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NOTE


Lloyd D. Blaylock General Contractor, Inc., and Lloyd D. Blaylock, individually, held duly perfected mechanics' liens on certain properties pursuant to a construction contract with Dollar Inns of America. Diversified Mortgage Investors (DMI) acquired deed of trust liens on these same properties through arrangements by which DMI provided permanent financing to Dollar Inns for purchase of the land and a prior vendor's lien, and for construction of two motels on these properties. Dollar Inns

1. Hereinafter collectively referred to as "Blaylock."

2. A mechanic's lien is a claim created by law for the purpose of securing a priority of payment of the price or value of work performed and materials furnished in erecting or repairing a building or other structure, usually attaching to the land as well as to the buildings erected thereon. See Tex. Const. art. XVI, § 37; Tex. Rev. Civ. Stat. Ann. art. 5452 (Vernon Supp. 1978-1979). See also Schutze v. Dabney, 204 S.W. 342, 344 (Tex. Civ. App.—Austin 1918), rev'd on other grounds, 228 S.W. 176 (Tex. 1921); Dilworth & Green v. Ed Steves & Sons, 169 S.W. 630, 632 (Tex. Civ. App.—San Antonio 1914), writ dism'd, 107 Tex. 73, 174 S.W. 279 (1915); Zollars v. Snyder & Lacey, 94 S.W. 1096, 1097 (Tex. Civ. App. 1906, no writ). The term "mechanic's lien," as used herein, includes the lien given for materialmen as well as workmen. Although occasionally it is necessary to stress the distinction between a mechanic and a materialman, the difference is generally ignored by courts and commentators.

3. A deed of trust is a conveyance given as security for the performance of an obligation and is generally regarded as containing the elements of a valid mortgage. Lucky Homes, Inc. v. Tarrant Sav. Ass'n, 379 S.W.2d 386 (Tex. Civ. App.—Fort Worth), rev'd on other grounds, 390 S.W.2d 473 (Tex. 1964). See also Johnson v. Snell, 504 S.W.2d 397, 399 (Tex. 1974); Phillips v. Campbell, 480 S.W.2d 250, 253 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). The distinction between an express vendor's lien and a purchase-money mortgage deed of trust is that in a vendor's lien situation, the vendor retains a security interest securing the purchase money debt, whereas under the modern purchase-money mortgage deed of trust situation, a lending company loans the purchase money to a vendee who conveys the property in trust to a trustee designated by the lender to secure the repayment of the purchase money. Once the lender satisfies the vendee's obligation to the vendor, the lender is subrogated to the vendor's lien. Lloyd D. Blaylock, Gen. Contractor, Inc. v. Dollar Inns of America, Inc., 548 S.W.2d 924, 932 (Tex. Civ. App.—Tyler 1977), rev'd sub nom. Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc., 576 S.W.2d 794 (Tex. 1978). This distinction is in accord with the rule that a lien is impressed with the character of the debt it is given to secure; and if given to secure purchase money, it has the status of a purchase money lien. See Irving Lumber Co. v. Alltex Mortgage Co., 468 S.W.2d 341 (Tex. 1971); National W. Life Ins. Co. v. Acreman, 415 S.W.2d 265 (Tex. Civ. App.—Beaumont 1967), modified, 425 S.W.2d 815 (Tex. 1968); C.D. Shamburger Lumber Co. v. Holbert, 34 S.W.2d 614 (Tex. Civ. App.—Amarillo 1931, no writ); Thompson v. Litwood Oil & Supply Co., 287 S.W. 279 (Tex. Civ. App.—Waco 1926, no writ).

4. A vendor's lien is either the implied lien of a vendor of real estate, who has conveyed the legal title, as security for the unpaid purchase money, or the express lien of a vendor of real estate under a provision of the contract that he is to retain title until the purchase money is paid, the vendee being in possession of the premises. See Flanagan v. Cushman, 48 Tex. 241 (1877); Davis v. Huff, 288 S.W. 267 (Tex. Civ. App.—Amarillo 1926,
subsequently defaulted on its deeds of trust, and DMI purchased the properties at a foreclosure sale. At trial, DMI and Blaylock sought a declaration of the priorities of their claims. Additionally, Blaylock sought to recover the balance due on the construction contract and to foreclose the mechanics' liens on the properties. In the alternative, Blaylock sought to recover the amount due on the construction contracts from the proceeds of the deed of trust foreclosure sales. The trial court rendered judgment against Dollar Inns, holding it liable on the construction contract. The trial court ruled that Blaylock take nothing from DMI, however, because the deed of trust liens were superior to the mechanics' liens. The court of appeals reversed, holding that DMI's deed of trust mortgages were superior to the mechanics' liens only to the extent that such mortgages secured the purchase money and not the construction loans. Moreover, the court of appeals held that Blaylock could recover from DMI out of the proceeds of the deed of trust foreclosure sales that exceeded the purchase money loaned from DMI's assignor to Dollar Inns. Both DMI and Blaylock appealed to the Supreme Court of Texas. DMI asserted that the appellate court erred in determining the inception of the mechanic's lien held by Blaylock. Both DMI and Blaylock argued that the court erred in its determination of the priority of the liens. Held, reversed in part, and modified and affirmed in part: DMI's deed of trust lien on the Fort Worth property is senior and superior to Blaylock's mechanic's lien. Therefore, the deed of trust foreclosure extinguishes the junior mechanic's lien. As to the Irving property, DMI's deed of trust lien is senior and superior to Blaylock's mechanic's lien only to the extent of the preexisting vendor's lien. Beyond the amount of the vendor's lien, Blaylock has a valid and subsisting lien. Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc., 576 S.W.2d 794 (Tex. 1978).

I. PRIORITY OF MECHANICS' LIENS

Mechanics' liens are made possible by constitutional or statutory provision for the purpose of assuring payment to those persons who increase

6. This holding was the result of a rehearing and subsequent withdrawal by the court of its original opinion as regards the issue of equitable subrogation. See note 84 infra.
7. See Lippencott v. York, 86 Tex. 276, 279, 24 S.W. 275, 276 (1893); Pratt v. Tudor, 14 Tex. 37 (1855). In Texas, both statutory and constitutional mechanics' liens exist. The constitutional mechanic's lien is embodied in TEX. CONST. art. XVI, § 37, which provides:

Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens.

The constitutional lien is self-executing between the property owner and the workman. Strang v. Prang, 89 Tex. 525, 35 S.W. 1054 (1876); Farmers' & Mechanics' Nat'l Bank v. Taylor, 40 S.W. 876 (Tex. Civ. App.), aff'd, 91 Tex. 78, 40 S.W. 966 (1897). The lien, how-
the value of the land at the owner's request. Mechanics and materialmen, in whose favor the lien is imposed, are not free, however, to attach their liens in isolation. Other individuals such as construction lenders and deed of trust holders have their own legitimate interests to protect when the land serves as security for their loans. When the landowner, as a result of financial difficulties, is forced to sell the land in order to satisfy the claims of lienholders, the proceeds of the sale often are depleted before the satisfaction of all liens. Faced with this common situation, each lienholder will attempt to have his claim satisfied before the available funds have been disbursed to other lienholders. In the absence of a statutory scheme, mechanics' liens achieve priority according to the chronologica-order of their attachment relative to the attachment of other encumbrances. The Texas Legislature has attempted to order the competing interests of lienholders by promulgating article 5459, section 1 of the Texas Revised Civil Statutes. Enacted in its present form in 1889, the statute gives perfected mechanics' liens priority over liens perfected after the inception of other liens. Ever, binds owners only to the original contractor and is ineffective against third parties without notice. Id. Thus, full protection is assured only by compliance with the more complex statutory provisions found in Tex. Rev. Civ. Stat. Ann. arts. 5452-5472 (Vernon 1958 & Supp. 1978-1979). Comment, Procedures for Claiming and Priority of Mechanics' and Materialmen's Liens in Texas, 21 Baylor L. Rev. 21 (1969).

8. See Lippencott v. York, 86 Tex. 276, 280, 24 S.W. 275, 276 (1893). See also Comment, Priority of Mechanics' and Materialmen's Liens in Texas, 40 Texas L. Rev. 872 (1962). Payment is assured by the imposition of a lien upon the improved land in the workman's favor until the workman is fully compensated. See William Cameron & Co. v. Trueheart, 165 S.W. 58, 60 (Tex. Civ. App.—Austin 1914, no writ).

In addition to the mechanic's lien, statutes in most states grant limited relief to those who, without any legal interest in the land, improve or cause land to be improved. These statutes are called "occupying claimants, betterment or improver in good faith" statutes. See Tex. Rev. Civ. Stat. Ann. arts. 7393-7401A (Vernon 1960 & Supp. 1978-1979). The Texas statute requires that the improver be in possession at least one year to claim thereunder. Id. art. 7393.

9. Attachment is a form of execution issued before judgment, and is an ancillary proceeding to preserve intact the title to the attached property so that it may be applied to the debt when established, and affects only the title that is subject to execution for the debt sued on. Stewart v. Rockdale State Bank, 52 S.W.2d 915, 916 (Tex. Civ. App.—Austin 1932), aff'd, 79 S.W.2d 116 (Tex. 1935).

10. For example, absent statutory intervention, a prior vendor's lien or deed of trust lien is superior to a subsequent mechanic's lien. Hammann v. H.J. McMullen & Co., 122 Tex. 476, 482, 62 S.W.2d 59, 61 (1933).

11. The statutory provision establishing priority of lien states:

The lien herein provided for shall attach to the house, building, improvements or railroad for which they were furnished or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which the houses, buildings or improvements, or railroad have been put, or labor performed, and the person enforcing the same may have such house, building or improvement, or any piece of the railroad property, sold separately; provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for.


of the mechanics' liens. Disagreement as to when inception occurs, however, has been a continuous cause of litigation.

Prior to the enactment of section 2 of article 5459 in May 1971, the legislature had provided no criteria by which to determine the date of inception. This lack of statutory guidelines forced the judiciary to establish tests grounded in case law for determination of inception dates of mechanics' liens. The Texas Supreme Court considered the meaning of the statutory phrase "the inception of the lien" for the first time in Oriental Hotel Co. v. Griffiths. The court stated that the word "inception" referred to the date of the original contract between the owner and the builder:

The word "inception" means "initial stage." It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected, and construction of it entered upon,—that is, contracted for,—the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its "inception." This definition, affirmed in subsequent decisions, allowed inception to occur at a relatively early date. Since the execution of construction contracts usually precedes delivery of materials or actual commencement of construction, the inception date of the lien will usually precede any on-site indication of construction. By according this favorable treatment to mechanics' liens, the court's opinion joined a series of opinions liberally construing this statute designed to protect laborers and materialmen who

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14. Id. § 2.
15. See note 11 supra.
16. The Supreme Court of Texas initially confronted the problem in Trammell v. Mount, 68 Tex. 210, 4 S.W. 377 (1887). The court held that a mechanic's lien, upon perfection, related back "to the time when the work was performed or the material furnished." Id. at 215, 4 S.W. at 379. The Trammell court did not construe article 5459, but rather its statutory predecessor, 1885 Tex. Gen. Laws ch. 66, art. 3171, at 64, 9 H. Gammel, Laws of Texas 784 (1898), which fixed the critical date as that on which the lien accrued rather than the date of the inception of the lien.
18. 88 Tex. 574, 33 S.W. 652 (1895).
19. Id. at 583-84, 33 S.W. at 662 (citation omitted); see Comment, Statutory Criteria for Determining the Time of Inception of Mechanics' and Materialmen's Liens, 9 Hous. L. Rev. 174 (1971). The court also held, pursuant to the relation-back doctrine, that the inception of subcontracts executed at a later date would be deemed to have occurred on the same day as the original general contract. For a discussion of the relation-back doctrine, see Comment, Procedures for Claiming and Priority of Mechanics' and Materialmen's Liens in Texas, 21 Baylor L. Rev. 21, 31-42 (1969).
by their contribution add to the value of the property.\textsuperscript{21}

In the first of two opinions by the Texas Supreme Court addressing the controversy in \textit{Irving Lumber Co. v. Alltex Mortgage Co.},\textsuperscript{22} the court attempted to extend the favorable treatment already accorded mechanics' liens. The plaintiff, Irving Lumber Company, orally contracted to build houses on four lots, the purchase of which Merit Homes, Incorporated, was then negotiating. Contemporaneously with vesting of title to the four lots in Merit Homes, Alltex Mortgage Company, the defendant, acquired a deed of trust lien on the land as security for purchase money and construction loans. Irving Lumber's oral agreement to provide labor and materials to Merit Homes antedated Alltex's lien, but Irving Lumber failed to begin construction until after execution of the deed of trust. Suit was brought after Merit Homes defaulted on the note held by Alltex, thus triggering the foreclosure provisions of the deed of trust. Both the trial court and the court of appeals had held for the defendant. The supreme court, however, initially reversed, holding that the inception of Irving Lumber's liens occurred on the date of the oral, executory contract with Merit Homes, and therefore was prior to the liens created by the deed of trust.\textsuperscript{23} Thus, foreclosure under the power of sale did not extinguish Irving Lumber's liens.\textsuperscript{24}

In response to this decision, the Texas Legislature enacted an amendment to article 5459, intending to settle seventy-five years of ambiguity as to the meaning of the term "inception of the lien."\textsuperscript{25} This legislative action, set forth in section 2 of article 5459,\textsuperscript{26} relieves mortgagors of the un-

\textsuperscript{21} University Sav. & Loan Ass'n v. Security Lumber Co., 423 S.W.2d 287, 296 (Tex. 1967).

\textsuperscript{22} 14 Tex. Sup. Ct. J. 212 (Feb. 6, 1971), \textit{withdrawn on rehearing}, 468 S.W.2d 341 (Tex. 1971).

\textsuperscript{23} See 14 Tex. Sup. Ct. J. at 214-15. The court held that the date of an oral contract, though unrecorded and executory, was the inception date for a perfected mechanic's lien. \textit{Id.} at 213. If an oral contract could determine the inception date for a perfected mechanic's lien, then no lending institution could be certain that a security interest would be free of adverse claims. Seventy-five years of liberal construction favoring mechanics' liens had thus culminated in a judicially equitable, but commercially unreasonable result. See Comment, supra note 19, at 178.

\textsuperscript{24} 14 Tex. Sup. Ct. J. at 214.

\textsuperscript{25} Senate Bill 733 was introduced in Feb. 1971. The bill was passed and became immediately effective on May 17, 1971, under an emergency clause that provided:

Sec. 2. The importance of this legislation and the crowded condition of the calendars in both Houses and the problems and confusion created by the Texas Supreme Court's recent decision in the case of Irving Lumber Company v. Alltex Mortgage Company create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and this Rule is hereby suspended; and this Act shall take effect and be in force from and after its passage, and it is so enacted.


\textsuperscript{26} TEX. REV. CIV. STAT. ANN., art. 5459, § 2 (Vernon Supp. 1978-1979) provides:

Section 2. The time of the inception of the lien, as used in this article, shall mean the occurrence of the earliest of any one of the following events:

(a) The actual commencement of construction of the improvements or the delivery of material to the land upon which the improvements are to be lo-
certainty of secret mechanics’ liens. The statute provides that a materialman must give actual notice by visible commencement of construction or delivery of material to be used in the construction. Alternatively, the materialman must give constructive notice either by recording an affidavit describing an oral contract or by recording a copy of the written contract.\(^{27}\)

Upon rehearing subsequent to the enactment of section 2, the supreme court retracted its first opinion in Irving Lumber.\(^{28}\) In its revised opinion the court concluded that title to the property had not vested in Merit Homes at the time the contractor agreed to furnish labor and materials. The court therefore held that Alltex’s deed of trust lien took priority over Irving Lumber’s mechanic’s lien, because “the priority of a security interest is not determined on the date of the ‘inception’ of an agreement between the contractor and a prospective owner.”\(^{29}\)

When Merit Homes acquired the land, it borrowed from Alltex a total of $137,850, which was secured by a deed of trust. Only $10,600 of the loan was used in payment for the land. In the first opinion on Irving Lumber the court afforded only the $10,600 the status of a vendor’s lien because the balance of the loan was used to pay for improvements and should not

27. *Id.* The statute clearly sanctions relation-back to any contract, whether it is general or special, whether for construction of a building or merely for the delivery of materials, and whether written or oral. The new amendment does pose some problems, however. The requirement under § 2(b) that the written contract itself be recorded may be extremely burdensome, both financially and logistically. Furthermore, preparation of an affidavit containing the required information is a formidable task for busy, unsophisticated contractors and subcontractors. Thus, the vast majority of workmen and materialmen may have lost the benefits of the *Oriental Hotel* doctrine. Youngblood, *supra* note 11, at 693-94.

28. 468 S.W.2d 341 (Tex. 1971).

29. *Id.* at 343 (emphasis by court). The majority stated this proposition without citing any authority on point. In response, the dissent argued that the majority ignored the doctrine of after-acquired title. The dissent charged that the majority, after recognizing the authority of Texas cases holding that a lien may be subsequently perfected, even though at the time the contract for the construction is made the purchaser is not the owner of the land, ignored that authority. *Id.* at 346. For a discussion of the doctrine of after-acquired title, see Enlow v. Brown, 357 S.W.2d 608 (Tex. Civ. App.—Dallas 1962, no writ); Breckinridge City Club v. Hardin, 253 S.W. 873 (Tex. Civ. App.—Fort Worth 1923, no writ); Schultze v. Alamo Ice & Brewing Co., 21 S.W. 160 (Tex. Civ. App. 1893, no writ).
affect the priority of a mechanic's lien.\textsuperscript{30}

Since the date of the contract between the owner and the builder usually antedates the delivery of supplies or the beginning of construction,\textsuperscript{31} the effect of the decision would have been to practically eliminate notice of the mechanic's lien. Thus, a lender could loan money to the owner, relying on the supposed lack of encumbrances on the land, while in reality the land was subject to a secret mechanic's lien. The confidence of lenders would have been seriously undermined.\textsuperscript{32}

In the second opinion on \textit{Irving Lumber}\textsuperscript{33} the court gave the subrogated rights held by a third party, the purchase-money lender, a greater effect than the original vendor's lien had. By virtue of the third party's subrogation to the vendor's lien, the deed of trust lien, which covered not only the purchase amount, but also improvements, gained priority over the mechanic's lien and imposed on the holder of a mechanic's lien an encumbrance in excess of the original burden. The decision created an unnecessary and inequitable burden on mechanics and materialmen.\textsuperscript{34} Moreover, the court refused to assign different priorities between the vendor's lien, which was arguably attributable to Merit Homes's use of some of the funds to purchase the lots, and the deed of trust, which was attributable to the entire amount of the loan, when both the vendor's lien and the deed of trust came into being by the same instrument and transaction.\textsuperscript{35}

In \textit{Justice Mortgage Investors v. C.B. Thompson Construction Co.} the Amarillo court of civil appeals construed the newly enacted section.\textsuperscript{36} The property owner entered into an unrecorded oral agreement with Thompson Construction Company for construction of a hotel in 1971. The owner applied to Justice Mortgage Investors, a lending institution, for construction financing. As security, Justice took a deed of trust covering the realty, together with a financing statement covering all personal property then or thereafter on or attached to the land and any improvements thereon. Both the deed of trust and the financing statement were filed and recorded with the county clerk on February 26, 1973. In late February 1973, Thompson moved a tool shed onto the property and began preliminary staking.\textsuperscript{37} Subsequently, payments on the construction loan were not delivered, and Justice foreclosed. Thompson brought an action to recover the unpaid balance of labor and materials furnished for construction of the hotel. The

\textsuperscript{31} Comment, \textit{supra} note 25, at 178.
\textsuperscript{32} \textit{Id.} at 176.
\textsuperscript{33} On rehearing following the enactment of § 2, the supreme court retracted its first \textit{Irving} opinion but did not base its new decision on a construction of new § 2. \textit{See} \textit{Irving Lumber Co. v. Alltex Mortgage Co.}, 468 S.W.2d 341 (Tex. 1971).
\textsuperscript{34} \textit{See} Comment, \textit{supra} note 25, at 180.
\textsuperscript{35} 468 S.W.2d at 342.
\textsuperscript{36} 533 S.W.2d 939 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). Although §§ 2(b) & 2(c) also constitute part of the 1971 amendment to article 5459, § 2(a) is the only portion subject to diverse judicial interpretation.
\textsuperscript{37} The first \textit{construction} labor for which the owner was billed was not performed until Apr. 13, 1973. This construction was characterized as a "feeble start" and, because of delay in steel delivery, Thompson was not going "full blast" until July or August.
court observed that a deed of trust securing a nonpurchase money mortgage takes priority over a competing mechanic's lien only if the deed of trust was recorded prior to the inception of the mechanic's lien. 38 Guided by section 2 of article 5459, the court concluded that Justice's deed of trust lien was prior in time and, therefore, superior to Thompson's mechanic's lien, because the tool shed and preliminary staking of the property did not constitute commencement of construction. 39

II. DIVERSIFIED MORTGAGE INVESTORS v. LLOYD D. BLAYLOCK GENERAL CONTRACTOR, INC.

In the case of Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc. the Texas Supreme Court attempted to solve the problem of priorities among liens by establishing a standard for interpreting the meaning of "commencement of construction" or "delivery of material" within section 2(a) of article 5459. 40 The controversy involved Blaylock, a general contractor, who had mechanics' liens on two properties pursuant to a construction contract with Dollar Inns. Diversified Mortgage Investors held deed of trust liens securing permanent financing to Dollar Inns for the purchase of land and the construction of two motels—one in Fort Worth and one in Irving.


39. 533 S.W.2d at 944. The holding is consistent with the rule in most states that mere preparation for construction, such as staking, clearing, measuring, filling or making test holes, is insufficient to define the inception of the mechanic's lien. See, e.g., New Hampshire Sav. Bank v. Vanner, 216 F. 721 (8th Cir. 1914) (construing the Kansas rule that a building is commenced when work or labor is begun on the excavation for the foundation), aff'd, 240 U.S. 617 (1916); Rupp v. Earl H. Cline & Sons, 230 Md. 573, 188 A.2d 146 (1963); Kloster-Madsen, Inc. v. Taft's Inc., 303 Minn. 303, 226 N.W.2d 603 (1975); M.E. Kraft Excavating & Grading Co. v. Barac Constr. Co., 279 Minn. 278, 156 N.W.2d 746 (1966); National Lumber Co. v. Farmer & Son, 251 Minn. 100, 87 N.W.2d 32 (1957); North Shaker Boulevard Co. v. Harriman Nat'l Bank, 22 Ohio App. 487, 153 N.E. 909 (1924); Mortgage Assocs. v. Monoma Shores, Inc., 47 Wis. 2d 171, 177 N.W.2d 340 (1970). See also Annot., 1 A.L.R.3d 822 (1965).

A. Fort Worth Property

Dollar Inns contracted to purchase the Fort Worth property on December 11, 1972. In early January 1973, after entering into a preliminary construction agreement, Blaylock conducted on-site subsurface soil investigations. On January 25, 1973, engineering stakes were delivered to the site and topographical survey work was commenced. Palomar Mortgage Investors and Dollar Inns executed an interim loan agreement on February 16, 1973, followed by the execution of the final construction agreement between Blaylock and Dollar Inns on February 21, 1973. Thereafter, from March 1 to March 5, 1973, subcontractors delivered lumber and fill dirt and placed engineering stakes, while Blaylock’s employees erected batter boards and began excavation. Dollar Inns completed the purchase of the Fort Worth property on March 8, 1973, and delivered the deed of trust to Palomar, receiving $598,325.45, of which $135,000 constituted the purchase price, from Palomar in return. The following day, Palomar recorded the Fort Worth deed of trust.

B. Irving Property

On December 29, 1972, Blaylock and Dollar Inns entered into a preliminary construction agreement. Dollar Inns then contracted to purchase the Irving property, which was followed by the delivery of engineering stakes to the site. On February 16, 1973, Palomar and Dollar Inns executed a loan agreement. During March 1973, Blaylock delivered lumber to the site, placed the previously delivered engineering stakes, and erected a large sign denoting motel construction. Thereafter, Blaylock delivered fill dirt to the Irving site on April 5, 1973, and began excavation and clearing. On the same day, Dollar Inns completed the purchase of the Irving property and delivered the deed of trust to Palomar in exchange for a promissory note in the amount of $1,665,000. An amount of $309,900 was allocated towards the purchase of the land, $109,900 of which was credited towards the purchase and release of the prior vendor’s lien on the Irving property. The remainder of the $1,665,000 was allocated for the financing of the construction on the property.

Following the assignments of the deeds of trust from Palomar to DMI,

41. Although the facts are similar as to each location, the court determined the lien priorities independently for each piece of property. Therefore, the facts relative to construction and financing on the two pieces of property will be discussed separately.

42. Palomar Mortgage Investors, through a three-party agreement, agreed to provide interim financing for the purchase and construction, while DMI was to provide permanent financing after construction was completed.

43. Palomar’s recordation took place subsequent to the completion of the batter board construction and the erection of a large sign denoting motel construction.

44. Prior to the acquisition of any interest by the other parties in this case, First Bank and Trust of Richardson held a vendor’s lien on the Irving property under a July 26, 1972, deed of trust.

45. On Feb. 5, 1974, after construction was completed on the Fort Worth motel, Palomar assigned its security interest in the motel and property (as well as the Irving motel and property upon completion) to DMI for a total consideration of $2,757,150. 576 S.W.2d at 798.
Dollar Inns defaulted on both deeds of trust. DMI then foreclosed the deed of trust liens and conducted foreclosure sales on each. At these sales, DMI itself purchased the Fort Worth and Irving properties for $600,000 and $1,200,000 respectively.

C. Priority of Liens

The trial court's decision denied Blaylock recovery from DMI due to the superiority of the deed of trust liens over Blaylock's mechanics' liens. Since Blaylock recorded neither the construction contract nor a supporting affidavit, the question of what constitutes "commencement of construction" or "delivery of material" under section 2(a) of article 5459 confronted the appellate court. Observing that such a determination must be based on the facts of each particular case, the court's primary inquiry was whether the commencement of construction or delivery of materials, which the court determined to include "stakes, iron rods, concrete pipe and lumber for batter boards" in accordance with the statutory language, was sufficiently visible to constitute notice. Relying upon these determinations, the court of appeals found that since the contractor had delivered stakes, surveyed the property, placed stakes on the site, delivered lumber, and started excavation work on both properties prior to the recording of the deed of trust, the mechanics' liens had their inception prior to the deed of trust liens. Nevertheless, the court held that the deed of trust liens were superior to the extent that they secured the purchase amount and not the construction loans. Furthermore, although all mechanics' liens were cut off by the foreclosure under the deeds of trust, the court held that the mechanics' lienholders were entitled to have their liens satisfied out of any consideration received at foreclosure that exceeded the purchase money.
loaned by the grantee of the deed of trust. This holding implied that the lender could cut off all rights of lien claimants merely by bidding at foreclosure no more than the amount of the purchase money advanced.

On appeal, the supreme court rejected the lower court's case-by-case approach to interpretation of section 2(a) of article 5459 as well as the court's sole reliance on a "visibility" standard. The supreme court attempted to articulate a more definitive standard by which to ascertain inception under the section 2(a) guideline of actual construction or delivery of materials. Actual commencement of construction required the "placing of something of permanent value on the land, as opposed to preliminary or preparatory activities or structures." Accordingly, under the "commencement of construction" provision of article 5459, the court held that the inception of the mechanic's lien occurs only when the activity "(1) is conducted on the land itself; (2) is visible upon the land; and (3) constitutes either (a) an activity which is defined as an improvement under the Texas statute or (b) the excavation for or the laying of the foundation of a building or a structure." In order for the "delivery of material" to signal the inception of a lien, the court must find "(1) that there has been a delivery of material to the site of construction; (2) that such material is visible upon inspection of the land; and (3) that such material constitutes either (a) material which will be consumed during construction or (b) material which will be incorporated in the permanent structure."

52. 548 S.W.2d at 934. The supreme court in Irving Lumber expressly stated that it was not deciding whether the holder of the mechanic's lien is entitled to pursue a portion of the proceeds of the sale in the hands of the party holding the deed of trust lien. Irving Lumber Co. v. Alltex Mortgage Co., 468 S.W.2d 341, 344 (Tex. 1971).

53. If the lender acquires the property at foreclosure for the amount of the purchase money advanced, the inference arises that the lender is receiving property worth that amount and therefore is not receiving any excess proceeds over the amount of the purchase money. See Heath & Bentley, Real Property, Annual Survey of Texas Law, 32 Sw. L.J. 27 (1978).

54. The court of appeals had stated:

We feel that the chief inquiry to be made by the courts is whether there was visibility of commencement of construction such that a person, upon inspection of the land, would be put on notice that construction work had commenced or, because of material delivered and resting on the land, work was to commence shortly thereafter.

548 S.W.2d at 931.

55. 576 S.W.2d at 802. Thus, in most circumstances, commencement of construction of improvements in the form of a building or a structure must entail excavation or the laying of foundation. Id.

56. Id. The supreme court determined that where the activity defined as an "improvement" has commenced or is being performed, such activity is sufficient to constitute commencement of construction of an improvement under art. 5459. Id. For statutory purposes, improvements include:

Butting sidewalks and streets and utilities therein; clearing, grubbing, draining or fencing of land; wells, cisterns, tanks, reservoirs, or artificial lakes or pools made for supplying or storing water; all pumps, siphons, and windmills or other machinery or apparatus used for raising water for stock, domestic use or for irrigation purposes; and the planting of orchard trees, grubbing out of orchards and replacing trees, and pruning said orchard trees. TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1978-1979).

57. 576 S.W.2d at 803.
The court then applied these guidelines to the facts surrounding each location. As to the Fort Worth property, the court determined that the construction activities performed by Blaylock prior to the recording of the deed of trust\textsuperscript{58} constituted work merely preliminary to or preparatory for construction and did not satisfy the criteria for actual commencement of construction.\textsuperscript{59} Further, the material delivered to the site\textsuperscript{60} was not of the character giving rise to the inception of a lien because none of the material ultimately formed part of the permanent structure or was consumed in such construction. The court found that actual construction began March 16, 1973, when Blaylock commenced the foundation work on the property. Thus, inception of the Fort Worth mechanic's lien occurred after March 9, the date the deed of trust was recorded.\textsuperscript{61}

On the other hand, the court held that the work on the Irving project, performed before recordation of the deed of trust on April 13, 1973, was sufficient to constitute the inception of a mechanic's lien. These activities included excavating and clearing of land,\textsuperscript{62} the delivery of concrete section pipe,\textsuperscript{63} and excavation and laying of a foundation.\textsuperscript{64}

Having determined that the inception of the mechanic's lien on the Irving site was prior to the recordation of the deed of trust lien, the supreme court considered the priorities of such liens. The court relied on the general rule that if the inception date of a mechanic's lien occurs subsequent to the recordation of a deed of trust, as in the case of the Fort Worth property, the deed of trust is senior to the mechanic's lien. Thus, foreclosure of the senior deed of trust lien will extinguish the junior mechanic's lien. Alternatively, the court stated that if the inception date of a mechanic's lien is prior to the recording of a deed of trust, a determination is necessary as to whether the party contracting with the mechanic or materialman had any legal or equitable interest in the property at the inception of the lien. If no such interest exists, then the lien could not arise. If such

\begin{itemize}
\item \textsuperscript{58} The construction activities performed prior to March 9 consisted of the following: subsurface investigation, topographical survey work, the spreading of fill dirt, staking, excavation for a retaining wall, and erection of a sign.
\item \textsuperscript{59} 576 S.W.2d at 803.
\item \textsuperscript{60} The material included bundles of stakes, lumber for batter boards, and fill dirt.
\item \textsuperscript{61} 576 S.W.2d at 803. This approach is apparently in line with the majority of jurisdictions that have dealt with statutes with similar wording and determined that preliminary or preparatory activities are not sufficient to constitute commencement of construction. See New Hampshire Sav. Bank v. Varner, 216 F. 721 (8th Cir. 1914), affd, 240 U.S. 617 (1916); Kiene v. Hodge, 90 Iowa 212, 57 N.W. 717 (1894); Rupp v. Earl H. Cline & Sons, 230 Md. 573, 188 A.2d 146 (1963); National Lumber Co. v. Farmer & Son, 251 Minn. 100, 87 N.W.2d 82 (1957); North Shaker Boulevard Co. v. Harriman Nat'l Bank, 22 Ohio App. 487, 153 N.E. 909 (1924); Annot., 1 A.L.R.3d 822 (1965).
\item \textsuperscript{62} The activity, including general site clearance and the digging up and removal of several large trees and a swimming pool, is encompassed under the expanded definition of "improvement," which includes "clearing, grubbing, draining or fencing of land." See note 56 supra.
\item \textsuperscript{63} The concrete pipe delivered to the site was visible upon inspection of the site, and constituted a material that would form part of the permanent structure; thus, its delivery was sufficient to constitute inception of the lien. 576 S.W.2d at 803.
\item \textsuperscript{64} The excavation and laying of a foundation clearly constitutes commencement of the construction of an "improvement." See note 56 supra.
\end{itemize}
an interest does exist; then the doctrine of after-acquired title is applied.\textsuperscript{65}

This doctrine provides:

[T]he lien attaches to whatever legal or equitable interest the contracting party had when the work was begun, and thereafter attaches to any other or greater interest whenever acquired before the lien is enforced: provided that the after-acquired title enlarges an estate or interest to which the lien has already become attached.\textsuperscript{66}

Accordingly, when the deed of trust lien is foreclosed, the purchaser at the foreclosure sale takes the property encumbered by the mechanic's lien.\textsuperscript{67}

In the case of the Irving property, this doctrine worked to expand the mechanic's lien to include the legal title to the property acquired by Dollar Inns upon consummation of the preexisting sale contract. Thus, the date of inception of the mechanic's lien preceded both the execution and the recordation of DMI's deed of trust lien on the Irving property and, absent other factors,\textsuperscript{68} the mechanic's lien would be senior and superior.\textsuperscript{69}

An additional issue in this case involved the doctrine of equitable subrogation.\textsuperscript{70} This doctrine was triggered by the existence of a prior vendor's lien, preceding any interest of any of the parties here involved, that was purchased by Dollar Inns with funds provided by Palomar and later assigned to DMI.\textsuperscript{71} The supreme court agreed with the court of appeals' holding that DMI was equitably subrogated to the rights under the prior vendor's lien.\textsuperscript{72} By virtue of its subrogation to the first lien, DMI occupied the same position as the prior vendor's lien holder held with respect to that lien.\textsuperscript{73}

The result of the court's holding was that the liens stood in the following order of priority: (1) the prior vendor's lien (in the amount of $109,000) to which DMI was equitably subrogated; (2) Blaylock's mechanic's lien in the

\begin{thebibliography}{12}
\item[65.] 576 S.W.2d at 805.
\item[66.] Id. at 805-06. For further discussion of the doctrine of after-acquired title, see Jones v. Mawson-Peterson Lumber Co., 150 P.2d 795, 797 (Colo. 1944); Service Lumber & Supply Co. v. Cox, 123 So. 820, 821 (Fla. 1929); Paget v. Peters, 286 P. 983, 988 (Or. 1930). See also Annot., 52 A.L.R. 693 (1928).
\item[67.] 576 S.W.2d at 806.
\item[68.] The doctrine of equitable subrogation is one such "other factor." See id.
\item[69.] Id.
\item[70.] Subrogation arises by operation of law or by implication in equity where a person has been compelled to pay off a prior encumbrance in order to protect himself, or where he has paid the debt of another in such circumstances that equity will afford him the security or obligation held by the creditor whose claim has been paid. See Texas Co. v. Miller, 165 F.2d 111, 115 (5th Cir. 1947); First State Bank v. Farmers' & Merchants' Nat'l Bank, 262 S.W. 225, 226 (Tex. Civ. App.—Dallas 1924, no writ).
\item[71.] See note 42 supra.
\item[72.] In according the doctrine of equitable subrogation favorable treatment, the court noted the well-established history of such a view. See Faires v. Cockrill, 88 Tex. 428, 437, 31 S.W. 190, 194 (1895), in which the Texas Supreme Court stated, "[p]erhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state." The court also recognized the importance of the doctrine to lenders in Texas due to the protection offered a lienholder from intervening liens, at least with respect to the amount of the initial lien, when the lienholder discharges a prior superior lien. 576 S.W.2d at 807.
\item[73.] The court rejected the argument that the doctrine of after-acquired title established the priority of Blaylock's lien by noting that the prior vendor's lien existed prior to Dollar Inns' equitable or legal interest in the land. 576 S.W.2d at 807.
\end{thebibliography}
amount of $136,767; and (3) the balance due on the deed of trust note held by DMI.\textsuperscript{74} The court agreed with the court of appeals' holding that Blaylock could pursue the excess proceeds\textsuperscript{75} of the foreclosure sale.\textsuperscript{76} Since DMI bid on the land at its own foreclosure sale, no cash actually changed hands. Instead DMI took title to the land and the supreme court, as well as the court of appeals, determined that Blaylock's proper remedy was in the form of a $136,767 money judgment against DMI for the unpaid portion of its lien on the Irving property.\textsuperscript{77}

The Texas Supreme Court's interpretation of section 2(a) of article 5459 regarding the inception of a mechanic's lien and the court's articulation of a priority test for mechanics' liens relative to other liens are the most important aspects of the decision. The court attempted to clarify and define the law surrounding the inception of mechanics' liens and the priorities of such liens. Nevertheless, the holding left several issues unanswered and created as many new problems as it resolved.

In construing section 2(a) of article 5459, the court established a permanency criterion for the inception of a mechanic's lien via actual commencement of activities or delivery of materials.\textsuperscript{78} This test provides lenders, mechanics and materialmen, and courts alike with a concise definition of the activities necessary to constitute inception. In addition, the test provides a prospective lender quantifiable standards on which to base his decision regarding the acceptance of a deed of trust as security.\textsuperscript{79}

One fundamental flaw in the court's standard is that it frustrates the purpose of section 2(a), which was enacted to relieve the lender of the problem of secret or silent mechanics' liens by requiring either actual or constructive notice of an existing encumbrance on the land.\textsuperscript{80} By holding that preliminary and preparatory activities such as staking, posting of signs, and the delivery of certain materials do not satisfy section 2(a) requirements for the inception of a mechanic's lien, the court precludes activities that provide a lender effective notice.\textsuperscript{81} Such obvious disregard for the purpose of section 2(a) is likely to result in legislative action to reformulate the standards, presumably more in tune with the original goals of section 2(a).\textsuperscript{82} A second weakness of the test for inception is the need

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  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} The court defined excess proceeds as all proceeds received at the foreclosure sale of Dec. 3, 1974, in excess of $109,000 (the extent of DMI's subrogation). Id. at 808.
  \item \textsuperscript{76} See note 52 supra. This holding meant that Blaylock's security interest transferred to the excess proceeds from the sale (which stand in place of the property). See also Jeffrey v. Bond, 509 S.W.2d 563, 565 (Tex. 1974); Pearson v. Teddlie, 235 S.W.2d 757, 759 (Tex. Civ. App.—Eastland 1950, no writ).
  \item \textsuperscript{77} 576 S.W.2d at 808.
  \item \textsuperscript{78} See TEX. REV. CIV. STAT. ANN. art. 5459, § 2(a) (Vernon Supp. 1978-1979).
  \item \textsuperscript{79} 576 S.W.2d at 802.
  \item \textsuperscript{80} See note 25 supra and accompanying text.
  \item \textsuperscript{81} Although a lender may have actual notice, he is not charged with notice of the mechanic's lien because these preliminary activities do not incept the mechanic's lien.
  \item \textsuperscript{82} One possible legislative action is the elimination of § 2(a) entirely, thereby allowing perfection of a mechanic's lien by the holder of such lien only by either recording an affidavit of his agreement under § 2(c) or recording the contract itself under § 2(b). Although this would not solve the problem of contractors being saddled with the burden (both financial
for a continual reliance on future litigation. Although the supreme court expressly overruled the court of appeals' case-by-case analysis as to what constitutes inception of a mechanic's lien, in reality, the supreme court merely changed the focus of future court battles. Instead of a case-by-case analysis regarding inception of a mechanic's lien, future litigation will involve a case-by-case determination of whether activities conducted were of a permanent nature.

Despite the problems involved in the newly established inception standards, the supreme court's resolution of the priority problems among the various liens was perhaps the most equitable solution possible. Logically, a lienholder is encumbered only by other liens of which he has actual or constructive notice. The result reached by the court is consistent with this reasoning. The court properly gave the vendor's lien on the Irving property first priority because this lien existed prior to any involvement of Blaylock, Dollar Inns, or DMI. Blaylock's mechanic's lien was appropriately next in the ordering of priorities because, at the time of its inception on the Irving property, the only encumbrance of notice to Blaylock was the prior vendor's lien. Finally, DMI's deed of trust was assigned the lowest priority since at the time of the loan to Dollar Inns,

and logistical) of filing their contracts (assuming knowledge of such requirements), it would serve to curtail the endless stream of litigation certain to continue as the provisions now stand. For state legislation similar to that suggested, see CAL. CIV. CODE § 3115 (West 1974).

83. 576 S.W.2d at 801.
84. The court reached this solution upon rehearing whereby an earlier opinion was withdrawn on the issue and substituted by the present one. Originally the court issued a holding that forced one who held a vendor's lien and a deed of trust simultaneously to make an election of which to foreclose. In the court's opinion, these remedies were mutually exclusive. Since DMI foreclosed its deed of trust lien, its subrogated rights under the vendor's lien were no longer available. This result left Irving Lumber as the applicable case when the vendor's lien was foreclosed, while DMI was controlling in a deed of trust foreclosure. The court in DMI (originally) also followed its earlier Irving Lumber decision in refusing to address whether the holder of a mechanic's lien could then pursue a portion of the profits of the sale from the holder of the deed of trust lien who foreclosed. See Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc., 21 Tex. Sup. Ct. J. 521, 530 (July 30, 1978). Fortunately, the court reheard the case on this issue, and retracted its election of remedies ruling. In addition the court held that a mechanic's lienholder could pursue profits in excess of the purchase price. 576 S.W.2d at 808. This holding upon rehearing was the only possible solution, since if the inception of the mechanic's lien is prior in time, the holder of the vendor's lien and deed of trust is charged with notice thereof, and should not be allowed a windfall by an opportune election of remedies. Such would have been the case had the court determined that the holder of a mechanic's lien could not pursue the holder of a vendor's lien or deed of trust for amounts received in excess of the purchase price. Under such a holding, if the deed of trust was deemed prior to the inception of the mechanic's lien, the holder of the deed of trust could have foreclosed, thereby extinguishing the mechanic's lien. Conversely, if the mechanic's lien was prior, or if there was any doubt as to priority, the vendor's lien could be foreclosed. In either case, the holder of the mechanic's lien would have been without remedy.

85. Note that even if the mechanic's lien due to the after-acquired title doctrine is incepted prior to the purchase of the property, the vendor's lien still achieves priority to the extent of the purchase price because the purchaser only receives title encumbered by the vendor's lien. The mechanic's lienholder accepts the burdens on, as well as the benefits of, a subsequently acquired legal title. Although the DMI court did not face this situation, the opinion implies such a result. See 576 S.W.2d at 807.
there was notice of both the prior vendor's lien and Blaylock's mechanic's lien. Any other ordering of priorities would be inequitable because a lien would be subject to an encumbrance of which the holder had no possible knowledge.

There remains one other area of conflict between section 2 of article 5459 and the case law in light of the decisions of Irving Lumber and DMI. A purchaser of land and a builder may contract for improvements before the purchaser acquires title. If the builder immediately records the contract, he has complied with the statutory requirement for establishing the inception of his mechanic's lien. Yet the date of inception of a lien against a prospective holder of a vendor's lien does not establish the priority of that mechanic's lien. Thus, the holdings of the court and the language of the statute conflict.

III. CONCLUSION

In providing liens for workmen and materialmen, legitimate interests of other individuals, such as owners, lender-mortgagees, and third-party purchasers, must be considered. The need for certainty in business relationships requires that priority between competing liens be resolved in a predictable manner. In formulating priority rules in DMI, the Texas Supreme Court solves many of the questions unanswered by previous decisions, and thus inserts somewhat more precise guidelines on which to rely. The downfall of the DMI decision, however, is the court's interpretation of the standard that must be met in order to constitute inception of a mechanic's lien. Not only does the court's solution ignore the purpose behind section 2 of article 5459, but it also fails to reduce the necessity for future litigation. Although this area of the law is extremely complex, a set of standards is necessary that will provide fairness and certainty to all concerned, thereby eliminating confrontations requiring litigation. The difficulty with formulating a set of satisfactory standards is evident from the fact that in each of the two predominant cases involving mechanics' liens since 1971 the court has withdrawn its original opinion and substituted a more appropriate one. In spite of the difficulty, it is to be hoped that judicial or legislative inception standards will be forthcoming that are equitable and quantifiable, as well as in accord with the original legislative purposes.

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88. See Comment, supra note 25, at 180. It is likely that the conflict will be resolved in favor of the vendor's lienholder because the party contracting with the mechanic's lienholder before acquisition of the property gets a title encumbered by the vendor's lien. Thus, the holder of the mechanic's lien claims title only as good as the contracting party has.