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Security Devices - Building contracts - Material Man Distinguished From Subcontractor

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submitted that the proper approach should be to analyze each case in terms of the test laid down by the statute — whether the activities in question threaten, coerce, or restrain any person engaged in a business affecting commerce to cease doing business with another person — rather than establish a substitute rule that all secondary consumer or products picketing is prohibited. It is not submitted that the results would be different in the instant case, but the suggested approach would avoid establishment of mechanical rules for applying the new secondary boycott provisions and would require a more careful consideration of the statute as applied to the facts of each case.

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SECURITY DEVICES — BUILDING CONTRACTS — MATERIAL MAN DISTINGUISHED FROM SUBCONTRACTOR

Plaintiff, general contractor for the construction of a public building, engaged a corporation to furnish structural steel conforming to plaintiff's architectural specifications. The corporation then contracted with defendant who agreed to fabricate in its own shop and deliver to the job site certain of the steel products. Defendant delivered the material but neither defendant nor the corporation did any work on the structure itself. The corporation went bankrupt without paying defendant and defendant filed an affidavit of its claim in accordance with statutes providing for the protection of certain furnishers of material for the construction of public buildings.[1] Plaintiff sued to have the affidavit cancelled and erased from the mortgage records. The district court found that the corporation was a material man and not a subcontractor, and since suppliers of material to material men are not given the benefit of the statutes in question,[2] ordered the cancellation of the affidavit. On appeal,

Analysis, 48 GEO. L.J. 346, 352-54 (1959). Mr. Previant contends that Congress would have used the word picketing had it intended to prohibit picketing automatically. He also suggests that a blanket prohibition on peaceful picketing raises serious first amendment freedom questions. See also Comment, 45 CORN. L.Q. 724 (1960).

1. LA. R.S. 38:2241 *et seq.* (1950).

2. The instant case is the first case so holding under the present revised statutes. However, the cases of American Creosote Works v. City of Monroe, 175 La. 905, 144 So. 612 (1932) and J. Watts Kearny & Sons v. Perry, 174 La. 411, 141 So. 13 (1932) had reached this result under La. Acts 1918, No. 224. The critical language of that act, found in Section 1, provided that: "When public buildings . . . or public work of any character are about to be constructed, . . .

to the Louisiana court of appeal *held,* affirmed. One who furnishes material but who does not perform any labor in attaching it to or incorporating it in the building is a material man even though there has been labor expended in preparing the material to meet specifications. *Jesse F. Heard & Sons v. Southwest Steel Products,* 124 So.2d 211 (La. App. 1960).

In order to insure payment for labor and materials employed in the construction of public works statutory protection has been given to certain furnishers of these commodities.[3] Claimants who file affidavits of their claim timely are given a cause of action against the governing authority for whom the work is being done if it has paid the contractor without deducting the amount of the claims thus filed.[4] The statute safeguards material men who supply contractors[5] or subcontractors,[6] but despite rather broad language it has been interpreted to afford no protection to material men who supply other material men.[7] Prior to the instant case, there were no decisions in Louisiana on the question of whether one who contracts to furnish material upon which labor must be performed in order for it to conform to required specifications but who does no work in incorporating the material into the structure is a subcontractor or a material man.[8] At common law[9] a few cases have held such a person to

under contract in excess of $500 at the expense of the State, or any parish, city, . . . public board or body, it shall be the duty of the official representative thereof . . . to require of the contractor a bond, with good and solvent and sufficient surety, . . . for the payment by the contractor and by all subcontractors for all work done, labor performed, or material furnished in the construction . . . of such building, road, work or improvement." This language is almost identical with that found in LA. R.S. 38:2241 (1950), and the court in the instant case regarded the prior jurisprudence as controlling the question.

3. LA. R.S. 38:2241-2247 (1950).

4. *Id.* 38:2242. In addition, the governing authority for whom the work is being done is required to exact from the contractor a surety bond to protect those suppliers of labor and materials embraced within the statute. *Id.* 38:2241.

5. *Id.* 38:2241.

6. *Ibid.*

7. See note 2 *supra.*

8. Probably the case closest to this situation was American Creosote Works v. City of Monroe, 175 La. 905, 144 So. 612 (1932). There one who furnished poles meeting certain specifications as to size and creosoting for use in the city's municipal lighting system was held to be a material man and therefore entitled to no protection by virtue of La. Acts 1918, No. 224. The court pointed out that the poles had been ordered by the city for stock and were not wanted for any particular work. It also said that "the contractor whom the law intends by Act No. 229 of 1916 and Act No. 224 of 1918, is one who constructs for another some work of fixed and permanent nature, which can neither be kept nor disposed of, but must be surrendered to him for whom the work was done; and a subcontractor is one who undertakes to do for the contractor part of the work which the contractor has undertaken. We see in this case no contractor or subcontractor, but simply a sale and resale." *Id.* at 911, 144 So. at 614.

9. In assessing the persuasive weight to be given the common law views, it should be borne in mind that at common law building contract security is purely

be a subcontractor,[10] but the majority holds that he is material man.[11]

The court in the instant case concluded that the best view was that in order to be classified as a subcontractor under the statute it would be necesary to perform some labor in incorporating the materials supplied into the building or improvements. This was based on the principle of *stricti juris* with respect to such statutes and on the idea that it would be an unwise policy to classify all persons who furnished any materials which required construction to specifications as subcontractors. The court feared that a contrary holding would allow the owner and subcontractor to be harassed by claims of those with whom they had not contracted and of which they had no knowledge. In the instant case the classification of the furnisher of materials was with respect to statutes regulating the security for public building contracts. Of additional interest is the question of whether the same rule will be followed when the statutes that regulate security for private building contracts are at issue.[12] On the basis of the prior jurisprudence it would seem that the statutes as presently worded afford protection to a material man who supplies a subcontractor,[13] but not to one who supplies

statutory, and the effect of the classification as material man in one jurisdiction may be quite different from the effect of a similar classification in another jurisdiction.

10. Holt & Bugbee Co. v. City of Melrose, 311 Mass. 424, 41 N.E.2d 562 (1942) (lumber worked into different sizes and dimensions to meet specifications, furnisher of subcontractor given right to be paid out of funds held by city); Illinois Steel Warehouse Co. v. Hennepin Lumber Co., 149 Minn. 157, 182 N.W. 994 (1921) (structural steel prepared and furnished, lien to supplier of subcontractor but not to supplier of material man); Western Sash & Door Co. v. Buckner, 80 Mo. App. 95 (1899) (doors and window sashes, lien to furnisher of subcontractor but not to furnisher of material man).

11. Rudolph Hegener Co. v. Frost, 60 Ind.App. 108, 108 N.E. 16 (1915) (stairs were specially constructed for house, lien available to subcontractor but not material man); Foster Lumber Co. v. Sigma Chi Chapter House, 49 Ind. App. 528, 97 N.E. 801 (1912) (stone cut to certain dimensions and carved to specifications, no lien available to subcontractor but lien available to material man if claim timely filed); Rebisso v. Frick, 159 Ohio St. 449, 112 N.E.2d 651 (1953) (concrete septic tank cemented together at site of construction, lien under statute granted to material man but not to subcontractor); Matzinger v. Harvard Lumber Co., 115 Ohio St. 555, 155 N.E. 131 (1926) (doors, sashes, and similar material furnished to meet specifications, material man and subcontractor both had liens but subcontractor required to file affidavit within a certain time).

12. LA. R.S. 9:4801 *et seq.* (1950).

13. The case of Ketteringham v. Eureka Homestead Society, 140 La. 176, 72 So. 916 (1916) held that under La. Acts 1914, No. 221, a furnisher of materials to a subcontractor was given no lien. The language of the statute which the court seems to have relied upon was: "Every person having a claim against the undertaker, contractor, master mechanic or engineer shall" file his claim within a certain time. The court pointed out that if the act had read, as did La. Acts 1916, No. 262, that: "Every person having a claim against the undertaker, contractor, *subcontractor*, master mechanic, or engineer shall" file his claim as specified, the

another material man.[14] The same appears true with respect to those who perform labor for subcontractors as contrasted with those who perform labor for material men.[15] Though the protection afforded claimants under the private contracts security statutes differs to some extent from that under the public contracts statutes,[16] the instant case furnishes strong persuasive authority for the application of the same rule of classification in cases involving private building contracts.

Robert B. Butler III

TORTS — AGENCY — LIABILITY OF ARCHITECT FOR FAILURE TO SUPERVISE WORK OF SUB-CONTRACTOR

Plaintiff brought a tort action to recover damages for the death of her husband, an employee of a plumbing sub-contractor.

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decision would have gone the other way. The question was presented again in the case of Frank v. Waters, 162 La. 255, 110 So. 413 (1926). This time the applicable statute was La. Acts 1922, No. 139, which provided for the filing of a claim by "Every person having a claim against the undertaker, contractor, master mechanic or contracting engineer. . . ." The court gave no lien to a material man who had supplied a subcontractor, saying that the legislature had had both the *Ketteringham* holding and dicta before it when it chose language of the type in the 1914 statute over that of the 1916 statute and so must have intended that the interpretation placed on the 1914 language be followed. Jeter v. Lyon, 8 La. App. 115 (1928) followed the *Waters* case. The latest case dealing with the question of whether a material man who supplies a subcontractor has a lien is Dixie Bldg. Material Co. v. Massachusetts Bonding and Insurance Co., 167 La. 399, 119 So. 405 (1928). That case held that under La. Acts 1926, No. 298, such a material man was afforded a lien. The court relied on Section 1 of the act and not on language similar to that used in the above cases. However, the wording of Section 2 of the act provides for the filing of a claim by "every person having a claim against the . . . subcontractor." In light of these decisions it would seem that a furnisher of material to a subcontractor is afforded a lien under the present statutes. In the first place, Section 1 of the present act is very similar to the first section of La. Acts 1926, No. 298, under which a lien was granted. Secondly, the second section of the present act contains provision for the filing of a claim by "every person having a claim against the subcontractor." LA. R.S. 9:4802 (1950).

14. In the case of Patterson v. Lumberman's Supply Co., 167 So. 471 (La. App. 1936), it was held that the supplier of a material man had no lien under La. Acts 1926, No. 298. The court relied on Sections 1 and 12 of that act and the *stricti juris* rule to reach that conclusion. There seems to be no wording in the present statutes which would justify a departure from this result.

15. The same statutes which provide protection for those who furnish material also provide protection for those who furnish labor. Since the courts have refused protection to material men who supply other material men under these statutes it would appear that they would reach the same result with respect to laborers who perform labor for material men.

16. It is beyond the scope of this paper to go into a detailed comparison of the public and private building contract security laws. Under both the claimant may, in certain circumstances, be protected by the contractor's bond and have a right of action against the governing authority or private owner, as the case may be. However, a claimant under a public building contract never receives a lien on the work, while in certain instances a private contract claimant does have a lien on the building.