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FICTION, FALLACY AND FACTS
IN RELATION TO
"IMPLIED CONSENT" PROVISIONS OF CERTAIN
MECHANICS' LIEN STATUTES

By O. O. Myhre*

For upwards of a half century the mechanics' lien statutes of Minnesota and a few other states have included a provision which establishes liens by means of a presumption that an owner authorized the improvement. Minn. Stat. (1945) § 514.06; Cal. Code of Civ. Proc. (1941) § 1192; Nev. Comp. Laws (1929) § 3743; N. Mex. Stat. Ann. (1941) § 63.210; Ore. Comp. Laws Ann. (1940) 67.104; S. Dak. Code (1939) § 39.0706. The particular provision in question charges the owner's interest in the improved land with liens for unpaid labor and materials if the owner knew that it was being improved and failed to give notice to claimants (contributors), at the time and in the exact manner prescribed, that he had not authorized the improvement.

The constitutional aspects of this section have had some consideration by the Courts of California and Oregon, but argumentative support of the law has been most extensive in the decisions of the Minnesota Court. A challenge of the law at this late date means, naturally, a challenge also of the judicial decisions supporting it, although fully appreciating that the ingenious language of the questioned statute presents a veritable legal riddle. It is proposed, therefore, to deal with the Minnesota Statute and decisions rather exhaustively, since it does not appear that this type of statute has yet been tested by appeal to the Supreme Court of the United States.

That which evidently has dominated the juristic, as well as the legislative minds, and obscured the real flaw of the act, is the

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zeal to prevent a landowner from reaping the fruit of another's contribution without paying for it. The flaw in the act, in final analysis, consists in the undue and prejudicial advantage given contributors of labor and material in making proof of facts necessary to sustain a lien. To illustrate: Assume that A, owning land in common with B, "authorized" C to make improvement X on the land. Upon proof by C of the "authorization," the contract between A and C, express or implied, supports the lien upon A's interest in the land in favor of C, for unpaid labor and materials. However, B's interest cannot be charged if B was not a party to the authorization. The Statute, however, compels a court to find "authorization" by B, if at any stage in the construction of X, B knew of its progress. This consequence B can escape only if he shows the giving of notice at the time, in the form, and in the manner prescribed by the Statute; and the onus of such proof is on B. By the same token, though B may have given C actual notice of his non-responsibility for X in form, time or manner different from these prescriptions, or though it may have been impossible for B to give notice in conformity with the Statute, such facts are made inadmissible in evidence. Thus the statutory presumption against B is, under all circumstances (absent, the statutory notice) conclusive; although there be, on the one hand, plain facts refuting the presumption, or there be, on the other hand, only the sole proof of B's knowledge. It should be observed also that the "authorization" by A imposes upon him personal liability for C's claim; not so—under the statute—in the case of B. Nevertheless B's property is "taken" under the pretext of a liability ex contractu which naturally follows the finding of "authorization" by B, which the evidence will not sustain.

The Statute manifestly is in the nature of a rule of evidence. However, as we shall see, courts have been prone to introduce in their discussions additional concepts as legal props for the Statute. Evaluation of these, and of technical terms involved, in terms of fundamental principles, plus some historical considerations, seem inescapable if the web of confused thought on the statute is to be disentangled. An adequate treatment of the subject must, then, embrace considerably more than the sole question of the statute as a rule of evidence, however disproportionate this may appear to the real issue presented by this brief statute.

Coming now to some general aspects of the lien laws, it may safely be said that in absence of statute one cannot make any
direct claim on real property—to the improvement of which he may have contributed—on the sole ground that he has added value to it. The lien statutes, however, invariably give a lien to a contributor to an improvement, where the owner of the land has contracted for it with the contributor; and, generally, where the owner has authorized the claimant to furnish it, either by request or direction. It will be recognized in such case that liens are founded on contracts, either express or implied. Some statutes contain an additional ground for liens, namely: the "consent" of the owner, or his "knowledge and consent," to the improvement. Since, in contracting, the law becomes a part of the contract, the owner's consent to the lien is implied in law and in fact unless the contract expressly provides that the law is excluded. But this is on the presumption that everyone knows the law; since ignorance of the law is not excusable. Since consent is of the essence of contract, the owner's "consent" to the improvement may also reasonably be said to imply the consent to the encumbrance, as in the case of a contract. Consequently, statutes granting liens based on contract, or on request by the owner for, or on his consent to, the improvement, are recognized as compatible with the "due process" clauses; because the owner in such cases, by virtue of the meeting of his mind with that of the contributor on subject matter to which existing statutes appertain, consents to the lien. If, on the other hand, due consideration to the owner's consent to the lien is not given in such legislation, it would be invalid; because the legislature cannot take the property of one and give it to another. This power is reserved to the judiciary to be accomplished through "due process of law." However clear this would seem to be, a review of the decisions involving this type of legislation discloses that legislatures have over-stepped constitutional limitations from time to time.

In the several jurisdictions alluded to at the outset, the foundation for a lien is enlarged by including in the statutes a provision through which the "authority" of an owner is implied. In such case (courts failing to distinguish "consent" from "authority") the consent to the encumbrance is thought to follow by implication, from an "authorization" of the improvement by an owner; which in turn is merely presumed from proof of certain specified but limited facts. Our present inquiry is, accordingly, concerned specifically with this type of provision; and, in particular, Sec. 514.06, 1945 Stats. Minn., being Sec. 8495, Mason's Minn. Statute 1927 (Sec. 3509 R. L. Minn.); the pertinent part of which is hereinafter set out.
All Courts seem to be agreed on the principle, inhering in the foregoing, that mechanic liens are encumbrances which must ultimately rest upon the consent of the owner of the land improved and charged unless an estoppel theory as adopted in California is an exception. Thus the voluntary act of an owner, in being a party to the scheme of improvement, so as to be chargeable with an agreement, implies his consent to the liens according to the lien statute, as a matter of fact.

"It cannot be questioned that by statute a lien may be given in favor of builders, laborers, and material men contracting, subsequently to the enactment of the statute, directly with the owner of the property. Such a lien is not a charge imposed upon the property of the owner by legislative enactment, without his consent and without process of law. The parties * * * are presumed to contract with reference to statute; and unless the parties by express agreement exclude such presumption, the statutory provisions are annexed to the contract expressly made, and are to be construed as a part of it."¹

"* * * We cannot assume that the legislature intended what it had no power to do—to impose liens on the owner's property without any reference to his consent. . . ."²

While these decisions refer to statutes basing liens upon express contracts, statutes may, and generally do, base liens upon implied contracts arising, for example, where improvements are made "at the instance or authority" of the owner. But reason dictates that any recession from an express contract as the basis of a lien, makes less apparent the owner's consent to the encumbrance, which in turn increases the necessity of weighing the mandates of the constitutional "due process" clauses.

Courts have frequently pointed out that there is no essential difference between implied and express contracts. The distinction rests in the mode of proof. In an express contract the promise to pay is expressed; whereas in an implied contract the promise to pay is supplied on proof of other elements of a contract. In both cases "there must be that connection, mutuality of will, and interaction of parties generally expressed, though not very clearly, by the term 'privity.'"³ Implied contracts may, in reference to an improvement, arise in two ways: one, out of the request by the

land owner; the other, by his acceptance of what is done, being done, or proposed to be done, by another. Hence, where something of value is furnished by one, to another, at the latter's request, the law implies the promise of the latter to pay for it, as a matter of fact. But if one furnishes something of value, without request by another, and the latter merely accepts it, the promise to pay arises as a presumption of fact. In the first instance, preponderance of proof is necessary to overcome the implied promise to pay; whereas, in the second instance, only slight proof will overcome the presumption of the promise to pay.\(^4\) Liens, then, are in effect security for a promise to pay analogous to mortgages. It is, accordingly, when lien questions transcend this analogy, that difficulties arise.

There is another class of obligation, sometimes called an implied contract, but which is strictly a legal fiction and properly termed a quasi, or constructive, contract. While it has no application to the lien law, its nature is worth noting for reasons to be considered later on. The Supreme Court of Michigan, for example, treats aptly this type of obligation in the following language:

"In order to afford the remedy demanded by exact justice and adjust such remedy to a cause of action, the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received. The courts, however, employ the fiction with caution, and will never permit it in cases where contracts, implied in fact, must be established, or substitute one promisor or debtor for another."\(^5\)

A further discussion of this class of obligations is found in Vol. 17 C. J. S. 322, Sec. 6; wherein quasi or constructive contracts are said to be:

"obligations imposed or created by law without regard to the consent of the party bound, on the ground that they are dictated by reason and justice * * * the obligation arises not from consent, as in the case of true contracts, but from the law or natural equity * * *. So, when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred the law may infer a promise even as against his intention. In order that a contract may be implied in law from the wrong of a party, it must have been committed with the intention of benefiting his own estate." (Italics supplied)\(^6\)

\(^4\) Wojahn v. Union Nat'l Bank of Oshkosh, (1911) 144 Wis. 646, 129 N. W. 1068.


\(^6\) This authority cites instances of quasi or constructive contracts as those—(1) in which money is improperly received—(2) or where money has been improperly paid—(3) cases of account stated—(4) judgment on which an action of assumpsit or debt may be maintained—(5) cases in which an obligation to pay money is imposed by statute—(6) cases where a person
Because of the great significance of the word in relation to the theory of liens, we pass now to a consideration of "consent" as a statutory basis for liens. The word has been before various courts, and has been construed to the extent that there can be little doubt about its nature. In *Valenti v. New York Theatre Co.*, it was stated that under lien law,

"the owner's 'consent' implies his actual consent that the improvement shall be made, and his mere general consent that the lessee at his own expense may make repairs is insufficient; nor do his expressions of satisfaction with the work, as to which he exercised no supervision, imply his consent." In *Avery v. Smith* the Supreme Court of Connecticut affirmed that "the mere fact that the * * * owner knew of the contract, and that the work was going on, does not constitute 'consent' within the statute; there being no 'consent' unless there is an implied agreement on the part of the owner to pay for the work or material... Consent means unity of opinion; the accord of minds; to think alike; to be of one mind. Consent involves the presence of two or more persons, for without at least two persons there cannot be a unity of opinion or an accord of mind or any thinking alike." "The words 'consent of the owner' are used in the statute as something different from an agreement with the owner, and, while it may be urged that they do not require such a meeting of the minds of the parties as would be essential to the making of a contract, there must be enough of a meeting of their minds to make it fairly apparent that they intended the same thing in the same sense. It cannot be supposed that the statute was designed to be made a cover for entrapping a party into seeming consent when there was no real one." That consent under lien statutes cannot be based merely on an owner's passive acquiescence in the making of improvements has been repeatedly stated.

The hail insurance law of North Dakota embodies a lien provision. By the statutes of 1919 and 1921, the consent of an owner to the lien for hail taxes originated in his knowledge of the law and its operation; but, if an owner desired insurance, the primary duty devolved upon him, or the tenant, to invoke the statute by wrongfully appropriating property to his own use becomes liable to pay the owner the reasonable value thereof—(7) cases in which a person fails to deliver specific property and becomes liable for the money value thereof—(8) cases where a person wrongfully compels another to render him valuable services—(9) cases where one man has obtained money from another by oppression, extortion, or deceit—(10) or thru the commission of trespass—(11) cases in which necessities are supplied to a person who by reason of disability cannot himself contract, i.e., minors, insane persons—(12) cases where a husband recovers funeral expenses from estate of his wife, etc.

7. (1917) 166 N. Y. S. 76, 77.
8. (1921) 96 Conn. 223, 113 A. 313.
through the affirmative act of filing an affidavit relating to acreage and crops. However, when that statute was re-enacted in 1933, hail insurance, under the new provisions, "would be granted only upon the written application, or pursuant to the consent of the owner of the land," and the resulting lien would "be prior and superior to all mortgages, liens and judgments executed subsequent to the approval of this act." The hail insurance statute was justified on the ground that "the business of insurance itself is impressed with a public interest so as to justify legislative regulation to an extent that may not be justified in many other types of business." In Federal Farm Mtg. Corp. v. Falk it is pointed out that the authorities, including the Supreme Court of the United States, have approved statutes giving liens on the basis of "request" or "consent," the court stating that "where any reasonable grounds exist for so doing, the legislative assembly may provide that a person, who at the request or with the consent of another has rendered service, furnished materials or supplies, shall have a lien on some property or thing of value belonging to the person at whose request or consent, and for whose benefit the services were performed or materials or supplies furnished. And where such statute operates prospectively, it is not in violation of the 'due process' or 'equal protection of the law' clauses of the 14th Amendment to the Constitution of the United States." (Italics supplied.)

In Clark v. North the Supreme Court of Wisconsin made it clear that "consent," as a ground for a lien, required something more than mere knowledge and acquiescence, or silence; that it has its origin in the proposal to do, or the doing of something by one party, with which another (owner) is in deliberate and voluntary accord. In that case the owner knew of the well drilling, and consented to it, on condition, however, that another (optionee) was to pay for it. The court said that: "such conditional consent was in effect a protest against the construction of the well at the expense of the defendant (owner) in whole or in part." The plaintiff (claimant) proceeding thereafter in effect waived any supposed lien. This view is also well expressed in the following language in the opinion in DeKlyn v. Gould:

13. See footnote 11.
14. (1907) 131 Wis. 599, 111 N. W. 681.
15. (1901) 165 N. Y. 287, 59 N. E. 95.
“Mere acquiescence in the erection or alteration, with knowledge, is not sufficient evidence of the consent which the statute requires. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth, unless upon equitable principles the owner should be estopped from asserting the truth.” (Italics supplied.)

The one thing which all of these authorities appear to be especially concerned with is that positive and affirmative behavior on the part of the owner which signals to a claimant that he has “a grant of the right” to make the improvement; and the right, as a consequence, to charge the property with a lien. Thus, it appears that “consent” is the most tenuous vehicle capable, as a matter of substantive law, of conveying an owner’s consent to a lien, which may constitutionally be prescribed. This is but to say: that unless there is at least “consent” to the improvement, there is no rational basis for consent to the incumbrance. Certainly “consent” as a fact, does not result from a law which may coerce or entrap an owner into seeming consent. Moreover, if a prescription or formula by the legislature, short of “consent”—such as “knowledge” and “passive acquiescence,” or “silence”—is made the basis for the “taking of property,” a denial of due process is involved. A statute arbitrarily assuming such character and effect would be void on its face. There is no basis in reason or natural justice for any assumption on the part of a stranger or trespasser that his entry and activities upon another’s land, without request of the owner, is going to have such approval and acceptance that the owner will either pay or consent to any lien. Reason dictates that he must defer to the rights of the owner in the land, and cannot make assumptions which he knows are apt to be contrary to the interests of the owner.

From the foregoing it becomes clear that “consent,” in respect of the mechanic lien laws, is, and apparently must be, equivalent to an implied contract in that the essential elements of “consent” constitute a prima facie implied contract. This in turn necessarily implies personal liability. The statute, however, by its language—as we will see presently—adroitly excludes the personal liability which logically follows the finding made mandatory by the statute: i.e. of “authorization,” in deference to the proof. The thought apparently is to ameliorate the consequences of the finding by limiting them to a lien on the owner’s property. In fine, the statute creates the illusion of a debt as a justification for the “taking of property.”
EARLY HISTORY OF THE MINNESOTA STATUTE

The lien statutes of Minnesota now in force were preceded by Chapter 170, G. L. 1887, which had a lease on life for over ten years. The framers of the old act went so far afield as to provide that "consent" should be conclusively proven by failure of any owner to bring suit in injunction against the contributors:

(Sec. 5) "The fact that the person performing labor or furnishing material was not enjoined by law by the person in whom the title was vested at the time such labor was performed or material furnished, shall be conclusive evidence that it was with and by the consent of the owner that such labor was performed and material furnished."

In the ten years following enactment of the older lien act, the supreme court had several occasions to examine it piecemeal. All of it was eventually challenged as being unconstitutional, and the court invalidated the entire act in Meyer v. Berlandi, Justice Mitchell writing the opinion. Section 5 of this act came in for specific consideration, and the court said in respect of it, as follows:

"As liens are an incumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or due process of law."

Further:

"The legislature may doubtless establish rules of evidence, but to enact a law making evidence conclusive which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property, and a destruction of vested rights without due process of law."

This Berlandi case seems to state the fundamental prerequisites of a statute of that nature concisely and clearly. It is doubtful, however, that what the court said above, in this case, was ever subsequently fully understood and applied. A new mechanic lien statute was enacted shortly after the Berlandi decision, being Chap. 200, G. L. of 1889. Section 5 of that Act (a remolding and recasting of Sec. 5 of the former act) was presumably an attempt to conform to the Berlandi decision. The ulterior purpose of the authors in contriving an advantage to claimants was, however, not abandoned. The remolded provision (Sec. 5) in substance provided, and read, in part:

"Every house (etc.) *** mentioned in Secs. (1) and (2) of this act *** erected, constructed, altered, removed to or repaired upon any land, with the knowledge of the owner of such land, or of any person having or claiming an interest therein otherwise than as

16. (1888) 39 Minn. 438, 40 N. W. 513.
a bona fide prior mortgagee, incumbrancer or lienor, shall be held
to have been erected ** at the instance of such owner or person,
so far only as to subject his interest to a lien therefor, as in this
section provided, and such interest so owned or claimed, shall be
subject to any lien given by the provisions of this act, unless such
owner or person shall, within five days after he shall have ob-
tained knowledge of the erection, construction, alteration, removal
or repair aforesaid, give notice that his interests shall not be sub-
ject to any lien for the same by serving a written or printed notice
to that effect personally upon all persons performing labor or fur-
nishing skill, material or machinery therefor, or shall, within five
days after he shall have obtained the knowledge aforesaid, or
knowledge of the intended erection, construction, alteration, re-
moval or repair aforesaid, give such notice as aforesaid by posting
and keeping posted a written or printed notice to the effect afore-
said in some conspicuous place upon said land or upon the buildings
or other improvements situate thereon * * *

A revised statute was subsequently enacted in which the above
provision was condensed and incorporated in Section 3509 R. L.,
from which comes the present statute (Sec. 514.06, Minn. Stats.
1945), the pertinent part of which reads, as follows:

"** When improvements are made by one person upon the
land of another, all persons interested therein otherwise than as
bona fide prior incumbrancers or lienors shall be deemed to have
authorized such improvements, insofar as to subject their interests
to liens therefor. But any person who has not authorized the same
may protect his interest from such liens by serving upon the per-
sons doing work or otherwise contributing to such improvement
within five days after knowledge thereof, written notice that the
improvement is not being made at his instance, or by posting like
notice, and keeping the same posted, in a conspicuous place on the
premises. **"

It will be seen that in this revision, the provision for posting of
notice upon learning of the intended improvement, and prior to
actual commencement thereof, has been eliminated. Some change
also was made in respect of the contents of the notice. Sec. 5 of
said Chap. 200, required the notice to state that the owner's "inter-
est shall not be subject to any lien"; whereas the revision requires
the owner to state, "that the improvement is not being made at his
instance." Under the older provision the owner seems to be per-
mitted to assent to the improvement, but to make an effective denial
of a lien on his interest; while under the revision he still assents
to the improvement, but denies he was instrumental in procuring it.
Thus, under the older provision he could possibly have "consented"
to it, but still avoid the lien by repudiating it; whereas under the
revision, while assenting, he simply denies any request on his part
—although this the prospective lienor already knows, in most cases at least. It is significant that "consent" to the improvement, by itself, is not made a ground for a lien, either in this particular section, or any other section of the statute; the only grounds for a lien being the owner's "contract," his "instance," or "authority." The Minnesota court, in any event, has indicated that the revision has not radically modified the legal effect of the 1889 statute.\textsuperscript{17}

**Decisions Under the Present Minnesota Statute**

The redrafted statute (Chap. 200, G.L. 1889) came first up for consideration by the Minnesota Supreme Court in \textit{John Martin Lumber Co. v. Howard}.\textsuperscript{18} Speaking of Section 5 of this statute, the court said:

"By the provisions of Sec. 5 there has been established a rule of evidence \*\*\* in the nature of an equitable estoppel, and under which all interested parties, with certain exceptions, are required to speak out when advised of the fact that improvements are being made upon real property. If, with knowledge of the fact, they remain silent, acquiescence and consent to the making of the improvements and to the consequences in case labor and materials are not paid for are conclusively presumed under the statute." (Italics supplied.)

This forthrightness seems to have called for some reservation by the court, possibly because of some argument in the case, since it goes on to say:

"In conclusion we will say that, whatever implied limitations there may be to the general language of Sec. 5, it is clear that it applied to all cases where the owner, knowing that improvements are being made on his property, keeps silent, when fairness and common honesty require him to speak." (Italics supplied.)

On the next occasion for consideration of this statute, the court seems to have recognized that an equitable estoppel is not fully accounted for in the John Martin Lumber Co. case. Apparently this tempted the court to draw upon the statute for the concept of "duty" devolving upon the owner to disclaim authority for an improvement, for the purpose of justifying its "equitable estoppel" hypothesis, or the application of the legal fiction of quasi-contract. Witness the case of \textit{Wheaton v. Berg},\textsuperscript{19} wherein the court says:

"Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that it is done with his con-

\textsuperscript{17} See \textit{Wallinder v. Weiss}, (1912) 119 Minn. 412, 138 N. W. 417.

\textsuperscript{18} (1892) 49 Minn. 404, 52 N. W. 34.

\textsuperscript{19} (1892) 50 Minn. 525, 52 N. W. 926.
sent. From the neglect of the duty created by statute the inference follows "***." But the embers from "implied limitations," in the preceding John Martin Lumber Co. case, have now been fanned into faint incandescence, for the court promptly proceeds:

"*** But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice conclusive upon the landowner in all cases.

"It is beyond the power of the legislature to subject one's property to such a liability by reason merely of his failure to perform a specified act arbitrarily prescribed by statute, if the circumstances are such as to render performance impossible.

"But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a prima facie nature rather than conclusive.

"As the statute was obviously intended to establish a rule of evidence, and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested we conclude that it must be so construed." (Italics supplied.)

From this it appears that the court regards the reasonable possibility for an owner to disaffirm authorization in the arbitrarily prescribed manner, as the equivalent of "due process."

It is interesting to note that Justice Mitchell, who wrote the opinion holding the original act invalid, in Meyer v. Berlandi, 20 dissented in the Wheaton v. Berg case, particularly with reference to the application of that section to vendors under land contracts. While this point is not germane to the present discussion, it may be noted that vendors were involved with that section, as they are under the revised version, which now provides:

"When land is sold under an executory contract requiring the vendee to improve the same, and such contract is forfeited or surrendered after liens have attached by reason of such improvements, the title of the vendor shall be subject thereto; but he shall not be personally liable if the contract was made in good faith."

The question arises, then, as to whether a vendor, in absence of his requiring an improvement, is subject to the section as an owner. The Minnesota court, entirely aside from this provision, has held, starting at least with Fauser v. McElroy, 21 that a vendor in a land contract is an owner, and not an encumbrancer or lienor, and, therefore, subject to the "duty" of giving notice. But it will be seen, from Wagner v. Wagner, 22 that under an identical statute

20. (1888) 39 Minn. 438, 40 N. W. 513, discussed at p. 567.
of South Dakota the supreme court of that state has held that such vendor is a lienor, and not an owner, and is thus excepted from the operation of the statute. This ruling subsists despite the recognition that the South Dakota statutes are an adoption of the Minnesota lien statutes.\textsuperscript{23} Whatever the interest of a vendor may be denominated in Minnesota, it has uniformly been held by the Minnesota court that he holds the legal title in trust or as security for payment of purchase price by vendee; and that in effect the contract may be foreclosed in an equitable action for specific performance;\textsuperscript{24} that, while it is not favored, a vendor's lien exists under Minnesota law;\textsuperscript{25} and that the vendor may bring an action, in case of default, to enforce a lien against the property for the unpaid purchase price.\textsuperscript{26} So, to the extent of these holdings, at any rate, the vendor is discriminated against by the court's incompatible decisions under this lien statute. In view of this situation, and irrespective of specific points discussed in the case, the following language from the dissenting opinion in the \textit{Wheaton v. Berg} case seems apropos:

"This construction (that all vendors be excepted from the operation of Sec. 5) is in harmony with the general policy of the section, as indicated by the exception of mortgagees and lessors from the operation of its provisions."

Judge Mitchell expressly refrained from committing himself on the other points in the rest of the opinion. This may be taken to signify a reservation on his part as to the soundness of the conclusions in respect of the section of the lien law now under consideration. If so, there would seem to be substantial reasons for it.

In considering this section again, in \textit{Congdon v. Cook},\textsuperscript{27} the court casts aside all considerations of "implied limitations" upon the section although recognizing the limited prima facie character of the presumption of the statute asserted in \textit{Wheaton v. Berg}. Here, however, the court justifies this statute by citing a Wisconsin decision,\textsuperscript{28} although the Wisconsin statute bases a lien on both "knowledge" and "consent," and contains no arbitrary provision as to the character of the notice of non-assent, or the time

\begin{itemize}
\item \textsuperscript{23} Botsford Lumber Co. v. Schriver, (1925) 49 S. D. 68, 206 N. W. 423.
\item \textsuperscript{24} Abbott v. Modestad, (1898) 74 Minn. 293, 77 N. W. 227.
\item \textsuperscript{25} Shove v. Burkholder Lumber Co., (1923) 154 Minn. 137, 191 N. W. 397.
\item \textsuperscript{26} Brooks v. Thorne, (1929) 176 Minn. 188, 222 N. W. 916.
\item \textsuperscript{27} U. S. Installment Realty Co. v. De Lancy Co., (1922) 152 Minn. 78, 188 N. W. 212.
\item \textsuperscript{28} Heath v. Salles, (1888) 73 Wis. 222, 40 N. W. 804.
\end{itemize}
and manner of serving it. Having acknowledged that consent to the lien is basically necessary, the court goes on to speak of "consent" to the improvement, wholly indifferent to the fact that the statute does not purport to make "consent," as such, a ground for a lien. Instead, the section specifically uses the word "authorized." The Minnesota court says:

"The evidence of his consent is the failure of the owner, after he acquires knowledge of the improvement, to give or post the notice required by the statute." (Cites Wheaton v. Berg, and refers to the construction of the statute in that case.)

"It is enough that the statute is a valid exercise of legislative power, and the legal basis of the lien as against the owner is his consent to an improvement presumably beneficial to the property." (Italics supplied.)

"The evidence justified the court in finding the plaintiff had reasonable knowledge of the improvement, and it was his duty to give the required notice, or show a valid excuse, which he failed to do." (But the court may well have added, "and which, under the language of the statute, he was not permitted to do.")

Likewise, in Hurlburt v. New Ulm Basket Works\textsuperscript{29} the court, in reasserting the validity of this section, fails to examine the statute further; being content to refer to the fact that similar statutes then existed in California, Oregon, Nevada, New Mexico and Washington. In this New Ulm Basket case, the court, moreover (on the excuse that the point had not sufficiently been advanced), refrained from considering whether or not an agreement, express or implied, was necessary to support a lien; and held that under Sec. 5, knowledge alone on the part of an owner was sufficient to support a lien.

In Wallinder v. Weiss\textsuperscript{30} the Minnesota court in comparing Sec. 1, Laws 1889, with the same section in the subsequently revised law, concludes that there is no change in meaning as to the "right to a lien." The court goes on to observe (what it failed to notice in Congdon v. Cook, supra):

"The foundation of this right (to a lien) as therein indicated (said Sec. 1) must be kept in mind in giving the proper meaning to the word 'authorized,' as found in said Sec. 3509 (Sec. 8495 Mason's Minn. Stats. 1927; Sec. 514.06, Minn. Stats. 1945). . . .

"We take it that 'authorized' here means authorized by contract with, or by direction or at the instance of, the owner or person interested, and not merely by his permission or consent at the instance of a tenant or vendee. * * * Such mere consent ought not to irrevocably subject the interest of the owner to mechanic's liens

\textsuperscript{29} (1891) 47 Minn. 81, 49 N. W. 521.

\textsuperscript{30} (1912) 119 Minn. 412, 138 N. W. 417.
for work or material performed or furnished at the instance of a lessee or vendee."

This clear distinction, thus drawn, between what amounts to a contract, express or implied, and mere assent, permission or license seems sound; and leaves no doubt except as to the sufficiency of mere assent as a ground for a lien, and as to the court's conception of the meaning of "consent." The proposition is re-stated thus in Berglund & Peterson v. Wright:31

"... to 'authorize' then, means something more than merely giving permission to make them. It means an affirmative grant of the right to make them." (Italics supplied.)

This is as if to explain what the court meant in a previous case where it had said:

"As that section is construed by this court, knowledge by the owner, and failure to serve notice, is evidence of his consent that his land be charged with the claims of persons doing work or furnishing material in constructing a building upon it." (Italics supplied.)

In Snell Sash & Door Co. v. Florsheim, the latest case, the Minnesota court points out that the statute calls for the giving of notice "within five days after knowledge *** that the improvement is being made," and concludes:

"Thus the vendor (owner) here is precluded by a statutory provision from showing any reason it may have had for not serving or posting the statutory notices. The statute has no exceptions." Berglund & Peterson v. Abram, and Bruer Lbr. Co. v. Kenyon, are cited. The Berglund case simply reiterates the "duty" of owners to warn materialmen, etc., imposed by statute, as first expounded in Wheaton v. Berg. The Bruer case restates generally the purported effect of the statute, that is, a lien resulting where such notice is lacking, present the owner's knowledge. The effect of the opinion in the Florsheim case is obviously to nullify the "prima facie" character of the statute contended for in Wheaton v. Berg.

By way of recapitulation, from the cases discussed up to this point, it will be observed that the Minnesota court has characterized the nature, purpose and effect of this section of the lien statute, as follows:

1. It is a rule of evidence.
2. It is in the nature of an equitable estoppel.

31. (1921) 148 Minn. 412, 182 N. W. 624.
32. Sandberg v. Palm, (1893) 53 Minn. 252, 54 N. W. 1109.
33. (1944) 217 Minn. 21, 13 N. W. 2d 776.
34. (1921) 148 Minn. 412, 182 N. W. 624.
35. (1926) 166 Minn. 357, 208 N. W. 10.
36. (1892) 50 Minn. 525, 53 N. W. 926.
3. It imposes upon the land owner the “duty” of “warning” workmen, etc., by serving or posting a specified notice, during a specified time, if he would avoid the conclusive inference of the statute.

4. It is intended as a protection to laborers and materialmen, and to make such protection more certain and effective.

5. It is intended to remove grounds for controversy. Nowhere, however, does the court appear to have scrutinized or analyzed this section from the standpoint of (a) vagueness or unsoundness which may inhere in it; or (b) the arbitrary nature of its provisions—except to the limited extent touched upon in Wheaton v. Berg, supra; or (c) any oppressive, unreasonable or unjust aspects of its nature and operation.

Similar statutes of other states have been sustained on similar reasoning without adequate consideration of the constitutional objections which might well be urged against the statute.37

Objections to the Statute

Common experience would indicate that serving notice on prospective lien claimants prior to the commencement of the improvement, should be sufficient to protect their interests. Also, it would certainly seem competent to post the premises with the required notice prior to the commencement. Not until Snell Sash & Door v. Florsheinz, has the court indicated specifically that this is not a compliance. It follows from the court’s view, that a prospective lien claimant is never burdened with any kind of notice, actual or constructive, of an owner’s non-consent, prior to the actual commencement of the improvement; nor will any kind of notice during the course of the improvement, no matter how effectual, take the place of the arbitrary prescriptions of the statute. Thus, by mere implication, a substantial body of law as to notice, based upon common sense, is revoked as to prospective lienors.

Then, again, is an owner required to serve or post notice when “knowledge” comes to an owner after the improvement has been completed? The court has not been clear on this point at any time

37. New Mexico and Oregon courts sustained the statute as a rule of evidence, while the California court sustained it on the basis of equitable estoppel. Albuquerque Lumber Co. v. Montevista Co., (1934) 39 N. Mex. 6, 38 P. 2d 77; Title Guarantee Co. v. Wrenn, (1899) 35 Ore. 73, 54 P. 1093; John R. Gentle & Co. v. Britton, (1910) 158 Cal. 328, 111 P. 9. Without indicating its theory, the Nevada court applied its statute strictly and ruled that personal service of notice upon the claimant will not bar the lien because the statute requires the notice to be posted. Rosina v. Trowbridge, (1888) 20 Nev. 106, 17 P. 751.
(except as it may be inferred from the Florsheim case); although reason, based on common experience, would again say that it should be unnecessary. Next, what of the duty of serving notice when an owner first acquires knowledge of the improvement, within, say, one to five days before the actual completion of the improvement? You are left to your own deductions in such case also. In looking at the statute from the viewpoint of the mechanic lien claimant, who evidently is intended to be the beneficiary of the act; note that he may complete the improvement without the owner’s knowledge, or he may have nearly completed it, and then be served with an owner’s notice of non-assent. In either case, is the statute very helpful to him? Questions of this nature do not bespeak the clarity and certainty of valid legislation, and should stimulate inquiry into the question of constitutionality. 38

As noted, the court regards the section as imposing a “duty” upon an owner to “warn” materialmen, etc., if he would escape the inference of “consent.” Statutes in other jurisdictions expressly basing liens upon “consent” of an owner to the improvement, contain no arbitrary prescriptions for the form, time and manner of giving of notice of dissent. Furthermore there is nothing in common experience which dictates the necessity of an owner waiting until improvements actually commence before giving such notice. The salutary purpose of this statute would be in most cases better served if the notice were given prior to commencement of the improvement—for in such case, if the prospective claimant could ever be said to have the right to rely on consent of some party interested in the premises, with whom he has had no dealings, it would be decidedly to his advantage to know it before expending time, energy and money on the project. Ergo, the suggestion that the time, manner and form of giving notice under the statute is unduly arbitrary, and that the courts consequently would not be obliged to enforce the statute as a rule of evidence. People v. Murguria, 6 Cal. 2nd 115. And, as defined by the court, does the statute operate justly and in a reasonable manner? If not, it must be objectionable on these grounds too. Is it reasonable or just to require a by-standing owner to abide the event of invasion of his property by strangers before he can effectively apprise them that he is not a party to the instigation of the improvement? They already know, or ought to know, at whose instance they are there. If they propose to take someone’s property, is it not more just that they give notice to

him of such intention? On the other hand, what is the protection—to say nothing of the certainty thereof—to one who is served with notice about the time his contribution is complete? These considerations are but other phases of another fundamental concept propounded by the court itself, namely: that of this statute as a rule of evidence.

Is the statute valid, in fact, as a rule of evidence? The fact that it operates to take an owner's property makes this inquiry highly pertinent. Obviously, the statute creates a conclusive presumption. It purports to establish the fact that an owner "authorized" an improvement, by the exclusive evidence that the owner (1) knows about it, and (2) serves or posts no notice in the prescribed manner, form and time. The severity of such rule is emphasized by the repudiation in Snell Sash & Door Co. v. Florsheim of the limited defense contended for in Wheaton v. Berg. So far as the statute itself is concerned, it makes no express provision for any exception affording an owner the opportunity to show any excuse, on any ground, for failure to serve or post the notice. The defense of impossibility of compliance was plainly read into the statute by the court in Wheaton v. Berg. But, in holding the presumption under the statute prima facie only for the purpose of showing such excuse, the court took an illogical and untenable position. By the express wording of the statute, it is conclusive for all purposes. As the Wisconsin Supreme Court said, in Rogers-Ruger Co. v. Murray regarding a lien statute: "This Court can only construe. It can't legislate. Words should not be read into or read out of a plain statute."

It is evident that the court, in approving the conclusive presumption created by the statute, has ignored the substitution of an arbitrary legislative prescription for certain essential evidence upon which the conclusion or deduction depends. The statute bluntly states that when improvements are going on, all persons interested in the land (with certain exceptions) shall be deemed to have "authorized" the improvement. Standing by itself—this is obviously ridiculous. It means simply that proof of the improvement is proof that owners contracted for it. So, by what follows, the fact of "knowledge" is added to the required proof. Then it seeks to leave a way out for an owner who has not in fact authorized the improvement, by his serving or posting of notice to the effect that the improvement is not made at his "instance." The court, however,

39. (1902) 115 Wis. 267. 91 N. W. 657.
instead of weighing the significance of the words "authorized" and "instance," simply accepts the premise, namely: knowledge of the improvement and absence of the prescribed notice by the owner give rise to the unwarranted conclusion that the owner consented, not only to the improvement, but also to a lien on his interest for the same. In fact, the conclusion is even broader. It includes "request" of the owner, because to "authorize" requires some positive and active behavior on the part of an owner inducing the doing of the improvement. The two quoted words—"authorized" and "instance"—were manifestly used by the legislature with the object of placing the party having a part interest in the land (but having nothing to do with the procuring of the improvement) on the same basis as the person actually authorizing the improvement. Presumably in this way the legislature sought to give the appearance of equal protection of the law to several persons interested in the same land. As we have seen, it is the authorization of the improvement, and the consequent express or implied contract, which draws to it the statute; and in that manner confers the necessary consent for the encumbrance on the interest of the instigator of the improvement. But the conclusive presumption of this law subjects an owner, on the basis of only knowledge of the improvement, and his failure to give the notice (two negative or passive factors), to the same consequence as one who has "authorized" the improvement; and attempts thereby to draw in his consent to the lien of the statute.

Under the express provisions of the Minnesota statute creating mechanic's liens, and the theory applicable thereto, certain facts must be present: (a) Real estate to be improved; (b) authorization or request by an owner; (c) directed to the contributor; (d) actual improvement (adding of value); and (e) consent of the owner to the lien for the added value, which results from the implied contract arising out of fact (b). But under the section under consideration, "authorization" is conclusively proven by two facts: Knowledge or notice of the owner (though merely a by-stander, or objector, in fact); and, absence of notice of non-assent—which by almost unanimous authority is not even enough to establish "consent," to say naught of "authorization." Yet, notwithstanding, fact (b) is deemed proven. By the same token, such owner is precluded from showing facts proving actual absence of any procurement on his part, of the improvement, or proving factual and effective objection to the improvement—to say nothing of the encumbrance—except in the arbitrarily prescribed manner. Nor, indeed,
is there provision for proving impossibility of an owner's compliance with the section.

Thus, it appears that additional evidentiary facts bearing upon the presence or absence of "authorization," on which consent to the lien by an owner depends, are completely shunted and, indeed, are precluded from consideration wherever the court has dealt with this statute as a rule of evidence—(except to the limited extent discussed in Wheaton v. Berg, supra).

When it comes to the taking of property, the pertinent constitutional provisions must prevail in judging whether or not a statutory presumption is a valid rule of evidence. On this point the U. S. Supreme Court has spoken. In Mobile, J. & K. RR. Co. v. Turnipseed, Adm'r.,40 that Court said:

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of the government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous [citing cases]..."

"That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presented."

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him." (Italics supplied.)

It seems therefore, (as if my way of confession and avoidance of the foregoing rule) that the Minnesota court in sustaining the statute, has drawn upon two unwarranted fictions: one relating to a "duty" of an owner; the other, relating to a supposed analogy between the statute and "an equitable estoppel." To speak of a "duty" of such owner to "warn" prospective lien claimants is simply begging the question. No duty arises under a law if it is invalid. But the theory of "duty" may have been intended to supplant, if not to reinforce, the concept of a rule of evidence. This

recalls the concept of quasi-contract, the application of which is a judicial and not a legislative function. By the introduction of this definition, the legislative branch is again conceded powers to legislate in the realm of "due process." If any duty arises in a situation aimed at by the statute, it ought, in any event, to devolve upon the one who seeks to take the owner's property, to give notice of his intention so to do. Silence of the owner thereafter may then have some significance. The limitations upon a legislature by the constitution proscribe arbitrary definitions:

"If the law making power were vested with unlimited authority to fix the meaning of words, to take cases without the prohibition of the constitution by arbitrary definitions, the fundamental rights of the citizen would be safe only so long as the legislature should abstain from defining away constitutional protections. Due process of law might be defined to embrace arbitrary confiscations; * * * and many, if not all of the barriers erected to shield the fundamental rights of the citizen from legislative assault . . . would crumble before the breath of legislative definition."

This principle could of course be nullified, by unrestrained judicial definition, as appears to be the case here.

The real question is: just what are the minimum specifications of the vehicle for consent to the encumbrance (lien)? From observations to this point, it is plain that "consent" to the improvement is the lowest common denominator of the grounds for liens certainly specified in lien laws, capable of the implication of consent to a lien. Unless there is at least such consent, no logical ground for consent to a lien for work done or materials furnished can be perceived. It is seen from what courts have said in defining "consent" as a ground for liens, that all have taken precautions against a definition short of real consent, as against imputed consent. On the other hand, will it do for the legislature as a matter of substantive law to prescribe a "duty," the neglect of which supplies "consent" and a promise to pay; or, instead thereof, some obligation to another to respond with his own property, without reference to his consent?

The fiction of a quasi or constructive contract is one relating to procedure and remedy, to prevent or rectify what in reason and justice would be a wrong. The "duty" in such case is positive. The right corresponding to the duty is unqualified, unconditional, and as apparent as the duty. The fiction is applied by the courts in order to recover property, or its equivalent, which in reason and justice does not belong to the obligor. He comes by it in violation

of the rights of another. This is unjust enrichment. Under the statute in question, however, a stranger or trespasser is given the right to assume consent, by an owner, to the entry, and to the doing of something, until notified to the contrary as prescribed, without ever consulting the owner. This right and correlative "duty" are in effect made superior to fundamental law by which one is supposed to have protection against the taking of his property against his will, except through due process. Thereby is defeated that reasoning which irrefutably evinces that mere knowledge, plus silence on the part of one, does not necessarily mean his consent to an act. Thereby is frustrated that sense of justice which dictates that one who, as a stranger, proceeds with an act without another's consent, is not in position, on that premise alone, to insist upon payment. An owner, for instance, having knowledge of an intended improvement, at such time makes known his dissent. The statute, as interpreted, practically requires the owner in such case, to stand guard in order that notice may be given within its arbitrary prescriptions—for only too often has the court treated such prior information (either with or without dissent) as evidence of "knowledge" of an owner of the improvement.

Whatever the interpretations or definitions have been, the statute here is clearly a mandate to find from proof of an undefined "knowledge" of the improvement by an owner, plus absence of arbitrarily prescribed notice by him to the contributor, that the improvement was procured in each and every case by (in the words of the court) "contract with, or by direction or at the instance of the owner or person interested." The words of the general provisions of the statute specifying grounds for liens, make real consent to the improvement mandatory; but under the specifications of proof in the statute considered, the dice are loaded as against the owner. This question of "duty" is most aptly treated and disposed of in People ex rel. Hillel Lodge v. Rose. An Illinois statute, in substance briefly stated, imposed on every corporation the duty to file with the Secretary of State an annual statement showing, among other things, the continued exercise of its charter. Upon failure to so do, the Secretary of State was obligated to file a certificate forfeiting the charter of any such corporation. While such failure was a breach of the statutory duty and made prima facie evidence of non-user, it was held that the legislature had no power or right to declare a forfeiture of the corporation charter, or delegate such function to the Secretary of State, because the forfeiture (being the "taking

42. (1904) 207 Ill. 352, 69 N. E. 762.
of property") is for the judiciary, whose functions may not be usurped through any conclusive presumption of forfeiture. The Court says: "It is not, however, within the legislative power to declare what shall be conclusive evidence, as that would be an invasion of the power of the judiciary" (citing authorities). The dissenting opinion by Magruder, J., is based on an older statute thought to be relevant but unconstitutional, and is illuminating on the subject of "due process," and on that score is in harmony with the majority opinion.

Substantial equity is readily possible under the statutes without the questionable section—witness the great majority of state statutes in which this provision is absent, and also the following from the opinion of the Minnesota court in the case of Althen v. Tarbox43 wherein the court said:

"It is not a case where work and labor have been performed or materials furnished with the mere knowledge of the owner of the land, in which case, and by reason of this knowledge alone, the statute declares that such work and such materials shall be held to have been done and furnished at his instance—that is, on his application, or at his solicitation; but it is a case wherein it clearly appears that the lien claimant has acted with the assent of the landowner, she having full knowledge of his acts as they were performed. Her authority * * * and consent * * * is so obvious as to come under the 1st section of the lien act."

Innumerable situations may exist under which a part owner of the land being improved ought not be subjected to the conclusive presumption of the statute, despite his knowledge and non-service of notice. The improvement may have been authorized with a distinct understanding with one part owner that he is to be saved harmless, and that other owners are to pay for the improvement. There may be an understanding that no improvements shall be made, so far as any one part owner is concerned. There may have been an understanding between the suppliers of the improvement and all owners that the improvement be of a limited or certain character and cost. The part owner sought to be charged may have previously objected, not only to the other owners, but to the suppliers of the improvement. The owner sought to be charged may have been deceived as to the character of the improvement and the extent thereof. Many other instances can doubtless be advanced, but the owner to be charged, though honestly failing to serve notice, is precluded from showing his defense by the conclusiveness of the presumption. In some instances—as logically follows from

43. (1892) 48 Minn. 18, 50 N. W. 1018.
the Turnipseed case—even though the facts proven are by the statute declared to be only prima facie evidence of the ultimate fact, a statute will be held invalid under the due process clauses if the inference does not have a rational connection with the proof. Thus, the legislature is recognized as having the power to legislate on the matter of rules of evidence, shifting the burden of proof, or making certain facts prima facie evidence of other facts; but legislating rules of evidence which are arbitrary, oppressive or unjust, or which operate in lieu of proof of facts to deprive one of life, liberty or property, constitute legislative invasion of the judiciary.

While the Statute may resemble an equitable estoppel, this ought not to be permitted to obscure the fact that the elements of this “tailor-made” estoppel fall considerably short of the conditions of an equitable estoppel. It is conceivable that an owner by his conduct or silence may have estopped himself from asserting that he has not requested an improvement and thereby become personally liable for value of contributions. In such case, whether estoppel is or is not a favorite of the law, a full disclosure of all of the facts are indicated. Liability so established through “due process” would support a lien under the general provisions of the Statute. Would equitable principles themselves support a lien in absence of statute? To view the Statute as an estoppel is but to assume in every case the nula fides of the owner and the reliance thereon by every contributor without any evidence pro or con. Once the gates are open, why not assume “knowledge”? In any case he received the benefit of the presumed improvement.

Where the Minnesota court casually refers to this section of the lien statute in *John Martin Lumber Co. v. Howard* as being “in the nature of an equitable estoppel,” the Supreme Court of California adopts this concept as the fundamental principle underlying and justifying such a statute. In *Fuquay v. Steckney* one Justice, speaking for the court, simply says: “I think the power of the legislature to enact this provision is not only free from doubt but the justice and wisdom of the measure are obvious.” But in *John R. Gentle & Co. v. Britton*, the court goes on to explain:

“The doctrine upon which 1192 of the code of Civil Procedure rests is that of estoppel which is indeed the underlying principle of the entire theory of the mechanic’s lien. The owner of real property having, either by his own act or that of another with his consent or knowledge, procured the improvement of such property.

44. (1892) 49 Minn. 404, 52 N. W. 34.
45. (1871) 41 Cal. 583.
and received the benefits of the labor or material of another thereby, is deemed to have created an equitable lien upon the premises to secure the payment of the value of such labor and materials. He is like the owner of property who stands knowingly and silently by and sees another person sell such property to an innocent purchaser who believes the seller to be the owner and so believing parts with value for it.” (Italics are supplied.)

The above quotation again illustrates how this statute bedevils the juridical mind. There is no differentiation between “knowledge,” “assent,” “consent,” and “procuring,” which in that order are respectively more inclusive. These words are treated as practically synonymous. Further, the word “held” or “deemed” are used without conscious regard for their implications of conclusiveness in all possible circumstances.

The subtlety of the court’s own self-deception, instead of illuminating the statute, veils its mischievous nature. What the court says is that an owner, having procured an improvement and received the benefits thereof, has created an equitable lien on the property (aside from Statute) and that mere knowledge of the improvement, as well as consent to it, is a means of “procuring.” By such loose language there is imparted to the statute a color of equitableness and a resemblance to an equitable estoppel. If, however, an equitable estoppel is to be ground for a lien, by what authority does a legislature pretend to redefine and modify it?

The analogy of the “innocent” purchaser is misleading. It is a statement of all of the conditions, facts and surrounding circumstances in that instance without relation to any statute. In the analogy of the court, the true owner knows that the purported owner is misrepresenting a material fact, and that the buyer is being misled into a situation for the worse. But under the court’s explanation of the lien statute, this state of facts in respect of an owner, or particularly a part owner, is purely and simply assumed. It may be completely fictitious. On the other hand the “contributor” may verify from the records or otherwise, the state of title. Further, either with or without such verification, or further inquiry, he may be willing to take the risk that (1) other owners whom he has not consulted, may come into knowledge of his contributing and give statutory notice of non-responsibility, or (2) that they may not know of it until after his contribution is complete, or until toward the end of his contribution when notice of non-responsibility may be given. He thereby is merely gambling that other interested parties will obtain the necessary “knowledge” and will neglect the giving
of notice. In what sense is such a one the victim of a conspiracy of silence, except by fiat of the legislature? On the other hand, proof of all the facts by which the non-contracting owner might establish his "innocence" (1) of representations by any contracting party interested in the land, or (2) of "reliance" thereon by the "contributor" is in fact denied him, save the artificial substitute created by the statute. The fact is, however, that the elements of an estoppel are not contemplated in or by the statute. Is that what the court seems to recognize in Fred A. Krenwinkel et al. v. Jane Louise Henne, where it is said that Sec. 1192 Code Civil Procedure "puts a non-contracting owner in the position of a party to the contract" (for the improvement). See 22 Cal. Law Rev. 315. Then, in Lorenz v. Rousseau, the confession is made that "it is well settled that estoppel is not favored and must clearly be proved."

CONCLUSION

Summarizing the salient points made by the courts in defense of the Statute, in the light of the discussion thus far, the following propositions become the inevitable logical result:

1. As a rule of evidence, the statute expressly prescribes that the fact "authorization" by an owner, of the doing or furnishing of an improvement by another, shall be conclusively proven by (a) the owner's (undefined) "knowledge" of the improvement, plus only (b) absence of the prescribed notice. This proof does not, in fact, compel the conclusion; nor does it furnish even a rational basis for the conclusion.

2. As an estoppel, the Statute serves in lieu of evidence to supply facts without which an equitable estoppel would not lie; and deprives the owner of his right to contest such facts or to show that they are fictitious.

3. As prescribing a "duty," the Statute is said to imply an obligation the breach of which is in effect the equivalent of the commission of a positive wrong, or the impairment of another's rights. This, of course, is merely a fiction. The Statute saddles the owner with a presumption and affords him one sole means of rebutting it. In either case the legislature is assuming judicial functions.

4. There is nothing in the entire lien statute granting any lien on the basis of an owner's "consent" to an improvement. All specified grounds are those equivalent to the "request" by the owner.

"Consent" is included in "request" but the two have different legal implications; and, unless uniformly applied, result in discrimination under "equal protection of the law" clauses.

5. "Consent" imposes upon an owner a purely presumptive obligation to pay, which is readily rebuttable; and, when made a ground for a lien by statute, is the weakest of all permissible grounds. Without at least the "consent" of an owner, a lien claimant has no rational basis for implying the owner's consent to the encumbrance.

6. Evidence sufficient to prove "authorization" of an improvement by an owner establishes a contract with the necessary incident of the owner's personal liability for the value of the improvement. The Statute recognizes that the personal liability supports the lien, but contradicts itself by allowing a lien without proof of personal liability.

7. Elimination of "controversy" is the result of unlawfully restricting an owner's defense.

8. The protection to a lienor under this Statute is certain only when the presumption is operative under its provision. There is no certain protection otherwise. A lienor, invoking this statute only, is not entitled to the protection of a lien, as a matter of fact.

In short, real consent, and even a contract, is presumed from mere notice and silence, from which in turn is presumed a consent to the encumbrance—all of which is purely fictitious.

Notwithstanding the court's position on this Statute, it has nevertheless recognized the evil of other statutes to which the rules springing from the "due process clauses" and "equal protection" clause apply. In a recent case the Minnesota court has issued an exemplary opinion invalidating a presumptive statute of Minnesota. Since the precise question did not involve a conclusive statutory presumption, but a rebuttable one, it is helpful only indirectly—but the principle of the foregoing cases is acknowledged.

As has been noted, consent is by some statutes made a foundation for a lien in addition to language indicating contract, express or implied. The word "consent" as so used then becomes a fact question to be determined, the same as the questions of fact which determine whether or not a contract, express or implied, exists—

for example: the mechanic lien statutes of North Dakota, Wisconsin and New York. In addition, we may find a provision for establishing such “consent” by presumption; as in North Dakota, Sec. 6237, R. C. 1905, which provides, in part:

“The owner shall be presumed to have consented to the doing of any such labor or making of any such improvement if at the time, he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien.”

Clearly the presumption in this statute does not purport to be conclusive, and is at least entitled to be classed as a rule of evidence because the facts to be proven would appear to be only *prima facie evidence* of the consent to the improvement. However, notwithstanding the *prima facie* character of this presumption, the court refused to apply it in *Christianson v. Hughes.* There the owner (wife of the one at whose instance the material was furnished), having expressed her objection to the improvement, to her husband; and not knowing who furnished the material, nor having made any attempt to serve any objection upon the materialman; was held not to have “consented” so as to charge her property with the lien. The evidence was insufficient for such purpose, there not being present all facts that “would create an equitable estoppel”; and furthermore, “it would be a manifestly unreasonable construction of the statute to require her (as owner) to seek out the prospective lienor and serve upon him notice of her objection.”

The great weight of authority points to the necessity of proving, as the foundation for a mechanic’s lien, facts sufficient to establish (1) an express contract, (2) implied contract, (3) “consent to the improvement,” or (4) an equitable estoppel; and nothing less; and the determination of the existence of any such ground is a judicial and not a legislative function.

The original form of the Minnesota statute in question (herein first quoted), required the restraining of the improvement as evidence of non-consent, but it must necessarily follow that an owner could not do so unless he knew about it. The present statute gives five days in which to disclaim liability by notice. Accordingly, the principal difference lies in the degree with which dissent or non-assent is to be evidenced, plus the fact that under the oldest statute permission for the improvement was also required to be withheld. Under the old statute, however, the real fact in issue was the “consent” of the owner; whereas under the successor statute, it is the “authorization” of the improvement by the owner. A failure to re-

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strain, or a failure to give notice, in either case would result in similar conclusive presumptions. Thus there exists a fundamental similarity—elusive perhaps, but very real—between the old invalidated law and the present, notwithstanding that the court in *Fauser v. McElroy* \(^5\) said that the old statute was "entirely dissimilar."

It will be observed that in some decisions—in other jurisdictions particularly—the general statement is made that the fundamental basis of a lien is the adding of value to the land. Even the Minnesota court, as we have noted, indicates that this is "presumptively" so. But were this all, it would seem unnecessary for courts to be so effusive on the question of the foundation of liens. It would be mere surplusage in any lien statute to mention "knowledge," "notice," etc., on the part of an owner; to say nothing of "consent," "instance," "request," "agreement," etc., of an owner. Further, although the "adding of value," in itself, as a ground for a lien, might be predicated upon public welfare—while limited to private persons and private property, in private transactions—and inhere in the police powers, the fact that the granting of a lien is the taking of an owner's property must be reckoned with, since the taking even of "an essential attribute" of property under the police power is prohibited.

The Supreme Court of the United States has nowhere sanctioned the basing of liens on anything short of a request or direction by the owner, or the consent of the owner. That is to say, either the owner originates and motivates the doing of the improvement, and the prospective lienor accepts; or the such lienor proposes, and the owner accepts. In either case, the parties know that the law enters into the subject. Now, it may be possible to view the matter in the light that when one takes title to property, he takes it subject to the law in question, of which he has knowledge. From this it may be reasoned that if one does not like to be subject to these provisions, one should never acquire property; and while this may argue consonantly with constitutional restrictions upon "impairment of contract," it obviously becomes an absurdity in respect of "due process"—which intends the protection of the ownership of property, rather than the discouragement of its acquisition.

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52. (1923) 157 Minn. 116, 195 N. W. 786.