

## RIGHTS OF A MECHANICS' LIENOR IN MISSOURI WHEN THE IMPROVEMENTS ARE CONTRACTED FOR BY THE LESSEE OR LICENSEE OF THE LAND

When the fee simple owner of land contracts for the erection or repair of improvements upon his land, "every mechanic or other person who shall do or perform any work or labor . . . or furnish any materials . . ." may, upon fulfilling the statutory requirements,<sup>1</sup> obtain a lien upon the entire fee simple interest of the landowner.<sup>2</sup> The purpose of this note is to consider what rights the artisan or materialman acquires when a licensee or lessee of the premises, not the fee simple owner, contracts for the improvements. In such a situation, the prospective lienor's rights will vary.<sup>3</sup> In some instances, he will be able to impress a lien upon the full fee simple interest, just as if he had contracted with the owner of the reversion directly. In other situations, he will be able to establish a lien against only the interest of the lessee or licensee in the premises, and perhaps against the improvements themselves also.

### WHEN THE REVERSIONARY INTEREST MAY BE SUBJECTED TO A LIEN

It may be stated as a general proposition that a contractor<sup>4</sup> can not, merely by proving the erection, alteration or repair of improvements under a contract with the lessee of the land, obtain a lien upon the reversionary interest. This is true regardless of whether the reversioner consented to the erection or alteration of the improvements.<sup>5</sup> Section 429.010 of the Revised Statutes

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1. See MO. REV. STAT. §§ 429.010-429.430 (1949).

2. MO. REV. STAT. § 429.010 (1949). See, generally, Creason, *The Mechanics' Lien*, 1 U. OF K.C.L. REV. (No. 2) 4 (1932); Daus, *Mechanics' Liens in Missouri*, 2 MO. BAR J. (No. 8) 3 (1931); Note, *Some Suggested Changes in the Mechanics' Lien Law of Missouri*, 17 U. OF K.C.L. REV. 130 (1948).

3. For purposes of this discussion, it is assumed that the lienor has otherwise satisfied the statutory requirements so that he would be entitled to a lien upon the full fee simple if he had contracted with the owner of the premises.

4. The term contractor will be used throughout this paper to denote any person who, having rendered services or supplied material, could qualify as a mechanics' lienholder.

5. *Mundet Cork Corp. v. Three Flowers Ice Cream Co.*, 146 S.W.2d 678 (Mo. App. 1940); *Sol Abrahams & Sons Const. Co. v. Osterholm*, 136 S.W.2d 36 (Mo. App. 1940); *Cochran v. Johnston*, 25 S.W.2d 130 (Mo. App. 1930); *Lepage v. Laux*, 211 S.W. 898 (Mo. App. 1919); *Philip Carey Co. v. Keller-*

of Missouri (1949), which is the section giving a lien upon the totality of interest in a piece of land, requires that the contract for improvements have been made with "the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor." Of course, if, upon general principles of agency, the lessee can be found to have been constituted the agent of the lessor for the purpose of making the improvements, the interest of the lessor will be subject to a lien.<sup>6</sup> But the mere relation of landlord and tenant does not create such an agency.<sup>7</sup>

However, it will be noted that Section 429.010 specifically provides that a contract made with the "agent" of the owner will give rise to a lien upon the owner's interest. The Missouri courts have, at least in verbalizing the results reached, attached great significance to this express mention of the word "agent" in the statute. They have pointed out that upon ordinary principles of construction, if a contract were made with one who would, under normal agency principles, be considered an agent of the owner, the courts would deem this in substance a contract with the owner and find the contractor entitled to a lien. For this reason, they have said that the legislature must have intended something more when specifically inserting the word "agent." Hence, the Missouri courts have evolved the doctrine that even though the

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man Contracting Co., 185 Mo. App. 346, 170 S.W. 449 (1914); *Marty v. Hippodrome Amusement Co.*, 173 Mo. App. 707, 160 S.W. 26 (1913).

6. *Ehrhardt Bros. Decorating Co. v. Columbia Candy Co.*, 186 S.W. 1113 (Mo. App. 1916). The necessary agency may arise upon the usual grounds of apparent authority or estoppel. *Dean & Hancock v. O'Bryan*, 290 S.W. 641 (Mo. App. 1927).

In one instance where there was a quite obvious scheme on the part of the owner to avoid paying for the improvements which it wished made, the Missouri Supreme Court quite readily looked through the scheme and held the fee subject to a lien. The defendant, a closely held corporation, owned premises containing an abandoned, partially completed building. The defendant leased the premises for ninety-nine years to another corporation which it had created, the stockholders of the second, meagerly financed corporation owning shares in substantially the same proportion that they did in the original corporation. The second corporation had the building completed and then defaulted on its indebtedness to the contractor. It also forfeited its lease to the parent corporation, the immediate right to the improvements thus reverting to the fee simple owner. It was held that although there was no requirement in the lease that the second corporation complete the building, since the defendant's shareholders, who dominated the second corporation, had intended to achieve erection of the building at the expense of only their limited investment in the second corporation, the second corporation should be held the agent of the first within the meaning of Section 429.010. *Winslow Bros. Co. v. McCully Stone Mason Co.*, 169 Mo. 236, 69 S.W. 304 (1902).

7. See note 5 *supra*.

lessor does not expressly authorize the lessee to erect improvements on the lessor's behalf, if the lessor requires, as a condition of making the lease, that the lessee obligate himself to make improvements of a substantial and permanent nature, the reversioner constitutes the lessee his agent for the purpose of subjecting the reversioner's interest to a mechanics' lien.<sup>8</sup> This rule holds true even though the lessee is not deemed the agent of the lessor for the purpose of subjecting him to personal liability. Obviously, then, the doctrine evolved by the courts has little relation to the ordinary principles of agency. It is a special, limited agency which the court purportedly finds suggested in the statute, although the lessor never intends that the lessee should be constituted his agent nor indulges in any acts which would make third parties believe that he had such an intention. In one of the leading cases, it was said:

Appellant insists that the 'agent' mentioned in the statute must be a person whose agency is sufficient in its scope to bind the owner *personally* for the price of the labor or materials furnished. We are unable to agree with this contention. The purpose of the mechanic's lien act is not to create a *personal* indebtedness not otherwise existing, but its *sole* purpose is to provide a lien under conditions enumerated.<sup>9</sup>

The court alluded to the fact that, if the lessee were, upon ordinary principles, an agent of the lessor so as to make him liable personally, there was no necessity to specifically mention this situation in the statute. It then said:

We, therefore, conclude that the 'agent' mentioned in the statute may be a person with such limited authority as to be unable to bind his principal personally for the work, but who at the same time by an exercise of limited authority given will transmit to the person furnishing the materials a right to a lien on the owner's premises. Such a relationship is very similar to the agency of the contractor who contracts with the owner to do the work.<sup>10</sup>

Whether the legislature intended that such significance be at-

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8. *Allen Estate Ass'n v. Fred Boeke & Son*, 300 Mo. 575, 254 S.W. 858 (1923); *Ward v. Nolde*, 259 Mo. 285, 168 S.W. 596 (1914); *American Sash & Door Co. v. Stein*, 231 Mo. App. 221, 96 S.W.2d 927 (1936); *Concrete Engineering Co. v. Grande Bldg. Co.*, 230 Mo. App. 443, 86 S.W.2d 595 (1935); *Weis & Jennett Marble Co. v. Rossi*, 198 Mo. App. 35, 198 S.W. 424 (1917); *Nicol Heating & Plumbing Co. v. J. B. Neevel & Sons Const. Co.*, 187 Mo. App. 584, 174 S.W. 161 (1915).

9. *Ward v. Nolde*, 259 Mo. 286, 298, 168 S.W. 597, 599 (1914).

10. *Id.* at 298, 168 S.W. at 600.

tached to its use of the word "agent" is quite doubtful. However, the doctrine of the lessee's being able to subject the reversionary interest to a lien when required to improve, although not expressly empowered to act as an agent, has become firmly established in Missouri. This result is in accordance with the tendency of the courts to consider the mechanics' lien law as remedial and to construe it liberally. And the fact that the legislature has taken no steps to alter this construction by the courts, although it has frequently amended other portions of the act, may be deemed an indication of legislative satisfaction with the interpretation placed upon it by the courts.

The usual situation in which the court will find the limited agency relationship necessary for subjecting the fee to a lien occurs when the lessor specifically exacts of the lessee a covenant, contained in the lease, according to which the lessee obligates himself to make improvements of a substantial and permanent nature.<sup>11</sup> The improvement required may be the erection of an entirely new building,<sup>12</sup> or the substantial alteration of, remodeling of, or addition to, an existing structure.<sup>13</sup> But the improvement must be *substantial and permanent*. That language is repeated in every case.

It is not altogether clear what amounts to a "substantial and permanent improvement," however. It is clear, on the one hand, that merely requiring the lessee to keep the premises in the state of repair which existed when they were leased to him will not subject the reversionary interest to a mechanics' lien.<sup>14</sup> And, on the other hand, it is apparent that the construction of a totally new building would equal a substantial and permanent improvement.<sup>15</sup> The difficulty arises when the lessee is required to remodel or alter an existing building in some manner.

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11. See note 8 *supra*.

12. *Allen Estate Ass'n v. Fred Boeke & Son*, 300 Mo. 575, 254 S.W. 858 (1923); *Arthur Morgan Trucking Co. v. Shartzler*, 237 Mo. App. 535, 174 S.W.2d 226 (1943); *Nicol Heating & Plumbing Co. v. J. B. Neevel & Sons Const. Co.*, 187 Mo. App. 584, 174 S.W. 161 (1915).

13. *Ward v. Nolde*, 259 Mo. 286, 168 S.W. 597 (1914); *American Sash & Door Co. v. Stein*, 231 Mo. App. 221, 96 S.W.2d 927 (1936); *Weis & Jennett Marble Co. v. Rossi*, 198 Mo. App. 35, 198 S.W. 424 (1917).

14. *McGuinn v. Federated Mines & Milling Co.*, 160 Mo. App. 28, 141 S.W. 467 (1911).

15. There may, of course, be instances in which a totally new structure of a very temporary nature may be erected, but the normal building will be one of a permanent nature and, of course, a substantial improvement.

The earlier decisions of the courts of appeals indicated that the improvement had to be of such a nature that it would be of benefit to the lessor at the expiration of the lease, when he would regain control of the premises.<sup>16</sup> It was thought that, if the improvements would be so deteriorated at the termination of the lease that the market value of the premises when they reverted to the lessor would not be enhanced by virtue of the installation of the improvements, they were to be deemed for the benefit of the lessee only and it would be unjust to hold the property of the lessor accountable for their cost. This premise was expressed in *Dierks & Sons Lumber Co. v. Morris*,<sup>17</sup> where the defendant had leased a three story building for ninety-nine years. Although the lessee had covenanted to expend at least \$5000 for additions and alterations to the building, it was pointed out that the effect of these improvements would probably be gone, through physical decay, before the end of the ninety-nine year lease. The Kansas City Court of Appeals said:

. . . in order to make such covenant constitute an agency between the lessor and lessee we are necessarily bound to look at the facts to determine whether there was an agency or not. If on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence . . . it can be seen that the improvement is really for the benefit of the lessor and that he is having the work done through the lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But if the facts do not show this, it would seem untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create a relation of agency between the tenant and the landlord.<sup>18</sup>

However, a year later the Missouri Supreme Court, without very much discussion, seemed to adopt a more liberal attitude in deciding what was a substantial and permanent improvement.<sup>19</sup> It had no difficulty finding that the making of \$20,000 worth of alterations upon a five story building under a twenty year lease was a substantial and permanent change. Although this later Supreme Court case is distinguishable from the *Dierks Lumber*

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16. *Dierks & Sons Lumber Co. v. Morris*, 170 Mo. App. 212, 156 S.W. 75 (1913); *Pickel Marble & Granite Co. v. The Apollo Turkish Bath Co.*, 85 Mo. App. 313 (1900). *But see Curtin-Clark Hdw. Co. v. Churchill*, 126 Mo. App. 462, 104 S.W. 476 (1907).

17. 170 Mo. App. 212, 156 S.W. 75 (1913).

18. *Id.* at 219, 156 S.W. at 77.

19. *Ward v. Nolde*, 259 Mo. 236, 168 S.W. 597 (1914).

Co. case in that the lease was for a shorter period and the alterations more extensive, the ease with which the Supreme Court found the improvements to satisfy the test indicates that the court would not be very strict in requiring the plaintiff to show that the improvements satisfied the definition.<sup>20</sup>

Then, in 1923, the Missouri Supreme Court clearly indicated that its definition of a substantial improvement was something which amounted to more than a mere repair by the lessee to keep the premises in the condition that existed when he acquired possession of the property, and that by permanent was meant merely that the improvements have an effect that would continue for some appreciable period of time, although not necessarily beyond the period of the lease.<sup>21</sup> Its statement was not a mere dictum because the lease in that case was to run for ninety-nine years. The court said that if the improvements met the above definition of substantial and permanent, there was in effect a conclusive presumption of a benefit to the reversioner:

These improvements having been made under the supervision of the lessor with a view of improving the property . . . it is immaterial as a matter of fact whether the owner was ultimately benefited by the transaction. . . . it is unnecessary to discuss the contention as to the effect of the improvements on the property at the end of the lease; or whether or not despite the improvements the lessor is now receiving a return from the property.<sup>22</sup>

One of the factors that the court had in mind in holding that it was immaterial whether the improvements would survive the ninety-nine year lease involved was that the lease might be forfeited considerably sooner, whereupon the reversioner would have the immediate benefit of the improvements.

Earlier, the Kansas City Court of Appeals had used similar language indicating an almost conclusive presumption of substantial benefit to the reversioner.<sup>23</sup> It was answering a contention that the mere conversion of the property from adaptability

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20. Following the *Ward* decision, the St. Louis Court of Appeals found that \$110 worth of marble wainscoting required by the lessor for decorating a waiting room was a substantial improvement. *Weis & Jennett Marble Co. v. Rossi*, 198 Mo. App. 35, 198 S.W. 424 (1917).

21. *Allen Estate Ass'n v. Fred Boeke & Son*, 300 Mo. 575, 254 S.W. 858 (1923).

22. *Id.* at 591, 254 S.W. at 862.

23. *Curtin-Clark Hdw. Co. v. Churchill*, 126 Mo. App. 462, 104 S.W. 476 (1907).

for one use to another did not necessarily indicate an increase in the market value of the property, and that hence the contractor should be required to prove that the value of the premises had been increased by their alteration. That court said:

. . . the right of the materialmen and laborers to liens . . . is not affected by the fact that the owner has derived no pecuniary benefit from the improvement. . . . An improvement must be held to be a betterment when it places the premises in the condition the owner would have them.<sup>24</sup>

Thus, the rule today seems to be that when the lessor requires an express promise on the part of the lessee to do more than keep the premises in ordinary repair the type of improvement necessary to subject the reversionary interest to a mechanics' lien will be found to have been required. This rule is founded principally upon the theory that if the lessor found it desirable to exact a covenant to improve from his tenant, he must have deemed such improvements of benefit to himself. And since the true basis for the doctrine of implied agency seems to be a feeling on the part of the courts that the landlord should not be able to derive a benefit from improvements which he compels to be placed upon his property without at least his property being liable therefor (despite any verbalizations the court may make as to the significance of the word "agent" in the statute), this rule seems quite sound.

As was indicated above, the usual case in which an implied agency is found is that in which the lessor exacts a promise from the lessee that he will improve the premises. However, the Missouri courts have extended this doctrine beyond the instances of express compulsion. If the court should find that the tenant was in effect required by the reversioner to improve, this finding has the same effect as an express compulsion upon the tenant. This situation arises where the premises are leased for a specified purpose only, and this purpose is one for which the premises are not suited in their existing condition. The reversioner is then said to compel the tenant to make the changes, for his only alternative would be to forfeit his lease.

This extension of the doctrine was first set forth in a case de-

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24. *Id.* at 470, 104 S.W. at 478. *Accord:* *American Sash & Door Co. v. Stein*, 231 Mo. App. 221, 96 S.W.2d 927 (1936).

cided by the Kansas City Court of Appeals.<sup>25</sup> The defendant had leased an old hotel for ten years. Although no improvements were specifically required of the lessee, it was stipulated in the lease that the premises were to be used as a theater only, and permission was given the tenant to make such alterations as might be necessary to make the premises suitable for this purpose. The lessee made alterations, such as the installation of a box office, at a cost of \$20,000. In holding the reversionary interest of the lessor liable for these improvements, the court said:

From the record before us it appears that the lessee was to use the premises for theater purposes alone. In their condition they were unsuited for such use and when converted into a theater they could be used for nothing else. In effect the lessor burdened the lessee with the obligation to make and pay for the necessary alterations. That it intended to derive a substantial benefit therefrom is evidenced by the fact that instead of requiring, at the end of the tenancy, the restoration of the premises in the condition they were in when leased, the improvements were to pass to the landlord. It was to receive a theater for a hotel. Evidently the metamorphosis accomplished at such great expense was for its benefit as well as that of the termor.<sup>26</sup>

This doctrine was adopted by the Missouri Supreme Court in a case decided in 1934 involving similar facts.<sup>27</sup> That court said that despite the fact that a lease of an auto repair shop contained no covenant for improvements, the fact that it did say "the building to be used for the purpose of a picture show house" and "the lessee has permission to make any changes his business requires" created a requirement of improvements by necessary implication. From this point on, the rule seems clear that when the premises are leased for a specified purpose and they are not in a condition to be used for that purpose so that substantial remodeling is necessarily imposed upon the lessee if he is to make the proper use of the leased property, the case will be treated in the same manner as one in which a covenant to improve has been exacted by the lessor.<sup>28</sup>

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25. *Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S.W. 405 (1905).

26. *Id.* at 584, 90 S.W. at 406.

27. *Masterson v. Roberts*, 336 Mo. 158, 78 S.W.2d 856 (1934).

28. The earlier courts of appeals cases of *Martin-Welch Hdw. Co. v. Moor*, 16 S.W.2d 667 (Mo. App. 1929); and *Marty v. Hippodrome Amusement Co.*, 173 Mo. App. 707, 160 S.W. 26 (1913) appear to have been overruled by the *Masterson* decision. In the latter case an old car barn had been



This extension of the doctrine of implied agency has merit, if the original basis of the implied agency to encumber (though not to render personally liable) is sound. If this basis be that the reversioner should not be permitted to benefit, without having his land subject to liability, from improvements which he has compelled another to make, there is as much reason for subjecting his interest to a lien when the improvements are "impliedly" required as when they are expressly so. But this doctrine is limited. The rule today remains that unless the reversioner somehow compels the tenant to make improvements, the lessor's interest will not be held. Thus if there is no covenant to improve and the premises are in a condition generally suitable for the business of the lessee (as a theater building leased for theater purposes), the mere fact that the premises may be somewhat run down and rehabilitation of the premises desirable to make them *more* suitable will not create an implied agency. If the lessee could use the premises in their existing condition, although they would not be very satisfactory without some alterations, there is no compulsion upon him to make the improvements. Contractors have contended that when the lease provided that such permitted improvements were to revert at the end of the term and that they should be made in accordance with specifications approved by the lessor, he was obviously intending to benefit from them and accordingly his interest should be rendered liable. However, the Missouri courts have rejected this contention, holding that such cases involved no more than a mere permission by the reversioner to make improvements if the lessee so desired.<sup>29</sup>

The amount for which the lien attaches will, of course, be only the cost of those improvements which the lessor either impliedly

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rented to the lessee for five years "for amusement purposes only." And although the the lease contained no promise on the part of the lessee to improve, it did state "the lessee *intends* to remodel and improve said premises at his own expense at an estimated cost of eight thousand dollars [*Italics added*]." Nevertheless, the Kansas City Court of Appeals held that there was no evidence that the lessor had constituted the lessee his agent for the purpose of burdening the reversion with a mechanics' lien.

29. *Sol Abrahams & Sons v. Osterholm*, 136 S.W.2d 86 (Mo. App. 1940); *Philip Carey Co. v. Kellerman Contracting Co.*, 185 Mo. App. 346, 170 S.W. 449 (1914). In the latter case the reversioner had agreed to reimburse the lessee for one-half the cost of the improvements made, if the lessee chose to make them. It was held that although the contractor might be subrogated to the claim of the tenant against his lessor for one-half of the cost, this fact did not create a lien in favor of the contractor. See also *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 184 Fed. 199 (8th Cir. 1910).

or expressly required. Thus where certain specified improvements which would cost "about \$20,000" were installed at a cost of \$22,000, but the lessee also contracted for "extras" not specified in the lease, notably a sprinkler system costing \$7000, the amount of the lien upon the reversion was set at \$22,000.<sup>30</sup> The important consideration is not the amount of expenditure required in the lease (if a figure is specified), but rather whether the improvement which forms the basis of the contractor's claim is one which was required in the lease. Thus where the lessor had required a number of alterations upon the property, but the only improvement placed thereon by the plaintiff seeking a lien was a heating plant, which was not among the required improvements, the plaintiff was held not entitled to a lien.<sup>31</sup> In those instances where the improvements were not expressly required but implied from the circumstances of the case, there has not been much indication of exactly what improvements may form the basis of the lien. Presumably, the cost of any improvements deemed necessary to make the premises suitable for the tenant's particular use might be included in the amount of the lien.<sup>32</sup>

Lessors have, at times, attempted to prevent the application of a lien to their freehold by spelling out in the lease that the lessee was not to be considered as having any authority to contract on behalf of the lessor. That these efforts have been unsuccessful,<sup>33</sup> illustrates the unusual character of this agency relationship, for the lessor, despite his express declarations to the contrary, finds himself forced to accept the tenant as his agent for the limited purpose of subjecting the reversion to a lien. Since the lessor is held even though he does nothing to give third parties the impression that the lessee is authorized to act for him, these results

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30. *Word v. Nolde*, 259 Mo. 285, 168 S.W. 596 (1914).

31. *Powell v. Reidinger*, 234 S.W. 850 (Mo. App. 1921).

32. *Cf. Dougherty-Moss Lumber Co. v. Churchill*, 114 Mo. App. 578, 90 S.W. 405 (1905).

33. *Allen Estate Ass'n v. Fred Boeke & Son*, 300 Mo. 575, 254 S.W. 858 (1923); *Concrete Engineering Co. v. Grande Bldg. Co.*, 230 Mo. App. 443, 86 S.W.2d 595 (1935). There may be some basis for saying that in a close case in which the court is undecided whether the requisites for finding an agency are present, the disclaimer clause may be of some benefit to the reversioner. See *Marty v. Hippodrome Amusement Co.*, 173 Mo. App. 707, 160 S.W. 26 (1913); *Dierks & Sons Lumber Co. v. Morris*, 170 Mo. App. 212, 156 S.W. 75 (1913). In each of these cases, where the requisites of an agency might have been found but were not, a disclaimer clause was present. However, the non-existence of the lien was not expressly placed upon this ground.

cannot be justified on the usual principles of apparent authority. Moreover, to a contention that when the lessor had duly recorded a lease containing such a disclaimer provision, the contractor had notice of it and acquiesced in the provision, the Kansas City Court of Appeals replied that the liens are not a consensual matter—they are purely statutory.<sup>34</sup>

It should be pointed out that in order to bind the interest of the lessor under the agency doctrine engrafted onto Section 429.010, he need not be the fee simple owner of the premises, although that will, of course, be the usual case. As was indicated in *Seaman v. Paddock*,<sup>35</sup> the interest against which Section 429.010 creates a lien is that of the "owner or proprietor." And a later section provides that any person for whose immediate benefit any building or other improvement may be made should be deemed the "owner or proprietor" for the purposes of the mechanics' lien statute.<sup>36</sup> In those situations where an agency relationship is found, the erection of the improvement will be said to have been for the immediate benefit of the reversioner. Thus the reversionary interest that is bound may be a life estate,<sup>37</sup> or one for years.<sup>38</sup> Of course, in the above situations if the holder of the ultimate reversionary interest in fee simple does not require the improvements, his interest will not be held.<sup>39</sup> But if he does require the original lessee of the premises to erect improvements, and that lessee then sub-lets to another who executes a similar covenant to the lessee, so that it is the sub-lessee who actually contracts for the improvements, this fact will not insulate the fee simple interest from liability.<sup>40</sup> The reversionary interest is being benefited

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34. *Concrete Engineering Co. v. Grande Bldg. Co.*, 230 Mo. App. 443, 86 S.W.2d 595 (1935). Cf. *Center Creek Mining Co. v. Coyne*, 164 Mo. App. 492, 147 S.W. 148 (1912).

35. 51 Mo. App. 465 (1892).

36. MO. REV. STAT. § 429.150 (1949). Cf. *Rogers Foundry Co. v. Squires*, 221 Mo. App. 17, 297 S.W. 470 (1927).

37. *Masterson v. Roberts*, 336 Mo. 158, 78 S.W.2d 856 (1934).

38. *Arthur Morgan Trucking Co. v. Shartzter*, 237 Mo. App. 535, 174 S.W.2d 226 (1943). MO. REV. STAT. § 429.070 (2) (1949) employs language similar to that of § 429.010 in saying that a contract by the agent of a lessee will subject the lessee's interest to a lien. Presumably a requirement by the lessee that his sub-lessee substantially improve might be held to constitute the sub-lessee an agent of the lessee under the same theory as that applied to § 429.010. See *Miners Lumber Co. v. Miller*, 117 S.W.2d 711 (Mo. App. 1938).

39. *Masterson v. Roberts*, 336 Mo. 158, 78 S.W.2d 856 (1934).

40. *Arthur Morgan Trucking Co. v. Shartzter*, 237 Mo. App. 535, 174 S.W.2d 226 (1943).

in such a situation, for the lessee has merely delegated to another the duty of contracting for the required improvements.<sup>41</sup>

#### RIGHTS OF THE CONTRACTOR WHEN HE IS UNABLE TO SUBJECT THE REVERSIONARY INTEREST TO A LIEN

Even though the contractor may be unable to subject the entire fee simple interest of the lessor to a mechanics' lien, he is not remediless when he contracts with the lessee for improvements. Section 429.070 of the Missouri Revised Statutes (1949) gives other remedies to the prospective lienor.<sup>42</sup> This section provides that when the contractor places a building or other improvement upon the land at the request of the lessee, the contractor may have a lien upon the improvement itself and the lessee's interest in the premises. Of course, these rights will never be as valuable as a claim upon the entire fee simple interest in both the land and the improvements thereon, particularly because the lessee's interest in the premises may be worth little. The lessee will frequently be in default in his rent to the lessor, and even if he is not in arrears, if he merely pays from month to month, the contractor will have a claim only to the unexpired part of a month's occupation of the premises. Nevertheless, the lien of the contractor upon those improvements which he has installed may be quite valuable.

Prior to an amendment to the mechanics' lien law in 1901, such rights were accorded the contractor only if the person with whom he contracted had a leasehold interest, as distinguished from a mere license to use the premises. A good deal of litigation formerly arose to determine whether the contracting party was a lessee or licensee, the problem being particularly acute when the interest which the contracting party acquired was one for

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41. An additional point, which is perhaps self-evident, is that there must be a tenurial relationship between the owner of the premises and the person who contracts for the improvement if there is to be any possibility of a lien upon the fee simple. In *Badger Lumber Co. v. Stepp*, 157 Mo. 366, 57 S.W. 1059 (1900), the defendant, the owner of a lot and two story building thereon, granted a lodge the privilege of adding a third story to her building which it might use as a meeting place. It was held that the lodge was the owner in fee simple of the third story, and hence there was no possible basis for subjecting the independent fee simple interest of the defendant to a lien for the lodge's debt incurred in erecting the third floor.

42. For a striking instance of how other remedies of the mechanics' lien act may help the contractor when he is unable to perfect his lien against the fee, see *Philip Gruner & Bros. Lumber Co. v. Jones*, 71 Mo. App. 110 (1897).

mining purposes.<sup>43</sup> That difficulty no longer exists, for the statute now uses such terms as "property furnished or placed on licensed or leased lots" and "under or by virtue of any contract or account with the owner or proprietor of the license or lease."<sup>44</sup> Hence, it appears today that, if the party contracting for the improvements has any sort of right to the use of the premises, he is in a position to subject the improvements installed and his own interest in the land to a mechanics' lien.<sup>45</sup>

An even more important change in the ability of the contractor to secure a mechanics' lien upon the improvements installed and the tenant's interest in the premises was made in 1911. Prior to that time, the Missouri courts had interpreted the mechanics' lien act as giving a lien upon improvements installed by the lessee and his leasehold interest only if the improvements became realty as between the landlord and tenant. Although the statute prior to 1911 did not by its wording expressly dictate that result, the courts felt this was its meaning, and much litigation arose in determining whether the improvements became realty or remained personalty as between the lessor and lessee.<sup>46</sup> This doctrine frequently meant that the contractor would be entitled to no lien of any kind, because there is a definite tendency to find that a particular improvement remains personalty when the issue arises between the landlord and his tenant. For example, whenever the materials installed were found to be "trade fixtures," the improvement was deemed personalty and hence there was no lien.<sup>47</sup>

43. See, for example, *Rogers v. C.C.C. Mining Co.*, 75 Mo. App. 114 (1898); *Buchanan v. Cole*, 57 Mo. App. 11 (1894).

44. MO. REV. STAT. § 429.070 (1949).

45. *Joplin Supply Co. v. West*, 149 Mo. App. 78, 130 S.W. 156 (1910). As early as 1892, it had been determined that a tenancy from month to month was a sufficient interest in the lessee to give the contractor a claim upon the improvements installed. *Deatherage v. Sheidley*, 50 Mo. App. 490. The early holding in *Squires v. Fithian's Adm'r*, 27 Mo. 134 (1858), that a contract with a tenant at will would not entitle the contractor to a lien upon the improvements installed seems to have been changed by the language of the statute. A tenant at will would seem to be the holder of at least a revocable license to be upon the premises.

46. See, for example, *Springfield Foundry & Machine Co. v. Cole*, 130 Mo. 1, 31 S.W. 922 (1895); *Richardson v. Koch*, 81 Mo. 264 (1883); *Hæussler v. Missouri Glass Co.*, 52 Mo. 452 (1873); *Ottumwa Iron Works v. Muir*, 126 Mo. App. 582, 105 S.W. 29 (1907). At a very early date there was a special mechanics' lien law for St. Louis County which did allow a lien upon improvements which remained personalty between the lessor and lessee. *Koenig v. Mueller*, 39 Mo. 165 (1866).

47. *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 184 Fed. 199 (8th Cir. 1910); *Collins & Holliday v. Mott*, 45 Mo. 100 (1869); *Carroll v. Shooting the Chutes Co.*, 85 Mo. App. 563 (1900). The early attitude of

The main reason given by the courts for this result was that they did not believe the legislature thought it necessary to give a contractor a lien upon improvements which remained personalty. They believed that those security devices available to persons asserting interests in chattels could give ample protection to the lienor.<sup>48</sup>

However, the legislature amended the mechanics' lien act in 1911 to make it quite clear that the lien might attach regardless of whether as between landlord against tenant the improvement remained personalty. As the statute now reads, no other holding is possible. After spelling out a list of things upon which liens may be obtained, such as boilers and pumps, the statute says, "and other personal property . . . furnished or placed on licensed or leased lots shall, regardless of whether or not the owner of the license or lease has the right thereunder to remove the same or other personal property from such licensed or leased premises during or at the end of the term thereof. . . ."<sup>49</sup> Hence, since the passage of this amendment, the Missouri courts have held that property which, either by express agreement or implication remains personalty as between the lessor and lessee is nevertheless lienable.<sup>50</sup> Of course, this does not obviate the necessity that the improvement installed be sufficiently identified with the freehold so as to become lienable within the requirements of the mechanics' lien law.<sup>51</sup> That problem is common to all mechanics' lien cases and beyond the scope of this note. It may briefly be stated, however, that whereas in the test between landlord and tenant all presumptions and doubts are resolved in favor of the material's remaining personalty, quite the opposite is true in the mechanics' lien cases, so that almost anything identi-

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the courts is illustrated by the following quotation, ". . . our law holds real estate, as property, in the highest sense. It operates upon that which is permanent, and wastes no energy on the floating and precarious tenure of chattel interests. . . . It has uniformly been held that the building, erection, or improvement, in order to be reached by the lien, must have become part of the real estate, unless a different interest [sic] is clearly expressed in the statute." *McMahon v. Vickery*, 4 Mo. App. 225, 229 (1877).

48. See particularly the statement in *John O'Brien Boiler Works Co. v. Haydock*, 59 Mo. App. 653 (1894).

49. Mo. REV. STAT. § 429.070 (1) (1949).

50. *Forest Lumber Co. v. Osceola Lead & Zinc Mining Co.*, 222 S.W. 398 (Mo. 1920); *Raithel v. Hamilton-Schmidt Surgical Co.*, 48 S.W.2d 79 (Mo. App. 1932); *Landreth Machinery Co. v. Roney*, 185 Mo. App. 474, 171 S.W. 681 (1914).

51. See, for example, *Woodling v. Westport Hotel Operating Co.*, 227 Mo. App. 1231, 63 S.W.2d 207 (1933).

fied with the realty is lienable. Thus it will be seen that the above amendment has greatly extended the relief available to mechanics and material men who contract with the lessee only.

The mechanics' lien act as enacted by the legislature formerly provided that if the lessee contracted for repairs or alterations upon a building which had previously been placed upon the land by the lessor and was owned by him, the contractor might have a lien upon the owner's fee simple interest in the building (although not the land), even though the lessor had not required the improvement so as to bring the case within the doctrine previously discussed. It did not matter whether the lessee had permission to make the repair nor how extensive it was. Thus if the lessee decided, upon his own initiative, to make repairs upon a building owned by the lessor, the contractor secured a lien upon the entire building.<sup>52</sup> In 1934 the Missouri Supreme Court held this part of the mechanics' lien statute unconstitutional.<sup>53</sup> It declared that to subject a reversioner's interest in a building to a lien merely because the lessee had decided to "reconstruct, alter, or repair" the building, though not required to do so by the lessor, nor even permitted to do so, was to deprive the reversioner of his property without due process of law. Although the facts of the case in which the unconstitutionality was declared were slightly unusual in that the fee simple interest in the building was really owned by remaindermen, the life tenant having leased to the lessee who contracted for the improvements, the court used broad language saying that entire portion of the statute was unconstitutional. The case has been treated as completely eliminating that portion of the statute giving a lien upon the entire building without regard to whether the lessor gave his permission to repair, although the case might be limited on its facts.<sup>54</sup> Thus the contractor no longer can, by virtue of merely doing some work upon a building, or installing an improvement therein, acquire a lien upon the entire building if it is owned by the lessor, not the lessee. Although the compilers of the Missouri Revised Statutes of 1939 left the wording of the act stand as it

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52. *Martin-Welch Hdw. Co. v. Moor*, 16 S.W.2d 667 (Mo. App. 1929), *cert. denied*, *State ex rel. Harrington & May v. Trimble*, 326 Mo. 623, 31 S.W.2d 783 (1930).

53. *Masterson v. Roberts*, 336 Mo. 158, 78 S.W.2d 856 (1934).

54. *Mundet Cork Corp. v. Three Flowers Ice Cream Co.*, 146 S.W.2d 678 (Mo. App. 1940).

was enacted by the legislature, the compilers of the 1949 Statutes altered the wording of the objectionable sections to conform to the Supreme Court's decision. Whereas the act originally read, "Every mechanic . . . who shall *do or perform any work or labor upon* or furnish, place, or *repair* any building . . . fixture or other personal property" shall have a lien thereon,<sup>55</sup> the act now reads "Every mechanic . . . who shall *erect or construct* any building . . . fixture . . . or other personal property . . . [Italics added]."<sup>56</sup> Thus the fact that the lienor has a claim to only those improvements which he himself places upon the land is emphasized by the changed wording. It indicates that the revisors also understood the decision to eliminate the entire portion pertaining to liens upon the whole building resulting from mere repair, without regard to whether the reversioner gave his permission to repair.

Of course, it is still specifically provided that if the contractor places such materials as an "engine, pump, boiler, belting, pulley, shafting, machinery" within a building owned by the lessor, the contractor has a lien upon such material and may have it sold and removed. Moreover, if the building itself is an entirely new one erected by the lessee, the contractor may then have a lien upon the entire building. The decisions upon that point<sup>57</sup> have not been overruled. And the contractor may have a claim upon the leasehold in both the building and ground in any event, whatever they may be worth to him.<sup>58</sup>

In addition, if the building is one owned by the lessee, a contractor who does not participate in the original construction, but merely repairs or otherwise does work upon it later will nevertheless be entitled to a lien upon the whole building plus the leasehold interest in the ground. Section 429.070 (3) of the statute specifically retains the "repair" or "perform any work or labor upon" language in saying that the contractor may have a claim against the property of the lessee himself when he has contracted with him. Thus where the contractor installed a sprinkler system in a building standing upon leased ground but

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55. MO. REV. STAT. § 3550 (1939).

56. MO. REV. STAT. § 429.070 (1949).

57. *Allen v. Sales*, 56 Mo. 28 (1874); *Julius Seidel Lumber Co. v. Hydraulic Press Brick Co.*, 288 S.W. 979 (Mo. App. 1926); *House Wrecking, Salvage & Lumber Co. v. Gartrell*, 204 S.W. 52 (Mo. App. 1918).

58. *Miners Lumber Co. v. Miller*, 117 S.W.2d 711 (Mo. App. 1938).



owned by the lessee, he was allowed a lien upon the lessee's total interest in the building.<sup>59</sup>

Nevertheless, despite those possible situations in which the contractor may be almost as well off as before the decision in *Masterson v. Roberts*, there are other situations in which he will be left with rights which are almost valueless. Thus when the improvement which he installs is a fixture such as machinery which can be easily removed in a resalable condition, he still has a valuable right, but if he merely repairs an existing building, performing such acts as painting it, refitting its doors, and the like, he has no improvements which he can remove and sell. Similarly, even though he installs something which is an entity in itself (as distinguished from paint which is spread all over the building) it may be so integrated with the lessor's building that the court will not permit it to be separated therefrom. Thus in one instance where the lessee had built an addition onto a pre-existing building owned by the lessor, the removal of this addition by the contractor was enjoined since it would have caused irreparable injury to the freehold by leaving one side of the lessor's building standing completely open.<sup>60</sup> There has been very little discussion or decision upon the point of what is a removable improvement in these situations. Since the statute gives the right to sell and remove in absolute terms, we may infer that the lessor would have to rely upon equitable principles to prevent removal and thus demonstrate that irreparable injury, not mere injury, to the freehold would occur before removal would be prevented. The courts would also be inclined to favor the contractor since he has no other adequate remedy, and would let him remove if at all possible, making him liable for damages for any injury he may inflict when removing. Nevertheless, there will be instances, such as the one cited above, in which removal will be prevented, and in those instances the contractor will have no more than a claim to the leasehold interest of the lessor.

As previously pointed out, this claim of the lienor to the leasehold or license interest will seldom be of much value. Usually, the lessee will not have paid the rent very far in advance and frequently will have forfeited the lease for non-payment of rent.

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59. *Automatic Sprinkler Co. v. Stephens*, 306 Mo. 518, 267 S.W. 888 (1924).

60. *Orear v. Dierks Lumber Co.*, 188 Mo. App. 729, 176 S.W. 467 (1915). Cf. *Seidel v. Bloeser*, 77 Mo. App. 172 (1898).

Although even in this latter contingency the contractor is allowed to pay the back rent and take over the lease for the remainder of the term, the contractor will ordinarily have no desire to become a lessee of the premises, and the right will be of no value unless he can find someone willing to pay him for the privilege of becoming an assignee of the lease.

It should also be pointed out that the fact that the lessee has defaulted upon the rent due makes the rights of the contractor less valuable even when he is able to sell the improvements to satisfy his lien. The statute provides that the lessor is entitled to payment of any claim for rent, which accrues until removal of the improvements from the premises, out of the proceeds of the sale of the improvements.<sup>61</sup> Although the statute does not specifically provide that the lessor's claim for rent has priority over that of the contractor for the cost of the improvements, it has been interpreted as having that meaning.<sup>62</sup>

#### CONCLUSION

In some instances, the mechanics' lien statute will provide ample security to the contractor who installs improvements under an agreement with the lessee. He may be able to assert a lien upon the entire fee simple interest, in which case his remedy is quite complete. In other cases, although unable to subject the fee simple to a lien, he will have the right to remove substantial improvements, the sale of which may completely satisfy his claim. In any event, he will be entitled to the interest of the lessee or licensee in the premises, but this right will frequently be of little value to him.

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61. MO. REV. STAT. § 429.070 (4) (1949).

62. *Rogers Foundry Co. v. Squires*, 221 Mo. App. 17, 297 S.W. 470 (1927).