

Materialmen's Liens - Statutory Bonds - Statutory Construction

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Leonard Bessman, *Materialmen's Liens - Statutory Bonds - Statutory Construction*, 20 Marq. L. Rev. 161 (1936).
Available at: <http://scholarship.law.marquette.edu/mulr/vol20/iss3/8>

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Industrial Commission, 205 Wis. 550, 238 N.W. 368 (1931). In that case the deceased was permitted by his employer to make a special trip to bring his wife home from a vacation visit. Incidentally he was expecting to call upon some of his employer's customers. The court felt that the personal interest was the primary reason for the trip. In the principal case the court refers to the *Barrager* case as decisive in the case before it. See also *Githens v. Industrial Commission* (Wis. 1936), 265 N.W. 662, a compensation case, and *Fawcett v. Gallery* (Wis. 1936), 265 N.W. 667, a third party liability case.

THOMAS J. BERGEN.

MATERIALMEN'S LIENS—STATUTORY BONDS—STATUTORY CONSTRUCTION.—The plaintiff sold iron posts to the Badger Company. The latter shipped them to the principal contractor who had entered into a contract with the state to build a bridge. The principal contractor, unaware of plaintiff's claim, paid the Badger Company which company later went into receivership. Dividends from that proceeding not having been declared, the plaintiff brought this action against the principal contractor and his surety, obligors on a bond required by statute. The trial court ordered judgment for the plaintiff, concluding it to be the duty of the defendants to have ascertained the plaintiff's status. On appeal, *held*, judgment reversed; a principal contractor doing public work is not liable to a subcontractor of a subcontractor. Subsequent liberalizing of the lien law to include remote claimants did not extend the remedy afforded by the Public Works Act, *Gilson Bros. Co. v. Worden-Allen Co.*, (Wis. 1936) 265 N.W. 217.

Until amendment the mechanic's lien law expressly denied the right of a lien to a subcontractor of a subcontractor. See WIS. REV. STAT. (1878) § 3315. In this exclusion was seen a recognition that building construction would be hampered by permitting a multiplication of liens on the part of distant claimants. *Dalman v. Clasen*, 116 Wis. 113, 92 N.W. 566 (1902). The Public Works Act making mandatory a bond to insure compensation to materialmen and laborers participating in public contract projects was enacted in 1899 as a substitute for the lien accessible on private undertakings. See WIS. STAT. (1935) § 289.16. Its protection is available to "parties in interest." By judicial interpretation claimants have been restricted to the kind or nature of claims approved by the lien law. *Wisconsin Brick Co. v. Nat. Surety Co.*, 164 Wis. 585, 160 N.W. 1044 (1917). Most courts have declined, in the absence of express direction, to limit such statutes in conformity with the restrictions of lien laws, but construe them independently to fulfill an apparent legislative purpose to secure the payment of all persons contributing to public improvements however far removed from contractual relationship with the principal contractor. *Franzen v. Southern Surety Co.*, 33 Wyo. 15, 246 P. 30, 46 A.L.R. 496 (1926); *Trenton v. N. J. Brick & Supply Co.*, 112 N. J. Law 218, 171 At. 176 (1934); *Eagle Oil Co. v. Altman*, 129 Okla. 98, 263 Pac. 666 (1928). It is the minority view that courts should not extend the protection of the bond to remote claimants not expressly included by statute. *Miller v. Bonner*, 163 La. 333, 111 So. 776 (1926); *Faurote v. State*, 111 Ind. 73, 11 N.E. 476 (1887).

In the principal case the default did not occur because of the mismanagement or insolvency of the principal contractor. Timely notice would have warned him against payment to the defaulting subcontractor until the plaintiff's claim was secured. In *Berger Mfg. Co. v. Lloyd*, 209 Mo. 681, 108 S.W. 52 (1908), the subcontractor was denied recovery on the bond because it was not shown that he relied on the principal contractor for payment, but that he merely dealt in the ordinary course of business upon the immediate subcontractor's credit.

Liability on the bond should not be endless. See also *Miller v. State*, 35 Ind. App. 379, 74 N.E. 260 (1905). The prevailing view does not recognize the distinction. The principal contractor and the surety are liable for the materials and labor furnished despite payment to the subcontractor and lack of notice by remote claimants. *Heine Safety Boiler Co. v. United States*, 35 D.C. App. 273 (1926); *Oliver Constr. Co. v. Williams*, 152 Ark. 414, 238 S.W. 615 (1923); *United States v. American Surety Co.*, 200 U.S. 197, 26 Sup. Ct. 168, 50 L.ed. 437 (1906). One court sees in the recognition of an exception to recovery the danger of inviting a collusive scheme between principal contractor and subcontractor where, through the latter's premeditated default, both would be unjustly enriched. *Portland v. New Eng. Casualty Co.*, 78 Or. 195, 152 Pac. 253 (1915). In the instant case a suggestion of collusion found by the trial court was deemed not justified by the record. Contractor and surety may protect themselves against undisclosed claimants by requiring security from the subcontractor. *McCrary v. Dade County*, 80 Fla. 652, 86 So. 612 (1920).

The lien law has been changed to grant the right to "every person," removing the formerly existing barrier to recovery by a subcontractor of the second degree under that statute. WIS. STAT. (1935) § 289.02. But the court declares that Section 289.16 is a reference statute, a legislative device used to avoid encumbering the statute book by constant repetition. Applying a rule of statutory construction, the Public Works Act is said to have adopted the then limits of the lien statute and cannot be affected by subsequent additions or modifications of the latter statute, in the absence of express intent. It has been observed that no other rule would furnish certainty as to whether a change in the one law would compel a corresponding construction to the other. *United States v. McMurray*, 5 F. Supp. 515 (W.D. Ky. 1933). Usually adoption by reference is denied where the reference to the statute sought to be incorporated is descriptive. *Vallejo & N. R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 170 Pac. 426 (1918), index number; *Haas v. Lincoln Park Com'rs.*, 339 Ill. 491, 171 N.E. 526 (1930), specific title. Where the reference is general it includes not only the law in force at the date of the adopting act, but all subsequent laws on the particular subject. *Lynam v. Romey*, 195 Ky. 223, 242 S.W. 21 (1922). The language of the public works statute does not point to either category. A scrutiny fails to reveal the "necessary implication" found by the court. Nevertheless, it is submitted that such a determination easily leads to a transcendental inquiry in which appreciation of the evils sought to be remedied is obscured. Disregard of traditional rules of statutory construction where their application would defeat an apparent social need is manifest in *City of Klamath v. Oregon Liquor Control Commission*, 146 Or. 123, 29 P. (2d) 564 (1934). See also *Posselius v. First Nat. Bank*, 264 Mich. 687, 251 N.W. 429 (1933). A similar realistic approach might lead to the conclusion that the same economic considerations which motivated the legislature to amend the lien law to embrace claimants however far removed from the principal contractor would impel the conferring of an equal benefit to claimants under the statute enacted as its substitute.

It is submitted that the decision in the instant case might have been supported by reason of the fact that the principal contractor was not in default. The court went farther than was necessary and laid down an inflexible rule of statutory construction which may bar from recovery a subcontractor of the second degree whose only recourse is on the bond because of the insolvency or misconduct of both principal contractor and subcontractor.

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