TREATISE

ON THE

MECHANIC'S LIEN LAW,

OF CALIFORNIA.

(PASSED MARCH 30, 1868.)

WITH

AN APPENDIX,

CONTAINING THE VARIOUS FORMS REQUIRED UNDER THE ACT, TOGETHER WITH A COPY OF THE ACT, AND AN

AMPLE INDEX.

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PREFACE.

The law passed at the last session of our Legislature on the subject of Mechanics' Lien has a most important effect as well upon the rights of mechanics, laborers, and persons furnishing materials for the construction and repairs of buildings and other superstructures, as upon the rights of those owning and making improvements on real estate. It has also an important effect on the rights of capitalists and loan societies lending money on mortgage. It is very clear, that without proper precautions, a real estate owner may, through this Act, be compelled to pay a much larger sum for improvements than he has contracted to pay, and may even be made personally responsible on demands for which he never contemplated a personal liability, while those having mortgages or other equitable claims upon the land may be seriously affected in their rights. The Act is a very crude and inconsistent piece of legislation, and requires many amendments for the benefit as well of the mechanic as the owner of real estate. Still, it will remain the law of the land till the year 1870, as no legislation is likely to be had on it till that time. It was thought by the author of this brief treatise, that in the meantime a work of this character, with the forms given in the appendix, might be useful to the community, and that when amendments are made by the next Legislature a second edition can be issued.

Most of the States have Mechanics' Lien Laws, and decisions have been rendered under them in the Courts of the different States where they exist. But the Lien Law of one State differs

materially from that of another. The different decisions in the State Courts on the subject have more reference to the peculiar language of the statute in the State in which the decision is made than to any general principle, and a reference to such decisions would tend only to confusion and verbosity. The author has confined his authorities, therefore, principally to decisions rendered by the Supreme Court of this State on former laws of a similar character. Those decisions, and the application of the general principles of equity jurisprudence to the provisions of the Act, and the peculiar cases which are likely to arise under it, will enable any professional man to arrive at a tolerably correct conclusion as to all questions under the Act on which he may be called upon to give his opinion.

If this little work will tend in any degree to aid in protecting the rights of the Laborer and Mechanic, and at the same time enable the owners of real estate to protect themselves from the creation and payment of unjust claims and demands against them, the object of the author will be obtained.

P. G. BUCHAN.

San Francisco, August 1st, 1868.

TREATISE

ON THE

MECHANICS' LIEN LAW OF CALIFORNIA.

The Act on this subject, as passed by the Legislature of California, on the 30th of March, 1868, is of great importance to our citizens, and ought to be generally understood, as well by mechanics and laborers, as by all engaged or interested in the erection of buildings, or superstructures of any kind.

The Act is of a very broad and comprehensive scope and character. It gives every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, or other person performing labor upon, or furnishing materials of any kind, to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, mining claim, aqueduct to create hydraulic power for mining or other purposes, or any other structure or superstructure, or who shall perform labor in any mining claim, a lien upon the same for work or labor done or materials furnished by each respectively.

Those persons are to have a lien whether the work is done or the materials furnished, at the instance of

the owner of the building or other improvement, or of his agent.

For the purposes of the Act, every contractor, sub-contractor, architect, builder, or other person having in charge the construction, alteration or repair, *either in whole or in part*, is to be held to be the agent of the owner. This, we presume, however, has reference to the particular department in which the sub-contractor may be employed. For instance: a sub-contractor for the brick work certainly, without special authority, would not be authorized to employ the plasterers, nor a sub-contractor, to perform the plastering, authorized to employ the painters, and yet the language of the Act is broad enough to cover just such a case. Under this Act, if a builder contracts to erect a building, and afterward contracts with a painter to do the painting, and the painter omits to pay his journeymen engaged on the work, or to pay the merchant from whom he has purchased the painting materials, each of his journeymen and the paint dealer would have a right to a lien on the building; each of the journeymen for his work and the paint dealer for his materials furnished, entirely independent of the price agreed by the owner of the land, to be paid to the builder.

The Act embraces every possible construction, improvement or repairs, and covers all those cases where the Supreme Court of this State had formerly decided the lien law did not reach; and lest there should be any room for misconstruction as to the work, for which a lien will lie under the first section of the Act, the fourteenth section declares that the words "building or "other improvements, whenever the same are used in

"this Act, shall be held to include and apply to any "wharf, bridge, ditch, flume, tunnel, fence, machinery, "railroad, wagon road, aqueduct to create hydraulic "power, or for mining or other purposes, and *all struc-* "*tures and superstructures*, whenever the same can be "made applicable thereto, and the words 'construc- "tion, alteration or repair,' whenever the same are used "therein, shall be held to include partial construction "and all repairs done in and upon any building or "other improvement."

By the former Act, and as decided by the Supreme Court in the case of *Dore* vs. *Sellers*, 27 Cal., R. 591, and also in the case of *Bowen* vs. *Aubrey*, 23 Cal., R. 563, the employees of a contractor could not enforce their lien to an amount exceeding the sum for which the contractor had a lien, which was only to the amount due on his contract for the construction of the building. But by this Act, the employees engaged in the construction by the contractor, are in no way bound by the price or rate of compensation agreed upon between the owner of the property and the contractor he has employed. It is clear, therefore, that under this Act, the owner may be made to pay an amount far exceeding the contract price for the construction of the building, and in addition to this, as will be seen afterward, he is liable for the expense of attorney and counsel, in preparing each lien and in carrying on to judgment the action, which may be instituted to foreclose the lien.

There are three modes of guarding against this on the part of the owner.

First—By taking a bond with sufficient sureties

from the builder for the performance of his contract, and to indemnify the owner against the creation of any liens under this Act.

Second—As all liens, except the original contractor's, must be filed within thirty days after the completion of the building, by making the payments for the work to become due more than thirty days after the completion of the building, and making it a condition in the contract precedent to payment, that no lien shall then be on the land; or—

Third—By a clause in the contract, that no payment shall be made unless the architect in charge of the building, or some other person, to be selected for that purpose, shall be first satisfied and shall so certify to the owner that all the work done and the materials furnished, have been paid for.

If, in addition to the evidence by receipts, which the architect in such a case would of course require, he took the contractor's statement in writing, that all the workmen and material men had been paid, and it turned out, in fact, after the payment to the contractor, that such claims had not been paid, the contractor, under the 131st section of the Act, as to "crimes and punishments," in reference to obtaining money under false pretenses, and the 376th section of the Criminal Practice Act, requiring the pretense to be in writing, would be liable to be indicted, if he made the statement knowingly and designedly and with intent to defraud.

Forms of contracts and of a bond, etc., in pursuance of the above suggestions, will be found in the appendix.

Where the work done consists in erecting or repair-

ing a building surrounded by land, the mode of making the lien effectual, and its extent on the surrounding land, is clearly enough pointed out by the statute; but although a lien is declared for other works, repairs and improvements, besides buildings, the statute does not point out upon what the lien is to be. By the second section, the land upon which any building or other improvement shall be constructed, together with a convenient space about the same, "or so much as may "be required for the convenient use and occupation "thereof, shall be subject to the liens created by this "Act." But take, for instance, the building of a fence around a fifty acre lot, or the erection of a bridge across a stream, or the making of a wagon road, or the erection of a wharf, or excavating a tunnel, or erecting an aqueduct to convey water to a mill or a mine, how much or what interest the workman or contractor is to have in the mill or mine, in the field surrounded by the fence, or in the bridge or wagon road, or how that interest or lien is to be made effectual, is not declared or provided for in the Act at all. The only similar case where it is provided for, and the lien defined, is in a separate section in the case of a person, at the request of the owner, grading, filling in, or otherwise improving a lot in a city or town, or the street in front of or adjoining it. In that case, for the labor done and materials furnished, a lien is, by section nine, given on the whole lot. This section is nearly the same as the 21st section of the Act of 1862. The Supreme Court of the United States, in a recent case (Gordon vs. The South Fork Canal Company), concerning a question of lien on a canal or ditch leading to a mine, decided (Judge Field

dissenting) that the lien applied only to the part of the ditch or canal made or repaired, and to nothing else. The Act in this particular requires amending. The extent of the lien over the mill or mine, to which the flume, ditch or aqueduct leads or is attached, or over the franchise or tolls in case of a wagon road or bridge, should be distinctly defined.

A lien is also given by section 15 of the Act on personal property, where the mechanic, artisan or laborer alters or repairs any article of personal property at the request of the owner. This is adopting the common law as to a mechanic's lien for work of that character, but the manner of the mechanic's availing himself of the lien by sale of the article which was not provided for by the common law, is distinctly provided for in that section, and of which we will speak hereafter when we come to treat of the various remedies given.

We have stated above the various liens created by this Act, and we will now come to the mode and manner in which they are thereby made effectual.

The second section of the Act provides that the land on which the building or improvement is erected, with a space around it convenient for its use and occupation, shall be subject to the lien created by the Act, if at the time the work was commenced, or the materials had been commenced to be furnished, it then belonged to the person causing the construction of the building, improvement or repairs. If such person owned less than a fee simple, then only his interest in the real estate is to be subject to the lien. If the interest is a leasehold interest, and the lessee shall have forfeited his right, the purchaser of the building and of the leasehold

term, or so much thereof as remains unexpired at a sale in proceedings under this lien law, shall be held to be the assignee of the lease, and shall be entitled to pay the lessor the arrears of rent and costs due, unless the "lessor shall have *regained possession or obtained judg-* "*ment for possession prior to the commencement of the* "*construction, alteration or repair of the building.*" If the lessee had forfeited the lease, and a judgment had been obtained against him before the commencement of the construction, or if the lease became forfeited and the lessor had legally obtained possession *before* the construction, it is difficult to perceive that the lessee had any interest in the land or building at the commencement of the construction or repair; yet the Act goes on to say: "In which event said purchaser "shall have the right only to remove the building "within thirty days after he shall have purchased the "same, and the owner of the land shall receive the rent "due him, payable out of the proceeds of the sale "according to the terms of the lease down to the time "of such removal."

It is very questionable whether, so far as leases in existence at the time of this Act going into operation are concerned, those provisions are constitutional, where they conflict with or alter the terms of the lease. Suppose that a lease, in existence before the Act went into effect, provided that in the event of the non-payment of the rent, at the time conditioned for its payment, the lease should become void and the term end, or that at the termination of the lease, either by the expiration of the term or by forfeiture, all buildings or improvements erected or made by the tenant should be-

come the property of the landlord, can the Legislature afterwards entirely change that contract, and not only give the legal assignee of the lease, under this Act, more rights than the lessee, but take from the lessor property, the right to which had vested in him by solemn contract, made before any such Act was passed? The sixteenth section of Article 1st of the Constitution of this State, provides that "no *ex post facto* law, or law "impairing the obligation of contracts, shall ever be "passed," and the Supreme Court of this State have given effect to this section in *Smith v. Morse*, 2 Cal., R. 524; *Thorn v. Hayes*, 4 Cal., R. 127; *Tallant v. Woods*, 7 Cal., R. 579; *Skinner v. Buch*, 29 Cal., R. 253. Again: suppose the building is the landlord's, and the improvements are made on it by the tenant, under a lease made before this Act took effect; could the lien-holder sell and the purchaser remove the landlord's building and pay him his rent with the proceeds of his (the landlord's) own property? This would be not only manifestly illegal and unjust, but absurd.

In reference to leases made subsequent to the passage of the Act, there is probably no question. Where the lessee has any interest at the time of the commencement of the improvement, the building becomes liable, and the purchaser, at the lien sale, is entitled to pay the lessor the arrears of rent, and the lessor is bound to receive them. But suppose the purchaser removes the building, as he has a right to do by section 3, what is to become of the building, a part of which, or the whole of it, may be the landlord's, after the lease has expired? It is a part of the leased property. Who is to be at the expense of removing it back? It may be

removed by the purchaser miles from its original location on the leased land. If the purchaser has a right to move it one foot, he has a right to move it one mile, and it may be utterly destroyed in the attempt to replace it. Suppose that the lease contains a covenant, that at the end of the term the lessee is to leave the premises in as good condition as at the commencement of the term; in what position does it place the purchaser and the landlord? The Act makes the purchaser of the building "the assignee of the leasehold term." The assignee of a lease is personally liable on all the covenants in the lease running with the land binding on the original lessee as long as he remains assignee or retains possession, so that it would appear that the purchaser is not only personally liable for the rent reserved in the lease, but to damages for the non-fulfilment of all such covenants contained in it, such as the covenants to repair, pay rent, taxes or assessments, etc. In short, he takes it subject to all the equities existing between the lessor and lessee. See *Taylor's landlord and tenant*, Sec. 437.

As to the assignee of a lease, however, our Supreme Court has decided in *Johnson v. Sherman*, 15 Cal., 287, that "an assignee of a lease may discharge him-"self from all liability under the covenants in the lease "by assigning over; and the assignment may be to a "beggar or a femme covert, even though a premium is "given as an inducement to accept the transfer." So that a purchaser of premises under this lien law, though declared by the Act to be assignee of the lease by reason of his becoming such purchaser, may rid himself of his liability in the same manner as the defendant in the case of *Johnson v. Sherman.*

On the subject of liens on leased property, the Act is full of crudities, absurdities and contradictions, and perhaps those provisions will never be taken advantage of, and it may be that no question upon them, under this Act, will ever arise. It is probable that no attempt will be made to enforce a lien in reference to leased property, except in cases of a long and valuable lease, and where it is an object for the purchaser to assume the performance of the covenants in the lease, and where the leased property consists of a single building. The second section provides for a lien on the building erected, repaired or improved upon, whether held by lease or otherwise, and so much space around as may be required for its convenient use. The building improved upon or repaired may be only one of two or more buildings erected on the leased land. The purchaser under the lien Act is to become the assignee of the lease. He must become the assignee of the whole lease and not of a part. There is no provision in the Act to the contrary. Two tenants cannot be forced on the landlord. There is, besides, no provision for an apportionment of the rent or a segregation or division of the leased premises provided for by the Act. Indeed, in reference to leased land, except so far as we have already indicated, there seems an utter want of legislation to carry the Act into effect, or render it intelligible.

All liens created by the Act, are, by section three, to be preferred to any lien, mortgage, or other incumbrance which may have attached *subsequent* to the commencement of the building or improvement, or the commencement of furnishing materials; and also to all

unrecorded incumbrances, though existing before such commencement. Under the old Act, an unrecorded mortgage had priority. (*Rose v. Munie*, 4 Cal., R. 173.)

But then follows the following somewhat ambiguous clause:

"All liens created by this Act upon any building or "other improvement, shall be preferred to ALL *prior* "*liens*, mortgages or other incumbrances upon the land "upon which said building or other improvement shall "have been constructed or situated WHEN *altered or* "*repaired.*"

If this means anything, it means that when the lien is for an alteration or repair, as distinguished from an original construction, the lien shall have preference to *all* prior incumbrances. This is calculated to work very great injustice. An illustration, by a case which is likely to be of common occurrence, will show. A owns a house and lot worth $4000. The lot is worth $1000, and the building worth $3000, and the title to the property is clear and unencumbered. He borrows $2000 on it from B, and gives a mortgage on the property to secure the loan. During the currency of the mortgage A undertakes to *alter* his building by adding a wing or other improvement, and runs in debt $1000 or more for it. That debt may be made a lien on the house prior to B's mortgage, the house sold under this law, and removed, and the mortgagee left nothing but the bare lot as a security for his money.

In enforcing the liens under this Act, the same section provides that the building or other improvement may be sold separately from the land, and when so sold

the purchaser may remove the same from the land within a reasonable time, not exceeding thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of the purchase to the time of removal. Whether this is meant to apply to leased land, or to land which, since the structure was erected, has become the property of another than he who was the owner at the time of the improvement, does not appear. Perhaps the latter is meant, for in the preceding section, the purchaser, in the case of leased land, is made the assignee of the lease, and is therefore liable for the rent as such. Who is to decide what is a reasonable rent for the use of the land, is not provided for. The purchaser, therefore, must tender sufficient, at his peril. It is provided, however, that if the removal is prevented by legal proceedings, the thirty days shall not begin to run until the final determination of such proceedings in the Court of First Resort, or in the Appellate Court, if an appeal be taken.

The fourth section of the Act provides that every building, improvement, etc., mentioned in the first section of the Act, constructed upon any lands, with the knowledge of the owner or 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 to have an interest therein, and the interest *owned or claimed* shall be subject to the lien, unless such owner or person, having or claiming any interest therein, shall, within *three days* after he shall have obtained "a 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 to that effect in some "conspicuous place upon said land, or upon the build- "ing or other improvement situated thereon."

If it is to be held that the work was done "at the instance" of the party, then the party at whose instance it is done, is *personally* liable. And that, evidently, is the construction to be given to the Act, because to relieve himself, he is to give notice, not that his land will not be subject to the lien, but that "he will not be responsible." The first question is, to what class of persons does this apply? It cannot, of course, refer to the person who contracts to have the building erected, or the improvement or repairs made, because such person would be personally liable without any such legislative provision, and "every contractor, sub- "contractor, architect, builder, or other person, having "charge of the work, is held for the purposes of the "Act to be to the agent" of the owner so contracting, and the acts of the authorized agent are the acts of the principal. Again: the principal owner of the land may not be in actual possession, and the land may, at the time of the improvement, be in the occupation of some one claiming, in good faith, title adverse to the true owner, and the true owner may afterwards obtain judgment in an action of ejectment against the one in possession, and at whose instance the building, improvement or repairs have been made, and yet, it would seem by this Act, that unless the true owner gave the notice required, within three days after the knowledge of the construction, or the intention to construct came to his notice, his land would not only be subject to the lien, but he would be personally liable. Perhaps, in con-

sequence of the uncertain state of land titles in California, it was only intended by the Legislature to make the lien good as against the true owner, where the work was done by a person in possession claiming title, leaving the remedy to the true owner, to give the notice required, and thus save himself and his land from liability for such a lien.

How far this section is to affect persons having, in the language of the Act, an interest, or *claiming any interest*, or what kind of interest is meant, it is impossible to say:—whether it means a claim to the whole or a part, an equitable title or interest, tax title, sheriff's certificate, or what, is not defined.

It may be questionable whether it would apply to a landlord, in view of the other provisions of the Act, in reference to leased land, yet the language of the statute is certainly broad enough to cover such a case. If it does, then, when a tenant intends to make an improvement, or makes an improvement on leased land, for which a lien can be created under the Act, the landlord, to save himself and his land from liability, must, within three days after the intention to make the improvement, or the making the improvement comes to his knowledge, give the notice required. Forms of notice, under this provision, will be found in the appendix.

By the fifth section of the Act, every original contractor, claiming the benefit of the Act, must, within sixty days after the completion of his contract, file with the Recorder of the county in which the improvement, or some part of it is situated, a claim containing a true statement of his demand, after deducting all just

credits and offsets, with the name of the owner or reputed owner, if known; and also the name of the person by whom he was employed, and *a description of the property to be charged with the lien*, sufficient for identification, which is to be verified by his own oath, or that of some other person.

Every mechanic, artisan, machinist, builder, lumber merchant, miner, laborer or other person, save the original contractor, claiming a lien, must do the same within thirty days after the completion of any building, mining claim, or other improvement, or the performance of any labor in any mining claim, or after the completion of the alteration or repair thereof.

In stating the demand in the notice, it is not necessary that the items of the account should be set forth. A statement of the demand, showing its amount and character, has been deemed to be sufficient, under similar provisions in the old Act. See *Selden* v. *Meeks*, 17 Cal., R. 128; *Brennan* v. *Swasey*, 16 Cal., R. 140; *Heston* v. *Martin*, 11 Cal., R. 41. The name of "the "person by whom he was employed, or to whom he "furnished the materials," must also be stated. By the Act of 1856, this was only required inferentially under the language, "a just and true account of the demands due" the claimant, and under that Act the Supreme Court, in *Tibbits* v. *Moore*, 23 Cal., R. 209, held that where the notice of lien states that the materials were furnished to A & Co., when in fact they were furnished to A, it does not invalidate the lien, for the material fact is whether the materials were furnished for and used in the construction of the building on which the lien is claimed. But as the language of the present

Act is explicit, it is well to comply strictly, and give the true name of the person by whom the claimant was employed.

The next point to be attended to in the notice, is the description of the property "to be charged with the lien." In the case of a wharf, bridge, ditch, fence, wagon road, aqueduct, etc., already alluded to, it will be difficult to describe the property to be charged with the lien, as it is not pointed out by the statute. It would be well, in such cases, however, to describe the improvement and the premises to which they are appurtenant, leaving to the Court to decide under this Act how far the lien shall extend and be effectual. In other cases, in reference to the description generally, we would say it must be so certain that the sheriff, on a writ of restitution or assistance, could clearly identify the land and premises described, and deliver the property according to the description. Such phrases as "about so many feet" one way or the other, will not answer. The Act provides that the notice shall contain a description "sufficient for identification." The Act of 1856 required the party claiming the lien to file "a correct description of the property to be charged with the lien." Under that Act the Supreme Court held in *Montrose* v. *Conner*, 8 Cal., R. 344, that the following notice does not contain such a description as the statute contemplates: "A dwelling house lately "erected by me for J. W. Conner, situated on Bryant "street, between Second and Third streets, in the city "of San Francisco, on lot No. ——," and the fact that Conner owned no other building on that street, would not cure the defect. *Hotaling* v. *Cronise*, 2 Cal., R.

60, and *Tibbits* v. *Moore*, 23 Cal., R. 208, give instances of descriptions held to be sufficient under that Act. There is no danger of claiming too much land, but only to be sure that the superstructure or improvement, and the necessary land around, are within the boundaries given, because the Court, in its decree on the foreclosure of the lien, will restrict the recovery to so much only as the Act allows, or as the Court may decide to be a "convenient space" around the same, or as they may allow, "for the convenient use and occu pation thereof." (Sec. 2.)

It is important that the name of the true owner should be stated. The statute says the name of "the owner or reputed owner, if known." But in every case there should be in the notice the name of the person in whose name the title to the property appears last of record in the recording office, so that the record of the lien may be notice to all subsequent purchasers and incumbrancers.

The Act provides that the claim shall be verified by "the oath of himself (the claimant) or some other person." The verification should be by an affidavit, annexed to the claim. Where not sworn to by the claimant himself, it is proper that it should be shown on the face of the affidavit why it is made by another person, his knowledge of the facts stated in the claim, and the relation he bears to the claimant as attorney, agent or otherwise. Besides giving the credits and offsets in the claim itself, the affidavit should distinctly state that the amount claimed is over and above all just credits and offsets, or, to use the precise language of the Act, that the amount claimed is due "after de-

ducting all just credits and offsets." The consequence of an omission of such a statement is discussed and decided in the case of *Davis* v. *Livingston*, 29 Cal., R. 283, where the question arose under the fifth section of the Act of 1862. The notice under that section of that Act was required to be of the nature and extent of the claim over and above all payments and set-offs. The Court decided that the omission in the notice of such a statement, was fatal.

In reference to the time when the notice shall be filed, there is some confusion in the Act, and an unfortunate adoption of the language of the Act of 1862, which was founded on an entirely different principle from the present Act.

The original contractor, if there is one, is to file his claim within sixty days after "*the completion of his contract.*" It will be sometimes difficult to say what constitutes the *completion* of the contract. Sometimes, although the original contract may be in writing, it may become, as it frequently does in building contracts, so varied by subsequent parole agreements, waivers, extensions, extra work, alterations of plan, etc., that the original contract, in its main features, is substantially lost sight of and abandoned. The rule, in such a case, in fixing a time and deciding whether the claim is filed in time, is to come as near the substantial completion of the contract as originally intended as possible, taking into consideration all the subsequent modifications. In reference to sub-contractors and other persons doing labor or furnishing materials, the language is different, and is variant and unsatisfactory. The claim in such case is to be filed within thirty days after

the *completion of any building*, mining claim, or other improvement; and as to labor in any mining claim, the Act says, "after the *performance* of any labor in any mining claim, *or* after the completion or repair thereof." It is probable that, as to labor in mining claims, the Legislature meant that, as a man may work or do labor in a mine, which labor may not consist either in completing it or repairing it, in such case he should be entitled to a lien, and should file his notice or claim in thirty days after the performance of the labor. If so, it will apply to every laborer in all kinds of mines, whether gold, silver, copper, coal, quicksilver, or any other ore or material. It is an unfortunate provision, that the claim of the sub-contractors and others, on buildings, is required to be filed thirty days after the completion of the building or improvement, instead of thirty days after doing of the labor or furnishing the materials, because what "completion" means must depend upon the original contract, which it is often difficult to get at. There may be a dispute between the owner and original contractor as to when the building contracted for is complete, which may be in litigation for years. The contract may, in its progress, be altered so that the building is to be left *incomplete*, and yet the contract may be *completed;* as, for instance, a contract may provide for the finishing a house by painting it, outside and in, yet the contractor and owner may change the contract by making the building, or the contract complete when it is lathed and plastered. What shall constitute the completion of the work may be, and usually is, a matter between the original contractor and owner, that the sub-contractor,

mechanic or laborer knows nothing about. So far as the owner is concerned, it is right that he should know with certainty within what time sub-contractors, and those doing labor and furnishing materials, are bound to file their claims, so that he can settle with the original contractor, without the danger of paying twice.

As the law makes the owner really liable, through his property, for what he may never have contracted to pay, it would have been well that the Legislature had re-enacted the law of 1856, which provided that "sub-contractors, journeymen, laborers, and other persons performing labor or furnishing materials," should file their claims within thirty days "after the work was done or materials furnished." The Act of 1862, as we remarked, was founded on a different principle from the old lien law or the present one. It enabled the mechanic or laborer to recover only through the principal contractor, and through his contract with the owner, and then not any amount beyond what was to become due on his contract; nor at all, unless notice was given to the owner before the payments on the contract became due. In that case there was a propriety in determining the time of filing the notice to be thirty days after the completion of the building. In the new Act, the Legislature has retained the language of the Act of 1862, though the reason for it does not now exist.

To avoid all question, it may be as well, in all cases, to file the claim within thirty days after the work is done or the materials furnished.

We have been particular in setting forth what is

necessary to be contained in the claim, and the time of its service, because our Supreme Court, in the case of *Davis* v. *Livingston*, 29 Cal., R. 283, above referred to, (Judge Shafter delivering the opinion of the Court), decided that the remedy given, even by the Act of 1862, was an extraordinary one, and therefore "all "the provisions of the Act must be strictly complied "with." In *Bottomly* v. *Grace Church*, 2 Cal., R. 90, Judge Heydenfelt, delivering the opinion of the Court on the Lien Law of 1850, decided that the language of the Act was sufficiently explicit, and must be strictly construed, because it gave rights in derogation of the Common Law. Afterwards, in *Tuttle* v. *Montford*, 7 Cal., R. 359, Judge Burnett delivering the opinion of the Court, decided that the lien of the mechanic, artisan and material man, is favored in law, because those parties have, in part, created the very property on which the lien attaches. In *McCrea* v. *Craig*, 23 Cal., R. 523, Judge Crocker, in delivering the opinion of the Court, used nearly the same language. He said: "Although the lien is created by and depends upon a "compliance with the terms of the statute, yet it is a "favored lien, because the very property upon which "the lien attaches has been created by the labor or "materials furnished by the person claiming the lien." Such are the conflicting opinions of our Judges on a very important principle. The decision in *Tuttle* v. *Montford* and in *McCrea* v. *Craig*, may be more in conformity with the principles of equity and the spirit of the age, than that in *Bottomly* v. *Grace Church*, which they overruled; but the opinion in *Davis* v. *Livingston*, is the last, and therefore the controlling

decision and the law of the State, until changed by some subsequent decision of our Snpreme Court. In all the preliminary steps, therefore, before proceeding to enforce the lien, it is necessary that the proceedings should be accurate, and strictly comply with the statute, or the lien may be lost. We have given in the appendix various forms and claims under the Act named, according to the position to the building, structure or improvement the claimant may occupy.

The County Recorder records the claim in a book to be kept by him for that purpose, and his fees are the same as are allowed by law for recording deeds and other instruments. (Sec. 6.)

Where the buildings or improvements are not contiguous, a joint claim for a lien on both cannot be filed; and where they are contiguous and owned by the same person, the joint claim shall designate the amount due the claimant on each of such buildings, and if it does not, the lien claimed shall be postponed to other lien holders. (Sec. 7.) A form for such claim will be found in the appendix. In contiguous or adjoining buildings the lien on each extends only to the amount of the claim on each building respectively.

No lien shall continue for a longer period than ninety days from the time of filing, unless a suit to enforce it is brought in a proper Court within that time, or if a credit has been given no longer than ninety days after the expiration of the credit. But no lien is to be in force, by any agreement to give credit, for more than two years from the time the work is completed. (Section 8.)

We have already spoken of the right to a lien that

a person acquires on a city or town lot, for grading, filling in and improving it. (Sec. 9.) The form for such a claim will be found in the appendix.

The 10th section of the Act provides for the bringing of actions to enforce liens under the Act. To enforce liens on real estate, the suit has to be commenced in a District Court, however small the sum may be. We give in the appendix the form of a complaint in the most ordinary case—that of the erection of a house; and we also give some other forms of complaints, but they, of course, will have to be adapted to the peculiar circumstances of the case for which a suit may be sought to be instituted. In all such actions, it is necessary to make all persons who are personally liable, and all lien holders whose claims have been filed in the Recorder's Office, and all other persons interested in the matter in controversy, or in the property to be charged with the lien parties to the action, otherwise they will not be bound by the proceedings. (See sub. 5th of sec. 10.)

In this respect the Act is different from the old Act, which provided for the publication of notice to all having an interest to appear and present their claims. Now they must be made parties to the action in the first instance, and regularly served with process. It will be necessary, therefore, for the claimant, before commencing his action, to have a thorough search made of the title in the Recorder's office, and also to see who is in the actual possession of the premises; for possession, under a title not appearing on the record, has been adjudged to give as sufficient notice to subsequent purchasers and incumbrancers as under our registry

acts, a recorded deed does. *Landers v. Bolton*, 26 *Cal.*, 394. In short, every one should be made a party who, either by the record or by possession, appears to have any interest in the premises. As to one class of persons being made parties, the statute is imperative. Persons, it says, who are personally liable, and all lien-holders whose claims have been filed for record under the 5th section of the Act, *shall* be made parties, and as to other parties interested in the controversy, it says they *may* be made parties.

Where, by reason of the absence of a party defendant from the State, or of his residence out of the State, "or for any other cause, he cannot be served personally," and where, by the Practice Act, service of a summons may be made by publication, service can in cases under this Act be made by publication, but instead of once a week for three months, as in the Practice Act, the publication is to be once a week for four successive weeks. By the Practice Act, the service is complete only at the end of the publication with the same effect as if the summons had been served that day, and then the time to answer commences to run; but this section of the Act provides that the time for answering shall expire when such publication is complete; and if no answer of such defendant is then filed his default may be entered; so that the time of service, four weeks, or twenty-eight days, is shorter in such a case than in a case where a defendant resides out of the district, but in the State, for in that case, the time required for his appearance is forty days. (3 sub. of sec. 25 of Practice Act.)

It will be observed that the Act speaks of a case

where, by the Practice Act, service may be made by publication. Now, where the residence of the party residing out of the State is known, by the Practice Act, service cannot be made by publication alone, but must also be made by mail. (Sec. 31 of Practice Act.)

In such cases, under this Act, service by mail should also be made. The Act, however, provides that the Court may in its discretion, in all cases, instead of ordering publication, or after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part. Perhaps it would be better, even after publication, in every case, to have such attorney appointed. In case of non-resident, absent or concealed defendants, the affidavits should be full and the statute in every respect strictly complied with. Forms are given in the appendix.

The Act provides that all suits to enforce a lien under this Act shall have a preference on the calendar of the Court over any civil suit, except suits to which the State is a party, and are to be tried by the Court without unnecessary delay. (4 sub. of sec. 10.)

It also provides (sub. 3 of sec. 10) that *the Court* shall, upon entering judgment for the plaintiff, allow as a part of the costs, all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees. This is new, and will, it is presumed, embrace all reasonable charges of the attorney in preparing the lien papers and conducting the cause, so that the party prosecuting his demand in this form will receive it without any deduction for his attorney and counsel fees, unless, indeed, the proceeds of the

sale should be insufficient to pay such fees. The fees to be paid to the attorney who may be employed by the Court to appear for absent defendants or protect their interests, will also, of course, be allowed and deducted. These amounts should be proved on the trial and inserted in the judgment, or an order made by the Court, on proper evidence, before the judgment is entered. Forms are given in the appendix.

There is another point in the decree, which is very important. It will be observed that by the 2d section of the Act, the lien is to be upon the land upon which any building or other improvement shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof. This is precisely the same language as the 4th section of the Act of 1856, as amended, and under that Act the Supreme Court, in the case of *Tibbits* v. *Moore*, 23 Cal. 213, decided that, "in cases of this kind, it is proper for the Court, by its "decree, to define the amount and extent of the land "connected with the building, which is properly sub-"ject to the lien. Such an omission will not invalidate "the decree, but renders it doubtful whether a pur-"chaser under it will acquire any land beyond that "covered by the building." The form of the decree in the appendix gives the author's idea of how a decree should be framed in that respect.

After the property has been sold on the decree, and the money realized, the Act provides (sub. 2 of sec. 10) how the proceeds shall be divided. If the money realized shall be insufficient to pay all the lien-holders, it is to be applied as follows:

First—To pay the liens of all persons other than the original contractor or sub-contractor. This class, of course, embraces mechanics, lumber merchants, and persons performing labor or furnishing materials; and if the sum is insufficient to pay them all, then they are to be paid *pro rata*. If sufficient to pay them all, then out of the remainder, if any, to pay,

Second—The sub-contractors, and if insufficient, to pay them in full, then they are to be paid *pro rata*. The remainder, if any, is to be paid,

Third—To the original contractor.

Such is the language of the statute; but we suppose it means that so much of the remainder as will satisfy the original contractor's demand, as settled by the decree, shall be paid to him, and the balance to the owner of the land, or to be paid by the Sheriff into Court for the behoof of those entitled to it in the same manner as under sec. 247 of the Practice Act, in reference to the foreclosure of mortgages. The rights of each party should be distinctly defined by the decree, for the second subdivision of section 10, provides that, in case of a deficiency, *each* claimant shall be entitled to execution for any balance due him after such distribution, and such execution is to be issued by the clerk of the Court on demand, after the return of the Sheriff, showing the balance due. We have given in the appendix forms of the decree and of the execution, as well for the sale as for the balance in favor of a claimant with the return of Sheriff, on which it is founded.

It will be observed that the liens commence to run from the time the work and labor is commenced, or the materials begun to be furnished. This is substanti-

ally the meaning of the third section, and under the old Act, the Supreme Court decided in the case of *Tibbitts* v. *Moore*, 23 Cal. R., already referred to, that "the lien of a material man accrues at the time he has the materials, which he has contracted to furnish, ready for delivery at the place where he has agreed to deliver them;" and in *McCrea* v. *Craig*, 23 Cal. 522, it was decided that "the lien given by the statute to the mechanic or material man, for work and labor performed or materials furnished in the construction of a building, commences and *attaches* to the property at the time of the commencement of the work or the beginning to furnish the materials." It is important, therefore, for a person lending money on property, to see that the lien has not commenced, though no claim may be filed in the Recorder's office.

The distribution of the proceeds of a sale, under the 2d subdivision of the 10th section, may be materially changed by the creation of a mortgage after one lien has attached, but before another lien has taken effect. In that event, the proceeds, after the first lien-holder is paid, would have first to be applied on the mortgage before being applied on the lien second in point of time. In the distribution, mortgages, prior to the liens, must, of course, be first paid, but if the lien is for an alteration or repair, the lien in such case is prior to all mortgages, if the construction the author has given to the 3d section of the Act is correct.

The 11th section of the Act provides that a contractor who files a lien shall be entitled to recover only such amount as may be due to him according to the terms of his contract, after deducting all claims of other

parties for work done or materials furnished. The claims here referred to, it is presumed, are claims which have become, or may become, liens, for the owner can have no interest in compelling the contractor to pay claims which have not been made or cannot be made a lien on the owner's property. The Act further provides that, where a lien is filed for work done or materials furnished to any contractor, he is bound to defend any action brought to foreclose it at his own expense and during the pendency of the suit, the owner may withhold from the contractor the amount of money for which the lien is filed; and in case of a judgment against the owner or his property for the lien, the owner shall be entitled to deduct from any amount due or to become due to the contractor the amount of the judgment and costs. If the judgment exceeds the amount due the contractor, or the owner has before paid the contractor in full, he is entitled to recover back from the contractor any excess of the contract price. When an action is brought by any other than the contractor, the owner should give the contractor notice, and call on him to defend the action. If the contractor is a party to the action, the judgment against the contractor for the excess may be obtained in that suit. If not, the owner will have to bring a separate action against him for the excess. We have given in the appendix forms of the notice and of the final decree where the contractor is a party, and also of the complaint where he is not.

By section 12, it is enacted that all materials furnished or procured by any mechanic, artisan, machinist, builder, lumber merchant, contractor, laborer, or other

person, for use in the construction, alteration or repair of any building, 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 of the materials, so long as in good faith the articles are about to be applied to the construction, alteration, repair, etc., of the building.

This section is somewhat vague, arising from the use of the indefinite word "about." A mechanic may have manufactured, or be manufacturing, doors and windows for a building, intending, in good faith, that they should be applied to the construction of a build ing, and yet they may be miles away from the build ing to be constructed; but whether they would be adjudged to be "about," to be applied to the construction of the building, under this Act, till they were removed to the ground, or in process of removal, will be a question to be decided by the peculiar facts of each case.

By section 13, a party who has a lien is not precluded from suing the person who is personally liable to him, in a personal action, and may take out an attachment therefor, notwithstanding his lien; and in his affidavit for an attachment, he need not state that his demand is not secured by a lien. In this respect, so far as such an action is concerned, it modifies the first subdivision of section 120 of the Practice Act. It is further declared, that the personal action neither impairs nor merges any lien held by the plaintiff under the Act, but it provides that any money collected on the judgment, in the personal action, shall be credited on the amount claimed under such lien in any action brought to enforce the lien.

The fifteenth section of the Act provides for the lien of mechanics, artisans or laborers, for the making, altering or repairing any article of personal property, where such making, altering or repairing is done at the request of the owner or legal possessor, and provides that he may retain the same in his possession till his reasonable charges are paid. This is substantially the Common Law on the subject. It does not provide that the lien shall remain after he has parted with the article. When he parts with it, therefore, the lien ends as it does at Common Law. The lien, too, by the Common Law, belongs only to the person contracting to do the work, and does not extend to persons employed under him. (*Hollingsworth* v. *Dow*, 19 Pick. R. 228.) This section does not change the Common Law in those respects, but it points out the mode and manner of making this lien effectual. The mode of realizing the amount due under such a lien was not provided by Common Law; at least the question was attended with considerable doubt and difficulty. Chancellor Kent says (2 *Kent's Com.* 823) that the right to sell is not allowed by general custom, but he presumes that satisfaction may be enforced by bill in chancery. This Act, however, provides how the lien shall be enforced, but to make the proceeding an effectual protection to the lien-holder, the statute must be strictly complied with. The mechanic, or other person, must wait for two months after the work is done before he can take measures to sell. He is then authorized to sell the property, at public auction, by giving ten days public notice of such sale, in some newspaper published in the county in which the work was done. If no newspaper

is published in the county, then by posting notices in three most public places in the "*town*" where such work was done, ten days previous to the sale. Nothing is said about the number of times the notice is to be inserted, but to make certain, it should be inserted as often as the paper is published till the day of sale, unless it is a daily paper, when probably an insertion once a week would be sufficient. A form for the notice is given in the appendix. The proceeds of the sale are to be applied to the discharge of the lien, and the cost of keeping and selling the property; and the remainder, if any, is to be paid over to the owner.

The 17th section of the Act repeals all previous acts in reference to mechanics' liens; but by the 16th section, nothing in the Act is to effect any lien acquired before the Act took effect; but such lien is to be enforced under the new Act. In suits pending when the Act took effect, the proceedings afterward thereon may be conducted according to the new Act. The Supreme Court so held in *McCrea* v. *Craig*, before referred to, without any legislative provision to that effect.

The Act was approved 30th March, 1868, and took effect sixty days from that date, so that it went into effect on the 30th of May, 1868.

Such is the law to secure the liens of laborers and mechanics in this State as it now stands. The necessity and the justice of lien laws have been recognized by almost every State in the Union, and legislation has been successfully invoked and obtained in establishing and enforcing them. While, however, it is just that

the wages of honest labor should be thus protected and the claims of the mechanic and artisan should be secured by lien, and for the very sufficient reasons given by Judges Burnett and Crocker that their labors create in part the very property on which the lien is sought, yet the law should be so framed as that, while on the one hand the rights of the claimants should be fully protected, on the other hand no injustice should thereby be done to the owners of the property who have contracted for the erection of the superstructure or improvement. It cannot be said of this Act, although it contains many highly beneficial and judicious provisions, that it has fully accomplished either of those purposes. By proper legislative amendments to the Act, however, the rights of all may be easily and fully secured and injury done neither to the one class nor the other. As the law stands it is a serious check in the progress of local improvements, in the way of which, and to the investment of capital in that direction, it throws many discouragements and impediments. There is another evil likely to be produced by it, and that is, its tendency to build up a kind of mechanical aristocracy. Few owners of real estate, as the law now is, will engage in erecting superstructures without taking from the master mechanic, before the commencement of the work, ample security against all and any liens that under this Act may be created on the owner's property. The result of this will very likely be to confine and restrict the business of building by contract to the wealthy master mechanics, who, besides their undoubted personal responsibility, are capable of giving abundant security to perform any contract they

may enter into, which the less wealthy class may experience much difficulty in doing. Thus the young and aspiring though comparatively poor mechanic will find obstacles thrown in the way of his advancement which did not before exist, competition will be lessened, the class of dependent journeymen and laborers increased, and the class of master mechanics diminished.

The object of this Treatise is to enable all parties affected by the law, as it now stands, to take such measures legally as may protect their just rights. If a subsequent edition is issued before the meeting of the next Legislature, the author will take the liberty of submitting the draft of a law which, in his opinion, will as far as practicable secure the rights of the laborer and mechanic without injuring the rights or interests of the owners of property.

THE ACT

COMMONLY CALLED THE MECHANICS' LIEN LAW,

PASSED BY THE LEGISLATURE OF THE STATE OF CALIFORNIA, AT ITS SEVENTEENTH SESSION, 1867–8, AND NUMBERED CHAPTER CCCCXLVIII OF THE ACTS OF THAT SESSION.

An Act for Securing Liens of Mechanics and others.

[APPROVED MARCH 30, 1868.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Every mechanic, artisan, machinist, builder, contractor, lumber merchant, miner, laborer, and other person performing labor upon or furnishing materials of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power for mining or other purposes, or any other structure or superstructure, or who shall perform labor in any mining claim, shall have a lien upon the same for the work or labor done or materials furnished by each respectively, whether done

or furnished at the instance of the owner of the building or other improvement, or his agent; and 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 as aforesaid, shall be held to be the agent of the owner for the purposes of this Act.

SEC. 2. The land upon which any building or other improvement as aforesaid shall be constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, shall also be subject to the liens created by this Act, if, at the time the work was commenced or the materials for the same had commenced to be furnished, the said land belonged to the person who caused said building or other improvement 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 shall be subject to such lien; and in case such interest shall be a leasehold interest, and the holder thereof shall have forfeited his right thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired at any sale under the provisions of this Act, shall be held to be the assignee of such leasehold term, and as such shall be entitled to pay the lessor all arrears of rent or other money and cost due under said lease, unless the lessor shall have regained possession of the said land and property, or obtained judgment for the possession thereof prior to the commencement of the construction, alteration, or repair of the building or other improvement thereon; in which event, said purchaser shall have the right only to remove the building or other improvement within thirty days after he shall have purchased the same; and the owner of the land shall receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal.

SEC. 3. All liens created by this Act upon any land or mining claim, shall be preferred to any lien, mortgage, or other incumbrance which may have attached to said land or mining claim, subsequent to the time when the building or other improvement was commenced, or the materials were begun to be furnished; also, to any lien, mortgage, or other incumbrance which was unrecorded at the time when said building or other improvement was commenced, or the materials for the same were commenced to be furnished; and all liens created by this Act upon any building or other improvement, shall be preferred to all prior liens, mortgages, or other incumbrances upon the land upon which said building or other improvement shall have been constructed, or situated when altered or repaired; and in enforcing such lien, such building or other improvement may be sold separately from said land; and when so sold, the purchaser may remove the same within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of his purchase to the time of removal; *provided,* that if such removal be prevented by legal proceedings, said thirty days shall not begin to run until the final determination of such proceedings in the Court of first resort, or in the appellate Court, if appeal be taken.

SEC. 4. Every building or other improvement mentioned in the first section of this Act, 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 Act, 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 responsi-

ble for the same, by posting a notice in writing to that effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

SEC. 5. It shall be the duty of every original contractor, within sixty days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, miner, laborer, or other person, save the original contractor, claiming the benefit of this Act, within thirty days after the completion of any building, mining claim, or other improvement, or the performance of any labor in any mining claim, or after the completion of the alteration or repair thereof, to file with the County Recorder of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and effects, with 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 also a description of the property to be charged with said lien, sufficient for identification, which claim shall be verified by the oath of himself, or of some other person.

SEC. 6. The County Recorder shall record said claim in a book kept by him for that purpose, which record shall be indexed as deeds and other conveyances are required by law to be indexed, and for which he shall receive the same fees as are allowed by law for recording deeds and other instruments.

SEC. 7. In every case in which one claim shall be filed, under the provisions of this Act, against two or more buildings, mining claims or other improvements, owned by the same person, the person filing such joint claim shall at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise, such claim shall be postponed to other lien-holders, and the lien of such claimant shall not extend beyond the amount so 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; *provided*, that no joint claim shall be filed upon two or more buildings, unless they are contiguous to or adjoining each other.

SEC. 8. No lien provided for in this Act shall bind any building, mining claim, or other improvement for a longer period than ninety days after the same shall have been filed, unless suit be brought in a proper Court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit. But no lien shall be continued in force for a longer time than two years from the time the work is completed by any agreement to give credit.

SEC. 9. Any person who shall at the request of the owner of any lot in any incorporate city or town, grade, fill in, or otherwise improve the same, or the street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished in grading, filling in, or otherwise improving the same; and all the provisions of this Act respecting the securing and enforcing of mechanics' liens shall apply thereto.

SEC. 10. *First*—Suits to enforce the liens created by this Act, except those under section fifteen, shall be brought in the District Courts; and the pleadings, process, practice and other proceedings, shall be the same as in other cases; *provided*, that where service of summons may be made under the Practice Act by publication, the time of publication, where the defendant resides out of, or is absent from, the State, or for any other cause, cannot be served personally, and [need] be but once a week for four successive weeks, and the time for answering shall expire when such publication is complete, and if no answer of such defendant is then filed, his default may be entered; and, *provided*, also, that the Court may in its discretion, in all cases under this Act, instead of ordering publication, or may after publication,

appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part.

Second—In case the proceeds of any sale under this Act shall be insufficient to pay all lien-holders under it, the liens of all persons other than the original contractor and sub-contractors shall first be paid in full, or *pro rata*, if the proceeds be insufficient to pay them in full; and out of the remainder, if any, the sub-contractors shall then be paid in full, or *pro rata* if the remainder be insufficient to pay them in full; and the remainder, if any, shall be paid to the original contracter; and each claimant shall be entitled to execution for any balance due him after such distribution, such execution to be issued by the Clerk of the Court upon demand, after the return of the Sheriff or other officer making the sale showing such balance due.

Third—In all suits under this Act the Court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorneys' fees.

Fourth—All suits to enforce any lien created by this Act shall have preference upon the calendar of the Court over any civil suit already brought or to be brought, except suits to which the State shall be a party, and shall be tried by such Court without unnecessary delay.

Fifth—In all suits to enforce any lien created by this Act, all persons personally liable, and all lien-holders whose claims have been filed for record under the provisions of section five of this Act, shall, and all other persons interested in the matter in controversy, or in the property sought to be charged with the lien, may be made parties; but such as are not made parties shall not be bound by such proceedings.

Sec. 11. Any contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all

claims of other parties for work done and materials furnished as aforesaid; and in all cases where a lien shall be filed under this Act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable.

SEC. 12. Whenever any mechanic, artisan, machinist, builder, lumber merchant, contractor, miner, laborer, or other person, shall have furnished or procured any materials 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.

SEC. 13. Nothing contained in this Act 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 said debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit, to procure an attachment, need not state that his demand is not secured

by a lien, but the judgment, if any, obtained by the plaintiff in such personal action, shall not be construed to impair or merge any lien held by said plaintiff under this Act; *provided*, only, that any money collected on said judgment shall be credited on the amount claimed under such lien in any action brought to enforce the same, in accordance with the provisions of this Act.

SEC. 14. The words "building or other improvement," whenever the same are used in this Act, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or for mining or other purposes, and all other structures and superstructures, whenever the same can be made applicable thereto: and the words "construction, alteration or repair," whenever the same are used therein, shall be held to include partial construction and all repairs done in and upon any building or other improvement.

SEC. 15. Any mechanic, artisan, or laborer, who shall make, alter, or repair any article of personal property at the request of the owner or legal possessor of such property, shall have a lien on the same for his just and reasonable charges for work done and materials furnished, and may retain possession of the same until such just and reasonable charges shall be paid; and if not paid within the space of two months after the work shall be done, such mechanic or other person may proceed to sell the property by him so made, altered or repaired, at public auction, by giving ten days' public notice of such sale by advertising in some newspaper published in the county in which the work was done; or if there be no newspaper published in such county, then by posting up notices of such sale in three of the most public places in the town where such work was done, for ten days previous to such sale, and the proceeds of such sale shall be applied to the discharge of such lien and the cost of keeping and selling such property, and the remainder,

if any, shall be paid over to the owner thereof.

SEC. 16. Nothing contained in this Act shall affect any lien heretofore acquired, but the same may be enforced by the provisions of this act, and where suits are now pending, the proceedings after this Act goes into effect may be conducted according to this Act.

SEC. 17. An Act entitled an Act for securing liens of mechanics and others, approved April 27th, 1855; an Act entitled an Act for securing liens of mechanics and others, approved April 19th 1856; an Act entitled an Act in addition to and explanatory of an Act for securing liens to mechanics and others, approved April 19, 1856, approved March 4th, 1857; an Act entitled an Act supplementary to an Act for securing liens to mechanics and others, passed April 19th, 1856, approved March 18th, 1857; an Act entitled an Act to amend an Act for securing liens to mechanics and others, passed April 19th, 1856, approved April 22d, 1858; an Act entitled an Act to amend an Act entitled an Act for securing liens of mechanics and others, passed April 19th, 1856, approved May 17th, 1861; an Act entitled an Act in relation to liens of mechanics and others, approved April 26th, 1862, are hereby repealed.

APPENDIX OF FORMS.

No. 1.

Builder's Contract.

Articles of Agreement, made this first day of September, in the year one thousand eight hundred and sixty-eight, between A B, of the city and county of San Francisco, party of the first part, and C D, of the same place, of the second part, witnesseth, as follows, viz:

First—The said party of the second part, for and in consideration of the payments hereinafter agreed and covenanted to be made by the said party of the first to the said party of the second part, doth hereby covenant and agree with the said party of the first part, that he shall and will erect and finish the building following, namely: That new building to be erected on the northwest corner of E and F streets, in the city and county of San Francisco, described in the plan, drawing and specifications hereunto annexed, and that said building shall be so erected and finished according to the said plan, drawings and specifications hereto annexed, made by G H, architect, which plan, drawings and specifications, hereto annexed, are signed by the parties hereto, and are referred to by, and form a part of, this agreement. And the said party of the second part hereby covenants with the party of the first part, that he will perform and execute the said work in a good, workmanlike and substantial manner, and will find and provide such proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient, and as required by said specifications for completing and finishing the foundation, walls, floors, ceilings, roofings and other works of the said building mentioned in the said annexed specifications, and that said work and said materials shall, in every respect, be strictly according to said plans, drawings and specifications, and of the

kind of workmanship and kind of materials therein mentioned, and none other—it being understood that said specifications and drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if they were mentioned in the specifications and set forth in the drawings according to the true intent and meaning of said drawings and specifications. And the said party of the second part hereby covenants and agrees with the said party of the first part, that he will well and sufficiently erect and finish said building according to the covenants and agreements herein contained, on or before the day of in the year one thousand eight hundred and sixty eight.

Second—The said party of the second part is, at his own proper cost and charges, to provide all manner of materials and labor, scaffolding, implements, moulds, models, and cartage of every description, for the due execution of this contract, and to bear all risk or loss by accidents, delays, encroachments, or otherwise, not caused by or through any act of the party of the first part.

Third—Should the party of the first part, at any time during the progress of said work, require any alterations, extra work, deviations or omissions from the work so contracted to be done, he shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the value thereof will be added to or deducted from the amount to be paid by him by the terms of this contract, as the case may be, according to a fair and reasonable valuation.

Fourth—Should the party of the second part, at any time during the progress of the said work, refuse or neglect to supply a sufficiency of material or workmen so as to render it impracticable to finish said work within the time said party of the second part has by this contract covenanted to complete the same, the said party of the first part shall have the power to provide the necessary materials or workmen, or both, after one day's notice in writing being given to the party of the second part to provide the same; and the expense of such supply, by the party of the first part, shall be deducted from the amount to be paid for said work, by said party of the first part.

Fifth—Should any dispute arise concerning the true construction or meaning of the plans, drawings or specifications, the same is hereby submitted to and shall be decided by said architect, and his decision

thereon shall be final; but should any dispute arise respecting the true value of any extra work or materials, or work or materials omitted, the same shall be valued by two competent persons, one to be nominated by the party of the first part, and the other by the party of the second part; and in case of disagreement between said persons so chosen on said subject matter so submitted, they shall have power to appoint an umpire, whose decision shall be binding on both parties hereto, and no recourse shall be had to law, but such award shall be final and conclusive on the matters so submitted.

Sixth—The said party of the first part shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work or any part or parts thereof, respectively, or any of the materials or other things used and employed in finishing and completing the same during the time of said erecting and completing, except that the party of the first part shall be liable for and take all risk by fire.

Seventh—No extra work is to be paid for unless the price has been fixed and agreed upon in writing by the parties hereto, and the work specified, and the agreement made for the same at the time the extra work is done, and no reductions or omissions are to be allowed without the price is fixed by agreement in writing at the time said omissions or reductions are made.

Eighth—There shall be a forfeiture of dollars per day for each and every day over the stated time for the completion herein mentioned, to be deducted out of the last payment. But if the weather is so wet or inclement as to hinder the progress of the work, a reasonable additional time is to be allowed by the party of the first part for the completion of the same. In all cases of extra materials and work done on said job during this contract, then the time expressed above shall not govern, but a reasonable additional time necessary for completing said extras shall be allowed. The nature, extent and price of all extras, as may be agreed upon, are to be entered in a written memorandum to be attached to the contract and signed by the parties hereto, and the same course is to be followed in reference to all omissions or reductions.

Ninth—In consideration of the faithful performance, by the said party of the second part, of the covenants and agreements herein contained, on his part to be fulfilled and performed, in the erection and

finishing of said building, said party of the first part hereby covenants and agrees with the said party of the second part, to pay him therefor the sum of ten thousand dollars, in gold coin of the Government of the United States, and in no other currency—to be paid in manner following, viz: (*Here specify the various stages of the work at which the different payments shall be made, if the payments are to be made as the work progresses, or if otherwise, then specify the times of payment.*)

Tenth—It is hereby agreed upon between the parties hereto, that before any payment is made under this contract, the said party of the second part shall satisfy the said architect that all the materials furnished by said party of the second part for the construction of said building have been paid for, and that all work of mechanics, laborers, and others, hired or employed by the said party of the second part, in the construction of said building, have been fully paid, so that no lien can be filed against said building for such materials, mechanical work, or labor, and that no payment shall be made without a certificate be first obtained and signed by said architect, that the said payment is due, according to the terms of this contract. The payment and discharge, by the said party of the second part, of all liens for such material, work and labor, or all such claims as may be made liens on said building, are hereby declared a condition precedent to the making of any payments under this contract, by the party of the first part to the party of the second part.

In witness whereof, said parties have hereto set their hands and seals, the day and year first above written.

[L. S.]
[L. S.]

Sealed and delivered in the presence of

No. 2.

Another Form.

This agreement, made this day of one thousand eight hundred and sixty-eight, by and between A B, of the city and

county of San Francisco, of the first part, and C D, of the same place, of the second part, witnesseth: That the said party of the second part covenants and agrees to and with the said party of the first part, to make, erect and finish, in a good, substantial and workmanlike manner, on the land of the said party of the first part, situate on F street, in the city and county of San Francisco (*describe the location of the lot in general terms*), according to the plan and specifications hereto annexed, and of the quality of materials and workmanship set forth in said specifications. (*If the materials are to be furnished by the party of the first part, say:* of such materials as the said party of the first part shall find or provide for the same); and the said party of the second part covenants and agrees with the said party of the first part that he will have the said building finished and completed according to said plans and specifications by the day of next.

And the said party of the first part covenants and agrees to pay unto the said party of the second part, for the same, the sum of dollars, in gold coin of the government of the United States, as follows, viz: The sum of dollars in gold coin in days from this date, and the remaining sum of dollars in like gold coin in thirty-one days from the day of the said dwelling house being completely finished according to said plans and specifications. (*If necessary add*: And also that said party of the first part will furnish and procure the necessary materials for the said work in such reasonable quantities, and at such reasonable time or times, as the said party of the second part shall or may require.)

It shall be a condition precedent to any of the foresaid payments, that at the time of such payment there shall be no liens on said building arising out of any claim for work and labor done for, or materials furnished by, any person whatever to said party of the second part, in the construction of said building, or any claims existing arising from such work, labor or materials, and out of which a lien may be obtained by any person or persons on said building and premises for such work, labor or materials.

In witness whereof, said parties have hereto set their hands and seals the day and year first above written.

[L. S.]
[L. S.]

Sealed and delivered in the presence of

No. 3.

Agreement with a Mason and Plasterer.

This agreement, made this day of in the year 1868, between A B, of, etc., of the first part, and C D, of, etc., of the second part, witnesseth: That the said party of the second part, for and in consideration of the payments hereinafter mentioned, promises and agrees to and with the said party of the first part, that he will do and perform in a good and workmanlike manner, and with materials to be furnished by the said party of the first part, all the mason and lathing and plastering work, to be done in and about the erecting of a new dwelling house, belonging to the party of the first part, situate on E street, in the city and county of San Francisco, (*specify generally the description of the lot on which the building is about to be erected*), and that according to the plans and specifications hereto annexed; and also that he will use all proper care in working up the materials to be furnished by the said party of the first part as aforesaid, to the best advantage for the said party of the first part, and that he will complete the said work on or before the day of next.

And the said party of the first part, in consideration of the premises, hereby agrees to furnish and provide good and sufficient materials for the said work at such time or times as the said party of the second part may request, and to pay said party of the second part for said work, when finished and completed, the sum of dollars, in gold coin of the Government of the United States. (*If the work is to be paid for by the yard or other measurement, and at certain stages of the work, as it progresses, then so state as the agreement in such respects may be.*) It is expressly understood and agreed upon between the parties hereto, that no payment shall be made by the party of the first part under this agreement, at the times above specified for the payment thereof, unless all claims against the said party of the second part, for any labor or mechanical work done for him by persons in his employ, in doing and performing the work under this contract, or any part thereof, are fully paid off and discharged; and that no work or labor performed by such persons, on said building, out of which could arise a claim for a lien under the Act of the Legislature of the State of California, entitled "An Act for Securing Liens of Mechanics and others," approved 30th March, 1868, shall remain unsatisfied. (*Or in-*

stead of the above insert as follows: Before any payment is made under this contract, the said party of the second part shall prove to the satisfaction of G H, who is hereby mutually selected and agreed upon for that purpose, that no claim or demand is outstanding for any mechanical work or labor performed on, or materials furnished for said work by any person or persons in the employ of said party of the second part, and out of which a lein could be claimed or maintained against the said building and premises; and said payments shall not be made until the said party of the second part furnishes the said party of the first part, the said G H's certificate in writing to that effect.)

In witness whereof, said parties have hereto set their hands and seals the day and year first above written.

[L. S.]
[L. S.]

Sealed and delivered in the presence of

No. 4.

Bond for the Performance of Building Contract.

Know all men by these presents, that we, A B, C D, and E F, all of the city and county of San Francisco, are held and firmly bound unto G H, of the same place, in the sum of ten thousand dollars (*or such other sum as may cover all possible damages*), lawful money of the United States, to be paid to the said G H, his executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this day of one thousand eight hundred and sixty-eight.

The condition of the above obligation is such, that whereas the said A B did at the date hereof enter into a contract in writing with the said G H, by which the said A B agreed to erect a certain dwelling house for the said G H, and fully fulfil and perform all the covenants,

agreements and stipulations therein contained on the part of said A B, to be so fulfilled and performed, a copy of which agreement is hereto annexed.

Now, therefore, if the above bounden A B, his executors, administrators or assigns, shall in all things stand to, abide by, and well and truly keep and perform the covenants, conditions and agreements in the within written instrument (*if the bond is endorsed on the agreement itself, or* in the instrument of which the annexed is a copy) contained on his part, to be kept and performed at the time and in the manner and form therein specified, then the above obligation shall be void; else to remain in full force and virtue.

A B. [L. S.]
C D. [L. S.]
E F. [L. S.]

Sealed and delivered in the presence of

No. 5.

Statement of Builder made to Architect, Referee, or Party as to Liens.

I, A B, the party of the second part, in the written agreement (*or* in the agreement annexed, *or* in the agreement of which the within is a copy) named, having, as I claim, performed so much of said agreement as to entitle me to the first (*or* second *or* third, *as the case may be*) payment in the within agreement, covenanted by the party of the first part therein to be paid to me, do hereby declare that I do not owe, nor am I liable to any person or persons, for any work or labor done or performed for me in the said work so far as it has progressed, nor for any materials furnished to me by any person or persons whatever, in carrying on the said work, so far as it has progressed, and that I have incurred no debt whatever in the performance of said contract, which can at any time, by the laws of the State of California, be made a lien on the building or premises in said agreement described. This state-

ment is made to enable me to obtain the said payment, which I claim to be now due under said agreement.

Witness my hand this day of 1868.

No. 6.

Notice, under Sec. 4, by the Owner of the Land that he will not be Liable for Improvement.

To all whom it may concern—

Take notice, that whereas I, A B, am the owner of the following described lot of land in the city and county of San Francisco, viz: (*Here describe the land, and if the person giving notice merely claims an interest in the land instead of* the words "am the owner of," *say* "claim an interest in;") and that I have within the last three days obtained knowledge that the following construction (*or alteration, or repair as the case may be*) has been commenced to be made (*or "has been made," as the case may be*, or that it is intended, or in contemplation to make the following construction, alteration *or* repair), viz: (*Here describe it.*) I hereby declare I will not be responsible for such construction (alteration *or* repair, *as the case may be*); that the same is done without my consent, authority, license or permission, and that I will oppose any attempt to make the same a lien upon the land and premises above described.

A B.

Dated San Francisco, day of 1868.

No. 7.

Claim of Lien by Contractor.

State of California, City and County of San Francisco.

A B
vs.
C D.

Notice is hereby given to all whom it may concern, that I, A B, of the

city and county of San Francisco, have performed work and labor and furnished materials for the construction of the building erected and now being upon the land and premises hereinafter more particularly described as a contractor.

That it is my desire to avail myself of the benefits of the Act of the Legislature of the State of California, entitled "An Act for Securing Liens of Mechanics and others," approved 30th of March, 1868; and that it is my intention to claim a lien upon the premises aforesaid and hereinafter described, and to claim and hold such lien not only on said building or superstructure so erected, but also upon the land upon which the same is so erected, and with a convenient space around the same, or so much as may be required for the convenient use and occupation thereof, or upon such interest as C D, the person with whom I contracted, had in said premises, on the day of 1868, when said work commenced and when said materials were begun by me to be furnished for the construction of said building.

That the following is a true statement of my demand, for which I claim such lien, namely: On the day of 1868, I entered into a written contract with said C D, to erect a dwelling house on said premises, and furnish the materials therefor, according to certain plans and specifications annexed to said written agreement (*or state generally what the work was that was to be done*). That said work was commenced and said materials begun to be furnished on the day of 1868. That said work has been completed according to said contract, and that sixty days have not elapsed since the completion of said work or building so contracted to be by me erected, and the completion of my said contract. That the price agreed to be paid to me, by said C D, under said contract, for said work, was the sum of ten thousand dollars,..... $10,000.00

That there is besides due to me, for extra work and extra materials, done and furnished for said superstructure, at the instance and request of said C D, the sum of two thousand dollars,..... $2,000.00

The total amount for said work and materials being twelve thousand dollars, for which I have since the entering into said contract, received, at sundry times, from the said C D, to apply on the same, the sum of $12,000.00

five thousand five hundred dollars,..... $5,500.00

$6,500.00

Leaving a balance now due to me on said work, from said C D, of six thousand five hundred dollars; and that the said balance is justly due to me on the same, after deducting all just credits and offsets. That C D is the name of the owner of said premises before mentioned and hereinafter particularly described, and that he was the person who employed me, and with whom I entered into said contract to do said work and furnish said materials, as aforesaid. That the following is a description of the property to be charged with such lien, viz: That piece or parcel of land situate, lying and being in the city and county of San Francisco, and State of California, bounded and described as follows, viz: Beginning at a point in the east line of B street, one hundred feet; south from the intersection of said east line of B street with the south line of A street; running thence south along the said east line of B street twenty-five feet; thence easterly at right angles to the east line of B street, one hundred feet; thence northerly at right angles twenty-five feet, and thence at right angles westerly one hundred feet to the place of beginning, with the said building, and all other appurtenances thereto belonging.

A B.

San Francisco, day of 1868.

City and County of San Francisco, ss:

A B being duly sworn, deposes and says, that he is the claimant in the above claim and notice of intention to hold a lien named; that he has read the said claim and notice by him subscribed, and knows the contents thereof, and that the same is, in all respects just and true, and that it contains a just and true statement of the demand due to him after deducting all just credits and offsets.

A B.

Sworn to before me this day of 1868.

[L. S.] C D, *Notary Public.*

No. 8.

Verification of Claim by Agent.

City and County of San Francisco, ss:

E F being duly sworn, deposes and says, that he is the clerk and book-keeper of A B, the claimant named in the above claim and notice of intention to hold a lien, and is authorized and empowered by said A B, as his said clerk and agent, to prepare and file the above claim and notice; that deponent has read said claim and notice, and knows the contents thereof, and that the same is in all respects just and true, and contains a just and true statement of the demand due to said A B, after deducting all just credits and offsets. That deponent has personal knowledge of all the facts stated and set forth in said claim and notice, and knows the same to be true, and that the reason why this affidavit is made by this deponent and not by said A B, is that at the making thereof, the said A B is temporarily absent from said city and county of San Francisco.

E F.

Sworn to before me this day of 1868.

[L. S.] C D, *Notary Public.*

No. 9.

Claim of Lien by Material Man.

Notice is hereby given to all whom it may concern, that I, A B, of the city and county of San Francisco, have furnished materials for the construction of the building erected and now being upon the land and premises hereinafter more particularly described.

That it is my desire to avail myself of the benefits of the Act of the Legislature of the State of California, entitled "An Act for Securing Liens of Mechanics and others," approved 30th of March, 1868; and that it is my intention to claim a lien upon the premises aforesaid and

hereinafter described, and to claim and hold such lien, not only on said building or superstructure so erected, but also upon the land upon which the same is erected, with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, or as C D, the owner (*or* reputed owner) of said land and premises, had on the day of 1868, when said materials were commenced by me to be furnished for said building or superstructure.

That E F is the person by whom I was employed to furnish the said materials for said construction, and to whom, at his special instance and request, I did furnish said materials, the said E F being engaged as contractor, under said C D, in erecting said building, and said C D is the owner of said land, building and premises.

That the following is a true statement of my demand, for which I claim such lien, namely: Materials, to wit: Lumber to the amount and of the value of one thousand dollars, which said lumber was furnished by me to the said E F, to be used, and was in fact used, in the construction of the said building. That the said E F has paid to me, upon account of said lumber so furnished, the sum of five hundred dollars, and that there is now due to me from said E F therefor, the sum of five hundred dollars, after deducting all just credits and offsets. That the said lumber was commenced by me to be furnished, for said construction, on the day of 1868, and was continued so to be furnished up to and including the day of 1868, and that thirty days have not elapsed since the completion of said building. That the following is a description of the property to be charged with said lien, viz: (*Here describe property as fully as in No. 7, and add the affidavit of verification.*)

No. 10.

Claim of Lien by Journeyman Carpenter.

To all whom it may concern:

Take notice, that I, A B, of the city and county of San Francisco,

have performed labor in the construction (*or* repair *or* alteration, *as the case may be*) of the building and superstructure, erected and now being upon the land and premises hereinafter more particularly described, as a journeyman carpenter and joiner.

That it is my desire to avail myself of the benefits of the Act of the State of California, entitled "An Act for Securing Liens of Mechanics and others," approved 30th March, 1868, and it is my intention to claim a lien for said labor upon the premises aforesaid and hereinafter described; and that it is my intention to claim and hold such lien, not only upon the said building and superstructure, but also upon the land upon which the same are erected, together with a convenient space around the same, or so much as may be required for the convenient use and occupation thereof.

That the following is a true statement of my demand on which I found said claim for a lien, namely:

Thirty days work on said building or superstructure, as a journeyman carpenter and joiner, commencing on the day of 1868, and ending on the day of 1868, and performed between said two dates, at the rate of five dollars per day, payable in gold coin of the United States; the amount of said thirty days work at said rate being one hundred and fifty dollars, on which I have been paid the sum of seventy-five dollars, leaving due to me for said work a balance of seventy-five dollars, after deducting all just credits and offsets. That the name of the owner (*or* reputed owner) of said building or superstructure, and of the premises hereinafter described, is C D. That the name of the person by whom I was employed to do said carpenter and joiner work on said building is E F, who was the contractor (*or* the sub-contractor under the principal contractor) employed by said C D in the erection (*or* repair *or* alteration, *as the case may be*) of said building and superstructure; that thiry days have not elapsed since the completion of said building or superstructure, and said sum of seventy-five dollars remains due and unpaid. That the following is a description of the property which I seek to charge with said lien, viz: (*Here insert description and then follow with affidavit of verification as before.*)

No. 11.

Claim of Lien by Laborer on Two Contiguous Buildings Under Section 7.

To all whom it may concern:

Take notice that I, A B, of the city and county of San Francisco, have performed labor in the construction of the two contiguous and adjoining buildings, erected and now being upon the land and premises hereinafter more particularly described, as a hodman in carrying bricks and mortar to said building, and attending as such on the masons and bricklayers while engaged in the erection of said buildings (*or whatever else the work may be.*)

That it is my desire to avail myself of the benefits of the Act, etc., etc. (*describe the intention to claim lien as in previous forms*).

That the following is a true statement of my demand on which I found my said claim for a lien, namely:

I performed labor of the kind above described on said two contiguous and adjoining houses and buildings for the period of thirty days, at the rate of three dollars per day, payable in United States gold coin, making for said work, on said two buildings, the sum of ninety dollars in all; that twenty days of said labor, making the sum of sixty dollars, was performed on the south house or building, on said premises, and ten days of said labor, making the sum of thirty dollars, on the north house or building, on said premises adjoining and contiguous to said south house. That said labor was performed between the day of 1868, and the day of 1868. That no part of said sum of ninety dollars has been to me paid, and the said sum of ninety dollars, for the work and labor aforesaid, is justly due to me after deducting all just credits and offsets. That the name of the owner of said contiguous and adjoining houses and the premises hereinafter described, is C D. That the name of the person by whom I was employed to do said labor on said buildings, is E F, who was the contractor employed by said C D in the erection of said contiguous and adjoining buildings or houses; that thirty days have not elapsed since the completion of said contiguous or adjoining buildings or houses, or either of them, and no part of said sum of ninety dollars has been to me paid, but the whole thereof remains justly due and unpaid as aforesaid. That the following is a correct description of the

premises which I seek to charge with said lien: (*Here insert description, and then follow with the affidavit of verification as in previous forms. This form can be varied so as to be adapted to any other kind of work, or for materials furnished.*)

No. 12.

Claim of Lien by Sub-Contractor.

To all whom it may concern:

Take notice that I, A B, of the city and county of San Francisco, have furnished certain materials and performed certain mechanical work and labor, which materials and work and labor were used in the construction, painting and finishing of a certain building or superstructure, in the city and county of San Francisco, hereinafter more particularly described; and that the said materials and work consisted of painting materials and work and labor in painting said building or superstructure, as more particularly hereinafter mentioned.

That it is my desire to avail myself of the benefits of the Act, etc., etc. (*Describe the intention to claim lien as in previous forms.*)

That the following is a true statement of my demand on which I found said claim for a lien: On the day of 1868, I, as a sub-contractor, entered into a contract in writing with one C D, who was the contractor employed by E F, the owner of said building and premises, to erect said building on said premises, by which contract so entered into between said C D and myself, I contracted with said C D, to do and perform all the painting requisite and necessary to be done on said building, according to the plans and specifications specified in the contract in writing, between said C D and said E F for the erection of said building, and furnish all the materials necessary for the same (*or whatever the contract was, setting it forth particularly, and the time the payments became due*), for which the said C D, by the terms of his said contract with me, was to pay to me the sum of eight hundred dollars, in United States gold coin. That I have fully completed my said con-

tract, and said C D has paid me thereon the sum of five hundred dollars, and that there remains due to me, by the terms of said contract, for said work and materials, done and furnished, under said contract, the just and full sum of three hundred dollars, after deducting all just credits and offsets.

That E F is the owner of said building and the premises hereinafter described, and said C D, the contractor under said E F, is the person who employed me as sub-contractor, to do and perform said painting, and furnish said materials therefor, and with whom I entered into the contract aforesaid, for such painting and materials. That thirty days have not elapsed since the completion of said building or superstructure, and said sum of three hundred dollars remains due to me and unpaid. That the following is a description of the property which I seek to charge with said lien, viz: (*Here insert description and then follow with affidavit of verification as before.*)

No. 13.

Claim of Lien by a Miner.

NEVADA COUNTY, *ss:*

To all whom it may concern: Take notice that I, A B, of Grass Valley, in said county, have performed labor as a miner in a certain mine, commonly called the El Dorado Mine, situate at in said county, and hereinafter more particularly described.

That for my said labor, it is my desire to avail myself of the benefit, etc., etc. (*reciting the Act as in the foregoing notices*), and that it is my intention to claim a lien upon said mine and its appurtenances, as hereinafter described, and sufficient space around the same, or so much thereof as may be required for the convenient working, use and occupation of said mine.

That the following is a true statement of my demand for such labor, under which I claim such lien, viz:

Thirty days labor in said mine, as a miner in (*here describe the work*

generally, showing it is labor performed in a mine). That the value of said labor (*or* the amount agreed to be paid for said labor) is five dollars per day, making the whole amount due for said labor one hundred and fifty dollars. That said labor commenced to be performed by me on the day of 1868, and ended on the day of 1868, and was done and performed within the said two dates.

That the name of the owner of said mine is "The El Dorado Mining Company," a mining corporation created under the laws of this State, and the person by whom I was employed to do the said labor was C D, the superintendent of said mine, duly appointed such by said corporation, and having authority from said corporation to employ me in performing the labor aforesaid.

That no part of my said demand has been paid, and there remains due to me therefor, the said sum of one hundred and fifty dollars, after deducting all just credits and offsets. That thirty days have not expired since the performance by me of said labor in said mine. That the following is a description of the said mine and property on which I claim a lien as aforesaid, viz: (*Here describe the mine, showing the mining district in which it is located, the number of feet of ground over which the mine extends and which it includes, all which will generally be found in the deed or claim recorded in the office of the District Recorder, and then close with the usual verification. This form can be changed so as to be adapted to the claim of a contractor for excavating a mine, or for repairing a mine, or for erecting an aqueduct leading to a mine, or excavating a ditch or canal leading to a mine, excavating a tunnel or other work connected with a mine. It is unnecessary to multiply forms on the subject of mines or mills. The subject itself will suggest the proper form taken in connection with the forms already given.*)

No. 14.

Claim of Lien for Grading or Improving a Town or City Lot Under Section 9.

City and County of San Francisco, *ss:*

To all whom it may concern: Take notice that I, A B, of the city

and county of San Francisco, have performed labor and furnished materials in filling in and grading a certain city lot in the incorporated city of San Francisco aforesaid, and hereinafter more particularly described.

That it is my desire to avail myself of the benefits of the Act, etc. etc. (*describing the Act as in foregoing forms*), and that to secure me payment for my said labor and materials, it is my intention to claim a lien upon the whole of said lot, more fully and particularly hereinafter described.

That the following is a true statement of my demand for such labor and materials under which I claim said lien, namely: On the day of 1868, I entered into a contract in writing with C D, to fill in and grade said lot, and that I was by said contract, to (*here describe generally what A B was to do by the terms of the contract and what the particular improvement was he was to execute, showing it was either grading, filling in, or otherwise improving the lot or the street in front of it or adjoining it.*) That by said contract, I was to be paid by C D, for said work, labor and materials, when the same was completed, the sum of one thousand dollars in United States gold coin (*or that he was to be paid so much a foot, and state what the total amount of the work is so calculated.*)

That I commenced the said work on the day of 1868, and completed the same on the day of and that thirty days have not expired since the completion of the said work by me. That there is due to me for said work, labor and materials, the just and full sum of one thousand dollars, and that said sum of one thousand dollars is so due to me after deducting all just credits and offsets. That said C D is the owner of said city lot, and he is the person by whom I was so employed, and for whom and to whom I did said labor and furnished said materials as aforesaid. That the following is a description of the lot of land on which I made said improvement and did such work and labor, and for which I furnished said materials, viz: That lot of land in the city and county of San Francisco, State of California, bounded and described as follows, viz: Commencing at the intersection of the south line of B street with the east line of A street; thence running south along the east line of A street one hundred feet; thence at right angles easterly and parallel with B street, one hundred and fifty feet; thence at right angles northerly and parallel with A

street one hundred feet, to the southerly line of B street, and thence westerly along the southerly line of B street one hundred and fifty feet, to the place of beginning (*and add affidavit of verification*).

No. 15.

Complaint on a Lien Claimed by Material Man.

In the District Court of the Judicial District of the State of California in and for the city and county of San Francisco.

JOHN BROWN,
Plaintiff,
vs.
JOHN SMITH,
WILLIAM JONES,
GEORGE MARTIN and
RICHARD WILSON,
Defendants.

State of California, City and County of San Francisco, ss:

John Brown, plaintiff in the above entitled action, by A B, his attorney, complains of the above named defendants, John Smith, William Jones, George Martin and Richard Wilson, and for cause of action, shows to the Court as follows, viz:

That the defendant, John Smith, was at the time of the accruing of the lien of the plaintiff after mentioned, and since hitherto, has been the owner in fee of the following described piece or parcel of land situate, lying and being in the city and county of San Francisco, and bounded and described as follows, viz: Commencing at the intersection of the south line of A street with the east line of B street; thence running south along the east line of B street twenty-five feet; thence east at right angles and parallel with A street one hundred feet; thence north at right angles and parallel with B street twenty-five feet, to the south line of A street; thence west along the south line of A street to the place of beginning, with the appurtenances thereto belonging.

That on the day of 1868, the said defendant, John Smith, entered into an agreement, in writing, with the defendant, William Jones, at said city and county, by which the said William Jones, for certain considerations therein expressed, agreed to erect, for said John Smith, on the premises above described, a certain building or dwelling house, of the dimensions in the manner and of the materials in said written contract expressed.

That the said Jones, in pursuance of the said agreement, went on and finished and completed said building or dwelling house, on or about the day of 1868, and said building or dwelling house is erected on said above described land, and within the boundaries thereof, as above described and set forth.

That at sundry times between the day of 1868, and the day of 1868, and while the said building or dwelling-house was in progress of erection by the said defendant Jones, under his said contract with the said defendant Smith, the said plaintiff did, at the special instance and request of the said defendant William Jones, furnish, sell and deliver to said Jones a large quantity of lumber, and materials for the erection and construction of the said building so contracted by him with said defendant Smith, to be erected as aforesaid, and that the said lumber and materials were furnished by this plaintiff for, and to be used, and were so used, by said Jones in the erection of the said building or dwelling house; that said lumber and materials were commenced to be furnished by this plaintiff, to said defendant Jones, for the purpose aforesaid, on the day of 1868.

That the said lumber and materials so furnished, as aforesaid, were of great value, to wit: of the value of one thousand dollars; and that of the said amount, there has been paid to this plaintiff the sum of five hundred dollars, and there remains due to the said plaintiff, for the same, the sum of five hundred dollars, no part thereof having been paid by said defendants Smith or Jones.

That within thirty days after the completion of the said house or building, and on the day of 1868, the said sum of $500, still remaining due to said plaintiff, the said plaintiff did file, with the County Recorder, of the said city and county of San Francisco, a claim in writing, containing a true statement of his said plaintiff's, said demand for said lumber and materials, after deducting all just credits and offsets, and showing that said $500 was justly due to him, said plaintiff,

therefor. Also, setting forth in said claim the name of the said defendant, John Smith, as the owner of the said property above described, and designating him as such, and also the name of the said William Jones as the person to whom the said plaintiff furnished the said materials, and by whom this plaintiff was employed so to furnish the same, and also a description of the above described real estate, building or dwelling house and premises, which the said plaintiff seeks to charge with a lien for said claim, and which description of said property, in said claim, was sufficient for the identification of said property; which claim, so filed with said Recorder, as aforesaid, was duly verified by the oath of this plaintiff, in writing attached to said claim, and filed therewith, and which claim and oath were thereupon duly recorded by said Recorder, in a book kept by him for that purpose.

That by the premises aforesaid, the said plaintiff became entitled to the benefit of, and to have a lien upon, the said building and dwelling house, and the land upon which the same was erected and constructed, or such a convenient part of said land around said building as is required for the convenient use and occupation thereof; and the said plaintiff avers that the whole of said land is necessary for that purpose; and the said plaintiff further claims that said lien, attached to said property, on the day of 1868, the day that said materials were so commenced by this plaintiff to be furnished for the erection of said building as aforesaid.

The said plaintiff further shows to the Court, on information and belief, that the defendant, George Martin, also claims a lien upon said property, for work and labor performed by him in the construction and erection of said building or dwelling house, to the amount of fifty dollars, and that his claim for that purpose has been filed and recorded in said Recorder's Office, and remains unsatisfied of record in said office; but whether the same is a good and sufficient claim and lien upon said property, the said plaintiff has no knowledge, information or belief.

The said plaintiff further shows, that since the creation and attaching of his, said plaintiff's, lien, as aforesaid, the said defendant, John Smith, has made and executed to the defendant Richard Wilson, a mortgage on the said premises, to secure the payment of the sum of one thousand dollars to said Wilson, in manner as in said mortgage specified, which mortgage is also recorded in said Recorder's Office, and remains unsatisfied of record.

The said plaintiff further shows, that the said William Jones, as contractor under said John Smith, has also filed a claim for lien on said property, in said Recorder's Office, by which he claims the sum of two thousand dollars as due to him from said defendant, John Smith, for the erection of said building under said contract.

Wherefore the plaintiff prays judgment of this Court, and that it may be decreed that the said defendant Jones is indebted to him in the sum of five hundred dollars for the lumber and materials so furnished, as aforesaid; that the said plaintiff is entitled to have a lien upon the aforesaid land and premises, for the said amount, and that said lien be adjudged to attach at the said time of commencing to furnish said lumber and materials; that the rights and interests of the said defendants Jones, Martin and Wilson, under their respective claims of lien and mortgage respectively, above set forth, be ascertained and determined. That this Court adjudge and determine how much of said land is necessary for the convenient use and occupation of said dwelling house, and having so determined, then that this Court order and direct a sale of said premises by the Sheriff of the city and county of San Francisco, in the manner prescribed by law, and direct said Sheriff to make application of the proceeds of said sale as follows, to wit:

First—To the payment of all the costs of this action and the expenses of said sale.

Second—To the payment of the plaintiff of his said demand, and also the payment of the demand, if any, found due the said defendant, George Martin, on his claim aforesaid.

Third—To the payment of the said defendant, William Jones, the original contractor of the amount, which may be found due to him on his said claim.

Fourth—To the payment of the said Richard Wilson on his mortgage aforesaid, and the remainder to the defendant, John Smith; and if the amount realized from said sale be not sufficient to pay said demands in their order, as aforesaid, then that the same be paid *pro rata*, and in the order and manner provided for by an Act of the Legislature of the State of California, entitled "An Act for Securing Liens of Mechanics and others," approved 30th March, 1868. That in case said proceeds are insufficient to pay said plaintiff his said demand, then that he have execution against said William Jones for the deficiency, and that the said defendants and all persons claiming by, through

or under them, may be barred or foreclosed of all right, title, claim, lien, equity of redemption or interest in and to said premises; or that the plaintiff may have such other further or different relief in the premises as to this Court shall seem just, and as shall be agreeable to equity and good conscience.

A B, *Plaintiff's Attorney.*

(*Then add the usual verification. The above form may not be ample enough, being drawn only to show the main facts required to be presented in such a complaint. The pleader will, of course, frame the allegations according to the peculiar circumstances of each case.*)

No. 16.

Form of Summons on the Complaint.

In the District Court of the Judicial District of the State of California, in and for the city and county of San Francisco.

John Brown *vs.* John Smith, William Jones, George Martin and Richard Wilson.	Action brought in the District Court of the Judicial District of the State of California, and the Complaint filed in the City and County of San Francisco, in the office of the Clerk of said District Court.

The People of the State of California send Greeting to John Smith, William Jones, George Martin and Richard Wilson.

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of the Judicial District of the State of California, in and for the city and county of San Francisco, and to answer the complaint filed therein (a copy of which accompanies this Summons), within ten days (exclusive of the day of service), after the service on you of this summons—if served within this county; if served out of this county, but within this Judicial District, within twenty days; or if served out of said District, then

within forty days—or judgment by default will be taken against you.

The said action is brought to obtain a decree of this Court for the foreclosure of a certain lien described in the complaint, on file in this action, obtained by the plaintiff on a dwelling house and the lot of land on which the same is erected, situate at the southeast corner of A and B streets, in the city and county of San Francisco, and which land and premises are more particularly described in said complaint, which lien is for the sum of five hundred dollars, for lumber and materials claimed by said plaintiff to have been furnished by him in the construction of said dwelling house, erected by the defendant Jones, under a contract with the defendant Smith, to have the rights of the other incumbrancers and lien-holders settled; and that the premises on which said liens and incumbrances attach, may be sold, and the proceeds applied to the payment of said plaintiff's said lien and the other liens and incumbrances, as the law directs; and in case such proceeds are not sufficient to pay the same, then that they may be distributed as the law directs; and that said plaintiff have execution against said defendant Jones for any balance remaining due, and also that the said defendants, and all persons claiming by, through or under them, may be barred and foreclosed of all right, title, claim, lien, equity of redemption and interest in and to said premises, and for other and further relief.

And if you fail to appear and answer the said complaint, as above required, the plaintiff will take default against you, and apply to the Court for the relief demanded in the Complaint.

Given under my hand and the Seal of the District Court of the Judicial District, this day of in the year of our Lord one thousand eight hundred and sixty.

Clerk.

Deputy Clerk.

No. 17.

Affidavit of Non Residence of a Party to Procure Order of Publication.

In the District Court of the Judicial District, in and for the city and county of San Francisco.

JOHN BROWN
vs.
JOHN SMITH,
WILLIAM JONES,
GEORGE MARTIN and
RICHARD WILSON.

City and County of San Francisco, ss:

John Brown being duly sworn, deposes and says: that he is the plaintiff in the above entitled action. That said action is brought by this deponent to foreclose a lien which he claims in his favor, on certain real estate, situate in the city and county of San Francisco, belonging to the defendant, John Smith, consisting of a lot of land in said city, with a dwelling house lately erected thereon by the defendant, William Jones, by virtue of a contract entered into between said Smith and Jones for such erection. That said lot of land, dwelling house and premises are more particularly described in the Complaint on file in this action, to which this deponent refers the Court. That the claim of this deponent is for the sum of five hundred dollars, for lumber and materials furnished said Jones, by deponent, at said Jones' request, and used by him in the construction of said building; and which sum remaining unpaid, this deponent duly filed a claim of lien on said premises in the Recorder's Office of said city and county, according to and in pursuance of the statute in such case made and provided; and for the obtaining satisfaction out of said property for said demand, so secured by said lien, this action is brought. That said defendant, George Martin, is made a party defendant, and is a necessary party defendant, because, as deponent avers, said George Martin also performed work and labor on and in the construction of said building; and for his demand for the amount thereof, he filed a claim for a lien on said property in said Recorder's Office, and same remains of record in said office unsatisfied; and deponent is informed and believes is in fact unsatisfied,

and that by section ten of the Act of the Legislature of California, entitled " An Act for Securing Liens of Mechanics and others," approved 30th March, 1868, the said George Martin is a necessary party to this action.

Deponent further says that he is personally acquainted with said George Martin, and that up to the day of the present month the said Martin resided, and for years previously had resided, in the said city and county of San Francisco. That on the day of 1868, and before the commencement of this action, the said George Martin removed from this State and went with his family to reside at Virginia City, in the State of Nevada, where said Martin now resides. That deponent heard from said Martin by letter, within the last few days, and knows that he is now residing at Virginia City aforesaid.

JOHN BROWN.

Sworn to before me this day of 1868.
[L. S.] C D, *Notary Public.*

No. 18.

Form of Order on Foregoing Affidavit.

[*Title of the Cause.*]

On reading and filing affidavit of John Brown, the plaintiff in the above entitled action, by which it appears to the satisfaction of the undersigned, Judge of said District Court, that the above named defendant, George Martin, is a necessary and proper party defendant to the above entitled action, and that personal service of the summons and complaint in this action cannot be made on said George Martin, for the reason that said Martin is not within this State, but resides at Virginia City, in the State of Nevada. On motion of Mr. A B, of counsel for said plaintiff, it is ordered that service be made on said Martin, by the publication of the summons in said action. That said publication be made in the newspaper published and printed in the city

and county of San Francisco, called "The Daily ," the publication in which is deemed, by the undersigned, most likely to give notice to the said defendant, Martin, and that said publication be once a week for four successive weeks. It is also hereby ordered and directed, that a copy of said summons and complaint in this action, be forthwith deposited in the postoffice, in the city and county of San Francisco, enclosed in a proper envelope, with the United States postage chargeable thereon, prepaid and addressed to said George Martin, Virginia City, State of Nevada, his present place of residence.

C D, *District Judge.*

Dated San Francisco, day of 1868.

No. 19.

Order Appointing Attorney to Defend for Absent Defendant.

[*Title of the Cause.*]

It appearing to the Court that, in pursuance of an order heretofore made in this action, for the publication of the summons in this action, said summons has been duly published, as by the Court in said order directed, and also a copy of said summons and of the complaint in this action, deposited in the postoffice, directed to the non-resident defendant, George Martin, at his residence, Virginia City, State of Nevada, in manner as directed by said order; and that on the proper affidavit, now on file, of these facts, the said George Martin's default, for not answering, has been duly entered, and that said Martin has not appeared in this action, the Court hereby appoints R C, Esq., an attorney and counsel of this Court, to appear for the said George Martin in this action, and conduct the proceedings on his part therein.

No. 20.

Notice of Lis Pendens in this Action Under the 27th Section of the Practice Act.

In the District Court of the Judicial District of the State of California, in and for the city and county of San Francisco.

JOHN BROWN
vs.
JOHN SMITH,
WILLIAM JONES,
GEORGE MARTIN and
RICHARD WILSON.

To all whom it may concern:

Take notice that the above entitled action is an action commenced in the District Court of the Judicial District of the State of California, in and for the city and county of San Francisco, and the names of the parties thereto, are correctly above set forth; that the object of the action is to foreclose a lien obtained by the plaintiff therein, on certain premises hereinafter described, for certain materials furnished by the said plaintiff, in the construction of a building or dwelling house on the premises after mentioned, and the claim for which lien is duly recorded in the office of the Recorder of said city and county of San Francisco, and to have said premises sold to satisfy said lien, and any other liens or incumbrances held by any of the defendants on said premises. That the following is a description of the property affected by said action, and which is therein claimed to be sold to satisfy said lien, viz: All that certain piece or parcel of land situate, lying and being in said city and county of San Francisco, bounded and described as follows (*here insert description*), with the buildings erected thereon, and the appurtenances thereunto belonging.

A B, *Attorney for said Plaintiff.*

Dated San Francisco, this day of 1868.

No. 21.

Decree in the Cause Setting Forth the Rights of the Respective Parties.

JOHN BROWN
vs.
JOHN SMITH,
And Others.

This cause having come on to be heard on the pleadings and proofs in this action, and after hearing Mr. A B, of counsel for plaintiff, Mr. C D, of counsel for the defendant, John Smith, Mr. E F, of counsel for the defendants, William Jones and Richard Wilson, and Mr. G H, counsel appointed by the Court to appear for the absent defendant, George Martin, and conduct the proceedings on his part; and the Court having maturely considered the proofs and allegations of the respective parties, does order, adjudge, decree and determine as follows, viz: That the said plaintiff, by reason of the demand in his complaint, in this action set forth, for materials furnished by him in the erection and construction of the building on the land of the defendant, John Smith, in said complaint, and in this decree hereinafter described, and his filing and recording of his claim, as in said complaint set forth, acquired a lien on said land and premises on the first day of July, 1868, and the Court adjudges that there is due to him, from said defendant, William Jones, on his said claim, the sum of five hundred dollars. The Court further adjudges to the said plaintiff the costs of his prosecuting this action, and allows as a part of said costs the sum of ten dollars, paid by him for filing and recording his said lien, and also the sum of three hundred dollars, as a reasonable amount for the fees of his attorney and counsel in prosecuting this action, which said two sums, for expenses and fees, together with fifty dollars, as taxed and settled by the clerk of this Court, for said plaintiff's costs and disbursements in this action, amount together to the sum of three hundred and sixty dollars, and making together, with said sum of five hundred dollars, so found due on his said claim, the sum of eight hundred and sixty dollars, for which sum judgment is awarded in favor of said plaintiff against said defendant, William Jones; and also that the said plaintiff have satisfaction therefor, out of the property, on which he so, as aforesaid, acquired a lien, and hereinafter described.

The Court further adjudges and decrees, that there is due to the said defendant, George Martin, from the said defendant, William Jones, the sum of fifty dollars on his claim for a lien, set forth in the complaint in this action, for work and labor performed by him in the construction of said building, at the instance and request of said Jones; and that by reason of his filing and recording said claim, he acquired a lien on said building and premises after mentioned, on the third day of July, 1868, for which sum of fifty dollars, with costs, judgment is hereby ordered in favor of said George Martin, against said William Jones, with his costs by him incurred in this action; and the Court allows, as a part of said costs, the sum of five dollars, paid by him, said Martin, for filing and recording his said lien, and also the sum of one hundred dollars as a reasonable amount for the fees of the attorney and counsel appointed by the Court to conduct the proceedings in this action, on the part of the said George Martin, which several items, for fees and expenses, together with the sum of five dollars for said Martin's costs and disbursements, as taxed and settled by the Clerk of this Court, amount to the sum of one hundred and ten dollars, and making together, with the sum of fifty dollars so adjudged to be due to him on his said claim, the sum of one hundred and sixty dollars.

The Court further adjudges and decrees to be due from the said defendant, John Smith, to the said defendant, William Jones, on the contract for erecting said building on said premises, set forth in the answer of said William Jones, in this action, the sum of two thousand dollars; and that the same became a lien on said building and premises on the 25th day of June, 1868, out of which said sum, as a lien on said premises, is to be deducted the sum of five hundred and fifty dollars, being the amount of the principal of the respective claims of said plaintiff and said defendant, George Martin, leaving, after such application, the sum of one thousand four hundred and fifty dollars due from said John Smith to said William Jones, for which judgment is awarded in favor of said defendant, William Jones, against said defendant, John Smith, with his costs by him incurred in this action; and the Court hereby allows, as a part of said costs, the sum of five dollars, paid by him for filing and recording his said lien in his said answer set forth; and also the sum of one hundred dollars, as a reasonable amount for the fees of his attorney and counsel, in his defending this action and establishing his said claim

therein, which said several sums, for fees and expenses, together with the sum of ten dollars for his costs and disbursements herein, as taxed and settled by the Clerk of this Court, amount to the sum of one hundred and fifteen dollars, making together, with the sum of one thousand four hundred and fifty dollars adjudged to be due to him on his said claim, the sum of one thousand five hundred and sixty-five dollars ; and it is adjudged and decreed that the said defendant, William Jones, have satisfaction thereof, out of the property hereinafter described.

It is further ordered, adjudged and decreed, that there is due from the defendant, John Smith, to the defendant, Richard Wilson, on the promissory note set forth and described in the answer of said Richard Wilson, the sum of one thousand dollars, principal, and thirty-five dollars interest, from the date of said promissory note to the date of this decree, making, together, the sum of one thousand and thirty-five dollars, for which sum, with interest from this date, judgment is hereby awarded against the said John Smith, in favor of said defendant, Richard Wilson, together with the sum of ten dollars for his costs and disbursements in this action, as taxed and settled by the Clerk of this Court. It is further adjudged that the said sum, for which judgment is so rendered, is secured by the mortgage on the premises set forth and described in the answer of said defendant, Richard Wilson, in this action, but that the mortgage, so held by said Richard Wilson, is subsequent as an incumbrance and lien on said premises to the several liens of the plaintiff, John Brown, and of the defendants, William Jones and George Martin, above set forth.

It is further ordered, adjudged and decreed, that the whole of the piece or parcel of land hereinafter described, is required and is requisite and necessary for the convenient use and occupation of the dwelling house erected thereon by the said William Jones, under his contract with the defendant, John Smith, in the pleadings in this action set forth, and in the erection of which the demands of said John Brown, William Jones and George Martin, adjudged by this decree to liens on said property, arose.

It is further adjudged and decreed, that the said premises described in the complaint in this action, and as hereinafter set forth, be sold at public auction in the city and county of San Francisco, by the Sheriff of said city and county ; that the said Sheriff give public notice of the

time and place of said sale, according to law and the practice of this Court; that either or any of the parties to this action may purchase at said sale; that out of the moneys arising from such sale, after deducting his fees and expenses on such sale, and any liens upon said premises so sold at the time of such sale for taxes or assessments, the said Sheriff pay—

First—The said John Brown and the said George Martin, or their respective attorneys, the sums above found due to them respectively, together with their respective costs, disbursements and attorneys' fees to them above awarded respectively; and if the proceeds be insufficient to pay them in full their said respective demands, then that he, said Sheriff, pay them *pro rata* according to their said respective demands.

Second—If said sum is more than sufficient to pay the said demands of said John Brown and George Martin, then that out of the remainder, said Sheriff pay the said defendant, William Jones, the sum above found due to him, together with his costs, disbursements and attorneys' fees above awarded.

Third—That out of the remainder, if any, he shall pay the said defendant, Richard Wilson, the sum above found due to him on his said promissory note and mortgage, with the legal interest thereon from this date, together with his costs and disbursements in this action above awarded.

That he, said Sheriff, take receipts for said sums respectively from said parties, or their respective attorneys, and the surplus of said purchase money, if any, after said payments, he deposit with the Clerk of this Court, to be drawn out only on the order of this Court, and as it may direct. That if the proceeds of said sale be insufficient to pay all or either of said parties the amounts above directed to be paid and in the order above directed, that said Sheriff then report said deficiencies respectively, so that the said parties may have execution for such deficiencies respectively, according to the statute in such case made and provided.

The following is a description of the premises so ordered to be sold to satisfy said demands and claims as hereinbefore mentioned. (*Here insert a full description of the property.*)

No. 22.

Return of Sheriff upon the Writ of Execution or Order of Sale in Same Cause.

In pursuance of the preceding writ (*or* order) I, the undersigned Sheriff of the city and county of San Francisco, do certify and return, that I advertised the premises therein described to be sold by me at the Sheriff's office, in the City Hall, in said city and county, on the day of in the year 1868. That previous to said sale, I caused notice thereof to be publicly advertised as follows, viz: By causing a printed notice thereof, particularly describing said property, to be posted in three public places, for twenty days successively, in the city and county of San Francisco, where said property is situated, and where it was to be sold, and by causing a copy thereof to be published once a week for the same period, in a public newspaper published in said city and county.

And I further certify and return, that on said day of in the year 1868, the day on which said premises were so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and exposed said premises for sale at public auction, to the highest bidder, and the said premises were then and there fairly struck off to A B, at the sum of two thousand two hundred dollars, he being the highest bidder therefor, and that being the highest sum bid for the same.

I further certify and return, that I gave to said purchaser a certificate in writing of said sale, containing a particular description of the said property so sold, the price bid for the same, and that it was subject to redemption according to law—a duplicate of which certificate was by me filed in the office of the Recorder of said city and county.

I further certify and return that I have disposed of and paid out said sum of two thousand two hundred dollars, as follows, viz:

I have retained in my hands, being the amount of my fees, commissions and disbursements on said sale, the sum of one hundred and five dollars,..... $105.00

I have paid to the attorney of the plaintiff, John Brown, the sum of eight hundred and sixty dollars, being the amount awarded to him by the Court, in the decree in this action, for his claim, attorney's fees, costs, expenses

and disbursements,..... 860.00

I have paid to the attorney of the defendant, George Martin, the sum of one hundred and sixty dollars, being the amount awarded to him by the Court in said decree, for his claim, attorneys' fees, costs, expenses and disbursements,..... 160.00

That I have paid the balance thereof, being one thousand and seventy-five dollars,..... 1075.00

$2,200.00

to the attorney of the defendant, William Jones, to apply on his claim of one thousand five hundred and sixty-five dollars, awarded to him by said decree, for his claim, attorneys' fees, costs, expenses and disbursements, leaving the sum of four hundred and ninety dollars of his said claim unsatisfied, and leaving the whole of the amount, interest and costs, adjudged to be due by said decree, from the defendant, John Smith, to the defendant, Richard Wilson, unsatisfied.

That I have taken receipts for the said respective payments, which I have hereunto annexed.

I further certify and return, that the premises so sold by me, as aforesaid, and as described in said certificate of sale, were as follows, viz: (*Here insert description*).

Dated, etc. P W, *Sheriff*.

No. 23.

Execution for the Deficiency in Favor of Contractor.

The People of the State of California to the Sheriff of the City and County of San Francisco, *greeting :*

Whereas, on the day of in the year one thousand eight hundred and sixty-eight, by a certain decree, made in the District Court of the Judicial District, in and for the city and county of San Francisco, in a certain action wherein John Brown is plaintiff and John Smith, William Jones and others are defendants, it

was, among other things, adjudged, that all and singular certain real estate and premises mentioned and set forth in the complaint, in said action, should be sold at public auction, by the Sheriff of said city and county; and that said Sheriff, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay, amongst other demands and claims specified in said decree to the said William Jones, the amount adjudged by said decree to be due by said John Smith to him, for a certain claim he had against said Smith, secured by a lien on said premises, or so much thereof as the purchase money of said premises would pay upon the same; and that if the money arising from said sale should, after paying certain other claims in said decree mentioned, be insufficient to pay the amount found due by said decree from said Smith to said Jones, the said Sheriff should specify the amount of the deficiency in his return, and the plaintiff have execution therefor; and whereas, it appears from the return of the said Sheriff, that the amount of the deficiency is four hundred and ninety dollars, and which, after the due application of said proceeds, remains due from said Smith to said Jones on the said claim of said Jones, therefore, we command you that you satisfy the said balance of the said claim of said Jones, as adjudged by said decree, out of the personal property of the said John Smith, within your county; or if sufficient personal property cannot be found, then out of the real property in your county, belonging to the said John Smith, on the day of one thousand eight hundred and sixty eight, the day on which the said claim, as a judgment, was docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return the execution within days after its receipt by you to the Clerk of this Court.

Witness: Hon. A B C, Judge of our said District Court, of the Judicial District, in and for said city and county of San Francisco, this day of one thousand eight hundred and sixty-eight.

D E F, *Clerk of said Court.*

No. 24.

Order of Reference where there are Various Claims of Different Classes.

[*Title of the Cause.*]

This cause being at issue on the complaint of the plaintiff. and the answers of the different defendants therein, on motion of Mr. A B, of counsel for said plaintiff, all the defendants appearing by their respective counsel and assenting thereto, it is ordered that this action be referred to Mr. C D, an attorney and counsel of this Court, as Referee, to take the proofs of the respective parties hereto, and report the same to the Court; that he also report for the consideration of this Court, a decree founded on the testimony so taken before him, showing the amount, if any, due to the plaintiff from the defendant, E F, and also the respective amounts due to the other defendants, respectively, on the various claims set up by them in their respective answers in this action, the time when their respective claims became liens on the real estate and premises described in the plaintiff's complaint, and the order of preference to which they are respectively entitled in the payment of their said respective claims; also showing what space of the real estate or land, of defendant E F, around the building or superstructure, in said complaint mentioned, is required for the convenient use and occupation thereof, and that he report to this Court with all convenient speed.

No. 25.

Demurrer to a Complaint for Want of Parties Under 5th Subdivision of Section 10.

[*Title of the Cause.*]

And now comes the defendant, A B, by C D, his attorney, and demurs to the complaint of the plaintiff in this action, and specifies the following as the grounds of said demurrer, namely:

First—That there is a defect of parties defendant in this action, in this, viz: That it appears by said complaint, that one E F is personally liable for the claim of the plaintiff in this action, and that one G H has a lien on the real estate and premises in said complaint described for certain materials furnished by him in the erection of the superstructure on said premises, and that neither said E F nor said G H are made parties to this action.

Second—That said complaint does not state facts sufficient to constitute a cause of action.

L N, *Defendant's Attorney.*

No. 26.

Averments in Answer of Want of Parties Under Sections 44 and 45 of Practice Act.

And the said A B, defendant, farther answering, says that there is a defect of parties defendant in this action in this: That at the commencement of this action, one C D had a claim for materials furnished by him in the erection of the building or superstructure in the plaintiff's complaint described, and which claim remains wholly unsatisfied; and that said C D, before the commencement of this action, had filed and recorded a claim for a lien on said premises, in the Recorder's office of said city and county of San Francisco, in pursuance of the Act entitled "An Act for Securing Liens of Mechanics and others," approved 30th March, 1868.

No. 27.

Petition of a Lienholder for Intervention Under Section 659 of Practice Act.

[*Title of the Cause.*]

To the District Court of the Judicial District, in and for the City and County of San Francisco.

The petition of A B showeth: That the petitioner, the said A B, heretofore, on the day of in the year 1868, and on divers and sundry days between that day and the day of in said year 1868, furnished and delivered to C D, one of the defendants in the above entitled action, and at his special instance and request, certain articles of lumber and other materials, to be used, and which were used, by him in the building or superstructure described in the plaintiff's complaint in this action; that the value of the said materials so furnished by this petitioner, as aforesaid, was five hundred dollars, no part or portion of which has been paid to this petitioner, but the same remains wholly due and unpaid. That within thirty days after the completion of said building or superstructure, this petitioner duly filed and recorded in the office of the Recorder of the city and county of San Francisco, a claim in writing, containing a true statement of his said demand, after deducting all just credits and offsets, with the name of the owner of said building or superstructure and premises described in said complaint; and also the name of the said defendant, C D, as the person by whom this petitioner was employed to furnish said lumber and materials, and a description of the property sought by the petitioner to be charged with a lien for said lumber and materials so furnished by the petitioner, which description was sufficient for the identification thereof, and which petitioner avers is the same property described in the complaint in this action, and on which the plaintiff in this action claims a lien for his demand in said complaint set forth, which claim so caused to be filed and recorded in said Recorder's office by this petitioner, was duly verified by the oath, in writing, of this petitioner, annexed to said claim.

That on the grounds above set forth, your petitioner claims to intervene in this action and to become a plaintiff therein, and claims judgment therein against said defendant, C D, for said sum of five hundred dollars, and for the costs of filing and recording said lien, his attorney's fees and his costs and disbursements in this action; that said demand be declared a lien upon said premises; that said petitioner have satisfaction thereout of his said demand, and if insufficient for that purpose, then that he have execution against said C D for the deficiency, or for such other or farther or different relief as he may be entitled to under the facts of this case, as they shall appear, and as may be agreeable to

equity and good conscience. And your petitioner, etc.

E F, *Attorney for Petitioner.*

(*Here will follow an affidavit of verification in the usual form*).

No. 28.

Notice to Contractor by Owner Under 11th Section.

To Mr. A B—

SIR:—You will please to take notice that an action has been commenced against me in the District Court of the Judicial District, of this State, in and for the city and county of San Francisco, by C D, as plaintiff; and in his complaint therein, said C D claims a lien on the building which you have, under the contract heretofore entered into between us, been constructing for me, situate on F street, in said city, for materials furnished by him, and for work and labor done by him for you in the construction of said building, to the amount of five hundred dollars. I hereby call upon you to defend said action, at your own expense, and notify you that I will withhold payment of any amount to become due under our said contract during the pendency of said action; and should judgment be obtained against me, upon the lien claimed in said action, by said C D, I will deduct the same from any amount to become due to you on said contract, and all costs and expenses which I may incur in defending said action, should you fail to do so on my behalf.

Dated, etc. E F.

No. 29.

Clause in a Decree where Contractor is made Personally Liable to the Owner for the Excess under Section 11.

[*Title of the Cause*].

(*After the adjudications on the claims of the different lienholders who are parties to the action, then add*): And whereas, it appears to this Court from the proofs in this action, that the defendant, A B, entered into the contract, in writing, with the defendant, E F, to construct the building on which the foregoing liens are declared as in the complaint and pleadings in this action set forth; and that the defendant, E F, was, by said agreement, to pay the said A B, for such construction, according to the terms of said agreement, the sum of ten thousand dollars. And whereas, it further appears that the said E F has paid the said A B, on said contract, for such construction, the sum of eight thousand dollars. And whereas, the different liens of the plaintiff in this action, and of the defendants G H and O P, as established by this decree, amount together to the sum of five thousand dollars, it is adjudged and decreed that upon the payment, by said E F, of the said claims of said plaintiff and of said defendants, G H and O P, as herein above in this decree settled and adjudged, or on the satisfaction thereof by the sale of said property, as hereinbefore directed, the said E F will be entitled to a judgment in this action against the said A B, for the sum of three thousand dollars, the amount of the excess of said payments and claims over said contract price; and that at any time hereafter, on establishing, to the satisfaction of this Court, the fact of such payments, said E F may apply at the foot of this decree, for judgment and execution against the said A B, for the said sum of three thousand dollars, and for his costs and disbursements. (*The terms of the subsequent order for judgment against the contractor are so plain and simple, that it is unnecessary to give a form.*)

No. 30.

Complaint by the Owner Against the Contractor for the Excess.

[*Title of the Cause.*]

The plaintiff in this action complains of the defendant, and for cause of action shows to the Court as follows, namely:

That heretofore, to wit: On the day of in the year one thousand eight hundred and sixty-eight, the said plaintiff entered into a contract, in writing, with the said defendant, whereby the said defendant, in consideration of the sum of five thousand dollars, to be paid by said plaintiff to said defendant, on the completion of his said contract, agreed to build and erect for said plaintiff a brick dwelling house on the corner of A and B streets, in the city and county of San Francisco, according to certain plans and specifications referred to in said agreement, in writing, and to have the same finished and complete by the first day of August, 1868. That the said defendant did finish and complete the said dwelling house, according to said contract, on the said first day of August, 1868, and the said plaintiff thereupon paid to the said defendant the said sum five thousand dollars. The plaintiff further shows, that during the construction of said dwelling house by said defendant, one C D furnished to the said defendant, at his special instance and request, lumber and other materials to be used in, and which were by said defendant used in, the construction of said dwelling house; and the said defendant not having paid the said C D therefor, the said C D, within thirty days after the completion of the said dwelling house, filed and recorded in the Recorder's office, in and for said city and county, a claim, in writing, containing a statement of his said demand, after deducting all just credits and offsets, and showing that said five hundred dollars remained unpaid, setting forth in said claim the name of the plaintiff as owner of the said dwelling house, and of the land on which it was erected, and also the name of said defendant as the person by whom he was employed to furnish said lumber and materials, together with a description of said property, and claiming a lien on said property for the same.

That afterwards, to wit: On the day of 1868, the said C D commenced an action against this plaintiff, as the owner of said property, in the District Court of the Judicial District, in and

for said city and county, to have his said demand declared a lien upon said dwelling house, and on the land on which it was erected, and that he obtain satisfaction of said demand by the sale of the same. That such proceedings were thereupon had in said action; that said sum of five hundred dollars, together with two hundred and fifty dollars for said C D's attorney's fees, costs and disbursements in said action, making in all the sum of $750, were adjudged a lien on said property, and said property ordered, by the said Court, to be sold to satisfy the same. That said plaintiff was compelled to pay, and did pay, said C D the sum of seven hundred and fifty dollars, and was put to great expense in defending said action, in attorney fees, disbursements and costs, to wit: the sum of two hundred dollars. And the said defendant, although often requested by this plaintiff, has not paid this plaintiff said sums of money so paid, laid out and expended by this plaintiff, as aforesaid, wherefore the plaintiff prays judgment against the defendant for the sum of nine hundred and fifty dollars, and interest and the costs of this action.

L M, *Plaintiff's Attorney.*

(*Add affidavit of verification in usual form.*)

No. 31.

Complaint of Lien-holder for Repairs of a Dwelling House and for a Lien Thereon Before all Prior Mortgages.

[*Title of Cause.*]

The plaintiff in the above entitled action complains of the defendants, and shows to the Court as follows:

That heretofore, to wit: On the day of in the year one thousand eight hundred and sixty-eight, this plaintiff was employed by the defendant, C D, as a carpenter and joiner, to, and did, at his special instance and request, repair the dwelling house of the said C D, situate on E street, in the city and county of San Francisco, and on the piece or parcel of land hereinafter more particularly described,

by putting a new roof thereon (*or whatever the repair may be*); and did at the like request of said defendant, furnish all the lumber and materials necessary for the said repair, by this plaintiff, as such carpenter and joiner, of the said dwelling house; and the said defendant did thereupon become indebted to the said plaintiff for his said services, work and labor, as such carpenter and joiner, in making of said repairs, and for the lumber and other necessary materials furnished by this plaintiff in the making and completing said repairs, in the sum of five hundred dollars, no part of which has been paid by said defendant, C D, to said plaintiff, although to pay the same he has been often requested by said plaintiff, for which sum the said plaintiff demands judgment against said defendant C D.

The plaintiff further shows to the Court, that within thirty days after the completion of the said repairs to the said dwelling house, to wit: On the day of 1868, he filed with the Recorder of the city and county of San Francisco, being the county in which said dwelling house is situated, a claim, in writing, containing a true statement of his said demand against said defendant, C D, for his said plaintiff's services, work and labor done and materials furnished, as aforesaid, in making said repairs, after deducting all just credits and offsets, stating therein the name of the said C D, as the owner of said property, and as the person by whom he, the said plaintiff, was employed to make said repairs, and also a description of the said dwelling house and the land on which the same is situated, sufficient for identification, which claim was duly verified by the oath in writing of this plaintiff, attached thereto, and by virtue of which proceeding said plaintiff claims a lien on said property for the satisfaction of the said sum of five hundred dollars, so due to him as aforesaid, and for his attorney's fees, costs and expenses, as the same may be allowed by the Court in pursuance of the Act entitled "An Act for Securing Liens of Mechanics and others," approved 30th March, 1868.

The plaintiff further shows that, as he is informed and verily believes, the defendant, E F, claims to have a lien upon said premises by virtue of a mortgage for the sum of two thousand dollars, made and executed by said defendant, C D, to him prior to the commencement of said repairs, and recorded before said commencement; but this plaintiff claims that under the Act aforesaid, the said lien of this plaintiff, so obtained as aforesaid, for said repairs, is preferable to that

of the said defendant, E F, by his mortgage aforesaid, and prays that such preference be so declared by decree of this Court, and his, said plaintiff's lien, first satisfied out of said premises.

That the land on which the said dwelling house stands and to which it is appurtenant, is bounded and described as follows, viz: (*Here insert description of land*).

The plaintiff demands judgment against the said defendant, C D, for the said sum of five hundred dollars, and his attorney's fees, and his costs and disbursements in this action, as the same may be taxed and allowed, and that his said demand be declared a lien on said dwelling house and so much of said land around the same as may be required for the convenient use and occupation thereof; that said lien be preferred to the lien by mortgage of said defendant, E F, and that said premises be sold to satisfy said plaintiff's said demand, or for such other further or different relief as the Court may adjudge the plaintiff entitled to, and as may be agreeable to equity and good conscience.

R S, *Plaintiff's Attorney.*

(*Add the usual affidavit of verification.*)

No. 32.

Complaint of Lien-holder for Grading or Improving a City Lot.

[*Title of the Cause.*]

The plaintiff in the above entitled action complains of defendant, and shows to the Court as follows, viz:

That heretofore, to wit: On the day of 1868, at said city and county, the plaintiff entered into a contract in writing with the defendant, to grade and improve a certain city lot of land, in said city and county, commonly called a fifty vara lot, said city and county being an incorporated city, under the laws of this State, by the name of "the City and County of San Francisco;" by which said contract said plaintiff agreed with said defendant to (*here describe what the*

improvement was, whether to "grade, fill in or otherwise improve the "same, or the street in front of or adjoining the same," so as to bring the improvement within the terms of the ninth section), and which improvement, by the terms of said contract, was to be finished and completed by this plaintiff, on the day of 1868, in consideration of which, said defendant, by said contract, covenanted and agreed with the plaintiff to pay him the sum of one thousand dollars, in United States gold coin, on the finishing and completing of said improvement. That the said plaintiff did commence the work of said improvement on the day of 1868, and finished and completed said improvement, in the manner and by the time as agreed by him in said contract, and did otherwise, in all respects, fully perform all the covenants and agreements in said contract on his part to be fulfilled and performed, and the said defendant thereupon became indebted to the plaintiff in the said sum of one thousand dollars, no part whereof has been paid by said defendant to said plaintiff, although to pay the same he has often been requested by the said plaintiff.

The plaintiff further shows, that within thirty days after the completion of the said improvement and the completion of his, said plaintiff's said contract, to wit: on the day of 1868, he filed with the Recorder of said city and county, a claim, in writing, containing a true statement of his said demand against said defendant, under said contract, after deducting all just credits and offsets, stating therein the name of said defendant as the owner of said city lot, and as the person by whom said plaintiff was employed to make the said improvement, with a description of the said city lot sufficient for identification, which claim was duly verified by the oath, in writing, of said plaintiff attached thereto, and duly recorded in said Recorder's office on the day and year aforesaid; that the following is a correct description of said city lot, viz: (*Describe it.*)

Wherefore (*conclude with prayer for judgment and for a lien, etc., as in previous forms, with affidavit of verification*).

No. 33.

Complaint of a Miner on Lien for Labor in Mine.

[*Title of Cause.*]

The plaintiff complains of defendant, and shows to the Court as follows, viz:

That the defendant is a mining corporation under the laws of this State, duly incorporated under the corporate name of "The El Dorado Mining Company." That the said plaintiff performed work, labor and services for said defendant, in their mine or mining claim, situate in the county of Nevada, in this State, and more particularly hereinafter described, at the special instance and request of said defendant. That said work, labor and services, consisted in— (*Here describe the kind of labor generally.*) That said labor commenced on the day of 1868, and ended on the day of and was reasonably worth the sum of one hundred and fifty dollars, which the said defendant, though often requested by this plaintiff thereto, has not paid nor any part thereof.

That within thirty days after the performance of said labor, said plaintiff filed in the office of the Recorder of said county of Nevada, a true statement of his said demand, after deducting all just credits and offsets, stating therein the name of the defendant as owner of said mine, and C D, who was the superintendent of said defendant at the time of the performance of said labor, as the person by whom, on behalf of said defendant, the said plaintiff was employed to do said labor, with a description of said mine sufficient for identification, which claim was duly verified by said plaintiff, and duly recorded in said Recorder's office, on the day and year aforesaid. That the following is a description of said mine. (*Insert description as directed in No.* 13.)

Wherefore plaintiff demands—(*prayer for judgment and lien, etc., as in previous forms, claiming a lien on the mine and appurtenances, and sufficient space around for the convenient use and working of the same.*)

No. 34.

Advertisement by Mechanic to Sell Personal Property Under Section 15.

AUCTION SALE.

Notice is hereby given that I, the undersigned, will expose for sale, at public auction, to the highest bidder, in front of the Merchants' Exchange, in California street, in the city and county of San Francisco, on the day of 1868, at twelve o'clock noon, of that day, a certain wagon (*here describe it generally*), which said wagon was, by A B, the owner thereof, left with me as a wagon maker, to be repaired on or about the day of 1868; that I made the necessary repairs to said wagon at the instance and request of said A B; that said repairs were justly and reasonably worth the sum of sixty dollars, and were completed on the day of 1868, when said sum so became due to me from said A B, for said repairs; that the said A B, though often requested, has not paid said sum or any part thereof, and said wagon has ever since the completion of said repairs, and for more than two months since the said work was done, been retained in my possession by virtue of my lien thereon, for said repairs, and the proceeds of said sale are to be applied to the discharge of said lien and of my costs of keeping and selling said property.

C D.

DIGEST

OF ALL THE DECISIONS OF THE SUPREME COURT OF THE STATE OF CALIFORNIA UP TO THE PRESENT TIME, IN REFERENCE TO LIENS UNDER THE DIFFERENT MECHANICS' LIEN LAWS EXISTING PRIOR TO THE ACT OF 1868.

To enable those persons entitled to the benefit of the statute of the mechanics' lien law to avail themselves of this extraordinary remedy, all the provisions of the law must be strictly complied with. *Walker* v. *Hauss Hijo*, 1 Cal. 185 ; *Bottomly* v. *Grace Church*, 2 Cal. 91.

A material man, to enforce his lien for the price of the material furnished, must file the notice of his intention to hold a lien in statute time, or his lien will be lost. *Walker* v. *Hauss Hijo*, 1 Cal. 185.

If the verdict of a jury fails to find a lien, the Court cannot render a judgment essentially different from the verdict, and a verdict, so far, will be reversed. *Ib.* 186.

Under Mexican law, a person who furnishes materials for the erection of a building has no lien on the building to secure payment for the materials furnished. *Macondray* v. *Simmons*, 1 Cal. 394 ; *Stowell* v. *Simmons*, 1 Cal. 452.

The description of property in a mechanic's lien, as situated on Battery, between Pacific and Jackson streets, in San Francisco, is sufficiently certain. *Hotaling* v. *Cronise*, 2 Cal. 63.

A transfer of property cannot defeat a lien which had already accrued upon the property. *Ib.* 64.

The materials must not only have been used in the construction of the building, but they must have been by the express terms of the contract furnished for the particular building on which the lien is claimed,

and these facts must be alleged and proven. *Bottomly* v. *Grace Church*, 2 Cal. 91 ; *Houghton* v. *Blake*, 5 Cal. 240.

One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the lien law, but must rest upon the equity of his case. *Godeffroy* v. *Caldwell*, 2 Cal. 491.

The statue of April 12th, 1850, has placed liens for materials and liens for labor on the same footing, and the proceeds of sale must be distributed in conformity to the same. *Moxley* v. *Shepard*, 3 Cal. 64.

The statute of April 12th, 1850, limits the structures on which the lien can exist to buildings and wharves. No lien can therefore exist on a bridge. *Burt* v. *Washington*, 3 Cal. 246.

Where a lien attaches upon a leasehold interest, it so attaches subject to all the conditions of the lease, and he who holds it can enforce it, notwithstanding a subsequent failure of the lessee to pay rent and a surrender of the lease to the lessor. *Gaskill* v. *Trainer*, 3 Cal. 339 ; *Gaskill* v. *Moore*, 4 Cal. 235.

It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagors without notice;" no mention is made of liens ; hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date. *Rose* v. *Munie*, 4 Cal. 173.

Unless the answer of the garnishee discloses liens having a privity of claim upon the funds in his hands, judgment must be entered for the amount he admits due. *Cahoon* v. *Levy*, 4 Cal. 244.

A County Court has no jurisdiction to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars. *Brock* v. *Bruce*, 5 Cal. 279.

T. & Co. were in the possession of certain property under a verbal agreement of sale from G., and employed W. to erect a building upon it. Before the completion of the building, G. signed a deed to the land, and at the same time T. & Co. executed a mortgage for the purchase money : Held, that the conveyance and mortgage were but one act, and that no prior lien on the general property of T. & Co. could have priority over the plaintiff's mortgage. *Guy* v. *Carriere*, 5 Cal. 512.

The statute concerning mechanics' liens was designated for two classes of laborers and contractors : first, contractors or material men, who contract directly with the owner of the building himself ; and

second, laborers, sub-contractors, etc.,who have no privity of contract with the owner. *Cahoon* v. *Levy*, 6 Cal. 296.

Contractors have an actual lien from the commencement of the work until sixty days after its completion ; the subcontractors or laborers have their remedy by giving notice to the owner, and their lien attaches by the service of such notice. *Ib.*

A garnishment served on the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of a sub-contractor or laborer. *Ib.* 297.

The remedy given the sub-contractor is simply in its nature an attachment without suit, but by notice, and having to give notice, he must yield to the claim of the attaching creditor. *Ib.*

Mortgages and liens of record form no exception to the rule prescribed by section 136 of the "Act to Regulate the Estates of Deceased Persons," and the claims secured by them must have been presented to the executor or administrator and rejected by him before an action can be maintained. *Ellissen* v. *Halleck*, 6 Cal. 393 ; *Falkner* v. *Folsom*, 6 Cal. 412 ; *Hentsch* v. *Porter*, 10 Cal. 558.

A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor ; therefore, where he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien cannot object to the legality of the mortgage in the face of which he contracted. *Ferguson* v. *Miller*, 6 Cal. 404.

The lien of a sub-contractor filed and notice given to the owner of a building within thirty days after the completion of the work, under the Act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor after the work was commenced and before the filing and serving notice of lien. *Tuttle* v. *Montford*, 7 Cal. 360.

The lien of the mechanic, artisan and material man is favored in law, because those parties have in part created the very property on which the lien attaches. *Ib.*

A mechanic's lien is in the nature of a mortgage ; is a charge upon the land, and can only be assigned in writing. *Ritter* v. *Stevenson*, 7 Cal. 389.

Where the owner of a lot contracted for the erection of a house

thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. releases a mortgage on the lot, and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently, on its completion, by agreement with the builders, gave his note for $10,000, instead of the lot he was to convey, and the builders filed a notice of lien and assigned note and lien to plaintiff: Held, that as much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. *Soule* v. *Dawes*, 7 Cal. 576.

The lien of the contractor, if filed in time, takes effect, by relation, from the date of the commencement of the work, and all persons who deal with the property during the work are charged with notice of the claim of the contractor. But if a party is informed of the nature of the contract between the owner and builder, and takes a conveyance of the property subject to it, no subsequent change of the terms of the contract can create an incumbrance which will have priority of his conveyance. *Soule* v. *Dawes*, 7 Cal. 576; *Crowell* v. *Gilmore*, 13 Cal. 56.

The following notice of mechanic's lien does not contain such a description of the premises as the statute contemplates: "A dwelling house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —." *Montrose* v. *Conner*, 8 Cal. 347.

The evident intention of the Mechanic's Lien Act was to give mechanics and artisans a lien on all work done by them, upon any description of property, and to give the mechanic a lien upon whatever interest the person who caused the superstructure had. *McGreary* v. *Osborne*, 9 Cal. 122.

Where a civil engineer's lien for work done for the defendants in the construction of a canal or ditch was filed in the Recorder's office of the county where the ditch is located on the sixth day of May, 1856, and suit was not commenced to enforce the lien until the twenty-sixth day of January, 1857: Held, that the time fixed by statute for the enforcement of the lien had expired before the commencement of the suit. *Green* v. *Jackson Water Co.*, 10 Cal. 375.

A decree for the sale of premises in a suit to enforce a mechanic's lien has the same and no greater effect upon the rights of purchasers

and incumbrances prior to the commencement of the suit that a similar decree would have upon the foreclosure of a mortgage. *Whitney* v. *Higgins*, 10 Cal. 551.

The liens which, by the act of April 19th, 1856, entitled "An Act for Securing Liens to Mechanics and others," are required to be exhibited and proved upon publication of notice in some newspaper of the county, or be deemed waived, are liens arising under that Act, and do not apply to other liens. *Ib.*

All persons interested in the premises prior to the suit brought to foreclose a mortgage, or to enforce a mechanic's lien whether purchasers, heirs, devisees, remainder men, reversioners or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interest by conveyance or incumbrance after suit brought, need not be made parties. *Ib.* 552.

Where a mechanic's lien attached on certain premises January 18th, 1856, and a mortgage was placed on the same premises February 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage, to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: Held, that the right of the mortgagees to redeem the premises by paying off the incumbrances of the mechanic's lien was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Ib.* 553.

In a mechanic's lien, it is not necessary to give the items of the work and materials in the statement of the lien filed, where the contract for the construction of the building is in a sum in gross. *Heston* v. *Martin*, 11 Cal. 42.

Neither the Mechanic's Lien Law of 1855 or 1856 give a lien upon canals or ditches. The language of the statute is "building, wharf, or other superstructure." A ditch is not a building or a wharf, and in no sense can be designated a superstructure. *Ellison* v. *Jackson Water Co.*, 12 Cal. 554.

Under the Mechanic's Lien Act of 1856 the owner of a building may contract to pay for it as soon as completed, and he is not liable to

material men until notice served on him, and then only to the extent of the sum due the contractor at the date of the notice. *Knowles* v. *Joost*, 13 Cal. 621.

Under the Mechanic's Lien Act, it is not necessary that the account to be filed in the Recorder's office should remain in the office after it is recorded. *Mars* v. *McKay*, 14 Cal. 128.

A suit to enforce a particular lien, under the Act, is a proceeding to enforce all the liens against the property, and an intervention in a suit already pending, if filed within the six months, is as much a compliance with the Act as an original suit. *Ib.* 129.

In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention, and where the suit has been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. *Hocker* v. *Kelley*, 14 Cal. 165.

For extra work on a building by the contractor, in pursuance of the general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgagee, given by the owner before the extra work was commenced ; provided, the work was done with the knowledge of the mortgagee, and without objection from him. *Soule* v. *Dawes*, 14 Cal. 250.

R. & Co., defendants, had two mechanic's liens upon certain property, one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. signed an entry on the record of liens, stating that the liens did not fall due until January 15th, 1856. This was done on the supposition that the Act of 1855 permitted such extension of credit with safety. Discovering that such Act in this respect did not apply to existing liens, R. & Co., November 16, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a Sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud : Held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb ; that such rescission is no evidence of fraud. *Gamble* v. *Voll*, 15 Cal. 509.

The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.* 510.

As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment of the liens, by paying the money justly due, interest, costs, etc.—he not having been party to the suit by the lien-holder. *Ib.*

Plaintiffs here cannot object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment. *Ib.*

In this case, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed ; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from the decree. *Ib.*

Under the Mechanic's Lien Act of 1858, material men, sub-contractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor ; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the sub-contractors, material men, etc., as on garnishment or assignment ; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin* v. *Duncan*, 16 Cal. 127.

The notice of mechanic's lien, filed in the Recorder's office, need not set out the items of the account ; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient. *Brannan* v. *Swasey*, 16 Cal. 142.

A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Ib.*

If the party attempts to pursue them in separate actions, he might be put to his election ; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit has been dismissed, and nothing was realized by the attachment. *Ib.*

The notice of mechanic's lien filed in the Recorder's office, need not set out the items of the account. Nothing more is required than a statement of the demand showing its amount and character. *Selden* v. *Meeks*, 17 Cal. 128.

Defendant employed plaintiff, a mechanic, to erect certain improvements upon a lot owned by the former. As part of these improvements, plaintiff was to place on the lot a small frame house, which he had previously constructed, and make certain additions thereto ; and for the house plaintiff was to receive a certain sum. Plaintiff complied with his agreement, and defendant gave his note for the amount due : *Held*, that although the Mechanic's Lien Act does not probably afford a lien for the price of a building already constructed, and then sold to be put on a lot, still, as in this case, the building sold was to constitute part of a larger structure, the erection of which was provided for by the agreement ; and as it was used in accordance with the provisions of the agreement, it may be regarded as material furnished for that purpose, and hence within the statute giving a lien. *Ib.*

Query: Whether a flume is a "superstructure" within the Mechanic's Lien Act of 1856. *Head* v. *Fordyce*, 17 Cal. 149.

Under the Act of 1856, the mechanic making the first contract, or first commencing work on a building, has no priority over others commencing work subsequently. The statute places all claimants on an equality, and directs the property to be sold and the proceeds applied to all without preference. *Crowell* v. *Gilmore*, 18 Cal. 370.

This rule of equity would not apply if some mechanics began work before a mortgage was executed by the owner of the property, and some afterward. In such case the first lien-holders would have priority over the mortgagee, while the latter would not. The first class would be paid in full before the mortgage ; then the mortgage, then the last class—each lien-holder having equal claims with the others of his class. *Ib.*

Where machinery is sold for the purpose of being placed in a build-

ing owned by the vendee, with a view of converting it into a manufactory, and is actually used for that purpose, the vendor has a mechanic's lien upon the building for the price. *Donahue* v. *Cromartie*, 21 Cal. 80.

Where the sale of materials, employed in the construction or alteration of a building, is made by a written contract, which is silent as to the purpose for which the articles sold are intended to be used, parole evidence is admissible to show such purpose and to establish thereby a mechanic's lien for the price in favor of the vendor. *Ib.*

It is not necessary to the establishment of a mechanic's lien that the labor or materials shall be employed in the *making* or *erection* of a building. It is sufficient if they are employed in the *alteration* of a building to adapt it to other than the original uses, or to change its form or structure. *Ib.*

Knowledge by a sub-contractor on a building, that there is an agreement in writing between the original contractor and the owner, is sufficient to put him upon inquiry as to the contents of the writing, and charge him with notice thereof. *Bowen* v. *Aubrey*, 22 Cal. 566.

When the owner makes a contract for erecting or doing work upon a building, no sub-contractor or person furnishing labor or materials for the original contract can acquire any rights against the owner in contravention of the terms and conditions of the original contract. *Ib.*

Where an original contractor sub-contracts work upon a building, there is no privity between the sub-contractors and the owner, and the latter cannot be made liable upon the sub-contract. *Ib.*

P and others contracted, in writing, with A, that the latter should erect a building for them, and in the agreement covenanted that he would not incumber or suffer to be incumbered the said building, or lot on which it is erected, by any mechanic's liens, or debts of material labor-men, contractors, sub-contractors or otherwise. A sub-let the brick work to C, who had notice of the existence of the written agreement. *Held*, that C was precluded by the condition in the original contract from acquiring a mechanic's lien upon the building for the work done by him. *Ib.*

A mechanic's lien which describes the property as a "quartz mill being at or near the town of Scottsville, in Amador county, known as Moore's New Quartz Mill," contains a sufficient description to hold the property, where there is no evidence that there was any other quartz

mill at the place so designated as to render it uncertain, which was intended. *Tibbets* v. *Moore*, 23 Cal. 208.

Where the lien describes the land around the building on which a lien is claimed in these words, "with such convenient space of land "around the same as may be required for the convenient use and occu- "pation thereof," the description is also sufficient ; but it is proper for the Court, by its decree, to define the amount and extent of the land connected with the building which is properly subject to the lien ; and if the decree follows the description in the lien, it is doubtful whether the purchaser will acquire any land beyond that covered by the building. *Ib.*

The lien of the material man accrues at the time he has the materials, which he has contracted to furnish ready for delivery at the place where he has agreed to deliver them. *Ib.*

Where the notice of lien states that the materials were furnished to A & Co, when in fact they were furnished to A, this does not invalidate the lien, for the material fact is, whether the materials were furnished for and used in the construction of the building on which the lien is claimed. *Ib.*

When a proceeding is commenced to enforce a lien under the Act of 1862, persons having a lien by mortgage upon the property upon which the lien is sought to be enforced, have no right to intervene. *Van Winkle* v. *Stow*, 23 Cal. 457.

The lien given by the statute to the mechanic or the material man for work and labor performed or materials furnished in the construction of a building, commences and attaches to the property at the time of the commencement of the work or the beginning to furnish the materials. *McCrea* v. *Craig*, 23 Cal. 522.

The reasonable construction in an allegation in a complaint that "plaintiff furnished the materials between the 6th of April, 1862, and the 28th of June, 1862," is that plaintiff commenced furnishing the materials on the 6th of April, and continued furnishing the same from time to time up to June 28th. *Ib.*

Where the contract was made and the materials were furnished while the lien law of 1858 was in force, but the notice of lien was not filed in the Recorder's office until after the lien law of 1862 went into effect : *Held*, that the lien was not lost, but must be enforced in accordance with the provisions of the Act of 1862. *Ib.*

The statute gives one who has entered into a contract in writing to construct a building, a lien on the same as security for the payment of the money becoming due to him according to the terms of the contract, but this lien cannot be enforced for an amount exceeding the sum to become due the contractor. *Dore* v. *Sellers*, 27 Cal. 591.

If a contractor engages to construct a building in consideration—in whole or in part—of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advanced payment cannot become a lien on the building. *Ib.*

The employés of the contractor have no lien on the building as principals, and cannot acquire a lien on the building independent of the one existing on the original contract, which they may enforce to the amount due them, so that the same does not exceed the sum for which the contractor has a lien. *Ib.*

If the contractor has paid the sub-contractor according to the terms of his contract with him, and has not made premature payment, the employees of the sub-contractor are not entitled to demand anything from the contractor or employer. *Ib.*

The employees of the sub-contractor cannot intercept any money due from the employer to the contractor, nor can they enforce the lien of the contractor for any of the same beyond what is due from the contractor to the sub-contractor at the time. *Ib.*

One claiming title to property under a Sheriff's deed, execution on the foreclosure of a mortgage may, in an action brought by him to quiet his title against one who claims under a Sheriff's deed, executed on the foreclosure of a mechanic's lien, in which foreclosure he was not a party, go behind the decree foreclosing the mechanic's lien, and show that no lien in fact existed. *Horn* v. *Jones*, 28 Cal. 194.

The notice of a sub-contractor or material man, given to the employer, claiming a lien under the contract of the contractor, should contain a statement that the amount for which the lien is claimed is due over and above all payments and set-offs. *Davis* v. *Livingston*, 29 Cal. 283.

The sub-contractor or material man, in order to hold a lien for work done for or materials furnished to the contractor, must comply strictly with the provisions of the Act. *Ib.*

If the sub-contractor or material man serves more than one notice

claiming a lien for the same account, the several notices cannot be considered together for the purpose of determining the sufficiency of notice to hold a lien, but each must stand on its own merits, and the lien will not exist unless one of the notices is sufficient in itself to give it. *Ib.*

The notice of a material man claiming a lien for materials furnished the contractor, need not state the particular character of the materials furnished, nor that the materials were used in constructing the building, and if there are several contractors the notice is sufficient if it name one of them. *Ib.*

If joint contractors apportion the job and compensation of constructing a building among themselves by a written contract, to which the employer is not a party, it is no defense in an action by a material man to enforce a lien for materials furnished one joint contractor that when notice was given there was nothing due the contractor furnished, under the apportionment. *Ib.*

The lien of the material man or laborer can be enforced for all sums to be paid the contractors, and not due when the notice given. *Ib.*

The right of a material man to a lien on the land and building, as against the owner for materials furnished the contractor, depends for its existence upon the fact of an indebtedness from the owner to the contractor at the time of or subsequent to the notice. *Blythe* v. *Poultney*, 31 Cal. 233.

If the contractor agrees with the owner to erect a building and furnish the materials for a sum certain, to be paid as the work progresses, with a reservation of twenty-five per cent. until completed, and he abandons the work, having collected all that is due him except the twenty-five per cent., one who has furnished the contractor with materials has no lien as against the owner. *Ib.*

Material men and mechanics who are entitled to a lien on a building, but whose claims are several without any community of interest in the claims themselves, may, under the statue, join as plaintiffs in an equitable action to establish and enforce their liens. *Barber* v. *Reynolds*, 33 Cal. 497.

When a person proceeds to erect a building without making any contract for the erection of the same, material men who furnish the materials and mechanics who labor on the building, in pursuance of section seventeen of the Lien Law of 1862, are entitled to liens without making a written contract, even if the value of the materials furnished or labor performed exceeds two hundred dollars. *Ib.*

GENERAL INDEX.

ERRATA.

Page 42, line 16, for "effects," read "offsets."

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