

VOLUME NO. 38

OPINION NO. 114

CLERK & RECORDER - Duty to file liens;
LIENS - Common law liens;
LIENS - Duty of Clerk & Recorder to file;
MONTANA CODE ANNOTATED - Section 7-4-2617.

HELD: County Clerk and Recorders may refuse to accept for filing written instruments purporting to be liens when the writing does not qualify as a statutory lien or lien created by contract.

21 November 1980

Harold F. Hanser, Esq.
Yellowstone County Attorney
Yellowstone County Courthouse
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion on the following question:

Must a County Clerk and Recorder accept for filing written instruments purporting to be liens when the same do not qualify for filing as a statutory lien under Montana law?

Specifically, your inquiry focuses upon the duty of a County Clerk and Recorder to record or file certain documents that are self-styled "common law liens."

The purpose of recording a lien is to provide notice of its existence, and in some cases to establish priority with other liens. In Montana the authority to create liens is established by statute.

Section 71-3-102, MCA, provides:

How Liens Created. A lien is created:

- 1) by contract of the parties; or
- 2) by operation of law.

The duties of a Clerk and Recorder for purposes of this opinion are provided in section 7-4-2617, MCA:

(1) When any instrument, paper, or notice authorized by law to be recorded is deposited for record in the office of the county clerk, as ex officio recorder, and accompanied by the required fee, he must endorse upon the same the time it was received, noting the year, month, day, hour, and minute of its reception, and the reception of the instrument must be immediately entered in the county clerk and recorder's reception book. (Emphasis added.)

In determining the duty imposed under the above-quoted language, the use of the phrase "authorized by law to be recorded" becomes significant. Obviously, constitutional and statutory enactments are encompassed within the meaning of the phrase. Certainly, pronouncements of the Montana and United States Supreme Courts are included. And, Montana does recognize the existence of common law, but only insofar as it does not conflict with specific statutory enactments. § 1-1-108, MCA.

Numerous statutory liens are authorized by the Montana Codes. See, e.g., Title 71, ch. 3, MCA. The Montana statutes have provided for liens that normally would have arisen under common law. However, your question concerns whether the Clerk and Recorder is required to record non-statutory liens.

I have found no authority in Montana that authorizes the filing of a common law lien. In states that have specifically recognized "common law" liens, it is generally held that the lien may attach only to personal property and the person claiming the lien must have possession of the property. See 51 Am. Jur. 2nd, LIENS, §§ 20, 21. The most essential attribute is possession of the property. Ahlswede v. Schoneveld, 87 Nev. 449, 488 P.2d 908 (1971). It is the possession of the property that gives rise to the lien, and serves as "notice to the world" of the potential existence of the lien. Therefore, no purpose is served by filing and no requirement exists to record the lien. Even if Montana does recognize the validity of a common law lien such liens are not "authorized by law to be recorded."

THEREFORE, IT IS MY OPINION:

County Clerk and Recorders may refuse to accept for filing written instruments purporting to be liens when the writing does not qualify as a statutory lien or lien created by contract.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 38

OPINION NO. 115

STATE AUDITOR - Duty to accept writ of attachment;
ATTACHMENT - Common law writ, validity;
ATTACHMENT - Judicial authorization required.