A. 884; Production Credit Ass'n v. Kent, 143 Me. 145, 56 A. (2d) 631.

Or mortgage will be invalid against subsequent purchaser, mortgagee or attaching creditor even with notice thereof.—The revised statutes touching the recording of deeds of real estate has changed the former law, so that actual notice of an unrecorded deed, to persons making claim to the estate subsequent to its delivery from the same source, alone will postpone the latter to the former. In the statutes requiring the record of mortgages of personal property, in order to make them effectual, there is no such qualification, and it cannot be properly inferred that one was intended, against the imperative language used. Rich v. Roberts, 48 Me. 548.

This section, requiring a mortgage of personal property to be recorded to render it valid, makes no exception, and one subsequently purchasing or attaching the property will not be affected by an unrecorded mortgage, notwithstanding he had actual notice of it. Sheldon v. Conner, 48 Me. 584.

In the case of personal property, a subsequent purchaser or mortgagee for a consideration valid between the parties—as a security or part payment of a preexisting indebtedness—even with notice of a prior encumbrance, unless actual intent to defraud is shown, may hold over the prior encumbrance if unrecorded. Hayden v. Russell, 119 Me. 38, 109 A. 485.

An unrecorded mortgage of personal property gives the mortgagee no rights against one who purchases that mortgaged property after the expiration of the recording period fixed by this section, even though the purchaser had knowledge of the mortgage, or against such a one who attaches it, or takes a mortgage on it and records it. Lewiston Trust Co. v. Deveno, 145 Me. 224, 74 A. (2d) 457.

Proof that attaching creditor had notice of unrecorded mortgage is excluded. — Proof that the attaching creditor had notice of the mortgage, which was not recorded as required by this section, before the attachment of the property was made was properly excluded. Rich v. Roberts, 48 Me. 548.

Impossibility of recording does not abrogate the necessity of possession any more than the impossibility of possession would annul the necessity of record. The purpose of registration was to give notice to creditors and subsequent purchasers, notice which before this statute was left to be inferred from delivery and possession, and the mortgagee must employ one method or the other, it matters not in what section of the state the mortgagor may reside. Peaks v. Smith, 104 Me. 315, 71 A. 884.

Delivery and retention of possession sufficient to make recording unnecessary.—The owner of personal property, attached upon a writ against him and actually retained by the officer or his bailee, may transfer his interest therein either absolutely or in mortgage, subject to the attachment lien. When such a mortgage has been made, and the bailee of the attaching officer, while the custody of the goods is in him, consents to hold the goods as servant of the mortgagee, and actually holds for him, there is such a taking of delivery and retaining of possession by the mortgagee as to make it unnecessary that the mortgage should be recorded. And it is not legally inconsistent that the same bailee should act to keep possession for the attaching officer and for a purchaser under the owner. Wheeler v. Nichols, 32 Me. 233.

Fund or chose in action representing mortgaged property.—A title by purchase from a mortgagor of a chose in action or fund, that represents mortgaged personal property, takes precedence under this section of the title under the mortgage to the property which is represented by such fund, where the mortgage had never been recorded. Garland v. Plummer, 72 Me. 397.

Sec. 2. Duty of clerk; consent for sale or exchange.—The clerk shall record all such mortgages, and all other papers and documents delivered to him and entitled to be recorded, in a book or books kept for that purpose, noting therein and on the mortgage, paper or document the time when it was received; and it shall be considered as recorded when received. No consent given by the mortgagee of personal property to the mortgagor for the sale or exchange of the mortgaged personal property shall be valid or be used in evidence in civil process unless in writing and signed by the mortgagee or his assigns. The clerk may, in recording such mortgages, papers and documents, copy the same into a book kept for such purposes or he may bind into such book a photostatic copy thereof

or an attested copy thereof. The pages of such book shall be numbered consecutively and within 24 hours of the time when such mortgage, paper or other document was received for record, the clerk shall record in a book kept for that purpose or on cards kept in a file and open to the public, the names of the parties to said mortgage or other document and the book and page where the same is recorded shall be added later. (R. S. c. 164, § 2.)

Cross references.—See c. 3, § 13, re duties of cities in respect to registration of voters; c. 89, § 226, re recording officer not to draft or aid in drafting any document he is required to record; c. 91, § 26, re appointment and duties of deputy town clerks.

History of section.—See Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

Substantial compliance sufficient.—The record of a mortgage is sufficient, if, over the signature of the clerk of the proper town, the writing shows a substantial compliance with the statute. Stevens v. Whittier, 43 Me. 376.

This section does not require the record of mortgages to be in a book kept exclusively for that purpose. Head v. Goodwin, 37 Me. 181.

The validity of a mortgage of personal chattels is not impaired by the fact that it is recorded upon a book of the town records. Head v. Goodwin, 37 Me. 181.

A chattel mortgage is "considered as recorded when received." This section defines that it shall be so regarded. Van Woudenburg v. Valentine, 136 Me. 209, 7 A. (2d) 623.

Although time of reception is not noted on record book.—A chattel mortgage is to be considered as recorded when received by the town clerk for record, even though the mortgage is not actually spread on the record book and the time of reception is not noted on the record book, provided the mortgage remains on file. Monaghan v. Longfellow, 81 Me. 298, 17 A. 74, overruling Handley v. Howe, 22 Me. 560, wherein it was held, under an early form of this section, that the mortgage could not be considered as recorded until the clerk had noted the time of reception in the record book, as well as upon the mortgage. See also Wheeler v. Nichols, 32 Me. 233.

Subsequent recording relates back to time noted on mortgage.—By the noting on the mortgage the time when the mortgage was received, the mortgage is to be considered as if it was recorded when left with the clerk. The subsequent recording has relation back to the time of noting, and the mortgage is to be considered as recorded at the time stated in the noting. Holmes v. Sprowl, 31 Me. 73.

But this provision applies only when mortgage was left with clerk until recording.—The provision of this section, that "it shall be considered as recorded when received" undoubtedly means that after the delivery and entry, the effect shall be the same as if actually spread upon the records. This, however, must have a reasonable construction. It must be understood as consistent with the purpose of the law, which is to give notice to all persons interested, not only of the existence of a mortgage, but of its contents. Hence this provision must be understood to apply only when the mortgage is left with the clerk until recorded. Jones v. Parker, 73 Me. 248.

And mortgage withdrawn before recording is not "considered as recorded when received."—Where the mortgage was taken away by the mortgagee himself after delivery to the clerk's office but before recording, and while it was away an attaching creditor's attorney as well as the attaching officer made the proper examination of the records and inquiries of the clerk, and finding no mortgage on file or on record, made the attachment, at the time of the attachment the mortgage was not recorded, nor under the law could it "be considered as recorded." Jones v. Parker, 73 Me. 248.

Purpose of requiring clerk to note time mortgage was received.—This section declares that the mortgage "shall be considered as recorded when received." It is essential to save disputes, that the time of such reception should be fixed, and officially noted; hence the section requires the clerk to note the time, on the mortgage, and also in the record book. Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

There is an interval of time, longer or shorter, as the case may be between the delivery of a mortgage to be recorded and the recording of the same. The design of the provision of this section which requires noting on the book and on the mortgage, the time when the mortgage was received was to protect the mortgagee during the time between such noting and recording. McLarren v. Thompson, 40 Me. 284.

Noting of time on mortgage should be made at time of delivery.—The noting on the mortgage should, to prevent mistakes, undoubtedly be made at the time of the delivery. Jones v. Parker, 73 Me. 248.

But noting in record book need not be made until mortgage is actually recorded.—The entry of the time received in the book where the mortgage is recorded is required by law, but it need not, perhaps cannot, be made until the mortgage is actually recorded. Jones v. Parker, 73 Me. 248; Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

This section contemplates a noting of the time in the record, and as a part of the record, and hence not to be done until the record is actually made. In the meantime, the mortgage itself, with the noting upon it, by remaining on the files, serves as a record. Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

Since inquirer may always ascertain time when mortgage was received.—The provisions of this section enable the inquirer always to ascertain the time when the mortgage was received, and when it should be considered as recorded. If the mortgage is actually recorded, the inquirer finds the time of reception noted in the record. If the mortgage is not in fact recorded, but is on file, he finds the time noted on the mortgage itself. There is need of noting the time on the mortgage at once when received, but there is no need of noting the time in the record, until the record is actually made. Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

If clerk omits to note time of reception, mortgage takes effect from time of recording.—If a town clerk omits to make a noting of the time at which he received a mortgage of personal property to be registered, the mortgage will, nevertheless, take effect from the time when it is actually recorded. Holmes v. Sprowl, 31 Me. 73.

Whether there is a noting or not when the mortgage is delivered for the purpose of being recorded, after it has been duly recorded the public are bound to take notice of its existence. Thus although the time of the reception of a mortgage is not noted upon the records, the title of the mortgagee is protected after it has been actually recorded. McLarren v. Thompson, 40 Me. 284.

The recording of a mortgage supersedes the necessity of noting in the book of records the time when it was received. Head v. Goodwin, 37 Me. 181.

The law does not require any entry of the date of the record. In this respect the clerk's duty is performed when he notes upon the mortgage, and in the book of records, "the time when it was received." Whatsoever is done more than this in respect to this entry is not done under an official sanction. Jones v. Parker, 73 Me. 248.

Certificate on back of mortgage is sufficient proof of time of delivery.—The certificate of the clerk on the back of the mortgage of his receipt of the same is sufficient proof that it was left with him to be recorded at the time stated in the certificate. Head v. Goodwin, 37 Me. 181.

And mortgage is understood as recorded at same time.—Where there is one date only to the certificate on the back of the mortgage, and the further statement thereon that it was recorded on the town records, it must be understood as recorded at the same time. Head v. Goodwin, 37 Me. 181.

But entry of time of receiving mortgage is not conclusive as to time of recording.—The entry of the date of receiving the mortgage for record made upon the back of the mortgage and in a book kept for that purpose by the town or city clerk, does not show the date of the record, except by inference, and that inference may be overcome by evidence showing the contrary. Jones v. Parker, 73 Me. 248.

This section contemplates that the record will not at once follow the delivery, else there would be no occasion for the provision "it shall be considered as recorded when received." Jones v. Parker, 73 Me. 248; Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

Clerk may be responsible to party injured by unreasonable delay.—The question is mooted as to how long a clerk may delay the actual recording, and still the mortgage be considered as recorded while on file. Undoubtedly, the clerk is responsible to any party injured by his unreasonable delay. Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

Failure to record schedule attached to mortgage.—If the mortgage and a schedule attached thereto were left with the town clerk and duly entered by him, and both were remaining in his office unrecorded, it might have been sufficient notice, but when it appeared that the town clerk had made up his record, it was that only which the law treats as the evidence required. When a party interested found the mortgage without the schedule extended upon the record, he is not presumed to be advised, from that circumstance, that the schedule existed at that time, and was to be found in the office, much less to be apprised of its contents. Sawyer v. Pennell, 19 Me. 167.

Consent of mortgagee to sale or exchange of property.—The provision of this section that "No consent given by the

mortgagee of personal property to the mortgagor for the sale or exchange of the mortgaged property shall be valid or be used in evidence in civil process unless in writing and signed by the mortgagee or his assigns" is consistent with sound public policy. Mortgages given as security for debts, and duly recorded, ought not to be open to such oral attack. The purchaser has merely to examine the records in order to ascertain whether the property is or is not encumbered. Rowe v. Green, 116 Me. 94, 100 A. 145.

Evidence was inadmissible to show that there was an oral understanding between the mortgagee and the mortgagor that the latter could sell and dispose of the mortgaged property in any way he saw fit, and that the security was given simply to prevent attachment of the property by other parties with whom the mortgagor might be dealing. Rowe v. Green, 116 Me. 94, 100 A. 145.

Applied in People's Trust Co. v. Mt. Waldo Granite Works, 117 Me. 507, 105 A. 113.

Cited in Rich v. Roberts, 48 Me. 548.

Sec. 3. Redemption after breach of condition.—When the condition of a mortgage of personal property is broken, the mortgagor or person lawfully claiming under him may redeem it at any time before it is sold by virtue of a contract between the parties or on execution against the mortgagor, or before the right of redemption is foreclosed, as hereinafter provided, by paying or tendering to the mortgagee or the person holding the mortgage by assignment thereof, recorded where the mortgage is recorded, the sum due thereon, or by performing or offering to perform the conditions thereof, when not for the payment of money, with all reasonable charges incurred; and the property, if not immediately restored, may be replevied, or damages for withholding it recovered in an action on the case. (R. S. c. 164, § 3.)

Cross reference.—See c. 177, § 30, re claimant of mortgagor's interest may file bill in equity to determine facts and assess damages.

History of section.—See Loggie v. Chandler, 95 Me. 220, 49 A. 1059; Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100; Harvey v. Anacone, 134 Me. 245, 184 A. 889.

Liberal construction.—This being a remedial statute, it may be construed liberally. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

The foreclosure and redemption of chattel mortgages are wholly regulated by statute in this state, and the statutory modes must be pursued wherever practicable. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

The right to redeem from a chattel mortgage is a right of property passing to the trustee of the estate of a bankrupt mortgagor. Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86.

Duration of right of redemption.—By this section the legislature has created a legal right of redemption, in the mortgagor or his assignee, attaching after breach of the condition of the mortgage. This right continues, by virtue of §§ 4-6 up to sixty days of the giving and recording by holder of the mortgage, in a prescribed manner, of notice of his intention to foreclose or bar the power of redeeming. Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86.

Second mortgagee has right to redeem until foreclosure of first mortgage.—The right of the grantee in a second mortgage to redeem the goods continues until the foreclosure of the first mortgage, unless defeated by the goods being taken and sold by a third party. Treat v. Gilmore, 49 Me. 34.

Failure to redeem within statutory limit forever precludes redemption.—Failure to pay or to tender payment of the sum due, or to perform or to offer to perform the other thing, as the case may require, within the statutory limit, by a competent person, forever precludes redemption. Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86.

Possession of the mortgagee prior to foreclosure in nowise affects the right of redemption of chattels by the mortgagor. Libby v. Cushman, 29 Me. 429.

But mortgagee in possession may waive lien of mortgage and attach property.—The mortgagee of personal property, who has taken possession of the property, may, before foreclosure, waive his lien under his mortgage and attach the property upon the debt secured by it. And a mortgagee who by attaching the property waives his lien, has no longer a title to the property as owner, and consequently is not obliged to account for its value. Libby v. Cushman, 29 Me. 429.

Mortgage conveys to mortgagee title subject to condition subsequent.—The mortgage conveys to the mortgagee and

his assigns a conditional title, a title subject to the condition subsequent, which would ripen into an absolute title after breach of the condition and foreclosure. Ramsdell v. Tewksbury, 73 Me. 197.

Compliance with condition or tender thereof takes title from mortgagee instanter.—Compliance with the condition subsequent of a chattel mortgage, by one entitled to make a redemption, though after breach of the condition of the expressly stated terms of the mortgage but within the time which the statute defines, immediately terminates the vital existence of the mortgage and takes the title to the property from the mortgagee instanter. The mortgagor, or he who stands in his stead, is thereupon invested with a right of property as complete and absolute as though the mortgage never had been given. Tender of compliance begets like result. Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86. See Mac Motor Sales, Inc. v. Pate, 148 Me. 72, 90 A. (2d) 460.

Tender of performance of the condition, ipso facto, puts an end to the mortgagee's interest, and restores the right of immediate possession to the mortgagor, who may enforce this right by replevin and recover damages for withholding it. Ramsdell v. Tewksbury, 73 Me. 197. See Williams v. Dunn, 120 Me. 506, 115 A. 276.

This section requires a tender of the amount due on the mortgage. Drummond v. Trickey, 118 Me. 296, 108 A. 72, holding that the facts in the case disclosed that a tender was made.

But payment or tender is not necessary when mortgagee has made restoration of property impossible.—The condition precedent for payment or tender before redemption or action at law for damages is not necessary of performance, when the mortgagee by his own act has made impossible the restoration of the mortgaged property. Excused is the useless ceremony of tender and demand, which otherwise would have been essential. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

No tender was necessary, although in fact made, where the mortgagee by his own admission could not restore the property mortgaged, having sold it. A tender in such case would be an idle, useless ceremony which the law does not require. A tender is not necessary when the recipient has not the power to return the property. Drummond v. Trickey, 118 Me. 296, 108 A. 72.

And it is not essential that tender be kept good.—The contention that the moneys tendered should be brought into court is unsupported by authority. Where the effect of a tender is the extinguishment of a right absolutely, it is not essential that the tender be kept good. Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86.

Mortgagee in possession is responsible for ordinary diligence in preservation of property.—The mortgagee of personal property, in possession after condition broken, and while the right of redemption exists, is responsible for ordinary diligence in the management and preservation of the property, and is liable for ordinary neglect. In this respect his duties and responsibilities are similar to those of a pawnee. If the property is destroyed without fault on his part, he cannot, while thus holding it as security for his debt, be held to account for it. But for the net proceeds of the income or profits, accruing to him before the destruction, he would be accountable. Covell v. Dolloff, 31 Me. 104.

He cannot lawfully sell property until foreclosure.—The mortgagee is not the owner of the property, and cannot lawfully sell the same until he has complied with the statutes. His mortgage is security for a debt, and the mortgagor has a right to redeem by the payment of the debt, until the mortgage is legally foreclosed. Drummond v. Trickey, 118 Me. 296, 108 A. 72.

Unless by virtue of contract between parties.—The right to sell mortgaged chattels by virtue of a contract between the parties still exists in this state. Instead of abrogating and excluding the exercise of this right, the legislature has expressly recognized it and made it superior to the mortgagor's right of redemption. Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100.

A sale under a power given in the mortgage is a sale "by virtue of a contract between the parties" and clearly within the purview of this section. Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100.

The remedy provided by this section is "an action on the case." Such is trover. So also are case and assumpsit. Which should be brought—case, trover or assumpsit—depends upon the facts of the particular case, applying thereto the common-law principles governing the form of action. Harvey v. Anacone, 134 Me. 245, 184 A. 889.

Mortgagor has election to bring trover or replevin.—By this section after payment of the mortgage debt "the property, if not immediately restored, may be replevied, or damages for withholding it re-

covered in an action on the case." The plaintiff therefore has his election to bring trover or replevin. Mathews v. Fisk, 64 Me. 101.

When mortgagor may maintain trover.—See Harvey v. Anaconc, 134 Me. 245, 184 A. 889.

Under ordinary circumstances, a bill in equity cannot be maintained for redemption of personal property from a chattel mortgage conditioned for the payment of money at a specified time. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

The court will not entertain a bill in equity to redeem from a chattel mortgage unless facts are stated making it apparent that the mode specifically provided by this section will not fully protect the mortgagor's rights. Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 A. 554.

Of course there may be in some cases peculiar facts and circumstances in the nature of the property, the character of the condition, the conduct of the mortgagee, or perhaps in the accidents or misfortunes of the mortgagor, or in other respects, that would render it necessary for a court of equity to intervene to protect the contractual or statutory rights of the mortgagor or his assigns. Such facts and circumstances may give to the court jurisdiction in equity. Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 A. 554.

Question whether performance has been made or tendered is fully cognizable by court of law.—If the mortgagor performs or tenders performance of the condition, the property becomes absolutely his, to be recovered and defended by his own hand or by the usual actions at law. If he fails to perform or to tender performance within the time allowed, the property vests absolutely in the mortgagee leaving no scintilla of right in the mortgagor cognizable either at law or in equity. In case of controversy, the question whether performance has been made, or tendered, is one of fact fully cognizable by a court of law with trial by jury. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

Second mortgagee may maintain trover against officer for wrongful attachment and sale.—The grantee in a second mortgage of chattels may maintain an action of trover against an officer who, before the title of the first mortgagee becomes absolute, attaches and sells the goods mortgaged, such grantee being by the act of the officer deprived of his right of redemption. Treat v. Gilmore, 49 Me. 34.

This section contemplates an assignment and a record thereof where the mortgage itself is recorded. It could not be recorded unless in writing. The assignment is for the benefit of all parties to inform the mortgagor and his voluntary or involuntary assigns to whom tender shall be made for redemption, and to relieve the mortgagee of all trouble after he has parted with his interest. Ramsdell v. Tewksbury, 73 Me. 197.

Equitable assignment of mortgage by transfer of negotiable note secured thereby.—See Ramsdell v. Tewksbury, 73 Me. 197.

Applied in Barnes v. Taylor, 31 Me. 329; Keen v. Jordan, 53 Me. 144; Winchester v. Ball, 54 Me. 558.

Quoted in Titcomb v. McAllister, 77 Me. 353.

Cited in Hix v. Giles, 103 Me. 439, 69 A. 692.

Sec. 4. Notice of foreclosure. — The mortgagee or his assignee after condition broken may give to the mortgagor or his assignee, when his assignment is recorded where the mortgage is recorded, written notice of his intention to foreclose the same, by leaving a copy thereof with the mortgagor or such assignee, or if the mortgagor is out of the state although resident therein, by leaving such copy at his last and usual place of abode, or by publishing such notice once a week for 3 successive weeks in one of the principal newspapers published and printed in whole or in part in the town where the mortgage is recorded. If the mortgagor cannot be found within the state by reasonable diligence, or takes up his residence outside the state, or remains outside of the state for the greater portion of 3 consecutive months, the mortgagee or his assignee, while any condition of the said mortgage remains broken, may foreclose such mortgage by publishing such notice once a week for 3 successive weeks in one of the principal newspapers published and printed in whole or in part in the town where the mortgage is recorded. When the mortgagor or his assignee of record is not a resident of the state and no newspaper is published in such town, such notice may

be published in any newspaper published and printed in whole or in part in the county where the mortgage is recorded. (R. S. c. 164, § 4.)

Cross reference.—See c. 107, § 4, sub-§ I, re equity powers in foreclosure of mortgages, etc.

History of §§ 4-6. — See Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100.

The only mode by which a mortgagee can acquire absolute title is by the statute foreclosure. Ramsdell v. Tewksbury, 73 Me. 197.

But statutes do not bar sale under power. — The method of foreclosure of chattel mortgages prescribed in §§ 4-6 is not exclusive and does not bar a sale under a power. Consolidated Rendering Co. v. Stewart, 132 Me. 139, 168 A. 100.

Applied in Peacock v. Rich, 125 Me. 504, 130 A. 509.

Cited in Trask v. Pennell, 59 Me. 419; Hix v. Giles, 103 Me. 439, 69 A. 692; Drake & Sons v. Nickerson, 123 Me. 11, 121 A. 86.

Sec. 5. Notice recorded; mortgagee out of state shall appoint agent to receive satisfaction.—The notice with an affidavit of service or the official return of service of any officer qualified to serve civil process, or a copy of the last publication with the name and date of the paper containing it, shall be recorded where the mortgage is recorded, and the copy of such record is evidence that the notice has been given. If the mortgagee or his assignee is not a resident of the state, he shall at the time of recording such notice, unless said nonresident mortgagee has an established place of business in said state, record therewith his appointment of an agent resident in the county where the mortgage is recorded, to receive satisfaction of the mortgage; and payment or tender thereof may be made to him. If he does not appoint such agent, the right to redeem is not forfeited. (R. S. c. 164, § 5.)

See note to § 4.

Sec. 6. Right of redemption forfeited after 60 days.—The right to redeem shall be forfeited, except as provided in the preceding sections, if the money to be paid or other thing to be done is not paid or performed, or tender thereof made, within 60 days after such notice is recorded; but nothing in the preceding sections defeats a contract of bottomry, respondentia, transfer, assignment or hypothecation of a vessel or goods, at sea or abroad, if possession is taken as soon as may be after their arrival in the state. (R. S. c. 164, § 6.)

Cross references. — See, generally, note to § 4. See note to § 1, re mortgage of vessel. See c. 177, § 30, re claimant of mortgagor's interest may file bill in equity to determine facts and assess damages.

The sixty days do not commence to run till written notice of intention to foreclose the mortgage has been given and recorded as provided in § 4. Trask v. Pennell, 59 Me. 419.

Sec. 7. Crops mortgaged.—Any person may mortgage as personal property annual and perennial crops including fruits, berries and nursery stock, whether such crops are grown or growing or are to be planted within the calendar year in which the mortgage is given, subject only to the rights of prior lienors and the rights of the state, county and municipality. (R. S. c. 164, § 7.)

Stated in Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A. (2d) 412.

Sec. 8. Validity of mortgage.—No mortgage of personal property shall be invalid, nor shall the extent of the lien thereof be affected because of any provision that the mortgagee may permit the mortgagor to sell, use and consume any of the mortgaged property to feed, cultivate, harvest, preserve and prepare for market other property covered by the mortgage. Such permission may be given without the consent of any subsequent lienor. (R. S. c. 164, § 8.)

Cited in Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A. (2d) 412.

Sec. 9. Chattel mortgage.—A chattel mortgage shall constitute a valid lien on property described in the mortgage to be purchased with the proceeds

of the loan secured thereby, and on substitutions for or replacements of property described in the mortgage, when acquired by the mortgagor. (R. S. c. 164, § 9.)

Stated in Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A. (2d) 412.

Sec. 10. Agreements recorded. — Nondisturbance agreements, subordination agreements and waivers executed by parties having rights or interests in mortgaged property as above described shall be recorded in the registry of deeds for the district wherein the land affected lies, if said right or interest pertains to real estate, otherwise they shall be recorded as are chattel mortgages and, when so recorded, shall constitute constructive notice. (R. S. c. 164, § 10.)

Sec. 11. Recording of personal property titles.—Any instrument entitled by law to be recorded, which by its terms transfers or retains title to personal property as security for the payment of money or the performance of any obligation, may be discharged by an entry made on the margin of the record of said instrument acknowledging satisfaction thereof, or by a proper written instrument signed by the person to whom the money is payable or the obligation is due, or by his executor, administrator or assignee. If such person or his executor, administrator or assignee, after full payment of the money or performance of the obligation aforesaid, whether before or after breach, refuses or neglects for 7 days after thereto requested to make such discharge, he shall be punished by a fine of not less than $10 nor more than $50, to be recovered in an action on the case. (R. S. c. 164, § 11.)

Liens on Vessels.

Sec. 12. Lien on domestic vessels.—All domestic vessels shall be subject to a lien to any part owner or other person to secure the payment of debts contracted and advances made for labor and materials necessary for their repair, provisions, stores and other supplies necessary for their employment, and for the use of a wharf, dry dock or marine railway, provided that such lien shall in no event continue for a longer period than 2 years from the time when the debt was contracted or advances made. (R. S. c. 164, § 12.)

Enforcement of lien for repairs.—A lien on a sea-going vessel for repairs made upon her is a recognized admiralty lien. It is nothing else. But it is not known to or enforcible by courts of common law. This lien when applied to a domestic vessel has not changed its nature. And such lien may lawfully be granted by the laws of a state in favor of materialmen for furnishing repairs or materials to a domestic vessel, to be enforced by proceedings in rem in the district courts of the United States, but not in the courts of the state. Warren v. Kelley, 80 Me. 512, 15 A. 49.

As to jurisdiction of federal courts over lien for repairs, see also Hayford v. Cunningham, 72 Me. 128.

Sec. 13. Lien for labor or materials furnished for building vessels; on vessels, by owners of dry docks or marine railways.—Whoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched; but if the labor and materials have been so furnished by virtue of a contract not fully completed at the time of the launching of the vessel, the lien may be enforced within 4 days after such contract has been completed. He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment; and the owners of any dry dock or marine railway used for any vessel have a lien on said vessel for the use of said dock or railway, to be enforced by attachment within 4 days after the last day in which the same is used or occupied by said vessel. (R. S. c. 164, § 13.)

Earlier form of section unconstitutional in part.—That portion of an earlier form of this section, which provided that "whoever furnishes labor or materials for a ves-

sel after it is launched, or for its repair, has a lien on it therefor to be enforced by attachment within four days after the work is completed," so far as it authorized proceedings in rem in the courts of this state for the enforcement of lien for labor, materials or repairs upon a domestic vessel, or foreign sea-going vessel, was in contravention of the constitution and the laws of the United States. Warren v. Kelley, 80 Me. 512, 15 A. 49.

The intention of this section was to give to those persons who performed labor or furnished materials for the construction or repair of vessels additional facilities for securing payment for such labor or materials. Scudder v. Balkam, 40 Me. 291.

Section is as comprehensive as § 52.— This provision is as comprehensive in securing those who perform labor and furnish materials about a vessel in the process of building as is § 52 giving to persons, who shall labor at cutting, hauling and driving lumber, a lien thereon. Atwood v. Williams, 40 Me. 409.

This section was not made for the benefit of the owners of the vessel, but rather for that of the lien claimants. Certain methods of procedure are adopted to protect the rights of the owners, but the section is antagonistic to their interests, and before their property can be taken all the elements necessary to authorize a judgment must be complied with. It is sufficient for the owners to make their objection whenever the judgment is asked for. Fuller v. Nickerson, 69 Me. 228.

The peculiar advantages which this section affords to a lien claimant are, that he may resort to the vessel upon which the labor was performed, or for which the materials were furnished, without regard to the question of ownership, and his attachment, when made, has precedence of all other attachments. Scudder v. Balkam, 40 Me. 291.

The right of lien extends to the employee of a contractor with the owner of the vessel, although the contractor has received his pay in full from the owner. And such lien may be secured by the employee by attachment of the vessel in a suit against his employer. Atwood v. Williams, 40 Me. 409.

The lien is the result of labor. It is the statute security for labor. It attaches unless there is an agreement that it shall not. It attaches notwithstanding the labor is performed for a contractor, to whom it is charged. McCabe v. McRea, 58 Me. 95.

It is not defeated by mortgage of vessel. —The lien is not defeated by a mortgage of the same vessel, made before or after the materials are furnished, provided the materials are actually used in the construction of the vessel. Deering v. Lord, 45 Me. 293.

The lien is a matter of, or at least an incident to, a contract. True, it is established by law, but it is affixed to, and cannot exist without, a contract. It is therefore an element of the contract of sale, just the same as though specially agreed to by the parties. But if the goods are sold generally without any reference to the use to be made of them, no such element can be attached. Fuller v. Nickerson, 69 Me. 228.

And this section in no way modifies or changes the obligation of the contract; it applies to the remedy only. Scudder v. Balkam, 40 Me. 291.

Contract must have been made with reference to law imposing lien. — Though the law imposes the lien for material furnished to build a ship, it can do so only when it appears that the contract was made with reference to the law. Mehan v. Thompson, 71 Me. 492.

There must have been existing intention that materials be used in vessel.— The materials cannot, in any proper sense, be furnished for a vessel unless there was at the time an existing intention that they should be used in that vessel. Fuller v. Nickerson, 69 Me. 228.

The material must be furnished for a vessel within this state, for this section can have no force beyond the state line. Mehan v. Thompson, 71 Me. 492.

But section may apply although materials were delivered in another state.— This section applied although the materials on which the lien was claimed had been delivered, pursuant to contract, in another state, where the contract was made, the vessel was to be built, and the materials were attached, in this state. Mehan v. Thompson, 71 Me. 492.

Lien is not general, but particular.— The lien provided in this section is not a general lien, but the same as a particular lien at common law. Taggard v. Buckmore, 42 Me. 77.

Materials must be furnished for vessel on which lien is claimed. — The terms of this section are plain and free from ambiguity. Any person furnishing materials for building a vessel shall have a lien on "it." The materials must be furnished for the vessel on which the lien is claimed, not for another, not for a different purpose, or without any purpose

whatever as to their use. Fuller v. Nickerson, 69 Me. 228.

But lien attaches to material though it never became part of vessel.—In order to sustain a lien for material under this section, the only requirement is that it shall be furnished for a vessel to be built in this state, and that such was the contract. The lien attaches to the material thus furnished though it has never become a part of the vessel. Mehan v. Thompson, 71 Me. 492.

Materials not used in construction of vessel. — See Taggard v. Buckmore, 42 Me. 77; Perkins v. Pike, 42 Me. 141.

Materials used in vessel other than that designated. — If the materials were incorporated into a vessel other than that designated, the lien would attach to the vessel on which they were in fact used. Taggard v. Buckmore, 42 Me. 77.

Model of ship and mould by which timbers are formed are not within section.— The model of a ship, or the mould by which a ship's timbers are formed, do not enter into the structure, and cannot be regarded as within the statutes by which liens are given, in certain cases, to the materialman and the laborer. Ames v. Dyer, 41 Me. 397.

Building and repair of vessel distinguished. — See Homer v. Lady of the Ocean, 70 Me. 350.

This section covers sales of materials on credit, as well as those where no credit is given. Mehan v. Thompson, 71 Me. 492.

Lien may be waived.—It is undoubtedly true that a party having a lien, or who might have one, may waive it by express terms or by implication. Mehan v. Thompson, 71 Me. 492.

This section gives to the laborer a lien. It is for the claimant to prove that he the laborer knowingly surrendered or waived such lien. McCabe v. McRea, 58 Me. 95.

But giving of credit is not waiver.—The giving of credit for materials furnished for a ship is not a waiver of the lien. Mehan v. Thompson, 71 Me. 492.

Though extended credit may be evidence of waiver.—It is true that a person may give so extended a credit that it might probably go beyond the time for enforcing it. In such case it might be evidence tending to show a waiver, but it could be no more. Mehan v. Thompson, 71 Me. 492.

However, party enforcing lien must have existing right of action. — To avail himself of the advantages of this section, the claimant must be in a situation to make a valid attachment. But before he can make such an attachment, he must have an existing right of action. Scudder v. Balkam, 40 Me. 291.

Thus lien is lost where credit extends beyond time for enforcing it. — The law has dispensed with none of the elements, in this class of cases, which are ordinarily necessary to give a right of action. If therefore the lien claimants chose to give so extended a credit that no action could be maintained until after the time during which a lien could be secured had elapsed, they must be deemed to have voluntarily waived their lien, and relied upon the personal security of the parties to whom credit was given. Scudder v. Balkam, 40 Me. 291.

A party having a lien may lose it by giving a credit so long that the time for enforcing it shall expire before the credit does. The only means of enforcing a lien is by an attachment, which must be made within a limited time, and in an action for the recovery of the debt. If the debt does not become payable within the time allowed to enforce the lien, the action cannot be maintained, and the attachment must necessarily fail. Mehan v. Thompson, 71 Me. 492.

Lien not discharged by acceptance of negotiable paper for debt.—See Mehan v. Thompson, 71 Me. 492.

Time for enforcing lien.—The launching is a definite period, one well understood as applied in shipbuilding, and the only period provided by law from which the four days can be computed under the first clause of this section. Homer v. Lady of the Ocean, 70 Me. 350.

Lien must be enforced in name of party to whom it accrued. — The lien given by this section is only for the benefit of the person performing labor upon or furnishing materials for a vessel. The claim is personal, and must be enforced in the name of the party to whom it accrued. The lienor can neither directly nor indirectly assign his lien so that it could be enforced in the name of an assignee. Pearsons v. Tincker, 36 Me. 384.

Laborer employed by contractor cannot enforce lien by action against owner.—A mechanic who has labored upon a vessel, having been employed not by the owner but by a person who had contracted with the owner to do the work for a specified price, cannot enforce a lien upon the vessel by an action against the owner. If he has such a lien, his remedy is by attaching the vessel in a suit against his employer. Ames v. Swett, 33 Me. 479.

Lien is not secured by attachment in

usual form. — The lien is not secured by attachment in the usual form, on a writ simply commanding the officer to attach the goods and estate of the defendant therein named. Where a writ gives no indication of a lien claim, an attachment confers on the plaintiff in the suit no special or peculiar rights in the property attached, by reason of his having furnished labor or materials for the construction or repair thereof. He stands on the same footing as any other creditor. Perkins v. Pike, 42 Me. 141.

Attachment under writ containing no specific direction to attach ship is void against purchaser. — If the writ contains no direction to the officer to attach the ship, but only "to attach the goods and estate of" the debtor, the attachment of the ship will be invalid as against one who prior thereto had become the purchaser of it from the builder. Deering v. Lord, 45 Me. 293.

And against mortgagee. — If a mortgagee holds the ship, and there is no specific direction in the writ to attach it, an attachment of it will be void unless the attaching creditor makes tender to the mortgagee. Deering v. Lord, 45 Me. 293.

Action on account embracing non-lien items. — Where an attachment of a vessel is made on a writ to preserve a lien given by this section, if in the plaintiff's account sued are embraced items for which he has no lien, the attachment is not, for that cause, void; but if a non-lien item should be included in the judgment rendered in the suit, the attachment will be thereby vacated. Deering v. Lord, 45 Me. 293.

Applied in Reed v. Bachelder, 34 Me. 205; Low v. Dunham, 61 Me. 566.

Cited in Bowen v. Peters, 71 Me. 463.

Sec. 14. Writ for enforcing lien. — The form of a writ for enforcing such lien shall be in substance as follows:

"STATE OF MAINE.

...., ss.

To the sheriff of our county of ...., or his deputy:

Greeting.

[L. S.] We command you to attach the vessel" (here give such a description of the vessel as will identify it,) "and summon all persons interested, in the manner directed by law, to appear before our justices of our .... court, next to be held at ...., within and for our county of ...., on the .... Tuesday of .... next, then and there in our said court to answer to A. B., of ...., who claims a lien on said vessel for" (here describe briefly the nature of the lien,) "to the amount of .... dollars and .... cents, according to the specification hereto annexed, which amount C. D., of ...., who owes the same, neglects and refuses to pay, to the damage of said A. B., as he says, the sum of ..... dollars, which shall then and there be made to appear, with other due damages; and have you there this writ with your doings thereon.

Witness, ..., Esquire, our ...., at...., on the .... day of ...., in the year of our Lord, nineteen hundred and .....

E. F., Clerk."

Said writ shall be signed, sealed and tested like other writs in civil actions, and returned in the county where said vessel is. (R. S. c. 164, § 14.)

Cross reference.—See c. 112, §§ 1-8, re forms, requisites and indorsements of writs.

The writ, and specification which is a part of it, are as much elements of the judgment as the contract, and the facts therein stated must be proved just the same or the judgment fails. These facts are in issue as much as the contract, and the whole issue must be determined at the same time. Fuller v. Nickerson, 69 Me. 228.

Attachment cannot be made except upon writ prescribed by law.—Where the plaintiffs are not seeking to enforce their claim against those who promised to pay it, but against the vessel in rem, and the question is not whether they shall have a judgment, but whether that judgment shall be against the property, so that they may secure their lien upon it, the statute requires certain things of the plaintiffs. There must be a valid attachment within four days after the vessel is launched, and that attachment cannot be made except upon such a writ as is prescribed by law. Fuller v. Nickerson, 69 Me. 228.

Attachment under writ containing no specific direction to attach ship.—See note to § 13.

Applied in Low v. Dunham, 61 Me. 566.

Sec. 15. Specification annexed to writ; verification by oath. — The specification annexed to the writ shall contain a just, true and particular account of the demand claimed to be due the plaintiff with all just credits, the names of the persons personally liable to him and names of the owners of the vessel if known to him; and it shall be verified by the oath of 1 plaintiff, or of some person in his behalf, that the amount claimed in said specification is justly due from the person named in the writ and specification as owing it, and that he believes that by the law of the state he has a lien on such vessel for the whole or a part thereof. (R. S. c. 164, § 15.)

Cross reference.—See note to § 14.

Specification is not required to be literally exact in all respects.—To require that a specification such as is required by this section should be literally exact in all respects and under all circumstances, would be so rigid an interpretation of the statute as to take away from parties in many cases the beneficial purposes for which it was designed. Dyer v. Brackett, 61 Me. 587.

Claimant need state name of owner only when he knows it.—A person claiming a lien for labor on a vessel is required to state in his specification the name of the owner only when he knows it. McCabe v. McRea, 58 Me. 95.

The specification must be verified by oath. This authentication is by this section made an indispensable prerequisite to an attachment. It is a part of the writ, as necessary as any other part. Without it the writ is incomplete, one upon which no attachment under this law can be made, and without an attachment no judgment can be rendered enforcing the lien claim. Fuller v. Nickerson, 69 Me. 228.

Verification held sufficient.—Where the plaintiff made oath that in his belief he had a lien on the vessel "for the amount of his claim," this was a sufficient compliance with the requirement of this section that the oath shall declare a lien "for the whole, or a part thereof." Dyer v. Brackett, 61 Me. 587.

No amendment to an insufficient specification can be allowed, for the reason that, if the attachment was invalid when made for want of process, no subsequent procuring of process can relate back so as to supply the deficiency, and in this respect there is no difference between an entire want of process and process deficient in any matter made requisite by law. Fuller v. Nickerson, 69 Me. 228.

But omissions and erroneous items may be corrected.—If an item of debt had been honestly claimed for which no lien existed, and others shown by a failure of proof on the part of the plaintiff, such an error would have no effect upon the sufficiency of the specification, whether voluntarily corrected by the plaintiff under leave of court, or by a verdict of the jury. Such a correction is not technically an amendment of the process. It is simply a correction of an error in the amount claimed, which has no effect upon the specification, as it was originally made, as a valid foundation for an attachment and judgment. Fuller v. Nickerson, 69 Me. 228.

In a suit to enforce a lien on a vessel, where, without fraudulent intention but through forgetfulness, there was an omission to render in the specification certain small credits, and such omission is discovered before trial and seasonably the plaintiff should have leave to amend so as to make his writ valid and sufficient. Dyer v. Brackett, 61 Me. 587.

Unless willfully and knowingly made.—If an item for which there is no lien is honestly claimed, or a credit inadvertently omitted from which no harm arises, the error may be corrected at the trial. But if the misstatement or omission is willfully and knowingly made the specification is still fatally defective. Whether it was so made is question of fact for the jury. Fuller v. Nickerson, 69 Me. 228.

Plaintiff may recover less than amount in specification.—The different provisions of this chapter relating to the lien on vessels that a plaintiff may recover a less amount than that put into his specification as a "just, true and particular account of his demand." Fuller v. Nickerson, 69 Me. 228.

Specification held fatally defective because not particular.—See Fuller v. Nickerson, 69 Me. 228.

Sec. 16. Attachment of vessel on stocks; sale of attached vessel liable to depreciation.—If the vessel at the time is on the stocks, the attachment shall be made by filing in the office of the clerk of the town in which such vessel is, within 48 hours thereafter, a copy of so much of his return on the writ

as relates to the attachment, with the name of the plaintiff, the name of the person liable for the debt, the description of the vessel as given in the writ, the date of the writ, the amount claimed and the court to which it is returnable, and by leaving a copy of such certificate with one of the owners of the vessel, if known to him and residing within his precinct, or with the master workman thereon; if the attachment is so made, the officer need not take possession of the vessel before it is launched unless specially directed by the plaintiff or his attorney to do so; but he shall, as soon as may be, afterwards. He may take possession at any time before it is launched; but if he does, he shall not hinder the work thereon or prevent or delay the launching. If at the time of attachment the vessel is launched, it shall be attached like other personal property. Whenever a vessel has been attached as aforesaid and the expense of retaining possession of said vessel is great, or the vessel is liable to depreciate in value by reason thereof, any attaching creditor or an owner of said vessel may in term time or vacation petition a justice of the superior court, praying that said vessel attached as aforesaid may be sold, and said justice may order a hearing thereon; and due notice shall be given to all parties in interest of the time and place appointed for said hearing and a hearing on said petition shall be had before a justice of said court. If it appears to said justice to be for the benefit of all parties in interest that said vessel should be sold, he shall issue to the officer in possession of the same, or to the sheriff of the county in which said vessel has been attached, an order to sell it at public auction, and shall designate in said order the notice to be given of the time and place of said sale. Said vessel shall be sold pursuant to said order, and the proceeds of such sale, after deducting necessary expenses, shall be held by the first attaching officer or the sheriff, subject to the successive attachments, as if sold on execution; provided, however, that if said parties do not consent to a sale as herein provided, the provisions of sections 32 to 41, inclusive, of chapter 112, so far as the same are applicable, shall apply to proceedings under this section. (R. S. c. 164, § 16.)

Applied in McCabe v. McRea, 58 Me. 95; Buck v. Kimball, 75 Me. 440.

Sec. 17. Service of writ on debtors and on owners.—The writ shall be served on persons named as personally liable for the plaintiff's claim, as in other personal actions against them, or on the owners of the vessel who are known or reside in the county where the vessel is, by a notice in substance, as follows, and served as summonses are, and by a notice in like form posted in some conspicuous place on the vessel attached:

" , ss. To the owners of the ship or vessel," (describe it as in writ,) "Greeting.

Take notice that the above described vessel is attached on a writ in favor of , who claims a lien thereon for the sum of dollars and cents," (naming the amount of the claim,) "due him by C. D., and that said writ is returnable to the court at the term to be held at , in and for the county of , on the Tuesday of , A. D. 19 , when and where you may appear and defend if you see fit.

Dated," (etc.)

"G. H., Sheriff," (or) "Deputy Sheriff."

The attachment, service and notices shall be made 14 days at least before the term of the court to which the writ is returnable. (R. S. c. 164, § 17.)

See c. 112, §§ 17-20, re service of writs on residents.

Sec. 18. Subsequent writs served by same officer unless disqualified.—On all writs made after the first attachment and while any lien attachment is pending, the attachment and services shall be made as aforesaid by the

same officer, or, if he is disqualified, by any qualified officer, by his giving notice thereof to the first attaching officer. (R. S. c. 164, § 18.)

Sec. 19. Entry of action; who may defend; bond. — At the return term, the actions shall be entered on the docket as follows: the person claiming the lien, as plaintiff; the person alleged to be personally liable, as defendant, and the name or other description of the vessel attached; and the owners or mortgagees of the vessel, or any plaintiff in a suit wherein it is attached for a lien, may appear and defend any action so far as relates to the validity and amount of the lien claim; but no such plaintiff shall so defend until he gives bond, to the satisfaction of the court, to pay the costs awarded against him. (R. S. c. 164, § 19.)

Sec. 20. Offer of default; owners may admit certain sum due.— The defendant may offer to be defaulted as in other cases; and the owners of the vessel may admit, in writing filed with the clerk, that a certain sum is due the plaintiff as a lien on the vessel; and if the plaintiff does not recover a greater sum as lien, he recovers no costs against such owner or the vessel or its proceeds after the admission is filed; but such owner recovers costs thereafter. (R. S. c. 164, § 20.)

Default of contractor is not evidence against owner as to amount of lien.— Where, in an action to enforce a lien upon a vessel, brought by a laborer against one who contracted with the owner, the defendant is defaulted, such default is not evidence against the owner as to the amount of the lien on the vessel. McCabe v. McRea, 58 Me. 95.

Quoted in Fuller v. Nickerson, 69 Me. 228.

Sec. 21. Court to apportion costs as in equity.—The court, except as provided in the preceding section, may decide all questions of costs and apportion them as they think proper, as in cases of equity. (R. S. c. 164, § 21.)

Cited in Parks v. Crockett, 61 Me. 489.

Sec. 22. Issue framed. — At the request of either party, the following questions of fact shall be submitted to a jury: "What amount claimed in the writ is due from the defendant to the plaintiff?" and "For how much of such amount has the plaintiff a lien on the vessel attached?" The verdict shall be in answer to these questions. If the parties waive a jury trial, these questions shall be decided by the court on a hearing or report of an auditor appointed by the court. (R. S. c. 164, § 22.)

Applied in McCabe v. McRea, 58 Me. 95.

Stated in Fuller v. Nickerson, 69 Me. 228.

Sec. 23. Judgment against defendant.—Upon ascertaining the amount aforesaid, judgment shall be rendered in his favor against the defendant as in other personal actions, for the amount found not to be a lien on the vessel, with such costs as the court awards; and a separate judgment shall be rendered in his favor against said defendant and the vessel attached for the amount decided to be a lien, with such costs as the court awards; and separate executions shall be issued thereon. (R. S. c. 164, § 23.)

Applied in Low v. Dunham, 61 Me. 566.

Stated in Fuller v. Nickerson, 69 Me. 228.

Sec. 24. Exceptions, motions, etc.—Parties have the same right of exceptions, motions for new trial and writs of error as in other actions. (R. S. c. 164, § 24.)

Sec. 25. Court may order vessel sold and proceeds paid into court. —When judgment is recovered in any suit on which a vessel was attached, the

court may issue an order to the attaching officer to sell it at auction, and to pay the proceeds thereof into court after deducting the expenses of sale and for taking care of the vessel while under attachment. Such officer shall sell it as other personal property is sold on execution; and the purchaser shall hold it free from any prior claim. (R. S. c. 164, § 25.)

Cross reference.—See c. 118, re levy of executions on personal property.

Order to sell follows judgment as matter of course.—Upon a judgment recovered for the amount decided to be a lien in any suit on which a vessel was attached, the order to the attaching officer to sell it at auction, etc., is one consequent upon the judgment and a necessary sequence thereof. It follows the judgment as a matter of course, as the execution does. Low v. Dunham, 61 Me. 566.

And lien being established, order cannot legally be withheld.—It was not the intention of the legislature that it should be left to the discretion of the court whether an order to sell the vessel should issue or not. All persons having established a lien are equally entitled to its enforcement and to an order of court for such enforcement. A lien being established, the order could not legally be withheld. The word "may" in this section is to be construed as "must" or "shall." Low v. Dunham, 61 Me. 566.

Applied in McCabe v. McRea, 58 Me. 95.

Cited in Lord v. Collins, 76 Me. 443.

Sec. 26. Distribution of proceeds and of any surplus.—If such proceeds are more than all the judgments recovered against such vessel and the amounts claimed in the undecided suits, the court may order the judgments, as fast as they are recovered against said vessel, to be paid from said fund until all such suits are terminated and all judgments satisfied. The court may, on petition, order the balance, if any, to be paid to the persons legally entitled thereto. (R. S. c. 164, § 26.)

By this section successive liens are provided for, and on sale of the property there is the additional provision that the proceeds are to be paid out in satisfaction of the several judgments as they may be recovered against the vessel until all are satisfied. Lord v. Collins, 76 Me. 443.

Sec. 27. When proceeds not enough distributed pro rata, and double liens prevented.—If such proceeds are not enough to pay in full the judgments recovered and the claims still undecided, the court may order the money to remain until all the suits are terminated, and then divide pro rata; or it may direct a sufficient amount to be retained to pay on the undecided claims their proportion and divide the residue ratably among the judgments recovered, and if, after all the suits are terminated, and the judgments recovered subsequent to the first division have received the same proportion as prior judgments, there is any sum remaining, it shall be divided among the judgments pro rata, and in such division the court shall make such orders as will prevent the enforcement of a double lien and will secure the just rights of all. (R. S. c. 164, § 27.)

Sec. 28. Vessel under attachment attached on lien claim.—If the vessel has been already attached by a sheriff or his deputy when a writ is issued for such lien claim, such writ shall be served by such officer; if attached by a constable, he shall give up to the officer having the lien writ the possession and the precept upon which he attached it with his return of the facts thereon; and the attachment shall hold subject to the legal priorities of the lien claim. (R. S. c. 164, § 28.)

Applied in Low v. Dunham, 61 Me. 566.

Sec. 29. If attached for lien, how attached for non-lien claims.—A vessel attached for a lien claim may be attached by the same officer in the ordinary manner in a suit against the owners thereof, and such attachment shall be valid, subject to the legal priorities of the lien attachments. (R. S. c. 164, § 29.)

Sec. 30. Sale of vessel, attached on both kinds of claims.—When a vessel attached for liens and also in the ordinary manner is sold by order of the court and the proceeds are more than sufficient to satisfy the lien judgments, the surplus shall be paid to the officer to be held upon the writs not founded on the lien claims. (R. S. c. 164, § 30.)

Sec. 31. Admiralty powers of court. — The court, like a court in admiralty, may make all orders necessary for carrying out the provisions of sections 14 to 30, inclusive, according to their true intent and meaning. (R. S. c. 164, § 31.)

Liens on Lime, Limerock, Granite and Slate.

Sec. 32. Liens on lime, limerock, granite and slate.—Whoever digs, hauls or furnishes rock for the manufacture of lime has a lien thereon for his personal service, and on the rock so furnished, for 30 days after such rock is manufactured into lime or until such lime is sold or shipped on board a vessel; whoever labors in quarrying or cutting and dressing granite in any quarry has a lien for his wages on all the granite quarried or cut and dressed in the quarry by him or his colaborers for 30 days after such granite is cut and dressed or until such granite is sold or shipped on board a vessel; and whoever labors in mining, quarrying or manufacturing slate in any quarry has a lien for the wages of his labor on all slate mined, quarried or manufactured in the quarry by him or his colaborers for 30 days after the slate arrives at the port of shipment and until it has been shipped on board a vessel or laden in a car; such liens take precedence over all other claims and may be enforced by attachment within the times aforesaid. (R. S. c. 164, § 32.)

History of section.—See Union Slate Co. v. Tilton, 73 Me. 207.

Purpose of section.—The object of this section is to make the pay of those whose labor has gone to enhance the value of the product prompt and secure in all cases against both the misfortunes and the possible dishonesty of their employers. Collins Granite Co. v. Devereux, 72 Me. 422.

The construction to be adopted is that which, without violating the true signification of the language employed, will best promote the object and efficiency of this section in all its parts. Collins Granite Co. v. Devereux, 72 Me. 422.

Duration of lien on granite.—The legislature intended to confer a substantial benefit and security upon the laborer by giving him a lien upon the granite for his wages for at least thirty days after it is cut and dressed, and as much longer as it remains unsold, and not shipped on board a vessel. Collins Granite Co. v. Devereux, 72 Me. 422.

Attachments of granite made before and after lapse of 30 days distinguished.—The lien on granite, if enforced by attachment within thirty days after it is cut and dressed, will have precedence of all other claims, including sales made within said thirty days. A laborer's attachment made after the lapse of said thirty days will prevail against prior claims only when made before the stone is sold or shipped on board a vessel. Collins Granite Co. v. Devereux, 72 Me. 422.

A person who labors in manufacturing slate at a place other than "in the quarry," has no lien thereon for the wages of his labor. Union Slate Co. v. Tilton, 73 Me. 207.

It is immaterial when the labor was performed upon the slate in the quarry, provided that within thirty days after its arrival at the port of shipment, the lien claimant causes the slate mined, quarried or manufactured in the quarry by himself or his colaborers to be duly attached. Union Slate Co. v. Tilton, 73 Me. 207.

But it must be shown that slate was attached within 30 days after arrival at port of shipment.—When a suit is brought to enforce the lien upon slate under this section, it must be shown affirmatively that the attachment was made within thirty days next after the slate arrived at the port of shipment. Union Slate Co. v. Tilton, 73 Me. 207.

What is "port of shipment."—Where slate was quarried at Mayfield and carried thence to Skowhegan, to a shop one-half mile from the railroad station, and there cut and finished for mantels, and

boxed and placed in a storehouse near the shop when not required to be immediately hauled to the station to be shipped to purchasers, the shop or storehouse whence the mantels were sold and delivered must be considered "their port of shipment" within the meaning of this section, and when the mantels were completed and ready for delivery either at the shop or the storehouse, they had arrived at their port of shipment and the thirty days begun to run. Union Slate Co. v. Tilton, 73 Me. 207.

Where liens cannot be upheld, attachments may still be valid.—Where suits are brought to enforce statute liens upon manufactured slate, and the liens cannot be upheld, the attachments may still be considered valid, as those of general attaching creditors, not seeking to enforce liens. Union Slate Co. v. Tilton, 73 Me. 207.

Declaration under section.—See Mahan v. Sutherland, 73 Me. 158.

Cited in Monroe v. Clark, 107 Me. 134, 77 A. 696.

Liens on Brick.

Sec. 33. Lien on brick.—Whoever performs labor or furnishes labor or wood for manufacturing and burning bricks has a lien on such bricks for such labor and wood for 30 days after the same are burned, suitable for use, provided that said bricks remain in the yard where burnt; such lien shall take precedence over all other claims and of all attachments and encumbrances not made to secure a similar lien and may be enforced by attachment within the time aforesaid. (R. S. c. 164, § 33.)

Contract lien substituted for statute lien.—Where one has a lien by special contract upon bricks which he manufactured, and the terms of the contract are inconsistent with the statute lien, the two liens cannot exist together, and it must be presumed that the parties intended to substitute the lien by special contract for the statute lien. Howe v. Patterson, 78 Me. 227, 3 A. 650.

Liens on Buildings and Lots, Wharves and Piers.

Sec. 34. Liens on buildings and lots for labor and materials.—Whoever performs labor or furnishes labor or materials or performs services either as an architect or an engineer in erecting, altering, moving or repairing a house, building or appurtenances, including any public building erected or owned by any city, town, county, school district or other municipal corporation, or in constructing, altering or repairing a wharf or pier, or any building thereon, by virtue of a contract with or by consent of the owner, has a lien thereon and on the land on which it stands and on any interest such owner has in the same, to secure payment thereof, with costs. If the owner of the building has no legal interest in the land on which the building is erected or to which it is moved, the lien attaches to the building, and if the owner of the wharf or pier has no legal interest in the land on which the wharf or pier is erected, the lien attaches to the wharf or pier, and in either case may be enforced as hereinafter provided; and if the owner of such land, building, wharf or pier, so contracting, is a minor or married woman, such lien shall exist and such minority or coverture shall not bar a recovery in any proceeding brought to enforce it. (R. S. c. 164, § 34. 1949, c. 19, § 1.)

I. General Consideration.

II. Labor and Materials for Which Lien Attaches.

III. Property to Which Lien Attaches.

IV. Contract with or Consent of Owner.

V. Priorities.

I. GENERAL CONSIDERATION.

History of section.—See W. A. Allen Co. v. Emerton, 108 Me. 221, 79 A. 905; E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405; Shaw v. Young, 87 Me. 271, 32 A. 897;

J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134; Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

The mechanics' lien statute is a just and reasonable one. It seems designed to protect the rights of the landowner as well as to afford security for the contractor and laborer. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

A lien is given upon the ground that the work has been a benefit to the realty, and has enhanced its value. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990; Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

Mechanics' lien statutes should be liberally construed.—Mechanics' lien statutes were at first deemed by the courts to be in derogation of the common law, and hence to be construed narrowly and strictly. They have now, however, become an integral part of our law, and their justice and beneficence have become apparent. They now form recognized principles of remedial justice, and should receive broad and liberal construction. Durling v. Gould, 83 Me. 134, 21 A. 833.

In determining the proper interpretation of lien statutes, courts need not feel hampered by the earlier decisions. These statutes were such an innovation upon the common law of real property that for some time the courts construed them most strictly. However, they are now general and familiar and their equity and beneficence are conceded even by landowners. Courts will now construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute. Shaw v. Young, 87 Me. 271, 32 A. 897; Andrew v. Bishop, 132 Me. 447, 172 A. 752. See Otis Elevator Co. v. Finks Clothing Co., 131 Me. 95, 159 A. 563.

But rights of owner and subsequent grantees should be protected.—While the lien law should be construed favorably to the laborer, the rights of the owner and subsequent grantees should also be respected. Hartley v. Richardson, 91 Me. 424, 40 A. 336.

While the mechanic's lien statute is to be construed somewhat liberally to accomplish its beneficent purpose, the rights of the owner should be fairly protected. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

And all requirements of statute must be met.—A lien for a materialman was unknown to the common law. It was given by statute, and, because such is its origin, every jurisdictional requirement must be met and all conditions precedent as prescribed by statute must be complied with, before the lienor can prevail. Andrew v. Bishop, 132 Me. 447, 172 A. 752.

While the court has recognized that the lien law should be construed favorably to those entitled to its protection, it has also recognized, that labor performed cannot be considered as labor entitling one to the benefit of the lien law simply because it would remedy unfortunate neglect to comply with the statute. The tests are whether the lien has been honestly earned and whether the lien claimant was within the statute. Morin v. W. H. Maxim Co., 146 Me. 421, 82 A. (2d) 789.

Mechanic's lien pertains to remedy and not to essence of contract.—The mechanic's lien is but a means of enforcing the contract, a remedy given by law, and like all matters pertaining to the remedy, and not to the essence of the contract, until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, it is entirely within the control of the lawmaking power, in whose edict it originated. Frost v. Ilsley, 54 Me. 345.

And may be modified or taken away without impairing obligation of contract.—The lien is the creature of the statute. It is no part of the contract, but a merely incidental accompaniment, deriving its validity only from positive enactment and liable always to be controlled, modified or taken away by subsequent enactment, and such modification or removal cannot be considered as in any degree impairing the obligation of the contract itself. Frost v. Ilsley, 54 Me. 345.

Lienor retaining title to specific property as security does not waive lien.—Retaining title to certain specific personal property as a means of securing payment does not impose upon the creditor or lienor any duty or obligation to assert such title by resuming possession of the property. It is not inconsistent with the lien claim, but merely additional security to that provided by this section. In thus retaining title to the specific property, the creditor or lienor does not waive his statutory lien upon the lot or premises upon which the personal property is placed. Otis Elevator Co. v. Finks Clothing Co., 131 Me. 95, 159 A. 563.

Lien must fail where lien claims and non-lien claims are intermingled.—Where a laborer has so intermingled his lien claim with non-lien items, that the exact

amount for which he is entitled to a lien, cannot be ascertained, the whole lien must fail. Baker v. Fesenden, 71 Me. 292.

Where the evidence showed some small repairs, which might be regarded as fixtures, and for which a lien might be claimed, but whatever small amount of labor and materials entered into these was so inextricably intermingled with larger and more important work, for which no lien could be claimed, that neither the items or their amounts could be separated and ascertained, no lien could attach. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

Lien waived by taking judgment including both lien and non-lien claims.—If a creditor in taking judgment for a lien claim includes with it, in the judgment, another claim, to which no lien attached, the lien is thereby waived and defeated. Lambard v. Pike, 33 Me. 141.

Lien not dissolved by proceedings in insolvency.—See note to § 45.

Applied in Conner v. Lewis, 16 Me. 268; Severance v. Hammatt, 28 Me. 511; Kendall v. Folsom, 34 Me. 198; Bangor v. Goding, 35 Me. 73; Johnson v. Pike, 35 Me. 291; Gray v. Carleton, 35 Me. 481; Cocheco Banks v. Berry, 52 Me. 293; Phillips v. Brown, 74 Me. 549; Dustin v. Crosby, 75 Me. 75; Woodruff v. Hovey, 91 Me. 116, 39 A. 469; De Pietro v. Modes, 124 Me. 132, 126 A. 575.

II. LABOR AND MATERIALS FOR WHICH LIEN ATTACHES.

The lien given is definite and for a particular work, which may indeed be of long continuance, but cannot be distinct jobs. One single lien cannot cover several distinct alterations in the same building made at different times and independent of each other. Baker v. Fessenden, 71 Me. 292.

Labor must be performed or materials furnished in erecting building.—In order to bring a case within this section, it must appear that the laborer performed the labor in erecting the building. Monroe v. Clark, 107 Me. 134, 77 A. 696.

Only such labor and materials as are used in "erecting, altering, moving or repairing" a building are protected by a lien. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

Although all labor need not be done on structure itself.—Where one engages to erect a building, or do certain things in the erection of the building, as for example, the carpenter work, or the painting, or the plumbing, or the granite work, his employees have liens for their labor in doing these things. And if, in connection with doing these things, he agrees to furnish, and does furnish, the materials, the result is the same. It is not necessary that all of the labor should actually be done on the structure itself. Monroe v. Clark, 107 Me. 134, 77 A. 696.

The doors and windows may be made at the shop, the boards may be sawed and planed at the mill, or the iron work done at the blacksmith shop. These processes are all a part of the erection of the building. The work so done, in the contemplation of this section, is done "in the erection of a building." Monroe v. Clark, 107 Me. 134, 77 A. 696.

Employees of one who merely contracts to furnish completed articles for use in building have no lien.—Where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employees have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed "in the erection of the building." Monroe v. Clark, 107 Me. 134, 77 A. 696.

Labor must be done on some portion of realty.—To sustain the lien, the plaintiff must show that his labor, or some definite and distinct part of it, was furnished in erecting, altering, or repairing the building itself, or appurtenances, that is, that it was done on some portion of the realty. Baker v. Fessenden, 71 Me. 292.

This section was intended to apply to repairs or alterations which became fixtures, not removable by the tenant. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

And not to temporary alterations made by lessee and not becoming part of realty.—No lien can be founded upon temporary alterations made by a lessee for his own convenience, not affixed to the building in a manner to become a part of the realty, subject to removal by the tenant, and not essential to the use and purpose for which the building was designed by its owner, and which were in fact removed by the lessee, leaving no trace of them in existence except a few nail holes in the floor and screw holes in the wall. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

Lien for labor in repairing, altering and installing machinery.—Where the work for which a lien is claimed in superintending machinery, repairing and altering it when necessary, and in making and putting in such new machinery as might be needed to replace the old, to sustain the plaintiff's allegation of lien it must affirmatively ap-

pear that the machinery for which the labor was furnished was so connected with and attached to the building, so adapted to and necessary for the use for which it was erected, as to lead to the conclusion that it was intended to be permanently a part of it, and in this action a part of the realty. Baker v. Fessenden, 71 Me. 292; See Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

Materials must be furnished for purpose mentioned in section.—It is only where materials are furnished for the purpose mentioned in this section that a lien results. J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

And if not furnished under contract with owner must be furnished for use on particular building. — Where the materials were not furnished under a contract with the owner, it must appear that they were furnished for the construction, alteration or repair of a particular building and were not sold on an open account for general use. J. W. White Co. v. Griffith, 127 Me. 516, 145 A 134.

And not merely sold in general course of trade on credit of purchaser.—Where materials, not furnished under contract with the owner, are sold in the general course of trade on the credit of the purchaser without any understanding that they were to be used in a particular building then under construction, alteration or repair, or under contract with the owner for the construction, alteration or repair, no lien will attach. J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

But it is not required that particular location of building be had in contemplation. —This section does not require that the particular location of the building must be had in contemplation when the materials are sold to a subcontractor; it is sufficient if the materials, when not supplied under contract with the owner, are supplied with his consent, and that they are furnished with the understanding that they are intended for one of the purposes named in this section. J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

And sale to contractor on credit does not bar lien as matter of law.—It does not follow as a matter of law that the sale of materials to a contractor on the usual terms of credit in the trade, if it does not extend beyond the limitation of filing notice of a lien, will prevent a lien from attaching, if the vendor knew that they were to be used in the construction or repair of a particular building is shown at the time of sale. Even the taking of a note it has been held was not necessarily a waiver of the lien. J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

One who buys lumber for use of contractor "furnishes" materials.—One who buys lumber of a dealer for the use of a contractor, who receives it and uses it in the repair of a building, "furnishes" it within the meaning of this section, and has a lien on the building for the same. Rounds v. Basham, 116 Me. 199, 100 A. 936.

But if the seller sold the lumber to the contractor, upon the claimant's undertaking to pay for it if the contractor did not, or, in other words, if the claimant merely became responsible for the contractor, the claimant had no lien. In such case, his undertaking was collateral, in the nature of a guaranty, and he could not be said to have furnished the lumber within the meaning of this section. Rounds v. Basham, 116 Me., 199, 100 A. 936.

Materials must be actually used in construction of building.—There is no lien under this section for materials furnished for a building but not used in the construction of the building. Fletcher, Crowell Co. v. Chevalier, 108 Me. 435, 81 A. 578.

And must be so applied as to constitute part of building.—To create a lien, the materials must be used for erecting, altering or repairing the building; they must be so applied as to constitute a part of the building. It will not be sufficient that they be placed in it for its more convenient use. Lambard v. Pike, 33 Me. 141; Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

Thus cylinder stove and funnel cannot constitute materials for repair of building. —A cylinder stove and funnel cannot constitute materials for the repair of a building or mill, in the sense contemplated by this section. Lambard v. Pike, 33 Me. 141.

But lien may attach for material incorporated in building and later removed.— Where two steel columns were made in accordance with the specifications for a building and were actually set up in the building by the contractors, and afterwards they were removed at the request of the owner's building committee, the columns were in fact incorporated into the building and became a part of the realty, and the lien created by this section was not defeated by the removal of the columns. Fletcher, Crowell Co. v. Chevalier, 108 Me. 435, 81 A. 578.

III. PROPERTY TO WHICH LIEN ATTACHES.

The lien attaches to real and personal

estate, when a proper and sufficient claim is filed by the claimant in the repository appropriate to a claim against property of either class, effective from date of creation. The object to which it attaches is primarily the building, but by virtue of this section it likewise attaches to the land on which it stands. Otis Elevator Co. v. Finks Clothing Co., 131 Me. 95, 159 A. 563.

And attachment against land as real estate is not void.—The attachment on the writ is not void because it is an attachment against the land as real estate instead of against the materials on the land as personal property, since the owner's consent that the building may be erected on his land is a consent that a lien for materials and services procured for erecting the same may be established on his land. He is estopped from denying the principal defendant's ownership. His consent is equivalent to defendant's ownership. The lien attaches to the res, the fee. That being so, the res, or fee, must be attached as real estate in order to execute the lien. Baker v. Waldron, 92 Me. 17, 42 A. 225.

Lien attaches to building and land united to building.—It was the intent to attach the lien to the building, and to the land united to the building, to the res, rather than to any particular estate in the building. Shaw v. Young, 87 Me. 271, 32 A. 897.

Substructure and superstructure are not distinguished.—It is too fine a distinction to attempt to draw a line, in the meaning of this section, between substructure and superstructure. It is all superstructure. The foundation walls of the building, though lowered into the earth, are just as much a part of the building as its upper story or roof is, and even a more essential part. Baker v. Waldron, 92 Me. 17, 42 A. 225.

Meaning of phrase "on any interest that such owner has in the same."—In the clause in this section that a claimant shall have a lien "on any interest that such owner has in the same," the words "the same" refer to the house or building and not to the land, to meet a case where the owner of the land also owns some interest in the building, and the clause is not repugnant to the idea of attachment of realty. Baker v. Waldron, 92 Me. 17, 42 A. 225.

Section applies to building partially completed.—The reason for this section applies just as strongly to a building partially completed as to one wholly so. Baker v. Waldron, 92 Me. 17, 42 A. 225.

When labor and materials are furnished for several buildings on the same lot and under an entire contract for an entire price, the labor and materials furnished for each building create a lien upon the whole estate and, therefore, upon all the other buildings. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

Public buildings. — Public buildings, buildings constructed by the state, or by a political subdivision of the state, (as a county, city, or town), for public purposes only and not for pecuniary profit, are not to be considered as included within a statute imposing a lien on "a house or building," unless they are expressly named as included. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581, decided before this section was made applicable to public buildings.

IV. CONTRACT WITH OR CONSENT OF OWNER.

Claimant must show materials were furnished under contract with or by consent of owner.—It is incumbent upon the plaintiff to show that the materials for which he would establish a lien were furnished "by virtue of a contract with or by consent of the owner." E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

Under this section the claimant of a lien for labor or material performed or furnished in erecting a building must establish as a proposition of fact that he performed or furnshed the labor or material either by virtue of contract with the owner of the building, or by the consent of such owner. Norton v. Clark, 85 Me. 357, 27 A. 252.

A bill in equity to enforce a lien claim against the property of the owner in invitum, for work and materials furnished under a contract to which the owner was not a party and over which he had no control, should not go beyond the natural import of the evidence offered to prove consent. The consent of the owner must be shown, and whether it appears in any given case will depend wholly upon the facts in that case. J. A. Greenleaf & Sons Co. v. Free-Andrews Shoe Co., 123 Me. 352, 123 A. 36.

"Owner" includes owner of leasehold.—The word "owner" is comprehensive enough to include the owner of a leasehold estate. E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

No estate can be affected without consent of owner of such estate.—No owner's estate in the property, whether in fee, for

life, or for a term of years, can be affected by the statute lien unless the labor and material were furnished "by the consent of the owner." Shaw v. Young, 87 Me. 271, 32 A. 897.

Lien is dependent upon existence of contract.—The mechanic's lien, though arising by virtue of express statute, is obviously dependent upon the existence of contract and the obligation of debt. The contract is the principal thing and the lien the incident, following the legal liability to pay. Whenever this obligation fails to arise, the security ceases to exist. Cole v. Clark, 85 Me. 336, 27 A. 186.

There can be no lien in favor of a party who voluntarily performs a service without express or implied promise of payment. Cole v. Clark, 85 Me. 336, 27 A. 186.

But this section does not confine the right to any particular species of contract. It extends to and includes implied as well as express contracts, and those which are entire as well as those which are divisible. Van Wart v. Rees, 112 Me. 404, 92 A. 328.

Stipulations in a contract that no liens should exist or be claimed for any labor or materials furnished by the contractor or others by him employed will not bar the lien of a laborer or materialman who has not assented to it, although he introduces the contract in evidence to prove the owner's consent. Norton v. Clark, 85 Me. 357, 27 A. 252.

The "consent" of the owner can be inferred without any notice to the owner. Shaw v. Young, 87 Me. 271, 32 A. 897.

After the analogy of implied contracts or agreements inferred from the conduct of parties and the circumstances of the case, if one furnishes labor and materials for making permanent repairs on a building, in the belief that the owner has given his consent thereto and in the expectation of having a lien therefor on the building, and the conduct of the owner, viewed in the light of all the circumstances, justified such expectation and belief, the basis of a lien is thereby established as effectually as by a mutual understanding between the parties to that effect. York v. Mathis, 103 Me. 67, 68 A. 746.

But consent within the meaning of this section means something more than acquiescence. It implies an agreement to that which could not exist without such consent. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990; E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405; J. A. Greenleaf & Sons Co. v. Free-Andrews Shoe Co., 123 Me. 352, 123 A. 36.

It is undoubtedly true that the consent required by this section to constitute the foundation for a lien must be something more than a mere acquiescence in the act of a tenant who for his own convenience makes temporary erections and additions which he has a right to remove before the expiration of his tenancy. York v. Mathis, 103 Me. 67, 68 A. 746.

And lessor will not be held to consent to construction which he could not, under lease, prevent.—Where, as long as the lessee observed all the terms and conditions of the lease, the lessor could not prevent the erection of an addition to a building on the leased premises, he could not be said to have given or withheld his consent, although the general contract for erecting the building was made with his actual knowledge and consent. In such a case, consent amounts only to acquiescence in that which the lessor could not prevent. E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

The fact that the lessor of a building knew that the lessees were putting in certain partitions, which were of no service to the lessor and to which he had no right to object consistently with the rights of the lessees, did not authorize the inference that he consented, in the sense of this section. Hanson v. News Publishing Co., 97 Me. 99, 53 A. 990.

Owner may be estopped by his conduct and declarations to deny existence of consent.—If the owner of a building induces another to furnish labor and materials for such permanent improvements upon his property, by conduct and declarations which create the appearance of an unqualified consent thereto on his part, the owner is estopped to deny the existence of such consent in reality. And under such circumstances it would not be necessary that the original conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. York v. Mathis, 103 Me. 67, 68 A. 746.

Consent to necessary repairs made by agent or tenant may be inferred.—It is assumed by the legislature that the owner of real estate will be vigilant in caring for it, either in person or by agents—that if he leaves it in the possession of agents or tenants, knowing that repairs are necessary to be made from time to time, and makes no provision for them, but leaves them to be made by agents or tenants and gives no notice of dissent, his consent may be inferred so far as the lien claimants are concerned. Shaw v. Young, 87 Me. 271,

32 A. 897; York v. Mathis, 103 Me. 67, 68 A. 746.

If the owner of the building has knowledge that certain repairs are necessary and makes no provision for them, but is present when they are being made by his tenant and gives no notice that he will not be responsible therefor, his consent may be inferred from his conduct, considered in connection with all the circumstances of the case. York v. Mathis, 103 Me. 67, 68 A. 746.

The consent of the owners was to be inferred from the language of the lease, their knowledge of what was contemplated and was actually being done, and their conduct. Maxim v. Thibault, 124 Me. 201, 126 A. 869.

But ordinary preservative repairs and extraordinary repairs are to be distinguished.—Consent may be inferred for ordinary preservative repairs when it would not be inferred for alterations, remodelings, additions, or even more extensive repairs. The consent must be shown, and whether it appears in any given case will depend wholly upon the facts in that case. Shaw v. Young, 87 Me. 271, 32 A. 897; York v. Mathis, 103 Me. 67, 68 A. 746; J. A. Greenleaf & Sons Co. v. Free-Andrews Shoe Co., 123 Me. 352, 123 A. 36.

And consent cannot be inferred from general knowledge alone that repairs were being made.—If it seems that from general knowledge alone repairs were contemplated and were being made, the consent of the lessor is not to be inferred so as to charge his interest with a lien, but the evidence must go to the extent of showing knowledge of what work was actually being done and that it was more than mere preservative repairs. Maxim v. Thibault, 124 Me. 201, 126 A. 869. See J. A. Greenleaf & Sons v. Free-Andrews Shoe Co., 123 Me. 352, 123 A. 36.

Consent may be inferred from contract between owner and building contractor.—The consent of the owner of a building that labor and materials may be furnished for its construction may be inferred from the existence of a contract for such construction between the owner and a building contractor, where the owner, although he may not know who actually furnished the labor and materials, is by circumstances put upon his notice that they were not being all furnished by his contractor. Norton v. Clark, 85 Me. 357, 27 A. 252. See J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

Owner's consent not inferred to contract of which he had no knowledge.—When a subcontractor under the general contractor makes a contract with another for materials intended to be used, and which are actually used, in the construction, of which contract the owner has no knowledge however vigilant he may be, the owner's consent to the furnishing of such materials should not be inferred in favor of the materialman so dealing with the subcontractor, against the established fact that the necesary knowledge of the owner on which to base such consent, and the necessary opportunity to consent or to object, do not exist. E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

Nor can a lien be sustained in behalf of such materialman, upon the interest of the lessee who had no actual knowledge that the lien claimant, who dealt with a subcontractor under the general contractor, was furnishing materials for the building. E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

Where the person contracting for the building to be built and who was building it for his son on land belonging to his son did not know the plaintiff was furnishing the material, upon the evidence in the record he could not be held to have consented to the plaintiff's furnishing it, and a fortiori his son, the owner, did not consent, and the bill to enforce the lien was properly dismissed. J. W. White Co. v. Griffith, 127 Me. 516, 145 A. 134.

Owner considered as assenting where construction of building was condition of contract for sale of land.—The owner of the land must be considered as assenting to the purchasing of materials and the hiring of labor for the purpose of erecting a contemplated mill, where the contract of sale of the land between him and the principal defendant, who hired the plaintiff's services, made it a condition of the sale that the principal defendant should erect just such a mill as he was undertaking to construct when by reason of his failure the work of construction became suspended. Baker v. Waldron, 92 Me. 17, 42 A. 225.

V. PRIORITIES.

Lien may be inferior or superior to mortgage, according to circumstances.—The claim of one who furnishes labor and materials is a lien only, but it fastens to the property and may be inferior or superior to the mortgagee's lien according to circumstances. Shaw v. Young, 87 Me. 271, 32 A. 897.

It takes precedence over mortgage subsequent to contract for labor or materials.

—A mechanic's lien for labor and materials furnished under a contract takes precedence over a mortgage given subsequently to the making of the contract, though the labor and materials, or some of them, may not be actually furnished until after the mortgage is given. Saucier v. Maine Supply & Garage Co., 109 Me. 342, 84 A. 461.

The lien given by this section for labor performed, or materials furnished, in the erection of buildings, does not take precedence of a mortgage, otherwise valid and recorded before the labor or material was contracted for, the mortgagee not being the party by virtue of a contract with whom, or by whose consent, the services were rendered or the materials were supplied. Morse v. Dole, 73 Me. 351.

Lien for materials furnished under contract made before recording of mortgage has priority.—A lien under this section should take precedence of two mortgages upon the property, one dated September 19, and the other, October 1, 1895, but both recorded upon the latter day, where all the materials were furnished by virtue of a contract made with the builder, with the knowledge and consent of the owner, before October first. Farnham v. Richardson, 91 Me. 559, 40 A. 553.

Materials delivered under contracts in force between the petitioners and the mortgagor when the mortgage was given and recorded, by which the petitioners were under a legal obligation to deliver them, so that the mortgagor could have demanded the delivery as a legal right, and held them in damages if they did not comply, would give the lien as against the mortgage. In such case, the mortgagor remaining in possession and control without interference on the part of the mortgagee, performance of the contract under which the lien accrued would give the prior right. Morse v. Dole, 73 Me. 351.

Prior mortgage has priority so far as advances thereunder were made before labor or materials furnished.—Under this section a lien under contract with the mortgagor in a prior recorded mortgage attaches to the equity of redemption only, but such mortgage takes priority over liens only so far as advances under the mortgage were made before the furnishing of the labor and materials for which liens are claimed, though the mortgage be given for a larger amount; the liens otherwise being superior. W. A. Allen Co. v. Emerton, 108 Me. 221, 79 A. 905.

And in such case lien attaches only to equity of redemption.—Where materials are delivered or work is done under a contract with a mortgagor, who is in possession and completing the house subject to the mortgage, it is only to the equity of redemption that the lien attaches, only to such interest in the premises as belongs to the man by whose contract or consent the labor or materials are furnished. The lien can hold against such a mortgagee only in cases where he has become a party to the delivery of the materials, or to the work done, by consent tacitly or expressly given. Morse v. Dole, 73 Me. 351.

The term "any interest such owner has in the same" includes in a concise form the interest which the owner has in the land if there is no mortgage, and also his interest if under mortgage. But this language should not be considered to support the theory that as the mortgagee is the owner of the fee his interest is subject to a lien if chargeable with even implied consent to the furnishing of labor and material by a contract with the mortgagor. W. A. Allen Co. v. Emerton, 108 Me. 221, 79 A. 905.

No agreement between mortgagor and mechanic can displace mortgage without knowledge and consent of mortgagee.—No agreement between the mortgagor and the mechanic or the materialman after the mortgage is recorded can subject the structure, or the lands on which it stands, to an incumbrance, great or small, which displaces the mortgage, without the knowledge or against the will of the mortgagee. Morse v. Dole, 73 Me. 351.

Evidence insufficient to show waiver or estoppel to assert lien against subsequent mortgagor.—See Saucier v. Maine Supply & Garage Co., 109 Me. 342, 84 A. 461.

Sec. 35. Lien prevented. — If the labor, materials or services were not furnished by a contract with the owner of the property affected, the owner may prevent such lien for labor, materials or services not then performed or furnished, by giving written notice to the person performing or furnishing the same that he will not be responsible therefor. (R. S. c. 164, § 35. 1949, c. 19, § 2.)

History of section.—See E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

Section presupposes that owner has knowledge of furnishing of materials.—It is clear that this section in its present form presupposes that the owner has knowledge of the furnishing of the ma-

terials; without such knowledge, he cannot protect his property by giving the notice mentioned in this section. Nor in strictness can the owner be said to consent to that of which he has no knowledge. E. Corey Co. v. H. P. Cummings Construction Co., 118 Me. 34, 105 A. 405.

Quoted in York v. Mathis, 103 Me. 67, 68 A. 746.

Stated in Shaw v. Young, 87 Me. 271, 32 A. 897.

Cited in Morse v. Dole, 73 Me. 351; Dustin v. Crosby, 75 Me. 75.

Sec. 36. Lien dissolved unless claim filed.—The lien mentioned in the preceding section shall be dissolved, unless the claimant, within 60 days after he ceases to labor, furnish materials or perform services as aforesaid, files in the office of the register of deeds in the county or registry district in which such building, wharf or pier is situated a true statement of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate to identify it, and the names of the owners, if known; which shall be subscribed and sworn to by the person claiming the lien, or by someone in his behalf, and recorded in a book kept for that purpose by the register of deeds for said county or registry district, who is entitled to the same fees therefor as for recording mortgages, but this section shall not apply where the labor, materials or services are furnished by a contract with the owner of the property affected. (R. S. c. 164, § 36. 1949, c. 19, § 3. 1951, c. 40.)

The object of this section is to give notice to the owner of the property, and to all persons having occasion to acquire any interest in it, of the lien claimed. Ricker v. Joy, 72 Me. 106.

The purpose of this section is to give notice to any and all persons of the lien incumbrance. Dole v. Bangor Auditorium Ass'n, 94 Me. 532, 48 A. 115.

This section is applicable to all claimants. It makes no distinction between a contractor and a subcontractor. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

Procedure for acquiring lien by attachment distinguished.—The provisions of c. 112, § 63, making certain specifications necessary to create a lien by attachment, are entirely distinct from the requirements of this section respecting the statement of account necessary to preserve a lien already acquired. The operation of the one is radically different from that of the other. The underlying principle of the mechanic's lien is that of consent or contract. The process of acquiring a lien by attachment is wholly in invitum. They are separate and independent methods of procedure. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

Lien preserved by compliance with section.—The lien is created by law when the laborer or materialman furnishes the labor and materials. The lienor, by recording his statement in the form required by law in the town clerk's office, within the time fixed by this section, does all the law requires of him to perserve the lien and prevent it from being dissolved, and to subject the property to the payment of the lien judgment he may recover in his bill in equity. Witham v. Wing, 108 Me. 364, 81 A. 100.

What statement of claim must show.—The statement of claim is a sufficient compliance with the provisions of this section where it states the amount due the plaintiff for which he claims the lien, that it is due for labor and materials furnished for and which entered into the building, a sufficient description of the property, and the name of the owner, and is signed and sworn to by the plaintiff, and filed and recorded. Ricker v. Joy, 72 Me. 106.

If, from the notice filed, it can be fairly and reasonably inferred: (1) that a lien is claimed; (2) by whom it is claimed; (3) what is the balance due, and that no credits are to be given; (4) what is the particular building upon which the labor was performed and to which the lien has attached; (5) that the name of the owner is not known to the claimant when no owner is named; and the notice is verified by the signature and affidavit of the claimant, it is sufficient though not symmetrical in form. Durling v. Gould, 83 Me. 134, 21 A. 833.

Formal and technical accuracy not required.—The purpose of this section is to secure to owners and prospective purchasers of the property notice of the amount and nature of the lien to which it is subject, and the person in whose favor the lien has accrued. If that notice is fairly and fully given under the sanction of the claimant's signature and affidavit, the interests of others are protected and the purpose of the section is fulfilled. It would be too rigorous to insist upon

formal and technical accuracy from a laborer in giving such notice. Durling v. Gould, 83 Me. 134, 21 A. 833.

Notice of lien need not have precision of allegation in indictment.—It would be unreasonable to insist that a laborer's notice of his lien once acquired shall have all the formal precision of allegation used in an indictment for crime. Durling v. Gould, 83 Me. 134, 21 A. 833.

It need not contain detailed statement of items in claim.—This section does not require that the statement filed should contain a detailed statement of the items of the claim. It requires only a statement of the amount due for which the lien is claimed. Ricker v. Joy, 72 Me. 106.

It need not show what part of amount due is for labor as distinguished from materials.—Where a contractor agrees to furnish labor and materials under an entire contract for a specified sum, it is sufficient for the preservation of the lien under this section to file a statement of the amount due, without stating the items making up such amount. Accordingly it need not appear what part of the amount due is for labor as distinguished from the amount due for materials. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

Formal allegation that name of owner is unknown to lienor is not required.—If the name of the owner of the property is unknown to the claimant, this section does not require him to formally allege his ignorance. His very omission to state the name of the owner would give notice that the name was unknown. Durling v. Gould, 83 Me. 134, 21 A. 833.

Claim filed need not contain name of person with whom lienor contracted.—This section does not require the claim filed in the town clerk's office to contain the name of the person with whom the lienor contracted. Witham v. Wing, 108 Me. 364, 81 A. 100.

Record is competent evidence of filing of claim.—When the statement required by this section is recorded, the record becomes the notice, and such record or a duly certified copy of it is competent evidence of the filing and recording of the claim. It is similar in principle to the record of a notice of foreclosure of a mortgage, or to the record of an attachment of real estate. Ricker v. Joy, 72 Me. 106.

Variance between statement and bill does not defeat lien.—As the statement filed under this section is received in evidence, and is admissible, only to show that the plaintiff has taken the necessary steps to preserve his lien, and not to prove the contract, any variance in the name of the persons contracted with, as alleged in the bill and shown in the statement, would not defeat the lien, only being available to impeach the plaintiff's testimony that the contract was made with the person alleged in the bill. Witham v. Wing, 108 Me. 364, 81 A. 100.

Time is of the essence in filing a lien statement. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

It is indispensable that the notice of the claim should be filed in the city clerk's office within sixty days after the claimants ceased to furnish materials. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

Filing after expiration of 60 days is not seasonable.—The filing of a lien certificate after the expiration of sixty days from the time the last materials or labor were furnished or performed is not seasonable. Morin v. W. H. Maxim Co., 146 Me. 421, 82 A. (2d) 789; Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400; Morin v. W. H. Maxim Co., 146 Me. 421, 82 A (2d) 789.

And lien is barred.—When the lien is created not by contract with, but by consent of, the owner, the claim is barred unless filed in the town or city clerk's office "within sixty days after he (the claimant) ceases to labor or furnish materials as aforesaid." Hahnel v. Warren, 123 Me. 422, 123 A. 420.

Time does not begin to run until all lienable labor and materials furnished.—The statutory period does not begin to run until all the lienable labor and materials have been furnished. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

Interruption of work does not prevent lien attaching from commencement of building.—The interruption of the construction of a building on account of the season of the year, though it be for months at time, will not prevent a mechanic's lien from attaching from the commencement of the building, if the construction is resumed without change of design and there is no evidence of an abandonment of the intention to prosecute the work. Van Wart v. Rees, 112 Me. 404, 92 A. 328.

Nor will the interruption of the work for a short period and its subsequent resumption without a change of its original design and character, constitute a new commencement, or effect the attaching of the lien when the building was originally commenced. Van Wart v. Rees, 112 Me. 404, 92 A. 328.

Materials furnished at different times under one continuing contract.—Where all the materials are furnished under one entire continuing contract, albeit at different

times, a statement filed within the time fixed by this section after the last item was furnished, is effective in regard to all the other items. And even if the materials be not ordered at one and the same time, or the quantity or prices of the materials be not agreed upon at the time of the first order, the contract will nevertheless be held a continuing one. Van Wart v. Rees, 112 Me. 404, 92 A. 328.

Lien lost by lapse of time cannot be revived by furnishing additional labor or materials.—When all lienable labor and materials have been furnished and a lien has been lost by lapse of time, it cannot be revived by furnishing additional labor or materials. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

A lien once lost cannot be recovered by subsequent work. Woodruff v. Hovey, 91 Me. 116, 39 A. 469; Dole v. Bangor Auditorium Ass'n, 94 Me. 532, 48 A. 115.

Where the plaintiff quit work on an auditorium building November 27, 1897, and notified the insurance exchange that the work was ready for inspection, but the inspection was not made till the first of October, 1898, and thereafterwards the plaintiff was notified by the inspector that a cutout cabinet was required, and the plaintiff, without any further contract with the defendants, put in the cutout cabinet, held that the plaintiff's lien for labor performed in 1897 had expired because he instituted no proceedings to enforce the same within the time required by this section, and that such lien was not preserved or revived by the work done in 1898. Dole v. Bangor Auditorium Ass'n, 94 Me. 532, 48 A. 115.

Or by tacking on new lien arising under new contract.—When a lien arising from one contract has been dissolved, it cannot be restored by tacking on a new lien arising under a new contract. Farnham v. Davis, 79 Me. 282, 9 A. 725.

The lien does not depend at all upon the amount or value of the material last furnished, provided all the other conditions necessary to the maintenance of the lien exist. Farnham v. Richardson, 91 Me. 559, 40 A. 553.

And fact that such material was of trifling character does not prevent lien continuing 60 days.—The fact that the material last furnished was of a trifling character shoud not prevent the lien from continuing for sixty days from that time. This section makes no distinction as to the amount of the labor performed or the value of the material furnished. Farnham v. Richardson, 91 Me. 559, 40 A. 553.

Although it may throw light on question whether service was intended to be gratuitous.—It is undoubtedly true that the trifling character of the labor last performed or material last furnished may often throw more or less light upon the question whether the service was at the time intended to be gratuitous and was only afterwards relied upon to save a lien which would otherwise have expired, or not. Farnham v. Richardson, 91 Me. 559, 40 A. 553.

Gratuitous service rendered after lienor has ceased to labor does not extend time.—Where the plaintiff, some days after he had ceased to labor on a building, loaned his tools for a few minutes, and rendered the trifling service of receiving from the foreman's hand a board which might otherwise have been allowed to fall without danger of injury, these were only spontaneous acts of friendly accommodation performed under circumstances which distinctly repel any implication of a promise to make payment. They were not labor which creates the obligation of debt and which draws after it the security of a lien, and did not have the effect of extending the time for filing the claim under this section. Cole v. Clark, 85 Me. 336, 27 A. 186.

The laborer ought not to be encouraged to leave some trifling matter incomplete, and wait to see if his payment is made, and if that fails, complete the trifling work left and revive and continue his lien, to the detriment of parties who in good faith, relying upon the records and the apparent completion of the work of the laborer, pay the contractor or take a conveyance of the property. Protection to the laborer should not operate a fraud upon other innocent parties. Hartley v. Richardson, 91 Me. 424, 40 A. 336.

Additional material furnished at request of owner before expiration of 60 days.—A lien, once lost by the expiration of the time within which the statement required by this section must be filed with the town clerk, cannot be revived by additional work. But this principle is not applicable to the case under consideration because the claimant's lien was not lost when the additional material was furnished; he then had nearly thirty days left within which to file his lien statement. Nor can it be said that the material was furnished for the purpose of reviving a lien already lost, because of the further reason that the claimant did not volunteer to furnish the material. He did so at the request of one of the owners for the contractor. Farnham v. Richardson, 91 Me. 559, 40 A. 553.

Filing second certificate after expiration

of time for enforcement of lien.—A lien claimant who had filed a certificate pursuant to this section and allowed the time for enforcement thereof under § 38 to expire, could not thereafter restore his rights under § 38 by performing additional work, at his own solicitation, and filing a second certificate alleging a later date for completion of the work, even though he had contracted to do such additional work. Morin v. W. H. Maxim Co., 146 Me. 421, 82 A. (2d) 789.

Admissions of debtor cannot restore lost lien.—It is not competent for a debtor to create upon any portion of his property a lien, which shall have precedence of all other attachments and incumbrances, by admissions that are inconsistent with actual facts. Nor can he, by making such admissions, restore a lost lien. Frost v. Ilsley, 54 Me. 345.

Applied in York v. Mathis, 103 Me. 67, 68 A. 746; W. A. Allen Co. v. Emerton, 108 Me. 221, 79 A. 905; DePietro v. Modes, 124 Me. 132, 126 A. 575; Maxim v. Thibault, 124 Me. 201, 126 A. 869; Andrew v. Bishop, 132 Me. 447, 172 A. 752.

Sec. 37. No inaccuracy avoids lien, if reasonably certain.—No inaccuracy in such statement relating to said property, if the same can be reasonably recognized, or in stating the amount due for labor, materials or services invalidates the proceedings, unless it appears that the person making it willfully claims more than his due. (R. S. c. 164, § 37. 1949, c. 19, § 4.)

The legislature has declared in this section that inaccuracies in the statement shall not invalidate, unless they be willful or leave the notice obscure. The court should give this section full play. Durling v. Gould, 83 Me. 134, 21 A. 833.

Trifling discrepancies between the different parts of the certificate are not to be regarded when the import of the whole is plain and obvious. It was not intended by the legislature that these statements should be strangled by technicalities. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

But section does not apply where proceedings are invalidated by delay in commencing suit.—This section does not apply where the proceedings are invalidated, not by technical inaccuracies in the notice, but by delay in commencing the suit which dissolved the lien. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

Discrepancy between date of last item proved in suit and date alleged in notice.—See note to § 38.

Sec. 38. Liens preserved and enforced by bill in equity.—The liens mentioned in the 4 preceding sections may be preserved and enforced by bill in equity against the debtor and owner of the property affected and all other parties interested therein, filed with the clerk of courts in the county where the house, building or appurtenances, wharf, pier or building thereon, on which a lien is claimed, is situated, within 90 days after the last of the labor or services are performed or labor, materials or services are so furnished, and not afterwards, except as provided in the following section. (R. S. c. 164, § 38. 1949, c. 19, § 5.)

Cross references.—See note to § 36, re time for filing bill; § 45 and note, re action at law to enforce lien.

Discrepancy between date of last item proved in suit and date alleged in notice.—Where the only allowable item delivered within ninety days before the filing of a bill to enforce a materialman's lien was delivered November 20, 1902, and plaintiff's notice filed under § 36 stated that the material was furnished "from July 1, 1902, to November 13, 1902," the item of November 20, being beyond the dates which the plaintiff's notice included, could not be proved as part of the plaintiff's lien claim. Consequently the suit in reference to the date of the last item provable was fatally late, and the lienors' rights were thereby lost. Section 37 did not apply; the proceedings were invalidated not by technical inaccuracies in the notice, but by delay in commencing the suit which dissolved the lien. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

Our statutes, so far as liens on buildings are concerned, do not provide for a process in rem, regardless of any personal defendant or any contract. There must be a suit against the party promising. The contract, whether express or implied, is the principal. The lien is the incident. The lien must be enforced along with the contract. Farnham v. Davis, 79 Me. 282, 9 A. 725.

General contractor as proper and necessary party.—To a bill in equity seeking to enforce a lien claim, the general contractor is a proper party. If payment is

claimed against him, he is a necessary party. But in a bill where no judgment is prayed for against him, and where a final decree can be rendered between the parties to the bill without radically and injuriously affecting the interest of the general contractor, or without leaving the controversy in such situation that its final determination may be inconsistent with equity and good conscience, he is not an indispensable party, and hence need not be joined. Andrew v. Bishop, 132 Me. 447, 172 A. 752.

Where the lien claim is brought against the owner of a building and a subcontractor, for materials furnished to the subcontractor and by him used in the building, the original contractor is not an indispensable party. Andrew v. Bishop, 132 Me. 447, 172 A. 752.

Lessee a necessary party notwithstanding assignment of lease.—The liability of a lessee upon covenants in the lease to pay the expense of repairs contemplated in the leases was not discharged or affected by the assignment of the lease. Thus he was a proper and necessary party to the bill, as a person interested in the property upon which the lien was claimed, and was bound by the decree as to the existence and amount of the lien. Maxim v. Thibault, 124 Me. 201, 126 A. 869.

It is indispensable that the suit should be commenced within ninety days after the last materials were furnished. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

The filing of a bill in equity after the expiration of ninety days from the time the last materials or labor were furnished or performed is not seasonable. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400; Morin v. W. H. Maxim Co., 146 Me. 421, 82 A. (2d) 789.

The statutory period does not begin to run until all the lienable labor and materials have been furnished. Marshall v. Mathieu, 143 Me. 167, 57 A. (2d) 400.

"Last labor" means last labor on particular work for which lien is claimed.—This section requires a suit to enforce the lien to be commenced within ninety days after the last labor is performed. This of course refers to the last labor on the particular work for which the lien is claimed. Baker v. Fessenden, 71 Me. 292.

One single lien cannot cover several distinct alterations, made at different times, and independent of each other, so as to entitle the claimant to a lien judgment for the whole if the action is seasonably brought after the work has ceased on the last alteration. The action must be brought within ninety days after the labor on an alteration is finished, to give a lien for that alteration, and it must be affirmatively shown that the labor performed within such ninety days was such as was entitled to be included in the lien. Baker v. Fessenden, 71 Me. 292.

The fact that a person has a second repair to make, and expends labor upon it, cannot revive a lien for the first repair or suspend the running of the time in which he must enforce the prior lien. Baker v. Fessenden, 71 Me. 292.

Applied in Johnson v. Pike, 35 Me. 291; Hartley v. Richardson, 91 Me. 424, 40 A. 336; York v. Mathis, 103 Me. 67, 68 A. 746.

Sec. 39. Lien extended.—When the owner dies, is adjudicated a bankrupt or a warrant in insolvency issues against his estate within the 90 days and before the commencement of a suit, the action in law or equity may be commenced within 60 days after such adjudication, or after notice given of the election or appointment of the assignee in insolvency, executor or administrator, or the revocation of the warrant; and the lien shall be extended accordingly. (R. S. c. 164, § 39.)

Cross reference.—See c. 165, § 15, re claims against estates to be filed in writing with affidavit.

Section construed with insolvent law and not in conflict therewith.—See Laughlin v. Reed, 89 Me. 226, 36 A. 131.

As to lien upon estate of person under guardianship by reason of insanity, whose estate has been duly represented insolvent, see Pratt v. Seavey, 41 Me. 370.

Sec. 40. Necessary allegations of bill; other lienors may join and be made parties, also mortgagees. — The bill shall state that the plaintiff claims a lien on the house, building or appurtenances, or on the wharf, pier or building thereon, as the case may be, described therein, and the land on which it stands, for labor or services performed or for labor, materials or services furnished, in erecting, altering, moving or repairing said house, building or appurtenances, or in constructing, altering or repairing said wharf, pier or building thereon, as the case may be; whether it was by virtue of a contract with or by

consent of the owner, and if not, that the claimant has complied with the provisions of section 36. The bill shall pray that the property be sold and the proceeds applied to the discharge of such lien. Two or more lienors may join in filing and prosecuting such a bill. Other lienors may be made parties; other lienors may become parties and preserve and enforce their liens on said property, provided their petitions therefor, setting forth their claims in substance as required in a bill as aforesaid, be filed with the clerk within 90 days after the last labor or services are performed or the last labor, materials or services are furnished by them, as aforesaid, or within the additional time prescribed in the preceding section. The court may consolidate two or more bills claiming liens on the same property into one proceeding, if justice shall so require. Any mortgagee or other person having a claim upon, or interested legally or equitably in, said property may be made a party. The court shall have power to determine all questions of priority of lien or interest, if any, between parties to the proceeding. (R. S. c. 164, § 40. 1949, c. 19, § 6.)

The only statutory provisions in Maine relating to consolidation of causes are this section and § 47, having to do with mechanics' liens. That legislative authority in such cases may have been deemed advisable arises from the fact that these provisions authorize the consolidation of two or more proceedings, either at law or in equity, pending at the same time in whatever court or courts, to enforce liens on the same building. Laforge v. LeBlanc, 137 Me. 208, 18 A. (2d) 138.

Applied in J. A. Greenleaf & Sons Co. v. Free-Andrews Shoe Co., 123 Me. 352, 123 A. 36; DePietro v. Modes, 124 Me. 132, 126 A. 575.

Sec. 41. Amount determined by jury trial or otherwise. — The court shall determine the amount for which each lienor has a lien upon the property by jury trial, if either party so requests in bill, petition or answer; otherwise in such manner as the court shall direct. Such determination shall be conclusive as to the fact and amount of the lien, subject to appeal and exceptions according to the practice in equity. Any lienor may contest another lienor's claim upon issues framed under direction of the court. (R. S. c. 164, § 41.)

Applied in York v. Mathis, 103 Me. 67, 68 A. 746.

Sec. 42. Court may decree that property be sold; redemption; lienors to share pro rata.—If it is determined that the parties or any of them, claiming a lien, have a lien upon said building and land or upon said wharf, pier, building and land, the court may decree that said property, or such interest in it as is subject to the liens or any of them, shall be sold, and shall prescribe the place, time, terms, manner and conditions of such sale; any justice, in term time or vacation, may order an adjournment of such sale from time to time, or the manner and conditions of any adjournment of such sale may be prescribed in the decree; and a deed of the officer of the court, appointed to make such sale, recorded in the registry of deeds where the land lies, within 3 months after the sale, shall convey all the title of the debtor and the owner in the property ordered to be sold. If justice requires, the court may provide in the order of sale that the owner shall have a right to redeem the property from such sale within a time fixed in the order of sale. If the court shall determine that the whole of the land on which the lien exists is not necessary therefor, it shall describe in the order of sale a suitable lot therefor; and only so much shall be sold. The lienors shall share pro rata; provided their bills or petitions therefor are filed with the clerk of courts prior to the order of sale and within the time mentioned in sections 38, 39 and 40. The court may make such decree in regard to costs as is equitable. (R. S. c. 164, § 42. 1951, c. 67.)

Sec. 43. If proceeds insufficient to pay claims, court may render judgment for balance.—If the proceeds of the sale after payment of costs and expenses of sale are insufficient to pay the lien claims and costs in full, the court

may render judgment against the debtor in favor of each individual lienor for the balance of his claim and costs remaining unpaid, and may issue executions therefor. If the proceeds of sale, after the payment of costs and expenses of sale, are more than sufficient to pay the lien claims and all costs in full, the balance remaining shall be paid to the person or persons legally or equitably entitled thereto. (R. S. c. 164, § 43.)

The plaintiff is only entitled to judgment against his debtor for any deficiency in the proceeds of sale. If his judgment against the building is satisfied from the proceeds of sale, or is paid by the owners to prevent the sale of their property, judgment against the debtor is not authorized. Maxim v. Thibault, 124 Me. 201, 126 A. 869.

Sec. 44. Clerk shall file certificate with register of deeds. — When any bill or petition provided for in this chapter in which a lien is claimed on real estate is filed with the clerk, he shall forthwith file a certificate, setting forth the names of the parties, the date of the bill or petition and of the filing thereof, and a description of the said real estate as described in said bill or petition, in the registry of deeds for the county or district in which the land is situated. (R. S. c. 164, § 44.)

The town clerk's certificate filed pursuant to this section is notice to the world that the lienor asserts a lien upon the property described, so that one thereafter purchasing it does so at his risk. Witham v. Wing, 108 Me. 364, 81 A. 100.

Sec. 45. Liens mentioned in §§ 34-37 enforced by action at law. —In addition to the remedy hereinbefore provided, the liens mentioned in sections 34, 35, 36 and 37 may be enforced by attachment in actions at law commenced in any court having jurisdiction in the county where the property on which a lien is claimed is situated, which attachment shall be made within 90 days after the last of the labor or services are performed, or labor, materials or services are furnished, and not afterwards, except as provided in section 39. (R. S. c. 164, § 45. 1949, c. 19, § 7.)

Mechanic's lien and lien created by ordinary attachment distinguished.—There is an obvious distinction between the lien which a mechanic acquires under statutory provisions by furnishing labor and materials in the erection of a building and a general lien created by the ordinary attachment of mesne process. In the latter case, an attaching creditor has no claim for preference over other creditors except by his attachment; whereas, when a mechanic obtains a statutory lien, and relying thereon, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement for building, and in this respect he has a marked preference over other creditors of the owner of the land, who had trusted to the personal credit of their debtor. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

Mechanic's lien upheld against warrant in insolvency.—This section expressly relates to liens created by the act of furnishing labor and materials and enforced by attachment, affording at the same time an obvious implication that all such liens are to be upheld against a warrant in insolvency. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

Although attachment was made within four months of filing petition.—The enforcement of a mechanic's lien is not obnoxious to the policy of the insolvent law although the attachment may be within four months of the filing of the petition in insolvency, and an attachment made to enforce the lien is not dissolved by proceedings in insolvency. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

Sundays are included in the computation of time allowed in which to make the attachment. Oakland Mfg. Co. v. Lemieux, 98 Me. 488, 57 A. 795.

When the last of the ninety days falls upon Sunday, an attachment upon the following Monday is not seasonably made. Oakland Mfg. Co. v. Lemieux, 98 Me. 488, 57 A. 795.

Applied in William H. Glover Co. v. Rollins, 87 Me. 434, 32 A. 999.

Cited in Witham v. Wing, 108 Me. 364, 81 A. 100.

Sec. 46. Owner may petition for release.—Any owner of a building, wharf, pier or real estate upon which a lien is claimed may petition in writing

a justice of the superior court in term time or vacation, setting forth the name of the lienor, the court and county in which the bill in equity or action at law is returnable or pending, the fact that a lien is claimed thereon under the provisions of sections 34, 35, 36 and 37, the particular building, wharf, pier or real estate, and his interests therein, its value and his desire to have it released from said lien. Such justice shall issue a written notice which shall be served on the lienor or his attorney 10 days at least prior to the time fixed therein for a hearing. At the hearing, such justice may order such owner to give bond to the lienor in such amount and with such sureties as he may approve, conditioned to pay the amount for which such lienor may be entitled to a lien as determined by the court, with his costs on the petition, within 30 days after final decree or judgment. The clerk shall give the petitioner an attested copy of the petition and proceedings, with a certificate under seal of the court attached thereto, that such bond has been duly filed in his office; and the record of such copy and certificate in the registry of deeds, in the county or district where such real estate or interest therein lies, vacates the lien. (R. S. c. 164, § 46.)

Cited in Witham v. Wing, 108 Me. 364, 81 A. 100.

Sec. 47. Proceedings pending at same time transferred to 1 court. —When two or more proceedings, either at law or in equity, are pending at the same time, in whatever court or courts, to enforce liens on the same house, building or appurtenances, wharf, pier and building thereon, upon petition of any lienor who has commenced such proceedings, or of the owner of the building, wharf or pier, a justice of the supreme judicial court after notice and hearing, in term time or vacation, may, if justice requires it, order all such actions to be transferred either to the supreme judicial court or to the superior court as he may determine, and require the parties in all such proceedings, in whatever court commenced, to plead in equity, substantially in the manner prescribed in section 40, and thereafter all the proceedings shall be in accordance with the provisions of said section and the 5 following sections; and while such petition is pending all such actions shall stand continued. (R. S. c. 164, § 47.)

The only statutory provisions in Maine relating to consolidation of causes are this section and § 40, having to do with mechanics' liens. That legislative authority in such cases may have been deemed advisable arises from the fact that these provisions authorize the consolidation of two or more proceedings, either at law or in equity, pending at the same time in whatever court or courts, to enforce liens on the same building. Laforge v. LeBlanc, 137 Me. 208, 18 A. (2d) 138.

Sec. 48. Property taken and sold on execution to satisfy judgment; proceedings when two or more rendered at same term; redemption.— When a judgment is rendered in any suit authorized by this chapter against any house, building or appurtenances, wharf, pier or building thereon, and the land on which it stands, or any interest that the owner of such house, building or appurtenances, wharf or pier has in such land, said property shall be taken and sold on execution in the same manner that rights of redeeming mortgaged real estate may be taken and sold. If two or more such judgments are rendered at the same term of the same court, the court shall direct in writing on which execution the property shall be sold, and in that event, and also in the event that the officer holding any execution recovered under the provisions of this chapter shall be notified in writing by any lienor who has caused said property to be attached as aforesaid, or who has filed his bill in equity as herein provided, that he claims a portion of the proceeds of the sale, said officer, unless all owners of such judgments and all lienors so notifying such officer otherwise direct, shall thereupon sell said property as aforesaid, and after deducting the fees and expenses of sale, shall return the balance into the court of highest jurisdiction in which any such lien suit is pending or in which such a lien judgment has been

rendered, and such court shall distribute such fund pro rata among the lienors who shall satisfactorily prove their right to share in the same. The court issuing execution on which the sale is made may fix the time within which the owner shall have the right to redeem the property from such sale. The court distributing the fund may make such decree in regard to costs as is equitable. Any balance not required to pay such lien claims and costs shall be paid to the person or persons legally or equitably entitled thereto. (R. S. c. 164, § 48.)

See c. 171, § 29 et seq., re levies on equities of redemption.

Sec. 49. Lien on lands for landscape gardening.—Whoever performs labor or services or furnishes labor, materials or services in the laying out or construction of any road, path or walk, or in improving or beautifying any land in a manner commonly known as landscape gardening, by virtue of a contract with or by consent of the owner, has a lien on the lot of land over which such road, path or walk is laid out or constructed or on the land so improved and beautified, to secure payment thereof, with costs. Such lien may be preserved and enforced in the same manner and under the same restrictions as liens on buildings and lots are preserved and enforced under the provisions of sections 34 to 48, inclusive, and is made subject to all the provisions of said sections wherever applicable. (R. S. c. 164, § 49. 1949, c. 19, § 8.)

Sec. 50. Lien for rent on buildings placed on leased land. — When a lease of land with a rent payable is made for the purpose of erecting a mill or other buildings thereon, such buildings and all the interest of the lessee are subject to a lien and liable to be attached for the rent due. Such attachment, made within 6 months after the rent becomes due, is effectual against any transfer of the property by the lessee. (R. S. c. 164, § 50.)

Sec. 51. Lien on buildings for land rent.—In all cases where land rent accrues and remains unpaid, whether under a lease or otherwise, all buildings upon the premises while the rent accrues are subject to a lien and to attachment for the rent due, as provided in the preceding section, although other persons than the lessee may own the whole or a part thereof, and whether or not the land was leased for the purpose of erecting such buildings; provided, however, that if any person except the lessee is interested in said buildings, the proceedings shall be substantially in the forms directed for enforcing liens against vessels, with such additional notice to supposed or unknown owners as any justice of the court having jurisdiction of the proceedings orders, or the attachment and levy of execution shall not be valid except against the lessee. (R. S. c. 164, § 51.)

Cross references.—See §§ 12-31, re liens on vessels; c. 118, § 11, re buildings on leased land may be sold for land rent.

A lien under this section is a continuing lien. It attaches from the time the building is placed upon the land, and continues in full vigor as long as it remains. Having once attached, it exists as to subsequently accruing rent, not as a new, but as the original lien. Union Water Power Co. v. Chabot, 93 Me. 339, 45 A. 30.

Enforceable irrespective of ownership of building. — A lien under this section is enforceable against the building, whenever land rent becomes due and payable, irrespective of its then ownership. Union Water Power Co. v. Chabot, 93 Me. 339, 45 A. 30.

And it takes precedence over a mortgage. — A lien under this section takes precedence of a mortgage, whether existing when the building was rightfully placed upon the land and made subject to rent, or subsequently created. Union Water Power Co. v. Chabot, 93 Me. 339, 45 A. 30.

Lien does not arise from contract. — A lien under this section does not arise from contract, like the lien for erecting or repairing buildings. Union Water Power Co. v. Chabot, 93 Me. 339, 45 A. 30.

Liens on Logs, Lumber, Wood and Bark.

Sec. 52. Lien on logs and lumber.—Whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, or in shoeing horses or oxen, or repairing property while thus employed, has a lien on the logs and lumber for the amount due for his personal services and the services performed by his team, and for the use of his truck, motor vehicle or other mechanical equipment, which takes precedence of all other claims except liens reserved to the state. Whoever both shores and runs logs by himself, his servants or agents has a lien thereon for the price of such shoring and running. Such liens continue for 60 days after the logs or lumber arrive at the place of destination for sale or manufacture and may be enforced by attachment. (R. S. c. 164, § 52. 1953, c. 4.)

I. General Consideration.

II. What Persons Have Liens.

III. Enforcement of Liens.

Cross References.

See note to § 53, re notice required in suit to enforce lien; note to § 72, re procedure for enforcement of lien; c. 142, § 6, and note, re lien where logs and timber of different owners intermixed.

I. GENERAL CONSIDERATION.

History of section.—See Parks v. Crockett, 61 Me. 489; Oliver v. Woodman, 66 Me. 54; Mitchell v. Page, 107 Me. 388, 78 A. 570.

Section construed with reference to its object.—This section should be construed with reference to the mischief to be remedied and the object to be accomplished. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

And its operation is neither extended nor restricted beyond the meaning of its words.—The correct rule for the interpretation of this statute is to neither extend nor restrict its operation beyond the fair meaning of the words used. Meands v. Park, 95 Me. 527, 50 A. 706; Hutchins v. Blaisdell, 106 Me. 92, 75 A. 291, overruled on another point in Mitchell v. Page, 107 Me. 388, 78 A. 570.

Section does not abridge property rights of owner.—This statute is no abridgement of the rights of the citizen, secured to him, by the constitution of the state, in art. 1, § 1, of "acquiring, possessing and protecting property." Spofford v. True, 33 Me. 283.

This lien is analogous to liens upon vessels and upon buildings, in favor of laborers, who have been employed in their construction. It takes away none of the rights of the owner, nor the one interested therein, by a lien or otherwise, any further than is necessary for the security of those who are presumed to have added something to its value, equal to the expense, at least, incurred. Spofford v. True, 33 Me. 283.

Section secures payment for labor.—The object of the statute giving the lien is to make certain the payment for the labor which has gone to increase the value of the timber. Murphy v. Adams, 71 Me. 113.

And labor is deemed to have been performed on credit of logs regardless of ownership.—Prior to this statute, confiding laborers who had no contract relations with the owners of the logs, were frequently defrauded of their hard-earned wages by unscrupulous operators by whom they were employed, and the legislature felt impelled to extend some protection against the wrongs thus practiced upon a deserving class by irresponsible contractors. This remedial legislation was evidently based on the theory that the labor should be deemed to have been performed on the credit of the logs, regardless of their ownership. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

This statute was enacted to prevent the wrongs which owners had allowed contractors to practice upon laborers. The remedy was based on the ground of considering the labor as having been performed on the credit of the logs regardless of their real ownership. The principle is just to both owner and laborer. Oliver v. Woodman, 66 Me. 54.

The lien created by this section is an absolute statute lien, like that upon vessels and logs, and treats the thing as the debtor independent of any question of

ownership. Union Water Power Co. v. Chabot, 93 Me. 339, 45 A. 30.

Or residence of the debtor.—This statute provides that the lien may be enforced by attachment, without limitation or qualification. It declares, in effect, that it may be so enforced without regard to the ownership of the logs, or the residence of the debtor. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

And jurisdiction over the debtor is not necessary.—Jurisdiction over the debtor, as well as over the owner of the logs attached, is not indispensable to a valid judgment against the property. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

The great purpose of this section evidently was to afford security to the laborer against the irresponsible employer. In the case of nonresident contractors who have no attachable property in the state, this lien on the logs is the laborer's only protection. To hold that in such case the lien cannot be enforced by an attachment of the logs without an attachment of some property belonging to the defendant, or without jurisdiction over the defendant, would be to hold the statute ineffectual and nugatory in the very cases in which the lien is most required, and to which it must also have been designed to apply. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

And laborers have lien although hired by person not the owner.—Generally, it is only by the act of the owner that a contract-lien upon property can be created. That rule was changed by this section, and where an owner of logs employs a contractor to drive them down the river at a stipulated price per thousand feet, and the contractor hires laborers, who assist in the driving, the laborers acquire a lien upon the logs. Doe v. Monson, 33 Me. 430, holding that the owner, being summoned as trustee of the contractor, may be allowed, out of the stipulated price for the driving, to discharge the laborers' liens.

Laborer's lien takes precedence over all claims except liens reserved to state.—By the express language of this statute, the lien takes precedence of all claims except liens reserved to the state, and the statute will not admit of a construction that there is to be a still further exception. Oliver v. Woodman, 66 Me. 54.

It was evidently intended by the legislature that the lien of laborers was not to be postponed to that of other individuals. The exception in favor of the state confirms this view. And the statute will not admit of the construction, that there is to be a still farther exception in favor of other grantors, who may attempt to provide the same kind of lien, when the plain language itself, expressly forbids it. Spofford v. True, 33 Me. 283.

Thus the lien on logs takes precedence over a prior mortgage. Oliver v. Woodman, 66 Me. 54.

And a lien reserved in a grant.—A lien, reserved in a grant of land, upon the lumber which the grantee may take therefrom, is postponed to the lien given by this statute to laborers who may aid him in getting the lumber. Spofford v. True, 33 Me. 283.

And § 72 does not modify the provisions of this section so as to add any further exception to those therein mentioned. Oliver v. Woodman, 66 Me. 54.

Lien not defeated by selling or sawing logs.—Nothing in this statute, either in its original or present form, suggests a legislative intent to authorize the log owner to defeat the statutory lien either by selling or sawing the logs. Perkins v. Rowe, 122 Me. 199, 119 A. 389.

Or manufacturing them into lumber.—Manufacturing logs into lumber, the identity being traceable, does not defect the laborer's lien provided by this section. Perkins v. Rowe, 122 Me. 199, 119 A. 389.

But the lien cannot extend to a claim for the payment of expenses in getting into the woods. Spofford v. True, 33 Me. 283.

Commingling of logs does not defeat the lien.—The commingling of the logs with those hauled from the same cutting by others does not defeat the lien. Perkins v. Rowe, 122 Me. 199, 119 A. 389.

And lien extends to logs of each owner.—When logs of different owners have been intermixed in the drive, the lien of the drivers extends to the logs of each owner, not however to an amount beyond his proportion of all the drivers' services. Doyle v. True, 36 Me. 542.

Where a laborer, having a lien for assisting to drive intermingled logs of different ownerships, has, in order to enforce his lien, rightfully and seasonably attached a part of the logs; if the officer, seasonably having the execution, refuses to sell the logs thereon, he will be liable for such refusal, unless he makes it to appear that such sale would take more in value of the logs of some one of the owners than to the amount of his indebted-

ness under the lien. Doyle v. True, 36 Me. 542.

Unless each owner has employed sufficient laborers to drive his own logs.—When, in the same stream, there are logs of different owners, and each owner has employed sufficient laborers to drive his own logs, the lien of such laborers is solely upon the logs they were employed to drive, although it happens that the logs of all the ownerships, being intermixed, are driven collectively by all the laborers employed by all the owners. Doe v. Monson, 33 Me. 430; Hamilton v. Buck, 36 Me. 536; Oliver v. Woodman, 66 Me. 54.

If several owners employ same drivers, liens are distributed according to labor bestowed.—Where several owners of logs separately employ the same drivers, or where they separately contract for the driving with a person, who employs the same drivers, and, in the drive, all the logs get intermixed, their respective liens are not collectively upon the whole mass of logs, but are distributed upon the logs of each owner in accordance with the amount of labor bestowed thereon. Hamilton v. Buck, 36 Me. 536.

Where the owners separately employ the same person to drive their respective logs, the laborers' lien is not upon the whole mass collectively, but it is to be apportioned upon the logs of each owner pro rata. Oliver v. Woodman, 66 Me. 54.

Lien is no part of the contract.—The lien is no part of the contract, and in no wise affects it, but it is a mode of enforcing payment, deriving its validity from positive statute. Oliver v. Woodman, 66 Me. 54.

Applied in Parsons v. Copeland, 33 Me. 370; Coburn v. Kerswell, 35 Me. 126; McNally v. Kerswell, 37 Me. 550; Leisherness v. Berry, 38 Me. 80; Robinson v. Bunker, 38 Me. 130; McPheters v. Lumbert, 41 Me. 469; Holyoke v. Gilmore, 45 Me. 566; Wilson v. Ladd, 49 Me. 73; Flood v. Randall, 72 Me. 439.

II. WHAT PERSONS HAVE LIENS.

Section designed for protection of laborers performing labor under an employer and for fixed wages.—This statute is designed solely for the protection of laborers performing physical labor with their own hands, and with their teams, under the direction of an employer and for fixed wages, and the subject matter of that protection is solely the wages earned by such laborers. Littlefield v. Morrill, 97 Me. 505, 54 A. 1109.

This statute giving a lien to those who "labor" at cutting or hauling logs was obviously designed to afford protection to common laborers who gain their livelihood by manual toil, and who may be imperfectly qualified to protect themselves. Meands v. Park, 95 Me. 527, 50 A. 706.

The word "labor" was undoubtedly employed by the legislature in its limited and popular sense, to designate this class of workmen who labor with physical force in the service and under the direction of another for fixed wages. And such is the primary or specific lexical meaning uniformly assigned to the word "laborer." Meands v. Park, 95 Me. 527, 50 A. 706.

The lien is only annexed to such labor as creates an enforceable claim against some personal or corporate defendant "for the amount due for his (the laborer's) personal services." Mott v. Mott, 107 Me. 481, 78 A. 900.

And who contracts to do a specific job is not a laborer.—One who contracts to do a specific piece of work which he may perform by his own labor or by the labor of others, is not a laborer in the statutory sense, even though he in fact performs the entire work with his own labor. In such case he does not work for wages but to save paying wages. Littlefield v. Morrill, 97 Me. 505, 54 A. 1109; Mott v. Mott, 107 Me. 481, 78 A. 900.

And is not entitled to a lien.—One who contracts to cut and haul all the logs and lumber on a definite tract of land at a fixed price per M. is, as to that work, a contractor and not a laborer, and hence is not entitled to a lien for such labor as he personally performs. Littlefield v. Morrill, 97 Me. 505, 54 A. 1109.

A foreman is not a laborer.—Where the plaintiff was foreman or superintendent of the entire logging operation, having charge of the men engaged in cutting and hauling the logs, but performed no personal manual labor on the logs attached, under these circumstances, it is clear that he did not "labor" in cutting or hauling the logs within the meaning of this statute. Meands v. Park, 95 Me. 527, 50 A. 706.

Nor is a scaler.—A plaintiff did not labor at cutting or hauling logs while acting as scaler. It is for the legislature and not for the court to extend the lien to the scaler. Meands v. Park, 95 Me. 527, 50 A. 706.

This statute gives no lien for cutting or hauling manufactured lumber. Mitchell v. Page, 107 Me. 388, 78 A. 570.

Or for sticking lumber. — Under this section no lien is created for sticking lumber. Hutchins v. Blaisdell, 106 Me. 92, 75 A. 291, overruled on another point in Mitchell v. Page, 107 Me. 388, 78 A. 570.

Nor does it give a lien to a trespasser. —The lien does not inure to a trespasser, but it comes through a contract express or implied with some person owning or rightfully possessing the property. Oliver v. Woodman, 66 Me. 54.

Or those employed by him. — "Whoever" is a very comprehensive term but it cannot reasonably be held to include trespassers, or persons employed by trespassers, or persons cooking for such laborers. Mott v. Mott, 107 Me. 481, 78 A. 900.

Married woman has no lien for cooking for her husband and those employed by him. — A married woman cannot maintain an action against her husband for wages or services in cooking for him and persons employed by him in laboring on logs and lumber under this section, and hence has no lien on the logs and lumber for such services. Mott v. Mott, 107 Me. 481, 78 A. 900.

Nor does one who lets his horse to another to haul logs. — One who lets his horse to another by the month to haul logs has no lien upon the lumber. McMullin v. McMullin, 92 Me. 336, 42 A. 500. See Richardson v. Hoxie, 90 Me. 227, 38 A. 142.

But laborer entitled to lien for services of team although legal title was not in him.—A claimant is entitled to a lien for his services and for the services of the team which he employed in hauling lumber, and over which he had personal superintendence, notwithstanding the fact that the legal title to one or both of the horses might not have become vested in himself. It could make no difference in law that he might be only a bailee, so long as he was the person entitled to the compensation for their labor. Kelley v. Kelley, 77 Me. 135.

And person who cuts by the cord has a lien. — One who cuts and piles poplar wood to be manufactured into pulp has a lien on the wood for his pay under this section although he cuts by the cord. Bondur v. LeBourne, 79 Me. 21, 7 A. 814.

Which merges with that provided for by § 57.—Where a person performs labor in cutting cordwood and lumber (logs) from a tract of land sawing and piling the same, he may, in an action to enforce a lien for his services, have a single in rem judgment against both the wood and the lumber, although the laborer's lien on lumber under this section and that on cordwood under § 57 were established at different times by different legislatures; the two liens in the circumstances of the case, becoming amalgamated and in effect one. Oulette v. Pluff, 93 Me. 168, 44 A. 616.

III. ENFORCEMENT OF LIENS.

Action must be against employer.—The action must be brought against the employer who hired the plaintiff and not against the owner when not the employer, and with whom there was no contract. Oliver v. Woodman, 66 Me. 54.

And laborer's only claim is against him in personam or property in rem. — The remedy of the contractor and his subcontractor is not the same; whereas the former has his security on the goods and estate of his debtor, that is, in personam, as well as on the specific property benefited by his labor, which may be in rem, and after judgment it is optional with the creditor on which species of property he will levy his execution, a subcontractor has no claim against the owner of the property. His claim is only against the property, in rem, and the person and property of his employer, in personam. Redington v. Frye, 43 Me. 578.

And laborer's claim is in rem so far as owner who is not employer is concerned. —The owner of the lumber may have contracted for its hauling and may have fully paid the individual with whom such contract was made, yet by virtue of this statute, the laborers may interpose their claims and assert their liens, and he may thus be compelled to pay twice for the same services. The proceedings under this statute are therefore to be viewed in a double aspect. So far as the debtor is concerned they are in personam, and, as against him, the plaintiff may insert any and all claims, which by law can be joined. So far as regards the general owner of the property, and against whom the laborer has no legal claim, when the person with whom he has contracted is other than the owner of the lumber, the proceedings are strictly in rem. Without contract, without personal liability on the part of the general owner, the laborer claims to seize his property to satisfy the debt of another. His rights and his position are different from that of the debtor with whom the contract to labor was made. Bicknell v. Trickey, 34 Me. 273; Redington v. Frye, 43 Me. 578.

As the bases of a judgment in rem un-

der this section, it must be made to appear in some mode that the labor has been performed by the plaintiff in the case, under a contract, express or implied, with the other contracting party, the debtor, and whatever may be necessary to entitle him to a judgment in personam; and that this labor has been done upon the property directed to be attached, and which has been attached on his writ, and a return thereof made upon the same by the officer, who had it for service. Thompson v. Gilmore, 50 Me. 428.

Logs can be attached only upon writ in suit against employer. — There is no provision for the enforcement of the lien claim under this section by simple process in rem. The only provision is by suit against the employer of the laborer, upon the writ in which suit the logs or lumber may be attached, under §§ 72-75. There is no provision that they can be attached upon any other process or in any other way. Mott v. Mott, 107 Me. 481, 78 A. 900.

If the plaintiff, in addition to the judgment in personam, seeks a judgment in rem by virtue of a lien, under this statute, on account of having performed labor upon the property, on which the lien is claimed, it can be done only by an attachment which he causes to be made of the property upon which his services were rendered, and upon a writ which he sues out for the double purpose of obtaining a judgment against his alleged debtors, and against the property itself. Thompson v. Gilmore, 50 Me. 428.

Logs cannot be sold on mesne process if owner is not a party. — The provisions of c. 112, §§ 31 and 32 authorizing, in certain cases, an officer to sell on mesne process personal property attached, do not apply where logs are seized on a writ brought to secure the statutory lien thereon, in favor of one who has rendered services in cutting and hauling them, if the owner of the logs is not a party defendant in the writ; and such proceedings and sale affords no justification to the officer in a suit against him, for their value, by the owner of the logs. Hinckley v. Gilmore, 49 Me. 59.

Laborers may maintain joint action for their services.—Where three men were employed to work together in clearing the growth from a parcel of woodland, each to have seventy-five cents per cord for such amount as should be cut by himself, the men working separately but piling the wood and lumber indiscriminately together on the land under the direction or with the assent of their employer, a joint action may be maintained by the three, personally against the employer and in rem against the wood and lumber cut by them, for their services. Ouelette v. Pluff, 93 Me. 168, 44 A. 616.

And purchaser of laborer's claim may enforce the lien.—One who has purchased the claim of a laborer in the cutting and hauling of logs may maintain an action thereon in the name of such laborer to enforce the laborer's lien on the logs. Murphy v. Adams, 71 Me. 113; Phillips v. Vose, 81 Me. 134, 16 A. 463.

The transfer by the laborer to a third party of an equitable interest in the sum due him for his labor does not work a forfeiture of his lien. Murphy v. Adams, 71 Me. 113.

Subject to equitable defenses open to original parties. — When an assignment has been made by the laborer of his interest, the courts will protect the interest of the assignee as they will that of the assignee of any other nonnegotiable chose in action—let in all equitable defenses which are open between the original parties to the contract, and give the plaintiff in interest the same remedy which the plaintiff of record may have. Murphy v. Adams, 71 Me. 113.

And it does not make any difference that the money when collected will be divided between two purchasers. Murphy v. Adams, 71 Me. 113.

Lien can be enforced only against logs upon which services performed.—When it appears that the services of the person, or that of his team, have in no way been performed upon the logs upon which he seeks to enforce his lien, no valid judgment in rem can be rendered. Kelley v. Kelley, 77 Me. 135. See this note, analysis line I, re commingling of logs of different owners.

Unless the owner intermingles several lots. — When a grant of land upon a condition subsequent authorizes the grantee to take lumber therefrom, subject to a lien for the purchase money, and several distinct quantities or lots of lumber are cut and driven to the boom by the grantee, the persons employed by him to work in getting one of the lots having no connection with those who labor in getting another of the lots, the lien of each laborer is upon the lot upon which he worked. But if, by the negligence or carelessness of the grantee in such a deed, such several lots of lumber become intermixed, so that the respective lots upon which the several laborers worked, cannot be distinguished,

their respective liens are upon the whole mass. Spofford v. True, 33 Me. 283.

And labor must be shown to have been done on specific property seized. — The identity of claim and of property must coexist, and must be traceable until the fruits of the judgment have been obtained by a satisfaction of the execution. The identity of the property must be established, else the lien cannot attach; the labor must be shown to have been done upon the specific property seized, for provision is made for nothing else. Bicknell v. Trickey, 34 Me. 273; Redington v. Frye, 43 Me. 578; Thompson v. Gilmore, 50 Me. 428.

In a suit under this statute to enforce a laborer's lien on logs not belonging to the persons for whom the services were rendered, the record of a judgment must show that the logs, upon which the labor was expended, are the same, which, in the writ, were commanded to be attached, and which were attached and returned by the officer. Thompson v. Gilmore, 50 Me. 428; Bean v. Soper, 56 Me. 297.

And this is not presumed without something in the record to show it. — No presumption of any proof can legally arise, that the logs attached and returned were identical with those on which the plaintiff's labor was alleged in the writ to have been done, without something in the record to show it. Thompson v. Gilmore, 50 Me. 428.

And it cannot be established by officer's return or by default.—A judgment in rem cannot be rendered against the property, without proof of other facts, which, from the nature of the case, cannot be alleged in the writ. The attachment of the property is necessarily subsequent to the purchase of the writ. Whether the property attached and returned is identical with that, in all respects, on which the labor was performed, as the basis of the lien, although it may have marks in common with that which is not attached, the officer's return has no tendancy to establish. The identity must be proved aliunde. Hence this latter proof cannot be supplied by a default of any one, who can be treated as a party, at any stage of the proceedings. Thompson v. Gilmore, 50 Me. 428.

In a case where the writ contained an allegation that labor was expended on logs of a certain mark, a default merely admits that fact, but does not establish the fact that the logs described in the writ are the same logs which were attached and returned by the officer. Thompson v. Gilmore, 50 Me. 428; Bean v. Soper, 56 Me. 297.

Limitation period does not commence until all logs subject to lien have arrived. —The sixty days within which an attachment must be made, in order to effectuate a laborer's lien thereon, do not commence to run, as to any of the logs upon which the lien exists, until all the logs subject to the same lien have arrived, provided the logs have been driven together and the driving has not been suspended after a portion of them has reached the boom, but has been continuously kept up until all the logs have been driven in. Sheridan v. Ireland, 66 Me. 65.

When poplar and birch logs are, under one contract, cut and hauled from the same land and delivered at the same mill in separate piles, all in the same season, an action to enforce a laborer's lien thereon is seasonably commenced within sixty days after all the poplar and birch logs are thus delivered. Phillips v. Vose, 81 Me. 134, 16 A. 463.

This remedial statute should not be so construed as to compel a laborer to divide his action for wages and make two attachments, which necessity might arise when different kinds of timber are cut and all of one kind arrives, sixty days before the other, at the place of manufacture. Phillips v. Vose, 81 Me. 134, 16 A. 463.

Lien defeated if judgment includes non-lien claim.—A laborer's claim of lien on lumber is defeated, if, in the judgment which he recovers for it, any non-lien claims are also included. Bicknell v. Trickey, 34 Me. 273.

By including in the same judgment a lien claim and a claim to which no lien attaches, the creditor waives his right of lien. McCrillis v. Wilson, 34 Me. 286.

Where one suing to enforce a lien for services in cutting and hauling logs given by this section so intermixed such services with the non-lien labor of firing a sawmill boiler, cutting up slabs, and hauling and sticking manufactured lumber, that it was impossible for him, at the trial, to make any separation, or for the court, from the evidence, to make any such distinction as would authorize a judgment for lien for any definite amount, the lien must fail. Mitchell v. Page, 107 Me. 388, 78 A. 570.

Sec. 53. Boomage paid by officer; lien not defeated by taking note; notice.—The officer making such attachment may pay the boomage thereon, not

exceeding the rate per thousand on the quantity actually attached by him, and return the amount paid on the writ, which shall be included in the damages recovered. The action or lien is not defeated by taking a note, unless it is taken in discharge of the amount due and of the lien. Such notice of the suit as the court orders shall be given to the owner of the logs or lumber, and he may be admitted to defend it. (R. S. c. 164, § 53.)

History of section. — See Parks v. Crockett, 61 Me. 489.

Notice enables owner to protect himself from collusion between contractor and laborer.—This section requiring notice to be given to the owners of the logs, was obviously designed to render the practical operation of the principle of § 52 just to the owner as well as to the laborer. Thus, the owners would not only make their contracts with full knowledge that the lumber is charged with a lien in favor of the laborer for services which greatly enhanced its value, and be enabled to protect themselves by requiring security from the operator if they saw fit; but by having an opportunity to contest the validity of the lien claimed and the amount due, they would also be enabled to protect themselves against any injustice which might result from collusion between the contractor and laborer. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

And provision as to notice is imperative. —When a party is seeking to enforce the lien upon logs or lumber given by statute the requirement of this section, that such notice of the suit shall be given to the owner of the logs or lumber as the court orders, is imperative and must not be disregarded. Sheridan v. Ireland, 61 Me. 486.

And plaintiff must obtain order for notice and see that it is complied with.—This statute requires the notice to be such as the court orders. Such an order of notice it is the duty of the plaintiff to obtain. It is also his duty to see that it is complied with. And until this is done, the action is not in a condition to be tried or otherwise disposed of adversely to the defendants; and there is no occasion for the plaintiff or his counsel to remain in attendance upon the court, and they should not be allowed to do so at the expense of parties who are in no way responsible for the delay. Sheridan v. Ireland, 66 Me. 138.

Want of notice vitiates the lien. — The reason why the owner of the property, alleged to be subject to a lien, may be notified, is that the question of lien may be settled in the same suit wherein the attachment is made. The want of such notice vitiates the lien, if any existed. And, for the same reasons, a judgment touching the validity of the lien, whether the general owner of the property appears or not, is absolutely necessary. Annis v. Gilmore, 47 Me. 152.

It is necessary, in order to preserve the lien on logs attached, that the owners should have due notice of the pendency of the suit. Redington v. Frye, 43 Me. 578.

And precludes judgment in rem.—Since the passage of the provision of this section relating to notice, the decisions have been that a notice must be given to the owners of logs or a judgment in rem cannot be obtained, and that it is necessary that the process, judgment, and execution must correspond in all essential respects to a libel in rem and proceedings thereon in admiralty. Parks v. Crockett, 61 Me. 489.

Appearance of parties claiming as owners does not dispense with necessity of notice.—The giving of such notice cannot be dispensed with though there may be an appearance upon the docket of parties claiming to own the logs or lumber. The court cannot judicially know or determine whether such claimants are or are not the owners without giving a notice that shall be binding upon the owner whoever he may be. Sheridan v. Ireland, 61 Me. 486.

Nor do the provisions of § 72.—The necessity of notice required by this section is not dispensed with by § 72, so that in no form of proceeding can a lien upon logs be made effectual without notice. Parks v. Crockett, 61 Me. 489.

Notice must be public.—In the very nature of things, the notice must always be a public notice as well as a specific notice to parties supposed to be the owners, because the court can never determine who are owners upon the mere suggestion of the plaintiff or of those who appear as claimants, and who may or may not be the owners who must be notified in conformity with the statute in order to have a valid judgment. Sheridan v. Ireland, 61 Me. 486.

In an action to secure a lien on logs, notice to the personal defendant (the debtor) is not sufficient. Nor is an appearance by him, or by persons claiming to be the owners of the logs, sufficient. It cannot be known that there are not others still, who have an interest in the property, and a right to be heard. Hence, such notice of

the pendency of the suit must be given as, in contemplation of law, is notice to all the world. Sheridan v. Ireland, 66 Me. 138.

And notice by publication is sufficient.—Actual notice to the owner of the logs, of a suit in which they have been attached, is not required, as this statute provides that the notice shall be such as the court shall order; and a notice will be sufficient if ordered and given by publication in a newspaper. Wilson v. Ladd, 49 Me. 73.

Owner may demur to the writ. — The general owner of logs, not the debtor, in a suit to enforce a lien, may demur to the plaintiff's writ and declaration, as insufficient to establish such lien. Parks v. Crockett, 61 Me. 489.

And controvert every material allegation. — The owner of the logs, like any other adverse party, may defend the suit in which the logs have been seized by controverting every material allegation in the plaintiff's writ, such as personal services performed on the lumber specifically described, and so as readily to be identified, and any other averments which may be necessary to bring the lien claim within the statute. Redington v. Frye, 43 Me. 578.

Whatever it may be essential for the plaintiff to allege and prove in order to perfect his lien judgment, it will be competent for the owner to controvert and disprove. Redington v. Frye, 43 Me. 578.

But the section provides only for the trial of matters of defense.—By this section it is provided that the owner of the lumber "may be admitted to defend" the suit. If the action can be defeated, the lien falls to the ground. This statute does not provide for the trying of any matter except what may be regarded as a defense to the suit; and all other modes of trying the question of lien, which the law provides, are left open to the parties interested therein. McPheters v. Lumbert, 41 Me. 469.

And owners cannot try question of lien. —It is not competent for the owners to try the question of lien in the suit. This statute does not provide for the trying of any matter, except what may be regarded as a defense to the action. McPheters v. Lumbert, 41 Me. 469.

Former provision of section. — As to procedure for enforcement of lien before passage of the provision of this section relating to notice, and of §§ 72-75, see Perkins v. Pike, 42 Me. 141; Cunningham v. Buck, 43 Me. 455.

Quoted in Coburn v. Kerswell, 35 Me. 126.

Sec. 54. Lien on logs for driving by contract.—Whoever drives logs or lumber by contract with the owner or with any other person has a lien on said logs or lumber for the amount payable under said contract, which takes precedence of all other claims, except liens for labor, for stumpage and for towing, continues for 60 days after the logs or lumber arrive at the place of destination for sale or manufacture and may be enforced by attachment. When the contract is made with any person other than the owner of the logs or lumber, actual notice in writing shall be given to the owner before work is begun, stating therein the terms of the contract. If the owner, at the time said notice is given him or immediately thereafter, notifies said contractor in writing that he will not be responsible for the amount payable or to become payable under said contract, then said contractor shall not have a lien on said logs or lumber so driven. (R. S. c. 164, § 54.)

Sec. 55. Lien on logs for towing.—Owners of steamboats employed in towing logs or lumber on any of the inland waters of the state have a lien on such logs or lumber for the amounts due for such towing. Such lien continues for 60 days after the logs or lumber arrive at the place of destination for sale or manufacture and may be enforced by attachment. Said lien shall take precedence of all other claims except liens reserved to the state, liens for labor and for stumpage. (R. S. c. 164, § 55.)

Sec. 56. Liens on logs, lumber or pulpwood for advances of money or merchandise.—Whoever makes an advance or series of advances of money or merchandise to the owner of, or person entitled to the possession of, any logs, lumber or pulpwood for the purpose of financing or furnishing supplies for the cutting, hauling, rafting, booming, driving or towing of the same shall have a

lien for the amount of all such advances upon all of such logs, lumber and pulpwood on which he or it has at any time caused his or its registered mark to be placed, which lien shall take precedence over all other claims except that it shall be subject to liens for labor, stumpage, towing or driving whenever acquired and all other liens legally acquired prior to the placing of such registered mark thereon, and such lien with respect to each such advance or series of advances shall continue for 2 years after the making of the last such advance, and may be enforced by attachment. The term "registered mark" as used in the foregoing sentence means a mark described in a certificate of registration issued by the secretary of state pursuant to the provisions of the following paragraph and recorded in the registry of deeds for the county or registry district of a county in which such logs, lumber or pulpwood were situated when such registered mark was placed thereon. No person, firm or corporation shall cause his or its registered mark to be placed upon any log or piece of lumber or pulpwood bearing the registered mark of any other person, firm or corporation without the written consent of the latter, and a registered mark placed upon any log or piece of lumber or pulpwood in contravention of the provisions of this sentence shall create no lien thereon.

Any person, firm or corporation, desiring to appropriate for his or its own exclusive use any distinctive mark to be placed upon logs, lumber or pulpwood for identification, may file a copy of such mark, accompanied by a statement claiming the exclusive use thereof for such purpose, with the secretary of state, who, if satisfied that such mark is not the duplicate of, or so closely resembles as to cause confusion, any such mark theretofore registered in his office, shall register such mark and issue to and in the name of such person, firm or corporation a certificate of registration of such mark. The person, firm or corporation in whose name such certificate of registration is issued shall be entitled to exclusive use of the mark therein described for all purposes of this section. Upon request the secretary of state shall issue certified copies of such certificates of registration upon payment of the fees hereinafter provided therefor.

A copy of any such certificate of registration, certified by the secretary of state and without acknowledgment, may be recorded in any registry of deeds upon payment of the fee hereinafter provided therefor.

The secretary of state shall receive a fee of $5 for the registering of each such mark, which fee shall cover issuance of the certificate of registration thereof, and a fee of $1 for the issuance of each certified copy of such certificates. Registers of deeds shall receive a fee of $1 for recording a certified copy of any such certificate of registration. (1949, c. 136. 1953, c. 308, § 109.)

Sec. 57. Lien on hemlock bark, cordwood and pulpwood.—Whoever labors at cutting, peeling or hauling hemlock bark, or cutting, yarding or hauling cordwood, or cutting, peeling, yarding or hauling pulpwood or any wood used in the manufacture of pulpwood, or at cooking for persons engaged in such labor, has a lien thereon for the amount due for his personal labor and the services performed by his team, which takes precedence of all other claims, continues for 30 days after the contract is completed, and may be enforced by attachment. (R. S. c. 164, § 56.)

Lien under this section and lien under § 52 enforced by single judgment. — See note to § 52.

Applied in Bisbee v. Grant, 127 Me. 243, 142 A. 775.

Cited in Mitchell v. Page, 107 Me. 388, 78 A. 570.

Sec. 58. Lien on last blocks, shovel handle blocks, railroad ties and ship knees.—Whoever labors in the manufacturing of last blocks, shovel handle blocks, railroad ties or ship knees, or is engaged in cooking for persons engaged in such labor, or cuts or furnishes wood for the manufacture of last blocks or shovel handle blocks, or furnishes a team for the hauling of last blocks

or shovel handle blocks or the lumber from which they are made, or for the hauling of railroad ties or ship knees, has a lien on said last blocks, shovel handle blocks, railroad ties and ship knees, as the case may be, for the amount due him for his personal labor thereon and for the services of his team and for the amount due for wood so cut or furnished for the manufacture of said last blocks or shovel handle blocks, which takes precedence of all other claims, except liens reserved to the state, and continues for 30 days after said last blocks are stored or housed for drying purposes, or for 30 days after said shovel handle blocks arrive at their destination either for shipment or to be turned, or for 30 days after said railroad ties are on the line of a raliroad, or for 30 days after said ship knees are delivered in a shipyard. Such lien may be enforced by attachment. (R. S. c. 164, § 57.)

History of section. — See Mitchell v. Page, 107 Me. 388, 78 A. 570.

Sec. 59. Lien on shingles, staves, laths, dowels and spool timber. —Whoever labors at cutting, hauling or sawing shingle, stave, lath, dowel or spool timber, or in the manufacture of shingle, stave, lath, dowel or spool timber into shingles, staves, laths, dowels or spool bars, or at piling staves, laths, dowels or spool bars, or at bunching shingles or dowels, or at cooking for persons engaged in such labor, has a lien thereon for the amount due for his personal labor thereon and the services performed by his team, which takes precedence of all other claims and continues for 60 days after such shingle, stave, lath or dowel timber and such shingles, staves, laths and dowels are manufactured, provided the same have not been sold and shipped, or for 60 days after such spool timber or spool bars arrive at the place of destination for sale or manufacture. Such lien may be enforced by attachment. (R. S. c. 164, § 58.)

History of section. — See Mitchell v. Page, 107 Me. 388, 78 A. 570.

Laborer has lien on both spool timber and spool bars.—The laborer has "a lien thereon for the amount due him for his personal labor thereon and the services performed by his teams." And the word "thereon" embraces both the spool timber and spool bars before named in the section. The lien is given upon both for all the different kinds of services enumerated, and continues for sixty days after either the timber or the bars arrive at the place of destination for either sale or manufacture. Chamberlain v. Wood, 100 Me. 73, 60 A. 706.

The "place of destination for sale or manufacture" named in this section is the place at which the spool bars are in fact intended to be sold or manufactured into spools. Chamberlain v. Wood, 100 Me. 73, 60 A. 706.

Liens on Hay.

Sec. 60. Lien on hay, for cutting.—Whoever labors in cutting or harvesting hay has a lien on all the hay cut or harvested by him and his colaborers for the amount due for his personal services and the services performed by his team, which takes precedence of all other claims except liens reserved to the state, continues for 30 days after the last of such services are performed, and may be enforced by attachment. (R. S. c. 164, § 59.)

Section construed with reference to common-law rules.—This statute, although peremptory in its language, must be construed with reference to common-law rules. Edgecomb v. Jenney, 108 Me. 538, 81 A. 1091.

And right to lien rests on contract.—The right to a lien under this section, for cutting or harvesting hay, rests upon a contract, express or implied, with the owner of the hay, and if there is no such contract then there is no lien. Edgecomb v. Jenney, 108 Me. 538, 81 A. 1091.

Sec. 61. Lien on hay, for pressing.—Whoever presses hay or straw has a lien on all the hay or straw so pressed for the amount due for such pressing, which takes precedence of all other claims except liens reserved to the state and

the lien specified in the preceding section, continues for 30 days after said pressing is completed, and may be enforced by attachment. (R. S. c. 164, § 60.)

Liens on Vehicles.

Sec. 62. Liens on vehicles, aircraft and parachutes.—Whoever performs labor by himself or his employees in manufacturing or repairing the ironwork or woodwork of wagons, carts, sleighs and other vehicles, aircraft or component parts thereof, and parachutes, or so performing labor furnishes materials therefor or provides storage therefor by direction or consent of the owner thereof, shall have a lien on such vehicle, aircraft or component parts thereof, and parachutes for his reasonable charges for said labor, and for materials used in performing said labor, and for said storage, which takes precedence of all other claims and incumbrances on said vehicles, aircraft or component parts thereof, and parachutes not made to secure a similar lien, and may be enforced by attachment at any time within 90 days after such labor is performed or such materials or storage furnished and not afterwards, provided that a claim for such lien is duly filed as required in the following section. Said lien, however, shall be dissolved if said property has actually changed ownership prior to such filing. (R. S. c. 164, § 61. 1949, c. 154.)

Section creates no new rights. — The common-law lien for repairs was not superseded or destroyed by the provisions of this section and § 63. No new rights are created by these sections. A new and additional remedy is created, and may be used by those persons, who, for their own reasons, do not wish to employ the remedy now provided by § 76, et seq. Crosby v. Hill, 121 Me. 432, 117 A. 585.

Repairs must be made by direction or consent of owner. — The common-law rights of the lienor are enlarged by this statute in certain respects, but it is still necessary that the repairs should be made "by direction or consent of the owner." Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 A. 769.

Or no lien attaches.—It is true that this statute gives precedence to the claim of the lienor over all other claims and encumbrances, excepting similar liens, but on one condition and in one event only, namely, that the claim is based on repairs ordered or consented to by the owner. Unless that condition is complied with no lien attaches. Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 A. 769.

And vendee under conditional sale contract is not the owner.—Under a conditional sale contract, properly recorded, in which title is expressly reserved in the vendor, the vendee is not the "owner" of an automobile within the meaning of this statute, nor has the vendee implied authority, by reason of his right of possession and use of the chattel, to procure necessary repairs on the credit of the property. Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 A. 769.

The rights of a conditional vendor are superior to the rights of a lienor when a bill for repairs is incurred by the vendee without the knowledge or consent of the vendor. Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 A. 769.

Nor is the mortgagor in possession.—A mortgagor in possession of the mortgaged chattels is not the "owner," within the terms and meaning of the lien statute. Eastern Trust & Banking Co. v. Bean & Conquest, Inc., 148 Me. 85, 90 A. (2d) 449.

And he cannot encumber property without knowledge of mortgagee.—The word owner as used in the lien statute includes a mortgagee. And the right to possession and use of the chattels by the mortgagor does not carry by implication, authority to encumber the chattels with a mechanic's lien without the knowledge or direction of the mortgagee. Eastern Trust & Banking Co. v. Bean & Conquest, Inc., 148 Me. 85, 90 A. (2d) 449.

The mortgagee who permits the mortgagor to be in possession and use the chattels does not impliedly authorize the mortgagor, without the knowledge or direction of the mortgagee, to encumber the chattels in a mechanic's lien. Eastern Trust & Banking Co. v. Bean & Conquest, Inc., 148 Me. 85, 90 A. (2d) 449.

Cited in Bath Motor Mart v. Miller, 122 Me. 29, 118 A. 715; Public Loan Corp. v. Bodwell-Leighton Co., 148 Me. 93, 89 A. (2d) 739.

Sec. 63. Lien claim filed in office of town clerk; inaccuracy of statement does not invalidate lien.—The liens mentioned in the preceding section shall be dissolved unless the claimant within 30 days after the labor is performed, or storage furnished, files in the office of the clerk of the town in which the owner of such vehicle resides, or, when said owner is a nonresident of this state, in the registry of deeds or registry district of the county where the claimant resides, a true statement of the amount due him for such labor and materials or for storage, with all just credits given, together with a description of the vehicle manufactured or repaired sufficiently accurate to identify it and the name of the owner, if known, which shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf, and recorded in a book kept for that purpose by the clerk, who is entitled to the same fees therefor as for recording mortgages. No inaccuracy in such statement relating to said property, if the same can be reasonably recognized, or in stating the amount due for labor or materials, or for storage, invalidates the proceedings unless it appears that the person making it willfully claims more than his due. (R. S. c. 164, § 62. 1951, c. 363.)

Cross reference. — See note to § 62, re common-law lien not affected by this section.

Applied in Hartford Accident & Indemnity Co. v. Spofford, 126 Me. 392, 138 A. 769.

Liens on Canned Goods.

Sec. 64. Lien on canned corn, grain and fruit.—Whoever furnishes corn or other grain or fruit for canning or preservation otherwise has a lien on such preserved article and all with which it may have been mingled for its value when delivered, including the cans and other vessels containing the same and the cases, for 30 days after the same has been delivered and until it has been shipped on board a vessel or laden in a car, which lien may be enforced by attachment within that time. (R. S. c. 164, § 63.)

Liens on Leather.

Sec. 65. Lien on leather, for wages.—Whoever performs labor in any tannery where leather of any kind is manufactured completely or partially, whether such labor is performed directly on the hides and skins or in any capacity in or about the establishment, has a lien for his wages on all leather so manufactured in such tannery for labor performed by him or his colaborers, which continues for 30 days after such leather is made and manufactured, and until such leather is shipped on board a vessel or taken in a car, and may be enforced by attachment within that time. (R. S. c. 164, § 64.)

Liens on Colts, and on Animals for Pasturage, Food and Shelter.

Sec. 66. Lien on colts, for service fee.—There shall be a lien on all colts foaled in the state to secure the payment of the service fee for the use of the stallion begetting the same. Such lien shall continue in force until the foal is 6 months old and may be enforced during that time by attachment of such foal. (R. S. c. 164, § 65.)

Colt must be attached before it is 6 months old.—There can be no lien judgment against the colt for service except upon the terms prescribed by this statute. One of those terms is that the attachment should be made before the colt is 6 months old. There is no provision that the parties, either or both, by estoppel or in any other way, may substitute a later date for the attachment. Gile v. Atkins, 93 Me. 223, 44 A. 896.

Sec. 67. Lien on animals for pasturage, food and shelter. — Whoever pastures, feeds or shelters animals by virtue of a contract with or by con-

sent of the owner has a lien thereon for the amount due for such pasturing, feeding or sheltering, and for necessary expenses incurred in the proper care of such animals and in payment of taxes assessed thereon, to secure payment thereof with costs, to be enforced in the same manner as liens on goods in possession and choses in action; and the court rendering judgment for such lien shall include therein a pro rata amount for such pasturage, feed and shelter provided by the lienor from the date of the commencement of proceedings to the date of said judgment. (R. S. c. 164, § 66.)

Cross references.—See §§ 77, 84, 85 and notes, re proceedings to enforce lien; c. 32, § 26, re lien on animals for entry fee at agricultural fairs and races; c. 140, §§ 14, 15, re lien on animals in transit for expenses of proper care; c. 140, § 20, re lien on animals for food, shelter and care furnished to abandoned or neglected animals.

Section not retroactive. — See Allen v. Ham, 63 Me. 532.

Mortgagee may subject animals to lien. — A mortgagee of animals may subject them to a lien for feeding or sheltering them under this section, by his consent. Bowden v. Dugan, 91 Me. 141, 39 A. 467.

Section does not limit time animal may have been kept.—There is nothing in the statute to limit the time the animal may have been kept, except the terms of the contract, or the consent of the owner. Allen v. Ham, 63 Me. 532, holding that it is no objection to the continuance of the lien that the animal was so kept by the petitioner for more than two years.

Allegation that animal was kept is sufficient.—It will be a substantial allegation that food and shelter were furnished if the petitioner states that he "kept" the animal. Allen v. Ham, 63 Me. 532.

Owner excused from making tender. — Where the defendant refused to surrender a horse to the plaintiff until the whole bill for its keeping was paid, including the time for which he had no lien, that is, before the plaintiff gave his consent to the keeping, as well as that for which he had a lien, the plaintiff was thereby excused from making a tender of the amount secured by the valid lien, and could maintain an action of trover without proof of such tender. Bowden v. Dugan, 91 Me. 141, 39 A. 467.

Former provision of section.—Under this section when it gave a lien only to a person who pastured, fed or sheltered animals, it was held that the lien did not extend to outlays for shoeing a horse and for the taxes assessed on him. See Allen v. Ham, 63 Me. 532.

Applied in Lord v. Collins, 76 Me. 443; Collins v. Blake, 79 Me. 218, 9 A. 358; McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Cited in Lewis v. Gray, 109 Me. 128, 83 A. 1.

Liens on Monumental Work.

Sec. 68. Lien on monumental work.—Whoever, under express contract fixing the price to be paid by the other party thereto, sells, erects or furnishes any monument, tablet, headstone, vault, posts, curbing or other monumental work has a lien thereon to secure the payment of such contract price, which continues for 2 years after the completion, delivery or erection of such monument, tablet, headstone, vault, posts, curbing or other monumental work, to be enforced by suit and attachment; such attachment shall be recorded within said 2 years by the clerk of the town in which the property subject to the lien is then situated; or such lien may be enforced by petition setting forth the names and residences of the parties to the contract, the contract price, the sum due, the description and location of the property on which the lien is claimed and such other facts as are necessary to make it appear that such petitioner is entitled to an enforcement of such lien, and praying for judgment for title and possession of the property therein described. Said petition, before service thereof and within said 2 years, shall be recorded by the clerk of the town in which such property is situated and a certificate of such record indorsed thereon. The sum alleged to be due shall be deemed to be the damage demanded, and the petition, after being recorded, may be inserted in a writ and made returnable, like other writs in transitory actions, before any court of competent jurisdiction. If the defendant is a known resident of the state, he shall be served with a summons

and copy of said writ and petition; otherwise the court, in term time or vacation, may order notice. If the petitioner prevails, he shall recover judgment for title and possession of the property on which the lien is claimed, and for his costs, and a possessory execution may issue. By virtue of such judgment the judgment creditor, if unopposed, may take possession and remove the property described in his execution, otherwise any officer qualified to serve civil process, having said execution, may take possession of said property and deliver the same to the judgment creditor, and shall make his return on said execution accordingly. Said lien may be discharged at any time before final judgment by tendering the petitioner the amount of the debt and costs. (R. S. c. 164, § 67.)

Liens on Watches, Clocks, Jewelry, Clothes, Electric Motors, Major and Traffic Appliances, Electronic Equipment and Musical Instruments.

Sec. 69. Lien on watches, clocks, jewelry, clothes, electric motors, major and traffic appliances, electronic equipment and musical instruments. — Every individual, partnership or corporation, having an established place of business in this state, engaged in making, altering, repairing or cleaning any watch, clock, jewelry, electric motor, major and traffic appliance, radio and other electronic equipment, musical instruments, and in cleaning, repairing or pressing of clothes, or expending any labor or materials thereon, shall have a lien upon said watch, clock, jewelry, clothes, electric motor, major and traffic appliance, radio and other electronic equipment and musical instrument for a reasonable compensation for said labor and materials, which shall take precedence of all other claims and incumbrances, and such watch, clock, jewelry, clothes, electric motor, major and traffic appliance, radio and other electronic equipment and musical instrument shall be exempt from attachment or execution until such lien and the cost of enforcing it are satisfied. (R. S. c. 164, § 68. 1951, c. 241. 1953, c. 237.)

Sec. 70. Sold after 6 months.—The lien holder shall retain such watch, clock, jewelry, clothes, electric motor, major and traffic appliance, radio and other electronic equipment and musical instrument for a period of 6 months, at the expiration of which time, if such lien is not satisfied, he may sell such watch, clock, jewelry, clothes, electric motor, major and traffic appliance, radio and other electronic equipment and musical instrument at public or private sale, after giving 30 days' notice in writing to the owner, specifying the amount due, describing the property to be sold and informing him that the payment of such amount within 30 days shall entitle him to redeem such property. Such notice may be given by mailing the same addressed to the owner's place of residence if known, or if the owner's place of residence is unknown, a copy of such notice may be posted by the holder of such lien in 2 public places in the town, village or city where the property is held. (R. S. c. 164, § 69. 1953, c. 237; c. 308, § 110.)

Sec. 71. Residue, if not claimed by owner.—After satisfying the lien and any cost and expenses that may have accrued, any residue remaining from said sale shall, on demand within 2 years, be paid to the owner, and if not so demanded within 2 years from such sale, such residue shall become the property of the lien holder. (R. S. c. 164, § 70. 1953, c. 237.)

General Provisions for Enforcement and Discharge.

Sec. 72. Lien attachments have precedence; upheld although debtor dies and estate insolvent.—Suits to enforce any of the liens before named have precedence of attachments and encumbrances made after the lien attached and not made to enforce a lien, and may be maintained although the employer

or debtor is dead and his estate has been represented insolvent; and his executor or administrator may be summoned and held to answer to an action brought to enforce the lien. The declaration must show that the suit is brought to enforce the lien; but all the other forms and proceedings therein shall be the same as in ordinary actions of assumpsit. (R. S. c. 164, § 71.)

Cross references.—See c. 92, § 14, sub-§ II, re lien for taxes created on yachts, pleasure vessels, etc.

Attachment may be maintained notwithstanding death and insolvency of employer.—The evident design of this section is to maintain the attachment notwithstanding the death and insolvency of the employer or debtor, and not to repeal by implication express and positive provisions applicable to some of the liens provided in the chapter. It was only in case of death and insolvency, that a subsequent incumbrance would interfere with a prior attachment in any case. To guard against that contingency alone they are mentioned in this section, and not to introduce any new or different rule when that contingency does not intervene. Oliver v. Woodman, 66 Me. 54.

Under this section the plaintiffs in a suit to enforce a mechanic's lien are entitled to execution as well as judgment, if it appears that they have taken the necessary steps to perfect a valid existing lien, where the defendant died pending the suit and his estate was represented insolvent. Frost v. Ilsley, 54 Me. 345.

But nature of claim must appear in writ itself.—Where the creditor would enforce a lien claim on logs by an attachment under the provision of this section, against an administrator of an estate represented to be insolvent, the nature of the claim must appear in the writ itself. McNally v. Kerswell, 37 Me. 550.

If in such suit it does not appear by the writ, that a lien claim is sued for, no action can be maintained against the officer for neglecting to serve it. McNally v. Kerswell, 37 Me. 550.

Section is permissive and not exclusive.—This section, though mandatory in form, is remedial in its nature and must be deemed permissive and not exclusive. Judgment and execution in the common form, as well as a judgment in rem, might be sufficient to make the lien claim available. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

The provision of this section that "the declaration must show that the suit is brought to enforce the lien; but all other forms and proceedings shall be the same as in ordinary actions of assumpsit," was remedial, and was intended to add, and not to take away, a form of remedy, and the word "shall" must be construed as meaning no more than "may." Parks v. Crockett, 61 Me. 489.

This section provides that, "the declaration must show that the suit is brought to enforce the lien," and that "all other forms and proceedings shall be the same as in ordinary actions of assumpsit." This provision was simply designed to obviate certain technical difficulties previously experienced in enforcing liens, by specifying one of the averments of the declaration and prescribing in a general way the form of the judgment necessary to effectuate the lien. It was never intended to be construed so that the power of the court to order notice by publication to the debtor should be restricted to those cases in which the property of the defendant was attached. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

Declaration is sufficient if it meets requirement of section.—A declaration in a suit to enforce a lien on logs under § 52 must be regarded as sufficient for a lien claim writ if it comes within the requirement prescribed by this section, which dispenses with the necessity of any allegations outside of the common forms of the common law, except that the declaration must disclose that the suit is brought to enforce a lien upon the property attached. Parks v. Crockett, 61 Me. 489; Otis Elevator Co. v. Finks Clothing Co., 131 Me. 95, 159 A. 563.

And general statement in first count that suit is to enforce the lien is sufficient.—The general statement in the first count of a declaration that the "suit" is brought to enforce the lien, necessarily applies to the second count for money had and received as well as for the first count; and inasmuch as evidence might be admissible under the second count to support a lien claim, there would seem to be no substantial basis for the assertion that this count is for a non-lien claim. Each count is aided by the general averment that the "suit" is brought to enforce the lien and must be construed with reference to it. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

But such statement must appear in the declaration itself.—To sustain an attachment of specific property to enforce a claim of lien thereon under this section it is not sufficient to state in the writ, outside of

the declaration, that the suit is brought to enforce the lien. It must be so stated in the declaration itself. Copp v. Copp, 103 Me. 51, 68 A. 458.

Declaration held sufficient.—See Otis Elevator Co. v. Finks Clothing Co., 131 Me. 95, 159 A. 563.

Property on which labor performed must be inserted in writ as property to be attached.—In order to enforce a lien for services on logs, it is necessary that the property on which the labor was performed should be specifically inserted in the writ, as the property to be attached, and the officer therein ordered to attach it, instead of the property of the defendant, as is usual in all writs of attachment. Redington v. Frye, 43 Me. 578.

But allegation that logs had not arrived, etc., is not necessary.—It is not necessary to allege, in a suit brought to enforce a laborer's lien on logs, that the logs had not arrived at their place of destination for use or manufacture, sixty days before the date of the writ. The point raised is one of proof rather than of pleading. It is clearly made so by this section. Getchell v. Gooden, 63 Me. 563.

Writ insufficient if one count is in personam and the other in rem.—The writ in a suit to enforce a lien on logs under § 52 will be deemed insufficient if one count therein contains a claim in personam and another count a different claim in rem. Parks v. Crockett, 61 Me. 489.

Attachment must be made by virtue of legal precept.—In order to secure a lien upon logs by one who performed labor in cutting them, in pursuance of this statute, the attachment must be made by virtue of a legal precept conferring the requisite authority upon the officer acting under it. Cunningham v. Buck, 43 Me. 455.

Applied in Parker v. Williams, 77 Me. 418, 1 A. 138.

Cited in Byard v. Parker, 65 Me. 576.

Sec. 73. Discharge. — All liens named herein may be discharged by tender of the sum due made by the debtor or owner of the property or his agents. (R. S. c. 164, § 72.)

Cited in Oliver v. Woodman, 66 Me. 54.

Sec. 74. Appearance of owner.—In all lien actions, when the labor or materials were not furnished by a contract with the owner of the property affected, such owner may voluntarily appear and become a party to the suit. If he does not so appear, such notice of the suit as the court orders shall be given him and he shall then become a party to the suit. (R. S. c. 164, § 73.)

Judgment valid only when notice given as ordered.—This section does not change the rule that when persons not parties to the case claim an interest in the property, either as owners or prior attaching creditors, no judgment can be rendered which would be valid against the rights of such persons until they are notified and have had an opportunity to become parties to the action, and be heard. A judgment in rem, valid as such against the world, can be rendered only when the world, has such notice as the court shall order. Martin v. Darling, 78 Me. 78, 3 A. 118.

Owner can challenge sufficiency of declaration.—If the owner appears he can challenge by demurrer the sufficiency of the declaration to sustain a lien judgment against his property. Copp v. Copp, 103 Me. 51, 68 A. 458.

And interpose any defense to prevent judgment.—The owner, having appeared as provided in this section becomes a party to the suit by authority of the statute and, as such party, can interpose any defense of law or fact that will prevent judgment against the property attached. Copp v. Copp, 103 Me. 51, 68 A. 458.

Applied in Laughlin v. Reed, 89 Me. 226, 36 A. 131.

Quoted in Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

Sec. 75. Judgment; discontinuance as to any defendant; costs. — In any such action, judgment may be rendered against the defendant and the property covered by the lien, or against either, for so much as is found due by virtue of the lien; and if the amount due exceeds the amount so covered, then a separate execution shall be issued to the plaintiff against the defendant for such excess and the plaintiff may discontinue as to any defendant. The court may apportion costs as justice requires. (R. S. c. 164, § 74.)

Judgment may be against property alone.—There may be cases where judgment should not be rendered against the defendant personally, although his promise is established. In such case, the judgment may be against the property alone. Farnham v. Davis, 79 Me. 282, 9 A. 725.

Although it is not the property of the

principal defendant.—The provision in this section that judgment may be rendered against the defendant and the property, or against either, affords a plain implication that a valid judgment might be rendered against the property attached on the writ, although not the property of the principal defendant. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

And although court has no jurisdiction over defendant's person.—A valid judgment might be rendered against the property attached on the writ, although the court has no jurisdiction to render judgment against the person of the defendant. Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

But section does not dispense with proof of contract.—Although there may be cases where the judgment may be against the property alone, this section does not change the nature of the lien as an incident of the contract. It does not dispense with a suit against the contracting party, nor does it authorize a suit directly against the owner of the property, if he was not the contracting party. If no contract, express or implied, is proved against the defendant, the suit must fail, and the annexed lien falls with it. Farnham v. Davis, 79 Me. 282, 9 A. 725.

And suit must be commenced against defendant against whom there is a claim for wages.—After bringing suit against his employer or employers "the plaintiff may discontinue as to any defendant" and recover judgment against the property under this section, but it is apparent from the whole statute that the suit must have been begun against a defendant against whom the plaintiff had a right of action to recover his wages. Mott v. Mott, 107 Me. 481, 78 A. 900.

Enforcement of Liens on Goods in Possession and Choses in Action.

§§ 76-85 applied in Palmer v. Tucker, 45 Me. 316.

Sec. 76. Enforcement by sale.—Whoever has a lien on or pledge of any stock or certificate thereof, bond, note, account or other chose in action, or on any other personal property in his possession, may enforce it by a sale thereof in the manner provided in the contract creating such lien or pledge, if in writing, or as hereinafter provided. (R. S. c. 164, § 75.)

Applied in Lord v. Collins, 76 Me. 443; McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Sec. 77. Petition filed; contents. — The person claiming the lien may file, in the superior court in the county where he resides or in the office of the clerk thereof, a petition briefly setting forth the nature and amount of his claim, a description of the article possessed and the names and residences of its owners, if known to him, and a prayer for process to enforce his lien. (R. S. c. 164, § 76.)

Petition is purely a proceeding in rem.—A petition under this section to enforce a lien for pasturage under § 67 is purely a proceeding in rem. No personal judgment is rendered against the owner of the animal, except for costs. The issue to be adjudicated is whether the petitioner has a lien or not. And if he has, the amount for which he has a lien is determined, and the animal is ordered to be sold to pay the claim and costs. No execution issues against the goods or estate of the owner. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Residence of lienor determines venue.—The evident intent of the statute is that the residence of the lienor, and not that of the owner, shall determine the venue in proceedings to enforce a lien given by § 67. It does not require the lienor, having the animal in possession, to go to remote counties, nor to wait for distant terms of the court in those counties, in order to enforce his lien. Such a requirement would greatly impair the usefulness of the statute, for, while the lien procedure slumbers, the animal continues to eat at the expense of another than its owner. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Regardless of residence of owner.—The venue in proceedings to enforce liens given by § 67 is fixed by this section in the county where the lienor resides, regardless of the residence of the owner. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Sections 77-85 held inapplicable to warehouseman's lien.—See Stoddard v. Crocker, 100 Me. 450, 62 A. 241.

Applied in Lord v. Collins, 76 Me. 443.

Sec. 78. Service on owners within state.—If the owners are set forth in a petition filed in the clerk's office and are residents of the state, the clerk may issue an order of notice to be given by serving them with a copy of the petition and order thereon, at least 14 days before the next term of the court in such county. (R. S. c. 164, § 77.)

Sec. 79. Service on owners, when unknown or out of state.—If the owners are not known or are not residents of the state, or if the petition is filed in court, the court may order reasonable notice of at least 14 days to them and to others interested, returnable at the same or a subsequent term; to be given by personal service of a copy of the petition with the order of court thereon or by publication in a newspaper, or both, as the court directs. (R. S. c. 164, § 78.)

Sec. 80. Appearance by owner.—At the time fixed in the notice, any party interested in the article as owner, mortgagee or otherwise may appear and, after appearance, the proceedings shall be the same as in an action on the case in which the petitioner is plaintiff and the party appearing is defendant. Questions of fact at the instance of either party shall be submitted to a jury on an issue framed under the direction of the court. (R. S. c. 164, § 79.)

Owner is respondent or claimant rather than defendant.—The provision of this section that if, after notice, the owner appears, "the proceedings shall be the same as in an action on the case in which the petitioner is plaintiff and the party appearing is defendant," relates to procedure merely. The owner in such case is really a respondent or claimant, rather than a defendant, as that term is used in legal proceedings. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Sec. 81. Owner required to give bond for costs.—If, in the opinion of the court, the article on which the lien is claimed is not of sufficient value to pay the petitioner's claim with the probable costs of suit, the court may order the defendant to give bond to the petitioner, with sufficient sureties approved by the court, to pay such costs as are awarded against him, so far as they are not paid out of the proceeds of the articles on which the lien is claimed. (R. S. c. 164, § 80.)

Sec. 82. Court may order property sold to pay lien.—After trial and final adjudication in favor of the petitioner, the court may order any competent officer to sell the article on which the lien is claimed, as personal property is sold on execution, and out of the proceeds, after deducting his fees and the expenses of sale, to pay to the petitioner the amount and costs awarded him, and the balance to the person entitled to it, if he is known to the court, otherwise into court. (R. S. c. 164, § 81.)

Cross reference.—See c. 118, §§ 3-8, re sale of goods on execution.

Applied in Lord v. Collins, 76 Me. 443.

Sec. 83. Disposal of proceeds.—Money paid into court may be paid over to the person legally entitled to it, on petition and order of the court. If it is not called for at the first term after it is paid into court, it shall be paid into the county treasury; and if afterwards the person entitled to it petitions and establishes his claim to it, the court may order the county treasurer to pay it to him. (R. S. c. 164, § 82.)

Sec. 84. Jurisdiction of trial justices; appeal. — Liens for less than $20 may be enforced before any trial justice for the county where the person having the lien resides, and all proceedings, rights and liabilities shall be the same as hereinbefore provided so far as the nature of the tribunal admits; and either party may appeal as in other cases. (R. S. c. 164, § 83.)

Trial justice in county where lienor resides has jurisdiction.—By this section, trial justices for the county where the person having the lien resides have jurisdic-

tion of cases of liens for less than twenty dollars, regardless of the residence of the owner. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Sec. 85. Concurrent jurisdiction of trial justices.—Trial justices in their respective counties have jurisdiction concurrent with the superior court and municipal courts of liens and proceedings relative thereto, for an amount not exceeding their jurisdiction in other civil actions, to be enforced as provided in this chapter. (R. S. c. 164, § 84.)

Municipal court has jurisdiction in county where lienor resides.—By this section, municipal courts are given jurisdiction concurrent with the superior courts and trial justices. Though no mention is made of venue, undoubtedly municipal courts have jurisdiction only when the superior courts or trial justices would have, and that is, in the county where the person claiming the lien resides. The jurisdiction is concurrent, and exists under precisely the same conditions in one case that it does in the other. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Despite provisions of c. 108, § 4.—Chapter 108, § 4 is not a limitation of the jurisdiction of the courts under this section. Neither the language nor the apparent purpose of that section, which provides that "a municipal court shall not have jurisdiction in any civil matter unless a defendant resides within the county in which such court is established," requires a holding that that act is a limitation of the jurisdiction of municipal courts under this section. McGillicuddy v. Edwards, 96 Me. 347, 52 A. 785.

Cited in Stoddard v. Crocker, 100 Me. 450, 62 A. 241.

Pledges.

Sec. 86. Pledge for payment of money; notice of sale. — The holder of stocks, bonds or other personal property in pledge for the payment of money or the performance of any other thing may, after failure to pay or perform, sell such stocks, bonds or other personal property in the manner provided in the contract creating the pledge, if in writing, or he may proceed as hereinafter provided.

If the pledger is a resident of this state, the pledgee or his assignee may give written notice of his intention to enforce payment by a sale of the pledge by serving a copy of such notice upon the pledger or leaving such copy at the last and usual place of abode of the pledger within the state, if such residence is known to the pledgee or his assignee or can be ascertained by reasonable diligence. If the pledger is, at that time, not a resident of this state or cannot be found by reasonable diligence, the pledgee may cause such notice to be published at least once a week for 3 successive weeks in one of the principal newspapers, if any, in the city or town where the pledgee resides; otherwise, in one of the principal newspapers published in the county or in the state paper. The notice with an affidavit of service or the official return of service of any officer qualified to serve civil process, or a copy of the last publication with the name and date of the paper containing it, shall be recorded in the clerk's office of the city or town where the pledgee resides and the copy of such record is evidence that the notice has been given. If the pledgee or his assignee is not a resident of the state, he shall, at the time of recording such notice, record therewith his appointment of an agent resident in the county where the notice is recorded, to receive satisfaction of the pledge; and payment or tender thereof may be made to him. If he does not appoint such agent, the right to redeem is not forfeited. (R. S. c. 164, § 85.)

Creditor's bill is not proper procedure to determine rights of pledgee or pledgor.—A creditor's bill under c. 107, § 4, sub-§ XI, is not the proper procedure to determine and enforce the rights of either a pledgee or pledgor. The pledgee has ample remedy under this section and § 87 without any resort to the court. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

Pledgee can transfer negotiable note to third person for collection.—The pledgee

of a negotiable promissory note may transfer it to a third person for collection, notwithstanding the provision of this section and § 87, requiring pledges to be sold at public auction after notice. Hunt v. Bessey, 96 Me. 429, 52 A. 905.

Cited in Patten v. Dennison, 137 Me. 1, 14 A. (2d) 12.

Sec. 87. Sale; application of proceeds.—If the money to be paid or the thing to be done is not paid or performed or tender thereof made within 60 days after such notice is so recorded, the holder may sell the pledge at public auction and apply the proceeds to the satisfaction of the debt or demand and the expenses of the notice and sale, and any surplus shall be paid to the party entitled thereto on demand. (R. S. c. 164, § 86.)

Cross reference.—See note to § 86.

Cited in Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285; Hunt v. Bessey, 96 Me. 429, 52 A. 905; Patten v. Dennison, 137 Me. 1, 14 A. (2d) 12.

Liens of Banks or Safe Deposit Companies.

Sec. 88. Right of bank or company to open box; lien on contents.—Whenever the amount due for the use of any safe or box in the vaults of any bank or safe deposit company shall not have been paid for 1 year, such bank or company may, at the expiration of such period, notify the person in whose name such safe or box stands on its books, by a notice in writing in a securely closed, postpaid, registered letter directed to such person at his post-office address as recorded upon the books of said bank or company, that if the amount then due for the use of such safe or box is not paid within 60 days from the date of such notice, said bank or company will then cause such safe or box to be opened in the manner hereinafter provided. At the expiration of 60 days after the mailing of said notice, said bank or company may then cause such safe or box to be opened in the presence of any officer or branch manager of said bank or company, and of a notary public not an officer or in the employ of said bank or company, and the contents of said safe or box shall then be sealed up by such notary public in a package and a certificate of such sealing shall be indorsed thereon, signed by such notary and attested by his seal, and said package shall be distinctly marked with the name and address of the person in whose name such safe or box stands upon the books of said bank or company, and the estimated value thereof; said package shall then be placed in one of the general safes or boxes of said bank or company, and shall be held subject to redemption by the owner thereof, who shall be required to pay the rent due for said safe or box and all costs and damages attending the opening thereof, together with reasonable charges for the custody of said package by said bank or company, and said bank or company shall have a lien upon said package to secure the payment of such rent, damages and charges. (R. S. c. 164, § 87. 1947, c. 10.)