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Creditors' Rights

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as authority for the rule, avoid the issue, since, according to the terms of the corporate charters in those proceedings, the power to call a meeting of the stockholders was expressly vested in the board of directors. However, the president and secretary of a church were held to be without authority to issue a call in a Louisiana case¹⁶ preceding the *Knoll* decision.

The *Wilbur* case illustrates the hazard of incorporating under RCW 24.08.010 *et seq.*, a short, inadequate, and antiquated chapter relating to educational, religious, benevolent, or charitable societies. If the Wilbur Mission Church had been incorporated under RCW 24.04.010 *et seq.*, relating to nonprofit, nonstock corporations, the conflict would probably have been averted by the requirement that the members of the corporation must meet and adopt bylaws before transacting any business. The time, place, and manner of calling and conducting meetings heads the list of suggested bylaw provisions under RCW 24.04.070. Also, RCW 24.16.010 *et seq.*, relating to associations for mutual benefit and educational, charitable, etc., purposes, would have been a better choice under which to incorporate than the one employed. Among other provisions the statute provides for adoption of bylaws and delineates the authority of trustees. Both RCW 24.04 and 24.16 are broad in scope, and yet lend a degree of guidance to incorporators and a partial framework from which the corporation may function. This cannot be said of RCW 24.08.

WILLIAM D. CAMERON

Corporations May Do Business Under Assumed Names. *Seattle Association of Credit Men v. Green*, 145 Wash. Dec. 128, 273 P.2d 513 (1954), was an action by the assignee for benefit of all creditors of an insolvent corporation against certain specific creditors of the corporation to recover a preferential payment. The Supreme Court held the Uniform Business Corporation Act, (adopted 1933, RCW Title 23), does not preclude a corporation from doing business under an assumed name. Funds of the insolvent corporation, paid within four months of the corporation's assignment for benefit of creditors by means of a check drawn under an assumed name used in transacting business with a creditor, could be recovered by the assignee under RCW 23.48.030.

CREDITORS' RIGHTS

Mechanics' Liens—Time for Filing of Claim. The filing of mechanics' liens is governed in Washington by a statute which, in the part pertinent to this inquiry, reads as follows:

No lien created by this chapter shall exist and no action to enforce the

¹⁶ State *ex rel.* Bellamore v. Rombotis, 120 La. 150, 45 So. 43 (1907).

same shall be maintained, *unless within ninety days from the date of the cessation* of the performance of such labor or of furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided . . . (Emphasis added.)¹

This choice of a criterion for the determination of the beginning of the period of limitation is less than happy, as the exact amount at which work on a construction contract ceases is usually very difficult to ascertain, especially since we have to deal not only with the main contract but with the individual performances of sub-contractors and materialmen. The court was never squarely faced with the problem when the period of limitation for sub-contractors and materialmen begins, but the wording of the statute forces the conclusion that each individual performance under sub-contracts is considered separately. This conclusion is strengthened by inferences drawn from two cases. In *Rieslin v. Graftron*² the court considered the timeliness of the filing of a materialman's lien. The whole discussion, by counsel, by the trial court and by the Supreme Court dealt only with the time of the plaintiff's performance with no reference to the main contract at all. In a recent case when discussing a materialman's lien the court said, "The remainder of the material was delivered between December 15 and December 30, 1949. Pioneer had ninety days from the latter date in which to file a lien."³ It is the opinion of the present writer that this construction not only agrees with the statutory language, but is also preferable as it gives full protection to the materialman and at the same time fulfills the purpose of the period of limitation in preventing the filing of stale claims.

It may be of interest to compare statutes from several other jurisdictions which deal with this problem. The Arizona statute⁴ provides for filing within ninety days for main contractors and within sixty days for sub-contractors and materialmen, the period of limitation starting for everybody with *the completion* of a structure or alteration. This statute has been construed with respect to sub-contractors in *Lesson v. Bartol*.⁵ The Colorado statute⁶ provides for the filing of the construction contract within five days from the start of the construction and

¹ RCW 60.04.060 (1).

² 63 Wash. 387, 115 Pac. 851 (1911).

³ *West v. Jarvi*, 44 Wn.2d 241, 249; 266 P.2d 1040, 1045 (1954).

⁴ § 62-202, A.C.A. 1939.

⁵ 55 Ariz. 160, 99 P.2d 485 (1940). In determining timeliness of filing of materialman's lien, the court established the time when the main contract was finished, which was over 6 months after last delivery of materials.

⁶ 86 C.S.A. c. 3 § 1.

such contract operates as a lien for all those performing services or furnishing materials under it. The lien must be foreclosed within six months after completion.⁷ The Oregon statute⁸ provides for the filing of liens by machinists, lumber merchants, laborers, etc. within thirty days from the completion of the construction.

On the other hand Oklahoma, whose statute resembles the Washington statute much more than any of the above, provides that materialmen and sub-contractors perfect their lien ". . . by filing . . . within 60 days after the date upon which material was last furnished or labor last performed under such sub-contract. . . ."⁹ This statute was construed in a recent case¹⁰ where the court held that a subcontractor who did not file within sixty days from the cessation of *his performance* had no standing to intervene in an action brought by the main contractor to foreclose his lien.

Returning to Washington law we find that the court has repeatedly been faced with the problem of determining on which date the last labor was performed or the last materials delivered by a lien claimant. Out of these decisions some definite guideposts for the prediction of results in future litigation have emerged.

The court has held that the lien was not timely filed where the last delivery was made pursuant to a new contract with a different party and based on a new consideration.¹¹ Similarly, where the last delivery consisted of materials which were not used in the construction of the building to be charged with the lien, the court has held that the last delivery of materials actually used in construction should be used for computation of the time of filing.¹² Also where the court found that the additional work was not done in good faith in furtherance of the

⁷ 86 C.S.A. c. 3 § 10.

⁸ § 87:035, Oregon L.A., construed in *Eastern and Western Lumber Co. v. Williams*, 129 Ore. 1, 276 Pac. 257 (1929).

⁹ 42 O.S. 1941 § 143.

¹⁰ *Acme Glass Co. v. Owens*, 204 Okla. 601, 232 P.2d 624 (1951).

¹¹ *Pacific Manufacturing Co. v. Brown*, 8 Wash. 347, 36 Pac. 273 (1894). Plaintiff materialman stopped delivery on March 6 and refused to continue unless paid in cash or unless additional security given. Certain third parties interested financially in the construction started negotiations with plaintiff, who as a result made one further delivery on March 23 for which he was given the third party's note which was paid at maturity. Held, lien filed on June 12 not timely.

¹² *Petro Paint Mfg. Co. v. Taylor*, 147 Wash. 158, 265 Pac. 155 (1928). The court found that the delay was not justified and the small amount of cement delivered was not used in the house. The court said that the last delivery was not made in good faith but solely for the purpose of extending time of filing. *Kellison v. Godfrey*, 154 Wash. 219, 281 Pac. 733 (1929). Plaintiff supplied defendant, a contractor, with materials for several houses. The house in question was sold to co-defendants who were told that there were no encumbrances. Held, that as last delivery of materials was made after the house was completed lien, filed within ninety days from this delivery, was not timely. Cf. *Warming v. Hargi*, 159 Wash. 501, 294 Pac. 248 (1930).

contract, but for the purpose of extension of the filing time, a lien filed within ninety days of such additional work was not timely.¹⁸ Where a contractor had stopped work and refused to proceed because of the owner's financial irresponsibility unless paid in cash or given additional security, the time for filing started running from the moment of refusal to proceed further with the construction.¹⁴ The court has also been very explicit in its refusal to permit extension of filing time by a succession of repair jobs, after the actual construction had been completed, and expressed its views as follows: "To permit the extension of the time for filing a lien, by the process of tacking on subsequent small, casual, and unrelated repairs, could create an intolerable condition not within the spirit or purpose of the lien law."¹⁵ Thus the last work performed or delivery made, to qualify under the statutory provision, must be a bona fide effort in furtherance of the contract and cannot be too far removed in time from the previous deliveries.¹⁶ However, delay alone was not decisive where the court found that the contract did not specify any time for completion and the delay was not caused by bad faith.¹⁷

The court has upheld the claimant's right to a lien where the additional work was done to remedy a defect¹⁸ or to replace defective materials.¹⁹ The same result has been reached where some adjustments

¹⁸ *Swensson v. Carlton*, 17 Wn.2d 396, 135 P.2d 450 (1943). Plaintiff veneered the house and built two fireplaces. Thereafter, at the owner's request, he cleaned a fireplace left dirty by the plasterers. Held, this was an independent contract which did not extend filing time. The request for cleaning was disputed by the owner and the court was of the opinion that the cleaning job was done for the purpose of extending filing time. See also, *Petro Paint Mfg. Co. v. Taylor*, *supra* note 12.

¹⁴ *Dower Lumber Co. v. MacCammon*, 141 Wash. 381, 250 Pac. 107 (1926).

¹⁵ *Brown v. Mychel Co.*, 186 Wash. 97, 56 P.2d 1020 (1936). Plaintiff remodelled the building and adapted it to a changed purpose, and thereafter for a period of five years did all repairs. Held, repairs did not extend time for filing.

¹⁶ *Ellsworth v. Layton*, 37 Wash. 340, 79 Pac. 947 (1905). The building was accepted as completed in October, a lien filed in April not timely, notwithstanding that on January 6 metallic flashings were put over six windows, which had been inadvertently omitted and on February 13 certain drain tile was relaid. The defects were not apparent. The court accepted the findings below in a *per curiam* opinion.

¹⁷ *Rose v. O'Reilly*, 138 Wash. 19, 224 Pac. 124 (1926).

¹⁸ *Osten v. Curtis*, 133 Wash. 360, 233 Pac. 643 (1925). Work of repairing house completed in the main on July 30, but a small repair of corner of foundation done at owner's request on October 15; lien filed on December 11. *American Plumbing and Steam Supply Co. v. Alavekin*, 154 Wash. 436, 282 Pac. 917 (1929). Plaintiff installed new heating system which proved unsatisfactory. Plaintiff thereafter installed a new boiler, without charge for labor or materials. Held, time for filing ran from the time when the new boiler was installed. *Kirk v. Rohan*, 29 Wn.2d 432, 187 P.2d 607 (1947). In this case plaintiff furnished labor and materials, at owner's request, two and a half months after apparent completion of garage and occupation by owner, to prevent flood water from backing up. The court added a dictum that a new and independent contract does not extend filing time.

¹⁹ *Rieffin v. Grafron*, *supra* note 2. Plaintiff delivered door and windows between March 2 and June 2, but on August 8 delivered two or three additional glass panes to replace defective ones. Held, lien filed on October 14 was within the ninety day period.

were made on a furnace and it was started for the first time.²⁰ Where a bridge built by the plaintiff had been certified as substantially completed on July 12, but some additional planking, which could not have been done before because of high water, had been done in September, the court held that a lien filed in October was timely.²¹ Also in more recent cases the delivery of a small additional item²² or a small alteration²³ were held to constitute the date upon which performance ceased. Similarly, where three buildings were constructed on the same tract for a common purpose and the plaintiff had no notice that they were to be treated as separate contracts, a lien filed within ninety days after the last delivery of materials for the third building was timely as to all three.²⁴

In many of these cases the court stressed the element of good faith on the part of the claimant. Some of the cases are difficult to reconcile on the facts,²⁵ but accepting the court's findings the analysis is consistent. However, there are in the cases several dicta which require further analysis, because of the court's decision in two cases decided in 1954.

In *Hopkins v. Smith*²⁶ the court found that the plaintiff, a contractor, had been remodeling the premises which were to be sold as a speculative venture, that he abandoned the work in November, 1951 after the defendant refused to pay one half of the expenses, that at the request of the defendant he installed two wooden steps on February 4, 1952. The court held that a lien filed on April 2, 1952, could not be foreclosed as it was past the ninety day period of limitation; the court found as

²⁰ *Friis v. Brown*, 37 Wn.2d 457, 224 P.2d 330 (1950). Plaintiff contracted with defendant to install a furnace and after installation did nothing from June 4 to September 23, when he went to defendant's house, made some adjustments and started the furnace. Held, lien filed on September 28 timely. The court said that the work was done in good faith in the furtherance of the contract.

²¹ *Washington Bridge Co. v. Land and River Improvement Co.*, 12 Wash. 272, 40 Pac. 982 (1895).

²² *Lofthus v. Cumming*, 198 Wash. 115, 87 P.2d 283 (1939). Delivery of materials was finished on November 30. The court found that on December 14 a small sash, value \$1.53, was delivered. Held, filing of lien on March 9 timely.

²³ *Flint v. Bronson*, 197 Wash. 686, 86 P.2d 218 (1939). The additional work involved in this case was the change of a fixed glass window in front door to make a "wicket," at the cost of \$1.55. Cf. *Building Supplies, Inc. v. Gillingham*, 17 Wn.2d 489, 135 P.2d 832 (1943). Owner employed plaintiff on March 1 to plaster outside walls, which task was completed on April 26. Thereafter owner re-employed plaintiff on June 13 to plaster inside of building which was completed about July 5; the lien was filed on August 21. The court accepted the trial court's finding that only one contract was involved.

²⁴ *Standard Lumber Co. v. Fields*, 29 Wn.2d 327, 187 P.2d 283 (1947).

²⁵ Compare *Ellsworth v. Layton*, *supra* note 16, with *Kirk v. Rohan*, *supra* note 18, and *Friis v. Brown*, *supra* note 20.

²⁶ 145 Wash. Dec. 511, 276 P.2d 732 (1954).

a matter of fact that the addition of the two steps was done under a new and independent contract. The only case relied on by the court was *Swensson v. Carlton*.²⁷ In an attempt to set up a standard for similar occasions, the court thus formulated the test:

If work is done or materials are furnished to complete the original contract, or remedy some defect in the work or materials furnished under the original contract, then such work or the furnishing of additional materials extends the time of filing a lien. If, however, the work is done or materials are furnished under a new and independent agreement, made after the original contract or continuing employment is ended, then such work or the furnishing of additional materials does not set the time running so as to preserve a lien for the earlier work.²⁸

However, earlier in 1954 the court was faced with this problem in *Powell v. Kier*,²⁹ where the plaintiff filed a lien for plumbing. The plaintiff had installed the plumbing on the lower floor and completed the work. Six weeks later the plans of the house were changed and a second story was added, the plaintiff again installing the plumbing. The parties segregated the costs of the two jobs. The court held that a lien filed within the statutory period after the completion of the second job covered both stories, saying that they must be considered as one for the purpose of computing the time for filing. The facts of the case, as reported, are meager and it is impossible to draw any very general conclusions as it is not stated whether the main construction contract was modified to include a second story, or whether it was also a separate contract. However, the important thing is that the only case relied on by the court was *Building Supplies, Inc. v. Gillingham*³⁰ where the court, after accepting the finding of the lower court that there had been only one contract, intimated in a dictum that even if there had been two separate contracts the result would have been the same, saying, "It should be noted that if there were two contracts, they were between the same parties, for the same type of work, on the same structure and that the time for filing a claim of lien had not run on the first before the second had begun."³¹ This dictum is in direct conflict with the test set up in *Hopkins v. Smith*.³²

As authority for the dictum in the *Building Supplies* case the court

²⁷ *Supra* note 13.

²⁸ 145 Wash. Dec. 511, 514, 276 P.2d 732, 734 (1954).

²⁹ 44 Wn.2d 174, 265 P.2d 1059 (1954).

³⁰ *Supra* note 23.

³¹ 17 Wn.2d 489, 493, 135 P.2d 832, 834 (1943).

³² *Supra* note 26.

used *Flint v. Bronson*⁸³ into which it read the existence of two separate contracts as follows:

We think our own case of *Flint v. Bronson*, 197 Wash. 686, 86 P.2d 218 is controlling. This is a very clear case of two contracts, the second one having been made to provide for a slight change in the work already completed, by a new owner who had just bought the property. The alteration amounted to only \$1.55. Separateness of the two contracts is beyond all question. The lien was filed within 90 days after the change, but altogether too late to save the items under the main contract if any distinction were to be observed.⁸⁴

If this interpretation of the *Flint* case represents the Washington rule, then it is in direct conflict with the *Swensson* and *Hopkins* cases, as well as with dicta in numerous other cases.

The only way to analyze all these cases is to say that in its quest for the date of cessation of performance of labor or delivery of materials, the court has been strongly influenced by the facts of each case—note the court's repeated insistence on the good faith of the claimant or the defendant—and if it finds the claim meritorious, it is prepared to find that a later performance was part of the contract, than in the case of a disputed claim or a claimant whose good faith is doubted. The single contract—separate contracts test seems to be a way of labelling results rather than of reaching them. In the same way the sometimes used expression that something did or did not extend the time for filing, must be understood to mean that a certain act, work or delivery, was part of the contract and performance did not cease until it was done, as it would be difficult to see how anything short of a legislative amendment could extend a statutory period of limitation. Viewed this way, the dicta in the *Building Supplies* case mean probably no more than in certain situations, because of the merits of the claim and close relation of both contracts, the court will not consider the job as completed until the second contract is finished.

The statute has been on the books in its present form since 1893 and it seems to be ripe for legislative revision. The vague test of "cessation" results in uncertainty and poses difficult problems of construction, as well as of fact finding. Its replacement by a more concrete and easily applied criterion would go a long way towards simplifying this important area of lien law. In order to have a more objective

⁸³ *Supra* note 23. The decision in this case was based on a determination of the time when performance ceased and did not discuss two contracts.

⁸⁴ 17 Wn.2d 489, 493, 135 P.2d 832, 834 (1943).

criterion it could be required in the case of sub-contractors and materialmen that they obtain upon completion of their task a certificate from the main contractor or preferably from the architect and that the date of such certificate would be used in computing filing time. In the alternative they could be required to give the owner notice of completion, similar to the notice of commencement of performance⁸⁵ and that the date of such notice shall be conclusive. In the case of the main contractor the date of the architect's certificate could be made conclusive. As an alternative the provisions of the Oregon statute⁸⁶ could be studied. This statute provides that in the case of unfinished construction a sixty days interruption is conclusively presumed to show abandonment and the owner by filing a notice and posting a copy prominently upon the property sets the period of limitation in motion. A similar procedure in the case of any construction contract would be one way of establishing an objective date from which the period of limitation could be computed.

RICHARD W. BARTKE

Creditors' Rights—Mechanics' Liens—Filing More Than One Lien. One of the issues in the case of *West v. Jarvis*, 44 Wn.2d 241, 266 P.2d 1040 (1954), was the validity of a second lien filed by Pioneer Sand & Gravel Co. for building supplies. Pioneer gave notice of their intention to claim a lien (RCW 60.04.020) within the statutory five-day limit from the date of beginning of delivery. The lien was duly filed, but by mistake, for an amount far less than the balance due. The defendant paid this amount and Pioneer executed a release. Thereupon the mistake was discovered and a second lien was filed for the balance due, still within the ninety days from the date of the last delivery (RCW 60.04.060). The defendant argued that the previous release exhausted the force and effect of the notice. The court said: "The filing of a lien by a materialman for less than the amount due, and the satisfaction of that lien, do not affect the force and effect of the notice given in conformity with RCW 60.04.020, and a second lien covering the amount still due will be enforced if filed within the statutory period following the last delivery of materials, in the absence of circumstances constituting an estoppel." The case while novel in the field of security transactions and statutory liens, applies well known contract principles, that a release given under a mistake of fact does not operate as full discharge. See, for instance, *Contractor's Machinery & Storage Co. v. Stewart*, 177 Wash. 263, 31 P.2d 546 (1934), and authorities cited therein. An exhaustive collection of authorities on the subject from other jurisdictions can be found in 6 CORBIN, CONTRACTS § 1292 (1951).

Judgments Valid at Time of Death of Judgment Debtor—Statute of Limitations. In *Morrison v. Hulbert*, 44 Wn.2d 171, 266 P.2d 338 (1954), the court construed RCW 11.40.130 for the first time in relation to judgments. The final judgment in the plaintiff's favor was entered on January 22, 1946; the judgment debtor died on Sep-

⁸⁵ RCW 60.04.020.

⁸⁶ § 87:045, Oregon L.A.

tember 22, 1951, the judgment being still unsatisfied; the administratrix, the defendant, was appointed on November 8, 1951, and published the notice to creditors of the estate on March 28, 1952; the plaintiff filed his claim on September 26, 1952—six years and eight months after judgment. The court has heretofore interpreted the statute of limitations concerning judgments in litigation involving a living judgment debtor. This statute, RCW 4.56.210 & 220, has been construed not only to bar the remedy but to extinguish the substantive right, *Hutton v. State*, 25 Wn.2d 402, 171 P.2d 248 (1946). Further, by judicial interpretation the operation of the statute is not tolled by the absence of the judgment debtor from the jurisdiction. *Hemen v. Reinhard*, 45 Wash. 1, 87 Pac. 953 (1906). In affirming a judgment for the plaintiff the court, in the principal case, said, "We hold that, in the event of the death of a judgment debtor, this section [RCW 11.40.130] applies to the exclusion of all other statutes, so that a claim, valid at the date of his death, must be allowed as a valid claim against his estate provided it is filed in accordance with RCW 11.40.010. . . ." This decision clarifies the law in this particular and puts judgments on the same footing with all other claims against the estate, so far as the time of presentation is concerned, and thus helps to prevent injustice.

CRIMINAL LAW

Perjury—What is Necessary to Constitute a Valid Oath in Washington. Due to the numerous situations in which statements must be made under oath the question of what constitutes a valid oath is one of practical importance. In a recent decision¹ the Washington Supreme Court said:

It is a matter of common knowledge that in many instances, notaries acknowledge signatures to claims, affidavits, depositions, and verifications without the signer actually being present, and also that quite often, when the signer is present, nothing is said about an oath and no thought is given to it whatever, thus raising a serious doubt as to whether a solemn oath had actually been administered by the notary and taken by the signer.²

Whether a valid oath has or has not been given is a question that frequently arises in a criminal action for perjury. Is proof of the defendant's signature and of the signature of the acknowledging officer sufficient to show the allegedly false statements were made under oath? There seems to be no clean-cut answer to this question by the Washington court.

In *State v. Dodd*,³ the defendant, a public official,⁴ was charged with perjury for falsifying several monthly claims for expenses.⁵ The

¹ *State v. Heyes*, 44 Wn.2d 579, 269 P.2d 577 (1954).

² *Id.* at 587, 269 P.2d at 582.

³ 193 Wash. 26, 74 P.2d 497 (1937).

⁴ Defendant was the King County Engineer during 1936.

⁵ Eleven expense account claims, one for each month except February, formed the basis of the charge.