CHAPTER 48
Liens and Mortgages

ARTICLE 1
Uniform Federal Lien Registration Act

48-1-1. Federal lien; place of filing.

A. Notices of liens upon real property for taxes and other obligations payable to the United States and certificates and notices affecting the liens shall be recorded in the office of the county clerk of the county in which the real property subject to a federal lien is situated.

B. Notices of liens upon personal property for taxes and other obligations payable to the United States and certificates and notices affecting the liens shall be recorded in the office of the county clerk of the county where the property owner resides at the time of recording the notice of lien.

History: 1953 Comp., § 61-1-8, enacted by Laws 1967, ch. 253, § 1; 1988, ch. 44, § 1.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, deleted "tax" after "federal" in the section heading and in Subsection A; inserted "and other obligations" in Subsections A and B; and substituted "property owner" for "taxpayer" in Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Federal Tax Enforcement §§ 6 to 24, 55.

Federal and state taxes, priority between, 62 A.L.R. 146.

Priority as between federal tax lien and mortgage to secure future advances or expenditures by mortgagee, 90 A.L.R.2d 1179.

Liens as competing with federal priorities as choate or inchoate, 94 A.L.R.2d 748.

Sufficiency of designation of taxpayer in recorded notice of federal tax lien, 3 A.L.R.3d 633.

Waiver of restrictions on assessment and collection of deficiency in federal tax, 115 A.L.R. Fed. 257.

Right of mortgagee and/or lienor to compensation when property subject to mortgage and/or lien is taken by federal government forfeiture based on criminal acts of owner, 136 A.L.R. Fed. 593.

48-1-2. Execution of notices and certificates.

Certification, by the secretary of the treasury of the United States, his delegate or any official or entity of the United States responsible for filing or certification, of notices of liens, certificates, notices of compromise or notices affecting federal liens entitles them to be filed, and no other attestation, certification or acknowledgement is necessary.

History: 1953 Comp., § 61-1-9, enacted by Laws 1967, ch. 253, § 2; 1988, ch. 44, § 2.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, inserted "or any official or entity of the United States responsible for filing or certification"; substituted "federal liens" for "tax liens"; and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Federal Tax Enforcement §§ 5, 7 to 16.

Sufficiency of designation of taxpayer in a recorded notice of federal tax lien, 3 A.L.R.3d 633.

Sufficiency of notice of sale of property seized for failure to pay federal taxes under 26 U.S.C.S. § 6335, 26 A.L.R. Fed. 381.

48-1-3. Duties of filing officer.

A. If a notice of federal lien, notice of compromise or notice of revocation of any certificate described in Subsection B of this section is presented to the recording officer, he shall endorse the certificate with his identification and the date and time of receipt, and immediately file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the serial number of the district director and the total amount of tax or other obligation, interest, penalties and costs.

B. If a certificate of release, nonattachment, discharge or subordination of any federal lien is presented to the recording officer specified in Section 48-1-1 NMSA 1978, he shall record the certificate and shall enter the certificate or notice with the date of recording in any alphabetical federal lien index on the line where the notice of lien is entered.

C. Upon request of any person, the recording officer shall issue his certificate showing whether there is recorded, on the date and hour stated on it, any presently effective notice of federal lien or certificate or notice affecting the lien, recorded on or after July 1, 1988 naming a particular person, and if a notice or certificate is recorded, giving the date and hour of its recording. The fee for a certificate is two dollars ($2.00). Upon request, the recording officer shall furnish a copy of any notice of federal lien or notice or certificate affecting a federal lien for a fee of one dollar ($1.00) per page.

History: 1953 Comp., § 61-1-10, enacted by Laws 1967, ch. 253, § 3; 1988, ch. 44, § 3.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, in Subsection A, deleted "tax" preceding "lien" near the beginning, inserted "of this section", substituted "endorse the certificate with" for "endorse thereon" and "immediately" for "forthwith", and inserted "or other obligation"; in Subsection B, substituted "federal lien" for "tax lien" twice and "Section 48-1-1 NMSA 1978" for "Section 1"; and in Subsection C, deleted "tax" preceding "lien" three times, substituted "July 1, 1988" for "July 1, 1967" and made a minor stylistic change.

48-1-4. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 22, § 1, repeals 48-1-4 NMSA 1978, relating to fees for recording and indexing documents affecting tax liens.

48-1-5. Uniformity of interpretation.

The Uniform Federal Lien Registration Act [48-1-1 to 48-1-7 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose: to make uniform the law of those states which enact it.

History: 1953 Comp., § 61-1-12, enacted by Laws 1967, ch. 253, § 5; 1988, ch. 44, § 4.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, substituted "The Uniform Federal Lien Registration Act" for "This act".

48-1-6. Short title.

Sections 48-1-1 through 48-1-7 NMSA 1978 may be cited as the "Uniform Federal Lien Registration Act".

History: 1953 Comp., § 61-1-13, enacted by Laws 1967, ch. 253, § 6; 1988, ch. 44, § 5.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, substituted "Sections 48-1-1 through 48-1-7 NMSA 1978" for "This Act" and deleted "Tax" following "Federal".

48-1-7. Federal liens and notices filed before the effective date of act.

Recording officers with whom notices of federal liens, certificates and notices affecting the liens have been recorded on or before July 1, 1988 shall, after that date, continue to maintain a file labeled "federal lien notices recorded prior to July 1, 1988" containing notices and certificates filed in numerical order of receipt.

History: 1953 Comp., § 61-1-14, enacted by Laws 1967, ch. 253, § 9; 1988, ch. 44, § 6.

ANNOTATIONS

The 1988 amendment, effective May 18, 1988, substituted "federal liens" for "tax liens" in the catchline and twice in the Section, "July 1, 1988" for "July 1, 1967" twice, and made a minor stylistic change.

ARTICLE 1A
Lien Protection Efficiency

48-1A-1. Short title.

This act [48-1A-1 to 48-1A-9 NMSA 1978] may be cited as the "Lien Protection Efficiency Act".

History: Laws 1999, ch. 144, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-2. Findings; purpose.

A. The legislature finds:

(1) that there is a problem with the presentation for filing or recording of invalid instruments that purport to affect the real or personal property interests of persons, including elected or appointed officials and employees of state, local and federal government. These instruments, which have no basis in fact or law, have

serious disruptive effects on property interests and title, appear on title searches and other disclosures based on public records and are costly and time-consuming to expunge. These instruments have serious disruptive effects on the conduct of government business and are costly and time-consuming to both government entities and individual officials and employees;

(2) that officials and employees authorized by law to accept for filing or recording liens, deeds, instruments, judgments or other documents purporting to establish nonconsensual common law liens do not have discretionary authority or mechanisms to prevent the filing, recording or disclosure of frivolous lien claims if the documents comply with certain minimum format requirements. It would be inefficient and would require substantial government expenditure to have the legal sufficiency of documents submitted for filing or recording determined in advance of acceptance; and

(3) that it is necessary and in the best interest of New Mexico and its citizens to provide a means to relieve this problem, to prevent the filing, recording or disclosure of frivolous lien claims and to authorize actions to void frivolous lien claims.

B. The purpose of the Lien Protection Efficiency Act is to provide for the efficient filing and recording of documents and the protection of public officials and employees and the citizens of the state against nonconsensual common law liens by imposing limitations on the circumstances in which nonconsensual common law liens may be recognized in the state.

History: Laws 1999, ch. 144, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-3. Definitions.

As used in the Lien Protection Efficiency Act:

A. "court" means:

(1) a court created by the constitution of the United States or pursuant to federal law, including the United States supreme court, the United States courts of appeals, the United States district or administrative courts or other federal courts of inferior jurisdiction, but does not include administrative adjudicative bodies;

(2) a court created by the constitution of New Mexico or pursuant to New Mexico law, including the supreme court, the court of appeals, district courts, magistrate courts, metropolitan courts and municipal courts, but does not include administrative adjudicative bodies; and

(3) a court comparable to any of those listed in Paragraph (2) of this subsection that is created by the constitution of another state or pursuant to the state law of another state;

B. "federal official or employee" means an appointed or elected official or an employee of a federal agency, board, commission or department in a branch of the federal government;

C. "filing officer" means the secretary of state; the clerk of a county or court; or a state, local or federal official or employee authorized by law to accept for filing as a public record a lien, deed, instrument, judgment or other document, whether paper, electronic or in another form;

D. "lien" means an encumbrance on property as security for the payment of a debt;

E. "nonconsensual common law lien" means a document, regardless of self-description, that purports to assert a lien against the assets, real or personal, of a person that:

(1) is not expressly provided for by a specific state or federal statute;

(2) does not depend upon the consent of the owner of the property affected or the existence of a contract for its existence; or

(3) is not an equitable or constructive lien imposed by a court of competent jurisdiction; and

F. "state or local official or employee" means an appointed or elected official or an employee of a state agency, board, commission, department in any branch of state government, or state institution of higher education, or a school district, political subdivision or unit of local government of this state.

History: Laws 1999, ch. 144, § 3.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-4. Construction.

A. The Lien Protection Efficiency Act shall not be construed to create a lien or interest in property not otherwise existing under state or federal law.

B. The Lien Protection Efficiency Act is not intended to affect a lien provided for by statute, a consensual lien now or hereafter recognized under common law of the state or the ability of the courts to impose equitable or constructive liens.

History: Laws 1999, ch. 144, § 4.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-5. Non-enforceability of nonconsensual common law liens.

Nonconsensual common law liens against real property shall not be recognized or be enforceable. Nonconsensual common law liens claimed against personal property shall not be recognized or be enforceable if, at the time the lien is claimed, the claimant fails to retain actual lawfully acquired possession or exclusive control of the property.

History: Laws 1999, ch. 144, § 5.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-6. Invalidity of claim of lien against a state or local official or employee or a federal official or employee; filing of notice of invalid lien.

A. A claim of lien against a state or local official or employee or a federal official or employee based on the performance or nonperformance of that official's or employee's duties shall be invalid, unless accompanied by a specific order from a court of competent jurisdiction authorizing the filing of the lien, or unless a specific statute authorizes the filing of the lien.

B. If a claim of lien, as described in Subsection A of this section, has been accepted for filing, the filing officer shall accept for filing a notice of invalid lien signed and submitted by an assistant attorney general representing the state agency, board, commission or department of which the individual is an official or employee; an attorney representing the state institution of higher education, school district, political subdivision or unit of local government of this state of which the individual is an official or employee; or an assistant United States attorney representing the federal agency of which the individual is an official or employee. A copy of the notice of invalid lien shall be mailed by the attorney to the person who filed the claim of lien at that person's last known address.

History: Laws 1999, ch. 144, § 6.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-7. No duty to accept or to disclose a nonconsensual common law lien; immunity from liability.

A. A filing officer does not have a duty to accept for filing or recording a claim of lien, unless the lien is authorized by statute or imposed by a court of competent jurisdiction having jurisdiction over property affected by the lien.

B. A filing officer does not have a duty to accept for filing or recording a claim of lien against a state or local official or employee or a federal official or employee based on the performance or nonperformance of that official's or employee's duties, unless accompanied by a specific order from a court of competent jurisdiction having jurisdiction over property affected by the lien, authorizing the filing of the lien.

C. A filing officer does not have a duty to disclose an instrument of record or filing that attempts to give notice of a nonconsensual common law lien. This subsection does not relieve a filing officer of a duty that otherwise may exist to disclose a claim of a lien authorized by statute or imposed by order of a court of competent jurisdiction having jurisdiction over property affected by the lien. The existence of a claim of a nonconsensual common law lien in the public record does not constitute a defect in the title of or an encumbrance on the real property described and does not affect the marketability of the title to the real property.

D. A filing officer shall not be liable for damages arising from a refusal to record or file or a failure to disclose any claim of a nonconsensual common law lien of record pursuant to this section.

E. A filing officer shall not be liable for damages arising from the acceptance for filing of a claim of lien as described in Subsection B of this section, or for the acceptance for filing of a notice of invalid lien pursuant to Subsection B of Section 6 [48-1A-6 NMSA 1978] of the Lien Protection Efficiency Act.

F. Except as otherwise provided by law, a filing officer shall not be required to defend decisions to accept or reject documents pursuant to Section 6 of the Lien Protection Efficiency Act.

History: Laws 1999, ch. 144, § 7.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-8. Action to void lien; order to show cause; service of process.

A. A person whose real or personal property is subject to a recorded claim of a nonconsensual common law lien and who believes the claim of lien is invalid may petition the district court of the county in which the claim of lien has been recorded for an order, which may be granted ex parte, directing the lien claimant to appear before the district court, at a time no earlier than six days nor later than twenty-one days following the date of service of the petition and order on the lien claimant, and show cause, if any, why the claim of lien should not be stricken and other relief provided for by Section 9 [48-1A-9 NMSA 1978] of the Lien Protection Efficiency Act should not be granted. The petition shall state the grounds upon which relief is requested and shall be supported by the affidavit of the petitioner or petitioner's attorney setting forth a concise statement of the facts upon which the claim for relief is based.

B. An order rendered pursuant to the petition and directing the lien claimant to appear shall clearly state that if the lien claimant fails to appear at the time and place noted, the claim of the lien shall be declared void ab initio and released and that the lien claimant shall be ordered to pay the costs incurred by the petitioner or any other party to the proceeding, including reasonable attorney fees, and damages as set forth in Section 9 of the Lien Protection Efficiency Act.

C. The petition and order shall be served upon the lien claimant by personal service, or, when the district court determines that service by mail is likely to give actual notice, the district court may order that service be made by a person over eighteen years of age who is competent to be a witness, other than a party, by mailing copies of the petition and order to the lien claimant's last known address or any other address determined by the district court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first-class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes shall bear the return address of the sender.

History: Laws 1999, ch. 144, § 8.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

48-1A-9. Orders; liability for costs and attorney fees; damages.

A. If, in proceedings pursuant to Section 8 [48-1A-8 NMSA 1978] of the Lien Protection Efficiency Act, the lien claimant fails to appear at the time and place noted or

if the lien claimant appears and the district court determines that the claim of lien is invalid, the district court shall issue an order declaring the lien void ab initio, releasing the lien, refunding any court docketing or filing fee to the petitioner and awarding other costs and reasonable attorney fees and damages as set forth in this section to the petitioner or any other party to the proceeding, to be paid by the lien claimant.

B. If the district court determines that the claim of lien is valid, the district court shall issue an order so stating and may award costs and reasonable attorney fees to the lien claimant to be paid by the petitioner.

C. A person who offers to have filed and recorded in the office of a filing officer a document purporting to create a nonconsensual common law lien against real or personal property, knowing or having reason to know that the document is forged or groundless, contains a material misstatement or false claim or is otherwise invalid, shall be liable to the owner of the property affected for actual damages or five thousand dollars ($5,000), whichever is greater, plus costs and reasonable attorney fees as provided in this section.

D. A grantee or other person purportedly benefited by a filed or recorded document that creates a nonconsensual common law lien against real or personal property, knowing or having reason to know that the filed or recorded document is forged or groundless, contains a material misstatement or false claim or is otherwise invalid, who willfully refuses to release the filed or recorded document upon request of the owner of the property affected, shall be liable to the owner for actual damages or five thousand dollars ($5,000), whichever is greater, plus costs and reasonable attorney fees as provided in this section.

E. A certified copy of an order rendered pursuant to this section shall be filed by the clerk of the district court in the office of the appropriate filing officer.

History: Laws 1999, ch. 144, § 9.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 144, § 11 made the Lien Protection Efficiency Act effective July 1, 1999.

Severability. — Laws 1999, ch. 144, § 10 provided for the severability of the act if any part or application thereof is held invalid.

ARTICLE 2
Mechanics' and Materialmen's Liens

48-2-1. ["Lien" defined.]

A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

History: Laws 1880, ch. 16, § 1; C.L. 1884, § 1519; C.L. 1897, § 2216; Code 1915, § 3318; C.S. 1929, § 82-201; 1941 Comp., § 63-201; 1953 Comp., § 61-2-1.

ANNOTATIONS

Cross references. — For oil and gas products lien, see 48-9-1 NMSA 1978.

For municipal utilities, liens on property, see 3-23-6 NMSA 1978.

For sewer assessments, liens, see 3-26-2 NMSA 1978.

For improvement district assessments, liens, see 3-33-23 NMSA 1978.

For municipal liens for taxes and assessments, see 3-36-1 NMSA 1978.

For refuse collection assessment as municipal lien on realty, see 3-48-7 NMSA 1978.

For assessment for irrigation of trees and shrubs in municipalities, lien, see 3-53-5 NMSA 1978.

For judgment as lien on real estate, see 39-1-6 NMSA 1978.

For decree for support of children, lien on real estate, see 40-4-15 NMSA 1978.

For adjudication of water rights, costs of hydrographic survey a lien, see 72-4-17 NMSA 1978.

For county board of horticultural commissioners, lien for expenses, see 76-3-3 NMSA 1978.

For rodent pest repression, lien on land, see 77-15-4, 77-15-5 NMSA 1978.

The New Mexico Mechanics' Lien Law is constitutional. Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603 (1910); Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902); Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910).

Legislative intent. — The object of the Mechanics' Lien Law is to protect those who, by their labor, services, skill or materials furnished, have enhanced the value of the property sought to be changed. Hobbs v. Spiegelberg, 3 N.M. (Gild.) 357, 5 P. 529 (1885).

Construction of act. — This act should be construed liberally. Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1933).

The right to a lien is purely statutory, and a claimant to such a lien must in the first instance bring himself clearly within the terms of the statute. The statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the lien; but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

The Mechanics' Lien Law, though in derogation of the common law, is remedial in its nature and is to have a liberal construction. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

The act is in fact remedial in nature and should be liberally construed. Home Plumbing & Contracting Co. v. Pruitt, 70 N.M. 182, 372 P.2d 378 (1962).

Lien statutory, not equitable. — The lien is of statutory, not equitable, origin. It depends wholly upon the existence of certain conditions and the performance by the claimant of a prescribed act. The absence of the conditions or the nonperformance of the act leaves equity powerless. The court's function is not to create a lien. It can only declare and enforce an existing lien. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

This article applies to mechanics and materialmen. Hobbs v. Morrison Supply Co., 41 N.M. 644, 73 P.2d 325 (1937).

Contract for vendor's lien. — An executory contract for the sale of land, reserving legal title in the vendor until payment, does not create a vendor's lien. Albuquerque Lumber Co. v. Tomei, 32 N.M. 5, 250 P. 21 (1926).

California cases followed. — This court (New Mexico supreme court) has consistently followed the pertinent decisions of the California courts in cases in which the mechanics' and materialmen's lien statutes have been involved. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

Unjust enrichment basis for statutory lien. — The Miller Act, § 270(b), Title 40, U.S.C.A., is not a lien statute, but merely provides a remedy for recovery of monies due for the doing of work or furnishing of materials provided for in the contract mentioned in Subsection (a) of the act; thus, the right of the claimant must relate to the provisions of the construction contract under the Miller Act and similar state statutes. With reference to mechanics' and materialmen's statutes, the rule is that the right relates to the benefit inuring to the property and arises from the equitable principle of unjust enrichment. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

Law reviews. — For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 12, 25, 39 et seq., 251 et seq.

What constitutes "commencement of building or improvement" for purposes of determining accrual of lien, 1 A.L.R.3d 822.

56 C.J.S. Mechanics' Liens §§ 2, 121.

48-2-2. Mechanics and materialmen; lien; labor, equipment and materials furnished; definition of agent of owner.

Every person performing labor upon, providing or hauling equipment, tools or machinery for or furnishing materials to be used in the construction, alteration or repair of any mine, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, road or aqueduct to create hydraulic power or any other structure, who performs labor in any mine or is a registered surveyor or who surveys real property has a lien upon the same for the work or labor done, for the specific contract or agreed upon charge for the surveying or equipment, tools or machinery hauled or provided or materials furnished by each respectively, whether done, provided, hauled or furnished at the instance of the owner of the building or other improvement or his agent. Every contractor, subcontractor, architect, builder or other person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement shall be held to be the agent of the owner for the purposes of this section.

History: Laws 1880, ch. 16, § 2; C.L. 1884, § 1520; C.L. 1897, § 2217; Code 1915, § 3319; C.S. 1929, § 82-202; 1941 Comp., § 63-202; 1953 Comp., § 61-2-2; Laws 1965, ch. 184, § 1; 1991, ch. 43, § 1; 1993, ch. 252, § 1.

ANNOTATIONS

Cross references. — For unlicensed contractor not entitled to lien, see 60-13-30 NMSA 1978.

The 1991 amendment, effective April 1, 1991, inserted "or is a registered surveyor or who surveys real property" and "surveying or" near the middle of the section and made a minor stylistic change.

The 1993 amendment, effective June 18, 1993, substituted "mine" for both occurrences of "mining claim" and made a minor stylistic change.

I. GENERAL CONSIDERATION.

Liens not due process violation. — The fact that the statute allowed liens to be asserted in excess of the contract price of the building or improvement was not a restraint upon the liberty of contract or a taking of property without due process of law. Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910).

The lien given by this section was founded upon the doing of the work or the furnishing of the material. Weggs v. Kreugel, 28 N.M. 24, 205 P. 730 (1922).

Purpose of cumulative effect not to nullify other statutes. — The purposes of the declaration of cumulative effect was not to make other statutory provisions applicable to those things covered by the Oil Act itself, but to show that the things for which liens were given by this act were not intended to nullify other lien statutes in favor of mechanics, laborers, clerks and others performing services in the oil industry, and materialmen who might furnish material in the oil or mining industry not covered by the act. Butt v. Vermejo Park Corp., 89 N.M. 679, 556 P.2d 835 (1976).

Similar provisions for benefit of suppliers for government construction project. — Sections 13-4-18 and 13-4-19 NMSA 1978 are intended to provide a remedy comparable to a mechanic's lien to materialmen who provide supplies for a state government construction project. State ex rel. W.M. Carroll & Co. v. K.L. House Constr. Co., 99 N.M. 186, 656 P.2d 236 (1982).

Relation back of subcontractor's lien. — A subcontractor's lien relates back to the date when any construction actually commenced, even though that subcontractor's work commenced after the mortgage was recorded. First Interstate Bank v. Hutchens, 112 N.M. 497, 816 P.2d 1119 (1991).

Where a miner mining gypsum and two other providers of labor (not "subcontractors" on a construction project) subsequently performed services unrelated to the mining enterprise, the claims of the later workers did not relate back to the date when the miner began his labor. First Interstate Bank v. Hutchens, 112 N.M. 497, 816 P.2d 1119 (1991).

Third-tier material suppliers in government construction projects are protected under "Little Miller Act," 13-4-18 to 13-4-20 NMSA 1978 (bonds of public contractors). Nichols Corp. v. Bill Stuckman Constr., Inc., 105 N.M. 37, 728 P.2d 447 (1986).

Identification of land in claim. — Where lien form claim listed mechanics' claim as against lot upon which minor portion of building was located but statement of charges for work completed correctly described address of building and owners admitted in answer that building was located at the named address, statute requiring that land identified in lien claim be land upon which improvements were made was complied with. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Effect of invalid lien. — The mere filing of a materialman's lien did not give defendant the right to foreclose the lien, where the lien was invalid from its inception because it was filed after defendant knew that the swimming pool heater he had furnished was not

actually used, and it was not a part of the swimming pool. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

Privity of contract is not required to give rise to the right to a lien. 1957-58 Op. Att'y Gen. No. 58-148.

It was not necessary that the owner be indebted to the contractor to entitle the subcontractor, materialman or laborer to mechanic's lien. Hobbs v. Spiegelberg, 3 N.M. (Gild.) 357, 5 P. 529 (1885).

Creation of lien. — Contractor, simply by performing labor in a mine, did not have a mechanic's lien made under this section. First Interstate Bank v. Hutchens, 112 N.M. 497, 816 P.2d 1119 (1991).

Abandonment as affecting lien. — Where a hole drilled for a water well was dry, and was abandoned, the fact of abandonment, if through no fault of driller, did not affect the driller's right to mechanic's lien. Dysart v. Youngblood, 44 N.M. 351, 102 P.2d 664 (1940).

Nonresponsibility notice ineffective. — Owner of land who, himself, orders or contracts for an improvement to be erected thereon cannot escape responsibility for the materials purchased for use in the improvement, and the posting of notice of nonresponsibility under 48-2-11 NMSA 1978 in such a case amounts to nothing. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

No quantum meruit enforcement. — Materialmen's lien filed on theory of express contract was extinguished when claimant failed to establish his claim on express contract, and could not be enforced in a subsequent action in quantum meruit. Terry v. Pipkin, 66 N.M. 4, 340 P.2d 840 (1959).

Oil Act lien where express contract. — Under the Mechanics' Act, a lien may be imposed upon the fee owner's interest if he has knowledge of the construction and fails to disclaim responsibility therefor in the manner and within the time therein provided while under the Oil Act (70-4-1 NMSA 1978 et seq.), the fee owner's interest is subject to a lien only if he expressly so contracts, an obvious conflict, and it was held that a company which built roads, leveled land, hauled water and provided gravel and load pipe in connection with certain oil and gas exploration and drilling was only entitled to assert a lien under the Oil Act. Butt v. Vermejo Park Corp., 89 N.M. 679, 556 P.2d 835 (1976).

Realty liens rare. — Generally, mechanic's lien statutes do not allow a lien against the realty for material or labor entering into the construction of trade fixtures or chattels, fixtures or improvements which a tenant will be permitted to remove at the expiration of his term. Porter Lumber Co. v. Wade, 38 N.M. 333, 32 P.2d 819 (1934).

California decisions followed. — This section was taken from California and the New Mexico supreme court has consistently followed the California decisions in construing the lien statute. Tabet v. Davenport, 57 N.M. 540, 260 P.2d 722 (1953).

II. CONSTRUCTION OF STATUTE.

A. LIBERAL CONSTRUCTION.

Liberal Construction. — The Mechanic's Lien Law, being remedial in its nature, and equitable in its enforcement, should be liberally construed. Lyons v. Howard, 16 N.M. 327, 117 P. 842 (1911); Finane v. Las Vegas Hotel & Imp. Co., 3 N.M. (Gild.) 411, 5 P. 725 (1885), overruled Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897); Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902); Houston Hart Lumber Co. v. Neal, 16 N.M. 197, 113 P. 621 (1911). See also Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1933).

Doctrine of liberal construction was invoked to bring within term "structure" plaintiffs' dry water well and labor and materials used in drilling it. Dysart v. Youngblood, 44 N.M. 351, 102 P.2d 664 (1940).

While the mechanic's lien statute would be liberally construed, the court would not go beyond the rights claimed. Texas, S.F. & N.R.R. v. Orman, 3 N.M. (Gild.) 652, 9 P. 595 (1886).

B. DEFINITION OF TERMS.

Definitions of terms. — Materials to be used in the construction means materials actually used in the construction, and did not cover a swimming pool heater which was not actually used in, and did not become a part of, a swimming pool. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

The words "construction," "alteration" and "repair" have different signification. Board of Comm'rs v. State, 43 N.M. 409, 94 P.2d 515 (1939).

"Mining claim" meant portion of public mineral lands to which qualified persons could obtain rights of occupancy and possession by certain prescribed methods. Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603 (1910).

"Owner" referred to the person causing the building to be constructed. Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.2d 77 (1934); Albuquerque Lumber Co. v. Tomei, 32 N.M. 5, 250 P. 21 (1926).

The agent, in case of a mine, was any person having charge of the mine, with power to employ laborers, and such employment subjected their claims to the lien provided by the statute. Post v. Fleming, 10 N.M. 476, 62 P. 1087 (1900).

To qualify as a subcontractor, the party must perform some portion of the work for which the owner originally contracted. It is not necessary that the work be done at the construction site, but work must be performed to the contract's plans and specifications, and the work performed must be substantial. Vulcraft v. Midtown Bus. Park, Ltd., 110 N.M. 761, 800 P.2d 195 (1990).

III. APPLICATION OF STATUTES.

A. SERVICES INCLUDED.

Claimant's labor included. — Work performed by lien claimant in lime quarry as a laborer, working as a sort of foreman with other laborers, and directing them in their work, working at the lime kiln, gathering up tools, closing lime bins and caring for teams of horses, was work within the terms of the lien statute. Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603 (1910).

Architect's plans entitled to lien. — An architect who, under contract with the owner, prepares and furnishes plans for a building which is actually constructed in accordance therewith, is entitled to a lien for his services, even though he does not supervise the construction of such building. Gaastra, Gladding & Johnson v. Bishop's Lodge Co., 35 N.M. 396, 299 P. 347 (1931).

Under statute providing liens for "every person performing labor," superintending architect had right to lien not only for his services in superintending work, but also for his plans and specifications in accordance with which building was erected. Johnson v. McClure, 10 N.M. 506, 62 P. 983 (1900).

B. USE AND FURNISHING OF MATERIALS.

Furnishing use of materials sufficient. — The furnishing of materials to be used in the construction and the putting of them into the building entitled the subcontractor to the lien upon the premises to the extent of the value of such materials, for the statute was general and did not restrict the right of lien to cases when materials were sold and delivered in this territory. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908); Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902).

Use, consumption of materials required. — This statute has been construed to require both allegation and proof that the materials "furnished . . . to be used in construction" were sold to be used on the land against which the lien is claimed and that the materials were used there and became part of the structure. Panhandle Pipe & Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969).

Ordinarily, unless expressly so provided by statute, no lien may be acquired for the value or use of tools, machinery, equipment or appliances furnished or lent for the purposes of facilitating the work, where they remain the property of the contractor and

are not consumed in their use, but remain capable of use in other construction or improvement work. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

One who asserts a lien for materials must not only allege and prove that he sold the materials for use in the particular building, but that they were actually used therein. Tabet v. Davenport, 57 N.M. 540, 260 P.2d 722 (1953).

Lien as to consumed, worthless materials. — Generally a lien may be acquired for materials which, although not incorporated in the building or improvement, are used in the construction and, by their use, are actually or practically consumed, wasted, destroyed or rendered worthless or unfit for further use. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

Furnishing materials required. — The statute provides a lien for "furnishing materials to be used in the construction" of houses; there being a failure of proof plaintiff furnished such materials, the judgment correctly dismissed the lien against defendant's property. Blueher Lumber Co. v. Springer, 77 N.M. 449, 423 P.2d 878 (1967).

Where there was a failure of proof that the materials itemized on invoices were furnished for use in defendant's house, plaintiff was not entitled to lien against those materials. Blueher Lumber Co. v. Springer, 77 N.M. 449, 423 P.2d 878 (1967).

Furnishing materials required. — Mechanic's lien did not have priority over a mortgage where, although an architect had performed work prior to the recording of the mortgage, no physical work had commenced upon the site nor had any materials been delivered thereto. Security Fed. Sav. & Loan Ass'n v. Commercial Inv., Ltd., 92 Bankr. 488 (Bankr. D.N.M. 1988).

C. PROPERTY SUBJECT TO LIEN.

Test as to "improvements," "fixtures". — While this section uses the word "improvements" rather than the word "fixtures," it is recognized that the test for determining whether a given article is subject to a lien under the section is whether it is a fixture or a permanent part of the building. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Supreme court has long recognized three guidelines in determining whether an article used in connection with realty is to be considered a fixture, which are: (1) annexation, (2) adaptation and (3) intention. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Where articles are securely attached to building and are used for the purpose for which they were installed, these articles annexed to the building with the owner's knowledge became a part of the building itself. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

In determining whether articles are fixtures, intent is the chief test and must affirmatively and plainly appear. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Where building required installation of electric wiring and heating to be usable and lease provided that improvements made by lessee with consent of lessor would merge and become part of realty, improvements were intended to be fixtures and subject to mechanics' liens. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Where by express terms of a lease it is provided that improvements shall not become fixtures, and where the nature of the article is such that it is not to be permanently attached to the land, it probably remains personalty and not subject to a mechanic's lien. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

No lien on personalty not permanently affixed. — Movable drilling outfit, not designed or intended to be permanently affixed to the land, was not the subject of a mechanic's lien. Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 P. 157 (1930).

Furnishing and repairing fishing tools and appliances for oil wells, not designed for permanent annexation to the realty, did not give rise to mechanic's lien. Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 P. 157 (1930).

To authorize a mechanic's lien for the repair of machinery, such repairs had to be in the nature of fixtures, and not small parts of a machine which were constantly wearing out and having to be replaced. Ripley v. Cochiti Gold Mining Co., 12 N.M. 186, 76 P. 285 (1904).

Lien attachable upon unimproved, abandoned property. — A mechanic's or materialman's lien can attach to property even if no improvement occurred due to the owner's abandonment of the project through no fault of the claimant. Cubit Corp. v. Hausler, 114 N.M. 602, 845 P.2d 125 (1992).

Extent of property subject to lien. — A person who was entitled to a mechanic's lien by reason of material furnished or work done was entitled to a lien on the whole of the building constructed or improved together with so much of the lot or lots on which the building so constructed or improved stands, as might have been necessary for the full use and enjoyment of the property. Mountain Elec. Co. v. Miles, 9 N.M. 512, 56 P. 284 (1899).

Lessees' improvements not included. — Mere fact that bowling alleys, constructed by lessees on leased premises, were necessary to enable the lessees to carry on their business was not sufficient to subject the lessor's property to lien for materials used in the construction of the bowling alleys. Porter Lumber Co. v. Wade, 38 N.M. 333, 32 P.2d 819 (1934).

Rent not lienable item. — Rent for equipment used in doing the excavation and construction work is not a lienable item under the mechanics' and materialmen's statutes of New Mexico. Lembke Constr. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

Workers' compensation premiums not lienable. — Workers' compensation premiums are not lienable under this section because they are neither labor, equipment, nor materials. CIT Group/Equipment Fin., Inc. v. Horizon Potash Corp., 118 N.M. 665, 884 P.2d 821 (Ct. App. 1994).

A ditch and reservoir system were covered by this section. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897).

An oil well is a "structure" subject to a laborer's lien. Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 P. 157 (1930).

Fishing for lost tools in oil well was work done in "repair" of a "structure." Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 P. 157 (1930).

D. PARTIES.

1. SUBJECT TO LIEN.

Application of "agent". — Every contractor is held to be the agent of the owner for purposes of this statute. Romero v. Coleman, 11 N.M. 533, 70 P. 559 (1902).

Vendee, under executory contract reserving legal title in vendor, though "builder" of improvements thereon, was not agent of vendor. Albuquerque Lumber Co. v. Tomei, 32 N.M. 5, 250 P. 21 (1926).

Lessee of mining claim was not lessor's agent in employing laborers, so as to subject his interest to lien, and lessor was not liable unless, with knowledge, he failed to disclaim liability. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086 (1927).

A lease of improved property for three years, by the terms of which the lessee was to make certain repairs to the building in consideration of rent free for a year, did not constitute the lessee the agent of the lessor, so as to bind the lessor upon a mechanic's lien for materials furnished. Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312 (1937).

No lien against soil conservation district. — The contractor's creditors may not impose a lien of any nature against the soil conservation district for the contractor's debts where the district had directly contracted with the contractor. 1957-58 Op. Att'y Gen. No. 58-148.

2. ASSERTING LIEN.

No manufacturer's claim. — Manufacturer that invoiced contractor's supplier could not assert a claim for a manufacturer's lien against premises upon which materials were used. Ronald A. Coco, Inc. v. St. Paul's Methodist Church, 78 N.M. 97, 428 P.2d 636 (1967).

Agent-superintendent not covered. — The general agent and superintendent of a mine, who attended to all the business, directed its conduct, and was the representative of the company with absolute and plenary power to employ and discharge laborers, was not within the beneficence of this statute, enacted for the security of a class not otherwise able to protect themselves. Boyle v. Mountain Key Mining Co., 9 N.M. 237, 50 P. 347 (1897).

Materialman furnishing supplies to middleman. — This section authorizes a materialman furnishing supplies to a middleman that contracted with a general contractor to provide specially fabricated material in accordance with project specifications to assert a lien against the building project, even though the middleman did no work at the construction site. Vulcraft v. Midtown Bus. Park, Ltd., 110 N.M. 761, 800 P.2d 195 (1990).

IV. PROCEDURAL ASPECTS.

Nonresident parties. — An adjudication under New Mexico statutes not purporting to be a personal judgment against a nonresident defendant, service by publication was valid, the proceeding, as to such defendant, being in rem. Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902).

A materialman in Colorado furnishing materials and machinery to a mining company in this state for use in the mine and mill was entitled to a mechanic's lien. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

Judgment void without service. — A judgment of foreclosure of a materialman's lien obtained without service of process upon the owner of the property was as to lien void for want of jurisdiction. Robertson v. Mine & Smelter Supply Co., 15 N.M. 606, 110 P. 1037 (1910).

Assumpsit not proper procedure. — Joint action in assumpsit, brought by contractor against owner and the latter's grantee, was not proper procedure for enforcing mechanic's lien. Rupe v. New Mexico Lumber Ass'n, 3 N.M. (Gild.) 393, 5 P. 730 (1885); Straus v. Finane, 3 N.M. (Gild.) 398, 5 P. 729 (1885).

The laws of New Mexico do not give subcontractor personal cause of action against owners, only a lien against the land or structure. George M. Morris Constr. Co. v. Four Seasons Motor Inn, Inc., 90 N.M. 654, 567 P.2d 965 (1977).

The mere establishment of a lien upon defendants' property did not warrant a personal judgment against them as owners, there being no contractual relation between them and the lienors. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519 (1934).

Burden on party establishing lien. — To establish a valid materialman's lien, the burden was on defendant to prove that the heater was actually used in, and became a part of, the structure. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

No presumption of delivery. — Evidence of delivery is generally as available to materialman as to the owner, and possibly more available to the materialman, since he normally makes the delivery to the contractor, not the owner, and therefore there is generally no presumption of delivery in favor of materialman. Panhandle Pipe & Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969).

No evidence of delivery. — There was no evidence to show delivery of materials to defendant's lot which would support a lien for the claimed balance of $2,609.84 where payment made by defendant exceeded the total for materials delivered to the lot. Blueher Lumber Co. v. Springer, 77 N.M. 449, 423 P.2d 878 (1967).

Where trial court weighed the evidence and found appellant's circumstantial proof to be inconclusive as to the fact of delivery of material by appellant to defendant, if properly sustained defendant's motion to dismiss under Rule 41(b) N.M.R. Civ. P. (now Rule 1-041B NMRA). Panhandle Pipe & Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969).

Use presumed from delivery. — Use of the materials furnished by materialman in the structure, by owner, may be presumed from delivery on the theory that generally the owner is more familiar than the materialman with the disposition of the materials after they are delivered to the property. Panhandle Pipe & Steel, Inc. v. Jesko, 80 N.M. 457, 457 P.2d 705 (1969).

Parol testimony sufficient. — A written contract was not necessary to entitle a materialman to a lien, and it could be shown by parol testimony that the materials were used in the construction and improvement of the property. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

Law reviews. — For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

For note, "Under Certain Circumstances, New Mexico Law Now Allows Mechanics' Liens on Property Where Construction Never Took Place: *Cubit v. Hausler*," see 24 N.M.L. Rev. 527 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens, §§ 1, 12, 30, 35, 56, 57, 58, 72 et seq., 109, 110, 111, 226, 256, 258, 264, 333, 334.

Scope and import of term "owner" in mechanic's lien statutes, 2 A.L.R. 794, 95 A.L.R. 1085.

Enforceability of a mechanic's lien against the property of a married woman for work performed or materials furnished under a contract made with her husband, 4 A.L.R. 1025.

Validity and effect of contract against mechanics' liens, 13 A.L.R. 1065, 102 A.L.R. 356, 76 A.L.R.2d 1087.

Lien on public property, 26 A.L.R. 326.

Freight charges on material as within mechanic's lien statute giving lien for labor or material, or within contractor's bond securing such claims, 30 A.L.R. 466.

Material specially fabricated for and adapted to building, but not used therein, 33 A.L.R. 320.

Mechanic's lien for building erected by licensee, 45 A.L.R. 581.

After-acquired title as supporting mechanic's lien, 52 A.L.R. 693.

Interest of vendor under executory contract for sale of realty as subject to mechanic's lien for labor or materials furnished to purchaser, 58 A.L.R. 911, 102 A.L.R. 233.

Vendee in possession of land not owner within statute giving lien for labor or materials furnished owner, 58 A.L.R. 912, 102 A.L.R. 233.

Mechanic's lien for services of person supervising construction of building, 60 A.L.R. 1257.

Installation of electric fan as basis for mechanic's lien, 62 A.L.R. 254.

Estoppel of one who has apparently acquiesced in improvements on real property to defeat mechanics' liens by asserting antagonistic title or interest, 76 A.L.R. 317.

Mechanic's lien for labor or material for improvement of easement, 77 A.L.R. 817.

Lessee as agent of lessor within contemplation of Mechanic's Lien Law, 79 A.L.R. 962, 163 A.L.R. 992.

Garnishment in respect of obligation to contractor under construction contract where payment was conditional on contractor's furnishing release of all liens and claims, 82 A.L.R. 1118.

Liens for material and labor employed in construction of concrete forms, 84 A.L.R. 460.

Church property as subject of mechanic's lien, 85 A.L.R. 953.

Termination of lease as affecting mechanic's lien on building erected by tenant where lien did not attach to landlord's title, 87 A.L.R. 1290.

Arbitration proceedings as affecting mechanic's lien, 93 A.L.R. 1151.

Foreign corporation's failure to comply, or delay in complying, with conditions of its right to do business as affecting its right to assert mechanic's lien, 95 A.L.R. 367.

Amount of owner's obligation under his guaranty of subcontractor's or materialman's account as deductible from amount otherwise due principal contractor as against claims of other subcontractors or materialmen, 153 A.L.R. 759.

Formal requisites of notice of intention to claim mechanic's lien, 158 A.L.R. 682.

Right to mechanic's lien as for "labor" or "work," in case of preparatory or fabricating work done on materials intended for use and used in particular building or structure, 25 A.L.R.2d 1370.

Sufficiency of notice, claim or statement of mechanic's lien with respect to nature of work, 27 A.L.R.2d 1169.

Grading, clearing, filling, excavating, and the like, 39 A.L.R.2d 866.

Right to mechanic's lien upon leasehold for supplying labor or material in attaching or installing fixtures, 42 A.L.R.2d 685.

Provision against mechanic's lien in contract between principal contractor and subcontractor as affecting, 76 A.L.R.2d 1087, 75 A.L.R.3d 505.

Amendment of statement of mechanic's lien claim as to designation of owner of property, 81 A.L.R.2d 681.

Services in connection with subdividing land, 87 A.L.R.2d 1004.

Water well-drilling contracts, 90 A.L.R.2d 1346.

Taking or negotiation of unsecured note of owner or contractor as waiver of lien, 91 A.L.R.2d 425.

Swimming pool as lienable item within mechanic's lien statute, 95 A.L.R.2d 1371.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien, 3 A.L.R.3d 573.

Mechanic's lien for work on or material for separate buildings of one owner, 15 A.L.R.3d 73.

Surveyor's work as giving rise to right to mechanic's lien, 35 A.L.R.3d 1391.

Labor in examination, repair, or servicing of fixtures, machinery, or attachments in building, as supporting a mechanics' lien, or as extending time for filing such a lien, 51 A.L.R.3d 1087.

Removal or demolition of building or other structure as basis for mechanic's lien, 74 A.L.R.3d 386.

Vacation and sick pay and other fringe benefits as within mechanic's lien statute, 20 A.L.R.4th 1268.

Right of subcontractor's subcontractor or materialman, or materialman's materialman, to mechanic's lien, 24 A.L.R.4th 963.

Delivery of material to building site as sustaining mechanic's lien - modern cases, 32 A.L.R.4th 1130.

Architect's services as within mechanics' lien statute, 31 A.L.R.5th 664.

Timeliness of notice to public works contractor on federal project, of indebtedness for labor or materials furnished, 69 A.L.R. Fed. 600.

56 C.J.S. Mechanics' Liens §§ 1 to 120, 307.

48-2-2.1. Procedure for perfecting certain mechanics' and materialmen's liens.

A. The provisions of Subsections B through D of this section do not apply to claims of liens made on residential property containing four or fewer dwelling units, to claims of liens made by an original contractor or to claims of liens made by mechanics or materialmen who contract directly with the original contractor. For purposes of this section, "original contractor" means a contractor that contracts directly with the owner.

B. No lien of a mechanic or a materialman claimed in an amount of more than five thousand dollars ($5,000) may be enforced by action or otherwise unless the lien claimant has given notice in writing of the claimant's right to claim a lien in the event of nonpayment and that notice was given not more than sixty days after initially furnishing work or materials, or both, by either certified mail, return receipt requested, facsimile with acknowledgement or personal delivery to:

(1) the owner or reputed owner of the property upon which the improvements are being constructed; or

(2) the original contractor, if any.

C. If the owner or the original contractor claims lack of notice as a defense to the enforcement of a lien described in Subsection B of this section, the owner or contractor shall show that upon the request of the mechanic or materialman that the owner or contractor furnished to the lien claimant not more than five days after such request was made:

(1) the original contractor's name, address and license number, if there is an original contractor on the project;

(2) the owner's name and address;

(3) a description of the property or a description sufficiently specific for actual identification of the property; and

(4) the name and address of any bonding company or other surety that is providing either a payment or performance bond for the project.

D. The notice required to be given by the claimant pursuant to the provisions of Subsection B of this section shall contain:

(1) a description of the property or a description sufficiently specific for actual identification of the property;

(2) the name, address and phone number, if any, of the claimant; and

(3) the name and address of the person with whom the claimant contracted or to whom the claimant furnished labor or materials, or both.

E. A person required by the provisions of Subsection B of this section to give notice to enforce the person's claim of lien may elect not to give the notice, but may give the required notice at a later time. If the person elects to do so, the lien shall apply only to the work performed or materials furnished on or after the date thirty days prior to the date the notice was given. The provisions of Subsections C and D of this section apply to any notice given under this subsection.

History: Laws 1990, ch. 92, § 2; 1993, ch. 252, § 2; 2007, ch. 212, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "fewer" for "less" in the first sentence of Subsection A; substituted "right" for "intention" in the introductory paragraph of Subsection B; and, in Subsection E, in the second sentence, deleted "the effective date of" preceding "the lien", substituted "shall apply only to the" for "for", inserted "performed", and substituted "on or after the date" for "will be".

The 2007 amendment, effective June 15, 2007, amended Subsection A to exclude from Subsections B through D claims of liens made by an original contractor.

Prelien notice not required. — This section does not require contractor to provide owner of land with a prelien notice. Wilgert Enter., Inc. v. Broadway Vista Partners, 2005-NMCA-088, 137 N.M. 806, 115 P.3d 822.

"Original contractor". — Where owner of land and supermarket company were joint venturers in the construction of a supermarket, contractor's contract with supermarket owner constituted a direct contact with owner of land under this section. Wilgert Enter., Inc. v. Broadway Vista Partners, 2005-NMCA-088, 137 N.M. 806, 115 P.3d 822.

Notice of lien. — Original contractor and its first level subcontractors are not required to give notice in writing of a right to claim a lien in the event of nonpayment. Wilgert Enter., Inc. v. Broadway Vista Partners, 2005-NMCA-088, 137 N.M. 806, 115 P.3d 822.

But all third level and higher subcontractors and those in privity with them must give notice to the owner or original contractor or they will not have an enforceable lien. Wilgert Enter., Inc. v. Broadway Vista Partners, 2005-NMCA-088, 137 N.M. 806, 115 P.3d 822.

48-2-3. [Improvement of city or town lot or street; lien on lot.]

Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in or otherwise improves the same, or the street in front of, or adjoining the same, has a lien upon such lot for his work done and materials furnished.

History: Laws 1880, ch. 16, § 3; C.L. 1884, § 1521; C.L. 1897, § 2218; Code 1915, § 3320; C.S. 1929, § 82-203; 1941 Comp., § 63-203; 1953 Comp., § 61-2-3.

ANNOTATIONS

Employee's purchases considered as made at owner's request. — Where a person is employed by the owner of a lot to construct a sidewalk in front, and he purchases materials therefor, such purchase will be considered as made at the request of the owner, and entitles the materialman to a lien. Houston-Hart Lumber Co. v. Neal, 16 N.M. 197, 113 P. 621 (1911).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 112, 114, 253.

Grading, clearing, filling, excavating and the like, 39 A.L.R.2d 866.

Municipal property as subject to mechanic's lien, 51 A.L.R.3d 657.

56 C.J.S. Mechanics' Liens §§ 27 to 29.

48-2-4. [Lien covers improvements and land.]

The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

History: Laws 1880, ch. 16, § 4; C.L. 1884, § 1522; C.L. 1897, § 2219; Code 1915, § 3321; C.S. 1929, § 82-204; 1941 Comp., § 63-204; 1953 Comp., § 61-2-4.

ANNOTATIONS

Liberal construction. — Mechanic's Lien Law while in derogation of the common law, was remedial in nature and would be liberally construed. Dysart v. Youngblood, 44 N.M. 351, 102 P.2d 664 (1940).

Land subject to lien. — Appellant could not complain of the quantity of land subjected to lien under this section when he did not request the trial court to limit the area. Albuquerque Foundry & Mach. Works v. Stone, 34 N.M. 540, 286 P. 157 (1930).

Mechanic's lien for drilling a water well covered the entire section of land upon which the well was drilled. Dysart v. Youngblood, 44 N.M. 351, 102 P.2d 664 (1940).

Mechanic's lien against a reservoir and ditch system covered the land proposed to be irrigated thereby. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897).

Lien for construction of mill and tramway covered mine adjacent thereto where mill was connected to mine by tramway, same parties owned mine and mill and the mill and tramway were used solely for treatment of ores from mine. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

Lien as to separate owners. — Bill to enforce lien was not made demurrable by fact that improvement was owned by one defendant and land was owned by another where materials were furnished and work done with knowledge of both. E.J. Post & Co. v. Miles, 7 N.M. 317, 34 P. 586 (1893).

Only lessee responsible. — Where materials were charged to the lessee, the lessee's interest only was subject to the lien unless the owner failed to post notice of nonresponsibility. Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312 (1937).

Labor on interdependent properties included. — Where mining claims and a mill were leased and operated as one property, each essential to the other, and the labor was diverted from one to the other at convenience, labor performed in the mill would support a lien on the claims even though the mill was not on them. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086 (1927).

No extension of lien after attachment. — Rescission of executory contract reserving title, for vendee's default, after a materialman's lien had attached to the equitable interest did not extend lien to cover the fee. Albuquerque Lumber Co. v. Tomei, 32 N.M. 5, 250 P. 21 (1926).

Mechanic's lien not avoided by destruction of improvements after filing lien. Armijo v. Mountain Elec. Co., 11 N.M. 235, 67 P. 726 (1902).

Showing benefit to land improved by another not indispensable to lien. Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.2d 77 (1934).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 56, 57, 58, 239, 256 et seq., 415 et seq., 430 et seq.

Lien on highways and bridges, 26 A.L.R. 344.

Rights and duties as between owner of land and owner of timber or of mineral in place as regards liens covering both interests, 26 A.L.R. 1031.

Casings of oil and gas wells as subject to mechanic's lien, 39 A.L.R. 1260.

Wells as within term of statute descriptive of improvement, 55 A.L.R. 1562, 92 A.L.R. 753, 109 A.L.R. 395.

Lien on interest of one causing improvements to be made, 58 A.L.R. 938, 102 A.L.R. 233.

Assertion of lien upon real estate to which chattels under conditional sales contract are attached, 58 A.L.R. 1122.

Interest of owner of land as subject to lien for material or service engaged by holder of mineral interests, 59 A.L.R. 548.

Removal, destruction, demolition of, or damage to improvement as affecting mechanic's lien, 74 A.L.R. 428.

Construction and application of provision of lien statute as to quantity or area of land around improvement which may be subjected to lien, 84 A.L.R. 123.

Canals, drains or ditches as within term of Mechanic's Lien Law descriptive of improvement, 92 A.L.R. 753.

Oil and gas, right or interest subject to statutory lien for labor or material in developing property for, 122 A.L.R. 1182.

Rights and liabilities with respect to natural gas reduced to possession and subsequently stored in natural reservoir, 94 A.L.R.2d 543.

Swimming pool as lienable item within mechanic's lien statute, 95 A.L.R.2d 1371.

What constitutes "commencement of building or improvement" for purposes of determining accrual of lien, 1 A.L.R.3d 822.

56 C.J.S. Mechanics' Liens §§ 4, 10, 18, 20, 22, 27, 28, 211 to 219, 236, 237, 274.

48-2-5. Preference over other encumbrances.

A. The liens provided for in Sections 48-2-1 through 48-2-17 NMSA 1978 are preferred to any lien, mortgage or other encumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done or materials were commenced to be furnished; also to any lien, mortgage or other encumbrance of which the lienholder had no notice and which was unrecorded at the time the building, improvement or structure was commenced, work done or the materials were commenced to be furnished.

B. Liens filed by registered surveyors shall have priority equal with other mechanics' and materialmen's liens, but work performed by registered surveyors shall not constitute the commencement of construction.

History: Laws 1880, ch. 16, § 5; C.L. 1884, § 1523; C.L. 1897, § 2220; Code 1915, § 3322; C.S. 1929, § 82-205; 1941 Comp., § 63-205; Laws 1947, ch. 8, § 1; 1949, ch. 18, § 1; 1953 Comp., § 61-2-5; Laws 1991, ch. 43, § 2.

ANNOTATIONS

The 1991 amendment, effective April 1, 1991, in Subsection A added the subsection designation and substituted "Sections 48-2-1 through 48-2-17 NMSA 1978" for "this article" and added Subsection B.

Meaning of "this article". — The words "this article" were substituted for "this act" by the 1915 Code compilers and refer to art. 1 of ch. 67, Code 1915 compiled herein as 48-2-1 to 48-2-8, 48-2-10 to 48-2-16 NMSA 1978.

In order for work to constitute a "commencement" such work must have been done on the "building, improvement or structure" upon which the lien is claimed. Accordingly,

work done that is not a part of the "building, improvement or structure" is irrelevant in assessing lien priorities. Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 784 P.2d 415 (1989); First Interstate Bank v. Hutchens, 112 N.M. 497, 816 P.2d 1119 (1991).

Determination of priority of subcontractor's lien on a home for providing materials and labor, vis-a-vis that of a mortgage recorded after work has already commenced on the construction project, relates back to the date when any construction actually commenced, even though the subcontractor's work commenced after the mortgage was recorded. Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Centers, Inc., 106 N.M. 223, 741 P.2d 826 (1987).

Prior recorded mortgages protected. — Although the statute in terms prefers mechanics' and materialmen's liens, the court has construed its language to protect mortgage liens recorded prior to commencement of work. House of Carpets, Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973).

As the mortgage was recorded prior to commencement of any work or the delivery of any materials to the construction site, absent any other facts, the mortgage lien would clearly prevail over the materialmen's liens by reason of this statute. House of Carpets, Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973).

Priority of obligatory advances under mortgage previously recorded. — A first mortgagee making future advances, which are optional and not obligatory under the first mortgage, with actual knowledge of an intervening lien, cannot obtain priority for subsequent advances over the intervening lien; however, where the making of the advances is obligatory upon the mortgagee or beneficiary, the lien of a mortgage or trust deed receives priority over mechanics' liens when the mortgage or deed has been recorded before the mechanics' lien attaches, despite the fact that advances are actually given subsequently to this time. House of Carpets, Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973).

If no default, mortgagee's advances obligatory. — Note which concludes with a statement that if it becomes immediately due and payable, as a result of an event of default, the appellant will be under no obligation to advance any additional portion of this note and shall incur no liability for refusing to do so, infers that if there are no events of default, the mortgagee was obligated to continue making advances under the note and, hence, the making of future advances is obligatory rather than optional. House of Carpets, Inc. v. Mortgage Inv. Co., 85 N.M. 560, 514 P.2d 611 (1973).

Mortgagee retains priority with contemporaneous discharge and new mortgage. — Where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening mechanic's lien. Houston Lumber Co. v. Skaggs, 94 N.M. 546, 613 P.2d 416 (1980).

Lien precedes any mortgage or trust deed not recorded. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

Mortgage without priority where continuing contract. — Where owner contracted to buy materials and pay within 30 days after each shipment, it was a continuing contract during construction, and fact that owner paid for all deliveries made before a mortgage was recorded, did not give the mortgagee priority over materialman for materials furnished later. Maxwell Lumber Co. v. Connelly, 34 N.M. 562, 287 P. 64 (1930).

Attachment with priority. — Plaintiff seizing real estate under writ of attachment and service of lis pendens notice acquired lien having priority over mechanic's lien for work done after the filing of lis pendens notice. Bell v. Gaylord, 6 N.M. 227, 27 P. 494 (1891).

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens § 265 et seq.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as against holder of mechanic's lien, 13 A.L.R. 459, 73 A.L.R. 748, 88 A.L.R. 1318, 111 A.L.R. 362, 141 A.L.R. 1283.

Priority of vendor's lien under executory contract for sale of realty, over mechanic's lien for labor or materials furnished purchaser, 58 A.L.R. 947, 102 A.L.R. 233.

Right of one who pays, or advances money or assumes obligation to pay, labor or materialman, to mechanic's lien or priority, 74 A.L.R. 522.

Remedy available to holder of mechanic's lien which has priority over antecedent mortgage or vendor's title or lien as regards the improvement but not as regards the land, where it is impossible or impracticable to remove the improvement, 107 A.L.R. 1012.

Constitutionality of statute giving to lien for alteration of property pursuant to public requirement, mechanic's lien or similar lien, preference over pre-existing mortgage or other lien, 121 A.L.R. 616, 141 A.L.R. 66.

Amount of owner's obligation under his guaranty of subcontractor's or materialman's account, as deductible from amount otherwise due principal contractor, as against claims of other subcontractors as materialmen, 153 A.L.R. 759.

Priority between mechanics' liens and advances made under previously executed mortgage, 80 A.L.R.2d 179.

56 C.J.S. Mechanics' Liens §§ 220 to 245.

48-2-6. Time for filing lien claim; contents.

Every original contractor, within one hundred and twenty days after the completion of his contract, and every person, except the original contractor, desiring to claim a lien pursuant to Sections 48-2-1 through 48-2-19 NMSA 1978, must, within ninety days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county clerk of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credits and offsets. The claim shall state the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, and shall include a statement of the terms, time given and the conditions of the contract, and also a description of the property to be charged with the lien, sufficient for identification. The claim must be verified by the oath of himself or of some other person.

History: Laws 1880, ch. 16, § 6; C.L. 1884, § 1524; C.L. 1897, § 2221; Code 1915, § 3323; Laws 1921, ch. 108, § 1; C.S. 1929, § 82-206; 1941 Comp., § 63-206; 1953 Comp., § 61-2-6; Laws 1979, ch. 168, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Compiler's notes. — Sections 48-2-18 and 48-2-19 NMSA 1978, referred to in the first sentence, were repealed by Laws 1981, ch. 352, § 2.

Mechanics' lien law is remedial in nature, equitable in its enforcement and should be liberally construed. Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

Purpose of statutory requirements. — In determining whether there has been substantial compliance, the purpose of the requirements of this section must be kept in mind, the primary object being to give notice to subsequent purchasers and incumbrancers and inform the owner of the extent and nature of the lienor's claim. Marsh v. Coleman, 93 N.M. 325, 600 P.2d 271 (1979); Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

This statute must be liberally construed. Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1934).

The Mechanics' Lien Law, though in derogation of the common law, is remedial in its nature and is to have a liberal construction. Chavez v. Sedillo, 59 N.M. 357, 284 P.2d 1026 (1955).

Supreme court will follow California decisions in construction of lien statute. Chavez v. Sedillo, 59 N.M. 357, 284 P.2d 1026 (1955).

Only substantial compliance with terms of this section is required. Marsh v. Coleman, 93 N.M. 325, 600 P.2d 271 (1979); Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

Claimant's name must appear on claim of lien. — There is no requirement under this section that a claim of lien contain a description of the type of entity that filed it; it is only necessary that the name of the claimant appear on the claim of lien, and courts have been liberal in upholding claims or statements in this respect. Marsh v. Coleman, 93 N.M. 325, 600 P.2d 271 (1979).

Proof under pleadings inexcusable trouble, expense. — Where under pleadings upon which the plaintiff has elected to stand he would have to prove matters at variance with the claim of lien he is seeking to foreclose, to put the parties to proof would result in inexcusable trouble and expense. Chavez v. Sedillo, 59 N.M. 357, 284 P.2d 1026 (1955).

Separate orders for material did not create separate liens where the understanding was that the materialman would furnish as much as the owner needed. Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1934).

When overstatement of amount due no invalidation. — In the absence of fraud or bad faith, an overstatement of the amount due does not invalidate a claim of lien. Marsh v. Coleman, 93 N.M. 325, 600 P.2d 271 (1979).

Effective recording without full payment. — Materialman's lien was filed for record within contemplation of statute even though it was accepted by the clerk without requiring payment of the full fee therefor, and the lien was superior to subsequent mortgage liens upon the premises therein described. Hedrick v. Jagger, 46 N.M. 379, 129 P.2d 340 (1942).

Superintendent's claim void. — A superintendent's claim for a fixed sum for all his services, part of which was not within the scope of the statute, was void in toto. Boyle v. Mountain Key Mining Co., 9 N.M. 237, 50 P. 347 (1897).

Notice requirement for a workers' compensation insurer's claim of a lien right against a performance bond, given in connection with a state construction project, was governed by this article, and not by the Little Miller Act, 13-4-18 to 13-4-20 NMSA 1978. State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc., 106 N.M. 140, 740 P.2d 690 (1987).

II. SUFFICIENCY OF CLAIM.

A. IN GENERAL.

No special statutory requirements for the allegations in complaints to enforce a mechanic's lien. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Alteration of original lien claim did not void it where cross claim of appellee was not based upon the original lien claim, but upon supplemental lien claim attached to the pleading which appeared to be timely filed, to contain the necessary recitals, and to be properly verified. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Notice attachment to complaint not required. — In action to foreclose, a copy of the notice of lien need not be attached to the complaint, the action not being founded on the notice. Weggs v. Kreugel, 28 N.M. 24, 205 P. 730 (1922).

Recorded lien, lacking acknowledgment, valid and binding between parties. — A valid materialmen's lien which lacked an acknowledgment, but had been filed and recorded, was valid and binding as between the parties to an action on the lien. Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

Circumstantial evidence is sufficient to foreclose on a materialmen's lien. Consolidated Electrical Distributors, Inc. v. Santa Fe Hotel Group, LLC, 2006-NMCA-005, 138 N.M. 781, 126 P.3d 1145.

Direct evidence is not required to establish the required elements for a valid lien. Consolidated Electrical Distributors, Inc. v. Santa Fe Hotel Group, LLC, 2006-NMCA-005, 138 N.M. 781, 126 P.3d 1145.

B. IDENTIFICATION OF LAND.

Claim should contain a description of the property sufficient for identification. Ackerson v. Albuquerque Lumber Co., 38 N.M. 191, 29 P.2d 714 (1934).

Requirement of land identification in claim complied with. — Where lien form claim listed mechanics' claim as against lot upon which minor portion of building was located but statement of charges for work completed correctly described address of building and owners admitted in answer that building was located at the named address, statute requiring that land identified in lien claim be land upon which improvements were made was complied with. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Insufficient identification of land. — Property described as "Lot one (1) of block numbered thirty-five (35) in the Terrace Addition" was not sufficiently identified where there was no block 35 in the Terrace Addition. Ackerson v. Albuquerque Lumber Co., 38 N.M. 191, 29 P.2d 714 (1934).

Actual knowledge irrelevant as to land description. — Actual knowledge plays no part in the test of description "sufficient for identification," and the same rule applies in case of the owner or one in possession of the facts as against the subsequent

purchaser or encumbrancer in good faith. Ackerson v. Albuquerque Lumber Co., 38 N.M. 191, 29 P.2d 714 (1934).

C. IDENTIFICATION OF PARTIES.

Owner identification sufficient. — Notices of claims for mechanics' liens were not insufficient because they alleged that the defendant "was the owner or reputed owner" of the mine against which the liens were sought to be established, since the designation made no difference in the liability. Minor v. Marshall, 6 N.M. 194, 27 P. 481 (1891).

Contrasting party required to be named. — This section did not require lien claimant to advise owner that lien was created by virtue of contract made with owner's agent, but it did require claimant to give owner name of party with whom contract was made. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897); E.J. Post & Co. v. Miles, 7 N.M. 317, 34 P. 586 (1893).

D. STATEMENT OF TERMS.

Claim showing amount due sufficient. — Claim for mechanic's lien was sufficient which shoed amount due after deducting credits and offsets for excavation and embankments made under special contract, copy of which was attached to claim. Springer Land Ass'n v. Ford, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897), aff'g, 8 N.M. 37, 41 P. 541 (1895).

This section requires "a statement of the terms, time given and conditions of his contract" and where under this recital in the printed form is typed "30 days net cash," the lien claim would comply with the requirements of the statute. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Requirements for lien claim. — The claim of lien must not only contain a statement of the terms, time given and conditions of the contract, but such statement must be true. Chavez v. Sedillo, 59 N.M. 357, 284 P.2d 1026 (1955).

E. STATUTE OF LIMITATIONS.

Materialmen's liens must be filed within statutory period, after which the remedy becomes unavailable to the claimant. Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

Lien timely filed 90 days after job completion. — Where the lien was filed on July 25, 2001, as the job was completed on April 26, 2001, and 90 days from April 26 expired on July 25, the lien was timely filed. Consolidated Electrical Distributors, Inc. v. Santa Fe Hotel Group, LLC, 2006-NMCA-005, 138 N.M. 781, 126 P.3d 1145. 138 N.M. 781, 126 P.3d 1145

No running of limitations where structure not substantially completed. — Where contractor failed to install elevating doors to a driveway through a wall of funeral home structure, or seven wheel guards on driveway, or iron pipe balcony rail, or ornamental iron grilles on three windows, structure was not substantially completed so as to start running of limitations against a mechanic's lien. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519 (1934).

"Substantial completion" of a building, improvement or structure is adequate to start the running of the limitation period within which a claim of lien of a material supplier must be filed. Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 706 (1968).

Explanation of "substantial completion". — Under former law, it was held that substantial completion was completion within meaning of provision of Mechanic's Lien Law (prior to 1921 amendment) requiring subcontractor to file lien within 60 days after completion of building. Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910); Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902).

Building is "substantially completed" notwithstanding trivial imperfections or omissions. Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 706 (1968).

A building is substantially completed for purpose of determining timeliness of mechanics' liens when all of the essentials necessary to the full accomplishment of the purpose for which the building has been constructed are performed. Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 706 (1968).

Period limited for filing a lien begins to run, as to each item of a running account, from the date when the last item was furnished. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

Lien timely filed two months after furnishing materials. — Where none of the several suspensions of work on the house were caused by any act or default chargeable to the material furnisher, and all of them were occasioned by the contractor's recurring breaches of the construction contract, and where the owner never abandoned his attempts to persuade the contractor to resume work and complete his original contract, twice amended, and although it took 33 months to finish the job, and where the owner paid all material bills due the materialman except those incurred during the last 18 months before completion, under such circumstances the lien filed within two months after furnishing the last item of material was filed in time. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

Suit filed timely within six months after debt due. — If the agreement contemplated time in which to pay (credit) then the requirement that suit to foreclose the lien must be brought within one year after filing was extended so as to make timely a suit filed within six months after the debt was due, but not later than two years after completion of the work. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

Abandonment equivalent to completion. — Where dumbwaiter accessory was abandoned by agreement of contractor and homeowners more than 90 days before lumber supplier filed mechanic's lien, such abandonment was equivalent in law to completion for purpose of determining timeliness of filing of mechanic's lien. Tabet Lumber Co. v. Baughman, 79 N.M. 57, 439 P.2d 706 (1968).

Temporary interruption not abandonment. — The temporary interruption in the furnishing of materials by a materialman, pending the making of more satisfactory credit arrangements, is not an abandonment of the undertaking to start the running of limitations. Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1933).

Omitting work to seek additional finances did not constitute abandonment. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519 (1934).

Equitable tolling. — District court acted within its discretion in applying equitable principles to toll the running of the filing deadline; although the contractors were told they would be paid upon inspection of the property and closing of the loan, they did not receive notice of an inspection or closing date despite repeated attempts to secure such information from the loan officer, and as such, the running of the 120-day filing deadline started from the time that the contractors realized they would not be paid in full from the proceeds of the owners' loan. Chase Manhattan Mtg. Corp. v. Caraway, 2003-NMCA-020, N.M. , 62 P.3d 748.

Right to foreclosure existed immediately upon filing lien, and the six-month period of limitations immediately began to run, and any disability which arrests the running of the statute must exist at the time the right of action accrues. The statute having once attached, the period will continue to run, and is not suspended by any subsequent disability. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

No foreclosure right upon filing invalid lien. — The mere filing of a materialman's lien did not give defendant the right to foreclose the lien, where the lien was invalid from its inception because it was filed after defendant knew that the swimming pool heater he had furnished was not actually used, and it was not a part of the swimming pool. Branch v. Mays, 89 N.M. 536, 554 P.2d 1297 (Ct. App. 1976).

No extension unless offered accepted. — The claim and statement which constituted a mechanic's lien had to be filed within 60 days after completion of the contract, and a proposal to extend the contract unless accepted was of no effect as an extension. Wiley v. San Pedro & Canon Del Agua Co., 5 N.M. 111, 20 P. 115 (1889).

Abbreviated filing period contingent on notice to subcontractor. — Where no notice was given by the contractor to the subcontractor as required in Paragraph B of 48-2-10.1 NMSA 1978, the abbreviated 20-day notice requirement of that section is not applicable, and a subcontractor is entitled to rely on the 90-day notice provision of this section. Pyburn v. Kirkpatrick, 106 N.M. 247, 741 P.2d 1368 (1987).

Time for filing. — Under former law, it was held that the provision of the mechanic's lien statute (prior to 1921 amendment) requiring subcontractor to file lien within 60 days after completion of building did not fix period of time during which a lien of a subcontractor had to be filed, but fixed a point of time after which such lien could not be filed. Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910).

F. VERIFICATION.

Verification requirement of this section is to be liberally construed. Garrett Bldg. Centers, Inc. v. Hale, 95 N.M. 450, 623 P.2d 570 (1981).

Verification of entire claim required. — The claim itself, and not any one or more averments of the claim less than all, must be verified. Minor v. Marshall, 6 N.M. 194, 27 P. 481 (1891).

Failure of verification fatal. — Where, though claim for mechanic's lien purported to have been sworn to, neither the signature nor seal of the officer before whom it was purportedly verified appeared, such failure was fatal to admissibility of the paper as a claim of lien and to the right to enforce any lien based thereon. Finane v. Las Vegas Hotel & Imp. Co., 3 N.M. (Gild.) 411, 5 P. 725 (1885), overruled on other grounds Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895).

Substantial compliance as to verification is all that is required. Lyons v. Howard, 16 N.M. 327, 117 P. 842 (1911).

Insufficient compliance with verification requirements. — A total absence of any words confirming correctness, truth or authenticity by affidavit, oath, deposition or otherwise, is not sufficient compliance with the requirements of a verification. Home Plumbing & Contracting Co. v. Pruitt, 70 N.M. 182, 372 P.2d 378 (1962).

Acknowledgment to mechanics' lien in form provided by 14-13-9 NMSA 1978 is insufficient to comply with the verification requirement of this section. New Mexico Properties, Inc. v. Lennox Indus., Inc., 95 N.M. 64, 618 P.2d 1228 (1980).

Clerk of district court of sister state could administer oath to a lien claimant when, under the laws of the sister state, such clerk was empowered to administer oaths, especially where the laws of New Mexico recognized the right of clerks to administer oaths. Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902).

Lien claim could be acknowledged by clerk of probate court, in absence of an authorizing statute, because clerks of courts of record at common law could administer oaths and the probate court met the requirements of a common-law court of record. Bucher v. Thompson, 7 N.M. 115, 32 P. 498 (1893).

This act does not require an affidavit to claim of lien; claim is sufficient if signed by a party, and if notary or other proper officer says that it is sworn to by the person signing it. Lyons v. Howard, 16 N.M. 327, 117 P. 842 (1911).

G. SUFFICIENCY OF NOTICE.

Exact statutory words not required. — Notice of mechanic's lien was not fatally defective for failure to use exact words of statute as to amount remaining due after allowing all just credits and offsets. Hobbs v. Spiegelberg, 3 N.M. (Gild.) 357, 5 P. 529 (1885).

Signature sufficient. — A notice of lien is not void because the Christian name of the person signing was designated by initials. Pearce v. Albright, 76 P. 286 (1904).

Notice where record filed as to balance. — Where claim was simply the account of the laborer or materialman, notice thereof could be filed for record simply in the form of ordinary bookkeeping, showing on one page the debits, on the opposite page the credits, striking a balance and alleging under oath that the amount there stated was due. Hobbs v. Spiegelberg, 3 N.M. (Gild.) 357, 5 P. 529 (1885).

If actual notice, no claim of ignorance by owner. — The primary object of filing the claim is to give notice to subsequent purchasers and incumbrancers and inform the owner of the extent and nature of the lienor's claim and as defendant was the owner he cannot rightfully claim that he was ignorant of the extent and nature of the lienor's claim, having in fact actual notice of the terms and conditions of the contract. Crego Block Co. v. D.H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969).

III. GENERAL DEFINITIONS.

"Original contractor" defined. — As bearing on time for filing claim of lien, every person who deals directly with the owner of property and who, in pursuance of a contract with him, performs labor or furnishes materials is an original contractor. Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603 (1910).

Materialman as "original contractor". — A materialman who sells material to a conditional vendee in possession is dealing with the "owner" and is an "original contractor." Freidenbloom v. Pecos Valley Lumber Co., 35 N.M. 154, 290 P. 797 (1930).

Materialmen furnishing plumbing and heating supplies for a building are "original contractors" under this statute, and required to file claim within 120 days after completion of contract. Hot Springs Plumbing & Heating Co. v. Wallace, 38 N.M. 3, 27 P.2d 984 (1934).

Legal title not necessary to be "owner". — One who pays part of the purchase price for real estate and takes possession in order to make improvements where it is expected that he will remain in possession, making subsequent payments, is an "owner"

under this section, not withstanding that legal title was in name of another. Hill v. Long, 61 N.M. 299, 299 P.2d 472 (1956).

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens § 175 et seq.

Requisites and sufficiency of notice of mechanic's lien in case of "cost plus" contract, 26 A.L.R. 1328.

Substitution or replacement of material as affecting time for filing mechanic's lien, 54 A.L.R. 984.

Agreement for, or acceptance of, other security as affecting right to lien of one who pays, or advances money or assumes obligation to pay laborer or materialman, 74 A.L.R. 531.

Right to amend notice of claim after expiration of time for filing claim, 81 A.L.R. 360.

Right of one other than contractor, laborer or materialman to file mechanic's lien, 83 A.L.R. 11.

Time when contractor commenced work or time when labor or material for which lien is claimed was furnished as date of mechanic's lien, 83 A.L.R. 925.

Continuing contract, transaction or account, what constitutes as regards time for filing mechanic's lien, 97 A.L.R. 780.

Removal by, or return to, claimant of part of material furnished as affecting time for filing claim, 122 A.L.R. 755.

Description and location of land required in notice of claim or statement, 52 A.L.R.2d 12.

Sale of real property as affecting time for filing notice of or perfecting mechanic's lien as against purchaser's interest, 76 A.L.R.2d 1163.

Time for filing notice or claim of mechanic's lien where claimant has contracted with general contractor and later contracts directly with owner, 78 A.L.R.2d 1165.

Sufficiency of notice under statute making notice by owner of nonresponsibility necessary to prevent mechanic's lien, 85 A.L.R.2d 949.

Sufficiency of designation of owner in notice, claim or statement of mechanic's lien, 48 A.L.R.3d 153.

Abandonment of construction or of contract as affecting time for filing mechanics' liens or time for giving notice to owner, 52 A.L.R.3d 797.

Liability of purchaser of real estate on mechanic's lien based on goods or labor supplied to vendor but filed after title passed, 33 A.L.R.4th 1017.

56 C.J.S. Mechanics' Liens §§ 132, 140, 141, 153, 155 to 195.

48-2-7. [Claims against two or more buildings or improvements; statement of amount due; loss of preference.]

In every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims or other improvements, otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated as against other creditors having liens, by judgment, mortgage or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

History: Laws 1880, ch. 16, § 7; C.L. 1884, § 1525; C.L. 1897, § 2222; Code 1915, § 3324; C.S. 1929, § 82-207; 1941 Comp., § 63-207; 1953 Comp., § 61-2-7.

ANNOTATIONS

Lien postponed, not voided. — Failure to segregate amounts due on each of the buildings does not render lien void, but does postpone such unsegregated liens to other liens. Post v. Fleming, 10 N.M. 476, 62 P. 1087 (1900).

Omission of the amount claimed to be due on each of two buildings does not affect the validity of the lien, but simply affects its priority. Allsop Lumber Co. v. Continental Cas. Co., 73 N.M. 64, 385 P.2d 625 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 170, 209, 242, 243, 249, 415 et seq., 430 et seq.

Mechanic's lien for work on or material for separate buildings of one owner, 15 A.L.R.3d 73.

Enforceability of single mechanic's lien upon several parcels against less than the entire property liened, 68 A.L.R.3d 1300.

56 C.J.S. Mechanics' Liens §§ 136, 137, 148 to 152, 161, 162, 185 to 188, 193, 194, 196, 216.

48-2-8. Recording of liens; indexing; fees.

The county clerk shall make a record of a claim that shall be indexed as deeds and other conveyances are required by law to be indexed and for which the county clerk may receive the same fees as are allowed by law for recording deeds and other instruments. Any claim, the form of which complies with the requirements of Chapter 48, Article 2 NMSA 1978, shall be entitled to be filed of record.

History: Laws 1880, ch. 16, § 8; C.L. 1884, § 1526; C.L. 1897, § 2223; Code 1915, § 3325; C.S. 1929, § 82-208; 1941 Comp., § 63-208; 1953 Comp., § 61-2-8; 1981, ch. 351, § 1; 2011, ch. 134, § 19.

ANNOTATIONS

Cross references. — For fees of recorder, see 14-8-12 NMSA 1978.

The 2011 amendment, effective July 1, 2011, eliminated the provision that provided that claims need not comply with Section 14-8-4 NMSA 1978.

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 130 et seq., 151, 175, 191 et seq., 274, 275, 276.

Amendment of statement of claim of mechanic's lien as to designation of owner of property, 81 A.L.R.2d 681.

56 C.J.S. Mechanics' Liens §§ 133 to 195, 390, 435.

48-2-9. Petition to cancel lien; security.

A. The owner of any building, mining claim, improvement or structure subject to a lien under Sections 48-2-1 through 48-2-17 NMSA 1978 or an original contractor having a contract with that owner may petition the district court for the county in which the property or a part of it is located for an order canceling the lien.

B. Upon the filing of the petition, the district court judge shall examine the lien claimant's recorded demands and determine an amount sufficient to satisfy the recorded demands and any other damages, court costs or attorney fees that may be recovered by the lien claimant. Security, in the amount set by the judge and of a type approved by the judge, shall be deposited by the owner of the property or original contractor with the district court conditioned on the payment of any sum found to be validly due to the lien claimant. An owner or original contractor may not provide a single security for the cancellation of the lien of more than one claimant.

C. When the security is deposited under this section, the judge of the district court shall immediately issue an order canceling the lien and shall notify the county clerk with

whom the lien was filed. Upon the recording of the order, the county clerk shall mark the filed lien as canceled. When an order is issued under this subsection, the claimant's lien attaches to the security and is enforceable as to the security in the district court in which it is deposited to the same extent as any other lien provided for in Sections 48-2-1 through 48-2-17 NMSA 1978.

History: 1953 Comp., § 61-2-8.1, enacted by Laws 1975, ch. 68, § 1; 2007, ch. 212, § 2.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, provided that the owner of property subject to a lien under 48-2-1 through 48-2-17 NMSA 1978 or an original contractor having a contract with the owner may petition the district court for an order to cancel the lien; that an owner or original contractor may not provide a single security for the cancellation of a lien of more than one claimant; and that when a claimant's lien attaches to security, it is enforceable as provided in 48-2-1 through 48-2-17 NMSA 1978.

48-2-10. Limitation of action to enforce.

No lien provided for in Sections 48-2-1 through 48-2-17 NMSA 1978 remains valid for a longer period than two years after the claim of lien has been filed unless proceedings have been commenced in a court of competent jurisdiction or in binding arbitration within that time to enforce the lien. A contingent payment clause in a contract shall not be construed as a waiver of the right to file and enforce a mechanic's or materialman's lien pursuant to Sections 48-2-1 through 48-2-17 NMSA 1978.

History: Laws 1880, ch. 16, § 9; C.L. 1884, § 1527; C.L. 1897, § 2224; Code 1915, § 3326; C.S. 1929, § 82-209; 1941 Comp., § 63-209; 1953 Comp., § 61-2-9; Laws 1979, ch. 168, § 2; 1990, ch. 92, § 1; 2007, ch. 212, § 3.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, rewrote the section to the extent that a detailed comparison is impracticable.

The 2007 amendment, effective June 15, 2007, tolled the limitation if the lien was submitted to arbitration within the two-year period and provided that a contingent payment clause shall not be construed as a waiver of the right to file and enforce a lien.

Definition of "credit". — "Credit" as that term is used in the statute, refers to terms for payment agreed upon when the sale is made, or possibly at a later time, but before filing of the claim of lien. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968).

Commencement of proceeding by filing, service of motion. — The filing and service of a motion to intervene, accompanied by a pleading setting forth the claim, constitutes the commencement of a proceeding for the mechanic's lien. Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979 (1970); Callaway v. Ryan, 67 N.M. 283, 354 P.2d 999 (1960).

Suit timely if within six months after debt due. — If the agreement contemplated time in which to pay (credit) then the requirement that suit to foreclose the lien must be brought within one year after filing was extended so as to make timely a suit filed within six months after the debt was due, but not later than two years after completion of the work. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968) (decided prior to 1990 amendment).

Judgment reversed where late filing to enforce lien. — Under former mechanics' lien statutes the pleading seeking the enforcement of a lien against the property had to be filed in the proper court within one year from the date of filing the lien, and where no such pleading was filed to enforce appellee's lien within that time the judgment for plaintiff had to be reversed. Brito v. Carpenter, 81 N.M. 716, 472 P.2d 979 (1970) (decided prior to 1990 amendment).

Once attached, statute of limitations not suspended by subsequent disability. — The right to foreclosure existed immediately upon the filing of the lien, and the six-month period of limitations immediately began to run, and any disability which arrested the running of the statute had to exist at the time the right of action accrued. The statute having once attached, the period continued to run, and was not suspended by any subsequent disability. Mutual Bldg. & Loan Ass'n v. Fidel, 78 N.M. 673, 437 P.2d 134 (1968) (decided prior to 1990 amendment).

Automatic stay in bankruptcy proceeding. — Statutory enforcement period was tolled pursuant to the federal bankruptcy law, where an automatic stay arising from the filing of a bankruptcy petition had prevented the lienholder from foreclosing on property leased by the owner to the bankruptcy debtor. Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354 (10th Cir. 1991).

Issue treated as raised by pleadings where tried with consent. — Where appellants made no objection to evidence of contractor's license and raised neither the jurisdiction nor the limitation question at trial, and requested no findings on either question, the requirement of the allegation of a contractor's license was a matter of public policy and did not, otherwise, bear any relation to the cause of action; and appellant cannot object to appellate court treating an issue tried with consent of the parties as though it had been raised by the pleadings. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 348 et seq., 408, 409, 410.

56 C.J.S. Mechanics' Liens §§ 258, 323 to 330.

48-2-10.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 301, § 13 repeals 48-2-10.1 NMSA 1978, as enacted by Laws 1981, ch. 352, § 1, relating to discharge of liens, effective June 16, 1989. For provisions of former section, see 1987 Replacement Pamphlet. For present comparable provisions, see 48-2A-11 NMSA 1978.

48-2-11. [Construction with knowledge of owner subjects land to lien; notice by owner of nonresponsibility.]

Every building or other improvement mentioned in the second section [48-2-2 NMSA 1978] of this article, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this article, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

History: Laws 1880, ch. 16, § 11; C.L. 1884, § 1529; C.L. 1897, § 2226; Code 1915, § 3327; C.S. 1929, § 82-210; 1941 Comp., § 63-210; 1953 Comp., § 61-2-10.

ANNOTATIONS

Theory of act. — This act is based on considerations of benefits deemed adequate to overcome constitutional barriers, absence of which may not be proved to defeat lien claimed, and to raise against owner the conclusive presumption that he consented to improvements of which he knew if within three days after acquiring such knowledge he does not post, on premises in another's possession, statutory notice of nonliability. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Time for posting. — Although lessor has granted lessee rent free for a year in consideration of repairs to the building, and hence had knowledge that repairs had to be made, his posted notice three days after he had knowledge that work had actually begun was timely. Rio Grande Lumber & Fuel Co. v. Buergo, 41 N.M. 624, 73 P.2d 312 (1937).

Time of notice of nonresponsibility as to third parties. — When the claimant gives the owner, in his claim, the name of the party with whom the contract was made, it becomes the owner's duty, within three days after he shall have obtained knowledge of

the contract, to give notice that he will not be responsible for the same, and if he fails to do so he is bound by the lien. E.J. Post & Co. v. Miles, 7 N.M. 317, 34 P. 586 (1893).

Personal liability of owner to subcontractors. — Property owner cannot be held personally liable to subcontractors for work and material where there was no contractual relationship between him and the subcontractors and the principal contractor had agreed to pay them. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519 (1934).

By posting notice of nonliability, owner does not become a guarantor that the notice thus given in statutory form will always be brought home to potential lien claimants. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Lien when owner with knowledge, failed to post notice. — Contractor doing earth work in constructing ditch and reservoir system was entitled to lien thereon and land appurtenant thereto where it appeared that his employer, by a contract with the owner, was to receive part of the proceeds of sale of such lands when sold at an increased value, after construction of the ditch, that owner had full notice of the construction contract, and that owner gave no notice that it would not be responsible for the work as required by this section. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897).

Where the owners of a mine have known of the employment of laborers by their agent and fail to post notice as above provided, the laborers are entitled to a lien. Pearce v. Albright, 12 N.M. 202, 76 P. 286 (1904); Post v. Fleming, 10 N.M. 476, 62 P. 1087 (1900).

Legal owner with duty to post notice. — Where one pays part of the purchase price for real estate and takes possession in order to make improvements, but legal title remains in another, it is the duty of the party holding legal title, if he knows the work is being done and he wishes to protect his interest in the real estate against the possibility of lien claims, to post notice on the property that he will not assume any responsibility for any work done or material furnished. Hill v. Long, 61 N.M. 299, 299 P.2d 472 (1956).

Vendee under executory contract not vendor's agent. — Vendee, under executory contract reserving legal title in vendor, though "builder" of improvements thereon, was not agent of vendor. Albuquerque Lumber Co. v. Tomei, 32 N.M. 5, 250 P. 21 (1926).

If no posting because of representation, owner protected by equity. — Where contractor's representative promised land owner that mechanic's lien would not be filed against the land if owner refrained from posting a nonresponsibility notice, equitable estoppel applied to prevent foreclosure of lien against land by contractor, despite lack of nonresponsibility notice. Franklin's Earthmoving, Inc. v. Loma Linda Park, 74 N.M. 530, 395 P.2d 454 (1964).

Oral notice insufficient. — Where a lumber company sells materials to a purchaser of a lot on contract, title to which has not yet been acquired, oral notice by lot owner to the

lumber company, that the purchaser has no title, is not sufficient to avoid liability of the lot owner on mechanic's lien absent the posting of the premises required by this section. Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.2d 77 (1934).

Notice irrelevant when owner involved in contract. — An owner of land who, himself, orders or contracts for an improvement to be erected thereon cannot escape responsibility for materials purchased for use in the improvement, and the posting of a notice in such a case amounts to nothing. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

This section is not applicable to a person who caused the building to be constructed or who contracted for the improvements directly or indirectly. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

Good faith posting required. — A vendor under executory contract for sale of real estate does not automatically absolve his premises from liability by the mere physical act of posting notices when, contrary to the legislative intent, the posting was not in good faith and was done under circumstances which the vendor must have realized would preclude the notice contemplated by the act. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Owner with good faith duty to replace notice. — Where owner learns that notice he has previously posted has been destroyed or torn down before reasonable time has elapsed, good faith calls upon him to repost. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Presumption notices remained posted. — Where notices of nonresponsibility had been posted securely by the vendor on two buildings and on board fence behind which construction was proceeding and the improvements contracted for by the purchasers in possession did not require demolition of the posting places, supreme court presumed that the notices remained posted for adequate period of time to acquaint the persons whom they were designed to reach with the information to be imparted. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Burden shifted to lien claimant by such presumption. — Where presumption has arisen that notices remain posted for sufficient time to impart knowledge to persons sought to be reached, the burden shifts to the lien claimants to develop proof by way of confession and avoidance to nullify effect of the notice thus attempted. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

In determining whether articles are fixtures, intent is the chief test and must affirmatively and plainly appear. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Wiring, heating intended as fixtures subject to lien. — Where building required installation of electric wiring and heating to be usable and lease provided that improvements made by lessee with consent of lessor would merge and become part of

realty, improvements were intended to be fixtures and subject to mechanics' liens. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

If improvements not fixtures, lien inapplicable. — Where by express terms of a lease it is provided that improvements shall not become fixtures, and where the nature of the article is such that it is not to be permanently attached to the land, it probably remains personalty and not subject to a mechanic's lien. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Articles part of building where securely attached. — Where articles are securely attached to building and are used for the purpose for which they were installed, these articles annexed to the building with the owner's knowledge became a part of the building itself. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Foreclosure on mining claims. — In action to foreclose liens on mining claims, owner could consistently take position that disclaimer provision of section did not apply to mining claims and, at same time, contend that if they did, she had complied with them. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086 (1927).

Land identification sufficient. — Where lien form claim listed mechanics' claim as against lot upon which minor portion of building was located but statement of charges for work completed correctly described address of building and owners admitted in answer that building was located at the named address, statute requiring that land identified in lien claim be land upon which improvements were made was complied with. Boone v. Smith, 79 N.M. 614, 447 P.2d 23 (1968).

Notice to general manager of corporation is sufficient notice to corporation. Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

If Oil Act applicable, no enforcement without express contract. — Under the Mechanics' Act, a lien may be imposed upon the fee owner's interest if he has knowledge of the construction and fails to disclaim responsibility therefor in the manner and within the time therein provided while under the Oil Act (70-4-1 NMSA 1978 et seq.), the fee owner's interest is subject to a lien only if he expressly so contracts, which is an obvious conflict if both acts apply. It was held that a company which built roads, leveled land, hauled water and provided gravel and load pipe in connection with certain oil and gas exploration and drilling were only entitled to assert a lien under the Oil Act. Butt v. Vermejo Park Corp., 89 N.M. 679, 556 P.2d 835 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Knowledge of owner of improvements or repairs, intended or in process under orders of lessee or vendee, as "consent," which will subject his interest to mechanics' liens, 4 A.L.R. 685.

Construction and application of statutory provisions making notice by owner of nonresponsibility for work or improvement on his property necessary to prevent attachment of mechanic's lien, 123 A.L.R. 7, 85 A.L.R.2d 949.

Sufficiency of notice of nonresponsibility, 85 A.L.R.2d 949.

56 C.J.S. Mechanics' Liens §§ 27, 28, 49 to 95.

48-2-12. Contractor liable for liens of subcontractors.

The contractor shall be entitled to recover upon a lien filed by the contractor only such amount as may be due to the contractor according to the terms of the contract, after deducting all claims of subcontractors under the contractor who have filed liens for work done and materials furnished, and during the pendency of the action, the owner may withhold from the contractor the amount of money for which the lien is filed unless the lien was asserted as a result of the owner's failure to pay the contractor for work done and materials furnished, and in case of judgment against the owner or the owner's property upon the lien, the owner shall be entitled to deduct from any amount due or to become due by the owner to the contractor the amount of the judgment. If the amount of the judgment exceeds the amount due by the owner to the contractor, or if the owner settles with the contractor in full, the owner shall be entitled to recover back from the contractor any amount paid by the owner, in excess of the contract price, and for which the contractor was originally the party liable.

History: Laws 1880, ch. 16, § 12; C.L. 1884, § 1530; C.L. 1897, § 2227; Code 1915, § 3328; C.S. 1929, § 82-211; 1941 Comp., § 63-211; 1953 Comp., § 61-2-11; 2007, ch. 212, § 4.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, eliminated the requirement that the contractor defend an action brought by a subcontractor and prohibited the owner from withholding money if the lien was asserted as a result of the owner’s failure to pay the contractor for work done and materials furnished.

Contractor obligated to owner for judgment, expenses of defense. — Owner, who was held liable for the lien, was entitled to judgment over against contractor for such amount, together with his expenses incurred in defending the action, since under this section the contractor was obligated to defend the action at his own expense. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

Recovery limited to contract. — Under this section, a contractor is entitled to recover upon a lien filed by him only such an amount as may be due him according to the terms of his contract. Nickle v. Coulter, 22 N.M. 105, 159 P. 673 (1916).

Separate finding erroneous where contractors, owners jointly liable. — In action by subcontractors to enforce lien by assumpsit, on a joint liability of the contractors and owners, it was error to find separately against the owners for sale of the property, and a general judgment for the money against the contractors. Rupe v. New Mexico Lumber Ass'n, 3 N.M. (Gild.) 393, 5 P. 730 (1885).

Supplier, not contractor, held indispensable party. — There is nothing in this section which makes the contractor an indispensable party. The tests of indispensability are whether the plaintiff is the owner of the right sought to be enforced, and whether he could release and discharge the defendant from the liability upon which the action is grounded. The supplier, as plaintiff, meets these tests, without the addition of the contractor. Crego Block Co. v. D.H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969).

Contractor is not indispensable party in suit involving lien foreclosure. Crego Block Co. v. D.H. Overmyer Co., 80 N.M. 541, 458 P.2d 793 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 160, 163, 170.

Rejection of work because not in compliance with principal contract as affecting right of subcontractor or materialman to lien, 16 A.L.R. 981.

Preexisting indebtedness of contractor to owner as affecting right of subcontractor, materialman or laborer to mechanic's lien, 68 A.L.R. 1263.

Payment in property other than money, mechanic's lien as affected by agreement for, 81 A.L.R. 766.

"Contractor," who is, within provisions limiting liens for material or labor to contractor to amount earned but unpaid on contract, or give such liens by subrogation, 83 A.L.R. 1152.

Bankruptcy of contractor or subcontractor, effect upon mechanics' liens of their subcontractors, laborers and materialmen, 98 A.L.R. 323.

Subcontractor, lien for labor and materials furnished to, against money due to principal contractor for public improvement, 112 A.L.R. 815.

Amount of owner's obligation under his guaranty of subcontractor's or materialmen's account, as deductible from amount otherwise due principal contractor, as against claims of other subcontractors or materialmen, 153 A.L.R. 759.

Amount for which mechanic's lien may be obtained where contract has been terminated or abandoned by consent of parties or without fault on contractor's part, 51 A.L.R.2d 1009.

Subcontractor's lien, provision against mechanic's lien in contract between principal contractor and subcontractor as affecting, 76 A.L.R.2d 1087, 75 A.L.R.3d 505.

Right of subcontractor who has dealt only with primary contractor to recover against property owner in quasi contract, 62 A.L.R.3d 288.

Effect of bankruptcy of principal contractor upon mechanic's lien of a subcontractor, laborer or materialman as against owner of property, 69 A.L.R.3d 1342.

Release or waiver of mechanic's lien by general contractor as affecting rights of subcontractor or materialman, 75 A.L.R.3d 505.

Vacation and sick pay and other fringe benefits as within mechanic's lien statute, 20 A.L.R.4th 1268.

Timeliness of notice to public works contractor on federal project, of indebtedness for labor or materials furnished, 69 A.L.R. Fed. 600.

56 C.J.S. Mechanics' Liens §§ 100, 106, 115, 123, 391 to 396.

48-2-13. [Rank of liens; order of payment.]

In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz:

A. all persons other than the original contractors and subcontractor;

B. the subcontractors;

C. the original contractors.

And the proceeds of the sale of the property must be applied to each lien, or class of liens, in the order of its rank, and whenever, on the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner, and with like effect as in actions for the foreclosure of mortgages.

History: Laws 1880, ch. 16, § 13; C.L. 1884, § 1531; C.L. 1897, § 2228; Code 1915, § 3329; C.S. 1929, § 82-212; 1941 Comp., § 63-212; 1953 Comp., § 61-2-12.

ANNOTATIONS

Cross references. — For foreclosure of mortgages, see 39-4-1 NMSA 1978 et seq.

Priority in time gives priority in right between lien holders of the same class. Kemp Lumber Co. v. Howard, 237 F. 574 (8th Cir. 1916).

Payment to real property lienors of same priority. — Once the priority between lienors of real property is determined according to 48-2-5 NMSA 1978, this section determines the rank of lienors of the same priority; when payment from the proceeds of foreclosed real property is distributed to lienors of the same rank, it must be done pro rata, and without regard to the time in which liens of the same rank vested. Valley Fed. Sav. & Loan Ass'n v. T-Bird Home Centers, Inc., 106 N.M. 223, 741 P.2d 826 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 265 et seq., 325, 415 et seq., 428 et seq.

56 C.J.S. Mechanics' Liens §§ 220 to 245.

48-2-14. Joinder of actions; attorney fees; costs.

Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them. A prevailing party in a dispute arising out of or relating to a lien action is entitled to recover from the other party the reasonable attorney fees, costs and expenses incurred by the prevailing party.

History: Laws 1880, ch. 16, § 14; C.L. 1884, § 1532; C.L. 1897, § 2229; Code 1915, § 3330; C.S. 1929, § 82-213; 1941 Comp., § 63-213; 1953 Comp., § 61-2-13; 2005, ch. 120, § 1; 2007, ch. 212, § 5.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, permitted the court to award attorney fees to the prevailing party in a lien foreclosure action.

The 2007 amendment, effective June 15, 2007, provided that a prevailing party may recover reasonable attorney fees, costs and expenses.

Section permitting allowance of attorney's fees is constitutional. Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603 (1910); Genest v. Las Vegas Masonic Bldg. Ass'n, 11 N.M. 251, 67 P. 743 (1902); Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910).

Allowance of fees rests in sound discretion of trial court and reviewing court will not alter or change such allowance unless there is manifest abuse of discretion of the court. Montgomery v. Karavas, 45 N.M. 287, 114 P.2d 776 (1941); Armijo v. Mountain Elec. Co., 11 N.M. 235, 67 P. 726 (1902); Pearce v. Albright, 12 N.M. 202, 76 P. 286 (1904); Baldridge v. Morgan, 15 N.M. 249, 106 P. 342 (1910).

No change in allowance unless abuse of discretion. — Court of appeals would not change an allowance made under this section by the trial court unless there was a manifest abuse of discretion. Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525 (Ct. App. 1968).

Trial court alone has authority to allow attorney's fees. Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370 (1953).

"Reasonable attorney's fee". — While the criteria under the Rules of Professional Conduct may, in general, determine the reasonableness of a fee, the court does not set the fee as between the mechanic or materialman and his attorney. Under this section, the court simply allows recovery of a "reasonable attorney's fee" from the owner. Ulibarri v. Gee, 106 N.M. 637, 748 P.2d 10 (1987).

Close scrutiny where amount based on questions collateral to lien. — The reasonableness of the attorney's fee must be closely scrutinized if the amount is based on the defense of counterclaims and other questions collateral to the enforcement of the lien. Lenz v. Chalamidas, 109 N.M. 113, 782 P.2d 85 (1989).

Time spent as factor in awarding fees. — The trial court's emphasis on time spent as the persuasive factor in awarding attorney fees, especially to an attorney inexperienced in lien foreclosure actions, resulted in an excessive award and was an abuse of discretion. Lenz v. Chalamidas, 113 N.M. 17, 821 P.2d 355 (1991).

Remand to trial court as to attorney's fees. — On affirmance of judgment foreclosing a lien, the supreme court will not fix attorney's fees for services on appeal, but will remand for allowance by the trial court at its discretion. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086 (1927).

Findings of fact for attorney fee awards. — In setting attorney fee awards, a trial court must make findings of fact on those factors on which the parties have presented evidence. Without findings of fact and conclusions of law, the supreme court cannot properly perform its reviewing function. Lenz v. Chalamidas, 109 N.M. 113, 782 P.2d 85 (1989).

Award of attorney fees on appeal requires statutory authority. Alber v. Nolle, 98 N.M. 100, 645 P.2d 456 (Ct. App. 1982).

Section permits court to allow additional attorney's fees for appeals. Daughtrey v. Carpenter, 82 N.M. 173, 477 P.2d 807 (1970).

Attorney's fees authorized in court of appeals. — Although this statute did not authorize an allowance of attorney fees in the court of appeals, the clear legislative intent was to authorize allowance of attorney fees in the trial and appellate courts. To deny an allowance for attorney fees in this court while authorizing such an allowance in the supreme court would be an absurd result. Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525 (Ct. App. 1968).

Attorney's fees treated as costs. — The language of this section indicates that any allowance made for attorney fees should be as costs, and treated the same as the

money paid for filing and recording the lien. Home Plumbing & Contracting Co. v. Pruitt, 70 N.M. 182, 372 P.2d 378 (1962).

Section does not apply to reimbursement of legal fees to subcontractors in suits against prime contractors for the recovery of work performed. Tyner v. DiPaolo, 76 N.M. 483, 416 P.2d 150 (1966).

Homeowners not entitled to attorney's fees. — Although this section allows for the award of attorney's fees to successful lien holders, it does not allow recovery of attorney's fees by homeowners. This article is meant to protect lien holders and not homeowners. Tabet Lumber Co. v. Romero, 117 N.M. 429, 872 P.2d 847 (1994).

No attorney's fees where no action. — Where no action was filed and no court had exercised its discretion in allowing filing and attorney's fees to a lien claimant, he is not entitled to such fees. Price v. Van Lint, 46 N.M. 58, 120 P.2d 611 (1941).

Award for defending counterclaim. — Although attorney's fees may be awarded for defending a counterclaim, it should be the exception and not the rule to do so. Hiatt v. Keil, 106 N.M. 3, 738 P.2d 121 (1987).

Attorney's fee held unreasonable. — This section provides that the fee must be reasonable, and a fee in excess of 300% more than the judgment awarded is patently unreasonable. Hiatt v. Keil, 106 N.M. 3, 738 P.2d 121 (1987).

Lien enforcement suit in equity. — A suit for the enforcement of a mechanic's lien must be brought on the equity side of the court, unless otherwise provided by statue. Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895), aff'd, 168 U.S. 513, 18 S. Ct. 170, 42 L. Ed. 562 (1897), overruled on other grounds Finane v. Las Vegas Hotel & Imp. Co., 3 N.M. (Gild.) 411, 5 P. 725 (1885); Ford v. Springer Land Ass'n, 8 N.M. 37, 41 P. 541 (1895); Rupe v. New Mexico Lumber Ass'n, 3 N.M. (Gild.) 393, 5 P. 730 (1885); Straus v. Finane, 3 N.M. (Gild.) 398, 5 P. 729 (1885); Newcomb v. White, 5 N.M. 435, 23 P. 671 (1890); Minor v. Marshall, 6 N.M. 194, 27 P. 481 (1891).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 337, 353, 403, 461 et seq.

Appointment of receiver in action to enforce mechanics' liens, 1 A.L.R. 1466.

Original contractor as necessary party to suit by subcontractor or materialman to enforce mechanic's lien against property of married woman for work performed or materials furnished under a contract made with her husband, 4 A.L.R. 1034.

Pleadings, verification by agent or attorney in action to enforce, 7 A.L.R. 13.

Prior action on contract in which claim on mechanic's lien might have been asserted by counterclaim, setoff or cross petition as bar to subsequent action to foreclose lien, 8 A.L.R. 714.

Interpleader against contractor and lien claimants, 70 A.L.R. 515.

What amounts to bringing of suit within limited time required by mechanic's lien statute, 75 A.L.R. 695.

Dismissal of proceeding to enforce mechanic's lien because of delay in prosecuting it, 79 A.L.R. 847.

Waiver of failure to bring suit to enforce lien in time prescribed, by failure to raise objection by demurrer or answer, 93 A.L.R. 1462.

Principal contractor as necessary party to suit to enforce mechanic's lien of subcontractor, laborer or materialman, 100 A.L.R. 128.

Nonresidence or absence of defendant from state as suspending running of limitations against action to foreclose mechanic's lien, 119 A.L.R. 372.

56 C.J.S. Mechanics' Liens §§ 296 to 307, 317, 318, 323 to 330, 333 to 343, 404, 408, 432 to 436.

48-2-15. [Materials exempt from attachment or execution for purchaser's debts.]

Whenever materials shall have been furnished for use in the construction, alteration or repair of any building or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration or repair of such building, mining claim or other improvement.

History: Laws 1880, ch. 16, § 15; C.L. 1884, § 1533; C.L. 1897, § 2230; Code 1915, § 3331; C.S. 1929, § 82-214; 1941 Comp., § 63-214; 1953 Comp., § 61-2-14.

ANNOTATIONS

Cross references. — For personal property, exemptions from execution and attachment, see 42-10-1 NMSA 1978.

For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, see Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

For form for claim of exemption from garnishment, see Rule 4-809 NMRA.

48-2-16. [Personal action for recovery of debt not affected.]

Nothing contained in this article shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor.

History: Laws 1880, ch. 16, § 16; C.L. 1884, § 1534; C.L. 1897, § 2231; Code 1915, § 3332; C.S. 1929, § 82-215; 1941 Comp., § 63-215; 1953 Comp., § 61-2-15.

ANNOTATIONS

Personal liability of owner to subcontractor. — When there is no contractual relation between subcontractors and the owner of the property, the latter will not be held personally liable to them for work and materials, the contractor having agreed to make payment. Allison v. Schuler, 38 N.M. 506, 36 P.2d 519 (1934).

Where there is no contractual relation between owner and lienors, a personal judgment for the amount of the debt is unwarranted. Home Plumbing & Contracting Co. v. Pruitt, 70 N.M. 182, 372 P.2d 378 (1962).

Claim in quantum meruit permitted. — A subcontractor who has lost his mechanic's lien claim against a property owner may have a claim in quantum meruit where the owner has not paid the general contractor. United States ex rel. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am., 695 F.2d 455 (10th Cir. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens §§ 338, 339, 340, 447.

56 C.J.S. Mechanics' Liens §§ 307 to 311.

48-2-17. Contractors; workmen's compensation insurance premiums; rights against performance bond.

Unpaid premiums or charges for the furnishing of workmen's compensation insurance furnished to any contractor or subcontractor, who is required by the terms of his contract or by law to obtain and carry such insurance, shall be and is hereby defined to be material furnished to the contractor or subcontractor for use in the performance of

the contract, and the person, firm or corporation so furnishing the same shall have the same rights and remedies against any performance bond given in connection with such contract as if the workmen's compensation insurance so furnished were physical property, and as though a lien had been filed against the improved premises, but shall have no lien against the improved premises.

History: 1953 Comp., § 61-2-17, enacted by Laws 1967, ch. 127, § 1.

ANNOTATIONS

The remedy provided under this section is treated as a lien right. State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc., 106 N.M. 140, 740 P.2d 690 (1987).

The phrase "in connection with such contract" refers to the general construction contract and does not require that the bond be executed in connection with the insured's subcontract. State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc., 106 N.M. 140, 740 P.2d 690 (1987).

Notice requirement governed by this act, not Little Miller Act. — Notice requirement for a workers' compensation insurer's claim of a lien right against a performance bond, given in connection with a state construction project, was governed by the Mechanics' Lien Act, 48-2-1 et seq. NMSA 1978, and not by the Little Miller Act, 13-4-18 to 13-4-20 NMSA 1978. State ex rel. Mountain States Mut. Cas. Co. v. KNC, Inc., 106 N.M. 140, 740 P.2d 690 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mechanics' Liens § 314.

56 C.J.S. Mechanics' Liens §§ 290 to 306.

48-2-18, 48-2-19. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 352, § 2, repeals 48-2-18 and 48-2-19 NMSA 1978, relating to the notice required to be given the owner of residential property and the failure to discharge a valid lien. For present provisions, see 48-2-10.1 NMSA 1978.

ARTICLE 2A
Stop Notice Act

48-2A-1. Short title.

This act [48-2A-1 to 48-2A-12 NMSA 1978] may be cited as the "Stop Notice Act".

History: Laws 1989, ch. 301, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of statutes requiring construction fundholder to withhold payments upon "stop notice" from subcontractor, materialman, or other person entitled to funds, 4 A.L.R.5th 772.

48-2A-2. Purpose.

The legislature finds there are practices within the industry of constructing residential properties containing not more than four dwelling units resulting in certain financial inequities and, therefore, declares that the purpose of the Stop Notice Act [48-2A-1 to 48-2A-12 NMSA 1978] is to: provide for timely payment by an original contractor to persons contracted with to furnish labor or materials incorporated or to be incorporated in residential construction; define stop notices and their legal usage; encourage construction lenders to assert reasonable supervision, monitoring and control of funds disbursed to the original contractor for the timely payment of labor or materials; restrain and bar diversion of funds for purposes not directly involved with construction of the residential site improvement; and provide for criminal penalties.

History: Laws 1989, ch. 301, § 2.

48-2A-3. Definitions.

As used in the Stop Notice Act [48-2A-1 to 48-2A-12 NMSA 1978]:

A. "bond" means good and sufficient sureties executed by a corporate surety entity or cash collateral;

B. "claimant" means any person entitled under the Stop Notice Act to give a stop notice for labor or materials furnished in connection with site improvement;

C. "claim satisfied notice" means a notice from the subcontractor or the materialman to the construction lender, if any, and the owner that the claim stated in the stop notice has been satisfied;

D. "completion of construction" means the earlier of the dates when any of the following occur:

(1) issuance of a certificate of occupancy;

(2) acceptance by construction lender of the final appraisal of value of the improvement on the residential site; or

(3) approval of final inspection by the insuring abstract or title entity;

E. "construction lender" means any financial institution lending funds for the purposes of contracting for construction or for materials to be incorporated for site improvements or any other person lending or holding funds to pay for construction costs or materials that were incorporated in site improvements;

F. "labor" means the performance of work or furnishing of skills or other necessary services to a site improvement;

G. "materialman" means any person who furnishes materials or supplies to a subcontractor or an original contractor, incorporated or to be incorporated into a site improvement;

H. "original contractor" means any contractor who has an express contractual relationship with the owner or in the case when the owner is the contractor, the owner;

I. "person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other association; "person" also means, to the extent permitted by law, any federal, state or other governmental unit or political subdivision;

J. "preliminary notice" means a notice which notifies the owner or the construction lender that the labor furnished or material incorporated or to be incorporated may be subject to a stop notice if the subcontractor or materialman is not paid timely;

K. "residential site" means the real property upon which the construction labor is furnished or the materials were incorporated or are to be incorporated for the site improvement;

L. "site improvement" means the construction on a residential site of no more than four dwelling units;

M. "stop notice" means a written instrument, signed and verified by the claimant or his agent that provides the claimant with a procedure to make and enforce a claim against the construction lender, or owner if there is no construction lender; and

N. "subcontractor" means any person performing labor upon or providing or hauling equipment, tools or machinery to the site.

History: Laws 1989, ch. 301, § 3.

48-2A-4. Requirements for disclosure; owners and construction lenders.

A. In every instance where an original contractor proposes to contract with a subcontractor or materialman or both for any site improvement, the original contractor shall inform the subcontractor and materialman of:

(1) the name and address of the owner of the residential site;

(2) the name and address of the construction lender lending the funds, if any, and the loan officer who actually made the construction loan, if any, for the site improvement; and

(3) the accurate legal description of the residential site, if available, however in all cases a description of the residential site sufficient for identification.

B. Where a subcontractor contracts with another subcontractor for labor or a materialman to provide materials for any site improvement, he shall, upon request, inform the contractor or materialman of:

(1) the name and address of the owner of the residential site;

(2) the name and address of the construction lender lending the funds, if any, and the loan officer who actually made the construction loan, if any, for the site improvement; and

(3) the accurate legal description of the residential site.

History: Laws 1989, ch. 301, § 4.

48-2A-5. Stop notices; contents.

A stop notice shall not be effective unless:

A. it is signed and verified by the claimant or his agent, accompanied with a bond as provided for in Section 7 [48-2A-7 NMSA 1978] of the Stop Notice Act, is served pursuant to Section 6 [48-2A-6 NMSA 1978] of the Stop Notice Act and states in general terms all of the following:

(1) the name of the claimant;

(2) the date the claimant files the preliminary notice;

(3) the date the claimant presented his request for payment to the original contractors;

(4) the name of the owner and original contractor of the residential site;

(5) a description of the kind of labor or materials furnished, or agreed to be furnished, for the residential site;

(6) the name of the person who ordered the labor or who accepted the materials;

(7) the total cost of all the labor or materials to be furnished to the residential site;

(8) the cost of the labor furnished or materials already furnished;

(9) the balance of the money due; and

(10) a demand that the construction lender, if any, or the owner, if there is no construction lender, withhold a sufficient amount of money from the construction loan funds to satisfy the demand of the claimant;

B. a preliminary notice was given by the claimant, in accordance with Section 6 of the Stop Notice Act, within twenty days after the claimant first began to furnish work or materials to the residential site;

C. if the claimant does not deliver the preliminary notice within twenty days after the claimant first began to furnish work or material to the site improvement, he may still deliver a preliminary notice but he shall lose his stop notice rights for all work performed or materials furnished more than twenty days before the preliminary notice actually is given; and

D. it is delivered, pursuant to Section 6 of the Stop Notice Act, no earlier than twenty days or later than thirty days from the date the subcontractor or materialman presented his request for payment to the original contractor.

History: Laws 1989, ch. 301, § 5.

48-2A-6. Notices.

A. Any preliminary notice given under the Stop Notice Act [48-2A-1 to 48-2A-12 NMSA 1978] shall be effective notice if the preliminary notice is:

(1) hand-delivered or mailed, return receipt requested, to the construction lender, if applicable for the purposes of the Stop Notice Act, or the manager or other responsible person at the address of the construction loan's origination or, if the address of origination has changed, then to the last known address of the construction lender; and

(2) hand-delivered to the owner or mailed, return receipt requested, to the owner's last known residential or business address.

B. The stop notice shall be effective notice if the stop notice was hand-delivered by a small package express carrier addressed to the manager of the real estate lending department of the construction lender if the construction lender is a financial institution. If the construction lender is not a financial institution, the stop notice shall be delivered to the manager or other responsible person at the address where the construction loan originated.

History: Laws 1989, ch. 301, § 6.

48-2A-7. Stop notices; bonds.

A. A stop notice shall not be effective unless it is accompanied by a bond equal to one and one-quarter of the amount of the claim stated in the stop notice. The claimant shall be the principal on the bond, and the bond shall have good and sufficient sureties executed by a corporate surety entity.

B. Requirements of posting bond set forth in this section shall be satisfied when the claimant posts cash collateral with the recipient of the stop notice, one and one-quarter times the amount of the payment or payments claimed.

C. The bond shall protect the owner, the original contractor and the construction lender against any damages that may be incurred by them because of the delivery of the stop notice.

History: Laws 1989, ch. 301, § 7.

48-2A-8. Distribution of construction funds; liability.

A. Upon receipt of a claim stated in a stop notice, the construction lender, if any, or the owner, if applicable, shall withhold an amount of construction funds equal to the amount claimed in the stop notice from the original contractor until the claim has been satisfied or adjudicated by a court of competent jurisdiction, unless the remaining construction funds are insufficient to completely satisfy the claim due to the prior disbursement or prior amounts being withheld due to previously received stop notices. In these instances, only the remaining unclaimed portion of the construction loan shall be withheld.

B. All funds not disbursed or unclaimed by a stop notice may be disbursed by the construction lender to the original contractor without liability to the construction lender; provided, that if the construction lender disburses construction funds to the original contractor which are subject to an unsatisfied stop notice that is later adjudicated by a court of competent jurisdiction in favor of the claimant, the construction lender shall be liable for the amount of the claim stated in the stop notice. In any action adjudicating a claim stated in the stop notice or adjudicating a claim made pursuant to this section, the prevailing party may be awarded reasonable attorneys' fees.

History: Laws 1989, ch. 301, § 8.

48-2A-9. Limitations for filing suit by claimant.

A. Suit for satisfaction of the stop notice shall be filed not earlier than thirty days after delivery of the stop notice and within sixty days after delivery of the stop notice, and written notice of such suit shall be mailed to the recipient of the stop notice within five days after the date the suit was filed.

B. While the stop notice suit for satisfaction is being litigated, the claimant shall not file a lien for payment of money claimed by the stop notice.

History: Laws 1989, ch. 301, § 9.

48-2A-10. Claim satisfied notice; procedure; contents; penalty.

A. A stop notice shall be discharged when:

(1) the claim has been satisfied and the claimant has notified the construction lender, if any, and the owner, if applicable, that the claim has been satisfied pursuant to Subsection C of this section; or

(2) time for filing pursuant to Subsection A of Section 9 [48-2A-9 NMSA 1978] of the Stop Notice Act has expired without suit being filed; or

(3) the original contractor gives the construction lender, if any, or the owner, if applicable, a bond one and one-quarter times the amount of the claim stated in the stop notice. The original contractor shall be the principal on the bond, and the bond shall have good and sufficient sureties executed by a corporate surety company. The bond shall protect the subcontractor or the materialman against damages that may be incurred by them by reason of nonpayment of a claim as adjudicated by a court of competent jurisdiction.

B. If a claim has been satisfied pursuant to this section then the claimant shall give notice of the satisfaction to the construction lender, if any, and the owner, if applicable.

C. A claim satisfied notice shall not be effective unless it contains at least the same information as required in the stop notice including a statement signed by the claimant stating that the claim has been satisfied and the claimant agrees to discharge the stop notice.

D. A claimant is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978 if he fails to deliver a claim satisfied notice to all persons who received a bonded stop notice, in accordance with this section, within ten days from the date the claim was satisfied.

History: Laws 1989, ch. 301, § 10.

48-2A-11. Discharge; penalty.

A. Payment by the owner or his successor in interest to any person entitled to payment of all and any amounts due and owing for any labor or materials furnished or other actions the performance of which could give rise to a lien pursuant to Section 48-2-2 NMSA 1978 to be performed upon a residential site shall discharge all such liens unless prior to payment any person who is entitled to such lien has filed for record his lien pursuant to Section 48-2-6 NMSA 1978. For the purposes of this section, the original contractor shall not be the agent of the owner.

B. Any contractor or subcontractor justly indebted to a supplier of material or labor who accepts payment for construction described in Subsection A of this section and knowingly and intentionally applies the proceeds to a use other than paying those persons with whom he contracted is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 301, § 11.

ANNOTATIONS

Applicability of section to owners. — Where final payment was not made, the owners cannot avail themselves of this section. Pyburn v. Kirkpatrick, 106 N.M. 247, 741 P.2d 1368 (1987).

Subsection A of this section discharges mechanics' and materialmen's liens recorded after the owner has made full payment for construction work performed when the owner has not been given the written notice of potential lien claims prescribed by Subsection B. Sundance Mechanical & Util. Corp. v. Armijo, 106 N.M. 249, 741 P.2d 1370 (1987).

This section imposes no duty upon the owner of a residential building containing four or fewer units to obtain from the original contractor notice or an affidavit as described in Subsection B in order to enjoy the protection from liens provided by Subsection A. Sundance Mechanical & Util. Corp. v. Armijo, 106 N.M. 249, 741 P.2d 1370 (1987).

This section applies to innocent owners only, i.e., owners who had no notice, actual or constructive, of intervening claims by unpaid materialmen. C & D Plumbing, Inc. v. Armstrong, 106 N.M. 155, 740 P.2d 705 (1987).

Where owners had notice that a subcontractor had not been paid by the contractor, the owners are not innocent as to subcontractor's claim of debt, and thus the subcontractor is entitled to recover against the owner for the remaining amount of his claim. Pyburn v. Kirkpatrick, 106 N.M. 247, 741 P.2d 1368 (1987).

The words "all amounts due and owing" in this section mean final payment, not partial payment. C & D Plumbing, Inc. v. Armstrong, 106 N.M. 155, 740 P.2d 705 (1987).

Partial payment not sufficient. — The legislature intended to emphasize the rule of *C & D Plumbing, Inc. v. Armstrong*, 106 N.M. 155, 740 P.2d 705 (1987) when, in 1989, it amended the language of this section to read "all and any amounts due and owing"; that language means payment of all amounts still owing under the original contract is the only way to discharge liens that are subsequently imposed upon the property. Partial payment to the contractor is not sufficient to do so. Wade v. Farnsworth, 1996-NMCA-053, 121 N.M. 698, 917 P.2d 967.

Effect of section on filing deadlines. — Since this section is more specific and more recently enacted than 48-2-6 NMSA 1978, it controls to reduce the filing time, where the original contractor has presented his bill for final payment from 90 to 20 days; and where the owner has paid the original contractor, no subcontractor of whom the owner had no notice of an amount owed, may file a lien because of Subsection A of this section. Aztec Wood Interiors, Inc. v. Andrade Homes, Inc., 104 N.M. 45, 716 P.2d 236 (1986).

Abbreviated filing period contingent on notice to subcontractor. — Where no notice was given by the contractor to the subcontractor as required in Subsection B, the 20-day notice requirement of that subsection is not applicable, and a subcontractor is entitled to rely on the 90-day notice provision of 48-2-6 NMSA 1978. Pyburn v. Kirkpatrick, 106 N.M. 247, 741 P.2d 1368 (1987).

Effect of escrow account on final payment. — An escrow account set up after the total contract price was paid as a device to ensure the general contractor completed certain punchlist items that did not concern the subcontractor's lien at all did not prevent final payment from occurring under the Stop Notice Act. Tabet Lumber Co. v. Romero, 117 N.M. 429, 872 P.2d 847 (1994).

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

48-2A-12. Purchase closing; penalty.

A. The original contractor, upon accomplishing completion of construction and upon acceptance of final payment from the owner, his successor in interest or his agent, shall sign an affidavit that all invoices of charges and costs received by the original contractor and related to the residential site have been paid. In lieu of such an affidavit, at the time of accomplishing completion of construction and upon acceptance of final payment from the owner, his successor in interest or his agent, the original contractor shall sign an affidavit stating:

(1) the names and addresses of persons to whom he has paid in full those invoices of charges and costs arising from furnishing labor or materials incorporated in the residential site;

(2) the names and addresses of those subcontractors and materialmen who have presented to the contractor invoices of charges and costs of labor or materials incorporated or to be incorporated in the residential site which have not been paid, accompanied by a waiver of lien for the invoices properly signed by each subcontractor or materialman; and

(3) the names and addresses of those subcontractors and materialmen who have presented the contractor invoices of charges and costs of labor or materials incorporated or to be incorporated in the site improvement and which have not been paid and which have not been accompanied by a waiver of lien.

B. The approximate amount of money represented by the total unpaid invoices of charges and costs, and not accompanied by a signed waiver of lien, as provided in this section, may be withheld at the discretion of the owner, his successor in interest or his agent. This money shall be placed in an escrow account pending disbursement of the money upon the signed approval of the contractor.

C. Any contractor who knowingly and intentionally signs an affidavit stating that all charges and costs arising from the furnishing of labor or materials for incorporation in the residential site have been paid when in fact all charges and costs have not been paid, or knowingly and intentionally fails to provide the names of persons who have presented invoices for costs and charges for labor or materials but who have not been paid for their labor or materials furnished as provided in this section, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 301, § 12.

ARTICLE 3
Liens on Personal Property

48-3-1. Liens for manufacture or repairs; motor vehicles.

A. All artisans and mechanics shall have a lien on things made or repaired by them for the amount due for their work, and may retain possession thereof until said amount is paid. Any person or corporation who repairs any motor vehicle or furnishes parts therefor, at the request or with the consent of any person lawfully in possession of any such motor vehicle, shall have a lien upon such motor vehicle or any part or parts thereof for the sum due for repairing the same, and for labor furnished thereon and for all costs incurred in enforcing such lien and may detain such motor vehicle in possession until such lien be paid.

B. While the artisan or mechanic retains possession of a motor vehicle, the possessory lien has priority over any other liens, including recorded liens on the motor vehicle. If the artisan or mechanic releases possession of the motor vehicle due to the acceptance or receipt of a check, draft or written order for payment of the indebtedness due thereon, but the check, draft or written order for payment is returned because of insufficient funds, no account, closed account or issuance of a stop-payment order, the possessory lien on the motor vehicle shall continue for a period of thirty days from the date actual possession was relinquished. At the expiration of such period, the artisan's or mechanic's lien shall continue but shall be subordinate to prior recorded liens on the motor vehicle. The lien shall not be applicable to a bona fide purchaser for value without notice of an artisan's or mechanic's lien or to a bona fide encumbrancer for value without notice of the artisan's or mechanic's lien, if the sale or encumbrance occurs subsequent to the artisan or mechanic releasing possession.

C. At any time the artisan or mechanic may repossess the motor vehicle upon which a lien is claimed.

D. In the event of a lawsuit relating to the possession of a motor vehicle and the indebtedness due thereon, a court may, in its discretion, award reasonable attorney's fees to the prevailing party.

History: Laws 1851-1852, p. 241; C.L. 1865, ch. 77(2d), § 13; C.L. 1884, § 1536; C.L. 1897, § 2233; Code 1915, § 3333; Laws 1917, ch. 65, § 1 (3333); 1923, ch. 24, § 1 (3333); C.S. 1929, § 82-401; 1941 Comp., § 63-301; 1953 Comp., § 61-3-1; Laws 1977, ch. 46, § 1.

ANNOTATIONS

Cross references. — For lien for towing, storage or wrecking service for motor vehicle, see 48-3-19 to 48-3-21 NMSA 1978.

For priority of liens under Uniform Commercial Code, see 55-9-301 NMSA 1978.

Retention of property pursuant to garageman's lien is not an unconstitutional deprivation of property under due process clause of U.S. Const., amend. XIV. DeMarsh v. Landreth, 89 N.M. 494, 553 P.2d 1301 (Ct. App. 1976).

Liens covered by article. — This article refers to liens of artisans, mechanics, landlords, innkeepers, agistors and those who board, feed, shelter or pasture animals. Hobbs v. Morrison Supply Co., 41 N.M. 644, 73 P.2d 325 (1937).

Mechanic's lien superior to prior liens when in possession. — As long as the repairer retained possession of the backhoe, it had a mechanic's statutory lien upon the vehicle for the value of the labor, parts, and repairs rendered which was superior even to recorded prior liens on the same vehicle as long as the work was ordered by a

person lawfully in possession of the vehicle. Tom Growney Equip., Inc. v. Ansley, 119 N.M. 110, 888 P.2d 992 (Ct. App. 1994).

Since the repairer elected to accept a promissory note from the customer for the value of the repairs and permitted the customer to take possession of the backhoe, thereby releasing the possessory lien, the repairer chose to look to the customer for payment and waived the security provided by this section. Tom Growney Equip., Inc. v. Ansley, 119 N.M. 110, 888 P.2d 992 (Ct. App. 1994).

No precedence over prior liens without mortgagee's authority. — A mortgagor may not, without the authority of the mortgagee, expressed or implied, create a lien on mortgaged property as to give it precedence over prior incumbrances. Maulhardt v. J.D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

Lien rights created by a prior mortgage become subordinated to those of a mechanic only where the mortgagee authorizes, expressly or impliedly, the chattel repair. Southwest Engine Co. v. United States, 275 F.2d 106 (10th Cir. 1960).

Priority between chattel mortgages and mechanic's liens. — Prior to the adoption of the Uniform Commercial Code, 55-1-101 NMSA 1978 et seq., dicta generally declared that recorded chattel mortgages had priority over mechanic's liens; noting that the question of priority had given the courts much difficulty and that different conclusions had been reached on a variety of reasons, the supreme court pointed to the adoption of 55-9-310 NMSA 1978 respecting priority of liens and concluded there were no benefits to be derived from analyzing this section to determine if the dicta were correct. Citizens Fin. Co. v. Cole, 47 N.M. 73, 134 P.2d 550 (1943); Universal Credit Co. v. Printy, 45 N.M. 549, 119 P.2d 108 (1941).

Exclusive possession of chattels not essential. — Exclusive possession by a mechanic of chattels undergoing repairs by him is not essential to the creation of a lien. Maulhardt v. J.D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

No repossession on same lien after voluntary surrender. — Lien claimant, by voluntarily parting with possession of a chattel upon which he has a lien, does not thereby waive the lien, but waives the right to possession of the chattel, and may not repossess it merely on the strength of his lien in absence of special circumstances. Mathieu v. Roberts, 31 N.M. 469, 247 P. 1066 (1926).

Lien ineffective as to innocent purchasers after voluntary surrender. — The lien of a garage owner for repairs furnished and of a workman for labor performed on an automobile is in force after possession is voluntarily surrendered, only as to such owner and those with notice thereof, and is not effective as to innocent purchasers without notice. Abeytia v. Gibbons Garage, 26 N.M. 622, 195 P. 515 (1920).

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 20, 21, 36, 38.

Common-law lien on personalty for work performed thereon, upon the owner's premises, 3 A.L.R. 862.

Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

Declarations or admissions of person in control of vehicle as admissible against or binding upon owner, lien claimants, or the like, of a vehicle subjected to forfeiture proceedings, 55 A.L.R.2d 1280.

Liability to pay for allegedly unauthorized repairs on motor vehicles, 5 A.L.R.4th 311.

What constitutes use of vehicle "in the automobile business" within exclusionary clause of liability policy, 56 A.L.R.4th 300.

Loss of garageman's lien on repaired vehicle by owner's use of vehicle, 74 A.L.R.4th 90.

8 C.J.S. Bailments §§ 80 to 85; 61A C.J.S. Motor Vehicles §§ 743 to 759.

48-3-2. [Labor liens on horse-drawn vehicles.]

Any person who shall perform any labor upon any wagon, buggy or other vehicle or furnish material for repairing the same shall have a lien upon such wagon, buggy or other vehicle for the amount due for such labor performed and materials furnished, and for all costs incurred in enforcing such a lien, and may detain such buggy, wagon or other vehicle in his possession until such sum is paid.

History: Code 1915, § 3334, enacted by Laws 1917, ch. 65, § 1 (3334); 1923, ch. 24, § 1 (3334); C.S. 1929, § 82-402; 1941 Comp., § 63-302; 1953 Comp., § 61-3-2.

ANNOTATIONS

Compiler's notes. — The 1917 law amended Code 1915, 3333 to 3345. That part of the Amendatory Act which bore the number 3334 contained entirely new matter. For the original Code 1915, 3334, see 48-3-5 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

8 C.J.S. Bailments §§ 80 to 85.

48-3-3. Penalty.

Any person removing or attempting to remove any property from the possession of a person that possesses a lien as provided in Sections 48-3-1 and 48-3-2 NMSA 1978, without the written consent of the possessor of the lien, is guilty of a misdemeanor and shall be punished by a fine of not more than fifty dollars ($50.00), or by imprisonment for not more than thirty days, or both.

History: 1953 Comp., § 61-3-2.1, enacted by Laws 1965, ch. 215, § 1.

48-3-4. [Blacksmith's lien.]

Any person who shall shoe or cause to be shod by his employees any horse, mule, ox or other animal, shall have a lien upon such animal for the amount due or to become due for such labor or services, and for all costs incurred in enforcing such lien, and may detain such animal in his possession until such sum is paid.

History: Code 1915, § 3335, enacted by Laws 1917, ch. 65, § 1 (3335); 1923, ch. 24, § 1 (3335); C.S. 1929, § 82-403; 1941 Comp., § 63-303; 1953 Comp., § 61-3-3.

ANNOTATIONS

Compiler's notes. — The 1917 act amended Code 1915, 3333 to 3345. That part of the Amendatory Act which bore the number 3335 contained entirely new matter. For the original Code 1915, 3335, see 48-3-11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

8 C.J.S. Bailments §§ 80 to 85.

48-3-5. Landlords' liens.

A. Landlords have a lien on the property of their tenants that remains in or about the premises rented, for the rent due by the terms of any lease or other agreement in writing, and the property shall not be removed from the premises without the consent of the landlord until the rent is paid or secured. A lien does not attach if the premises rented is a dwelling unit.

B. For purposes of this section, "dwelling unit" means a structure, mobile home and a leased parcel of land upon which it is located, or a part of a structure that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household.

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), § 14; C.L. 1884, § 1537; C.L. 1897, § 2234; Code 1915, § 3334; Laws 1917, ch. 65, § 1 (3336); 1923, ch. 24, § 1 (3336); C.S. 1929, § 82-404; 1941 Comp., § 63-304; 1953 Comp., § 61-3-4; Laws 1995, ch. 195, § 25; 1997, ch. 39, § 4.

ANNOTATIONS

Cross references. — For rental dwellings, lien of owners and operators, see 48-3-16 to 48-3-18 NMSA 1978.

For agricultural landlord liens, see 48-6-1 to 48-6-16 NMSA 1978.

For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.

For landlord lien under the Uniform Resident-Owner Act, see 47-8-36.1 NMSA 1978.

For warehousemen's liens, see 55-7-209 to 55-7-210 NMSA 1978.

The 1995 amendment, effective July 1, 1995, designated the existing language as Subsection A; in Subsection A, substituted "in or about the premises" for "in the house", deleted "or to become due" following "rent due", added the second sentence, and made minor stylistic changes throughout the subsection; and added Subsection B.

The 1997 amendment substituted "does not attach if" for "shall not attach where" in the second sentence of Subsection A and inserted "and a leased parcel of land upon which it is located" in Subsection B. Laws 1997, ch. 39 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3334 bore the number 3336 in the 1917 and 1923 amendatory laws. For the original Code 1915, 3336, see 48-3-13 NMSA 1978.

All of the following annotations were taken from cases decided prior to the 1995 amendment.

"House" does include a commercial building. Heyde v. State Sec., Inc., 63 N.M. 395, 320 P.2d 747 (1958).

Apartment as "house rented". — Where a building consists of several apartments rented to different tenants, each apartment is a "house rented" within the meaning of the statute, and the removal of the property from one apartment to another is a removal from "said house." Wolcott v. Ashenfelter, 5 N.M. 442, 23 P. 780 (1890).

Lien attached only after property on premises. — Generally, a landlord's lien attaches at the beginning of a tenancy for the rent due or to become due under the terms of the lease. But where lessee acquired the property (inventory) after his term began, the landlord's lien could only attach at the time the property came onto the premises. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

In general, a landlords' lien attaches at the beginning of the tenancy for any rent that will come due during the tenancy. However, the lien does not attach to the tenant's property until after the property is brought onto the premises. Kuemmerle v. United N.M. Bank, 113 N.M. 677, 831 P.2d 976 (1992).

Written lease agreement required. — Since the plaintiff alleged that his contract for rent in the defendant's storage facility was oral, and the defendant admitted that, there was no landlord lien on plaintiff's goods. Bird v. Lankford, 116 N.M. 408, 862 P.2d 1267 (Ct. App. 1993).

Landlord's lien, provided by this section, has two parts as there is a lien for rent due and for rent to become due by the terms of a lease or other instrument in writing. Chessport Millworks, Inc. v. Solie, 86 N.M. 265, 522 P.2d 812 (Ct. App. 1974).

Landlord may not forcibly seize property prior to compliance with this section. Ross v. Overton, 29 N.M. 651, 226 P. 162 (1924).

Conventional lien where statutory lien not specified. — Since pleadings did not show whether landlord was seeking to enforce his statutory lien or his conventional lien under his lease, the court was justified in finding that lessee's claim was based on his conventional lien where the claim was limited to property on leased premises. Whether he has waived his statutory lien is a matter of intent. In re Frick Book & Stationery Store, 38 N.M. 120, 28 P.2d 660 (1933).

No lien when conditional vendor not tenant, with title. — In a controversy between a conditional vendor and a landlord, property which is held by the tenant under a conditional sale contract, where title has not passed, is not the property of the tenant within the meaning of the statute, and the landlord's lien would not extend to any such goods. Hesselden v. Karman, 67 N.M. 434, 356 P.2d 451 (1960).

Foreclosure on conditional vendor's property not conversion. — A lessor who forecloses his landlord's lien and sells property for nonpayment of rent is not guilty of wrongfully converting that property where it appears that the property was being purchased by the lessee and the plaintiff under a conditional sales contract from a vendor who had guaranteed the rent. Hesselden v. Karman, 67 N.M. 434, 356 P.2d 451 (1960).

A landlord's agistor's lien on cattle is lost by sale by tenant to a purchaser without notice of the lien, where there is no statute requiring recording of an agistor's lien and such lien was not recorded. Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939).

Property must belong to tenant. — A landlord may assert a lien on the property of its tenants; however, where the property in question is not owned by a tenant but by a third party, a landlord's purported foreclosure of its lien will not vest the landlord with valid title. Security Pac. Fin. Servs. v. Signfilled Corp., 1998-NMCA-046, 125 N.M. 38, 956 P.2d 837.

If landlord consents to removal of property, he waives lien. Wolcott v. Ashenfelter, 5 N.M. 442, 23 P. 780 (1890).

No waiver when collateral security accepted. — Where landlord had accepted collateral security for the rentals due and to become due, it had not waived its landlord's lien. Gathman v. First Am. Indian Land, Inc., 74 N.M. 729, 398 P.2d 57 (1965).

Rights retained as to assignee. — An assignment of a lease creates the landlord-tenant relationship between the lessor and assignee, and the lessor retains all rights, including landlord's liens. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

Priorities between landlord's lien, security interest, governed by case law. — Since there is no statutory provision, including the Uniform Commercial Code, to cover the priority between a statutory landlord's lien and a perfected security interest, the supreme court would rely on existing New Mexico case law to determine the priority between the interests. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

Priority between landlord's, mortgage liens. — Where rent was unpaid on a lease to three for the last month of the term, two of the lessees withdrew and a chattel mortgage was given on property included, by the third lessee, prior to the execution of a new lease to such third lessee, the landlord's lien was superior to the mortgage lien as to the one month's rent, but inferior to the mortgage lien for the term of the second lease. Dees v. Dismuke, 30 N.M. 528, 240 P. 198 (1925).

Preexisting, perfected security interest with priority. — Under 63-304 and 63-501 through 63-504, 1941 Comp., the filing by the Reconstruction Finance Corp. in Quay county served as constructive notice to the landlord of the chattel mortgage, and, consequently, the landlord's lien was inferior to the chattel mortgage, despite the fact that only the original mortgagors were named and not the assignee, and the described personalty was said to be located in Guadalupe county, so that as a practical matter, an inquirer could not readily have learned of the existence of the instant mortgage by checking the chattel records since no reference was made to the present owner. Reconstruction Fin. Corp. v. Stephens, 118 F. Supp. 565 (D.N.M. 1954).

Where the bank loaned money to business owner over a month before he entered into a lease assignment the bank could not be charged with notice of the lessor's statutory lien, which did not exist, while lessor had notice of the recorded security interest at the time of the assignment; therefore, it was held that the security interest of the bank had

priority over the landlord's lien. National Inv. Trust v. First Nat'l Bank, 88 N.M. 514, 543 P.2d 482 (1975).

A purchase money security interest that is perfected before any interest claimed by a landlord under a landlord's lien arises is superior to that landlord's lien. Security Pac. Fin. Servs. v. Signfilled Corp., 1998-NMCA-046, 125 N.M. 38, 956 P.2d 837.

Priority over subsequent security interest. — Landlord's statutory lien which attached at the beginning of the tenancy for rental due or to become due under the terms of the lease is accorded priority over a subsequent security interest. Chessport Millworks, Inc. v. Solie, 86 N.M. 265, 522 P.2d 812 (Ct. App. 1974).

Priority over execution lien from judgment during lease. — Landlord's statutory lien attached at the beginning of the tenancy for rental due or to become due under the terms of lease and had priority over execution lien arising from judgment recovered against tenants during lease, even though execution issued and sheriff levied on tenant's property before suit. Gathman v. First Am. Indian Land, Inc., 74 N.M. 729, 398 P.2d 57 (1965).

Priority over homestead exemption. — Landlord's statutory lien for rent would defeat a claim for exemption in lieu of a homestead. Tomson v. Lerner, 37 N.M. 546, 25 P.2d 209 (1933).

Law reviews. — For articles, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant §§ 675 to 725.

Subject matter covered by landlord's statutory lien for rent, 9 A.L.R. 300, 96 A.L.R. 249.

Lessor's right, upon bankruptcy of lessee, to enforce lien or retain security for future rentals, 45 A.L.R. 717.

Landlord's lien or right of distress on property sold to tenant on conditional sale, 45 A.L.R. 949.

Warehouse Receipts Act as affecting landlord's lien on property represented by receipts, 61 A.L.R. 952.

Landlord's distress for rent on property of stranger in possession of livery stable keeper, 62 A.L.R. 1125.

Landlord's lien on property sold to tenant by conditional sale, 96 A.L.R. 262.

Chattel mortgage or conditional sales contract, landlord's acceptance of, as waiver of his lien or reservation of title, 96 A.L.R. 568.

Landlord's lien for rent as including taxes or other expenditures which tenant has agreed to pay or make, 99 A.L.R. 1104.

Lien on property of lessor for damages resulting from lessee's sale of intoxicating liquor, 169 A.L.R. 1203.

Subrogation of lessee in respect of liens superior to his lease, 1 A.L.R.2d 286.

Contribution, subrogation and similar rights, as between cotenants, where one pays the other's share of sum owing on lien, 48 A.L.R.2d 1305.

Application of statutory landlord's lien to property of third person used by tenant on rented premises, 95 A.L.R.3d 1205.

Priority as between statutory landlord's lien and security interest perfected in accordance with uniform commercial code, 99 A.L.R.3d 1006.

Landlord's remedy by way of distress or lien on defaulting tenant's property on leased premises as including right to collect for all unpaid utility expenses, 99 A.L.R.3d 1100.

43A C.J.S. Inns, Hotels, and Eating Places § 19; 52 C.J.S. Landlord and Tenant §§ 619 to 673.

48-3-6. Landlord's preference in bankruptcy or insolvency proceedings.

In all cases where a tenant becomes insolvent and any assignment for the benefit of creditors is executed, or a receiver is legally appointed, or bankruptcy or other insolvency proceedings are instituted, either by or against the tenant, covering property upon the demised premises which is liable to distress by the landlord for rent, the landlord shall be first entitled to receive, out of the proceeds of the sale of the property by the legal representative of the tenant, any sum due the landlord for rent of the premises at the time of the institution of the receivership, bankruptcy or insolvency proceedings, not exceeding six months' rent. If the proceeds of the sale by the legal representative of the tenant are insufficient to pay the landlord and the costs of the insolvency proceedings, the landlord shall be entitled to receive the proceeds of the sale after deducting an amount equal to such costs as the landlord would be liable to pay in case of a sale under distress. Nothing in this act [section] shall be construed to deprive any person of preference for wages now provided by law in any insolvency or receivership proceedings.

History: 1953 Comp., § 61-3-4.1, enacted by Laws 1969, ch. 83, § 1.

ANNOTATIONS

Law reviews. — For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M.L. Rev. 293 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 4, 58.

52 C.J.S. Landlord and Tenant § 631.

48-3-7. Liens for board, feed, shelter or pasture; priority.

A. Innkeepers, livery stable keepers, lessors and agistors and those who board others for pay or furnish feed, shelter or pasture for the property and stock of others shall have a lien on the property and stock of such guest or guests and lessees or of those to whom feed or shelter has been furnished until the same is paid, and shall have the right to take and retain possession of such property and stock until the indebtedness is paid.

B. It shall be unlawful for a lessee or owner to remove livestock from the leased premises, feedlot or pasture without the consent of the lessor feedlot operator or agistor unless the amount due for pasturage or feed be paid.

C. The liens provided for in this section shall not take precedence over prior filed or recorded chattel mortgages, duly filed or recorded as provided by law, unless the holder of such mortgage shall expressly so consent in writing; provided that the giving of such written consent shall not affect the rights or priority under a prior mortgage as against a subsequent mortgage but the rights, liens and priorities of all such mortgages shall be and remain the same as if no such written consent had been given.

D. An agistor shall retain his lien, notwithstanding the fact that he has relinquished possession of the livestock, if prior to relinquishment, he has filed for record with the clerk of the county in which the livestock are situate a statement declaring his intention to retain the lien and containing a description of the livestock in [on] which the lien is claimed.

E. For the purposes of this section, "agistor" means a person or entity whose primary business is to board, feed and care for livestock of others for a fee.

F. The notice which an agistor is required to file to protect his lien claim under this section shall contain the following:

(1) name of the agistor;

(2) location by general description and county of the feedlot in which the livestock are boarded;

(3) identification of livestock by quantity, owner and other identifying information to permit an identification as to which livestock the lien applies; and

(4) signature of the agistor and the date on which the notice was served.

G. Within fifteen days after the agistor releases the lien he shall file a release of lien in the manner provided for filing of termination statements under the Uniform Commercial Code [Chapter 55 NMSA 1978].

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), § 15; Laws 1884, ch. 17, § 1; C.L. 1884, § 1542; C.L. 1897, § 2239; Code 1915, § 3339; Laws 1917, ch. 65, § 1 (3337); 1923, ch. 24, § 1 (3337); C.S. 1929, § 82-405; 1941 Comp., § 63-305; 1953 Comp., § 61-3-5; Laws 1961, ch. 96, § 11-115; 1967, ch. 219, § 1; 1981, ch. 103, § 1.

ANNOTATIONS

Cross references. — For quarantine, lien for inspection of livestock, see 77-3-18 NMSA 1978.

For herd law district, trespassing, lien for damages, see 77-12-5 NMSA 1978.

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3339, bore the number 3337 in the 1917 and 1923 amendatory laws. The original Code 1915, 3337, provided that liens should be released of record upon discharge, but such provision was not carried forward in the amendatory laws.

Agistor's lien interpreted by common law. — Although an agistor's lien was unknown at common law, it is in the nature of a common-law lien and must be interpreted according to its principles. Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939).

Express consent is positive, direct, unequivocal, and such as does not require the aid of inference or implication to supply its meaning. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 40 N.M. 116, 55 P.2d 667 (1936).

Trailer space renter not guest. — A person renting trailer space by the week is not a guest in the sense of those seeking transient accommodations of an innkeeper. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

Dealer not included as furnishing feed to stock of others. — Lien, given by statute to one who furnishes feed and shelter for the stock of others, does not inure to a dealer in grain and feed who, in the course of his business, sells grain and feed which the stock owner feeds to his stock. Roswell Trading Co. v. Long, 26 N.M. 349, 192 P. 482 (1920).

Party furnishing pasturage required to perfect lien. — Under this section, party furnishing pasturage is entitled to a lien if he complies with 48-3-13 NMSA 1978, but the lien does not become effective until the claimant has complied with the statute and perfected his claim by giving the notice provided for. 1915-16 Op. Att'y Gen. p. 171.

Limits of agistor's lien. — This section grants a lien to an agistor on livestock bailed to him, for the amount of feed and care provided for the cattle in his possession, but not for damages sustained by the lessor due to the breach of contract by the lessee. Citizens State Bank v. Christmas, 107 N.M. 220, 755 P.2d 64 (1988).

Priority between agistor's lien, mortgage. — There must be express words of consent to give an agistor's lien precedence over a prior recorded mortgage of cattle. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 40 N.M. 116, 55 P.2d 667 (1936).

Agistor's lien shall not take precedence over a prior filed and recorded chattel mortgage unless the holder of the mortgage shall so consent in writing. United States v. Evans, 245 F.2d 681 (10th Cir. 1957).

Agistor may not claim lien upon animals removed from his possession with his knowledge, although without his consent. Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939).

No evidence of consent to subrogate. — Evidence failed to show express consent in writing by assignee of mortgage executed by ranching company as lessee of ranch to subrogate the mortgage lien to agistor's lien claimed by lessor-owner of the ranch. Pacific Nat'l Agrl. Credit Corp. v. Hagerman, 40 N.M. 116, 55 P.2d 667 (1936).

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 96.

Lien on animal damage feasant, 26 A.L.R. 1047.

3A C.J.S. Animals §§ 21, 190, 196, 206; 43A C.J.S. Inns, Hotels and Eating Places §§ 18, 19; 3A C.J.S. Animals § 348.2.

48-3-8. [Common carriers' liens.]'.

Common carriers shall have a lien on the things carried for the freight due, if payment of freight was to have been made on delivery of the things carried, and all persons carrying goods for another for hire or pay shall be deemed common carriers within the provisions of this article.

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), §§ 16, 17; C.L. 1884, §§ 1547, 1548; C.L. 1897, §§ 2244, 2245; Code 1915, §§ 3344, 3345; Laws 1917, ch. 65, § 1 (3338); 1923, ch. 24, § 1 (3338); C.S. 1929, § 82-406; 1941 Comp., § 63-306; 1953 Comp., § 61-3-6.

ANNOTATIONS

Cross references. — For lien under bills of lading provisions of Uniform Commercial Code, see 55-7-307, 55-7-308 NMSA 1978.

For railroads, lien on baggage and freight, see 63-3-12 NMSA 1978.

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3344 and 3345, was combined and given number 3338 in the 1917 and 1923 amendatory laws. For the original Code 1915, 3338, see 48-3-10 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Carriers §§ 497 to 506.

Carrier's certificate of convenience and necessity, franchise or permit as subject to transfer or encumbrance, 15 A.L.R.2d 883.

13 C.J.S. Carriers §§ 484 to 486.

48-3-9. [Loss of lien.]

Any lien acquired under the provisions of this law [48-3-1 to 48-3-15 NMSA 1978] except those provided in Sections 48-3-5 and 48-3-7 NMSA 1978 hereof shall become void, if the person entitled to the same shall consent that the property subject thereto be removed from his control or possession, except as against the person at whose request the repairs or parts were furnished and the labor performed. In the case of the liens provided in Sections 48-3-5 and 48-3-7 NMSA 1978, if the person or persons entitled to the lien consent to a removal of the property subject to the lien from the leased premises the lien shall become void.

History: Code 1915, § 3339, enacted by Laws 1917, ch. 65, § 1 (3339); 1923, ch. 24, § 1 (3339); C.S. 1929, § 82-407; 1941 Comp., § 63-307; 1953 Comp., § 61-3-7.

ANNOTATIONS

Compiler's notes. — The 1917 law amended Code 1915, 3333 to 3345. That part of the Amendatory Act which bore the number 3339 contained entirely new matter. For the original Code 1915, 3339, see 48-3-7 NMSA 1978.

Mortgagee's authority required to create superior lien. — A mortgagor may not, without the authority of the mortgagee, expressed or implied, create a lien on

mortgaged property as to give it precedence over prior incumbrances. Maulhardt v. J.D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

Implied authority to create superior lien. — When a mortgage clause requires the mortgagor to keep the mortgaged chattel in a good state of repair, authority is implied from the mortgagee to the mortgagor to create a mechanic's lien superior to the lien of the mortgagee. Maulhardt v. J.D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

Exclusive possession by mechanic of chattels undergoing repairs is not essential to the creation of a lien. Maulhardt v. J.D. Coggins Co., 60 N.M. 175, 288 P.2d 1073 (1955).

Unrecorded liens lost by sale to innocent purchaser. — A landlord's agistor's lien on cattle is lost by a sale by the tenant to a purchaser without notice of the lien where the lien is not recorded and there is no statute requiring that it be recorded. Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939).

The lien of a garage owner for repairs furnished and of a workman for labor performed on an automobile is in force after possession of such automobile is voluntarily surrendered, only as to such owner and those with notice thereof, and is not effective as to innocent purchasers without notice. Abeytia v. Gibbons Garage, 26 N.M. 622, 195 P. 515 (1920).

Waiver of repossession by voluntary parting with chattel. — A lien claimant by voluntarily parting with possession of a chattel upon which he has a lien does not thereby waive the lien, but waives the right to possession thereof, and may not repossess the same merely on strength of lien in absence of special circumstances showing he is entitled to possession. Mathieu v. Roberts, 31 N.M. 469, 247 P. 1066 (1926).

48-3-10. [Priorities between liens.]

The priorities of liens provided for by this act shall be fixed as to several lien claimants as of the time of serving notice or of filing suit as provided in Section 48-3-13 NMSA 1978.

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), § 8; C.L. 1884, § 1541; C.L. 1897, § 2238; Code 1915, § 3338; Laws 1917, ch. 65, § 1 (3340); 1923, ch. 24, § 1 (3340); C.S. 1929, § 82-408; 1941 Comp., § 63-308; 1953 Comp., § 61-3-8.

ANNOTATIONS

Cross references. — For occupational taxes by municipality, see 3-38-6 NMSA 1978.

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3338, was given number 3340 in the 1917 and 1923 amendatory laws. For the original Code 1915, 3340, see 48-3-13 NMSA 1978.

Meaning of "this act". — The term "this act," referred to in this section, apparently means Laws 1917, Chapter 65, which appears as 48-3-1, 48-3-2, 48-3-4, 48-3-5, and 48-3-7 to 48-3-15 NMSA 1978.

Lien priorities covered by section. — This section pertains to priority between liens established by 48-3-1 to 48-3-15 NMSA 1978 and does not apply to liens not covered by these sections. Chessport Millworks, Inc. v. Solie, 86 N.M. 265, 522 P.2d 812 (Ct. App. 1974).

This section does not include judgment liens. Gathman v. First Am. Indian Land, Inc., 74 N.M. 729, 398 P.2d 57 (1965).

Landlord's lien with priority over subsequent security interest. — Landlord's statutory lien which attached at the beginning of the tenancy for rental due or to become due under the terms of the lease is accorded priority over a subsequent security interest. Chessport Millworks, Inc. v. Solie, 86 N.M. 265, 522 P.2d 812 (Ct. App. 1974).

Mortgage by continuing tenant before second term with priority. — Mortgage of personal property made by continuing tenant during first term of lease, but prior to commencement of new term, created a lien superior to that of the landlord for rent of such second term. Dees v. Dismuke, 30 N.M. 528, 240 P. 198 (1925).

Landlord's lien with priority over subsequent judgment lien. — Landlord's statutory lien attached at the beginning of the tenancy for rental due or to become due under the terms of lease, and had priority over execution lien arising from judgment recovered against tenants during lease, even though execution issued and sheriff levied on tenant's property before suit. Gathman v. First Am. Indian Land, Inc., 74 N.M. 729, 398 P.2d 57 (1965).

Unrecorded sales contract was not invalid as to landlord's lien, the landlord's lien claimant being neither a mortgagor nor judgment nor attaching creditor. Beebe v. Fouse, 27 N.M. 194, 199 P. 364 (1921).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 51 to 58.

Priority of landlord's lien as against chattel mortgage, 37 A.L.R. 400, 52 A.L.R. 935.

Priority between tax or assessment lien and mortgage or other nontax lien held by state or municipality, 159 A.L.R. 832.

Priority as between lien for repairs and right of seller under conditional sales contract, 36 A.L.R.2d 198.

Priority as between artisan's lien and chattel mortgage, 36 A.L.R.2d 229.

Automobiles: priorities as between vendor's lien and subsequent title or security interest obtained in another state to which vehicle was removed, 42 A.L.R.3d 1168.

Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment, 34 A.L.R.4th 665.

Priority between attorneys charging lien against judgment and opposing party's right of setoff against same judgment, 27 A.L.R.5th 764.

Right of mortgagee and/or lienor to compensation when property subject to mortgage and/or lien is taken by federal government forfeiture based on criminal acts of owner, 136 A.L.R. Fed. 593.

48-3-11. [Acceptance of collateral security waives lien.]

No person shall be entitled to a lien under this article who has taken collateral security for the payment of the sum due him.

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), § 5; C.L. 1884, § 1538; C.L. 1897, § 2235; Code 1915, § 3335; Laws 1917, ch. 65, § 1 (3341); 1923, ch. 24, § 1 (3341); C.S. 1929, § 82-409; 1941 Comp., § 63-309; 1953 Comp., § 61-3-9.

ANNOTATIONS

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3335, was given the number 3341 in the 1917 and 1923 amendatory laws. For the original Code 1915, 3341, see 48-3-14 NMSA 1978.

Landlord's chattel mortgage deemed cumulative, not collateral security. — A landlord who takes a chattel mortgage on property of his lessee already covered by his statutory lien will be deemed to have taken cumulative and not collateral security. In re Frick Book & Stationery Store, 38 N.M. 120, 28 P.2d 660 (1933)See also; Woodcock v. Cochran, 21 N.M. 76, 153 P. 273 (1915).

Partial security credited toward lien. — Taking security for a portion of the material bill for plumbing did not invalidate the lien on the balance. The lien would be credited with the proceeds of the collateral. Hobbs v. Morrison Supply Co., 41 N.M. 644, 73 P.2d 325 (1937).

Effect of taking collateral security. — Under former law it was held that this section does not work a forfeiture ex vi termini of a landlord's statutory lien for rent where landlord has taken collateral security for the rent after it has accrued and expressly disavowed any intent to waive the lien. Woodcock v. Cochran, 21 N.M. 76, 153 P. 273 (1915).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens § 40.

Right to require security, as condition of canceling lien of record or of recording payment, 2 A.L.R.2d 1064.

53 C.J.S. Liens §§ 19 to 28.

48-3-12. [Assignability of liens.]

Liens provided under this act shall be assignable.

History: Code 1915, § 3342, enacted by Laws 1917, ch. 65, § 1 (3342); 1923, ch. 24, § 1 (3342); C.S. 1929, § 82-410; 1941 Comp., § 63-310; 1953 Comp., § 61-3-10.

ANNOTATIONS

Compiler's notes. — The 1917 law amended Code 1915, 3333 to 3345. That part of the Amendatory Act which bore the number 3342 contained entirely new matter. For the original Code 1915, 3342, see 48-3-15 NMSA 1978.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1917, ch. 65, § 1, which appears as 48-3-1, 48-3-2, 48-3-4, 48-3-5, and 48-3-7 to 48-3-15 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 30 to 32.

48-3-13. Enforcement of liens; optional methods.

A. In order to enforce any lien under Sections 48-3-1 through 48-3-20 NMSA 1978, the procedure shall be the same as in the case of the foreclosure of a chattel mortgage if suit is filed in court. The lien claimant when the property subject to the lien is under his control or in his possession may, after the debt for which the lien is claimed becomes due and payable, serve the person against whom the lien is sought to be enforced with a written notice or forward to the last known address of the person, by certified or registered mail, return receipt requested, a written statement, setting forth an itemized statement of the amount of the indebtedness. If the indebtedness is not paid within ten days after the service or mailing of the notice, the property may be advertised by posting or publication as provided in Section 48-3-14 NMSA 1978 and sold to satisfy the indebtedness.

B. Where the property involved is a motor vehicle upon which a lien exists under Sections 48-3-19 and 48-3-20 NMSA 1978, then in addition to the ten-day notice of the debt under this section and the twenty-day notice of sale under Section 48-3-14 NMSA 1978, the motor vehicle shall be held for the following periods:

(1) for fourteen days where the vehicle is registered in this state; or

(2) for forty days where the vehicle is registered in a foreign jurisdiction or where the registration cannot be found in the records of this state.

C. Where the property on which the lien exists is a motor vehicle, the time periods referred to in Subsection B of this section are to be used for the purpose of establishing ownership and the names and addresses of lienholders so that they may be given notice of the sale. The time periods shall be in lieu of the time period referred to in Section 66-3-203 NMSA 1978, but the provisions of giving notice to the state police of unclaimed vehicles shall still apply, and the lien claimant shall give such notice within five days after the expiration of the ten-day notice period referred to in Subsection A of this section.

History: Laws 1851-1852, p. 243; C.L. 1865, ch. 77(2d), § 6; Laws 1884, ch. 17, § 2; C.L. 1884, §§ 1539, 1543; C.L. 1897, §§ 2236, 2240; Code 1915, §§ 3336, 3340; Laws 1917, ch. 65, § 1 (3343); 1923, ch. 24, § 1 (3343); C.S. 1929, § 82-411; 1941 Comp., § 63-311; 1953 Comp., § 61-3-11; Laws 1955, ch. 67, § 1; 1967, ch. 183, § 1; 1989, ch. 34, § 1.

ANNOTATIONS

Cross references. — For foreclosure of mortgages, see 39-4-1 NMSA 1978 et seq.

The 1989 amendment, effective June 16, 1989, in Subsection A substituted "48-3-1 through 48-3-20 NMSA 1978" for "61-3-1 through 61-3-18 New Mexico Statutes Annotated, 1953 Compilation" in the first sentence and "48-3-14 NMSA 1978" for "61-3-12 New Mexico Statutes Annotated, 1953 Compilation" in the last sentence, and made minor stylistic changes throughout the subsection; in Subsection B substituted "48-3-19 and 48-3-20 NMSA" for "61-3-17 through 61-3-18 New Mexico Statutes Annotated, 1953 Compilation" and "48-3-14 NMSA 1978" for "61-3-12 New Mexico Statutes Annotated, 1953 Compilation" in the introductory paragraph, "fourteen" for "thirty" in Paragraph (1), and "forty" for "sixty" in Paragraph (2); and in Subsection C substituted "66-3-203 NMSA 1978" for "64-5-3 New Mexico Statutes Annotated, 1953 Compilation" in the second sentence.

Compiler's notes. — The subject matter which was originally in Code 1915, 3336 (derived from Laws of 1851-1852), and Code 1915, 3340 (derived from Laws of 1884, ch. 17), was combined as two paragraphs of one section bearing number 3343 in the 1917 Amendatory Law.

The original Code 1915, 3343 (derived from Laws 1884, ch. 17, § 5), gave landlords and common carriers the right to enforce their liens under the provisions of 48-3-13 to 48-3-15 NMSA 1978.

Demand for rent, claim of lien required. — Before 1923 amendment, a landlord could enforce his lien in either of the two ways then provided, but he could not forcibly take

possession of the property without first demanding the rent due and claiming the lien. Ross v. Overton, 29 N.M. 651, 226 P. 162 (1924).

Exemption waived by tenant. — A tenant having conceded to his landlord the right to a lien on chattels by moving them onto landlord's property waives exemption. Tomson v. Lerner, 37 N.M. 546, 25 P.2d 209 (1933).

Repossession right waived by voluntary parting. — A lien claimant who voluntarily parts with possession of a chattel on which he has a lien waives only the right to possession, and may not repossess the same on strength of the lien alone in absence of special circumstances showing his right to possession. Mathieu v. Roberts, 31 N.M. 469, 247 P. 1066 (1926).

Right to lien foreclosure notice not forfeited by failure to file address change known to claimant. — Failure to file a change of address with the division of motor vehicles in compliance with 66-3-23 NMSA 1978 did not forfeit the right to lien foreclosure notice under this section when lien claimant knew of the more recent address. Phoenix, Inc. v. Galio, 100 N.M. 752, 676 P.2d 829 (Ct. App. 1984).

Where mechanic's lien claimant knows of a more recent address of car owner, mailing notice of lien to the address shown by motor vehicle division records does not fulfill the requirement of sending notice to the "last-known address." Phoenix, Inc. v. Galio, 100 N.M. 752, 676 P.2d 829 (Ct. App. 1984).

Foreclosure on conditional vendor's property not conversion. — A lessor who forecloses his landlord's lien and sells property for nonpayment of rent is not guilty of wrongfully converting that property where it appears that the property was being purchased by the lessee and the plaintiff under a conditional sales contract from a vendor who had guaranteed the rent. Hesselden v. Karman, 67 N.M. 434, 356 P.2d 451 (1960).

Wrongful sale justifies punitive damages. — Where a trailer is wrongfully withheld and sold contrary to law and a court's restraining order, these facts alone justify the imposition of punitive damages. Newman v. Basin Motor Co., 98 N.M. 39, 644 P.2d 553 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 63 to 76.

What constitutes public sale, 4 A.L.R.2d 575.

48-3-14. Advertisement and sale of property.

If default be made in the payment of the debt, after such notice, it shall be lawful for the lien claimant or creditor, as provided in this article (48-3-1 to 48-3-15 NMSA 1978), to advertise and sell such property at public auction to the highest bidder for cash after giving at least twenty days' notice of such sale by:

A. at least six handbills posted up in public places in the county in which such sale is to be made; or

B. by publishing once each week for two successive weeks in some newspaper of general circulation in the county; such notices of sale shall set forth the time and place of sale and a description of the property to be sold, and the amount of indebtedness claimed under such lien.

History: Laws 1884, ch. 17, § 3; C.L. 1884, § 1544; C.L. 1897, § 2241; Code 1915, § 3341; Laws 1917, ch. 65, § 1 (3344); 1923, ch. 24, § 1 (3344); C.S. 1929, § 82-412; 1941 Comp., § 63-312; 1953 Comp., § 61-3-12; Laws 1955, ch. 67, § 2.

ANNOTATIONS

Cross references. — For publication in lieu of posting, see 14-11-3 NMSA 1978.

For judicial sales of perishable property pursuant to this section, see 39-5-1.1 NMSA 1978.

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3341, was given number 3344 in the 1917 and 1923 amendatory laws. For original Code 1915, 3344, see 48-3-8 NMSA 1978.

A landlord may not forcibly seize the property prior to compliance with this section. Ross v. Overton, 29 N.M. 651, 226 P. 162 (1924).

Foreclosure on conditional vendor's property not conversion. — A lessor who forecloses his landlord's lien and sells property for nonpayment of rent is not guilty of wrongfully converting that property where it appears that the property was being purchased by the lessee and the plaintiff under a conditional sales contract from a vendor who had guaranteed the rent. Hesselden v. Karman, 67 N.M. 434, 356 P.2d 451 (1960).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens § 76.

What constitutes public sale, 4 A.L.R.2d 575.

48-3-15. [Disposition of proceeds of sale; purchase by lien claimant.]

After sale made as provided in the preceding section [48-3-14 NMSA 1978], the proceeds of such sale shall be applied to the payment of the costs of advertising and making the sale and the satisfaction of the demand of the lien claimant, and the residue, if any, shall be refunded to the lien debtor; provided, that the lien claimant shall not be precluded from bidding on or purchasing the property at such sale.

History: Laws 1884, ch. 17, § 4; C.L. 1884, § 1545; C.L. 1897, § 2242; Code 1915, § 3342; Laws 1917, ch. 65, § 1 (3345); 1923, ch. 24, § 1 (3345); C.S. 1929, § 82-413; 1941 Comp., § 63-313; 1953 Comp., § 61-3-13.

ANNOTATIONS

Compiler's notes. — The subject matter which was originally contained in Code 1915, 3342, was given number 3345 in the 1917 and 1923 amendatory laws. For original Code 1915, 3345, see 48-3-8 NMSA 1978.

Landlord's lien with priority over subsequent judgment lien. — Landlord's statutory lien attached at the beginning of the tenancy for rental due or to become due under the terms of lease and had priority over execution lien arising from judgment recovered against tenants during lease, even though execution issued and sheriff levied on tenant's property before suit. Gathman v. First Am. Indian Land, Inc., 74 N.M. 729, 398 P.2d 57 (1965).

Rights of innocent purchasers not considered. — No interest of third person as purchaser for value without notice has been considered by the legislature in setting up the procedure for the satisfaction of claims hereunder. Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003 (1939).

48-3-16. Liens of owners and operators of public accommodations.

A. The owner or operator of any hotel, motel, trailer court or campground shall have a lien upon the baggage, personal effects, trailer house, trailer, automobile, motor vehicle and other property placed in or upon the premises of the hotel, motel, trailer court or campground of the owner or operator for the payment of any services and accommodations offered by the owner or operator to the person for transient occupancy, including gas, water, electricity or other things furnished to the person or at the request of the person.

B. For purposes of this section, "transient occupancy" means occupancy of the premises for which rent is paid on less than a weekly basis or by a person who has not manifested an intent to make the occupied premises a residence or to maintain a household on the premises.

History: 1941 Comp., § 63-304a, enacted by Laws 1951, ch. 51, § 1; 1953 Comp., § 61-3-14; Laws 1995, ch. 195, § 26.

ANNOTATIONS

Cross references. — For landlord lien under the Uniform Owner-Resident Act, see 47-8-36.1 NMSA 1978.

The 1995 amendment, effective July 1, 1995, added the section heading; designated the existing language as Subsection A; in Subsection A, substituted "motel" for "rooming house, apartment house, rental dwellings, auto court" twice, deleted "rent" preceding "services", inserted "offered by the owner or operator to the person for transient occupancy", and made minor stylistic changes throughout the subsection; and added Subsection B.

Person renting trailer space by the week is not a guest in the sense of those seeking transient accommodations of an innkeeper. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

Legislative intention not to give liens priority. — Section 48-3-17 NMSA 1978 which provides that the lien created by 48-3-16 NMSA 1978 "is subject to such priorities of liens as are otherwise provided by law" clearly indicates an intention by the legislature not to give priority of the lien created by this section over other liens. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

No precedence over prior recorded mortgage. — A statutory lien does not take precedence over a prior recorded chattel mortgage, unless expressly so provided by statute. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Hotels, Motels and Restaurants §§ 187 to 196.

Relation of innkeeper and guests as affected by payment for accommodation by week, month or the like, 12 A.L.R. 261, 145 A.L.R. 363.

Conditional sale, innkeeper's lien, property sold to guest on, 45 A.L.R. 960.

What constitutes a hotel or inn, 53 A.L.R. 988.

Automobile as subject to innkeeper's lien, 56 A.L.R. 1102.

43A C.J.S. Inns, Hotels and Eating Places §§ 18, 19.

48-3-17. [Priority and enforcement of lien.]

The lien provided for under this act [48-3-16 to 48-3-18 NMSA 1978] is subject to such priorities of liens as are otherwise provided by law, and may be enforced in the same manner and through the same procedure as now provided by law for the enforcement of liens on personal property and as provided in Section 48-3-13 NMSA 1978.

History: 1941 Comp., § 63-304b, enacted by Laws 1951, ch. 51, § 2; 1953 Comp., § 61-3-15.

ANNOTATIONS

Legislative intent not to give priority over other lien. — This section provides that the lien created by 48-3-16 NMSA 1978 "is subject to such priorities of liens as are otherwise provided by law" clearly indicates an intention by the legislature not to give priority of the lien created by 48-3-16 NMSA 1978 over other liens. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

A statutory lien does not take precedence over a prior recorded chattel mortgage, unless expressly so provided by statute. Diamond Trailer Sales Co. v. Munoz, 72 N.M. 190, 382 P.2d 185 (1963).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of mortgagee and/or lienor to compensation when property subject to mortgage and/or lien is taken by federal government forfeiture based on criminal acts of owner, 136 A.L.R. Fed. 593.

43A C.J.S. Inns, Hotels and Eating Places §§ 18, 19.

48-3-18. [Penalty for removal of property on which lien has attached.]

Any person removing or attempting to remove any property on which the owner or operator of any hotel, rooming house, apartment house, rental dwellings, auto court, trailer court or campground has a lien for any sum due such owner or operator for rent, services or accommodations as provided in this act [48-3-16 to 48-3-18 NMSA 1978], without the written consent of such owner or operator; shall be guilty of a misdemeanor and upon conviction shall be punished by fine of not more than $50.00 or by imprisonment in the county jail for a period not to exceed 30 days or by both such fine and imprisonment.

History: 1941 Comp., § 63-304c, enacted by Laws 1951, ch. 51, § 3; 1953 Comp., § 61-3-16.

48-3-19. Lien for towing, storage or wrecker service for automobiles.

All garage owners and persons engaged in the business of towing automobiles, storing automobiles or furnishing wrecker service shall have a lien on all automobiles towed, stored or upon which wrecker service is performed when such towing, storage or wrecker service is furnished or performed at the request or with the consent of any person lawfully in possession of such automobile, for the reasonable value of such services and for costs incurred in enforcing the lien. A peace officer who requests

towing, storage or wrecker service for a wrecked, abandoned or stolen vehicle shall be deemed a person lawfully in possession of such vehicle within the meaning of this section. The lien created under this section shall be perfected under Sections 48-3-13 and 48-3-14 NMSA 1978.

History: Laws 1937, ch. 150, § 1; 1941 Comp., § 63-314; 1953 Comp., § 61-3-17; Laws 1963, ch. 99, § 1; 1967, ch. 183, § 2.

ANNOTATIONS

Cross references. — For lien for repair of motor vehicle, see 48-3-1 NMSA 1978.

There is no right to a storage lien on a freight trailer, as a freight trailer separated from a truck tractor is not an "automobile" under the Motor Vehicle Code. Newman v. Basin Motor Co., 98 N.M. 39, 644 P.2d 553 (Ct. App. 1982).

Wrongful sale justifies punitive damages. — Where a trailer is wrongfully withheld and sold contrary to law and a court's restraining order, these facts alone justify the imposition of punitive damages. Newman v. Basin Motor Co., 98 N.M. 39, 644 P.2d 553 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

Lien for storage of motor vehicle, 48 A.L.R.2d 894, 85 A.L.R.3d 199.

What constitutes use of vehicle "in the automobile business" within exclusionary clause of liability policy, 56 A.L.R.4th 300.

8 C.J.S. Bailments §§ 80 to 85; 61A C.J.S. Motor Vehicles §§ 743 to 759.

48-3-20. [Rights of holder of lien for automobile service.]

The person entitled to a lien hereunder may retain such automobile in his possession until such lien is paid. Such lien may be enforced in the manner now or hereafter provided for the enforcement of mechanics' liens in this state; or in the manner now provided under Sections 48-3-13 and 48-3-14 NMSA 1978, or hereafter provided by any amendments thereof or any laws of New Mexico in substitution therefor.

History: Laws 1937, ch. 150, § 2; 1941 Comp., § 63-315; 1953 Comp., § 61-3-18.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bailee's lien for work on goods as extending to other goods of the bailor in his possession, 25 A.L.R.2d 1037.

61A C.J.S. Motor Vehicles §§ 743 to 759.

48-3-21. Definitions.

As used in Sections 48-3-1 through 48-3-20 NMSA 1978:

A. "automobile" includes trucks, trailers and motor vehicles of all classes and kinds; and

B. "motor vehicle" means every self-propelled device in, upon or by which, any person or property is, or may be, transported upon land, in water or in the air.

History: Laws 1937, ch. 150, § 3; 1941 Comp., § 63-316; 1953 Comp., § 61-3-19; Laws 1965, ch. 140, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A C.J.S. Motor Vehicles § 749.

48-3-22. Lien for work or services by retaining possession.

A. A person or firm, which, at the request of the owner or person lawfully in possession:

(1) repairs, cleans, adjusts or otherwise services jewelry, timing apparatus, watches, clocks, radios, home appliances, electrical equipment, musical instruments;

(2) repairs, cleans, adjusts or otherwise services sporting equipment including guns; or

(3) enhances the value of personal property, shall, by retaining possession of the articles upon which the work or service was performed, have a lien for unpaid charges for the work or services.

B. A person or firm, to qualify under the provisions of this act [48-3-22 to 48-3-27 NMSA 1978], must have posted a notice at each place of business at the time such work is authorized, which reads:

"All articles left for (state the type of work or service provided) and not called for in 3 months will be sold for charges pursuant to Sections 48-3-22 through 48-3-27 NMSA 1978."

C. The provisions of this act do not extend to a person or firm that performs any of the functions described in Subsection A of this section on a wholesale basis or as a subcontractor.

History: 1941 Comp., § 63-317, enacted by Laws 1953, ch. 125, § 1; 1953 Comp., § 61-3-20; Laws 1971, ch. 157, § 1.

ANNOTATIONS

Time periods for notice, foreclosure proceedings mandatory. — Under former law, it was held that the notice provided for must use the period of three months as specifically provided in this section and that under 48-3-25 and 48-3-26A NMSA 1978 a lien claimant may commence foreclosure proceedings in court at any time after three months from the date for which the lien claimed becomes due, or may sell the property under the nonjudicial procedure provided in 48-3-26 NMSA 1978 at any time after six months from the date upon which the lien claimed became due. 1953-54 Op. Att'y Gen. No. 5741.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bailments §§ 281, 282; 51 Am. Jur. 2d Liens §§ 15, 34, 35.

8 C.J.S. Bailments §§ 80 to 85.

48-3-23. Possession; when lien shall not exist.

The possession required under this act [48-3-22 to 48-3-27 NMSA 1978] shall be physical custody. No lien shall exist where:

A. the article has not been delivered to the physical custody of the person or firm claiming the lien;

B. without fraud or false representation, the physical custody of the article has been surrendered by the person or firm performing the work or service;

C. the person or firm performing the work or service has accepted collateral security for payment of the amount due.

History: 1941 Comp., § 63-318, enacted by Laws 1953, ch. 125, § 2; 1953 Comp., § 61-3-21.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right to require security as condition of canceling lien of record or of recording payment, 2 A.L.R.2d 1064.

48-3-24. Lien not exclusive.

The lien provided for by this act [48-3-22 to 48-3-27 NMSA 1978] shall be a cumulative remedy and shall not be construed to limit the remedies otherwise provided by law to a creditor against his debtor. The lien provided for by this act and the method

and procedure for enforcement thereof is in addition to and not a substitution for any other lien and procedure for enforcement otherwise provided by law.

History: 1941 Comp., § 63-319, enacted by Laws 1953, ch. 125, § 3; 1953 Comp., § 61-3-22.

48-3-25. Enforcement of lien.

Three (3) months after the debt for which the lien is claimed becomes due, the lien claimant may enforce such lien by either a suit to foreclose the lien or by a sale as hereinafter provided.

History: 1941 Comp., § 63-320, enacted by Laws 1953, ch. 125, § 4; 1953 Comp., § 61-3-23.

ANNOTATIONS

Foreclosure or sale by lien claimant. — Under 48-3-22 to 48-3-27 NMSA 1978 a lien claimant may commence foreclosure proceedings in court at any time after three months from the date for which the lien claimed becomes due, or may sell the property under the nonjudicial procedure at any time after six months from the date upon which the lien claimed became due. 1953-54 Op. Att'y Gen. No. 5741.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 Am. Jur. 2d Liens §§ 63 to 76.

Estoppel of or waiver by parties or participants regardingirregularities or defects in execution or judicial sale, 2 A.L.R.2d 6.

8 C.J.S. Bailments §§ 80 to 85.

48-3-26. Sale to enforce lien.

A. Six (6) months after the debt for which the lien is claimed becomes due, the lien claimant may serve written notice upon the person against whom the lien is sought to be enforced. Such notice shall itemize the amount of the indebtedness and demand payment thereof. Notice sent by registered mail to the address given at the time the work or service was authorized shall be sufficient notice under the provisions of this paragraph. If no address was given at time work or service was authorized, notice of sale shall be by one publication in a legal newspaper circulated in the community where the work was originally authorized, or by posting two (2) notices in the community, provided that one notice is posted at the place of business where the work or service was authorized, and the other notice is posted at the county courthouse, or village, town or city hall. This notice may include the sale of more than one lien debtor's property, provided the property of each debtor and the amount due for service thereon is listed in separate paragraphs.

B. If payment is not made within ten (10) days after service of notice as provided in Paragraph A of this section, the lien claimant may sell such property at public sale, for cash, after the elapse of at least twenty (20) days following the giving of notice of sale. Notice of sale shall be given pursuant to the procedures for notices prescribed in Paragraph A above. Such notice shall state the time and place of sale, describe the property to be sold and state the amount of indebtedness claimed under the lien.

C. Storage charges may be charged beginning thirty (30) days after articles are left for service.

D. Costs of serving notice on person authorizing work and of advertising sale of unclaimed property shall become part of lien.

E. Bailments having replacement value not exceeding five dollars ($5.00) may be given to charity, utilized by the servicing agency or sold for charges without compliance to the provisions of this section.

F. The lien claimant may bid and may be a purchaser at such sale.

History: 1941 Comp., § 63-321, enacted by Laws 1953, ch. 125, § 5; 1953 Comp., § 61-3-24.

ANNOTATIONS

Foreclosure or sale by lien claimant. — Under 48-3-22 to 48-3-27 NMSA 1978 a lien claimant may commence foreclosure proceedings in court at any time after three months from the date for which the lien claimed becomes due, or may sell the property under the nonjudicial procedure at any time after six months from the date upon which the lien claimed became due. 1953-54 Op. Att'y Gen. No. 5741.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 C.J.S. Bailments §§ 80 to 85.

48-3-27. Disposition of proceeds of sale.

The proceeds of such sale shall be applied first to the payment of costs in giving notice of sale and conducting the sale, and second to the indebtedness claimed under the lien.

Any amount of the proceeds then remaining shall be paid to the lien debtor, after first deducting any other amounts due by lien debtor to lien claimant. If the whereabouts of the lien debtor are unknown and are not discovered within six (6) months from the date of the sale after reasonable search and inquiry, any remaining proceeds due such lien debtor shall be paid to the county treasurer for the benefit of the common school fund of the county.

History: 1941 Comp., § 63-322, enacted by Laws 1953, ch. 125, § 6; 1953 Comp., § 61-3-25.

48-3-28. Lien for laundering, dry cleaning or renovating by retaining possession; possession; sale.

A. Any person or firm that, at the request of the owner or person lawfully in possession, launders, dry cleans, presses, mends or renovates clothing, hats, furs, shoes, rugs, curtains, household linens, window shades or blinds and other similar articles shall have a lien, for unpaid charges arising from such work, by retaining the articles on which the work was done.

B. To qualify under this section, a person or firm shall have posted a notice conspicuously in each place of business at the time such work is authorized, which reads:

"All articles left for (state the type of work) and not called for within 30 days will be sold for charges pursuant to Section 48-3-28 NMSA 1978. Please leave your name and address."

C. The provisions of this section do not extend to any person or firm that performs the work specified in Subsection A of this section wholesale or as a subcontractor.

D. The possession required by this act [section] consists of physical custody. No lien exists if:

(1) the article has not been delivered into the physical custody of the person or firm doing the work; or

(2) collateral security for payment of the amount due has been accepted by the person or firm doing the work.

E. The lien claimant may enforce the lien by a sale:

(1) thirty days after the debt for which the lien is claimed becomes due, the lien claimant may serve written notice upon the person against whom the lien is sought to be enforced. The notice shall itemize the amount of indebtedness and demand its payment. Notice sent by registered or certified mail to the address given when the work was authorized is sufficient notice under this subsection. If no address was given at the time the work was authorized, notice of sale shall be given by publication once in a newspaper of general circulation in the community where the work was authorized or by posting one notice at the place of business where the work was authorized and another notice at the county courthouse or municipal building. The notice shall state the time and place of the sale, describe the property to be sold and state the amount of indebtedness claimed under the lien. This notice may include the sale of more than one

lien debtor's property, but each debtor's property and the amount due for work on it shall be listed in separate paragraphs;

(2) if payment is not made prior thereto, the lien claimant may sell the property at public sale for cash after twenty days have elapsed following the giving notice of the sale;

(3) costs of serving notice on the person authorizing the work and of advertising the sale become part of the lien;

(4) the lien claimant may bid and be a purchaser at the sale;

(5) the proceeds of the sale shall be applied first to the payment of costs of giving notice of and conducting the sale, and second to the indebtedness claimed under the lien. Any remaining proceeds shall be paid to the lien debtor after first deducting any other of his indebtedness to the lien claimant. If the lien debtor cannot be found after reasonably diligent search within three months after the sale, any remaining proceeds due him shall be subject to the Uniform Disposition of the Unclaimed Property Act.

History: 1953 Comp., § 61-3-26, enacted by Laws 1971, ch. 157, § 2.

ANNOTATIONS

Compiler's notes. — The Uniform Disposition of Unclaimed Property Act, referred to in Paragraph E(5), was compiled as Chapter 7, Article 8 NMSA 1978 before being repealed in 1997. Comparable sections are compiled as Chapter 7, Article 8A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 C.J.S. Bailments §§ 80 to 85.

48-3-29. Lien for repair or service to aircraft; detention; priority; enforcement.

A. Any person engaged in the business of operating an airport, hangar or place for maintenance or repair of aircraft who stores, maintains or repairs any aircraft accessories or furnishes materials for an aircraft at the request or with the consent of the owner or his representative, agent or lessee, whether the owner is a conditional vendee or a mortgagor or in possession or not, shall have a lien upon the aircraft or any part thereof for the sum due for storing, maintaining or repairing the aircraft for labor furnished, for accessories or materials and for all costs incurred in enforcing the lien and may detain the aircraft until the sum due is paid. The possessory lien shall have priority over all other liens, including recorded liens on the aircraft, except liens for taxes, and the operator of the aircraft shall be deemed the agent of any owner, mortgagee, conditional vendor or other lienor of the aircraft for the establishment of that lien.

B. If the person who provides the services provided in Subsection A of this section relinquishes possession of the aircraft due to the acceptance or receipt of a check, draft or written order for payment of the indebtedness due on the aircraft, but the check, draft or written order for payment is returned because of insufficient funds, no account, closed account or issuance of a stop-payment order, or if possession is lost due to the illegal acts of the owner or his agent, the possessory lien on the aircraft shall continue for a period of thirty days from the date actual possession was relinquished or lost. At the expiration of the thirty days, the lien shall continue but shall be subordinate to prior recorded liens on the aircraft. The lien shall not be applicable to a bona fide purchaser for value without notice of an aircraft lien or to a bona fide encumbrancer for value without notice of the aircraft lien, if the sale or encumbrance occurs subsequent to the relinquishment or loss of possession.

C. At any time, the aircraft upon which a lien is claimed may be repossessed.

D. Any person entitled to a lien pursuant to Subsection A of this section shall, within ninety days after the date on which labor was last performed or materials, supplies or services [were] last furnished, file in the office of the county clerk of the county in which the aircraft is based, or where the labor was performed or materials, supplies or services [were] furnished, a statement verified by oath. The statement shall include the name of the person entitled to the lien, the name of the owner of the aircraft, a description of the aircraft, and the sum due for labor performed or materials, supplies or services furnished.

E. The lien perfected pursuant to Subsection D of this section may be enforced against the aircraft, whether or not in the possession of the lienholder, by judgment of the court having jurisdiction in the county where the lien is filed and a writ of execution pursuant to that judgment. The court may, in its discretion, award reasonable attorney's fees to the prevailing party.

History: 1978 Comp., § 48-3-29, enacted by Laws 1985, ch. 92, § 1.

ANNOTATIONS

"Supplies" are not "materials". — For purposes of the possessory lien statute, the term "supplies" (such as fuel, oil, and oxygen) is distinguishable from and would not come within the definition of "materials", which, by common definition, compose parts of an airplane. Air Ruidoso, Ltd. v. Executive Aviation Ctr., Inc., 1996-NMSC-042, 122 N.M. 71, 920 P.2d 1025.

Service provider did not have possessory lien. — Regardless of whether an airline service provider had actual possession when providing supplies, the service provider did not, by virtue of providing supplies, have a possessory lien under this section. Air Ruidoso, Ltd. v. Executive Aviation Ctr., Inc., 1996-NMSC-042, 122 N.M. 71, 920 P.2d 1025.

ARTICLE 4
Abstracters' Liens

48-4-1. Lien on real estate.

Every bonded abstracter or abstract company, doing business in compliance with the provisions contained in Sections 51-1301 and 51-1302, 1941 Comp. Statutes, who shall hereafter compile and furnish any abstract or continuation of abstract, of title to any real estate at the request of the owner thereof, or his authorized agent, shall have a lien on said real estate for the amount due for compiling and furnishing such abstract of title and for all costs incurred in enforcing such lien, including cost of the preparation of claim of lien.

History: 1941 Comp., § 51-1305, enacted by Laws 1949, ch. 15, § 1; 1953 Comp., § 61-4-1.

ANNOTATIONS

Compiler's notes. — 1941 Comp., 51-1301 and 51-1302, cited in this section and compiled as 70-2-1 and 70-2-2 1953 Comp., were repealed by Laws 1963, ch. 307, § 10. For present provisions, see 47-4-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 C.J.S. Abstracts of Title § 6.

48-4-2. Time for filing claim; contents of claim.

Every abstracter claiming the benefit of this act [48-4-1 to 48-4-4 NMSA 1978] must, within ninety (90) days after the date of the certificate in the abstract for which lien is claimed, file for record with the county clerk of the county or counties in which the property, or any part thereof, covered by said abstract, is situated, a claim containing a statement of his demands, after deducting all just credits and offsets, the name of the owner, and also the name of the person by whom he was employed, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of claimant or of some other person.

History: 1941 Comp., § 51-1306, enacted by Laws 1949, ch. 15, § 2; 1953 Comp., § 61-4-2.

48-4-3. Recording of liens; indexing; fees.

The county clerk must record the claim of lien in a book kept for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds.

History: 1941 Comp., § 51-1307, enacted by Laws 1949, ch. 15, § 3; 1953 Comp., § 61-4-3.

48-4-4. Limitation on enforcement of liens; manner of enforcement.

No lien provided for in this act [48-4-1 to 48-4-4 NMSA 1978] shall bind any real estate for a longer period than one (1) year after the same has been filed, unless proceedings be commenced in the district court in and for the county in which the real estate or any of it, described in said lien, is located within that time, to enforce the lien. The proceedings for enforcement of said claims of lien shall be under the rules of pleading, practice and procedure in the district courts and such proceedings shall be had as in the case of the foreclosure of mortgages upon real estate; and the court may allow as part of the costs of foreclosure, the moneys paid for the preparation of the claim of lien and for the filing and recording thereof, and reasonable attorney's fees in the district and supreme courts.

History: 1941 Comp., § 51-1308, enacted by Laws 1949, ch. 15, § 4; 1953 Comp., § 61-4-4.

ARTICLE 5
Threshing Liens

48-5-1. Who may have.

Any owner or lessee of a threshing machine who threshes grain for another, therewith shall, upon filing the statement provided for in the next section [48-5-2 NMSA 1978], have a lien upon such grain for the value of his services in threshing the same from the date of commencement of the threshing.

History: Laws 1923, ch. 102, § 1; C.S. 1929, § 82-501; 1941 Comp., § 48-1403; 1953 Comp., § 61-5-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agriculture § 16.

48-5-2. Procedure to obtain lien.

Any person entitled to a lien under this chapter [48-5-1 to 48-5-3 NMSA 1978], shall within ten days after the threshing is completed, file in the office of the county clerk of the county in which the grain was grown a statement in writing, verified by oath, showing the amount and quantity of grain threshed, the price agreed upon for threshing the same, the name of the person for whom the threshing was done and a description of the land upon which the grain was grown. Unless the person entitled to the lien shall file

such statement within the time aforesaid he shall be deemed to have waived his right thereto.

History: Laws 1923, ch. 102, § 2; C.S. 1929, § 82-502; 1941 Comp., § 48-1404; 1953 Comp., § 61-5-4.

48-5-3. Priority.

Such lien shall have priority over all other liens and encumbrances upon such grain.

History: Laws 1923, ch. 102, § 3; C.S. 1929, § 82-503; 1941 Comp., § 48-1405; 1953 Comp., § 61-5-5.

ARTICLE 5A
Harvester's Liens

48-5A-1. Who may have a lien.

Any individual or company who harvests any crop for another, either manually or by the use of a machine, shall, upon filing the statement provided for in Section 2 [48-5A-2 NMSA 1978] of this act, have a lien upon the crop for the value of his services in harvesting the crop. The lien shall exist from the date of the harvest.

History: Laws 1989, ch. 89, § 1.

48-5A-2. Procedure to obtain lien.

Any person or company entitled to a lien under this act [48-5A-1 to 48-5A-3 NMSA 1978] shall, within twenty-one days after the harvest is completed, file in the office of the county clerk of the county in which the crop was grown a statement in writing, verified by oath, showing the amount and quantity of the crop harvested, the price agreed upon for harvesting it, the name of the person for whom the harvest was done and a description of the land upon which the crop was grown. Unless the person entitled to the lien files that statement within the twenty-one day time limit, he shall be deemed to have waived his right to the lien.

History: Laws 1989, ch. 89, § 2.

48-5A-3. Petition to cancel lien; security.

A. The owner of any crop subject to a harvester's lien may petition the district court in the county in which the crop was grown for an order canceling the lien.

B. Upon a filing of a petition, the district court judge shall examine the lien claimant's recorded demands and determine an amount sufficient to satisfy the recorded demands and any other damages, court costs or attorneys' fees which may be recovered by the lien claimant. Security, in an amount set by the judge and of a type approved by him, shall be deposited by the owner of the crop with the district court conditioned on the payment of any sum found to be validly due the lien claimant.

C. When the security is deposited, the district court shall immediately issue an order canceling the lien and shall notify the county clerk with whom the lien was filed. Upon the recording of the order, the county clerk shall mark the filed lien canceled. When an order is issued pursuant to this subsection, the claimant's lien attaches to the security.

History: Laws 1989, ch. 89, § 3.

ARTICLE 5B
Producers' Liens

(Repealed by Laws 1996, ch. 56, § 10; Laws 1997, ch. 83, § 1.)

48-5B-1 to 48-5B-14. Repealed.

ANNOTATIONS

Repeals. — Laws 1997, ch. 83, § 1 repealed 48-5B-1 to 48-5B-3, 48-5B-5 to 48-5B-7, 48-5B-9, and 48-5B-14 NMSA 1978, as enacted by Laws 1995, ch. 157, §§ 1 to 14 and by Laws 1995, ch. 56, §§ 4 and 9, and as amended by Laws 1996, ch. 56, §§ 1 to 8, relating to producer's liens, effective June 20, 1997. For provisions of former sections, *see* the 1996 NMSA 1978 on New Mexico One Source of Law DVD.

Laws 1996, ch. 56, § 10, repealed 48-5B-4, 48-5B-8, and 48-5B-10 to 48-5B-13 NMSA 1978, as enacted by Laws 1995, ch. 157, §§ 4, 8, and 10 to 13, relating to producer's liens, effective May 15, 1996. For provisions of former sections, *see* the 1995 NMSA 1978 on New Mexico One Source of Law DVD.

ARTICLE 6
Agricultural Landlord Liens

48-6-1. Landlords shall have preference lien.

All persons leasing or renting agricultural lands, at will or for a term, shall have a preference lien upon the property of the tenant hereinafter indicated, upon such premises, for any rent that may become due and for all money and the value of all animals, tools, provisions and supplies furnished by the landlord to the tenant to enable the tenant to make a crop on such premises, and to gather, secure, house and put the

same in condition for market, the money, animals, tools, provisions and supplies so furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products or other property; and this lien shall apply only to animals, tools and other property furnished by the landlord to the tenant, and to the crop raised on such rented premises.

History: Laws 1921, ch. 182, § 1; C.S. 1929, § 82-101; 1941 Comp., § 48-1501; 1953 Comp., § 61-6-1.

ANNOTATIONS

Cross references. — For priority of threshing liens, see 48-5-3 NMSA 1978.

For rentals for lease of state lands, lien, see 19-7-34 NMSA 1978.

Landlord's lien statute has no application to the relation of vendor and vendee but only to that of landlord and tenant. Snipes v. Dexter Gin Co., 45 N.M. 475, 116 P.2d 1019 (1941).

Lien superior to subsequent chattel mortgage. — The preference lien inuring to a landlord under this section, for moneys and supplies furnished the tenant in the production of crops, is superior to the lien of a chattel mortgage on such crops given by the tenant subsequent to creation of the tenancy. Farmers' Cotton Fin. Corp. v. Cotton Fin. & Trading Corp., 37 N.M. 101, 18 P.2d 1027 (1933).

No legislative intent lien have priority over prior chattel mortgage. — There is nothing which indicates a legislative intent to give to a landlord's lien upon crops grown on leased or rented premises and fed to livestock belonging to the tenant, priority over and above a chattel mortgage lien covering the livestock at the time the tenant brought such livestock onto the leased premises. United States v. Evans, 245 F.2d 681 (10th Cir. 1957).

Sale in excess of lien not conversion as to subordinate mortgagee. — Where a landlord holding a lien under this section, far exceeding in amount the value of all crops raised by tenant, with the latter's consent, either express or implied, takes possession of such crops, harvests and markets same, and applies proceeds toward satisfaction of his lien, he is not guilty of conversion as against a third person holding chattel mortgage on same crops, subordinate to landlord's lien for advancements. And if the landlord is not guilty of conversion, a fortiori his transferee of such crops cannot be. Farmers' Cotton Fin. Corp. v. Cotton Fin. & Trading Corp., 37 N.M. 101, 18 P.2d 1027 (1933).

Law reviews. — For article, "The Warehouseman vs. the Secured Party: Who Prevails When the Warehouseman's Lien Covers Goods Subject to a Security Interest?" see 8 Nat. Resources J. 331 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Agriculture §§ 12 to 15; 49 Am. Jur. 2d Landlord and Tenant §§ 686, 700, 701.

Statutory lien upon crops removed from premises, 9 A.L.R. 305, 96 A.L.R. 249.

Priority of landlord's lien as against chattel mortgage, 37 A.L.R. 400, 52 A.L.R. 935.

Warehouse Receipts Act as affecting landlord's lien on property represented by receipts, 61 A.L.R. 952.

Property covered by landlord's lien, 96 A.L.R. 249.

Landlord's acceptance of chattel mortgage, or conditional sales contract, as waiver of landlord's lien, 96 A.L.R. 568.

Subrogation of lessee in respect of liens superior to his lease, 1 A.L.R.2d 286.

What constitutes theft within automobile theft insurance policy - modern cases, 67 A.L.R.4th 82.

3 C.J.S. Agriculture §§ 105, 116; 52A C.J.S. Landlord and Tenant §§ 817 to 820.

48-6-2. Tenants not to remove property subject [to lien]

It shall not be lawful for the tenant, while the rent and such advances remain unpaid, to remove, or permit to be removed, from the premises so leased or rented any agricultural products produced thereon, or any of the animals, tools or property furnished as aforesaid, without the consent of the landlord.

History: Laws 1921, ch. 182, § 2; C.S. 1929, § 82-102; 1941 Comp., § 48-1502; 1953 Comp., § 61-6-2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 C.J.S. Agriculture § 114; 52 C.J.S. Landlord and Tenant §§ 639, 714.

48-6-3. When lien expires.

Such preference lien shall continue as to such agricultural products and as to the animals, tools and other property furnished to the tenant as aforesaid, so long as they remain on such rented or leased premises and for one month thereafter; and such lien, as to agricultural products and as to animals and tools furnished as aforesaid, shall be superior to all exemptions.

History: Laws 1921, ch. 182, § 3; C.S. 1929, § 82-103; 1941 Comp., § 48-1503; 1953 Comp., § 61-6-3.

ANNOTATIONS

Effectiveness as against person with knowledge. — As against a person who has full knowledge of existence of the landlord's "preference lien," the lien is effective for thirty days. Goggins v. Dexter Gin Co., 46 N.M. 440, 130 P.2d 1029 (1942).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

52 C.J.S. Landlord and Tenant § 652.

48-6-4. Do not apply to, etc.

Such lien shall not attach to the goods, wares and merchandise of a merchant, trader or mechanic, sold and delivered in good faith in the regular course of business to the tenant.

History: Laws 1921, ch. 182, § 4; C.S. 1929, § 82-104; 1941 Comp., § 48-1504; 1953 Comp., § 61-6-4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 49 Am. Jur. 2d Landlord and Tenant §§ 704, 706.

48-6-5. Distress warrant.

When any rent or advances shall become due, or the tenant shall be about to remove from such leased or rented premises, or to remove his property from such premises, it shall be lawful for the person to whom the rent or advances are payable, his agent, attorney, assigns, heirs or legal representatives, to apply to a justice of the peace [magistrate] of the precinct where the premises are situated, or in which the property upon which a lien for rents or advances exist, may be found, or to any justice [magistrate] having jurisdiction of the cause of action, for a warrant to seize the property of such tenant; provided, that when a distress warrant shall be issued by any justice [magistrate], other than the justice of the peace [magistrate] of the precinct in which the rented premises may be situated, or in which the defendant may reside, such warrant shall be made returnable to, and the affidavit and bond upon which it is issued shall be transmitted by, the justice [magistrate] issuing such distress warrant, to the justice [magistrate] of the precinct in which the rented premises may be situated, or in which the defendant may reside.

History: Laws 1921, ch. 182, § 5; C.S. 1929, § 82-105; 1941 Comp., § 48-1505; 1953 Comp., § 61-6-5.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets throughout this section. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 C.J.S. Landlord and Tenant §§ 661, 685 to 692.

48-6-6. Oath and bond.

The plaintiff, his agent or attorney, shall make oath that the amount sued for is for rent or advances, such as are mentioned in the first section [48-6-1 NMSA 1978] of this act, or shall produce a writing signed by such tenant to that effect, and shall further swear that such warrant is not sued out for the purpose of vexing and harassing the defendant; and the person applying for such warrant shall execute a bond with two or more good and sufficient sureties, to be approved by the justice of the peace [magistrate], payable to the defendant, conditioned that the plaintiff will pay the defendant such damages as he may sustain in case such warrant has been illegally and unjustly sued out, which bond shall be filed among the papers of the cause; and, in case the suit be finally decided in favor of the defendant, he may bring suit against the plaintiff and his sureties on such bond, and shall recover such damages as may be awarded to him by the proper tribunal.

History: Laws 1921, ch. 182, § 6; C.S. 1929, § 82-106; 1941 Comp., § 48-1506; 1953 Comp., § 61-6-6.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

48-6-7. Distress warrant, issued by whom.

Upon the filing of such oath and bond, it shall be the duty of such justice of the peace [magistrate] to issue his warrant to the sheriff or any constable of the county, commanding him to seize the property of the defendant, or so much as will satisfy the demand, which warrant shall be returnable to said justice [magistrate].

History: Laws 1921, ch. 182, § 7; C.S. 1929, § 82-107; 1941 Comp., § 48-1507; 1953 Comp., § 61-6-7.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

48-6-8. Duty of officer.

It shall be the duty of the officer to whom such warrant is directed to seize the property of such tenant, or so much thereof as shall be of value sufficient to satisfy such debts and costs, and the same in his possession safely keep, unless the same is replevied as herein provided, and make due return thereof to the court to which said warrant is returnable.

History: Laws 1921, ch. 182, § 8; C.S. 1929, § 82-108; 1941 Comp., § 48-1508; 1953 Comp., § 61-6-8.

48-6-9. Defendant may replevy.

The defendant shall have the right at any time within ten days from the date of said levy to replevy the property seized, by giving bond payable to the plaintiff, with two or more good and sufficient sureties in double the amount of the debt, or, at his election, for the value of the property so seized, conditioned that if the defendant be cast in the action he shall satisfy the judgment that may be rendered against him or pay the estimated value of the property, with lawful interest thereon from the date of the bond.

History: Laws 1921, ch. 182, § 9; C.S. 1929, § 82-109; 1941 Comp., § 48-1509; 1953 Comp., § 61-6-9.

48-6-10. Judgment against sureties.

When the property levied on has been replevied as provided in the preceding section [48-6-9 NMSA 1978] and final judgment shall be rendered against the defendant, such judgment shall be also against him and his sureties on his replevy bond for the amount of the judgment, interest and costs, or for the value of the property replevied and interest, according to the terms of such bond.

History: Laws 1921, ch. 182, § 10; C.S. 1929, § 82-110; 1941 Comp., § 48-1510; 1953 Comp., § 61-6-10.

48-6-11. Perishable property sold.

If the property is of a perishable or wasting kind, and the defendant fails to replevy as herein provided, the officer making the levy, or the plaintiff, or the defendant, may apply to the court, or judge thereof, to which the warrant is returnable, either in term

time or vacation, for an order to sell such property; and if any person other than the defendant shall apply for such order of sale, the court shall not grant such order, unless the person applying shall file with such court an obligation, payable to the defendant, with two or more good and sufficient sureties, to be approved by said court, that they will be responsible to the defendant for such damages as he may sustain in case such sale be illegally and unjustly applied for, or be illegally and unjustly made, which sale shall be conducted as sales under execution.

History: Laws 1921, ch. 182, § 11; C.S. 1929, § 82-111; 1941 Comp., § 48-1511; 1953 Comp., § 61-6-11.

48-6-12. Summons for defendant.

It shall be the duty of the justice of the peace [magistrate], at the time he issues the warrant to issue a summons to the defendant requiring him to answer before such justice [magistrate], if he has jurisdiction to finally try the cause, and, upon it being returned served, to proceed to judgment as in ordinary cases. If such justice of the peace [magistrate] has not jurisdiction to finally try the case, by reason of any provisions herein contained, he shall forthwith transfer all papers to the justice of the peace [magistrate] having jurisdiction to finally try said cause, who shall without delay issue summons to defendant, giving him notice of the suit and the time of the setting as provided by law; provided, that if the defendant has removed from the county without service, notice of suit shall be given him, as now provided by law, in attachment suit in justice of the peace [magistrate] court in this state, when the defendant is absent from the county or cannot be found in the county.

History: Laws 1921, ch. 182, § 12; C.S. 1929, § 82-112; 1941 Comp., § 48-1512; 1953 Comp., § 61-6-12.

ANNOTATIONS

Cross references. — For attachment in magistrate court, see 35-9-2 NMSA 1978.

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets throughout this section. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

48-6-13. Rights of tenant.

Nothing in this act [48-6-1 to 48-6-16 NMSA 1978] shall be so construed as to prevent landlords and tenants from entering into such stipulations or contracts in regard to rents and advances as they may think proper; and, should the landlord, without any default on the part of the tenant or lessees, fail to comply in any respect with his part of the contract, he shall be responsible to said tenant or lessee for whatever damages may be sustained thereby; and to secure such damages to such tenant or lessee, he shall

have a lien on all the property in his possession not exempt from forced sale, as well as upon all rents due to said landlord under said contract.

History: Laws 1921, ch. 182, § 13; C.S. 1929, § 82-113; 1941 Comp., § 48-1513; 1953 Comp., § 61-6-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Tenant's right to lien, in absence of agreement therefor, for improvements made on leased premises, 25 A.L.R.2d 885.

48-6-14. Tenants shall not sublet without consent, etc.

If lands are rented by the landlord to any person or persons, such person or persons shall not assign their lease or sublet said lands, or any part thereof, during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney.

History: Laws 1921, ch. 182, § 14; C.S. 1929, § 82-114; 1941 Comp., § 48-1514; 1953 Comp., § 61-6-14.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 C.J.S. Agriculture §§ 112, 113, 118.

48-6-15. Suit in district court.

When the amount in controversy is in excess of two hundred dollars [$200], suit may be instituted in the district court in the county in which the premises is [are] situated, or in which the defendant resides or may be found, by the filing in said court of complaint, affidavit and bond, with the clerk of said court as are required by this act [48-6-1 to 48-6-16 NMSA 1978] to be filed in the justice of the peace [magistrate] court, and notice of suit and trial thereof shall be had according to law and the rules of said court in civil cases.

History: Laws 1921, ch. 182, § 15; C.S. 1929, § 82-115; 1941 Comp., § 48-1515; 1953 Comp., § 61-6-15.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

48-6-16. [Construction of act.]

This act [48-6-1 to 48-6-16 NMSA 1978] shall not be construed to repeal, amend or modify Section 19 [48-3-5 NMSA 1978] of Chapter 65 of the Session Laws of 1917.

History: Laws 1921, ch. 182, § 16; C.S. 1929, § 82-116; 1941 Comp., § 48-1516; 1953 Comp., § 61-6-16.

ARTICLE 7
Mortgages

48-7-1. Right of possession.

In the absence of stipulation to the contrary, the mortgagor of real poperty [property] shall have the right of possession.

History: Laws 1876, ch. 36, § 8; C.L. 1884, § 1593; C.L. 1897, § 2365; Code 1915, § 571; 1941 Comp., § 63-401; 1953 Comp., § 61-7-1; Laws 1961, ch. 96, § 11-116.

ANNOTATIONS

Cross references. — For mechanic's lien with preference over unrecorded mortgage, see 48-2-5 NMSA 1978.

For recording of instruments affecting real property, see 14-9-1 NMSA 1978.

For acknowledgments, see 14-14-1 to 14-14-11 NMSA 1978.

For foreclosure of mortgages, see 39-5-16 NMSA 1978.

For Mortgage Finance Authority Act, see 58-18-1 NMSA 1978 et seq.

For rural electric cooperatives, mortgages, see 62-15-23 NMSA 1978.

Compiler's notes. — This section was omitted from the 1929 Compilation presumably because it was part of a chattel mortgage act deemed superseded by the provisions compiled as 61-8-1 to 61-8-7, 61-8-9 to 61-8-11, 1953 Comp. (now repealed), but the latter made no reference to real property.

"Mortgage" defined. — A mortgage of real estate is simply security for the payment of a debt, leaving the legal title in the mortgagor. Cleveland v. Bateman, 21 N.M. 675, 158 P. 648 (1915); Stearns-Roger Mfg. Co. v. Aztec Gold Mining & Milling Co., 14 N.M. 300, 93 P. 706 (1908).

Change of common-law rule. — Common-law rule that mortgagee is entitled to possession of mortgaged property has been changed by this section which, in the absence of any agreement to the contrary, gives the right of possession to the

mortgagor until divested by operation of law or by breach of the terms of the mortgage. Kitchen v. Schuster, 14 N.M. 164, 89 P. 261 (1907).

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Property Law," see 14 N.M.L. Rev. 189 (1984).

For article, "Mortgages in New Mexico," see 20 N.M.L. Rev. 585 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Mortgages § 168 et seq.

Validity, construction and effect of provision in real estate mortgage as to rents and profits, 4 A.L.R. 1405, 55 A.L.R. 1020, 87 A.L.R. 625, 91 A.L.R. 1217.

Acceleration clause, effect in mortgage of delay in declaring mortgage due, 5 A.L.R. 437.

Right to receive rents, as between mortgagor and mortgagee of leased premises, 14 A.L.R. 640, 105 A.L.R. 744.

Contract requiring mortgagee to look to property alone for payment, 17 A.L.R. 717.

Right to acceleration clause, reasonable time in which to make payment required by mortgage after acceleration clause becomes effective, 21 A.L.R. 1547.

Effect of acceleration clause on note secured by mortgage, 34 A.L.R. 848, 56 A.L.R. 185.

Rights in abstract of title held by mortgagee, 44 A.L.R. 1332.

Duty of mortgagee in possession to account for use and occupation, 46 A.L.R. 138.

Acceleration clause as affected by cross indebtedness or obligation, 51 A.L.R. 1256, 151 A.L.R. 896.

Acceleration of maturity of mortgage in absence of express provision to that effect, by failure to keep up insurance or to pay taxes or interest, 54 A.L.R. 1230.

Rights and liabilities of purchaser of timber from mortgagor, 57 A.L.R. 454.

Marketability of title as affected by mortgage, 57 A.L.R. 1379, 81 A.L.R.2d 1020.

Grounds of relief from acceleration clause, 70 A.L.R. 993.

Duty of creditor to apply funds so as to prevent operation of acceleration clause, 80 A.L.R. 246.

Mortgagor in possession as liable to receiver for occupational rent, 91 A.L.R. 1236.

Exploitation of oil or gas resources of land by mortgagor, or purchaser or lessee subsequently to mortgage, as waste as against mortgagee, 95 A.L.R. 957.

Invalidity or avoidability of assumption clause in deed as between grantor and grantee as affecting mortgagee's rights, 100 A.L.R. 911.

Acceleration, bankruptcy proceedings as affecting provision for, 108 A.L.R. 1030.

Easement appurtenant to land created subsequent to mortgage of dominant estate, as inuring to benefit of mortgagee, 116 A.L.R. 1078.

Forged or unauthorized mortgage, proceeds of which are used to discharge valid lien, as giving mortgagee equitable lien, 151 A.L.R. 417.

Deed absolute on its face, with contemporaneous agreement or option for repurchase by grantor, as mortgage vel non, 155 A.L.R. 1104.

Delivery of mortgage by one but not all of the mortgagors, 162 A.L.R. 892.

Joining instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294.

Effect of supplying description of property conveyed after manual delivery to mortgage, 11 A.L.R.2d 1372.

Estoppel of mortgagee from contesting mortgagor's title, 11 A.L.R.2d 1397.

Rights of parties under oral agreement to buy or bid in land for another, 27 A.L.R.2d 1285.

Corporate officers' authority to mortgage corporate personal property, 62 A.L.R.2d 712.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242.

What constitutes waste justifying appointment of receiver of mortgaged property, 55 A.L.R.3d 1041.

59 C.J.S. Mortgages §§ 300 to 306.

48-7-2. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 234, § 18 repealed 48-7-2 NMSA 1978, as enacted by Laws 1927, ch. 43, § 1, relating to assignments of mortgages, recordings, person entitled to payment, the effect of failure to record and assignee's action against assignor, effective January 1, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD.

48-7-3. Repealed.

ANNOTATIONS

Repeals. — Laws 2009, ch. 234, § 18 repealed 48-7-3 NMSA 1978, as enacted by Laws 1927, ch. 43, § 2, relating to recording of prior assignments, the effect of failure to record and actual notice of assignment, effective January 1, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on New Mexico One Source of Law DVD.

48-7-4. Release on record upon satisfaction of mortgage.

A. When any debt or evidence of debt secured by a mortgage or deed of trust upon any real estate in the state has been fully satisfied, it is the duty of the mortgagee, trustee or the assignee of the debt or evidence of debt, as the case may be, to cause the full satisfaction of it to be entered of record in the office of the county clerk of the county where the mortgage or deed of trust is recorded.

B. The debt or evidence of debt secured by a mortgage or deed of trust shall not have been fully satisfied for purposes of Subsection A of this section, even if all sums due thereunder have been paid in full, if the written agreement between the mortgagor or trustor and the mortgagee or beneficiary provides for the securing of a series of loans or a line of credit by a mortgage or deed of trust and the notation "Line of credit mortgage" is prominently placed on the mortgage or deed of trust that is filed with the county clerk in the county or counties in which the property is located.

C. If, at any time the obligation secured by the mortgage or deed of trust described in Subsection B of this section is fulfilled, and the balance is zero, the mortgagee or beneficiary shall cause the mortgage or deed of trust to be released of record upon written demand of the mortgagor, trustor or the successor or assignee thereof. In the event of the death or incompetence of the mortgagor or trustor, the heirs, personal representative, conservator or guardian of the mortgagor or trustor as appropriate may make the demand for release described in this subsection.

History: Laws 1909, ch. 51, § 1; Code 1915, § 4776; C.S. 1929, § 117-120; 1941 Comp., § 63-404; 1953 Comp., § 61-7-4; Laws 1991, ch. 59, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, added the catchline; designated the section as Subsection A; added Subsections B and C; and made minor stylistic changes in Subsection A.

Compiler's notes. — The compilers of the 1915 Code substituted "county clerk" for "probate clerk and ex officio recorder."

Cancellation granted on condition of payment. — Where a building and loan association had agreed to take home owners' loan corporation bonds in full settlement of a claim, part of which had been paid, but the mortgage had not been released, the court granted mortgagors cancellation of note and mortgage upon condition of payment. Chaves County Bldg. & Loan Ass'n v. Hodges, 40 N.M. 326, 59 P.2d 671 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 55 Am. Jur. 2d Mortgages §§ 410 et seq., 1222 et seq.

Quitclaim deed by mortgagee to mortgagor as satisfaction of mortgage, 44 A.L.R. 1273, 162 A.L.R. 556.

Satisfied or discharged mortgage as cloud on title, 78 A.L.R. 101.

Tender of amount of mortgage debt which is made upon condition of receipt in full or release of mortgage as affecting lien of mortgage, 93 A.L.R. 74.

Mortgagor as released by consent of mortgagee to release or impairment of mortgage security by grantee of mortgagor, 112 A.L.R. 1343.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 A.L.R.2d 260.

Requiring security as condition of canceling of record mortgage or lien, or of recording payment, 2 A.L.R.2d 1064.

Reinstatement and restoration of mortgages released or discharged without authorization, as against subsequent purchasers, lienholders, judgment creditors and the like, without notice, 35 A.L.R.2d 948.

Construction of provision in real estate mortgage, land contract or other security instrument for release of separate parcels of land as payments are made, 41 A.L.R.3d 7.

Damages recoverable for real estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R.4th 853.

Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 43 A.L.R.5th 519.

59 C.J.S. Mortgages §§ 470 to 472.

48-7-4.1. Alternative form of release of mortgage; filing by title insurer.

A. If, within ninety days after full satisfaction of a debt or evidence of debt secured by a mortgage or deed of trust upon any real estate, evidence of the full satisfaction has not been recorded pursuant to the provisions of Section 48-7-4 NMSA 1978, a title insurer may prepare and record a release of the mortgage or deed of trust; provided, however, no release shall be recorded by the title insurer unless the insurer has, no later than ten days prior to the date of recording, mailed notice of the intent to record to the last known address of the mortgagee, the trustee and beneficiary of a deed of trust or the assignee of record of the debt or evidence of debt.

B. A release recorded pursuant to this section shall include:

(1) the name of the mortgagee or trustee and beneficiary;

(2) the name of the mortgagor or trustor;

(3) the recording reference to the mortgage or deed of trust;

(4) a recital that the obligation secured by the mortgage or deed of trust has been paid in full; and

(5) the date and amount of payment.

C. A release recorded pursuant to this section shall be deemed to be the equivalent of a release recorded pursuant to Section 48-7-4 NMSA 1978.

D. In addition to any other remedy, a title insurer recording a release pursuant to this section shall be liable to any mortgagee or beneficiary of a deed of trust for damages, including attorney fees, that the mortgagee or beneficiary of a deed of trust may sustain by reason of the wrongful recording of a release of mortgage or deed of trust.

E. Nothing in this section relieves a person from an obligation to record a full satisfaction or release pursuant to Section 48-7-4 NMSA 1978 or from the imposition of a penalty for failure to record a full satisfaction or release pursuant to Section 48-7-5 NMSA 1978.

F. A title insurer may charge a reasonable fee to the mortgagee for the preparation and recording of the release of mortgage.

History: Laws 2003, ch. 245, § 1.

ANNOTATIONS

Cross references. — For forms related to mortgage and release, *see* 47-1-44 NMSA 1978.

Effective dates. — Laws 2003, ch. 245 contained no effective date provision, but, pursuant to N.M. Const., art. IV. § 23, was effective June 20, 2003, 90 days after adjournment of the legislation.

48-7-5. [Failure to release; penalty; civil liability.]

Any person who shall be guilty of violating the preceding section [48-7-4 NMSA 1978], upon conviction before any justice of the peace [magistrate] or district court having jurisdiction of the same shall be punished by a fine of not less than ten [($10.00)] nor more than twenty-five dollars [($25.00)], and shall be liable in a civil action to the owner of such real estate for all costs of clearing the title to said property including a reasonable attorney's fee.

History: Laws 1909, ch. 51, § 2; Code 1915, § 4777; C.S. 1929, § 117-121; 1941 Comp., § 63-405; 1953 Comp., § 61-7-5.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1968, ch. 62, § 40, "magistrate" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law. For justice of the peace construed to refer to magistrate court, see 35-1-38 NMSA 1978.

Ejectment denied where parties contemplated new mortgage. — Ejectment was denied where no consideration had been paid for unrecorded satisfaction of a real estate mortgage, parties having contemplated that a new mortgage was to be given in place of it, though the transaction was never carried out, so that the purported satisfaction of the old mortgage had never become effective. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 55 Am. Jur. 2d Mortgages §§ 436 et seq., 1088 et seq.

Validity and construction of statute allowing penalty and damages against mortgagee refusing to discharge mortgage on real property, 56 A.L.R. 335.

Damages recoverable for real estate mortgagee's refusal to discharge mortgage or give partial release therefrom, 8 A.L.R.4th 853.

59 C.J.S. Mortgages § 474.

48-7-6. [Release by administrator or executor of deceased mortgagee.]

When the mortgagee of any land or tenements shall die leaving minor heirs, the executors or administrators of such mortgagee shall be and are hereby authorized, on receiving the amount due the estate of such deceased mortgage [mortgagee], to release to the mortgagor the legal title of the said mortgaged premises, and such deed of release shall be valid.

History: Laws 1884, ch. 29, § 30; C.L. 1884, § 2255; C.L. 1897, § 2092; Code 1915, § 4778; C.S. 1929, § 117-122; 1941 Comp., § 63-406; 1953 Comp., § 61-7-6.

ANNOTATIONS

Compiler's notes. — This section was enacted as part of a law relating to the real estate of decedents, the remaining sections of which were almost entirely superseded by a similar law, former 31-7-9, 31-7-10, 31-7-14 to 31-7-34, 1953 Comp. (now repealed). For present provisions relating to property of decedents, see Uniform Probate Code, Chapter 45 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Foreign executor's or administrator's right to discharge mortgage, 10 A.L.R. 283.

33 C.J.S. Executors and Administrators § 181.

48-7-7. Sale of real property under power of sale; allowed if trustor agrees.

Except as specifically provided in the Deed of Trust Act [48-10-1 to 48-10-21 NMSA 1978], no real property or any interest in it shall be sold under any power of sale contained in any mortgage, mortgage deed, trust deed or any other written instrument having the effect of a mortgage, which has been executed subsequent to the effective date of Laws 1929, Chapter 139, Section 1.

History: Laws 1929, ch. 139, § 1; C.S. 1929, § 117-301; 1941 Comp., § 63-407; 1953 Comp., § 61-7-7; Laws 1987, ch. 61, § 23.

ANNOTATIONS

Cross references. — For foreclosure of mortgages, see 39-5-1 NMSA 1978 et seq.

The 1987 amendment, effective June 19, 1987, added the catchline; inserted "Except as specifically provided in the Deed of Trust Act" at the beginning of the subsection; deleted "or by virtue of" following "shall be sold under"; substituted "effective date of

Laws 1929, Chapter 139, Section 1" for "time this act shall go into effect" at the end of the subsection; and made minor stylistic changes.

Compiler's notes. — Laws 1929, ch. 139, contains no effective date provision, but was enacted at a session which adjourned on March 9, 1929. See N.M. Const., art. IV, § 23.

Sections not in conflict. — This section does not conflict with provision of 37-1-20 NMSA 1978 limiting time within which chattels, goods and land may be sold under power of sale in mortgage. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Lien enforcement time not extended by intervening legislation. — Where 1929 act (48-7-7 NMSA 1978) intervened before lien resulting from a 1921 mortgage had been enforced and a "renewal" mortgage was executed, time for enforcing the 1921 mortgage lien was not extended because remedy by foreclosure under power of sale had been withdrawn by the legislature which allowed a reasonable time for enforcing the remedy before it took effect. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Mortgagee entitled to retain possession until debt paid. — Though foreclosure of mortgage is barred by limitations, a mortgagee in possession under contract with mortgagors did not lose the status of a mortgagee in possession by ineffective attempt to sell the land under power of sale, but was entitled to retain possession until mortgage debt was paid. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Effect of new note. — Where a new note is given promising to pay one year later the face amount of earlier note barred by limitations but not interest accrued thereon, it represents a new contract in so far as concerns effect of intervening statutes limiting the time for exercising power of sale arising under real estate mortgage given to secure the old note. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Fire policy's notice of sale requirement imperative. — The phrase "any notice of sale" in a fire policy, requiring notice by mortgagee of any sale relating to such property, referred to notice of sale under power of sale in mortgage or trust deed, and was inoperative in this state, having been abolished by statute. National Mut. Sav. & Loan Ass'n v. Hanover Fire Ins. Co., 40 N.M. 44, 53 P.2d 641 (1936).

Notice of foreclosure requirement applied solely to first mortgage. — A provision of a fire policy containing standard mortgage clause requiring mortgagee to give notice of foreclosure proceedings applied solely to a first mortgage, and first mortgagees were not precluded from recovery because of failure to notify insurer of proceedings on second mortgage. National Mut. Sav. & Loan Ass'n v. Hanover Fire Ins. Co., 40 N.M. 44, 53 P.2d 641 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 55 Am. Jur. 2d Mortgages §§ 1107 et seq., 1296 et seq.

Declaratory judgment as to deeds of trust, 12 A.L.R. 83, 19 A.L.R. 1124, 50 A.L.R. 42, 68 A.L.R. 110, 87 A.L.R. 1205, 114 A.L.R. 1361, 142 A.L.R. 8

Judgment creditor's remedy where debtor surrenders property to vendee under prior security deed, 36 A.L.R. 805.

Rights and remedies against mortgagee under deed intended as a mortgage, who defeats or impairs equity of redemption by conveying or encumbering property, 46 A.L.R. 1089.

Deed placed in escrow to be delivered to grantee to pay debt due him, as a mortgage, 65 A.L.R. 120.

Change of deed intended as mortgage by subsequent agreement into an absolute deed, 65 A.L.R. 771.

Extension of existing mortgage or deed of trust by subsequent agreement to cover additional indebtedness, 76 A.L.R. 574.

Financial depression as justification of moratorium or other relief to mortgagor, 90 A.L.R. 1330, 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123, 104 A.L.R. 375.

Removal, substitution and succession of trustee under deed of trust or mortgage securing bonds or other obligations, 98 A.L.R. 1132.

Misstatement in trustee's or mortgagee's report as to amount for which property has been sold under power of sale, 22 A.L.R.2d 979.

Who may assert invalidity of sale, mortgage or other disposition of corporate property without approval of stockholders, 58 A.L.R.2d 784.

Duty and liability of trustee under mortgage or deed of trust to holders of obligations secured thereby, 90 A.L.R.2d 501.

Validity and enforceability of due-on-sale real estate mortgage provisions, 61 A.L.R.4th 1070.

59 C.J.S. Mortgages §§ 544 to 547.

48-7-8. Mortgage escrow funds; limitation; credit against principal.

A. A monthly charge may be held in escrow by a mortgagee for the payment of taxes, insurance premiums and other charges required by the terms of a mortgage subject to the restrictions in Subsection B of this section.

B. Any balance in the escrow fund, exceeding two months' total escrow charges for future taxes, insurance premiums or other required charges, plus the pro rata accrual for such taxes, premiums and other charges, upon the demand of the mortgagor but not more than once each year, shall be credited to the principal amount of the mortgage as provided in Subsection B, or as provided by the contractual agreement, within sixty days of the demand.

C. Failure of a mortgagee to credit upon demand any excess accumulation of escrow funds as provided in Subsection B of this section shall cause [a] penalty at the rate of six percent per year to run on the amount of such excess accumulation of escrow funds which penalty shall be payable to the mortgagor.

History: 1953 Comp., § 61-7-8, enacted by Laws 1971, ch. 175, § 1.

ANNOTATIONS

Bracketed material. — The bracketed word "a" in Subsection C was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 Am. Jur. 2d Escrow § 2; 54A Am. Jur. 2d Mortgages §§ 2, 154, 155, 157.

Acceptance of past-due interest as waiver of clause in mortgage, 97 A.L.R.2d 997.

Rights in funds representing "escrow" payments made by mortgagor in advance to cover taxes or insurance, 50 A.L.R.3d 697.

59 C.J.S. Mortgages §§ 246, 418.

48-7-9. Mortgages; future advances; lien.

Every mortgage or other instrument securing a loan upon real estate and constituting a lien, or the full equivalent thereof, upon the real estate securing such loan, may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from the time of recording as to all advances, whether obligatory or discretionary, made thereunder until such mortgage is released of record; provided, that the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.

History: 1953 Comp., § 61-7-9, enacted by Laws 1975, ch. 61, § 1.

ANNOTATIONS

Recording statutes provide notice and indicate limits of financing. — In lending money secured by property, recording statutes provide for notice to other potential

lenders and indicate the upper limits of that financing. New Mexico Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 582 P.2d 379 (1978).

Certainty of extent to which mortgage encumbers property required. — Because potential lenders rely upon recorded mortgages to determine whether to make other loans, there must be certainty as to the extent to which a mortgage encumbers property. New Mexico Bank & Trust Co. v. Lucas Bros., 92 N.M. 2, 582 P.2d 379 (1978).

Section does not require that subsequent advances make reference to previous mortgage with the future advance clause for that clause to operate. In re Davis, 44 Bankr. 88 (Bankr. D.N.M. 1984).

Amount secured by mortgage. — This section should be read to mean that the amount secured by the mortgage shall not exceed the maximum amount stated in the mortgage. Any excess would be unsecured. Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 784 P.2d 415 (1989).

48-7-10. Mortgages; insurance proceeds.

Where there is a mortgage of a single family residence securing a loan and where there are no federal regulations to the contrary, the mortgagor may require the proceeds of any insurance policy, which are payable by reason of damage to or destruction of the mortgaged property and which would otherwise be payable to the mortgagee, to be held jointly by the mortgagor and the mortgagee in an escrow account and to be applied toward the repair or replacement of the damaged property. Provided that it shall first be reasonably established to the satisfaction of the mortgagee that such repair or replacement will restore the mortgaged property to a value at least equal to the balance remaining on the obligation, at the time the damage or destruction occurred, secured by the mortgage.

History: 1953 Comp., § 61-7-10, enacted by Laws 1975, ch. 184, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54A Am. Jur. 2d Mortgages §§ 65 et seq., 83 et seq.; 55 Am. Jur. 2d Mortgages § 1177.

Right of mortgagee to proceeds of property insurance payable to owner not bound to carry insurance for former's benefit, 9 A.L.R.2d 299.

Fraud, false swearing or other misconduct of insured as affecting right of innocent mortgagee or loss payee to recover on property insurance, 24 A.L.R.3d 435.

Right of mortgagee to notice by insurer of expiration of fire insurance policy, 60 A.L.R.3d 164.

Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

Right of mortgagee, who acquires title to mortgaged premises in satisfaction of mortgage, to recover, under fire insurance policy covering him as "mortgagee," for loss or injury to property thereafter damaged or destroyed by fire, 19 A.L.R.4th 778.

59 C.J.S. Mortgages §§ 175 to 177, 203, 210, 240, 368.

48-7-10.1. Repealed.

ANNOTATIONS

Repeals. — Laws 2005, ch. 191, § 4, repealed 48-7-10.1 NMSA 1978, as enacted by Laws 2003, ch. 200, § 1, relating to available funds required at closings, effective January 1, 2006. For provisions of former section, *see* the 2004 NMSA 1978 on New Mexico One Source of Law DVD. For present comparable provisions, *see* 58-21-23.1 and 58-21-23.2 NMSA 1978.

48-7-11 to 48-7-14. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 314, § 11, repeals 48-7-11 to 48-7-14 NMSA 1978, relating to due-on-sale clauses, effective April 7, 1983. For present provisions, see 48-7-15 to 48-7-24 NMSA 1978.

48-7-15. Purpose [of "due-on-sale" law]

A. The legislature finds that the congress of the United States by an act entitled the Garn - St. Germain Depository Institutions Act of 1982 has preempted New Mexico law restricting the enforcement of due-on-sale clauses, except as provided in Section 341(c)(1) of that act as to loans made or assumed during the period March 15, 1979 through October 15, 1982. For real property loans made by lenders subject to state regulation, made or assumed during that period of time, the legislature may provide for restrictions on the enforcement of due-on-sale clauses. It is the intent of the legislature by this act [48-7-15 to 48-7-24 NMSA 1978] to provide legislation regulating due-on-sale clauses in contracts either made or assumed from March 15, 1979 through October 15, 1982.

B. The legislature further finds that the Garn - St. Germain Depository Institutions Act of 1982 gives the legislature the authority, during a three-year period commencing on October 15, 1982, to act regarding state restrictions on due-on-sale clauses contained in real property loans, which loans were made by lenders subject to state regulations. It is the intent of the legislature to affect by legislation such loans made or assumed between March 15, 1979 and October 15, 1982. Federally regulated federal

savings and loan associations are the only lenders that are immune from state regulation of due-on-sale clauses. If the legislature fails to act during this three-year period, then due-on-sale clauses on any loan made by any lender may be escalated to any rate the lender desires upon assumption by another party.

C. The legislature finds that:

(1) the federally chartered savings and loan associations being permitted to enforce due-on-sale clauses and state chartered savings and loan associations being restricted in doing so creates a competitive advantage for federally chartered associations. This advantage will lead to a continued weakening of state chartered associations;

(2) a blended rate, as contained in this act, for real property loans which are assumed is the best approach for both the consumer and the lender. The consumer is assured of a predictable, fair interest rate and the lender a fair rate of return more reflective of its cost of money; and

(3) continuation of the current prohibition on enforcement of due-on-sale clauses will discourage investors from investing through mortgage bankers in New Mexico real property loans; whereas, a blended rate on assumptions will permit the sale of New Mexico real property loans and thereby attract additional capital to New Mexico.

History: Laws 1983, ch. 314, § 1.

ANNOTATIONS

Garn - St. Germain Depository Institutions Act. — The federal Garn - St. Germain Depository Institutions Act of 1982, referred to in the first sentence in Subsections A and B, appears as various sections throughout Titles 11, 12, 15, 20 and 42 U.S.C. Section 341 (c)(1) of the act, referred to in the first sentence in Subsection A, appears as 12 U.S.C. § 1701j-3(c)(1).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

For annual survey of New Mexico law relating to property, see 13 N.M.L. Rev. 435 (1983).

48-7-16. Definitions.

As used in this act [48-7-15 to 48-7-24 NMSA 1978]:

A. "due-on-sale clause" means a provision in a contract involving a real property loan which authorizes a lender, at its option, to accelerate an indebtedness and declare due and payable sums secured by the lender's security instrument if all or any

part of the property, or an interest therein, is sold or transferred or, in the alternative, to demand an increase in the interest rate as a condition of approving an assumption of the loan;

B. "lender" means a person or government agency making a real property loan or any assignee or transferee, in whole or in part, of such a person or agency;

C. "mobile home" means a movable accommodation with not less than four hundred square feet of floor space used or designed for use as living quarters; and

D. "real property loan" means a loan, mortgage, advance or credit sale secured by a lien on real property, the stock allocated to a dwelling unit in a cooperative housing corporation, or a mobile home, whether real or personal property.

History: Laws 1983, ch. 314, § 2.

48-7-17. Due-on-sale generally enforceable.

Notwithstanding any provision of the statutory or common laws of this state to the contrary, a lender may enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan, except as provided in Sections 5 and 6 [48-7-19 and 48-7-20 NMSA 1978] of this act.

History: Laws 1983, ch. 314, § 3.

ANNOTATIONS

Not restraint on alienation. — Due-on-sale clauses in a commercial mortgage are not a restraint on alienation of property. Brummund v. First Nat'l Bank, 99 N.M. 221, 656 P.2d 884 (1983); Quintana v. First Interstate Bank, 105 N.M. 784, 737 P.2d 896 (Ct. App. 1987).

Law reviews. — For annual survey of New Mexico law relating to property, see 12 N.M.L. Rev. 459 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of provisions entitling mortgagee to increase interest rate on transfer of mortgaged property, 92 A.L.R.3d 822.

What transfers justify acceleration under "due-on-sale" clause of real estate mortgage, 22 A.L.R.4th 1266.

Validity and enforceability of due-on-sale real-estate mortgage provisions, 61 A.L.R.4th 1070.

48-7-18. Real property loan contract controls.

Except as otherwise provided in Sections 5 and 6 [48-7-19 and 48-7-20 NMSA 1978] of this act, the exercise by the lender of its option pursuant to a due-on-sale clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.

History: Laws 1983, ch. 314, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What transfers justify acceleration under "due-on-sale" clause of real estate mortgage, 22 A.L.R.4th 1266.

48-7-19. Limitation of enforcement of regulated due-on-sale clauses.

A. In the exercise of its options under a due-on-sale clause, in a real property loan made or assumed between March 15, 1979 and October 15, 1982, a lender shall be prohibited from accelerating the indebtedness and declaring the loan due and payable and shall be limited in increasing the interest rate upon an assumption of the loan upon the transfer of the real property to the existing contract rate of interest plus an increase in the rate of interest not greater than two percentage points and a fee to transfer the real property loan of not greater than one percentage point of the unpaid principal balance of the real property loan at the time of the transfer. On each succeeding assumption of the real property loan on the same property, the lender may increase the contract rate of interest and charge the transfer fee as provided in the previous sentence. There shall be no enforcement of a prepayment penalty in said mortgages.

B. In no case shall the rate of interest charged on an assumption as provided in Subsection A of this section exceed one percent above the most recent federal national mortgage association auction rate of interest at which bids were made, rounded to the nearest one-fourth of one percent. Upon closing, the lender shall disclose in writing to the party assuming the real property loan the most recent federal national mortgage association auction rate of interest referred to in this subsection.

History: Laws 1983, ch. 314, § 5.

ANNOTATIONS

Prepayment penalty. — The prohibition on enforcement of a prepayment penalty in Subsection A is sufficiently justified by the significant and legitimate public purpose of promoting the alienability of land to withstand challenge under N.M. Const., Art. II, § 19. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

The prohibition on enforcing prepayment bans, found in the last sentence of Subsection A, applies whether or not there has been a sale and whether or not the lender has

sought to exercise its options under a due-on-sale clause. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

Even if a prohibition on prepayment penalties is governed by the restriction on window-period loans in the Garn-St. Germain Act (12 U.S.C. § 1701; 3(b)(1)), that Act does not prevent a state from enlarging the class of loans subject to the prohibition, so long as they are "real property loans" made or assumed during the window period. Los Quatros, Inc. v. State Farm Life Ins. Co., 110 N.M. 750, 800 P.2d 184 (1990).

48-7-20. Limitation of exercise of all due-on-sale [options]

A lender may not exercise its option pursuant to a due-on-sale clause upon:

A. the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

B. the creation of a purchase money security interest for household appliances;

C. a transfer by devise, descent or operation of law on the death of a joint tenant or tenant by the entirety;

D. the granting of a leasehold interest of three years or less not containing an option to purchase;

E. a transfer to a relative resulting from the death of a borrower;

F. a transfer where the spouse or children of the borrower become an owner of the property;

G. a transfer resulting from a decree of a dissolution of marriage, legal separation agreement or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or

H. a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

History: Laws 1983, ch. 314, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What transfers justify acceleration under "due-on-sale" clause of real estate mortgage, 22 A.L.R.4th 1266.

48-7-21. Security; safeguard.

Any lender who feels the security interest is endangered by the transfer of a real property loan may proceed by foreclosure; provided that the lender shall, as a condition to such foreclosure, prove that the security interest in the property would be substantially impaired.

History: Laws 1983, ch. 314, § 7.

48-7-22. Due-on-sale policy on nonregulated contracts.

In the exercise of its option under a due-on-sale clause, a lender is encouraged to permit an assumption of a real property loan at the existing contract rate or at a rate which is at or below the average between the contract and market rates, and nothing in this act [48-7-15 to 48-7-24 NMSA 1978] shall be interpreted to prohibit any such assumption.

History: Laws 1983, ch. 314, § 8.

48-7-23. Governmental entity limitation of act.

The provisions of Section 5 [48-7-19 NMSA 1978] of this act shall not apply to the transfer of a real property loan where the funds for the real property loans were provided through the issuance by a governmental entity or instrumentality of bonds the interest on which is exempt from federal income taxation and the transfer fails to conform to state and federal law governing the bonds.

History: Laws 1983, ch. 314, § 9.

48-7-24. Attorney fees.

Attorney's fees shall be awarded to the prevailing party in any action brought under this act [48-7-15 to 48-7-24 NMSA 1978].

History: Laws 1983, ch. 314, § 10.

ARTICLE 8
Hospital Liens

48-8-1. Liens upon personal injury damages recovered by patients; creation; exception.

A. Every hospital located within the state that furnishes emergency, medical or other service to any patient injured by reason of an accident not covered by the state

workmen's compensation laws is entitled to assert a lien upon that part of the judgment, settlement or compromise going, or belonging to such patient, less the amount paid for attorneys' fees, court costs and other expenses necessary thereto in obtaining the judgment, settlement or compromise, based upon injuries suffered by the patient or a claim maintained by the heirs or personal representatives of the injured party in the case of the patient's death.

B. A hospital lien may be filed upon damages recovered, or to be recovered, either as a result of a judgment, or upon a contract of settlement or compromise, for the amount of the reasonable, usual and necessary hospital charges for treatment, care and maintenance of the injured party in the hospital and to the date of payment of the damages.

History: 1953 Comp., § 61-9-1, enacted by Laws 1961, ch. 227, § 1.

ANNOTATIONS

Lien upon proceeds of uninsured motorist policy is permitted. Storey v. University of N.M. Hospital/BCMC, 105 N.M. 205, 730 P.2d 1187 (1986).

Court lacks authority to void or reduce liens. — The district court lacks equitable or discretionary power to void or reduce the public hospital liens which are created pursuant to this article. Gutierrez v. Gutierrez, 99 N.M. 333, 657 P.2d 1182 (1983).

Hospital cannot accept part payment as satisfaction. — The New Mexico constitution prohibits a public hospital from accepting payment of less than the full amount of an undisputed legal obligation as a satisfaction. The state cannot compromise the amount owed to it for providing medical services unless a good faith dispute exists as to the amount of indebtedness or liability. Gutierrez v. Gutierrez, 99 N.M. 333, 657 P.2d 1182 (1983).

Section governs hospitals' assertions of liens over wrongful death proceeds. — The Wrongful Death Act was enacted in 1882; the Hospital Lien Act was enacted in 1961. The relevant provisions of the two acts have not been amended. Therefore, in view of the inconsistency between § 41-2-3 and this section, the relevant provision of § 41-2-3 of the Wrongful Death Act is implicitly repealed to the extent it would prevent a hospital from asserting a lien against the proceeds of a wrongful death action. Moreover, the Hospital Lien Act specifically allows satisfaction of the decedent's hospital debt out of proceeds of an action brought by the decedent's personal representative, and this specific provision qualifies the general prohibition in the Wrongful Death Act against using proceeds from a wrongful death action to satisfy the debts of the deceased. Hall v. Regents of Univ. of N.M., 106 N.M. 167, 740 P.2d 1151 (1987).

Hospital liable for proportion of attorneys' fees. — In hospital lien cases the "common-fund" doctrine most appropriately defines the duties and liabilities of the parties and provides the most fundamental fairness. Under this doctrine, an attorney

who creates a pool of funds for a group has the right to seek payment from the pool or seek proportional contribution from those who accept the benefits of the attorney's efforts. In hospital lien cases, the hospital's right to assert a lien, and its right to recovery based on that lien, depend by statute on the obtaining of a judgment or settlement. The proceeds of that judgment or settlement operate as a fund, and, without the fund, the hospital has nothing upon which to assert a lien under the Act. By seeking payment from the fund in reliance on the lien, the hospital directly receives the benefits of the work done by the patient's attorney. Martinez v. St. Joseph Healthcare Sys., 117 N.M. 357, 871 P.2d 1363 (1994).

Where a private hospital seeks recovery from a common-fund or asserts a lien under the Hospital Lien Act, and plaintiff's recovery is insufficient to pay attorneys' fees and the hospital bill in full, the hospital must pay a proportionate share of the attorneys' fees incurred in obtaining the judgment settlement or compromise that created the common-fund. Wright v. First Nat'l Bank, 1997-NMSC-026, 123 N.M. 417, 941 P.2d 498.

Hospital not liable for fees when award sufficient. — When a public hospital held liens to be paid from the proceeds of the patients' personal injury claims, since the claim proceeds were sufficient to pay attorney's fees and costs and the hospital liens in full, the hospital could not be held liable for the proportionate share attorney fees and costs incurred by patients in pursuing personal injury claims, on the basis of quantum meruit, implied contract, or unjust enrichment. Eaton, Martinez & Hart v. University of N.M. Hosp., 1997-NMSC-015, 123 N.M. 76, 934 P.2d 270; Schroeder v. Memorial Medical Ctr., 1997-NMSC-046, 123 N.M. 719, 945 P.2d 449.

Insured's liability when hospital reimbursed by insurer. — Where a hospital has a contract with plaintiff's insurer under which reimbursement by the insurer constitutes payment in full by the insured, the only amount the hospital is entitled to collect from the insured is any co-pay or cost-share payment due, and, under these circumstances, a hospital may not file a lien under the Hospital Lien Act for any amounts disallowed by the insurer. Wright v. First Nat'l Bank, 1997-NMSC-026, 123 N.M. 417, 941 P.2d 498.

Post-common-fund distribution deficiencies. — Where it was found that plaintiff's obligation to the hospital was satisfied by the net proceeds of the settlement, the hospital could not proceed against plaintiff for any "deficiency" arising after the proceeds from a common-fund were distributed. Wright v. First Nat'l Bank, 1997-NMSC-026, 123 N.M. 417, 941 P.2d 498.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Hospitals and Asylums § 5.

Construction, operation, and effect of statute giving hospital lien against recovery from tortfeasor causing patient's injuries, 16 A.L.R.5th 262.

Physicians' and surgeons' liens, 39 A.L.R.5th 787.

Limitation to quantum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause, 56 A.L.R.5th 1.

Method of calculating attorneys' fees awarded in common-fund or common-benefit cases - state cases, 56 A.L.R.5th 107.

41 C.J.S. Hospitals § 15.

48-8-2. Filing and notice of hospital liens.

No hospital lien is effective upon damages recovered for personal injuries unless:

A. a written notice is filed in the office of the county clerk of the county in which the hospital asserting the lien is located containing the following information:

(1) an itemized statement of all claims certified as correct by an agent of such hospital;

(2) the date of the accident;

(3) the name and location of the hospital; and

(4) the name of the person, firm or corporation alleged to be liable to the injured party for the injuries received; and

B. the hospital sends by certified mail with return receipt requested, prior to the payment of any money to the injured person or his attorneys or legal representative as compensation for the patient's injuries, a copy of the written notice, together with a statement of the date of filing, to the person, firm or corporation alleged to be liable to the injured party for the injuries sustained. The person, firm or corporation alleged to be liable to the injured person shall, upon request of the hospital, disclose the name of the insurance carrier that has insured the person, firm or corporation against liability; and

C. the hospital mails a copy of the written notice by certified mail with return receipt requested to the home office of any insurance carrier that has insured the person, firm or corporation against liability, if the name and address is known.

History: 1953 Comp., § 61-9-2, enacted by Laws 1961, ch. 227, § 2.

ANNOTATIONS

Substantial compliance sufficient for notice. — Substantial rather than strict compliance with the statutory notice provision satisfies the legislative intent. Southwest Community Health Servs. v. Safeco Ins. Co., 108 N.M. 570, 775 P.2d 1287 (1989).

Notice held sufficient. — Hospital substantially complied with the statutory notice provision, where notice was mailed to the insurer's home office in Albuquerque rather than Seattle, after the insurer's agent assured the hospital that the Albuquerque office was sufficient for serving notice upon the insurer. Southwest Community Health Servs. v. Safeco Ins. Co., 108 N.M. 570, 775 P.2d 1287 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 C.J.S. Hospitals § 15.

48-8-3. Persons liable for payment of lien; limitation of actions.

A. Any person, firm or corporation, including an insurance carrier, making any payment to a patient or to his attorney, heirs or legal representative as compensation for the injury sustained, after the filing and receipt of written notice of the lien, as aforesaid, and without paying the hospital asserting the lien the amount of its lien or that portion of the lien which can be satisfied out of the money due under any final judgment or contract of compromise or settlement, less payment of the amount of any prior liens, shall be liable to the hospital for the amount that the hospital was entitled to receive.

B. Liability of the person, firm or corporation for the satisfaction of the hospital lien shall continue for a period of one year after the date of any payment of any money to the patient, his heirs or legal representatives as damages or under a contract of compromise or settlement. Any hospital may enforce its lien by a suit at law against the person, firm or corporation making the payment. In the event of a suit to enforce a lien the hospital may recover a reasonable attorney's fee and the costs of filing and recording the lien.

History: 1953 Comp., § 61-9-3, enacted by Laws 1961, ch. 227, § 3.

ANNOTATIONS

Running of limitation period. — This section makes payment to the patient the act that triggers the running of the one-year limitation period. Regents of Univ. of N.M. v. Fireman's Fund Ins. Cos., 103 N.M. 709, 712 P.2d 1371 (1986).

The statute of limitations runs from the time the court orders disbursement of insurance policy proceeds, not the date that the proceeds are deposited in the court registry. Schroeder v. Memorial Medical Ctr., 1997-NMSC-046, 123 N.M. 719, 945 P.2d 449.

Court lacks authority to void or reduce liens. — The district court lacks equitable or discretionary power to void or reduce the public hospital liens which are created pursuant to this article. Gutierrez v. Gutierrez, 99 N.M. 333, 657 P.2d 1182 (1983).

"Legal representative". — An attorney is a "legal representative" for purposes of receiving payment under this section and to commence the running of the statute of limitations therein. Regents of Univ. of N.M. v. Lacey, 107 N.M. 742, 764 P.2d 873 (1988).

"Payment of any money" for purposes of Subsection B occurred when an insurer delivered a settlement check to a personal injury victim, and not on the date when the check was deposited in a bank. Regents of Univ. of N.M. v. Lacey, 107 N.M. 742, 764 P.2d 873 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 C.J.S. Hospitals § 15.

48-8-4. County clerk to maintain hospital lien records.

Every county clerk shall maintain a proper index of all hospital liens under the name of the injured person.

History: 1953 Comp., § 61-9-4, enacted by Laws 1961, ch. 227, § 4; 1995, ch. 78, § 1.

ANNOTATIONS

Cross references. — For lien filing fees, see 48-8-6 NMSA 1978.

For county clerk, see Chapter 4, Article 40 NMSA 1978.

The 1995 amendment, effective June 16, 1995, substituted "records" for "book" in the section heading; deleted the former last two sentences, relating to the information entered into the lien book, and rewrote the remaining language.

48-8-5. Release of lien.

The hospital shall, upon receipt of payment of the lien or the part recoverable under the lien, execute and file, at the expense of the hospital, a release of lien.

History: 1953 Comp., § 61-9-5, enacted by Laws 1961, ch. 227, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 C.J.S. Hospitals § 15.

48-8-6. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 78, § 2 repeals 48-8-6 NMSA 1978, as enacted by Laws 1961, ch. 227 § 6, relating to entering and filing a hospital lien, effective June 16, 1995. For provisions of former section, see 1987 Replacement Pamphlet.

48-8-7. [Hospital's interest in settlement restricted to lien rights.]

Nothing in this act [48-8-1 to 48-8-7 NMSA 1978] shall be construed to permit any hospital to be a party to or to have any interest in the amount or manner of any settlement of any claim on which a lien has been filed other than the lien rights as provided in this act.

History: 1953 Comp., § 61-9-7, enacted by Laws 1961, ch. 227, § 7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 C.J.S. Hospitals § 15.

ARTICLE 9
Oil and Gas Products Lien Act

48-9-1. Short title.

Sections 48-9-1 through 48-9-8 NMSA 1978 may be cited as the "Oil and Gas Products Lien Act."

History: 1953 Comp., § 61-10-1, enacted by Laws 1973, ch. 100, § 1.

ANNOTATIONS

Cross references. — For liens on wells and pipelines, see 70-4-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gas and Oil §§ 135 to 140.

48-9-2. Definitions.

As used in the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978]:

A. "commission" means the oil and gas accounting commission [oil and gas accounting division of the taxation and revenue department];

B. "product" or "products" means severed oil, natural gas, liquid hydrocarbons, individually or in any combination thereof;

C. "severed" means the taking, extraction or production from the soil of any product in any manner;

D. "production unit" means a unit of property designated by the commission from which products of common ownership are severed;

E. "person" means any individual, executor, administrator, estate, agent, trust, trustee, institution, receiver, business trust, firm, corporation, partnership, cooperative, joint venture, governmental entity or agency, association or any other group or combination acting as a unit;

F. "interest owner" means a person owning an entire or fractional interest of any kind or nature in the products at the time they are severed from a production unit, or a person who has a right, either express or implied, to receive a monetary payment determined by the value of the products;

G. "operator" means any person engaged in the severance of products from a production unit for himself, for himself and other persons or for other persons;

H. "first purchaser" means the first person who takes, receives or purchases products from an interest owner at or after the time the products are severed from a production unit; and

I. "purchaser" means a person who takes, receives or purchases products from a first purchaser or another person other than an interest owner.

History: 1953 Comp., § 61-10-2, enacted by Laws 1973, ch. 100, § 2.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1977, ch. 249, §§ 5, 12, "oil and gas accounting division of the taxation and revenue department" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law.

48-9-3. Security interest; lien; payment.

A. To secure payment from the first purchaser of the purchase price of the product, state royalty and all taxes which are required to be or are withheld and paid or to be paid by the first purchaser, an interest owner, subject to Section 48-9-5 NMSA 1978, shall have a continuing purchase money security interest in and a lien upon his interest in or share of the unpaid for product severed from a production unit in which he owns an interest or the proceeds of product if such unpaid for product has been sold by the first purchaser, until the purchase price, state royalty and taxes have been paid to the person entitled to receive payment therefor.

B. In the event of a bona fide dispute as to the amount due the interest owner, the purchase money security interest and the lien herein provided shall not accrue if the first purchaser tenders to the interest owner the amount which the first purchaser in good faith believes to be due and payable.

C. Any purchaser who pays the purchase price for products to the person from whom the products are acquired or to a person who is authorized to receive payment for

an interest owner shall be deemed a buyer in ordinary course of business, as defined in Section 55-1-201(9) NMSA 1978, and take the products free of the purchase money security interest and lien of the interest owner, and the purchaser who makes such payment and all of his property shall be free from and not subject to the claims or purchase money security interest and lien of an interest owner.

History: 1953 Comp., § 61-10-3, enacted by Laws 1973, ch. 100, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Assertion of statutory mechanic's or materialman's lien against oil and gas produced or against proceeds attributable to oil and gas sold, 59 A.L.R.3d 278.

58 C.J.S. Mines and Mining § 220.

48-9-4. Validity of security interest and lien; possession.

The validity of the purchase money security interest and lien granted to an interest owner under the provisions of the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978] shall not be dependent upon possession of the product by an interest owner or operator and no such purchase money security interest or lien shall become or be deemed to be void or expired by reason of a change or transfer of the actual or constructive possession or title of the product from the interest owner or an operator to an operator or purchaser.

History: 1953 Comp., § 61-10-4, enacted by Laws 1973, ch. 100, § 4.

48-9-5. Perfection of security interest and lien; filing notice.

A. If the purchase price for products, state royalty and the taxes which are required to be or are withheld and paid or to be paid are not paid to the person entitled to receive payment therefor after fifteen days and within forty-five days after payment is due by terms of agreement, the interest owner or operator may perfect the purchase money security interest and lien by filing for record in the office of the county clerk of the county in which the production unit is located a notice of lien in substantially the following form:

"NOTICE OF LIEN

Notice is hereby given that (name of interest owner for whom notice is filed) whose address is (address of named interest owner) owns an (fractional or decimal interest) interest in the products severed from the (name of well) by (name and address of operator), which well is designated as production unit No. (number) by the oil and gas accounting commission [oil and gas accounting division of the taxation and revenue department] and is located on the following described land in (name of county) county, New Mexico:

(description of land)

Products severed from said production unit have been and are now or may be taken, received and purchased by (name of first purchaser); and the above named interest owner has a purchase money security interest in and lien upon such products and the proceeds thereof to secure payment of the purchase price, state royalty and taxes for the months of (list months and year for which payment was not received) under the provisions of the Oil and Gas Products Lien Act.

Dated: (date)

.....
(signature of interest owner or operator)";

If the notice of lien is not filed for record within the time limit specified in this section, the purchase money security interest and lien shall terminate at the expiration of that time limit.

B. All instruments which are presented to a county clerk for filing in accordance with Subsection A of this section shall be deemed to be and filed as financing statements under the Uniform Commercial Code [Chapter 55 NMSA 1978], even though the signature of the first purchaser may not appear thereon. All such instruments may be terminated in the same manner as financing statements under the provisions of the Uniform Commercial Code. Filing of a notice of lien or termination statement by an operator shall inure to the benefit of and be binding upon all named interest owners.

C. Upon perfection by filing, the purchase money security interest and lien of the interest owner shall relate back to and be effective as of the date on which the first purchaser took, received or purchased product unpaid for and shall take priority over the rights of all persons whose rights or claims arise or attach to the product unpaid for or the proceeds of product if such product has been sold by the first purchaser, including those which arise or attach between the time the purchase money security interest and lien attaches and the time of filing.

History: 1953 Comp., § 61-10-5, enacted by Laws 1973, ch. 100, § 5.

ANNOTATIONS

Bracketed material. — Pursuant to Laws 1977, ch. 249, §§ 5, 12, "oil and gas accounting division of the taxation and revenue department" was inserted in brackets. The bracketed material was not enacted by the legislature and is not law.

48-9-6. Effect of act and filing; title; purchaser's rights; collateral security.

A. Neither the provisions of the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978] nor the filing of any instrument permitted under that act shall affect the time at which legal title to the products from a production unit may pass from an interest owner or operator to a purchaser by agreement or operation of law subject to the purchase money security interest and lien granted under the provisions of that act, the ownership of the products before severed from a production unit as reflected by the records affecting real property or the right of a purchaser to take or receive products from a production unit under the terms of a division order or similar agreement for the sale and purchase of products and a purchaser shall be free to transport products out of the state notwithstanding the provisions of the Oil and Gas Products Lien Act.

B. No person entitled to a purchase money security interest and lien under the provisions of the Oil and Gas Products Lien Act shall be deemed to have waived or relinquished such purchase money security interest and lien by taking or receiving collateral security for payment of the purchase price for or taxes measured by the value of the product unless he expressly agrees thereto in writing.

History: 1953 Comp., § 61-10-6, enacted by Laws 1973, ch. 100, § 6.

48-9-7. Enforcement; actions and costs; cumulative remedies.

A. The purchase money security interest and lien granted to an interest owner under the provisions of the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978] shall follow the product unpaid for or the proceeds of the product if such product has been sold by the first purchaser and the purchase money security interest and lien shall expire one year after the date of the filing of the notice of lien unless proper action to enforce the lien is commenced within a one-year period in the district court of the county in which the production unit, or any part thereof, is located, or wherever the product unpaid for or the proceeds of product sold may be found. Any number of persons claiming purchase money security interests and liens with respect to the products from the same production unit may join in the same action and where separate actions are commenced, the court may consolidate them. The court shall allow as part of the costs of the action any moneys paid for filing and recording instruments under the provisions of Subsection A of Section 48-9-5 NMSA 1978 and reasonable attorneys' fees for the prevailing party in the trial and appellate courts. If an action is commenced after the filing of an instrument as provided in Subsection A of Section 48-9-5 NMSA 1978, said instrument shall be considered as a lien upon all product [products] unpaid for and all accounts receivable of or debts due the first purchaser from subsequent purchasers for payment of the price of the products, state royalty payments and the taxes measured by the value of the product, and the purchase money security interest and lien of the claimant may be enforced against such property of the first purchaser in the manner provided by law.

B. Nothing in the Oil and Gas Products Lien Act shall be construed to impair or affect the right of any person to whom any debt may be due for the purchase price of

product, state royalty or taxes to maintain a personal action to recover the debt against the person liable for payment thereof.

C. Nothing in the Oil and Gas Products Lien Act shall be construed to impair or affect the rights and remedies of any person under the provisions of the Uniform Commercial Code [Chapter 55 NMSA 1978] and the provisions of the Oil and Gas Products Lien Act shall be deemed cumulative to and not a limitation on or a substitution for any rights or remedies otherwise provided by law to a creditor against his debtor. The claimant of a purchase money security interest and lien granted under the terms of the Oil and Gas Products [Lien] Act may utilize the remedies of replevin, attachment and garnishment.

D. Nothing contained in the Oil and Gas Products Lien Act shall alter or restrict any other remedies in favor of the state of New Mexico, including the cancellation of state oil and gas leases for nonpayment of oil or gas in kind sold by the state or nonpayment of state royalty money due and unpaid, and the provisions of this act shall be deemed cumulative to and not an amendment to, a limitation on or a substitution for any rights or remedies provided by Section 19-10-11 NMSA 1978.

History: 1953 Comp., § 61-10-7, enacted by Laws 1973, ch. 100, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

48-9-8. Priority; assignment; representation.

A. Liens or claims for taxes measured by the value of product and royalty payments due the state, whether under the Oil and Gas Products Lien Act [48-9-1 to 48-9-8 NMSA 1978] or other acts, shall have a first, superior and paramount priority. The purchase money security interest and lien provided by the Oil and Gas Products Lien Act shall then and thereafter be preferred to and have priority over any other lien, mortgage, security interest or other encumbrance which may attach to or be asserted against the unpaid for products severed from a production unit or the proceeds of product if such product has been sold by the first purchaser, except liens under the Oil and Gas Lien Act [70-4-1 to 70-4-15 NMSA 1978] and perfected liens of common carriers provided by Sections 48-3-8, 65-2-51 and 63-3-12 NMSA 1978 or under published tariff schedules.

B. The purchase money security interest and lien granted to an interest owner under the provisions of the Oil and Gas Products Lien Act may be assigned, in whole or in part; provided, however, that the rights of any assignee shall be the same as those of the assignor; and, provided further, however, that any deed of trust, mortgage or security agreement executed by an interest owner in favor of another and covering products severed or to be severed from a production unit shall also be deemed an assignment of the interest owner's rights under this act.

C. Any first purchaser who takes, receives or purchases products severed or to be severed from a production unit shall be deemed to make a continuing representation that he will not take, receive or purchase products while insolvent.

History: 1953 Comp., § 61-10-8, enacted by Laws 1973, ch. 100, § 8.

ANNOTATIONS

Compiler's notes. — Section 65-2-51 NMSA 1978, referred to in the second sentence in Subsection A, was repealed in 1981.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gas and Oil § 140.

ARTICLE 10
Deeds of Trust

48-10-1. Short title.

Sections 1 through 21 [48-10-1 to 48-10-21 NMSA 1978] of this act may be cited as the "Deed of Trust Act".

History: Laws 1987, ch. 61, § 1.

48-10-2. Repealed.

ANNOTATIONS

Repeals. — Laws 2006, ch. 32, § 8, repealed 48-10-2 NMSA 1978, as enacted by Laws 1987, ch. 61, § 2, relating to the purpose of the Deed of Trust Act, effective May 17, 2006. For provisions of former section, *see* the 2005 NMSA 1978 on New Mexico One Source of Law DVD.

48-10-3. Definitions.

As used in the Deed of Trust Act, unless the context otherwise requires:

A. "beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or the person's successor in interest;

B. "contract" means an agreement between or among two or more persons, including, without limitation, a note, promissory note, guarantee or the terms of any deed of trust;

C. "credit bid" means a bid made by the beneficiary in full or partial satisfaction of the contract that is secured by the deed of trust. A credit bid may only include an amount owing on a contract with interest secured by liens, mortgages, deeds of trust or encumbrances that are superior in priority to the deed of trust and which liens, mortgages or encumbrances, whether recourse or nonrecourse, are outstanding as provided in the contract or as provided in the deed of trust, together with the amount of other obligations provided in or secured by the deed of trust and the costs of exercising the power of sale and the trustee's sale, including the fees of the trustee and reasonable attorney fees actually incurred by the trustee and the beneficiary;

D. "parent corporation" means a corporation that owns eighty percent or more of each class of the issued and outstanding stock of another corporation or, in the case of a savings and loan association, eighty percent or more of the issued and outstanding guaranty capital of the savings and loan association;

E. "person" means an individual or organization;

F. "deed of trust" means a document by way of mortgage in substance executed in conformity with the Deed of Trust Act and in conformity with Section 47-1-39 NMSA 1978 granting or mortgaging trust real estate to a trustee qualified under the Deed of Trust Act to secure the performance of a contract;

G. "junior encumbrancer" means a person holding a lien, mortgage or other encumbrance of record evidencing an interest in the trust real estate that is subordinate in priority to the deed of trust and includes a lienholder, a mortgagee, a seller and a purchaser as provided in a real estate contract and, where the context is applicable, escrow agents as provided in a real estate contract;

H. "trust real estate" means any legal, equitable, leasehold or other interest in real estate, including the term "real estate" as defined in Section 47-1-1 NMSA 1978 and any improvements and fixtures, which is capable of being transferred whether or not the interest is subject to any prior mortgages, deeds of trust, contracts for conveyance of real estate, real estate contracts or other liens or encumbrances; provided, however, trust real estate shall not include:

(1) any real estate used by the trustor for farming operations, including farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry or livestock, and production of poultry or livestock products in an unmanufactured state; or

(2) oil and other liquid hydrocarbons, or gas, including casinghead gas, condensates and other gaseous petroleum substances, or coal or other minerals in, on or under real estate, including patented and unpatented mining claims, unless such minerals have not been severed from and are included with the surface estate.

The character of trust real estate shall be determined as of the date of the deed of trust covering the trust real estate;

I. "trustee" means a person qualified as provided in the Deed of Trust Act. The obligations of a trustee to the trustor, beneficiary and other persons are as provided in the Deed of Trust Act, together with any other obligations specified in the deed of trust. Both the beneficiary and the trustee have all the powers of a mortgagee as provided by law; and

J. "trustor" means the person or the person's successor in interest granting or mortgaging trust real estate by a deed of trust as security for the performance of a contract and is the same as a mortgagor granting or mortgaging real estate by way of mortgage as provided by law.

History: Laws 1987, ch. 61, § 3; 1993, ch. 145, § 2; 1998, ch. 63, § 5; 2006, ch. 32, § 1.

ANNOTATIONS

Cross references. — For Section 501 of the Internal Revenue Code of 1986, *see* 26 U.S.C. § 501.

The 1993 amendment, effective June 18, 1993, added Subsections B, C, J, and K, redesignating other subsections accordingly; added "except when occupancy is designed for low-income households" to the end of Paragraph (1) of Subsection L; and made stylistic changes in Subsections E, F, H, and I.

The 1998 amendment, effective July 1, 1998, in Subsection E, substituted "attorney" for "attorneys'" near the end, added Subsection L, and redesignated the following subsections accordingly.

The 2006 amendment, effective May 17, 2006, deleted former Subsection B, which defined "qualified construction project"; deleted former Subsection C, which defined "qualified nonprofit organization"; deleted the provision in Subsection F (formerly Subsection H), which provided that a deed of trust does not include a deed of trust that encumbers trust real estate located in New Mexico and in one or more other states; deleted former Subsection J, which defined "low income household"; deleted former Subsection K, which defined "low-income housing project"; deleted former Subsection L, which defined "state housing authority"; provided in Subsection H (formerly Subsection M), that real estate includes any improvements and fixtures; and deleted Paragraph (1) of Subsection H (formerly Subsection M), which provided that trust real estate did not include any dwelling and underlying real estate for occupancy by one to four families, including mobile homes and condominiums, except when occupancy is designed for low-income households.

48-10-4. Repealed.

ANNOTATIONS

Repeals. — Laws 2006, ch. 32, § 8, repealed 48-10-4 NMSA 1978, as enacted by Laws 1987, ch. 61, § 4, relating to express consent required, effective May 17, 2006. For provisions of former section, *see* the 2005 NMSA 1978 on New Mexico One Source of Law DVD.

48-10-5. Description of trust real estate; mailing address of trustor, beneficiary and trustee.

A. In deeds of trust the legal description of trust real estate shall be given by one of the following methods:

(1) by the use of lot, block, tract or parcel as provided in a recorded subdivision plat;

(2) by the use of a metes and bounds or course and distance survey;

(3) by the use of the governmental rectangular survey system with specific identification of the location within any section or sections, tract or tracts, of a township and range; or

(4) by the use of any other method of description provided by law.

B. If the trust real estate is the subject of a recorded subdivision plat, the legal description of the trust real estate shall be given by the use of lot, block, tract or parcel as shown on the recorded subdivision plat.

C. The mailing address of each trustor, beneficiary and trustee shall be specified in each deed of trust.

History: Laws 1987, ch. 61, § 5.

48-10-6. Trustee of deed of trust; qualification.

A. Except as provided in Subsection B of this section, the trustee of a deed of trust shall be:

(1) an organization doing business under the laws of New Mexico as a bank, trust company, savings and loan association, escrow company or title insurance company including an agent or underwriter;

(2) an individual who is a member of the state bar of New Mexico;

(3) an organization which is licensed, chartered or regulated by the federal deposit insurance corporation, the comptroller of the currency, the federal savings and

loan insurance corporation, the federal home loan bank, the bureau of federal credit unions or any successors; or

(4) the parent corporation of any association or corporation referred to in this subsection or any subsidiary corporation all the stock of which is owned by or held solely for the benefit of any such association or corporation referred to in this subsection.

B. No trustee of a deed of trust or parent corporation or subsidiary corporation of a corporate trustee which is a trustee of a deed of trust shall be the beneficiary of the deed of trust.

History: Laws 1987, ch. 61, § 6.

48-10-7. Appointment of successor trustee by beneficiary.

A. If a person appointed as trustee fails to qualify, is unwilling, unqualified or unable to serve or resigns as trustee, the beneficiary may appoint a successor trustee and the appointment shall constitute a substitution of trustee.

B. The beneficiary may remove a trustee at any time for any reason or cause and appoint a successor trustee, and the appointment shall constitute a substitution of trustee.

C. Substitutions shall be made by recording notice of the substitution in the office of the county clerk of each county in which all or any part of the trust real estate is situated at the time of the substitution. The beneficiary shall give written notice through registered or certified mail, postage prepaid, to the trustor, the trustee and the successor trustee. A notice of substitution of trustee shall be sufficient if acknowledged by all beneficiaries as provided in the deed of trust and prepared in substantially the following form:

"NOTICE OF SUBSTITUTION OF TRUSTEE

The undersigned beneficiary hereby appoints _____

_____ successor trustee under the

deed of trust executed by _____ as

trustor, in which _____ is named

beneficiary and _____ as trustee,

and recorded _____, 20_____, in

_____ County, New Mexico, in book

_____, page _____, and

legally describing the trust real estate as:

(legal description of trust real estate)

Dated this _____ day of

_____, 20_____.

_____

Signature of Beneficiary

(Here add Acknowledgment).".

D. A notice of substitution of trustee is effective immediately on execution as provided in Subsection C of this section.

E. A person appointed as a trustee under a deed of trust may resign as trustee at any time. The resignation shall be without liability, provided the person has not agreed in writing to be appointed trustee or has not acted in the capacity of trustee. The trustee may only resign as provided in the deed of trust and the Deed of Trust Act. If a trustee fails to qualify or is unwilling or unable to serve or resigns, the validity of the deed of trust shall not be affected, except that no action required to be performed by the trustee as provided in the Deed of Trust Act or as provided in the deed of trust may be taken until a successor trustee is appointed by the beneficiary as provided in this section. If the beneficiary fails or refuses to appoint a successor trustee, the terms of Section 47-1-42 NMSA 1978 shall be applicable. Resignation by a trustee is made by recordation of a notice of resignation in the office of the county clerk of each county in which all or any part of the trust real estate is situated at the time of the resignation. Written notice shall be given through registered or certified mail, postage prepaid, to the trustor and the beneficiary. A notice of resignation of trustee is sufficient if acknowledged by the trustee and prepared in substantially the following form:

"NOTICE OF RESIGNATION OF TRUSTEE

The undersigned trustee hereby resigns as trustee

under the deed of trust executed by

_____, as trustor, in which

_____ is named

beneficiary, and recorded _____,

20_____, in _____

County, New Mexico, in book _____,

page _____, and legally describing the

trust real estate as:

(legal description of trust real estate)

Dated this _____ day of

_____, 20_____.

_____

Signature of Trustee

(Here add Acknowledgment).".

History: Laws 1987, ch. 61, § 7; 2006, ch. 32, § 2.

ANNOTATIONS

The 2006 amendment, effective May 17, 2006, added Subsection D to provide that a notice of substitution is effective immediately on execution.

48-10-8. Deed of trust as security.

Deeds of trust may be executed as security for the performance of a contract. The laws of New Mexico which refer to mortgages as security instruments are deemed to also include deeds of trust unless the context otherwise requires. The lien theory of mortgages in New Mexico shall continue to apply to deeds of trust executed as provided in the Deed of Trust Act.

History: Laws 1987, ch. 61, § 8.

48-10-9. Grants in trust of real estate; uses.

Grants or mortgages of trust real estate may be made to secure the performance of a contract of the trustor or any other person. Unless otherwise specifically provided in the deed of trust or otherwise specifically agreed in writing by the trustor and the beneficiary at the time of acquisition, an interest in the trust real estate acquired by the trustor after the execution of the deed of trust shall run to the benefit of the trustee and

beneficiary as security for the contract for which the trust real estate is granted or mortgaged as if the interest had been acquired before execution of the deed of trust.

History: Laws 1987, ch. 61, § 9.

48-10-10. Sale of trust real estate; power of trustee; foreclosure of deed of trust.

A. By virtue of the trustee's position, a power of sale is conferred upon the trustee of a deed of trust under which the trust real estate may be sold as provided in the Deed of Trust Act after a breach or default in performance of the contract for which the trust real estate is granted or mortgaged as security or a breach or default in performance of the deed of trust. Except as specifically provided in the Deed of Trust Act, the trustee shall not delegate the duties of the trustee as provided in the Deed of Trust Act. At the option of the beneficiary, a deed of trust may be foreclosed in the manner provided by law for the foreclosure of mortgages on real estate. Either the beneficiary or the trustee shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust.

B. The trustee or beneficiary may commence an action to foreclose a deed of trust at any time before the trust real estate has been sold as provided in the power of sale. A sale of trust real estate as provided in a power of sale in a deed of trust shall not be held after an action to foreclose the deed of trust has been commenced unless the foreclosure action has been dismissed.

C. The power of sale of trust real estate conferred upon the trustee shall not be exercised before the expiration of ninety days from the recording of the notice of the sale.

D. The trustee need only be joined as a party in separate civil actions pertaining to a breach of an obligation of a trustee as provided in the Deed of Trust Act or as provided in the deed of trust. Any order of the court entered against the beneficiary is binding upon the trustee with respect to any actions that the trustee is authorized to take by the deed of trust or by the Deed of Trust Act. If the trustee is joined as a party in any other separate civil action, other than an action in which the trustee is an indispensable or necessary party, the trustee is entitled to be immediately dismissed and to recover the costs and reasonable attorney fees actually incurred by the trustee from the person joining the trustee and from the beneficiary, jointly and severally.

History: Laws 1987, ch. 61, § 10; 1993, ch. 145, § 4; 2006, ch. 32, § 3.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection C, inserted "as to trust real estate for commercial or business loans" in the first sentence and added the second sentence; and made a stylistic change in the second sentence of Subsection D.

The 2006 amendment, effective May 17, 2006, in Subsection C, deleted the former reference to trust real estate for commercial or business loans; changed the minimum time to exercise the power of sale from 180 days to 90 days; and deleted the provision with respect to low-income household loans that the power of sale shall not be exercised before the expiration of 45 days from recording the notice of sale.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Mortgage foreclosure forbearance statutes - modern status, 83 A.L.R.4th 243.

48-10-11. Notice of trustee's sale.

A. The trustee shall give written notice of the time and place of sale, legally describing the trust real estate to be sold, by each of the following methods:

(1) publication of the notice as provided by law for foreclosure of mortgages on real estate;

(2) recording of the notice in the office of the clerk of each county in which the trust real estate is situated; and

(3) giving notice as provided in Section 48-10-12 NMSA 1978 to the extent applicable.

B. The sale shall be held at the time and place designated in the notice of sale on a day other than a Saturday, Sunday or legal holiday and at the time provided by law for the foreclosure sale of real estate under real estate mortgages on the front steps of the courthouse of the county in which the trust real estate is located. If the trust real estate is located in more than one county, the sale may be held in any county in which part of the trust real estate is located.

C. The notice of sale shall contain the street address, if any, or identifiable location as well as the legal description of the trust real estate. Failure to accurately describe within the notice either the street address or the identifiable location of the trust real estate to be sold shall not be grounds for invalidating the sale if the correct legal description of the trust real estate to be sold was contained in the notice of sale. The notice of sale shall be sufficient if made in substantially the following form:

"NOTICE OF TRUSTEE'S SALE

The following legally described trust real estate

will be sold, pursuant to the power of sale as

provided in the deed of trust recorded in book

_____ at page _____,

_____ County, New Mexico, records, at

public auction to the highest bidder on the front

steps of the county courthouse in

_____ County, New Mexico, in or

near _____, New Mexico, on

_____, 20____, at _____

o'clock ___m. of that day:

(street address, if any, or identifiable location

of trust real estate and legal description of

trust real estate)

Dated this _____ day of

_____, 20_____.

_____ _____

(Name of Trustor) (Name of Trustee)

_____

Signature

(Here add Acknowledgment).".

History: Laws 1987, ch. 61, § 11; 2006, ch. 32, § 4; 2007, ch. 156, § 2.

ANNOTATIONS

The 2006 amendment, effective May 17, 2006, deleted the former Paragraph (2) of Subsection A, which provided that the trustee shall give notice by posting at least 20 days before the sale in a conspicuous place on the property to be sold and at the courthouse of the county in which the property is located.

The 2007 amendment, effective April 2, 2007, eliminated the provision in Subsection B that a sale can be held on a day other than a nonbanking day.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applied to deeds of trust on or after May 17, 2006 and that the provisions of Laws 2007, ch. 156 applied to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2007.

48-10-12. Request for copies of notice of sale; mailing by trustee or beneficiary.

A. A person desiring a copy of a notice of sale as provided in a deed of trust shall, at any time after the recording of the deed of trust and before the recording of a notice of sale as provided in a deed of trust, record in the office of the county clerk in any county in which part of the trust real estate is situated an acknowledged request for a copy of the notice of sale. The request shall provide the name and address of the person requesting a copy of the notice and shall identify the deed of trust by providing the county book and page numbers of the recording data of the deed of trust and by stating the names of the original parties to the deed of trust, the date the deed of trust was recorded and the legal description of the trust real estate and shall be in substantially the following form:

REQUEST FOR NOTICE

Request is made that a copy of any notice of sale as provided in the deed of trust recorded in book ..... at page ....., ... County, New Mexico records, on ....., 19 ...

(legal description of trust real estate)

executed by ..... as trustor, in which ..... is named as beneficiary and ..... as trustee, be mailed to .....at .....

Dated this ... day of ....., 19 ...

.....

Signature

(Here add Acknowledgment)

B. Not later than thirty days after recording the notice of sale, the trustee or beneficiary shall mail by certified or registered mail with postage prepaid a copy of the notice of sale with the recording date shown on the notice of sale, together with any notice required to be given by Subsection C of this section, addressed as follows:

(1) to each person whose name and address are provided in a request for notice, which has been recorded before the recording of the notice of sale, directed to the address designated in the request; and

(2) to each person who, at the time of recording of the notice of sale, appears by a document recorded in the real estate records of the county clerk in the county in which any part of the trust real estate is situated to have an interest in any of the trust real estate including junior encumbrancers. The copy of the notice shall be addressed to the person whose interest so appears at the address provided in the document. If no address for the person is provided in the document, no notice need be mailed to the person. If the interest which appears on the records of the county clerk is a deed of trust, a copy of the notice need only be mailed to the beneficiary as provided in the deed of trust. If any person having such an interest, or the trustor, or any person who has recorded a request for notice wants to change the address to which notice shall be mailed, the change shall be accomplished by a request for notice as provided in this section.

C. The trustee or beneficiary shall, within five business days after the recordation of the notice of sale, mail by certified or registered mail, with postage prepaid, a copy of any notice of sale showing the recording date the notice was recorded to each of the persons who were parties to the deed of trust. The notice shall be addressed to the mailing address specified in the deed of trust. In addition, notice to each such party shall contain a statement that a breach or default in performance of the deed of trust or the contract secured by the deed of trust, or both, has occurred and shall provide the nature of the breach or default in performance and of the election of the beneficiary to sell or cause to be sold the trust real estate as provided in the deed of trust and the additional notice shall be signed by the beneficiary or the agent of the beneficiary. A copy of the additional notice shall also be sent with the notice as provided in Paragraph (2) of Subsection B of this section to all junior encumbrancers together with a written statement that the interest of the junior encumbrancer may be subject to being terminated by the trustee's sale. The written statement may be provided in the statement of breach or default in performance.

D. No request for a copy of a notice recorded as provided in this section nor any statement or allegation in the request nor any record of the request shall affect the title to the trust real estate or be deemed notice to any person that a person requesting a copy of notice of sale has or claims any interest in, or claim upon, the trust real estate.

History: Laws 1987, ch. 61, § 12.

48-10-13. Sale by public auction; postponement of sale.

A. On the date and at the time and place designated in the notice of sale, the trustee shall sell the trust real estate at public auction for cash to the highest bidder. To determine the highest bidder, the trustor or beneficiary present at the sale may suggest the then existing and legally described and established lots, blocks, tracts or parcels of

the trust real estate in which the trust real estate may be sold. The trustee shall ascertain all such suggestions, shall conditionally sell the trust real estate under each suggestion and, in addition, shall sell the trust real estate as a whole. The trustee shall determine which conditional sale results in the highest total price bid for all of the trust real estate. The lawyer for the trustee may conduct the sale and may act at the sale as the auctioneer for the trustee. Any person, including the trustee or beneficiary, may bid at the sale. Only the beneficiary may make a credit bid, instead of cash, at the sale. A junior encumbrancer may bid the amount or value of the obligation secured by the lien, mortgage, encumbrance or real estate contract, as the case may be, owed to the junior encumbrancer, less the amount or value of any prior deeds of trust, mortgages, liens, encumbrances or real estate contracts, if any, instead of cash, at the sale. In appropriate circumstances, the trustee may sell the trust real estate subject to prior deeds of trust, mortgages, liens, encumbrances or real estate contracts that are not being foreclosed. Every bid shall be deemed an irrevocable offer until the sale is completed and the sale shall not be deemed completed until the purchaser pays the price bid in immediately collectible or available federal funds. If the purchaser fails to pay the amount bid by the purchaser for the trust real estate struck off to the purchaser at the sale as provided in the Deed of Trust Act [48-10-1 NMSA 1978], the trustee may accept the next highest bid or proceed with the sale of the trust real estate to the highest bidder. The person who fails to make the payment shall be liable to any person who suffers loss or expenses, including reasonable attorney fees actually incurred by the trustee and beneficiary occasioned by the failure, and the trustee may subsequently in any postponed or continued sale of the trust real estate reject any bid of the person failing to pay the amount bid.

B. The person conducting the sale may, for the purpose of verifying the proper amount to be paid or the availability of immediately collectible federal funds, postpone or continue the sale for a reasonable period by giving notice of the new time by public declaration at the time and place last appointed for the sale. No other notice of the postponed or continued sale is required.

History: Laws 1987, ch. 61, § 13; 2006, ch. 32, § 5; 2007, ch. 156, § 3.

ANNOTATIONS

The 2006 amendment, effective May 17, 2006, added Subparagraph C to provide for completion of a sale that is contrary to a federal bankruptcy statute.

The 2007 amendment, effective April 2, 2007, eliminated former Subsection G, which provided for the continuance of a sale if the sale is contrary to a federal statute because of an unknown or undisclosed bankruptcy.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applied to deeds of trust on or after May 17, 2006 and that the

provisions of Laws 2007, ch. 156 applied to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2007.

48-10-14. Payment of bid; trustee's deed.

A. The purchaser at the sale, other than the beneficiary or the beneficiary's personal representatives, successors or assigns, to the extent of the credit bid of the purchaser, shall immediately pay the price bid. Upon receipt of payment of the price bid by the trustee in collected federal funds, the trustee shall execute and deliver the trustee's deed to the purchaser. The trustee's deed shall raise the presumption of compliance with the requirements of the Deed of Trust Act relating to the exercise of the power of sale and the sale of the trust real estate, including recording, mailing, publishing and posting of notice of sale and the conduct of sale, in favor of subsequent purchasers, mortgagees or encumbrancers for value and without actual notice.

B. The trustee's deed shall operate to convey to the purchaser the title, interest and claim of the trustee, the trustor, the beneficiary, their respective successors in interest and of all persons claiming the trust real estate sold by or through them, including all interest or claim in the trust real estate acquired after the recording of the deed of trust and before delivery of the trustee's deed. The conveyance shall be clear of the interests of junior encumbrancers in the trust real estate whose interests have been effectively foreclosed by the proceeding.

History: Laws 1987, ch. 61, § 14; 2007, ch. 156, § 4.

ANNOTATIONS

The 2007 amendment, effective April 2, 2007, eliminated the provision that the trustee’s deed shall be without right of redemption.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applied to deeds of trust on or after May 17, 2006 and that the provisions of Laws 2007, ch. 156 applied to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2007.

48-10-15. Disposition of proceeds of sale.

A. The trustee shall apply the proceeds of the sale of the trust real estate by the trustee as follows:

(1) to the costs of exercising the power of sale and of sale, including the payment of the fees of the trustee and reasonable attorneys' fees actually incurred by the trustee and the beneficiary;

(2) to the payment of the contract secured by the deed of trust;

(3) to the payment of all other obligations provided in or secured by the deed of trust; and

(4) to the junior encumbrancers in order of their priority. After payment in full to all junior encumbrancers, payment shall be made to the trustor.

B. The trustee may, in the discretion of the trustee, instead of any one or more of the applications specified in Subsection A of this section elect to deposit the balance of the proceeds available for distribution to junior encumbrancers with the clerk of the district court in the county in which the sale took place. The trustee may deposit the balance of the proceeds in connection with a separate civil interpleader action. Upon deposit of the balance of the proceeds, the trustee shall be discharged from all responsibility for acts performed in good faith as provided in the Deed of Trust Act [48-10-1 to 48-10-21 NMSA 1978] and the clerk shall hold the proceeds subject to the order of the district court upon the application, by separate civil action if necessary, of any interested party.

History: Laws 1987, ch. 61, § 15.

48-10-16. Redemption.

A. Except as otherwise provided in Subsection E of this section, the redemption period after a trustee's sale shall be nine months, or the period provided in the deed of trust, whichever is the lesser period, and shall begin to run from the date of the trustee's sale. In the deed of trust, the parties may shorten the redemption period to not less than one month.

B. After the sale of trust real estate pursuant to Section 48-10-13 NMSA 1978, the trust real estate may be redeemed by the trustor or any junior encumbrancer:

(1) by paying to the purchaser at any time within the redemption period, the amount paid at the sale, with interest from the date of sale at the rate of ten percent a year, together with all taxes, interest and penalties thereon, and all payments made to satisfy in whole or in part any prior lien or mortgage not foreclosed, paid by the purchaser after the date of sale, with interest on the taxes, interest, penalties and payments made on liens or mortgages at the rate of ten percent a year from the date of payment; or

(2) by filing a petition for redemption in the district court in the county where the trustee's sale was held and by making a deposit of the amount set forth in Paragraph (1) of this subsection in cash in the office of the clerk of that district court at any time within the redemption period. Copies of the petition for redemption shall be served upon the purchaser of real estate under a trustee's sale; and

(3) the trustor shall have the first priority to redeem the real estate sold under a trustee's sale. If the trustor does not redeem the real estate as provided in this

section, each junior encumbrancer shall have a right to redeem the real estate. The order of priority of such redemption rights shall be the same priority as the underlying junior encumbrances, as agreed by the parties or as otherwise determined by the court. All redemptions must be made within the redemption period.

C. The purchaser of real estate under a trustee's sale, upon being served with the petition for redemption of the property, shall answer the petition within thirty days after service of the petition.

D. The hearing shall be governed by the rules of civil procedure. After the case is filed, the hearing shall be set upon the earlier of the filing of a petition for redemption by the trustor or the expiration of the redemption period. At the hearing, the judge shall determine the amount of money necessary for the redemption, which shall include the money paid at the sale and all taxes, interest, penalties and payments made in satisfaction of liens, mortgages and encumbrances. If more than one redemption is filed, the court shall also determine which redemption has priority pursuant to the provisions of Subsection B of this section and which party is therefore entitled to redeem the property. At the conclusion of the hearing, the district court may order the clerk of the court to issue the certificate of redemption upon such terms and conditions as the district court deems just.

E. A junior encumbrancer who does not have actual notice or knowledge of the trustee's sale and who has been otherwise omitted from the trustee's sale proceeding shall be entitled to redeem the trust real estate by petitioning the district court in the county where the trustee's sale was held and making a deposit of the amount set forth in Paragraph (1) of Subsection B of this section. The action shall proceed as provided in Subsections C and D of this section. The purchaser of the trust real estate at the trustee's sale may petition the district court to terminate the right of redemption of an omitted junior encumbrancer. In any action commenced pursuant to the provisions of this subsection by or against an omitted junior encumbrancer, the redemption period shall be the period provided in Subsection A of this section, except that the redemption period shall begin to run from the date the final judgment is filed in the action, or from such later date as may be ordered by a court having jurisdiction:

(1) if enforcement of a judgment affecting the redemption is stayed on appeal; or

(2) for other good cause shown.

F. As used in this section, the terms "trustor", "beneficiary", "junior encumbrancer" and "purchaser" include their respective personal representatives, heirs, successors and assigns.

History: Laws 1987, ch. 61, § 16; repealed and reenacted by Laws 2006, ch. 32, § 6; 2007, ch. 156, § 5.

ANNOTATIONS

Repeal and reenactment. — Laws 2006, ch. 32, § 6 repealed 48-10-16 NMSA 1978 and enacted a new section, effective May 17, 2006.

The 2007 amendment, effective April 2, 2007, eliminated former Subsections A and B and added Subsections A through F.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applied to deeds of trust on or after May 17, 2006 and that the provisions of Laws 2007, ch. 156 applied to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2007.

48-10-17. Action to recover balance after sale or foreclosure on trust real estate as provided in deed of trust; action to recover balance prohibited on loans secured by low-income households.

A. Except as provided in Subsections D and E of this section, within six years after the date of a trustee's sale of trust real estate under a deed of trust as provided in the Deed of Trust Act, a separate civil action may be commenced to recover a deficiency judgment for the balance due on the contract for which the deed of trust was given as security. The deficiency judgment shall be for an amount equal to the sum of the total amount owing the beneficiary or the beneficiary's personal representatives, successors or assigns as of the date of the sale, as determined by the court, and, if applicable, the amount owing on all prior mortgages, deeds of trust, liens and encumbrances and real estate contracts with interest less the sale price at the sale by the trustee of the trust real estate. Any deficiency judgment recovered shall include interest on the amount of the deficiency from the date of the sale at the rate provided in the deed of trust or contract, together with any costs of the action.

B. If no action is commenced for a deficiency judgment as provided in Subsection A of this section, the proceeds of the sale, regardless of amount, shall be deemed to be in full satisfaction of the debt and no right to recover a deficiency in any separate civil action shall exist.

C. Except as provided in Subsections D and E of this section, the Deed of Trust Act does not preclude a beneficiary or a trustee or their respective personal representatives, successors or assigns from foreclosing a deed of trust in the same manner provided by law for the foreclosure of mortgages on real estate.

D. A deed of trust may prohibit the recovery of any balance due after the trust real estate is sold at a trustee's sale or after the deed of trust is foreclosed in the manner provided by law for the foreclosure of mortgages on real estate.

E. No deficiency judgment shall be sought or obtained under any deed of trust securing a residential loan made to a low-income household.

F. No deficiency in recovery of any balance due after the sale at a trustee's sale or a judicial foreclosure sale of trust real estate under a deed of trust securing a residential loan made to a low-income household shall be reported to any credit reporting agencies or disclosed to any person other than the trustor or the trustor's personal representatives, unless the disclosure is required by law.

G. For the purposes of Subsections D, E and F of this section:

(1) "low-income household" means a household in which the current annual income is at or below eighty percent of the area median income adjusted for family size as determined by the United States department of housing and urban development and calculated pursuant to the United States department of housing and urban development part 5 guidelines; and

(2) "residential loan" means a loan the primary purpose of which is the purchase or finance of a permanent dwelling located in New Mexico and which is primarily secured by a deed of trust encumbering the dwelling and related trust real estate.

H. The determination of whether a household is a low-income household and whether a loan is a residential loan shall be made as of the time the loan is made on the basis of information obtained during the loan application process.

History: Laws 1987, ch. 61, § 17; 1993, ch. 145, § 5; 2006, ch. 32, § 7; 2007, ch. 156, § 6.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, added "action to recover balance prohibited on loans secured by low-income households" to the end of the catchline; substituted "Subsections D and E" for "Subsection D" in the first sentence of Subsection A and in Subsection C; inserted "not encumbering real estate occupied by a low-income household" in Subsection D; and added Subsections E and F.

The 2006 amendment, effective May 17, 2006, deleted the provision in Subsection A that within twelve months after the sale, a civil action may be commenced to recover a deficiency judgment; and added Subsection G to define "low-income household".

The 2007 amendment, effective April 2, 2007, permitted a civil action to recover a deficiency judgment within six years after the date of a trustee’s sale of trust real estate under a deed of trust; prohibited deficiency judgments or reports of deficiencies to credit reporting agencies if a residential loan is to a low-income household; defined "low-income household" and "residential loan"; and added Subsection H.

Applicability. — Laws 2007, ch. 156, §7 provided that Laws 2006, ch. 32, which is codified as Sections 48-10-3, 48-10-7, 48-10-10, 48-10-11, 48-10-13, 48-10-16, and 48-10-17 NMSA 1978, applied to deeds of trust on or after May 17, 2006 and that the provisions of Laws 2007, ch. 156 applied to deeds of trust executed on or after the effective date of Laws 2007, ch. 156, which is April 2, 2007.

48-10-18. Method of indexing.

Every deed of trust, substitution of trustee, notice of resignation of trustee, request for notice, assignment of beneficial interest in a deed of trust, notice of sale, cancellation of notice of sale or release of deed of trust which is entitled to recordation as provided in the Deed of Trust Act [48-10-1 to 48-10-21 NMSA 1978] shall be indexed in the real estate records of the county clerk in which only part of the trust real estate is located with the trustor indexed as mortgagor, and if the name of the beneficiary appears on the instrument being recorded, the name of the beneficiary or that of the successor of the beneficiary shall be indexed as mortgagee. If the name of the beneficiary does not appear on the instrument being recorded, the name of the trustee or the successor or the trustee shall be indexed as mortgagee.

History: Laws 1987, ch. 61, § 18.

48-10-19. Limitation on action or sale of trust real estate.

The sale of trust real estate by the trustee under a deed of trust shall be made or any action to foreclose a deed of trust as provided by law for the foreclosure of mortgages on real estate shall be commenced within the period prescribed by law for the commencement of an action on the contract secured by the deed of trust.

History: Laws 1987, ch. 61, § 19.

48-10-20. Notice from instruments recorded; assignment of a beneficial interest.

Except as otherwise provided in this section, a deed of trust, notice of resignation of trustee, assignment of a beneficial interest in a deed of trust, notice of sale, cancellation of notice of sale, trustee's deed, release of deed of trust and any instrument by which a deed of trust is subordinated or waived as to priority, if acknowledged as provided by law, shall from the time of being recorded impart notice of the content to all persons, including subsequent purchasers, mortgagees and encumbrancers for value. The recording of an assignment of the beneficial interest in a deed of trust shall not be deemed notice of the assignment to the trustor or the trustee so as to make ineffective any payment made by the trustor or received by the trustee or to preclude the application of proper credit for the payment and shall not be deemed notice to the trustor or the trustee for any other purpose. Such assigned beneficial interest is not entitled to recognition by the trustor or the trustee until actual notice of the assignment is given to the trustor or the trustee.

History: Laws 1987, ch. 61, § 20.

48-10-21. Liberal interpretation.

The Deed of Trust Act [48-10-1 to 48-10-21 NMSA 1978] shall be liberally construed to carry out its purpose.

History: Laws 1987, ch. 61, § 21.

ANNOTATIONS

Severability clauses. — Laws 1987, ch. 61, § 22 provides for the severability of the Deed of Trust Act if any part or application thereof is held invalid.

ARTICLE 11
Self-Service Storage Liens

48-11-1. Short title.

This act [48-11-1 to 48-11-9 NMSA 1978] may be cited as the "Self-Service Storage Lien Act".

History: Laws 1987, ch. 314, § 1.

48-11-2. Definitions.

As used in the Self-Service Storage Lien Act [48-11-1 to 48-11-9 NMSA 1978]:

A. "default" means the failure to perform in a timely manner any obligation or duty set forth in the Self-Service Storage Lien Act or in the rental agreement;

B. "occupant" means a person or his sublessee, successor or assign who is entitled to the use of storage space, to the exclusion of others, at a self-service storage facility under a rental agreement;

C. "owner" means the owner or his heirs, successors or assigns, the operator, the lessor or the sublessor of a self-service storage facility, his agent or any other person authorized by him to manage the facility or to receive rent from an occupant under a rental agreement;

D. "rental agreement" means any written agreement or lease between the owner and the occupant which establishes or modifies the terms, conditions, rules or any other provisions concerning the use and occupancy of a self-service storage facility; and

E. "self-service storage facility" means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such facility for the purpose of storing and removing personal property.

History: Laws 1987, ch. 314, § 2.

48-11-3. Rental agreement.

The rental agreement shall contain a notice stating that all articles stored under the terms of that agreement will be sold or otherwise disposed of under the terms and conditions of the Self-Service Storage Lien Act [48-11-1 to 48-11-9 NMSA 1978] if the tenant is in default. The agreement shall contain a disclosure provision stating the name and address of any lienholder with an interest in the property that is or will be stored in the self-service storage facility. The agreement shall also contain the address of the tenant.

History: Laws 1987, ch. 314, § 3.

ANNOTATIONS

Saving clauses. — Laws 1987, ch. 314, § 10 provides that all rental agreements entered into before July 1, 1987 and not extended or renewed after that date shall remain valid and may be enforced or terminated in accordance with their terms as is permitted by law.

Written lease agreement required. — In accordance with 48-11-2 NMSA 1978, rental agreements under this act are written agreements, such that an oral contract for rent in a storage facility did not give rise to either a landlord lien or a self-service storage lien on the plaintiff's goods. Bird v. Lankford, 116 N.M. 408, 862 P.2d 1267 (Ct. App. 1993).

48-11-4. Self-service storage facility; exclusion.

A self-service storage facility is not a warehouse as that term is used in Sections 55-7-209 and 55-7-210 NMSA 1978; nor shall a self-service storage facility be used for residential purposes.

History: Laws 1987, ch. 314, § 4.

48-11-5. Lien established.

When an owner has a lien, it is on all personal property located at the self-service storage facility for rent, labor or other charges in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to the provisions of the Self-Service Storage Lien Act [48-11-1 to 48-11-9 NMSA 1978]. The lien attaches as of the date the occupant goes into default and continues as long as the owner retains possession of the personal property

and until the default is corrected, or a sale is conducted, or the property is otherwise disposed of to satisfy the lien.

History: Laws 1987, ch. 314, § 5.

48-11-6. Perfected security interests; payment; possession.

Any person who has a perfected security interest under Chapter 55, Article 9 NMSA 1978 may claim any personal property subject to the security interest and subject to a lien arising under the Self-Service Storage Lien Act [48-11-1 to 48-11-9 NMSA 1978] by paying the total amount due for the storage of the property as specified in the notice to the owner on behalf of the occupant as provided in Section 7 [48-11-7 NMSA 1978] of the Self-Service Storage Lien Act. Upon payment of the total amount due, the owner shall deliver possession of the particular property subject to the security interest to the person who paid the total amount due together with an affidavit setting forth his entitlement to the property. The owner shall not be liable for any action taken pursuant to the provisions of the Self-Service Storage Lien Act if the owner has fully complied with the provisions of [the] act.

History: Laws 1987, ch. 314, § 6.

48-11-7. Enforcement of lien.

A. An owner's lien, as provided under the Self-Service Storage Lien Act [48-11-1 to 48-11-9 NMSA 1978], for a claim that has become due may be satisfied as follows:

(1) after the occupant has been in default continuously for a period of five days, the owner may deny the occupant access to his space for storage;

(2) after the occupant has been in default continuously for a period of thirty days, the owner may enter the space and may remove the personal property within it to a safe place, providing that the owner has sent a notice of intent to enforce a lien pursuant to Subsection B of this section to the occupant at his last known address within five days of entering the space. The owner shall also give notice to all lienholders listed in the disclosure provision in the rental agreement; and

(3) no action to sell any property as provided in the Self-Service Storage Lien Act shall be taken by an owner until the occupant has been in default continuously for a period of ninety days.

B. The notice of intent to enforce a lien shall include:

(1) an itemized statement of the owner's claim showing the sum due at the time of the notice and the date when the sum became due;

(2) a brief and general statement of the personal property subject to the lien. That description shall be reasonably adequate to permit the person notified to identify the property, except that any container including a trunk, valise or box that is locked, fastened, sealed or tied in a manner which deters immediate access to its contents may be so described without describing its contents;

(3) a notification of denial of access to the personal property. That notification shall provide the name, street address and telephone number of the owner or his designated agent, whom the occupant may contact to respond to that notification;

(4) a demand for payment within a specified time, not less than fifteen days after the delivery of the notice; and

(5) a conspicuous statement that unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of to satisfy the owner's lien.

C. All notices made pursuant to this section shall be by certified mail return receipt requested.

D. After the expiration of the time given in the notice of intent to enforce a lien, the owner shall publish an advertisement of the sale or other disposition of the property once a week for two consecutive weeks in a newspaper of general circulation in the county where the self-service storage facility is located. The advertisement shall include:

(1) a brief and general description of the personal property reasonably adequate to permit its identification as provided in Paragraph (2) of Subsection B of this section, the address of the self-service storage facility where the personal property is located and the name and last known address of the occupant; and

(2) the time, place and manner of the sale or other disposition. The sale or disposition shall take place not sooner than fifteen days after the first publication.

If there is no newspaper of general circulation in the county where the self-service storage facility is located, the owner shall post the advertisement at least ten days prior to the sale or other disposition in at least six conspicuous places in the neighborhood where the self-service storage facility is located.

E. Any sale or other disposition of the personal property shall conform to the terms of the notification as provided for in this section.

F. Any sale or other disposition of the personal property shall be held at the self-service storage facility or at the nearest suitable place within the county to where the personal property is held or stored.

G. Before any sale or other disposition of personal property pursuant to this section is made, the occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section and thereby redeem the property. Upon receipt of the payment, the owner shall return the personal property and thereafter the owner shall have no liability to any person with regard to that personal property.

H. A good faith purchaser takes the property free of any rights of an unsecured lienholder and free of any rights of a secured lienholder who has received notice by owner as provided in this section.

I. In the event of a sale under this section, the owner may satisfy his lien from the proceeds of the sale, subject to the rights of any prior lienholder who has not received notice. The lien rights of such prior lienholder are automatically transferred to the proceeds of the sale. If the sale was made in good faith and conducted in a reasonable manner, the owner shall not be subject to any surcharge for a deficiency in the amount of a prior secured lien, but shall hold the balance, if any, for delivery to the occupant, lienholder or other person in interest. If the occupant, lienholder or other person in interest does not claim the balance of the proceeds within two years of the date of sale, it shall become the property of the owner without further recourse by the occupant, lienholder or other person in interest.

J. Nothing in this section affects the rights and liabilities of the owner, occupant or any other person if there is a willful violation of any of the provisions of the Self-Service Storage Lien Act.

History: Laws 1987, ch. 314, § 7.

48-11-8. Notice; posting.

Each owner shall post in a prominent place in his office at all times a notice which reads as follows:

"All articles stored under a rental agreement, which have incurred unpaid charges for thirty days, will be sold or otherwise disposed of to pay charges at the end of ninety days."

History: Laws 1987, ch. 314, § 8.

48-11-9. Criminal liability.

Any person who willfully fails to disclose any lienholder as required by the disclosure provision of the rental agreement defined in Section 3 [48-11-3 NMSA 1978] of the Self-Service Storage Lien Act is guilty of a petty misdemeanor.

History: Laws 1987, ch. 314, § 9.

ANNOTATIONS

Severability clauses. — Laws 1987, ch. 314, § 11 provides for the severability of the act if any part or application thereof is held invalid.