Denver Law Review

Volume 34 | Issue 6 Article 3

May 2021

Mechanics' Liens Relative to Oil and Gas Operations - Part II

Phillip G. Dufford

Richard R. Hemlick

MECHANICS' LIENS RELATIVE TO OIL AND GAS OPERATIONS - - PART II

BY PHILIP G. DUFFORD AND RICHARD R. HELMICK

EDITOR'S NOTE: This is the second installment of an article which began in the July-August issue, 34 DICTA 207 (1957)

In the first section of this article, we concluded that a lien claimant wishing to claim a lien against an oil and gas interest must comply with the provisions of the specific statute.[31] We are now faced with the problem of interpreting the specific statute. Interpreting this statute brings us to a discussion of the property and property interests which are subject to the lien, the parties who may assert it, the details of claiming and enforcing the lien, and the extent of deficiency liability.

PROPERTY AND PROPERTY INTERESTS SUBJECT TO THE LIEN

It must be said at the outset that it is possible to become so embroiled within the language of the statute and the variations of judicial interpretations relating to such language, that the underlying theory and purpose of the mechanics' lien can be lost entirely. We believe that much of the confusion in this field is due to a failure on the part of the courts to relate the particular statute under interpretation to its purpose. A sensible interpretation of the statute, in our opinion, requires constant relation of the statutory language to the basic concepts of a mechanics' lien. A completely different result can be obtained with ample justification from a purely literal interpretation.

We have concluded that the specific statute should be construed to grant a lien right only against a real property interest. We think that a careful analysis of the statute and of the holdings of the *Poudre River*[32] and *Terminal* [33] cases indicate that this is the intent of the statute. In taking this position, we are aware that others have concluded differently.[34] Nonetheless, even the confirmed advocates of this theory must admit

[31] Recall that it was not clear in the general statute whether oil and gas interests were subject to the lien granted by the general statute; and the specific statute was enacted, in our opinion, for the purpose of providing a clear basis for the lien against such interests. Terminal Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 59 A.L.R. 549, 550, 557 (1928), views all of the lien statutes—general, the mining section of the general, and the specific—together and decrees that they are to be applied in pari materia; and to this is added the mandate from Chain O' Mines v. Lewison, 100 Colo. 186, 66 P.2d 802 (1935), that the specific statute is intended to broaden the scope of the mechanic's lien. Our conclusion in the presence of these factors was that in the areas where the specific statute legislated it was the exclusive remedy, with the qualification that it supplemented and did not abridge the remedies provided by the general lien act.

[32] Poudre River Oil Corp. v. Carey, 83 Colo. 419, 266 Pac. 201 (1928).

[33] Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 59 A.L.R. 549 (1928).

[34] Lane, **Mechanics' Liens in Colorado** 31, 45 (1948). This author consistently takes the position that personal property is subject to the liens given by the specific statute, but only in favor of the supplier of the personalty. Particularly illustrative of such author's position is this statement:

> "While this statute gives a lien on personal property (materials, machinery and supplies), this lien is restricted for the benefit of those who furnish the same. This personal property is not subject to a lien for labor unless and until it becomes a part of the realty, i.e., a fixture: in which event the interest of a mere contractor in the derrick and drilling rig becomes subject to the lien of a laborer under a subcontractor under such contractor, in the absence of notice of nonliability, as well as the interest of a subcontractor of the lessee in a boiler and engine, even where the boiler and engine has been leased to the subcontractor by a third party to whom it actually belonged." Id. at 45.

Recent writers, however, in viewing the statute, have presumed the conclusion we advance. See Storke and Sears, **Colorado Security Law** 95 (1955).

that the specific statute is not clear on this point and is, therefore, subject to varying views. The one we advance we naturally feel is that which yields the most meaningful and orderly results, and is the one which we feel to be most strongly suggested by our available authority.

It has been stated that the mechanics' lien is a creature of statute in derogation of the common law.[35] This statutory right arises from the social policy favoring certain creditors,[36] which policy we believe to be due to the following factors. Where credit is voluntarily extended, security can be contracted for by the creditor before he permits the commodity to leave his possession, and there is no justification for giving him any greater right than generally available to creditors under our economic system. As a practical matter, security cannot be readily obtained for materials or labor furnished upon credit for the improvement or benefit of land, and the fact that the value furnished cannot be readily reclaimed makes such credit one of the least secure of unsecured credit, and ordinarily for a relatively long period of time. Also, the parties furnishing such benefits, at least as to labor, have traditionally been those members of our economic society who depend for their living upon receiving an hour's pay for an hour's work.[37] Accordingly, those who enhance the value of the land by furnishing labor or materials for the improvement thereof are given a lien against such land to secure payment of their claims.[38] It is a means of eliminating the search for assets and earmarking specific property for the payment of the debt before the creditor parts with the benefit which he can bestow.[39]

Although we have concluded that the lien is against real property only, we hasten to point out that a real property interest often includes many valuable improvements which are frequently thought of as personalty. In an effort to avoid confusion in this regard, we introduce into our discussion the phrases "affixed or installed personalty" and "detached personal property," to distinguish between those items of personal property which have become absorbed into the well and its appurtenances, and those items of personal property which are merely used in the drilling and operation of the well, but retain their individual identity and portability. In determining the character of particular personal property as affixed personalty or detached personal property, we find it helpful to draw a parallel to the liens available against ordinary building construction under the general statute. For example, we conclude that casing in the hole is a part of the improvement and therefore affixed personalty even though it could be removed.

As a similar instance in general construction, an installed heating plant could be removed relatively easily by its supplier, but it becomes a part of the lienable structure when installed—lienable by all of the lien claimants.[40] Conversely, we conclude that a portable rig is ordinarily not lienable, just as hoist equipment installed on the location of a skyscraper being constructed is temporary and not lienable, regardless of how securely it may be affixed to the structure during construction.

[35] See the first section of our article, 34 DICTA at 214, citing Lane, **Mechanics' Liens in Colorado**. 3 (1948).

[36] Storke and Sears, **Colorado Security Law** 21 (1955).

[37] **Id.** at 21.

[38] **IV American Law of Property** § 16.106F (1952).

[39] See Storke and Sears, **Colorado Security Law** 10-11 (1955); (and see generally § 3 of this work).

[40] **In re** Ben Boldt, Jr., Floral Co., 37 F.2d 499 (10th Cir. 1930).

In each instance, it is, of course, a factual determination, but not too difficult since the intent in placing the personalty upon the property should usually be quite clear.[41]

Upon this construction, property which does not become an inseparable part of the leasehold estate,[42] that is, detached personal property, is not lienable. A condition of the statute is that the labor or material furnished was so furnished "by virtue of a contract . . . with the owner or lessee of any interest in real estate . . . ."[43] Where such condition is

[41] Lane, supra, note 23 at 36-39.

[42] This discussion is concerned principally with the leasehold estate, since that is the interest commonly available to the lien claimant; but the remarks are equally applicable to any real property interest detailed in the statute.

[43] Because of the need for constant reference to the first section of the specific statute throughout a consideration of the questions discussed in this article, the first section is quoted here in full. "**Property subject to lien.** Every person, firm or corporation, whether as contractor, subcontractor, material man, or laborer, who performs labor upon or furnishes machinery, material, fuel, explosives, power or supplies for sinking, repairing, altering or operating any gas well, oil well or other well, or for constructing, repairing, or operating any oil derrick, oil tank, oil pipe line or water pipe line, pump or pumping station, transportation or communication line, gasoline plant and refinery, by virtue of a contract, express or implied, with the owner or lessee of any interest in real estate, or with the trustee, agent or receiver of any such owner, part owner or lessee, shall have a lien to secure the payment thereof upon the properties mentioned, belonging to the party or parties contracting with the lien claimants, and upon the machinery, materials and supplies so furnished, and upon any well upon and in which such machinery, materials and supplies shall have been placed and used, and upon all other wells, buildings and appurtenances, and the interest, leasehold or otherwise, of such owner, part owner or lessee in the lot or land upon which said improvements are located, or to which they may be removed, to the extent of the right, title and interest of the owner, part owner or lessee, at the time the work was commenced or machinery, materials and supplies were begun to be furnished by the lien claimant or by the contractor under the original contract; and such lien shall extend to any subsequently acquired interest of any such owner, part owner or lessee." Colo. Rev. Stat. Ann. § 86-5-1 (1953).

fulfilled, the statute gives the laborer or materialman a "lien to secure the payment thereof upon the properties mentioned belonging to the party or parties contracting with the lien claimants . . . ." Considering for the moment only these two provisions, if the lien is given against the properties of the contracting party, and the contracting party must be the owner or lessee of a real property interest, the inference is that the lien is given against real property. This inference is fortified by the fact that the statute uses the phrase "properties mentioned" and although open to some argument itself, the "properties mentioned" are "any gas well, oil well, or other well, or . . . any oil derrick, oil tank, oil pipeline or water pipeline, pump or pumping station, transportation or communication line, gasoline plant and refinery," all of which "properties," we submit, are affixed or installed personalty and therefore real property.[44]

If some of the "properties mentioned" are not considered real property *per se,* we believe that they are intended to be restricted to their character as real property for purposes of the statute because the only properties which could be in question follow the words "constructing, repairing, or operating," the import of which to us is a permanency characteristic of real property improvements. Present day operations do not even permit the extension of the lien to detached personal property belonging to the contracting party upon the theory expressed in the dissenting opinion of the *Terminal* case.[45] Under present operating procedure it could not be inferred that the portable drilling rig, no matter who owns it, is intended to become a part of the well.[46]

We believe that the view that the "properties mentioned" are real property is further supported by the fact that at the time the statute was written, oil derricks were more permanent installations than they are now.[47] "Rig" and "derrick" are sometimes used interchangeably,[48] the current usage favoring "rig," presumably because of the highly por-

[44] This interpretation blocks the possible argument that the statutory language is broad enough to grant a lien also against any personal property which might belong to the same contracting party.

[45] 84 Colo. 279, 289, 269 Pac. 894, 899 (1928).

[46] We do not consider this a departure from the basic statutory interpretation, however, since in such instances the property in question is not really detached personal property but has become a part of the real estate interest of the contracting party.

[47] See Terminal Drilling Co. v. Jones, supra, note 33, at p. 281. 84 Colo. 279, 281, 269 Pac. 894 (1928).

[48] Id. at 289, 269 Pac. at 899.

table character of present day units. The word "rig" was used in both the *Poudre River* and *Terminal* cases, but without particular meaning and with confusion in result. The *Poudre* decision impliedly considered the rig detached personal property. The majority opinion in the *Terminal* case (written by the same Justice who wrote the *Poudre* opinion) considered the rig a part of the real estate.[49] The dissenting opinion in the *Terminal* case considered the "derrick" as an item of portable equipment.

The clauses which follow the basic grant of lien in the statute, commencing with the first "and upon," do not in our opinion expand the right given to embrace detached personal property, but merely describe the various real property interests involved, some of which would not by a strict construction of the statute fall within the phrase "properties mentioned" as used in the basic grant of lien.[50] The most tenable argument against this construction rests in the phrase "and upon the machinery, materials and supplies so furnished," but, as is now apparent from the foregoing discussion, we construe this language to mean only such items which have become a part of the real estate and attached personalty.

Assuming that it is clearly recognized that the statute pertains only to real property interests, still another problem is present. The *Poudre River* case indicates that a lien is available to certain parties against detached personal property which they have furnished.[51] If the *Poudre River* case were to stand alone, the language which provides this indication could be discounted as dictum, but the language was elevated from this status when the same Justice who wrote the opinion stated in the *Terminal* case, "and the lien upon the equipment as such is restricted to those who furnish it, as is held in *Poudre River* . . . ." The court's language was not necessary to the decision in either case, and we believe that it was an unfortunate implication which is an error. The dissenting opinion in the *Terminal* case clearly takes the position that a lien

[49] Though really determining the issue, we think, upon estoppel, emphasizing the fact that the rig owner had contracted for indemnity against mechanics' liens with its subcontractor through whom the lien claims arose.

The Terminal decision permitted a lien to be foreclosed against the rig, which did not belong to the party owning an interest in the real estate, although it should be noted that the rig owner was a party to the contract with the lien claimant. It is, of course, proper for a contracting party to be liable for the expense incurred in fulfillment of his contract, but it does not follow that a lien should be available against his property to secure the payment of such indebtedness, since the mechanic's lien was traditionally granted against property which benefited from labor or materials in favor of those persons who furnished the benefit. No benefit was conferred upon the property of the rig owner, and the dissenting opinion recognized the inequity in permitting a lien against such property.

[50] For example, machinery affixed to the well and the leasehold interest would appear to be technically excludable from "properties mentioned."

[51] The Poudre River case is somewhat anomalous. We have previously expressed our opinion that it reached a questionable result. (See note 26, **supra**). The conclusion that the plaintiff was not entitled to a lien was correct upon the facts obviously assumed by the court; but the reasoning for the conclusion was not in point, and the facts appear to be different from the basis assumed by the court. The court said, "One furnishing only labor has not created value in the machinery and equipment as detached personal property, but only in the well itself and the leasehold interest, and upon these the statute gives him a lien." We believe that the real basis of the decision lies in the court's expressed assumption that the properties against which the lien was claimed were detached personal property; and if this were actually the case the court's decision would be in full accord with the statutory interpretation to which we have adhered. However, the actual facts in the case showed that the lien was claimed against, among other properties, "a rig, rig irons, steel crown blocks, string of 10" casing in the hole, other casing upon location, drilling line and sand line." Without concluding whether the rig was affixed or portable under the facts, the "string of 10" casing in the hole" would not be detached personal property but instead a part of the well structure, subject to the liens of laborers and materialmen alike.

against detached personal property is not contemplated by the specific statute, and says nothing with reference to an exception in favor of the party supplying the detached personal property. Practically speaking, the specific question is not a great problem, except from the standpoint of procedure, since the vendor of such property can be protected apart from the specific statute as detailed below.

We have previously noted that the 1929 statute, which is the basis for the specific statute in its present form, followed closely the determination of the *Poudre River* and *Terminal* cases, and that we consider this to be more than a coincidence.[52] We believe that the 1929 Act was an attempt to approve the dissenting view expressed in the *Terminal* case that no lien is available against detached personal property. We are not entirely satisfied, however, that the act clearly repudiates the result implied in *Poudre River* that a materialman would have a lien against the detached personal property which he has furnished; but again we interpret the act in the light of the underlying theory of a mechanics' lien. The mechanics' lien is non-consensual,[53] and as such should be limited to those situations where the parties are unable, as a practical matter, to contract for security. The vendor of detached personal property can protect himself by permitting only a qualified or limited title to pass to the purchaser through the use of a conditional sale contract or a chattel mortgage;[54] and even without an express security contract he may possibly have an inchoate right to reclaim the detached personal property,[55] as witness the tacitly approved action of the defendant Panuco in the *Terminal* case.[56] As well, the materialman has a lien against the real property interests of the contracting party served by such detached personal property, as discussed in more detail hereinafter, for the value of such service.

The foregoing considerations of theory relative to the nature of the property and property interests subject to lien rights under the statutes must constantly be borne in mind as specific classes of property and property rights are examined to determine their lienable nature. These considerations may be summarized as follows:

(a) Both the general and specific statutes contemplate lien rights only against interests in realty.
(b) Detached or unaffixed personalty cannot be made the subject of a lien under the statutes regardless of its ownership.
(c) Attached or affixed personalty is subject to liens granted by the statutes, subject only to prior valid recorded rights.

Confining our analysis to a normal oil and gas well operation and with-

---

[52] See the first section of this article, note 27, **supra** (34 DICTA at 215).

[53] Storke and Sears, **Colorado Security Law** 36 §§ 6 and 25 (1955).

[54] See Colo. Rev. Stat. Ann. § 86-5-3 (1953). If full title is not permitted to pass to the purchaser, and notice of such fact is properly recorded before possession is delivered to the purchaser, the security interest retained as a part of the sale transaction should take priority over a mechanic's lien even though the date of inception of the right to the lien predates the date of recording. See **American Law of Property,** § 16.106H (1952). The "extent of the right, title and interest" of the purchaser would never exceed his equity under these circumstances.

[55] Cf. Rice v. Cassells, 48 Colo. 73, 108 Pac. 1001 (1910); Bethlehem Supply Corp. v. Wotola Royalty Corp., 140 Tex. 9, 165 S.W.2d 443 (1942). **But See** Colo. Rev. Stat. Ann. § 121-1-56 (1953).

[56] See note 33 **supra.** The defendant, Panuco Exploration Co., had gone upon the property and removed the items of machinery which it had supplied and for which it was unpaid. The court concluded that the property was not subject to a lien since it was not a part of the oil well for the purposes of the lien statutes. It should be noted by way of caution that the court was not faced with the problem of determining the relative rights of the parties as between Panuco and the party to whom it had sold the machinery.

out attempting to cover the other types of oil and gas operations described in the specific statute, we provide a check list of lienable property and property interests as follows:

LEASEHOLD INTERESTS

Landowner's Royalty and the Mineral Fee: The *Terminal* case should leave little question that the fee mineral estate and the landowner's royalty cannot be reached by liens under the general act and under the predecessor to the specific act. It denies the argument for finding a statutory agency between the landowner and his lessee, holds that there is no basis in contract, and limits the lien there asserted to the lessee interests. Further, the present specific act removes the landowner from any liability except, of course, where he contracts with the lien claimant.[57]

Overriding Royalty Interests; Production Payments: The same reasoning which in the *Terminal* case prohibited attachment of liens to a landowner's interest should preserve the so-called overriding royalty interests and also production payments which were created and recorded prior to the commencement of work operations. These are estates separate from that of the working interest owner who contracts for the improvements. There is no greater element of agency between the holders of such interests and the working interest owner than there is between such owner and the base lessor since these are non-expense-bearing interests. If on no other basis, they may be preserved on the theory that they are a prior encumbrance against the leasehold.[58]

Carried Working Interests and Net Profit Interests: Quite commonly the owner of an oil and gas lease may transfer or reserve a given fraction of his working interest estate on the following basis:

(a) The holder of the working interest residue may agree that he will pay, for the holder of the fractional part, that portion of the drilling and completion expenses or that portion of either the drilling or completion expenses which would otherwise be paid by such holder for any well drilled on the lease; or

(b) The holder of the residue may agree to "advance" on the part of the fractional holder the latter's share of either drilling or completing costs, or both of such costs, and subsequently recover such expenditure from the fractional holder's share of production.

Such fractional interests are commonly referred to as "carried interests." Cases from other jurisdictions go both directions in answering the question of their susceptibility to mechanics' liens.[59] It is arguable that they, like overriding royalty interests, are encumbrances against the working interest. The difficulty we see to this position is that the holders of these estates come dangerously close to standing in an agency relationship with the residue working interest, at least for lien purposes. They have all of the incidents of control and chargeability of costs attendant to a consenting working interest, and are distinct only on the basis that

---

57 Colo. Rev. Stat. Ann. § 86-5-11 (1953).

58 An excellent case on this point is M. E. Roberts v. Dock Tice, 198 Ark. 397, 129 S.W.2d 258, 122 A.L.R. 1177 (1939), decided under the Arkansas statute, which contains language similar to the Colorado specific act.

59 In Weir v. Janecki Mfg. Co., 254 Ky. 738, 72 S.W.2d 450 (1933) the carried interest was held immune to the lien, but in Ball v. Red Square Oil and Gas Co., 113 Kan. 763, 216 Pac. 422 (1923) the lien attached to the carried interest. The distinctions between the Kentucky and Kansas statute are not significant insofar as the question immediately considered is concerned.

the holder of the residue has *contracted* as between the parties to pay or advance on their behalf their share of costs.

The same reasoning may be applied to a "net profit interest," which is merely a contractual right on the part of one to take a given percentage of the net income that an oil and gas leasehold yields to a lessee. Here, again, it is arguable that the net profit interest is in the nature of an encumbrance upon the working interest, but it strikes us as being an unsegregated portion of such estate, committed in agency by contract to the working interest for lien purposes and, therefore, subject to liens.

Working Interests: Where the oil and gas lessee's interest or working interest is held in one person, there is no problem under our statutes for it can be impressed to its entire extent with the liens given thereby.[60] What, however, is the case where this estate is divided by assignment among several owners? Where a holder of a partial working interest consents expressly or impliedly to a development or improvement of the leasehold and commits his interest to the program, we feel his interest, in its entire extent, is lienable under the terms of the statutes. If he participates in the control of the program, he is an owner, part owner, or lessee, contracting with the lien claimant, as required by the acts. If he delegates this authority by contract, even while limiting his liability, he has created an agency or trusteeship; and under the statute his interest is rendered subject to the lien even though he may not be liable for the deficiency debt.[61]

Where, however, a holder of a partial working interest is nonconsenting, there cannot be a contractual basis for a lien, either directly or by agency, and the lien would fail.[62]

If the provisions[63] of the general act which require that a nonconsenting owner post notice of his non-liability following knowledge of improvements are applicable in *pari materia* to the specific statute, a non-consenting working interest holder should protect himself by so doing.[64] In any event, until the question of applicability is clarified this would be an advisable practice to follow.

A particularly perplexing problem in this area arises with respect to working interests which are totally or partially "farmed out." Often a company holding a large area under lease will contract with another company to drill a test well in the area. Within the industry these contractual arrangements are called farmout contracts. The company owning the lease is normally called a "farmor," and the company which agrees to drill the well is called the "farmee." The agreements vary in substance, but generally they provide that if the farmee drills a well to a given depth at a specified location within a limited time and grants the farmor access to information obtained during drilling, the farmor will then convey to the farmee either a divided or an undivided interest in its leasehold estate or a portion thereof.

A significant fact under this type of contract is that the farmee's interest is contingent. If the farmee does not perform the required act,

[60] Colo. Rev. Stat. Ann. § 86-5-1 (1953) specifically provides that the lien shall run to all of the right, title and interest, leasehold or otherwise, of the owner or lessee.

[61] See discussion relative to deficiency liability infra.

[62] The specific act limits the interests which can be reached to those belonging to the contracting party or parties. See also J. S. Abercrombie Co. v. Lehulu Oil Co., 181 La. 644, 160 So. 126 (1935) (decided at a time when the Louisiana statutes required a contractual basis for the lien; this is no longer required in that state); Oil Well Supply Co. v. Independent Oil Co., 219 La. 935, 54 So. 2d 330 (1951).

[63] Colo. Rev. Stat. Ann. § 86-3-5 (1953).

[64] We doubt that the referred to section of the general act does apply pari materia to the specific act. See discussion relative to enforcement, infra.

it does not acquire any interest in the leasehold and title remains absolute in the farmor. Under these circumstances it becomes necessary to determine whether a lien claimant for work done on the well may reach the farmor's retained interest in the leasehold (presuming that the farmee has fully performed his agreement), or whether such claimant may reach the farmor's leasehold in the event of default by the farmee.

It is unfortunate that the *Terminal* case did not reveal either in the decision or in the trial record the terms of the agreement between the original lessee, Municipal Oil, Inc., and Terminal Drilling Co., for it is possible that such agreement may have been in the nature of a farmout contract. In its absence there is no definitive authority in this state other than the statutes themselves.

The problem becomes one of statutory agency, and in our opinion agency exists. In the absence of agency between the farmor and farmee a claimant could reach only the farmee's interest, which is contingent in its inception and then vested upon the farmee's unilateral performance. Cases of other jurisdictions reach opposed results as to whether there is or is not statutory agency between these parties.[65]

Because they run the gamut of both views and because of similarities between the lien statute there under consideration and our own specific act, the *Brooks* and *Etheridge* cases[66] deserve particular note. The factual narratives in the cases leave little question that a farmout arrangement existed between the Superior Oil Co., as farmor, and one McSpadden, as farmee. The United States District Court (Arkansas) in the *Brooks* case[67] denied a lien against the farmor's interest and limited the claimant to a right against McSpadden's contingent interest, which, since there had been a default by him, was virtually no right at all. The Arkansas Supreme Court then ruled in the *Etheridge* case[68] that McSpadden was both "agent" and "contractor" for Superior in the statutory sense and gave a lien against the leasehold and also apparently against personalty, both detached and attached. We feel that there are factors in the *Etheridge* case which make it misleading authority relative to a farmor-farmee arrangement. Most significant of these is the fact that the

[65] Brooks v. Superior Oil Co. 198 F.2d 89 (8th Cir. 1952), **reversing** Brooks v. Superior Oil Co., 96 F. Supp. 641 (D.Ark. 1952); Superior Oil v. Etheridge, 219 Ark. 289, 242 S.W.2d 718, (1951). Also see J. S. Abercrombie Co. v. Lehulu Oil Co., 181 La. 644, 160 So. 126 (1935) (which may have involved farmout estate although court talks in terms of "sub-lease"); O'Brien v. Greene Production Co., Tex. Civ. App., 151 S.W.2d 900 (1941); Hoffman v. Continental Supply Co., Tex. Civ. App., 120 S.W.2d 851, modified, 135 Tex. 522, 144 S.W.2d 253 (1938).

[66] See note 65 **supra.**

[67] 96 F. Supp. 641 (D.Ark. 1952).

[68] 219 Ark. 289, 242 S.W.2d 718 (1951).

court viewed Superior's agreement as a "turnkey contract,"[69] which, of course, it was not, since Superior had no interest in the well other than in the technical data it yielded. Also, the Arkansas court laid great stress on the fact that Superior had prohibited recording of the agreement, which implies an estoppel against Superior to deny agency. In any event, the *Etheridge* case became controlling as to Arkansas law and the United States circuit court was obligated to reverse the district court's trial decision in the *Brooks* case.

Whether one agrees or disagrees with the ultimate result of these cases, they are forceful authority in the instant situation and should be constantly considered by those who advise clients relative to their rights and liabilities under farmout contracts. It might be helpful from a farmor's standpoint to specifically refute agency in the contract and to require recording of the agreement. Perhaps, also, the result of the *Brooks* case could be altered by assigning the farmee his interest in the lease prior to work commencement, subject to disfeasance for failure to perform. We see no security in any of these suggestions, however, and submit that the best insurance is in the form of bonding the farmee for payment of his costs.

Unitized Leaseholds: The specific statute lays the lien right against enumerated properties including the well upon which the benefit was conferred, "and upon all other wells . . . and the interest, leasehold, or otherwise . . ." of the owner, part owner, or lessee, to the extent of his

[69] A "turnkey contract" is normally viewed within the oil industry as an agreement between a lease owner and a drilling contractor providing for the drilling of a well at a fixed price for the owner's account. The significance in this is that the owner has and retains an ownership interest in the well.

interest. As previously noted, the mining section of the general act provides that when two or more deposits are worked in common they shall, for purposes of the act, be presumed to be a single mine.

Today it is a common practice to group separately-owned leases into a single plan for development through devices of unitization and pooling. Under the provisions of the acts specified above it can be asserted that a lien right may be claimed against all lienable property belonging to a lienable interest holder in the entire unit area for work performed upon a single well within the area. Cases arising under other statutes permit such a result.[70] The claimant must, of course, still satisfy the requirements of basing his claim in contract and of describing and identifying in his lien statement the property to be charged with the lien.[71]

PERSONALTY

Attached Equipment and Machinery: Once casing and other production machinery and equipment such as tanks, pumps, pipe, etc., are affixed, they become lienable under both the specific and general statute.[72]

Detached Equipment and Machinery: It is always troublesome to take a definitive position on questions of law where answers are not clear, and certainly this category presents such a problem. We have previously discussed the matter in general terms and specifically affirm our position here that we do not think that our general and specific statutes, when properly construed, permit the liens there given to attach to portable well drilling and servicing equipment and machinery, nor to well materials and equipment such as casing, pumps, tanks and fittings delivered to and stacked at the well site *but not* consumed in the well or not affixed thereto.

There are numerous cases, primarily from Louisiana, allowing liens to attach to detached personalty, principally to drilling equipment.[73] These cases should all be viewed in the light that they arise under specific oil and gas statutes which differ severely in their language from our specific statute.[74]

Produced Oil: There is one special class of personalty that should

[70] Oil Field Salvage v. Simon, 140 Tex. 456, 168 S.W.2d 848 (1943). Cases involving liens asserted under a mining statute are Standard Pipe and Supply Co. v. Red Rock Co., 57 Cal. App. 2d 897, 135 P.2d 659 (1943); Standard Pipe and Supply Co. v. Marvin, 43 Cal. App. 2d 230, 110 P.2d 476 (1941). On this question careful attention should be given to the terms of the unit or pooling agreement when the pleadings for lien foreclosure are drawn. Generally these contracts provide that the leases committed to the agreement are to be developed as a single and entire leasehold.

[71] Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 54 A.L.R. 1549 (1928). The form of lien statement set forth, infra, should carry the entire unit area description in the space provided for a land description.

[72] Poudre River Oil Corp. v. Carey, 83 Colo. 419, 266 Pac. 201 (1928) denied a laborer's lien against casing in the hole, and thereby impliedly held it to be detached personalty. The question of annexation is in all instances a factual one and the varying results of our cases make it difficult to set forth any fully definitive guide for its determination. A general analysis of the question and a summary of different case results can be found in Lane, Mechanics' Liens in Colorado 36 (1948).

[73] Compare Meyer v. Latta, 178 Kan. 316, 285 P.2d 782 (1955); with Given v. Campbell, 127 Kan. 378, 273 Pac. 442 (1929); Idom v. Mass, La. App., 32 So. 2d 411 (1947), (rig removed before lien attached); Sargent v. Freeman, 204 La. 997, 16 So. 2nd 737 (1944); Odom v. McClanahan, La. App., 196 So. 382 (1940); Smith v. Benson, 262 P.2d 438, 2 Oil and Gas Rep. 1420 (Okla. 1953).

[74] Louisiana Laws, Act. No. 68, § 1 (1942) and its successor Act. No. 100, § 1 (1955) direct the lien (privilege) to drilling rigs and machinery attached to or located on the leasehold. Separate sections for enforcement of the liens (privileges) against movable and immovable property are provided. Kan. Gen. Stats. § 55-207 (1935) provides that the lien shall extend to the fixtures and appliances used in operating for oil and gas purposes. Okla. Stat. Ann. § 144 places the lien upon any "oil well supplies, tools and other articles used in digging."

be dealt with in detail, and this is produced oil. In the ground oil is realty[75] and is therefore, of course, impressed with the liens arising under the statutes here considered. Upon notification of the existence of lien rights, crude oil purchasers will suspend their payments for produced oil on the theory that it was impressed with the lien right prior to severance. What then of the oil which was produced and stored or sold prior to the time that the lien attached? Again there is no fully definitive authority in this state, but the better view elsewhere, we feel, holds that upon severance the oil or proceeds therefor are not subject to the lien on the theory that they are not included within the lienable properties specified in the statute, which is the case with our statute.[76]

PARTIES WHO MAY ASSERT THE LIEN

Next analyzed are the classes who may assert liens against oil and gas properties in Colorado. A constant consideration, especially at this phase, is the statutory necessity that the lien right must be based in contract, express or implied.[77] Under the general statute the lien claimant must plead and prove that he rendered his benefit at the instance of the owner or his agent, with those who have charge of construction being presumed agents.[78] Similarly, under the specific statute the benefit must be conferred by virtue of a contract express or implied with the owner or part owner or lessee of any interest in real estate or with the trustee, agent or receiver of any such owner, part owner, or lessee.[79]

Laborers: In this general class we include toolpushers, tool dressers, drillers, roustabouts (in short, all members of a normal drilling crew, except watchmen),[80] carpenters,[81] repairmen,[82] truck drivers,[83] "cat men,"[84] and all other persons whose contribution is one of physical labor.[85]

---

[75] 1 Summers, Oil and Gas, 28 (1954).

[76] Garey v. Rufus Lillard Co., 196 Okla. 421, 165 P.2d 344 (1945); Stanolind Crude Oil Purchasing Co. v. Busey, 185 Okla. 200, 90 P.2d 876 (1939). The statutes of some states (Arkansas, Louisiana and Wyoming) specifically allow the lien to reach the produced minerals or their proceeds.

[77] Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 54 A.L.R. 1549 (1928). Interesting cases on this point are Sklar v. Oil Incomes, Inc., 133 F.2d 512 (5th Cir. 1943); Pace v. National Bank of Commerce, 190 Okla. 503, 125 P.2d 178 (1942); and Lange Cable Tool Drilling Co. v. Barnett Petroleum Corp., 142 S.W.2d 833 (Tex. Civ. App. 1940). See Lane, **Mechanics' Liens in Colorado**, 67-84 (1948) for collection of Colorado cases on this point. Also, see Roberts v. Dock Tice, 198 Ark. 397, 129 S.W.2d 258, 122 A.L.R. 1177 (1939). **Caveat:** Louisiana's specific oil and gas statute does not now contain a requirement that there be a direct contractual basis to the lien, Oil Well Supply Co. v. Independent Oil Co., 219 La. 935, 54 So. 2d 330 (1951), and this is most significant in appraising the cases of that jurisdiction. Even in that state the lien right does not inure to a mere volunteer of services. Willis v. Mills Tooke Properties, 42 So. 2d 548 (La. App. 1949). So it is questionable whether the requirement for contract is negated entirely in that state.

[78] Colo. Rev. Stat. Ann. § 86-3-1 (1953).

[79] Colo. Rev. Stat. Ann. § 86-5-1 (1953).

[80] Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 59 A.L.R. 549 (1928) (granted liens to a truck driver, a driller, and a tooldresser). The claimants in Pace v. National Bank of Commerce, 190 Okla. 503, 125 P.2d 178 (1942) were a pumper and a roustabout. The lien of a watchman (and scout) was denied in Gleason v. Twin Cities Drilling Co., 183 So. 67 (La. App. 1938) but on the basis that the services were not rendered during the drilling of a well. See also Donaldson v. Orchard Crude Oil Co., 6 Cal. App. 641, 92 Pac. 1046 (1907); Bell Oil and Refining Co. v. Price, 251 S.W. 559 (Tex. Civ. App. 1923).

[81] Superior Oil v. Etheridge, 219 Ark. 289, 242 S.W.2d 718 (1951) grants a lien for carpentry and lumber. The case appears correct insofar as it accords a lien to this type of claimant, but can be criticized insofar as it allows the lien against an oil and gas "farmor's" retained or reversionary interest.

[82] Sargent v. Freeman, 204 La. 997, 16 So. 2d 737 (1944) allows a repairman's lien, for work done upon unattached personalty, a generator, to run against realty interests. As we use the term "repairman" here we would confine its meaning to those who render repair services to installed and affixed machinery.

[83] Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 59 A.L.R. 549 (1928).

[84] An earth moving contractor and operator was denied a lien for roadwork and backfilling in Willis v. Mills Tooke Properties, 42 So. 2d 548 (La. App. 1949) but on the basis that the plaintiff had, in effect, volunteered his services.

[85] Ball v. Davis, 118 Tex. 534, 18 S.W.2d 1063 (1929).

There are, even under the specific statute, some very special problems attendant to this class of claimant and also to other classes which should be noted in summary here. In some jurisdictions the phase or "time" during which the expenditure of labor was made, and also to some extent the "situs" of expenditure have come to be factors. To illustrate this, assume that a bulldozer operator, under a contract with a lessee or his drilling contractor, performs the following labor items during three phases of an oil and gas well program:

(a) Prior to the time drilling is commenced the operator cuts out an access road from the highway to the location and grades and levels the location.
(b) During the time that the well is drilling the operator cuts reserve pits and levels an additional parking and storage area.
(c) After drilling he levels the location, "chisels" the roadway and park area, backfills the pits attendant to abandonment of the well or else does further excavating for the installation of completion equipment.

It is possible in the face of these circumstances to argue that the operator does not qualify for a lien under the specific statute as to the work items rendered in phases (a) and (c) because he did not expend his labor at a time when a well was being sunk, repaired, altered or operated. Such a contention has been accepted elsewhere.[86]

[86] In Willis v. Mills Tooke Properties, 42 So. 2d 548 (La. App. 1949) a lien was denied because the service was rendered after installation of production equipment and not during the drilling phase as well as on the ground that the plaintiff's services were not ordered. The dissent argues that case should turn on the basis that services were not ordered and implies that there should be a lien for services performed after drilling. Big Three Welding and Equip. Co. v. Crutcher, 149 Tex. 204, 229 S.W.2d 600 (1949) (denies lien against realty for services rendered to the dismantling of a portion of a pipeline).

It is also arguable that the operator, particularly as to his work on the roadway and removed parking area, did not render his labors at the "situs" contemplated by the statute; by this we mean that he did not bestow his benefit upon the well itself.[87] These contentions could be made against any type of labor or contractor claimant or against the supplier of expendable items rendering benefits during the phases preceding or following actual drilling, or upon operations not at the actual drillsite. We do not feel that the statutory language should be so narrowly construed.[88] Rather, the decisions of our Supreme Court indicate that every act essential to the well endeavor is a part of the endeavor itself and that there is not a terminus of the endeavor until all essential parts are completed.[89] Since the drilling of any oil and gas well contemplates and necessitates the performance of certain preparatory operations in the phase prior to actual drilling, and also the performance of abandonment operations (if the well is dry) or completion operations (if productive) in the phase following drilling we feel that the better view extends the terms "drilling and operating" to include expenditures of services and supplies made during all three phases,[90] and also deems these expenditures as being made "upon or . . . for" the well and other lienable property if they are expended upon operations related and necessarily incident to the actual drilling of the well.[91]

Surveyors: In our opinion it does not require an unduly broad construction of the specific statute to hold that the surveyor who stakes location, lays out access roads, or who defines lease lines and corners, has performed labor for the "sinking, repairing, altering or operating" of a well. There is, however, a separate section of the general act[92] which grants a lien to surveyors and civil and mining engineers who do any work of surveying or plotting of mineral deposits. Undeniably, this provision was intended to afford a lien to mine surveyors, but a liberal construction of its language allows its applicability to oil and gas operations. By our view, the rights and statutory requirements of this class of claimant are defined by the specific act.

Technicians: Quite commonly certain technical personal services are rendered during oil and gas drilling operations, such as those of a consultant geologist,[93] core analyst, mud analyst, log analyst, and test engineers.

We think a lien in favor of these persons could be justified under the wording of the general statute on the basis that they are "engineers" rendering professional services, but the Colorado cases are not clear;[94]

[87] Willis v. Mills Tooke Properties, 42 So. 2d 548 (La. App. 1949).

[88] Cases of other states evidencing a more liberal approach on this question include Gourley v. Iverson Tool Co., 186 S.W.2d 726 (Tex. Civ. App. 1945) (plaintiff allowed lien though his work was rendered on well machinery in his shop several miles from well). Note also Superior Oil v. Etheridge, 219 Ark. 289, 242 S.W.2d 718 (1951); Arkansas Fuel Oil Co. v. McDowell, 119 Okla. 77, 249 Pac. 717 (1926).

[89] Western Elaterite Roofing Co. v. Fisher, 85 Colo. 5, 273 Pac. 19 (1928); Curtis v. McCarthy, 53 Colo. 284, 125 Pac. 109 (1912).

[90] Like Colorado, the Oklahoma statute does not specifically authorize a lien for services rendered during abandonment but in Indo Oil Co. v. Bennett, 202 Okla. 300, 213 P.2d 546 (1949) plaintiff was allowed a lien for services rendered during plugging operations.

[91] Labor and materials for a plank roadway to the location formed the basis for a lien in Superior Oil Co. v. Etheridge, 219 Ark. 289, 242 S.W.2d 718 (1951). In Terminal Drilling Co. v. Jones, 84 Colo. 279, 269 Pac. 894, 59 A.L.R. 549 (1928), the court allowed a lien for labor to one whose function was driving a truck to and from the well.

[92] Colo. Rev. Stat. Ann. § 86-3-21 (1953).

[93] Lindemann v. Belden Consol. Min. and Mill. Co., 16 Colo. App. 342, 65 Pac. 403 (1901) (denied lien to geologist).

[94] Ibid.

and such technicians in their own right may not possess lien rights under the wording of either our specific statute or general statute by the argument that they do not perform labor or furnish material within the statutory sense.[95] Their protection may lie only in advance payment of fees.

Drilling Contractors: By express statement the drilling contractor has a lien under the specific statute. It is significant that his account will normally include items not only for labor and services but also for supplies and materials purchased by him and expended upon the well.

It is well to note at this point a problem of general theory which could occasion difficulty. This is the possible distinction between an individual claimant and a contractor or subcontractor claimant. We have stated previously that "cat men," truck drivers, carpenters, and members of drilling crews have lien rights as "laborers" meaning thereby that as *individuals* their contribution is one of labor. Below, segregated classes of "materialmen" and their correlative lien rights are discussed, and here again our approach is on an individual basis. The question then arises as to whether the results reached as to these individual situations are changed by the fact that they are merged into a contracted service. We think not. To illustrate this, presume that a drilling contractor agrees to drill a well to the point of setting casing on a "turnkey" basis, and that pursuant to such agreement he not only furnishes and pays for all necessary labor and third party services but also he supplies and pays for all surface pipe, cement, water, fuel, and other materials and supplies consumed in the drilling. There is some doubt that the contractor may use as a basis for lien the rental value of his machinery and equipment;[96] but otherwise his account, at least insofar as it is composed of items for which a lien is given by the statute, forms the basis for a valid lien with theoretically the same net result as if liens were filed by the individual laborers and suppliers who expended services or supplies upon the well.[97] Moreover, we feel that the better view would give him a lien to the full extent of his account as based upon the contract price.[98]

[95] This was the argument accepted in Lindemann v. Belden Consol. Min. and Mill. Co., 16 Colo. App. 342, 65 Pac. 403 (1901).

[96] See Wilkinson v. Pacific Midwest Oil Co., 152 Kan. 712, 107 P.2d 726 (1940); Arkansas Fuel Oil Co. v. McDowell, 119 Okla. 77, 249 Pac. 717 (1926).

[97] Superior Oil Co. v. Etheridge, 219 Ark. 289, 242 S.W.2d 718 (1951).

[98] So holding, but of limited value on this point because they relate to the general act are Great Western Sugar Co. v. Gilcrest Lumber Co., 25 Colo. App. 1, 136 Pac. 553 (1913); Armour & Co. v. McPhee & McGinnity Co., 85 Colo. 262, 275 Pac. 12 (1929).

Common Carriers: Even a liberal interpretation of the language of the specific and general acts does not, in our opinion, justify a lien to common carriers who transport equipment or supplies to the well, since they do not perform labor upon or furnish materials to it. Such class does, however, have a separate statutory lien,[99] but only against the personalty transported.

Fencing Contractors: Tank batteries and other production equipment are often fenced as a protection for and a protection against persons and livestock. To our minds this is a necessary incident to the well, if not to its "sinking" then to its "operating," and consequently we would find a lien for those who perform labor or furnish supplies in this regard.

The various separate classes enumerated above embrace largely the types who would confer personal services or "labor" to an oil and gas drilling operation, or who confer both labor and material to such an operation. It is recognized that there are certain other types of professional and trades people who would confer indirect benefits to a drilling operation, such as landmen, lawyers and accountants; but, for the most part, their rights to non-consensual liens are based upon statutes other than those which are studied here and affect property and property interests not significant to this discussion.[100]

Suppliers of Expendable Well Materials: Within this class are those materialmen who furnish materials which are in a sense "consumed" during the drilling of a well. The more common types of such supplies are: water,[101] drilling "mud," fuel,[102] lumber, cement, explosives, "fracing" and acidizing fluids, chemicals, lost circulation materials, and other additives. It seems clear that such suppliers have furnished "materials" to the sinking or operating of the well and therefore have a lien right under the specific statute.

Suppliers of Drilling Machinery and Parts: Instances have arisen and will arise where the vendors of portable drilling and servicing machinery, and parts for the same, attempt to assert liens under statutes of the type under consideration.[103] In our opinion, since these claimants confer their benefit solely upon detached personalty and not upon the "improvement" for which the statutes give a lien, they should be denied liens against the lienable properties under the specific statute.[104]

Suppliers of Well Equipment: Those who supply casing, tubing, tanks, pumps, pipes, fittings, separators, treaters, and other production equipment which is installed and affixed to the well and leasehold, have a lien under our specific statute.

Suppliers of Service Tools: One of the most difficult classes to appraise is that comprised of those who furnish special tools and equip-

[99] Colo. Rev. Stat. Ann. § 86-1-4 (1953).

[100] See Ball v. Davis, 118 Tex. 534, 18 S.W.2d 1063 (1929). It is hoped that nothing contained in this paragraph misleads brethren of the matron profession to overlook their attorney's lien rights under Colo. Rev. Stat. Ann. § 12-1-10 et seq. (1953).

[101] Although water is one of the basic elements, the same fact which makes its haulage necessary in this area, to-wit, its scarcity, makes it a thing of value and hence it constitutes a material or supply.

[102] Fuel is a specifically enumerated supply in the special statute, Colo. Rev. Stat. Ann. § 86-5-1 (1953).

[103] See Sklar v. Oil Incomes, Inc., 133 F.2d 512 (5th Cir. 1943), in which a lien was denied to a vendor of drilling machinery attempting to assert a lien against a leasehold interest upon which a well had been drilled by his vendee as an independent contractor.

[104] The reasoning of Sklar v. Oil Incomes, Inc., supra, note 103, can be applied to our own specific act on this question.

ment, often on a contracted basis, which includes operating personnel. Here we would include bit companies, and those special service houses that furnish core barrels, reamers, shoes, fishing tools, directional drilling tools, jet perforating equipment, "fracing" equipment, electrical testing units, and mud logging equipment. Some such suppliers, such as bit companies, furnish only equipment (usually on a rental basis). Others, i.e., electric log companies, furnish both equipment and operating personnel. For the purposes of determining ultimate result, we do not feel that this difference should be significant because in either case essentially what is furnished is a benefit conferring service. In one instance the service is comprised of equipment and in the other it is comprised of equipment and personnel, but they both equate to a service which is necessary for the sinking, repairing, altering, or operating of the well.

While the specific or general statutes do not employ the term "services," still if a service involves the furnishing or rendering, even in part, of labor, machinery or material (and most do) it appears that a lien for the service, to the extent of its entire contracted price, should be allowed. This is by no means a strain of the statutory language, since the price of "materials" for which a lien is given is composed in large part of services and profit of the supplier.

Much of the difficulty in this area arises from those cases of other jurisdictions denying a lien based upon the rental value of equipment.[105] We feel that a different rule should prevail in Colorado because the classes of claimant, at least under the specific act, broadly embrace not only those who confer a benefit by virtue of furnishing labor and material for the purposes of sinking, repairing, altering or operating the well, but also include those who furnish machinery for such purposes. These cases are also distinguishable on other grounds.

CLAIMING AND ENFORCING THE LIEN

As a preliminary and necessary step to discussing enforcement of the lien we should examine briefly the problem of avoiding the lien.

There is no provision in the specific statute under which an owner or part owner of a lease interest could avoid lien liability, presuming that the required contractual basis between such person and the claimant is established expressly or by implication.[106] In view of this, the only complete safeguard a contracting owner can obtain is to bond his prime

[105] See Wilkinson v. Pacific Midwest Oil Co., 152 Kan. 712, 107 P.2d 726 (1940); Arkansas Fuel Oil Co. v. McDowell, 119 Okla. 77, 249 Pac. 717 (1926).

[106] See discussion, supra, relative to property interests subject to the lien.

drilling contractor as to performance and as to payment of his obligations incurred for the well. This is a recommended practice from a great many standpoints, too often ignored in the oil industry when contractors of questionable stability are employed, because bonding costs are generally passed on to the owner. To our minds, however, the threat of being obligated to pay twice for a $100,000 well should always outweigh the burden of paying a $1,000 bond premium.

Aside from bonding, one could argue that the doctrine of *pari materia* announced in the *Terminal* case could conceivably extend the contract recording benefits of the general act[107] to persons rendered subject to liens under the specific act. This points up the difficulties which arise in applying the rule of *pari materia,* even upon the theory which we have advanced, where the specific statute is silent and the general statute speaks. It does not necessarily follow from these circumstances that the provision in the general statute controls. And, as we indicated in the first installment of this article, there are conflicts within the specific statute itself which no form of application of the rule of *pari materia* can resolve.

In the event that the recording provisions of the general statute are applicable, a contracting owner, whose agreement provides for payment to the contractor in an amount exceeding $500, may record his agreement and thereafter be protected against lien claimants on the basis that he shifts to them the responsibility for notifying him of their claims. He must, of course, then exercise his privilege of withholding funds. The contract itself must qualify under the statute in that it must involve a payment in excess of $500, no part of which can be payable in advance of the time work commences. Installment payments after work commences, upon the basis of estimated costs, are permissible but at least 15% of the contract price must be withheld for thirty-five days following completion of the contract operation.[108] We offer this only as a suggestion, and certainly there is no assurance that future decisions will permit this protective feature of the general act to apply against liens asserted under the specific act.

For owners who are in a sense noncontracting or nonconsenting, such as farmors and the holders of carried working interests (supra), we feel their protection must lie through bonding the person who contracts for operations. Their lien liability rests, if at all, upon a theory of implied agency or trusteeship under the statutes; and if this is found, their property becomes subject to the lien as if they had personally contracted with the claimant. This being the case, there would not be relief for such persons even if the provisions for giving notice of nonliability contained in the general act were deemed applicable to the specific statute. As stated earlier, such provisions if applicable in *pari materia* to the specific statute might be employed to protect a nonconsenting working interest owner.

The problems of whether the protective features of the general act

---

[107] Colo. Rev. Stat. Ann. §§ 86-3-1, 86-3-2 (1953).

[108] This time period for which the final payment must be held is a graphic example of the difficulties inherent in applying this portion of the general act pari materia to the specific act. The thirty-five days specified is designed to embrace the ultimate date, following completion, that a laborer's lien can be filed under the general act. Under the specific act he has six months from the last date he furnished labor. Therefore, for one working during the last days of the well operation and filing his lien close to the end of his time for filing, the deferment in payment required by the general act would be of no assistance.

apply in turn raise the problems which the practitioner faces in attempting to determine whether notice should be served upon the owner of the property interest against which the lien is claimed. The specific statute contains no provision such as the one appearing in the general statute which permits such notice. The manner in which the 1903 specific statute was written would have required the conclusion that the notice provided by the general statute was necessary to give the fullest protection to the claimant. The present specific statute, however, provides its own requirements in many respects, and it is not easy to determine exactly what provisions of the general law "are necessary and convenient to the enjoyment of the full benefits of the lien conferred by the specific statute."[109] The safe approach for the practitioner, of course, is to serve the notice; however, this is easier said than done in many of the oil and gas lien situations, since it is not unusual for the owners of the leasehold to be *in absentia* upon the determination that a drilling program has resulted in a dry hole.

Although directing its remarks to the general statute, the Wyoming court[110] has aptly described the purpose in requiring service of notice by pointing out that the property owner against whose interest the lien is claimed should be warned against paying the principal contractor while there are outstanding claims existing in favor of laborers or materialmen.[111] Since we are dealing in mechanics' liens with a situation where the property subject to the lien is frequently owned by some party other than the party owing the debt,[112] we think that it is desirable to require service of notice upon the property owner insofar as possible, where there is a provision for avoiding liability. This is a matter for future clarification by the legislature, however, both as to the problem of lien avoidance through contract recording and as to the permissiveness and effect of serving notice of the lien. Until so clarified we do not think a claimant under the specific act should be deemed to have any burden relative to the service of his lien statement, but in the absence of a judicial determination of the point in Colorado, we think that it would be advisable for the lien claimant to be in a position to show service or a bona fide attempt to obtain service of the notice.

Enforcement of the lien granted by the specific statute involves the filing of a verified statement pertaining to the claim within six months from the date on which the lien claimant furnished the last item of material or performed the last service of labor.[113]

Limitations of space do not permit even a survey approach to the problems attendant to preparing the lien statement; but in the hope of meeting some of the questions which are present, we submit the following form of lien statement:

---

109 See the first section of this article, 34 DICTA at 215.

110 We have pointed out our observation that the specific statute closely follows the language and format of the 1919 Wyoming statute. The Wyoming statute did not contain any provision for service of notice; and the present Wyoming statute contains such a provision only in connection with a lien against oil runs, this latter provision being enacted in 1955.

111 Jordan v. Natrona Lumber Co., 52 Wyo. 393, 75 P.2d 378 (1938).

112 Storke and Sears, Colorado Security Law 22 (1955).

113 Colo. Rev. Stat. Ann. § 86-5-4 (1953). See the statutory section for the detailed requirements pertaining to the lien statement.

NOTICE AND STATEMENT OF LIEN

To ....., ...,
....., and to all whom it may concern:

KNOW ALL MEN BY THESE PRESENTS, that .....,
(of .....), (a Colorado corporation) (a corporation organized and existing under the laws of ....., duly licensed to do business within the State of Colorado), hereinafter called Claimant, wishing to avail himself (itself) of all provisions of the statutes in such cases made and provided, does hereby declare and state that he (it) claims and holds a lien in the amount of $..... in accordance with the following statement of lien:

1. That the property to be charged with the lien is all of the right, title and interest, leasehold or otherwise, of ....., ...,
....., and of any owners, part owners or lessees in whose behalf said named persons now act or have acted as agents or trustees, in and to all of the following described lands:
   T. ....., R. ....., 6th P. M.
   Section .....: .....
   Section .....: .....
   located in ..... County, Colorado, together with all appurtenances and improvements thereto and thereon, specifically including but without limitation the following:
   (a) That certain well drilled for oil and gas (or water) described as the (Belmont No. 1) and located (at and upon the SE¼NW¼SW¼ of Section ....., Township ....., Range ....., 6th P. M., ... County, Colorado) and also any other gas wells, oil wells, or other wells (oil tanks, oil pipelines, water pipelines, pumps, pumping stations, transportation or communication lines, gasoline plant, refinery and buildings) located upon the lands described above, and
   (b) Any machinery, materials and supplies furnished to the properties described in subparagraph (a) including without limitation, ...,
....., and
   (c) Any other appurtenances to or improvements upon the properties described in subparagraph (a) above.
2. The within lien is claimed for and on account of work (and labor, machinery, material, fuel, explosives, power, supplies) performed upon and furnished by claimant to the sinking (repairing, altering, operating) of the properties described in 1 (a) above by virtue of a contract between claimant and .....,
....., ...,
and those owners and part owners of the property described in Paragraph 1 above in whose behalf said persons acted as agents or trustees.
3. That the just and true account of the amount due claimant because of the items performed or furnished as specified in Paragraph 2 above after allowing all credits is $ ....., together with interest thereon at the rate of .....% for the period ..... to ..... of $.....

By .....
(Individual Verification)

STATE OF .....)
) ss.
County of .....)

....., of lawful age, being first duly sworn upon his oath, deposes and states that he is the claimant above named and that he has read the foregoing statement and notice of lien and account of indebtedness, and knows the contents thereof, and that the same is true and correct to the best of his knowledge, information and belief.

.....

Subscribed and sworn to before me this ..... day of ....., 1957
My commission expires .....

.....
Notary Public.

(Verification on behalf of corporation)

STATE OF .....)
) ss.
County of .....)

I, ..., being of lawful age, being first duly sworn upon my oath depose and state:

That I am ..... of ..... corporation, the claimant therein named, am authorized to make and do make the above statement of lien and account of indebtedness on behalf of said corporation; that I have read the within statement of lien and account of indebtedness and know the contents thereof and that the same is true to the best of my knowledge, information and belief.

.....

Subscribed and sworn to before me this ..... day of ....., 1957
My commission expires .....

.....
Notary Public.

Suit on the statement must be commenced in the district court of

the county in which the statement is filed "not later than" six months after the date of filing the lien statement.[114]

We think that no reasonable argument can be made to apply the different enforcement provisions of the general statute as to time requirements for filing and foreclosing, since the specific statute is clear and unambiguous in its requirements. It is therefore of no importance in connection with the filing of the statement whether the lien claimant is a laborer, materialman, subcontractor or contractor; and it is not necessary to determine the date of completion of the improvements, all as would be necessary under the general statute.

There is an additional remedy available to the lien claimant where the property subject to the lien has been removed from location after the lien has attached without the written consent of the lien claimant. An inventory of the property so removed can be filed upon certain conditions in the county to which the property has been removed and the lien is then valid against not only the removed property, but also the leasehold or other property with which the removed property has been put in use.[115] There is a criminal penalty provided against the person removing the property without proper consent.

Enforcement of the lien entails the often difficult question of priorities as among various security claimants. The priority questions stem primarily from the fact that the statute is dealing with real property interests which include affixed or installed personal property which can also be the subject of a personal property security transaction.[116] The immediate question of priority between the lien and a chattel mortgage is quickly disposed of by the statutory provision that the mechanics' lien will take priority over mortgages which are not "existing and recorded as provided by law at the time of the inception of the lien." It is an unrelated priority provision in the statute which gives rise to the problem.

The statute provides that "all liens created by virtue of this Article in any particular case shall be of equal rank and validity, except liens for labor which shall be preferred." The clear import of all of the statutory provisions[117] appears to require the construction which would establish the time of inception of the individual liens at the time the individual lien claimant first furnished labor or materials; and there is little room to argue that it is the intent of the statute to adopt the date specified in the general statute to which all of the general mechanics' liens relate.

The quoted provision (that all of the liens are of equal rank and validity) conflicts with this construction to the extent that there could be intervening mortgage rights. This conflict has been considered nonexistent under a similar situation which developed in connection with the general mechanics' lien statute of Nebraska.[118] The court concluded that the Nebraska provision meant that there would be no priority as

114 Colo. Rev. Stat. Ann. § 86-5-5 (1953).
115 Colo. Rev. Stat. Ann. § 86-5-6 (1953).
116 Storke and Sears, **Colorado Security Law** 95 (1955).
117 Colo. Rev. Stat. Ann. § 86-5-4(3) (1953). § 86-5-1 includes the language "at the time the work was commenced, machinery, materials and supplies were begun to be furnished by the lien claimant"; but this language must be restricted to a definition of the interest to which the lien attaches. It is possible that the Legislature felt that this phrase established the time of inception of the lien; but the structure of the statute makes this phrase unquestionably a part of the description of the specific interest subject to the lien.
118 See Henry & Coatsworth Co. v. Bond, 37 Neb. 207, 55 N.W. 643 (1893).

between lien claimants, but the respective interests of the lien claimants attached only to the property interests available at the time of inception of their respective liens. The effect of this construction, of course, is to prefer one lien over another, since those which attached prior to the recording of a mortgage would have first claim against all of the property interests subject to lien, the mortgagee would be next in line as to his claim against the specific property mortgaged, and those liens which attached subsequent to the time of recording the mortgage would share in whatever was left. Although we think the result is just, it is an anomaly to us to say that all of the liens have equal rank and validity while permitting one lien to be paid in full and another to receive a partial payment; and this result could obtain under the statute. Further, this construction could result in the payment of materialmen whose liens attached before the recording of a mortgage in preference to laborers whose liens attached after such recording, thereby effectively negating the statutory provision giving priority to liens for labor.

The priority of a valid recorded mortgage on the leasehold or other interest existing prior to the attachment of any liens under the specific statute is protected. The provision of the statute limiting the lien "to the extent of the right, title and interest of the owner . . ." suffices to recognize the priority of such mortgages; but even without this provision, it is ordinarily protected by constitutional limitations.[119] We think that it would be possible under the reasoning of *Joralmon v. McPhee*[120] for such a mortgage to be given priority over the liens which subsequently attach, if the mortgage is given to secure the repayment of a loan granted for the specific purpose of providing money with which to drill a well, and notice of such fact is given in the recorded instrument itself.

A priority question could arise as between a lien claimant whose lien has followed the property from its original lienable location to a new location, as discussed above,[121] and lien claimants whose liens arose out of operations at the new location upon which the "removed property" has been placed. We believe that the equal rank and validity provision must be taken to apply to all liens arising as the result of a given location, and that any such lien which follows the property to a new location is prior to any new liens granted by the statute.

Deficiency Liability

It is extremely important that the practitioner, in attempting to determine who is personally liable on his deficiency judgment following lien foreclosure, bear in mind that while a given class of lease interest holders may have a liability to the claimant in the sense that their interests may be subjected to the claimant's lien, it does not necessarily follow that such interest holders are personally liable to the claimant for the debt upon which the lien was based.[122]

It is for this reason that in prior portions of this article in discussing situations of agency we have attempted to limit that term by the use of the words "statutory agency" so that it applies only to an agency for

[119] See Prugh v. Imhoff, 44 Wyo. 143, 9 P.2d 152 (1932).

[120] 31 Colo. 26, 71 Pac. 419 (1903); see IV American Law of Property 241, § 16.106I (1952).

[121] See note 115 and related text.

[122] Kern v. Guiry Bros. Co., 60 Colo. 286, 153 Pac. 87 (1915); Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. 619 (1896); Lane, Mechanics' Liens in Colorado 258 (1948).

the purpose of affixing lien liability and not for the purpose of rendering one liable for a debt through the acts of his agent.

It is our opinion that a personal judgment may not be entered against an owner of a lease interest unless such owner is personally liable under the general law of contracts.[123] This conclusion is extremely significant when it is considered that in most of the instances where a mechanics' lien is asserted, the well upon which the benefits have been conferred by the lien claimant is much more likely to have been abandoned as a dry hole than to have been completed as a commercial producer of oil or gas. This being the case, the likelihood of a deficiency judgment following lien foreclosure is much more probable than it is in those cases where mechanics' liens against general building construction are foreclosed.

There are numerous cases arising out of the Louisiana courts where a personal judgment is obtained against a lease interest holder even in the face of the fact that there was no contractual undertaking on the part of such lease owner to pay a given debt. One should not be misled by their results, for in Louisiana a statutory provision requiring lease owners to bond their contractors has the effect of placing the owner in the position of a bondsman insofar as those persons who deal with the contractor are concerned. There is no such statutory liability imposed in Colorado.

The question of personal liability is particularly significant from the standpoint of those persons who purchase undivided working interests in a given lease and the attendant fractional interest in the well to

[123] See note 122, supra.

be drilled thereon. Quite generally, these persons pay a flat consideration for their interest and for their share of drilling and completing a given well. In doing so they presume that their liability will be limited to such amount. There are cases where a personal liability was attached to such persons on the theory that they were members of a mining partnership.[124] But certainly the better view, and the one more widely held, is to the effect that such persons were not members of a mining partnership during the exploratory phase of the oil and gas operation; and this view prohibits their personal liability on the debt. One of the best statements of this rule is found in *Dunbar v. Olson*,[125] which reads as follows:

> "The owner of a so-called working interest in an oil and gas lease has a duty to share in the expense in proportion to his interest, which is consistent with his co-tenancy relationship, but he does not become a mining partner by virtue of this fact. (Summers, Oil and Gas, Permanent Edition, Vol. 4, Sec. 723, Page 152). Before a mining partnership exists, it must be shown, not only that there is a joint ownership of the property, but also a joint working and a joint operation of the lease involved, which must be shown by competent evidence."[125a]

Following this statement, the Illinois court emphasized that the lien claimant did not rely upon the credit of any one of the owners of the lease other than the party with whom he contracted and added this very significant statement relating to the financial structure of oil and gas ventures:

> "Because of the uncertainty of mining operations, few persons are willing to risk their means at such an undertaking, . . . interests owned by persons differ in amounts as each is able to furnish means or is willing to take the risks, and . . . these interests are constantly being assigned and strangers are being injected into the ownership, so that it would be unjust to subject each proprietor to personal liability which might sweep away all his property in an undertaking created against his consent by those who could become members without his knowledge and against his wishes."[125b]

It is, of course, possible when the facts so warrant to establish personal liability on the basis that the person against whom the same is asserted was a member of a mining partnership and as such is liable jointly and

[124] Mud Control Laboratories v. Covey, 2 Utah 2d 85, 269 P.2d 854, 3 Oil and Gas Rep. 1572 (1954).
[125] 349 Ill. 308, 110 N.E.2d 664, 2 Oil and Gas Rep. 321 (1953).
[125a] 110 N.E.2d at 666.
[125b] Id. at 666-7.

severally with his co-partners for a debt incurred in behalf of the partnership.[126] If the necessary elements for a mining partnership are present, a careful pleader representing a lien claimant will insure collectibility of his client's debt by pleading this fact in his lien foreclosure suit and action on the debt.[127] On this point, however, it should be remembered that under most authorities a mining partnership does not exist during the exploratory phase of an oil and gas venture,[128] and also that a member of a mining partnership is not liable for the antecedent debts of the partnership or of his co-partners.[129] There are some recent companion cases[130] arising in Utah which appear contrary to these general concepts; however, a careful examination of these authorities reveals them to be doubtful.

CONCLUDING REMARKS

Limitations of time and space have made it imperative that many very significant problems relating to our subject be deleted from consideration here. Also, to facilitate both its reading and writing, we have confined the article in most phases to well operations. Generally, however, we do feel that the theories applied here to such operations are applicable to the other types of oil and gas operations such as pipelines which are included within the specific statute.

The reader should continually carry an awareness of the lack of authority existing in Colorado on the questions considered. Cases from other jurisdictions, of which there are many, should be approached on a basis of extreme caution because of the distinguishable character of the statutes upon which they are based. Further, such statutes have legislative histories and backgrounds as complicated and as confusing as our own statutes. Because of these circumstances it has been necessary at many points in the article, in order to be definitive at all, to reach conclusions based largely upon our own analysis of the statutes and of what we feel to be their underlying intent. Time, and our Supreme Court, will either vindicate or condemn the results so reached.

126 Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735 (1899).

127 In Hendershott v. Dale Leonard Prospecting Co., 298 Mich. 367, 299 N.W. 110 (1941) the complaint alleged a mining partnership and a joint venture. Joint and several liability was denied, but only because the facts proved that the claimant had dealt individually with the defendants on the basis that each would be liable only for his proportionate share of the claimant's debt.

128 Dunbar v. Olson, 349 Ill. 308, 110 N.E.2d 664, 2 Oil and Gas Rep. 321 (1953); Browne v. Sabine Mach. and Supply Co., 253 S.W.2d 713, 2 Oil and Gas Rep. 268 (Tex. Civ. App. 1952); Southwestern Leg. Found. 5th Ann. Inst. on Oil and Gas Law and Taxation, 237-39 (1954); 12 Texas L. Rev. 418 (1934).

129 Elm Oil Co. v. Clark Lumber Co., 179 Okla. 241, 65 P.2d 1221 (1937).

130 See note 124 supra.