

Approved January 31, 1989
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Representative Michael O'Neal at
Chairperson

3:30 ~~xxx~~/p.m. on January 26, 1989 in room 313-S of the Capitol.

All members were present except:

Representatives Crowell, Douville, Fuller, Peterson and Vancrum, who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:

Bill Mitchell, Kansas Land Title Association, Hutchinson
Representative Mary Jane Johnson
Nick Tomasic, District Attorney, Wyandotte County, Kansas City

BILL REQUESTS:

Bill Mitchell requested the Judiciary Committee introduce a bill clarifying the Kansas Mechanic's Lien laws. He explained the Mechanic's Lien Statutes were amended in 1977 and 1986. In 1986 the Supreme Court determined that a party furnishing labor or material to the builder could file a mechanic's lien either as subcontractor under K.S.A. 60-1103 or as an original contractor under 60-101. He said the proposed amendments are not intended to affect any substantive rights of parties heretofore existing under the Kansas mechanic's lien statutes, but are only to clarify actions previously taken by the Kansas legislature in 1977 and 1986; and to effect improvements in procedural matters, see Attachment I. He also submitted a proposed bill, see Attachment II.

Representative Jenkins moved to introduce the proposed bill as a Committee bill. The motion was seconded by Representative Buehler, and the motion passed.

The Chairman explained Justice Holmes of the Kansas Supreme Court requests the Committee introduce legislation that would change the jurisdiction of class B felony that is on appeal where the sentence is not life. It is proposed these class B felonies go to the Court of Appeals so the Supreme Court would be able to handle more of the civil cases they receive on petition for review out of the Court of Appeals.

A motion was made by Representative Solbach and seconded by Representative Jenkins to introduce the proposed legislation requested by the Supreme Court, as a Committee bill. The motion passed.

HEARING ON H. B. 2035-- Forensic examiner report

Representative Mary Jane Johnson explained this bill amends the same statutes of H.B. 2069, and the two bills could be put into one bill. She introduced Nick Tomasic, Wyandotte District Attorney, who would explain H.B. 2035.

Nick Tomasic testified this bill amends K.S.A. 22-2902a, the criminal procedure act. The bill would authorize the Bethany Medical Center laboratory reports to be introduced into evidence without the necessity of someone coming in to testify, see Attachment 111.

The hearing was closed on H.B. 2035.

Representative Jenkins moved to approve the minutes of January 23 and January 24. Representative Lawrence seconded the motion. The motion passed.

The Committee meeting was adjourned at 3:50 p.m. The next meeting will be Monday, January 30, 1989 at 3:30 p.m. in room 313-S.

A PROPOSAL FOR CLARIFICATION OF KANSAS

MECHANIC'S LIEN LAWS

I.

Amendments were made to the Kansas Mechanic's Lien Statutes in 1986 for the purpose of offering protection to purchasers of new homes against the filing of mechanic's liens following the receipt of payment in full by the builder and transfer of title of the home to the buyer. The procedure established for this protection was to require parties furnishing labor and material to the home while it was still owned by the builder to file with the Clerk of the District Court in the county in which the house is located a "notice of intent to perform" prior to the time title is transferred to the buyer. The filing of such a notice was made a prerequisite to a mechanic's lien claim under K.S.A. 60-1103. The intention was to enable a buyer to determine, at the time of parting with his purchase money, whether any third parties claimed a right to file a mechanic's lien against the home he was buying.

However, the decision of the Kansas Supreme Court in Star Lumber & Sup. Co. v. Capital Const. Co., Inc., 238 Kan. 743, 715 P2d 11 (1986) determined that a party furnishing labor or material to the builder could file a mechanic's lien either as subcontractor under K.S.A. 60-1103 or as an original contractor under 60-1101.

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The proposed amendment to K.S.A. 60-1101 and 60-1103b would give recognition to the Star Lumber decision and require that the notice of intent to perform be recorded before the transfer of title, regardless of whether the claimant is claiming as an original contractor under K.S.A. 60-1101 or as a subcontractor under K.S.A. 60-1103.

Another problem that has arisen is that the 1986 Act made no provision for extinguishing a notice of intent to perform once the claim had been satisfied. A new subsection (d) is added to K.S.A. 60-1103b to provide for the filing of a waiver of lien, which will extinguish the Notice of Intent to Perform.

II.

In 1977, K.S.A. 60-1101 was amended for the apparent purpose of abolishing the "first spade" rule. The "first spade" rule says that all mechanics' liens rank in priority from the date the first spade is put into the earth. All mechanics' liens relating to the same improvement had equal rank with one another, and all had priority over any other encumbrance such as a mortgage, that was recorded subsequent to the commencement of work. The 1977 amendment added the

single word "unsatisfied" to the statute, in the following context:

The lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, material or supplies at the site of the property subject to the lien. When two or more such contracts are entered into applicable to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest unsatisfied lien of any of them.

It is felt, however, that the failure to modify the preceding sentence which says that "the lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor ... [or] material ..." creates an ambiguity which is clarified by the proposed addition of the words "by such claimant" immediately following the phrase just quoted. This would establish beyond any doubt that all mechanics' liens resulting from the same improvement are of equal rank with one and another, and that their priority vis-a-vis other liens is measured not from the date that work was commenced by some party who has been paid in full, but from the date of commencement of work by the claimant.

III.

The requirement of existing section 60-1106 that "other incumbrancers of record" be made parties to a suit to enforce a mechanic's lien is overly broad. If the party or parties claiming mechanic's liens do not contend that their liens would be prior to another lien of record, such as a mortgage, then the other lien would not be disturbed by the mechanic's lien action, and there is no purpose to having such a lienholder as a party to the action.

The best example of the injustice caused by the existing provision is in the case of a purchase money mortgage which might have been in place for years. Under §60-1106 a suit to enforce a mechanic's lien for work done years later would nonetheless have to name the mortgagee as a party defendant to the suit. The mortgagee would incur the expense of making a defense to the claim, which at today's legal costs, would likely run to several thousand dollars.

This injustice would be cured by amending §60-1106 to make it clear that only lienholders who are claimed to be junior to the mechanic's lien need be named.

IV.

The procedure for the filing of a statutory bond established by K.S.A. 60-1110 requires that the bond be in the amount of the contract. This provision fails to recognize that at times there is a need to bond off a single lien claim which might be in dispute, and which is probably in a relatively small amount when compared to the whole contract. To require a bond in the full amount of the contract is onerous in such a case, and an amendment to the section is proposed which would allow a bond to be filed in the contract amount which would encompass all potential liens, or it would allow the filing of a bond in the amount of an individual claim which would extinguish a lien for that claim alone.

Additionally, it should be provided that in suits filed on such bonds, the only proper parties defendant are the principal and surety on the bond, and other parties, if any, who are contractually liable for the debt. Principally, this is an attempt to make clear that there is no need to join an owner or mortgage lender (who may have been a proper party if the suit were one to enforce a mechanic's lien rather than one to recover on a statutory bond), and therefore alleviate

the incurring of defense costs by such parties for what are tantamount to nuisance claims. The proposed amendment to K.S.A. 60-1110 would resolve this problem.

The foregoing amendments are not intended to affect any substantive rights of parties heretofore existing under the Kansas mechanic's lien statutes, but are only to clarify actions previously taken by the Kansas Legislature in 1977 and 1986; or to effect improvements in procedural matters.

AN ACT concerning mechanic's and materialmen's liens; amending KSA 60-1101, 60-1103b, and 60-1110, and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A 60-1101 is hereby amended to read as follows: 60-1101. Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, under a contract with the owner or with the trustee, agent or spouse of the owner, or with an owner contractor, shall have a lien upon the property for the labor, equipment, material or supplies furnished, and for the cost of transporting the same; however, a notice of intent to perform, if required pursuant to K.S.A. 60-1103b, must have been filed as provided by that section. The lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the furnishing of such labor, equipment, material or supplies by such claimant at the site of the property subject to the lien. When two or more such contracts are entered into applicable

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to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest unsatisfied lien of any them.

Section 2. K.S.A. 60-1103b is hereby amended to read as follows: 60-1103b. (a) As used in this section, "new residential property" means a new structure which is constructed for use as a residence and which is not used or intended for use as a residence for more than two families or for commercial purposes. "New residential property" does not include any improvement of a preexisting structure or construction of any addition, garage, or outbuilding appurtenant to a preexisting structure.

(b) A lien for the furnishing of labor, equipment, materials or supplies for the construction of new residential property may be claimed pursuant to K.S.A. 60-1101 OR K.S.A. 60-1103 and amendments thereto after the passage of title to such new residential property to a good faith purchaser for value only if the claimant has filed a notice of intent to perform prior to the

recording of the deed effecting passage of the title to such new residential property. Such notice shall be filed in the office of the clerk of the district court of the county where the property is located.

(c) The notice of intent to perform provided for in this section, to be effective, shall contain substantially the following statement:

NOTICE OF INTENT TO PERFORM

"I _____
(name of supplier, subcontractor or Contractor)

(address of supplier, subcontractor or contractor)

do hereby give public notice that I am a supplier, subcontractor or contractor or other person providing materials or labor on property owned by _____
(name of

property owner

and having the legal description as follows:

(d) When any claimant who has filed a notice of intent to perform as above provided desires to relinquish its right to a lien, said claimant may thereafter file in the office in which the notice of intent to perform was filed a waiver of lien which shall be executed by the claimant, shall identify the property as in the notice of intent to perform, and state that it is the intent of the claimant to waive or relinquish any statutory right to a lien for the furnishing of labor or material to said property. Upon such filing, the notice of intent to perform previously filed by such party shall be of no further force or effect, and such claimant's right to a lien under K.S.A. 60-1101 and 60-1103 shall be extinguished.

Section 3. K.S.A. 60-1106 is hereby amended to read as follows: 60-1106. In such actions all persons whose liens are filed as herein provided, and other

encumbrancers of record, whose liens are claimed to be inferior in rank shall be made parties, and issues shall be made and trials had as in other cases. Where such an action is brought by a subcontractor, or person other than the original contractor, such original contractor shall be made a party defendant, and shall at his or her own expense defend against the claim of every subcontractor, or other person claiming a lien under this article, and if he or she fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he or she may be required to pay. If the sheriff of the county in which such action is pending shall make return that he or she is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs.

Section 4. K.S.A. 60-1110 is hereby amended to read as follows: 60-1110. The contractor or owner may execute a bond to the state of Kansas for the use of all persons

in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of said claim in the amount thereof. Any such bond shall have with good and sufficient sureties, to be approved by, and filed with, the clerk of the district court, and when such bond is so approved and filed no lien shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on said bond by any person interested, but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim.

Section 5. K.S.A. 60-1101, 60-1103b, and 60-1110 are hereby repealed.

Section 6. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL 2035 is a criminal procedure bill amending K.S.A. 22-2902a, to include the Bethany Medical Center, as one of the authorized forensic labs recognized by the courts. This would allow the written report of the Forensic Examiner into evidence without having that person appear.

K.S.A. 22-2902(a) already allows other forensic lab reports into evidence. This amendment expands the statute to allow the Bethany Lab report in.

This will not cost money. It will save money. No longer will the forensic expert have to personally appear in the court. His time will be saved and the court will not have to pay expert witness fees.

HOUSE BILL 2069 is an amendment of the same statute, allowing U. S. Government lab reports into evidence. Both of these should be combined when the amendments are allowed.

Bethany Medical Center is expanding their services to include a rape center, pathology labs, and now a forensic drug lab. We can have the results of a test within 48 hours.

If we send to the Kansas Bureau of Investigation, the results are delayed for months.

This bill will speed up the entire criminal justice system, and will not result in any increase in cost.

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Attachment III