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Liens - Mechanics' Liens - Right to and Protection of Liens

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Court to take the initiative and break with an archaic, unjust rule.

North Dakota has a constitutional barrier greatly limiting the scope of the court's power by providing that "suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."[33] Municipal corporations, as creatures of the state,[34] are therefore liable only as established by statute. This is also the rule regarding counties in North Dakota,[35] but a different rule was established by the court for charitable institutions, which are no longer immune.[36] The Legislature has provided for suits against municipal corporations for injuries arising because of defective streets, sidewalks, and bridges.[37] The North Dakota Court considered the governmental immunity doctrine in a 1965 case,[38] and, noting that the previous Legislative Session had recognized the doctrine when it amended and reenacted a statute concerning the "right to claim governmental immunity" by political subdivisions which purchase liability insurance,[39] the court upheld the doctrine. Therefore, it would appear that if any relief is to be forthcoming in the State of North Dakota regarding governmental immunity, such a change will have to be made by statute or constitutional amendment.

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LIENS—MECHANICS' LIENS—RIGHT TO AND PERFECTION OF LIENS —Plaintiff brought action to foreclose a mechanics' lien against the property owners and also a mortgagor and judgment creditor who claimed first priority on the property Plaintiff's claim to the mechanics' lien hinged on whether a certain item delivered was actually used in construction of the defendant's house and whether plaintiff had perfected his lien according to statute. The Supreme Court of Kansas *held* that the mechanics' lien would not attach because it was not proven that the item in question was actually used in construction and thus the statement required to perfect the lien

33. N.D. CONST., § 22.
34. N.D. CONST., § 130. See Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
35. Mayer v. Studer & Manion Co., 66 N.D. 190, 262 N.W 925 (1935).
36. Granger v. Deaconess Hosp. of Grand Forks, 138 N.W.2d 443 (N.D. 1965) Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946).
37. N.D. CENT. CODE § 40-42-01 (1960).
38. See Fetzer v. Minot Park Dist., 138 N.W.2d 601 (N.D. 1965).
39. N.D. CENT. CODE § 40-43-07 (Supp. 1965). For a discussion of the effect of liability insurance on governmental immunity, see 39 N.D.L. REV. 358 (1963).

was not filed in time. *Seyb-Tucker Lumber and Implement Co. v. Hartley*, 415 P.2d 217 (Kan. 1966).

Mechanics' liens date back to 1791 when the Maryland legislature adopted a statute creating their mechanics' lien law [1] Because all mechanics' liens are statutory, the requirements for perfecting must be strictly pursued[2] but the provisions of the statutes are liberally applied.

Most statutes state that the material furnished must be used,[3] but there are two doctrines of use. One doctrine requires actual use and demands that the materials are actually used in the construction of the building before a mechanics' lien can attach.[4] The rationale of the actual use doctrine is that a lien should not be attached to property for materials which never entered into its construction.[5] Under this doctrine the burden of proof is on the material-man and often it would be more of a burden than a benefit to establish the lien.[6] It is also notable that this rule appears to place the burden of proof on the one not in the best position to establish the truth of a statement. The second doctrine is "presumptive use" which states that merely furnishing or delivering goods to the construction site will be *prima facie* evidence of, or raise a presumption that, the goods were used.[7] This position is justified on the basis that the owner is in a better position to prove non-use than the materialman is to prove use,[8] and is the position adopted in a majority of jurisdictions.[9]

Notably, some jurisdictions apply different theories of use depending on whether goods were delivered directly to the owner or routed through a contractor [10] These jurisdictions hold that delivery to the owner will allow presumptive use and allow the lien to attach, however actual use must be proven if the goods are routed through a contractor [11] There are also two basic groups of statutory wording. One group refers to furnishing material in designated circumstances such as "for the construction" of a building or "in

1. See, generally, 3 WILLIAMETTE LAW JOURNAL 73 (1964).
2. *E.g.*, Logan-Moore Lumber Co. v. Black, 185 Kan 644, 347 P.2d 438 (1959).
3. N.D. CENT. CODE § 35-27-01 (1961), MINN. STAT. ANN. § 514.01 (1945) S.D. CODE § 39.0701 (1939) MONT. REV. CODE § 45-501 (1947), KAN. STAT. ANN. ch. 60 § 1101 (1963).
4. *E.g.*, Unit Sash & Sales Co. v. Early, 117 Kan. 425, 232 Pac. 232 (1925) Pittsburgh Plate Glass Co. v. Leary, 25 S.D. 256, 126 N. W 271 (1910).
5. See, generally, 39 A.L.R.2d 425.
6. W Bateson & Co. v. Baldwin Forging & Tool Co., 75 W Va. 574, 84 S.E. 887 (1915).
7. See, *e.g.*, David v. Doughty, 96 Kan. 556, 152 Pac. 660 (1915), State Loan Co. v. White Earth Coal Mining, Brick & Title Co., 34 N.D. 101, 157 N.W 834 (1916).
8. See, generally, 39 A.L.R.2d, *op. cit. supra*, at 434.
9. State Loan Co. v. White Earth Coal Mining, Brick & Title Co., *supra* note 7.
10. See, generally, 39 A.L.R. 2d, *op. cit. supra* at 435.
11. Francis & Nygren Foundry Co. v. King Knob Coal Co., 142 Wis. 619, 126 N.W. 39 (1910), States that the owner has no control of goods delivered to the contractor thus mechanics' lien should not attach.

erecting" a building or "to be used in the construction of a building."[12] Statutes of this type are the ones generally to be construed as adopting the presumptive use doctrine and delivery is considered sufficient for the lien to attach,[13] except in those jurisdictions which distinguish between delivery to the owner and delivery to a contractor The other group of statutes declare that a lien shall be granted only under designated circumstances, such as "for delivery of material" or to materialmen "who deliver material in connection with construction" and here proof of actual use is essential.[14]

All mechanics' lien statutes require certain steps to perfect the lien.[15] The most important is that the lien must be filed within a specified period of time following delivery of the last item used in the project.[16] This statutory time differs from state to state,[17] but its importance is illustrated by the instant case where the court concluded that the owner had rebutted the presumption that the last item delivered to the site was used for his project and thus the lien failed because it was not filed within the statutory time. An extension of the statutory period for filing may be achieved by furnishing some comparatively small item at a much later date if the item was furnished in good faith,[18] however, if the goods were furnished merely to provide an extension of time it will not be allowed.[19] There is also a divergence of opinion on the effectiveness of the lien when the claimant fails to file within the statutory time limit. Some statutes state that the lien is lost entirely if not filed in time,[20] whereas, others merely provide that the mechanics' lien is not lost for failure to file but it will be subordinated to the claims of a purchaser or encumbrancer for value.[21]

The Kansas Supreme Court says it has adopted the presumptive use doctrine and is applying it in this case, but, they found no use because the plaintiff could not prove definitely that the item was used in the building. It becomes evident, therefor, that in substance

12. See. generally 39 A.L.R. 2d, *op. cit. supra,* at 452.
13. See, *e.g.,* Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N.W 300 (1914) State Loan Co. v. White Earth Coal Mining, Brick & Title Co., *supra* note 7.
14. Hill v. Bowers, 45 Kan. 592, 26 Pac. 13 (1891).
15. See, *e.g.* N.D. CENT. CODE § 35-27-13 (1961) MINN. STAT. ANN. § 514.08 (1945) S .D.CODE § 39.0708 (1939) MONT. REV. CODE § 45-502 (1947) KAN. STAT. ANN. ch. 60 § 1102 (1963).
16. *Ibid.*
17. *Id.,* North Dakota, Minnesota and Montana require filing within 90 days of the last delivery. South Dakota reqires filing within 120 days and Kansas calls for filing within 4 months.
18. W.B. Martin Lumber Co. v. Noss, 256 Minn. 471, 99 N.W.2d 65 (1959).
19. Guy T. Bisbee Co. v. Granite City Investing Corp., 59 Minn. 442, 199 N.W 17 (1924).
20. MONT. REV. CODE § 45-502 (1947).
21. N.D. CENT. CODE § 35-27-14 (1961).

the court utilized the actual use doctrine in finding that the lien had not been filed in time to meet the statutory requirement.

Jurisdictions adjacent to North Dakota have adopted varying viewpoints as to which doctrine to apply That Montana takes a stricter view as to use is demonstrated by the fact that Montana by statute[22] and through case interpretation[23] places the burden of proof on the lien claimant, and he must show actual use or no lien attaches. South Dakota courts state that the requirement of actual use is the better rule and further state that it is incumbent on the contractor to see that his goods are actually used.[24] Minnesota has one of the most generous courts in allowing mechanics' liens[25] and consequently adopts the more liberal presumptive use doctrine under which delivering or furnishing of goods is sufficient for a lien to attach unless the owner rebuts the presumption.

Although the North Dakota statute requires use,[26] our courts have adopted a liberal viewpoint[27] and follow the presumptive use doctrine. This interpretation relieves the materialman of the burden of watching his material until it is put into the structure or consumed in the process and places the burden of proof on the owner who is in a better position to prove non-use than is the materialman to prove actual use. Notably North Dakota's statute goes further than some others as it allows the mechanics' lien to attach the land on which the structure is located as well as the structure itself.[28] North Dakota also allows the mechanics' lien priority over all other attachments if filed within the statutory period, however, failure to file within the statutory period will not bar the lien, but the priority will then be determined by the order in which they are filed.[29]

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EVIDENCE—ADMISSIBILITY OF A DECLARATION AGAINST PENAL INTEREST—SUFFICIENCY OF TRUSTWORTHINESS—Plaintiff sued decedent's estate for the return of stolen money An accomplice, while

22. MONT. REV. CODE § 45-502 (1947).
23. Rogers-Templeton Lumber Co. v. Welch, 56 Mont. 321, 184 Pac. 838 (1919).
24. Pittsburgh Plate Glass Co. v. Leary, 25 S.D. 256, 126 N.W 271 (1910).
25. See, generally, 39 A.L.R.2d 406.
26. N.D. CENT. CODE § 35-27-01 (1961).
27. McCauli-Webster Elevator Co. v. Adams, 39 N.D. 259, 167 N.W 330 (1918).
28. N.D. CENT. CODE § 35-27-19 (1961).
29. N.D. CENT. CODE § 35-27-22 (1961). It should also be noted that the Uniform Commercial Code which is now effective in North Dakota has no effect on statutory liens such as the mechanics' liens. This is stated in 41-09-04.