1972

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Eldon L. Youngblood

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Recommended Citation
Eldon L. Youngblood, Mechanics' and Materialmen's Liens in Texas, 26 Sw L.J. 665 (1972)
https://scholar.smu.edu/smulr/vol26/iss4/2

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MECHANICS' AND MATERIALMEN'S LIENS IN TEXAS

by

Eldon L. Youngblood*

MECHANICS' liens originated in the United States as a statutory creation.¹ No such concept existed at common law or in equity,² and no similar legislation has ever been passed in England.³ The first mechanic's lien law in this country was enacted in the state of Maryland in 1791 on the recommendation of a commission organized to improve the city of Washington.⁴ By passing "an act securing to master builders a lien on houses erected and land occupied," the legislature sought to stimulate the rapid development of the new capitol city. Apparently, the experiment was a success; Pennsylvania followed with a similar statute in 1803,⁵ and eventually every state in the union enacted mechanic's lien laws to spur the growth of its cities in the wake of the great expansion of the nineteenth century.⁶

The mechanic's lien appeared in Texas in 1839 when the Congress of the Republic enacted "An act for the Relief of Master Builders and Mechanics of Texas."⁷ This early statute was admirably uncomplicated. A contractor erecting a building in an incorporated city or town under a written contract with the owner was given a lien on the building and the land on which it was situated, provided he recorded his contract within thirty days after its making. No other filing or notice requirement was imposed.

In 1844 the Congress passed "An Act for the Better Security of Mechanics and Others"⁸ which, for the first time, accorded lien benefits to subcontractors. Coupled with the Act of 1839, it began to mold our present statutory scheme. This act allowed an unpaid subcontractor performing on a written contract to deliver an attested account of the value of his work or materials to the owner, and thereby require the owner to retain from funds due the contractor a sufficient amount to pay the subcontractor's account. The owner was further required to furnish a copy of the account to his contractor, and if the contractor failed to dispute the claim within ten days, the owner was required to

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¹ Lippencott v. York, 86 Tex. 276, 24 S.W. 275 (1893). The term "mechanic's lien," as used in this Article, encompasses the lien given for materialmen as well as workmen. Although it is sometimes important to emphasize the distinction between a mechanic and a materialman, the conjunctive form is often discarded by courts and commentators.


⁵ Id.

⁶ Id. See also S. KNEELAND, A TREATISE UPON THE PRINCIPLES GOVERNING THE ACQUISITION AND ENFORCEMENT OF MECHANIC'S LIENS 12 (2d ed. 1882); Woodward, The Acquisition of Mechanics' and Materialmen's Liens on Non-Homestead Property, 14 SW. L.J. 469 (1960).


deliver enough of the funds withheld to pay the subcontractor's claim. If the owner paid his contractor in advance, he was liable to the subcontractor for any loss resulting from a premature payment.

The essential purpose and scheme of these early Texas statutes has remained intact for over a century, despite numerous comprehensive amendments, deletions, and additions throughout the period. Pursuant to these acts, the owner’s original contractor had a direct lien on the improvement and associated realty to secure his debt, and the subcontractor, while not entitled to a direct lien, was accorded an efficient means of satisfying his debt by trapping funds due the contractor in the hands of the owner. The present mechanic’s lien laws have virtually the same objectives. But the procedures prescribed by the current statutes, particularly procedures for perfecting the subcontractor’s lien, have become vastly more complex and unwieldy. Indeed, it well may be argued that the cumulated amendments of a century have been counterproductive to the interests of those for whom the original statutes were enacted.

The central purpose of this Article is to survey and, hopefully, simplify the Texas law pertaining to mechanics’ liens. A second purpose, born of the frustration experienced in pursuit of the first, is to suggest improvements in the present scheme.

Part I analyzes the so-called “statutory lien,” the direct descendant of the aforementioned Acts of the Republic; Part II examines the quite separate, but less significant, lien created by the Texas Constitution; Part III undertakes a review of Texas law applicable to the relative priorities between mechanics’ liens and other encumbrances; Part IV deals with payment bonds prescribed and permitted by the Hardeman Act and the McGregor Act; and Part V undertakes to study feasible means of improving our present system. An attempt has been made throughout to place the current laws in their historical context.

It is a convention in survey articles to disclaim any intention to cover a fair number of topics arguably a part of the subject being surveyed. In that connection, no attempt will be made herein to discuss contractual mechanics’ liens or liens on chattels given by statute or by the Texas Constitution; the scope of this Article is limited to liens on real property and fixtures which arise by operation of law. Moreover, no detailed discussion is entered upon with respect to statutory liens on oil and mineral property or liens provided by statute for farm, factory, and store operatives. Finally, the discussion of surety bonds in Part IV does not encompass the requirements of the Miller Act, or other laws of the United States pertaining to bonding requirements on federal building projects.

9 TEXAS CONST. art. XVI, § 37 (1869).
12 Id. arts. 5480-82.
13 Id. arts. 5483-88.
I. THE STATUTORY LIEN

A. Historical Development

For more than twenty-five years the Acts of the Republic\(^{15}\) regulated the mechanic's lien rights of workmen and materialmen in Texas. The next development came with the Texas Constitution of 1869, which asserted the rights of mechanics and artisans to a lien and directed the legislature to provide for its speedy and efficient enforcement.\(^{16}\) In 1871, in response to the constitutional admonition, the legislature passed "An Act to Provide for and Regulate Mechanics, Contractors, Builders and Other Liens in the State of Texas."

This act was the genesis of a number of modern concepts: the lien was extended to "any improvement whatever," whether in the city or country;\(^{17}\) a lien was provided for "repairs," as well as for construction work; and oral contracts were for the first time made to support a mechanic's lien. The manner of perfecting the contractor's lien was "fixed" from the date of recordation of his written contract (or if the contract was oral, recordation of a sworn bill of particulars thereto) accompanied by a description of the affected real estate, provided the contract was filed within six months after the debt became due.\(^{18}\)

The present constitution, adopted in 1876, contains a mechanic's lien section which, except for minor changes, is identical to the 1869 provision.\(^{19}\) Shortly after the adoption of the new constitution, the Act of 1871\(^{20}\) was recodified to include a slightly reworded version of the Act of 1844,\(^{21}\) which required an owner to retain funds on presentation of an attested account by a subcontractor, and a recitation of the constitutional requisites for enforcing liens on homestead property.\(^{22}\)

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\(^{16}\) TEX. CONST. art. XII, § 47 (1869).

\(^{17}\) Ch. 34, §§ 1-6, [1871] Tex. Laws, 7 H. GAMMEL, LAWS OF TEXAS 30 (1898).

\(^{18}\) Id. Under the previous statute the lien applied only to work done on a "building" in an incorporated city or town. See Act of Jan. 23, 1839, [1839] Tex. Laws, 2 H. GAMMEL, LAWS OF TEXAS 66 (1898).

\(^{19}\) Ch. 34, §§ 1-6, [1871] Tex. Laws, 7 H. GAMMEL, LAWS OF TEXAS 30 (1898).

\(^{20}\) Id. Under the previous statute the lien applied only to work done on a "building" in an incorporated city or town. See Act of Jan. 23, 1839, [1839] Tex. Laws, 2 H. GAMMEL, LAWS OF TEXAS 66 (1898).

\(^{21}\) Id.


\(^{23}\) TEX. CONST. art. XVI, § 50 provides, in part, that a homestead may be subject to forced sale for payment of debts "for work and material used in constructing improvements thereon . . . only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead . . . ." The 1876 revision to the mechanic's lien statutes went further and required the mechanic or materialman to obtain a written contract signed by the husband and wife and acknowledged by the wife as required when making a sale of the homestead, at the time the work is done or the materials furnished. In addition, he was required to record the contract in the county clerk's office in the county where the improvements were made or the land situated. See ch. 81, § 1-8, [1876] Tex. Laws, 8 H. GAMMEL, LAWS OF TEXAS 927 (1898).

The current statute is very similar. However, the exemption is now limited to the homestead of a married person; the contract must be recorded before performance; and the contractor's compliance with the formalities is specifically made to inure to the benefit of subcontractors. See TEX. REV. CIV. STAT. ANN. art. 5460 (1958).
A comprehensive amendment in 1885 introduced the current concept that the filing period for the subcontractor should be briefer than that applicable to the original contractor: The original contractor was required to file his contract or affidavit within four months after "the indebtedness shall have accrued," but the subcontractor was given only thirty days. In addition, the current preference enjoyed by mechanics' lien holders over prior liens on the land was introduced in this amendment, which, with the exception of the word "accrual," employed the language of section 1 of the present article.

Several other concepts in our present law first appeared in this amendment: (1) the original contractor was given the affirmative duty to defend any action by a subcontractor to enforce his lien; (2) the owner was entitled to deduct from sums owing the contractor the amount of any subcontractor's judgment and costs, or, if he had previously paid the original contractor in full, he was entitled to recover from him the amount of any judgment so paid; (3) the money due the original contractor from the owner was made nongarnishable by other creditors to the prejudice of subcontractors, who were given a preference over other creditors of the original contractor; (4) all mechanics' liens on the same improvement were placed on an equal footing without reference to the date of filing; and (5) a basic principle of Texas mechanic's lien law was codified:

[In no case shall the owner be compelled to pay a greater sum for or on account of labor performed or material, machinery, fixtures, and tools furnished than the price or sum stipulated in the original contract between such owner and the original contractor for such house, building, fixtures, improvements or repairs.]

Another innovation of this amendment survived up to the Hardeman Act of 1961: a subcontractor was required to give at least ten days notice in writing to the owner before he filed a lien claim, stating the amount of his claim and from whom it was due.

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24 Ch. 66, § 1, [1885] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 683 (1898).
25 Id. at 683-84. Under the current statute an original contractor must file his lien affidavit within 120 days after the indebtedness accrues; a subcontractor is given 90 days after the accrual of indebtedness. See TEX. REV. CIV. STAT. ANN. art. 5453 (1958).
26 In an 1889 revision the phrase "accrual of the lien" was changed to "inception of the lien." Ch. 98, §§ 1-20, [1889] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 1138 (1898). See notes 201-05 infra, and accompanying text.
28 These concepts are now embodied in TEX. REV. CIV. STAT. ANN. art. 5463, § 2 (1958) in essentially the same language.
29 TEX. REV. CIV. STAT. ANN. art. 5464 (1958) was left untouched by the Hardeman Act. It was finalized in 1889 and provides essentially the same protection as the 1885 amendment: "All subcontractors, laborers and materialmen shall have preference over other creditors of the principal contractor or builder." It has been held that this preference here given is applicable only to those subcontractors who have liens. Lebo v. Dochen, 310 S.W.2d 715 (Tex. Civ. App.—Austin 1958), error ref. n.r.e.
30 See notes 201-05 supra, and accompanying text.
31 Ch. 66, § 1, [1885] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 683 (1898). While the principle embodied in this provision is as viable as ever, there is no clear statement of it in our current statutes. However, TEX. REV. CIV. STAT. ANN. art. 5463, § 2 (Supp. 1972) limits the liability of the owner in somewhat the same fashion: "The owner shall in no case be required to pay, nor his property be liable for, any money, other than that required to be retained by him under the provisions of Article 5469 . . . . " See, e.g., Lonergan v. San Antonio Loan & Trust Co., 101 Tex. 63, 104 S.W. 1061 (1907).
32 The deletion of this requirement was a salutary accomplishment of the Hardeman Act.
MECHANICS' AND MATERIALMEN'S LIENS

An 1889 amendment severely complicated the lien-perfecting procedure prescribed for materialmen. One who furnished materials was required to give written notice to the owner of "each and every item as it is furnished" and "how much there is due and unpaid on each bill of lumber furnished . . . within ninety days after the indebtedness shall have accrued." The event which marked when the indebtedness accrued was alternatively defined:

When labor is performed by the day or week, then the indebtedness shall be deemed to have accrued at the end of the week during which labor is performed. When material is furnished the indebtedness shall be deemed to have accrued at the date of the last delivery of such material, unless there is an agreement to pay for such material at a specified time.

Minor amendments followed in 1895, but by the turn of the century the statutory scheme was basically set in the form in which it was to remain. Later amendments required the owner to retain ten percent of the original contract price during the progress of the work and for thirty days after completion for the sole benefit of artisans and mechanics; expanded the kinds of improvements for which a lien is given; and lengthened, to three months, the period during which a subcontractor may file his contract or affidavit.

In August 1961 the legislature enacted the Hardeman Act, the most thoroughgoing revision to the mechanic's lien laws yet attempted. Of the twenty-five relevant statutes in existence at the time, nine were amended, four were repealed, and one new article was added. This Act was the culmination of long efforts by representatives of various segments of the construction industry to revise a body of laws with which there was general dissatisfaction. Industry complaints were evident from the emergency clause of the Act, which

In 1889 the statute was amended to exempt from the requirement materialmen claiming under § 3 of the 1889 Act (which section contained the 90-day notice provision). Ch. 98, §§ 1-20, [1889] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 113 (1898). The principal difficulty was determining to whom the requirement was applicable. See Woodward, supra note 6.

3 Ch. 98, §§ 1-20, [1889] Tex. Laws, 9 H. GAMMEL, LAWS OF TEXAS 115 (1898).

4 Id. at 1139. This requirement was further extended to those who perform labor by ch. 224, § 1, [1929] Tex. Laws 478. The requirement of itemization was an onerous one, necessitating a meticulous listing of each item of labor and material separately and the unit price of each. In Woodward, supra note 6, it was severely criticized for exalting form over substance. Possibly as a result of Professor Woodward's urging, the Hardeman Act did away with the itemization requirement entirely.


6 Railroad improvements were included in the scope of improvements on which the lien would attach, and rights available to natural persons were specifically made applicable to corporations. Ch. 126, §§ 1-10, [1895] Tex. Laws, 10 H. GAMMEL, LAWS OF TEXAS 924 (1898).

7 This requirement is now embodied in TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1972). It took on much greater significance when its benefits were extended to all subcontractors by the Hardeman Act. See text accompanying notes 153-56 infra. Materialmen derived no benefits from the original statute.

8 Ch. 124, [1913] Tex. Laws 252 provided a mechanic's lien for construction or repair of "levees or embankments to be erected for the reclamation of overflow lands along any river or creek in this state." Improvements to a homestead and "clearing, grubbing, draining and fencing land" were included by ch. 171, § 1, [1917] Tex. Laws 383. "Grubbing out of domestic orchards, replacing trees, pruning, cultivating and caring for orchard trees" were added by ch. 348, § 1, [1951] Tex. Laws 593.

9 Ch. 224, § 1, [1929] Tex. Laws 478.

10 Amended: TEX. REV. CIV. STAT. ANN. arts. 5452-56, 5463, 5467-69; Repealed: id. arts. 5457, 5461, 5462, 5465; Added: id. art. 5472d.

11 See Woodward, supra note 6.
cited "the fact that existing statutes governing mechanics and materialmen's liens are antiquated, vague, and ambiguous, and have been the subject of numerous court decisions resulting in loss of liens through technicalities." 43

The resulting Act was an industry-drawn compromise between general contractors and materialmen groups which, despite meritorious efforts, fell woefully short of correcting the shortcomings of the cumulated amendments of a century.

B. The Hardeman Act and the Mechanic's Lien Today

Articles 5452-5471 44 constitute the present body of statutes pertaining to the acquisition of mechanics' liens on real estate. 45 Article 5452 is the basic statute. It provides a lien for those who "labor," "specially fabricate material," or "furnish labor or material" under a contract with the owner, his agent, trustee, or his contractor, or any subcontractor, for the construction or repair of (1) a house, building, or improvement, (2) a levy or embankment to be erected for the reclamation of overflow lands along a river or creek, or (3) a railroad.

Persons Entitled to Lien. The categories of possible lien claimants set forth in the statute are broad enough to include every type of workman on a building and every materialman who furnishes materials for its construction. 46 Accordingly, any person with legal capacity who furnishes labor or material, or specially fabricates material for construction or repair of one of the enumerated structures, is entitled to perfect the lien. The manner in which the lien is established, however, is primarily dependent on the fundamental question whether the claimant is an "original contractor" or a "subcontractor."

Article 5452e defines an "original contractor" as one "contracting with an owner directly or through his agent." A subcontractor is defined as "any person or corporation who has furnished labor or materials or both... to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contractor." 47 Subcontractors are often

45 Id. arts. 5160 (1971), 5472(a), 5472(b), 5472b-1 (1958), 5472c, 5472d (Supp. 1972) pertain to liens on payment bonds or funds payable on public works. Liens on oil and mineral property are provided in arts. 5473-79. Liens on fixtures and chattels are given to farm, factory, and store operatives by arts. 5483-88. Article 5472e makes certain monies "trust funds" for the benefit of contractors and subcontractors.
46 Bassett v. Mills, 89 Tex. 162, 34 S.W. 93 (1896).
47 These terms were not defined by statute prior to the Hardeman Act. "Original contractor" was long ago defined by the supreme court in essentially the terms used in the Hardeman Act. Matthews v. Waggenhaeuser Brewing Ass'n, 83 Tex. 604, 19 S.W. 150, 151 (1892). The term "subcontractor" is now used more freely in the statutes to encompass other designations employed conjunctively in previous enactments, such as "materialman," "journeyman," or "laborer." Historically, the term "subcontractor" referred to one who takes from the principal contractor a specific part of the work, and did not encompass those contracting with a subcontractor or a materialman. Huddleston v. Nislar, 72 S.W.2d 959 (Tex. Civ. App.—Amarillo 1934), error ref. It is unfortunate that the drafters saw fit to use the word being defined in the definition itself. Presumably it was done in an attempt to make clear that one who supplies labor or material to a person contracting with the original contractor for part of his work has the lien. But what is the status of one who furnishes material to the supplier of a materialman who contracts with the original contractor? Bassett v. Mills, 89 Tex. 162, 34 S.W. 93 (1896), made it clear that the lien is available to a workman or materialman irrespective of the tier at which he makes his contribution. It would be unfortunate if a contrary intention were attributed to the legislature because of the awkward definition of "subcontractor" provided by the Hardeman Act.
Properly characterizing the claimant as an original contractor or subcontractor is important because a subcontractor is not entitled to a constitutional lien, and it is relatively difficult for him to perfect a statutory lien. On the other hand, an original contractor often has a constitutional lien automatically, and the manner of perfecting his statutory lien is relatively simple.

For years many developers used "dummy" or "sham" original contractors in order that all of the persons with whom they dealt would be considered subcontractors, instead of original contractors. In 1965 the legislature attempted to eliminate that practice by enacting article 5452-1. That statute permits a workman or materialman to have original contractor status if he (1) contracts with a corporation effectively controlled by the owner, or (2) contracts with an original contractor under circumstances where there is no good faith intention between the owner and that original contractor that the contract be performed. It further provides that an owner or sham contractor who, with intent to defraud, makes false written statements that a bill has been paid may be punished by fine and imprisonment.

Effort for Which Lien Provided. The statutory lien is available only to those who furnish labor in the direct prosecution of the work, furnish material actually delivered, or specially fabricate undelivered material.

Labor. The requirement that labor furnished be "used in the direct prosecution of the work" was included in article 5452 for the first time by the

In the first instance, the subcontractor's lien is dependent on the original contractor's lien being unextinguished by payment, but a penalty lien is given against the owner for breach of his obligations to retain funds. TEX. REV. CIV. STAT. ANN. arts. 5463, 5469 (Supp. 1972); see text accompanying notes 161-67 infra. However, the failure of the original contractor to perfect his lien does not affect the subcontractor's rights.


See text accompanying notes 126-43 infra.

Strang v. Pray, 89 Tex. 525, 35 S.W. 1054 (1896).

See text accompanying notes 107-25 infra.

By "paying" the sham original contractor in full at the beginning of work, all liens except those given for failure to abide by the 10% statutory retainage requirement were extinguished. See note 47 supra.

Ch. 175, § 1, [1965] Tex. Laws 368.

TEX. REV. CIV. STAT. ANN. art. 5452-1, § 1 (Supp. 1972) provides:

Whenever any owner of real property shall enter into any contract with a corporation for [construction] . . . thereon, and said owner can effectively control the corporation with whom such contract is made . . . or, when any owner of real property shall enter into such a contract with any natural person or corporation for such construction or repair, and it shall be proved that such contract was made without good faith intention on the part of the parties thereto that it was to be performed . . . [then] any person, firm or corporation who, under a direct contractual relationship with said person or corporation and who may labor, specially fabricate material, or furnish labor or material to be used in the prosecution of the work under such contract shall be deemed to be in a direct contractual relationship with the owner and may perfect his lien against the property in the same manner as any other original contractor.

Note that effective control by the owner of a contractor organized as a partnership or un-incorporated association will not suffice.

Id. § 2 (Supp. 1972) provides for a penalty consisting of a fine of not more than $5,000 or less than $100, or imprisonment in the county jail for not more than one year, or both.

Id. art. 5452, § 2a (Supp. 1972).
Hardeman Act. However, there is no indication in the case law that this legislative addition was intended to change previous decisions respecting, for example, the rights of architects or engineers to establish a lien for off-site labor performed in drawing plans and specifications.\textsuperscript{57} It is probable that the new statutory admonition is flexible enough to include such labor.\textsuperscript{58}

Labor performed in installing fixtures, such as machinery or floor covering, is includable as labor for which a mechanic's lien may be established,\textsuperscript{49} and a lien may be established for labor performed by the agent or the employee of a mechanic's lien claimant.\textsuperscript{59} But not all labor performed in connection with an improvement merits a mechanic's lien. For example, the services of an attorney rendered to a contractor do not make the attorney a subcontractor entitled to a lien on the owner's property for payment of his fees.\textsuperscript{60} Furthermore, since the lien is given only for construction or repair work, no lien is available to one who performs labor in removing or demolishing a structure.\textsuperscript{61}

\textbf{Material.} The Hardeman Act greatly expanded the definition of "material." That term now encompasses not only materials which are to be incorporated in the work, but certain consumable material as well, such as power, water, fuel, and lubricants. Rent and repair expenses for construction equipment are also included in the definition of "material."\textsuperscript{62}

A requirement that all materials furnished be "incorporated in the work or consumed in the direct prosecution of the work or ordered or delivered for such incorporation or such consumption" was added by the 1961 revisions.\textsuperscript{63} It is not clear whether this requirement is intended merely to codify the existing case law or whether it excludes a lien for that part of the contract price attributable to such items as transporting workers or hauling materials.\textsuperscript{64} The language is perhaps desirable to discourage further attempts by enterprising counsel to establish liens for materials consumed or used at a place remote from the construction task, such as meals consumed by workers,\textsuperscript{65} money lent for construction,\textsuperscript{7} or attorneys' fees.\textsuperscript{66}


\textsuperscript{58} In Sanguinetti & Staats v. Colorado Salt Co., 150 S.W. 490, 491 (Tex. Civ. App.—Ft. Worth 1912), error ref., the court wrote: "An architect who prepares the drawings, plans and specifications for a building and superintends the erection thereof, may as truly be said to perform labor thereon as any one who takes part in the work of construction." An architect was awarded a constitutional lien in Atkinson v. Jackson Bros., 259 S.W. 280 (Tex. Civ. App. 1924), rev'd on other grounds, 270 S.W. 848 (Tex. Comm'n App. 1925), holding approved. It was suggested in Lancaster v. McKenzie, 439 S.W.2d 728 (Tex. Civ. App.—El Paso 1965), that performing supervisory duties, in addition to drawing plans and specifications, may be an indispensable condition to establishment of the lien.


\textsuperscript{64} Big Three Welding Equip. Co. v. Crutcher, Rolfs, Cummings, Inc., 149 Tex. 204, 229 S.W.2d 600 (1950).


\textsuperscript{66} Id.

\textsuperscript{67} Woodward, supra note 6, at 473.


\textsuperscript{69} See West v. First Baptist Church, 123 Tex. 388, 71 S.W.2d 1090 (1934).

Specially Fabricated Materials. This is an entirely new category of effort for which a lien was provided by the Hardeman Act. "Specially fabricated material" is defined in section 2(c) of article 5452 as "material fabricated for use as a component part of the construction or repair so as to be reasonably unsuitable for use elsewhere, even though such material may not be delivered." This addition was obviously made to protect the manufacturer of custom items who expends time and money fabricating material which he cannot sell to anyone else because of its uniqueness, but which is never delivered, perhaps because of the insolvency of the owner or contractor. Special procedures for perfecting the lien for specially fabricating materials are provided by article 5453 to ensure that the lien will be established even though the material is never delivered to the job site.

Property Affected. The labor must have been performed or materials delivered or specially fabricated for construction or repair of a house, building or improvement, a reclamation levee or embankment on a river or creek, or a railroad. The last two categories are infrequently applied and merit no more than a passing mention. The terms "house, building or improvement" were long ago held to encompass any structure permanently attached to realty. In addition, section 1 of article 5452 includes the following items under the definition of "improvement," although some are not definable as structures:

- abutting 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.

A mechanic's lien will not attach to mere personal property which is not identifiable as a fixture. However, it is often difficult to determine whether a particular item is or is not a fixture. Various tests have been advanced, but no clear, objective rule has emerged. The test most often approved involves a weighing of three considerations: (1) the degree of actual or constructive annexation of the property to the realty, (2) the adaptation of the item annexed to the use or purpose served by the realty, and (3) the intention of the annexor that the annexation be permanent. Of these considerations, the most

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69 The lien on materials actually furnished could never be defeated by redirection to another site. Brick & Tile, Inc. v. Parker, 143 Tex. 383, 186 S.W.2d 66 (1945); Trammel v. Mount, 68 Tex. 210, 4 S.W. 377 (1887). However, prior to the Hardeman Act, materials ordered, but refused or returned, did not give rise to a lienable claim. Murphy v. Fleetford, 30 Tex. Civ. App. 487, 70 S.W. 989 (1902).

70 See text accompanying notes 134, 135 infra.


72 There are no reported cases in which a definitional problem has arisen in connection with these categories.


74 These odd categories were inserted in the statutes at various times, probably in response to isolated complaints. See note 38 supra.


76 See, e.g., Hutchins v. Masterson, 46 Tex. 551 (1877); Ruby v. Cambridge Mut. Fire
important is the intention of permanence; the other two are useful mainly as evidence of intention. Thus, items of furniture, appliances, paintings, or other articles only slightly or temporarily attached in a building usually retain the character of a chattel. But items which are so firmly attached to the building that their severance would cause serious injury to the realty are usually fixtures. It does not follow, however, that an item is personalty merely because it is severable without causing injury. Non-severability may be strong evidence that an item is a fixture, but many severable items can be fixtures.

If an intention that the item remain personalty is strongly manifested by all of the circumstances, it will govern the question. Thus, the installation of trade fixtures which a tenant expects to remove at the expiration of his lease will not give rise to a mechanic's lien.

Because of the definitional problem it is often advisable for a materialman to perfect his security interest by following the procedure prescribed in article 9 of the Texas Uniform Commercial Code, as well as by perfecting his mechanic's lien; he is thus protected if his materials should be deemed personalty. A security interest in fixtures is not subject to the general Code exclusion with respect to transactions creating liens on interests in real estate.

Mechanics' liens cannot be attached to public works. If materials or labor are furnished for the construction or repair of a public building, structure or grounds, such as a county courthouse, public road, public schoolhouse, or public cemetery, no mechanic's lien is available. The claimant's remedy on a public project is limited to a statutory lien on funds payable under certain small contracts, or a claim against a mandatory payment bond on larger contracts.

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82 Id. § 9.104(10). Id. § 9.313 provides that a security interest cannot be created in "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like... unless the structure remains personal property" but prescribes rules of priority for other fixtures.

83 Atascosa County v. Angus, 83 Tex. 202, 18 S.W. 563 (1892).


88 See id. art. 5160 (1958), discussed in text accompanying notes 289-96 infra.
Once established, a mechanic’s lien attaches to the improvement being constructed or repaired and the “lot or lots of land necessarily connected therewith.” The statutory phrase refers to a tract of land treated as one parcel, regardless of the number of lots or improvements on the parcel. If the land is located outside a city, town, or village the lien includes up to fifty acres of land on which the improvement is situated. If the lien is for construction or repair of a railroad, it extends to all of the railroad’s properties.

Nature of "Contract" Required. The labor or material must be furnished pursuant to a contract with the owner or his agent, trustee, receiver, contractor, or subcontractor. If the lien is to attach to property other than marital homestead property, the contract may be written or oral, express or implied. But a lien cannot be attached to the homestead of a married person unless the work is being done pursuant to a written contract which has been signed by both the husband and the wife before the labor was performed or the material was furnished, and the contract must be recorded in the county clerk’s office. A subcontractor may perfect his lien with respect to homestead property if the contract between the original contractor and the owner has been signed and recorded in accordance with these requirements.

Although the statute requires a contract with the owner, it may not be necessary that such owner hold the legal title at the time the laborer or materialman contracts with him in order to entitle the claimant to a lien. A purchaser under an executory contract of sale or other prospective purchaser, is not an owner if the sale is not consummated prior to performance. Nevertheless, many cases have held that a contract with one who obtains title after its making, but prior to performance, is a contract with an owner. However, it has been held by the supreme court that, for purposes of determining priorities, the “inception” of a lien cannot relate back to the date of a contract

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89 Id. art. 5452 (Supp. 1972).
92 Id.
93 Id. art. 5452 (Supp. 1972).
94 Ball v. Davis, 118 Tex. 534, 18 S.W.2d 1063 (1929); Ferguson v. Ashbell & Simpson, 53 Tex. 245 (1880).
95 Tenison v. Hagenedorn, 155 S.W. 690 (Tex. Civ. App.—Dallas 1913) (contract implied where owner knew work was for his benefit, suggested changes, and supervised work); Tex. Rev. Civ. Stat. Ann. art. 5452, § 2e (Supp. 1972) defines an “original contract” as “an agreement to which an owner is a party, either directly or by implication of law.” (Emphasis added.)
96 Tex. Rev. Civ. Stat. Ann. art. 5460 (Supp. 1972). A failure to comply with formalities before work on a contract has begun defeats the lien for all work done on that contract, even if formalities are completed before the performance of the specific work for which the lien is claimed. Kepley v. Zachry, 131 Tex. 554, 116 S.W.2d 699 (1938). However, a lien was held to attach to extras performed on homestead property pursuant to oral change orders in Collins v. Hall, 161 S.W.2d 311 (Tex. Civ. App.—Austin 1942), error ref. w.o.m.
with one who is not the owner at the time of the contract, even if title is acquired prior to performance by the claimant.\textsuperscript{89}

To support a lien, the ownership need not be of the entire title in fee. For example, a lien may be enforced against a leasehold interest.\textsuperscript{100} But the landlord's interest in the property cannot be subjected to a lien without his consent.\textsuperscript{101} Hence, a contract with a lessee will not provide a basis for a lien on fixtures in the absence of authority from the owner.\textsuperscript{102} Circumstances, however, may lead to the conclusion that the owner has ratified a contract between his tenant and the mechanic's lien claimant. For example, if the tenant is given limited authority to contract for improvements and the landlord, with knowledge, fails to repudiate a contract which exceeds that authority, the tenant may be deemed the landlord's agent by ratification.\textsuperscript{103} But, in \textit{Campbell v. Teeple}\textsuperscript{104} and \textit{Sheer v. Cummings},\textsuperscript{105} it was held that an owner's mere knowledge that the contractor is making improvements under a contract with a tenant does not amount to ratification by the owner, if the owner did not authorize any improvements. Moreover, a requirement in a lease that the tenant make improvements which revert to the owner has been held not to amount to a consent which revert to the owner to the establishment of a lien for materials furnished in the construction of such tenant improvements.\textsuperscript{106}

\textbf{Perfecting the Lien.} A cornerstone principle of Texas mechanic's lien law is that so long as the owner complies with his statutory responsibilities to retain funds from the contractor, his aggregate liability, and that of his property, to contractors and subcontractors is limited to the amount of the price of the original contract.\textsuperscript{107} Thus, the owner is enabled to control his maximum liability regardless of the number of subcontractors his original contractor employs or the extent to which the original contractor becomes indebted to them. In Texas, unlike many states,\textsuperscript{108} only an original contractor enjoys a direct lien on the property; the subcontractor must rely on his statutory rights to collect funds due from the owner to his contractor.\textsuperscript{109} Consequently, once the owner has paid the full price to his original contractor, if he has complied


\textsuperscript{101}Penfield v. Harris, 7 Tex. Civ. App. 659, 27 S.W. 762 (1894), \textit{error ref.}


\textsuperscript{103}William Cameron & Co. v. Gibson, 278 S.W. 522 (Tex. Civ. App.—Austin 1925), \textit{error ref.}

\textsuperscript{104}272 S.W. 290, 304 (Tex. Civ. App.—San Antonio 1925).

\textsuperscript{105}80 Tex. 294, 16 S.W. 37 (1891).


\textsuperscript{107}See note 31 \textit{supra}, and accompanying text.

\textsuperscript{108}Several states give the subcontractor a direct lien. \textit{See}, e.g., ARK. STAT. ANN. § 51-601 (1947); N.M. STAT. ANN. §§ 61-2-2, 61-2-6 (1953); OKLA. STAT. tit. 42, § 143 (1951).

with the statutes in doing so, no subcontractor can subject his property to a lien. It is, therefore, vital to a subcontractor's interest that the owner be constrained not to pay all of his contract price to the original contractor before the subcontractor has been paid. A great part of the verbiage in our lien statutes is calculated to induce the owner to retain funds for unpaid subcontractors by withholding them from the original contractor.10

Two additional principles contribute to the appalling verbosity of our lien-perfecting procedures: (1) the owner and third parties must have reasonable notice of a mechanic's lien on the property, and (2) the owner and the contractor must have prompt notice of the accrual of unpaid subcontractor claims which may ripen into liens on the real estate. The former principle is fulfilled by the recorded sworn claim of lien; the latter, by the requirement that subcontractors send periodic statements of unpaid debts. Unfortunately, in effectuating these requirements the legislature has created a labyrinth of technicalities. It has been suggested that the average subcontractor could as easily interpret the Internal Revenue Code as determine his duties by reading the Hardeman Act.11

The Lien Affidavit.112 Every original contractor, to perfect his lien, must file a lien affidavit with the county clerk within 120 days after the indebtedness accrues; subcontractors are required to file the affidavit within 90 days after the accrual of indebtedness. Every claimant must also send two copies of the affidavit to the owner by certified or registered mail addressed to his last known business or residence address. By filing the affidavit within the prescribed time and sending the requisite copies to the owner, the original contractor has perfected his lien; there is no additional requirement imposed upon him. But the subcontractor, in addition to filing the lien affidavit, must furnish various notices to the owner and, in some circumstances, to the original contractor.

The form of the mechanic's lien affidavit is not prescribed by the statute, but article 5455 sets forth certain requisites:

(1) The affidavit must be a sworn statement containing a jurat;113 a mere acknowledgment is insufficient.114 Moreover, an acknowledgment is not required in order to make the instrument recordable.115

(2) If known, the name of the owner or reputed owner must be shown.116

(3) It must contain a general statement of the kind of work done or materials furnished or specially fabricated, or both. Customary symbols and abbreviations are sufficient.117

(4) It must state the name of the employer of the claimant, or to whom

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113 Id. art. 5453, § 2.
114 Id. art. 5455.
117 If title to the property has passed since performance, one should show the former owner's name as well as the current owner. Prudence dictates that every person holding title from date of performance to filing be set forth.
118 Prior to the 1961 revisions strict itemization was required. This change was one of the better accomplishments of the Hardeman Act. See Woodward, supra note 6.
the claimant furnished the material, and the name of the original contractor.

(5) It must contain a description of the property sought to be charged with the lien which is "legally sufficient" for identification.¹¹⁹

(6) It must be signed by the claimant or by someone on his behalf. An assignor may execute an affidavit after assignment or he may authorize his assignee to execute it.¹²⁰

The affidavit must be filed with the clerk of the county in which the real estate is situated within a stated period of time following the time that "the indebtedness accrues."¹²¹ Article 5467 sets forth the alternative events which constitute accrual of indebtedness in specific circumstances. Before the 1961 amendments, this article was simpler.¹²² Under the present statute¹²³ the event which produces debt accrual depends upon the kind of work a laborer is performing or the type of materials which the materialman is contributing. Furthermore, the revision deleted a provision permitting the parties to agree upon a date for the accrual of indebtedness. It is perhaps no longer possible for the parties to set their own debt accrual date for the purpose of starting the time periods for filing the lien affidavit.¹²⁴ Under the current statute, in by far the majority of cases, accrual of indebtedness is deemed to be on the tenth of the month next following the month in which a specified event occurs.¹²⁵

**Subcontractor Notice for Labor or Materials Furnished.** Where the claim is for labor or materials actually furnished, the notice required is a periodic notice of the unpaid balance owed the claimant for his labor or materials. A subcontractor claiming on a debt owed by the original contractor for labor done or materials delivered must send such notice to the owner within ninety days after the tenth of the month next following the month of performance.¹²⁶ If a subcontractor’s contract is neither with the owner nor the original contractor, he has two notices to send: one notice to the owner, as just described, and one to the original contractor. The time for sending notice to the original


¹²⁰ Wortham v. Trane Co., 432 S.W.2d 520 (Tex. 1968).


¹²³ Baker, supra note 111.

¹²⁴ Tex. Rev. Civ. Stat. Ann. art. 5467 (Supp. 1972). For the original contractor and for all claimants seeking retainages, it is the tenth of the month next following the month in which the original contract was completed, finally settled, or abandoned. For the subcontractor who furnished labor or materials, it is the tenth of the month next following the last month in which he performed. If the claim is for "specially fabricated material" which was never delivered, the indebtedness accrues on the tenth of the month next following the month in which delivery would normally have been required at the job site. If the claim is for wages, and the claimant is on an hourly, daily, or weekly wage, the debt accrues at the end of the calendar week in which the labor was performed.

¹²⁵ Id. art. 5453, § 2b(2).
contractor also begins to run on the tenth of the month, but he has only thirty-six days after the tenth (rather than ninety days) to send such notice.\footnote{Id. § 2b(1). Prior to the Hardeman Act, notice to the original contractor was not required, a fact which sometimes resulted in a contractor's paying twice for the same material. See Wilson v. Sherwin-Williams Co., 110 Tex. 156, 217 S.W. 372 (1919); W.L. MacAtee & Sons v. House, 137 Tex. 259, 153 S.W.2d 460 (1941).}

It is important to remember that the time periods for sending the prescribed notices begin running from each month in which materials are delivered or labor is performed. Typically, a claimant will send several sets of notices in connection with a single job or contract.\footnote{See text accompanying notes 302, 303 infra.}

There is no prescribed form for notice of materials or labor furnished. A copy of the regular statement or billing is sufficient, but when sent to the owner, it must contain a warning that, if the bill remains unpaid, the owner may be personally liable and his property subjected to a lien unless he holds funds to pay the subcontractor.\footnote{9TX. REV. Civ. STAT. ANN. art. 5453, § 2b (Supp. 1972).} Article 5453 specifically provides that the statutory warning is necessary if the notice is to be effective to "trap funds." It does not say that the warning is necessary in order to perfect the lien, nor that it is necessary other than when a subcontractor is noticing by using a statement or billing in the customary form. Nonetheless, in Trinity Universal Insurance Co. v. Palmer\footnote{120412 S.W.2d 691 (Tex. Civ. App.-San Antonio 1967), error ref. n.r.e.} the San Antonio Court of Civil Appeals held that if a warning is not given, the notice is inadequate to perfect the lien. In Hunt Developers, Inc. v. Western Steel Co.\footnote{11409 S.W.2d 443 (Tex. Civ. App.—Corpus Christi 1966).} the Corpus Christi court, only a year before, had held that the warning is not necessary to perfect a lien qualifying a claimant for statutory retainage.\footnote{See text accompanying note 180 infra.} In view of the conflict in the cases, it seems prudent to include the warning to the owner in every notice for material or labor furnished.\footnote{120 In the warning is clearly not required in notices to be given for undelivered specially fabricated materials or with respect to retainage agreements. Perhaps the holdings of the two courts can be reconciled by ascribing a different meaning to the injunction, "send notices in the time and manner required by this act," contained in art. 5469, and the requirement of art. 5472d that a claim must be perfected "in the manner prescribed for fixing and securing a lien by Article 5453," but such distinction would appear to be merely semantic and not substantive. On the face of it, the Hunt case probably reached the correct statutory construction. But one may well ponder why the legislature saw fit to restrict the warning requirement to the isolated circumstances described in the proviso. If there are valid policy reasons to ensure that unsophisticated owners be advised of the consequences of their failure to retain funds, why not require the warning in every notice as a prerequisite to recovery of statutory retainage, as well as funds withheld pursuant to art. 5463?}

Subcontractor Notice for Specially Fabricated Material. To perfect a lien on undelivered specially fabricated materials, the materialman must have sent notice of his acceptance of a contract to fabricate the materials to the owner (and to the original contractor, if the materialman is not in privity with him).\footnote{4TEX. REV. Civ. STAT. ANN. art. 5453, § 2c (Supp. 1972).} The time for sending such notice to either the owner or the original contractor begins to run from the date of the acceptance, and he is given only thirty-six days from the tenth of the month following the month of such acceptance to send it. But once the specially fabricated materials are actually de-
livered, notice of the unpaid balances must be given to the owner and to the original contractor in the usual way. Even if the materials are never delivered, the materialman must give the prescribed notices which he would have otherwise given had he delivered the materials. The time for that notice begins to run from the date delivery would normally have been required under his contract with the subcontractor or contractor.\textsuperscript{135}

The notice given to perfect a lien on undelivered fabricated material must contain (1) a statement that an order has been received and accepted, (2) a description of the material, and (3) the price of the material. The form of notice given after such materials are actually delivered or when delivery would normally have been required is the same as for notice of delivery of ordinary materials.

Subcontractor Notice of Retainage Agreement. An optional method of subcontractor notice is available to those claimants who have made agreements whereby they are to receive payment for their labor, materials, or specially fabricated materials at some date after the expiration of the month immediately following the month of their performance.\textsuperscript{138} Such payments are defined in article 5452.2(g) as "retainage."\textsuperscript{137} Materials which are sold on a sixty- or ninety-day account fall into this category.

If notice of a retainage agreement is given to the owner (and to the original contractor if the agreement is with a subcontractor) within thirty-six days after the tenth of the month next following the month in which the agreement is made, no further notices of any kind are required to be given for labor or materials which are allocable to the retainage agreement.\textsuperscript{138} Such notice relieves the subcontractor of the burden of sending periodic notices over an extended period as labor and materials are furnished.\textsuperscript{139}

A substantial limitation on the desirability of relying on this form of notice is that its receipt by the owner does not authorize him to withhold funds from the original contractor. Authorization to withhold comes only with receipt of the lien affidavit, when this is the sole method of notice utilized by the subcontractor.\textsuperscript{140} Fortunately, the statute permits a subcontractor having a retainage agreement to give the regular notices for labor or material actually delivered in lieu of, or in addition to, the optional notice.\textsuperscript{141}

Notice of a retainage agreement must state that retention of funds has been agreed upon between the claimant and the original contractor or subcontractor;

\textsuperscript{130} Id.
\textsuperscript{131} Id. § 2a.
\textsuperscript{137} Retainage as referred to in this Act (other than the statutory retainage prescribed by Article 5469) is defined as any amount representing any part of the contract payment or payments which are not required to be paid to the claimant within the month next following each month in which the labor was performed, or material! furnished or both; or specially fabricated material was delivered.
\textsuperscript{138} Id. art. 5452, § 2(g).
\textsuperscript{139} Id. art. 5453, § 2a.
\textsuperscript{132} Subcontractor notices under art. 5453, § 2b must be given with respect to each month of performance.
\textsuperscript{141} Id. art. 5453, § 2a.
the sum to be retained; the due date or dates, if known; and the general nature of the agreement.\(^{142}\)

**Delivery of Notices.** Article 5456 is a welcome addition made by the Hardeyman Act; it specifically sets forth the events which constitute the giving of notice. If a lien affidavit or subcontractor notice is in the proper form and mailed by certified or registered mail, it is deemed to have been given at the time it is deposited in the United States mails. If any other method of delivery is used, the notice is deemed to have been given only when it is actually received.\(^{143}\)

**Effect of Subcontractor Notice.** As previously stated, a subcontractor enjoys no automatic, direct lien on the owner's property by virtue of his compliance with the lien-perfecting procedures. The subcontractor's rights are lost after the original contractor has been paid in full, provided that in so paying the contractor the owner has not violated a statutory injunction to withhold funds from the contractor. But if the owner fails to comply with the statutory requirements for retention of funds, a penalty lien is given to the subcontractor against the owner's property.\(^{144}\)

Article 5463 requires an owner to withhold funds due from him to the original contractor on receipt of a subcontractor notice given after the actual delivery of materials.\(^{145}\) The owner must thereafter withhold sufficient funds to pay all claims properly noticed, limited to the amount of the original contract price minus all sums paid prior to receipt of the notice.\(^{146}\) This statute is often referred to as the "fund-trapping" statute because it lends to the notice the effect of trapping or impounding undisbursed funds in the hands of the owner. The notice works like a writ of garnishment; the owner is personally liable and his property subjected to a lien to the extent of funds which he pays to the original contractor in violation of the requirements of article 5463.\(^{147}\)

When the owner has retained funds under the fund-trapping statute, he must pay the noticing subcontractor's claim out of those funds, if sufficient to do so, on proper written demand from the subcontractor. The demand must be sent to the owner with a copy to the original contractor. If the contractor fails, within thirty days after receipt of the demand, to send notice to the owner that he intends to dispute the claim, the owner must pay the demand if he has retained sufficient funds.\(^{148}\)

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\(^{142}\) Id. art. 5456. However, if the applicable statutory provision requires receipt, the notice cannot be deemed given when mailed. See, e.g., id. arts. 5454, 5463.

\(^{143}\) See id. arts. 5463, 5469.

\(^{144}\) Note that the owner's obligation to withhold funds cannot be imposed prior to receipt of the notice. Consequently, a notice may be effective to perfect the lien if mailed in proper form within the prescribed time period and yet fail to trap funds which are paid after mailing, but prior to receipt of the notice.

\(^{145}\) TEX. REV. CIV. STAT. ANN. art. 5454 (Supp. 1972).

\(^{146}\) TEX. REV. CIV. STAT. ANN. art. 5455, § 1c (Supp. 1972) provides that the funds are to be retained "unless payment is made under Article 5455, or the claim otherwise settled or determined, until the time for securing a lien under this Act has passed; or if a lien affidavit has been filed, until the lien claim has been satisfied and released."


The subcontractor may make written demand for payment only after he "shall have given written notice to the owner that his claim or any portion thereof, either has accrued under the terms of Article 5467 or is past due according to the agreement between the parties." Taken literally, this provision imposes a notice requirement in addition to that of article 5453. A statement or billing may be sufficient notice to perfect the lien, and yet not state affirmatively that the debt has "accrued" or is "past due." However, since article 5454 specifically permits the demand to "accompany the original notice of nonpayment or of a past due claim" or to be "stamped or written on the face of said notice," as well as subsequently given, the requirement is not overly burdensome. Better practice would be to state in the subcontractor notice and in the written demand that the debt has accrued under article 5467 or is past due by agreement of the parties.

Article 5469, like the fund-trapping statute, imposes a withholding requirement on the owner; he must retain in his hands a fund equal to ten percent of the original contract price, or its value, during the progress of the work and for thirty days after its completion. This fund is commonly referred to as "statutory retainage" because it arises by operation of law and not solely upon receipt of a subcontractor notice.

Article 5469 was enacted in 1909 in form similar to the current statute, with two important exceptions. The original statute made the fund retained inure to the sole benefit of artisans and mechanics. The Hardeman Act, while conferring a preference to the fund on artisans and mechanics, earmarked the residue for all other subcontractors. In addition, the Hardeman Act imposed the requirement that to be entitled to statutory retainage the claimant must file his lien affidavit within thirty days after completion of the work.

The significance of these changes may be measured by the fact that in over fifty years only one reported case construed the old statute, while the Hardeman Act revision has produced more than a dozen cases in a single decade. This plethora of litigation is largely attributable to the almost universal custom, at least on smaller jobs, of paying the contractor in full on or before completion of the work. Prior to the Hardeman Act few disputes arose because few artisans and mechanics were denied payment for their labor, and fewer still were prone to invoke their lien rights. The infrequent invocation of the statute coupled with the preeminent necessity of satisfying the contractor's demand for payment led to a wholesale disregard of statutory retainage requirements. Under the revision, these requirements can no longer be ignored.

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140 Id.
150 Id.
151 The reference in Tex. Rev. Civ. Stat. Ann. art. 5454 (Supp. 1972) that the notice may state that the debt is past due by agreement of the parties suggests that the parties may set their own debt-accrual date, even though such provision was stricken from art. 5467. See notes 123, 124 supra, and accompanying text.
155 Miller v. Harmon, 46 S.W.2d 342 (Tex. Civ. App.—Austin 1932); see Woodward, supra note 6.
157 See Woodward, supra note 6, at 490-91.
Now that every subcontractor has a right to statutory retainage, article 5469 has virtually eclipsed the fund-trapping statute in significance to the average subcontractor.

The owner, then, must beware of paying his contractor in full until thirty days have expired after completion of the work, and he should pay him at that time only if there are no unpaid subcontractors who have filed lien affidavits. The subcontractor seeking a share of the statutory retainage fund must take care to file his lien affidavit before the thirty days have expired. Sole reliance on the ninety-day period given by article 5453 for perfecting the lien may prove to be fatal to the claim.

If the owner withholds the statutory retainage fund, all unpaid claimants who send proper, timely subcontractor notices and file their lien affidavits within thirty days after completion of their work, have a ratable lien on the fund, artisans and mechanics having a preference lien over other claimants. If the owner fails to withhold the fund, all claimants who perfect liens in the manner prescribed by article 5453 share ratably (with a preference ratably among artisans and mechanics) in a lien on the owner's property, "at least to the extent of the . . . fund of ten per cent (10%) which should have been retained." Thus, if the owner defaults in his responsibilities, the subcontractor's failure to file his lien affidavit within thirty days of completion will not prejudice his claim.

Article 5469 does not by its terms impose personal liability on the owner independent of a lien for failure to abide by its provisions. But in W & W Floor Covering Co. v. Project Acceptance Co. the Austin Court of Civil Appeals found such personal liability implicit in the statutory admonition that, after judgment on a subcontractor claim, "the owner shall be required to pay . . . any money he is required to retain by the provisions of Article 5469 . . ."

In W & W Floor Covering the owner entered into a mechanic's lien contract with a contractor for construction of a homestead residence. Proper formalities were undertaken for establishing a lien on homestead property, but prior to the performance of any work the owner gave a negotiable note for the full contract price secured by the contract, and the contractor assigned his note and lien to Project Acceptance Co., a holder in due course, as security for his construction loan. The statutory retainage statute does not specify the length of time during which the owner is required to retain the funds if an affidavit has been filed. The procedures for paying on demand pursuant to TEX. REV. CIV. STAT. ANN. art. 5454 (Supp. 1972) do not apply to statutory retainage. It would appear that he should retain the funds until the claim is settled or until the lien claim has been satisfied and released. See id. art. 5463, § 1c.

The financing device used in this case is extremely common. It is the rule, rather than the exception, in financing residential dwellings.
contractor during the progress of the work to install carpet and lay tile, but after performance by W & W the contractor abandoned the work, leaving W & W unpaid for its labor and materials. W & W sent the required notices and filed its lien affidavit in compliance with statutory requirements and sued to foreclose its lien.

Payment in full by a negotiable note which is assigned to a holder in due course constitutes full payment to a contractor and thus extinguishes his lien rights. Payment in full also forecloses the rights of subcontractors under the fund-trapping statute, since every notice will be too late to require withholding. Moreover, the derivative claimant can have no first lien rights under article 5469, because the lien rights of the holder in due course are for the full payment price and are paramount, and a subcontractor can have no lien on homestead property derived from the contractor's compliance with homestead formalities if the contractor's lien is extinguished.

Relying primarily on the language of article 5463 the court held that, although no lien rights could be obtained by the subcontractor, the owner was personally liable to him to the extent of the ten percent fund which should have been retained. The case elects perhaps the more equitable escape from the dilemma created by our statutory scheme, but it marks the demise of a long tradition that an owner should have no personal liability for non-compliance with the statutes independent of a lien.

Another traditional concept was cast in doubt by Lennox Industries, Inc. v. Phi Kappa Sigma Educational & Building Ass'n. In that case the contractor abandoned the project prior to completion, and the owner was forced to complete the project at his own expense. His costs, plus sums already paid the original contractor, exceeded the original contract price, and his contract provided that in such event he was not required to pay further sums to the contractor. In defending against claims by subcontractors who sent proper notices and filed timely lien affidavits after the contractor's abandonment, the owner invoked a rule traditionally applied under the fund-trapping statute: that where his contract so provides, the owner is entitled to use funds in his hands to complete the project after abandonment, and that, since he expended more than the original contract price, his liability and that of his property to derivative claimants is extinguished. But the court read article 5469 to require the ten percent withholding even though it results in the owner being liable for a sum greater than the original contract price and

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165 The assignee of the note who qualifies as a holder in due course is also a holder in due course of the lien because the attributes of negotiability in the note are imparted to the lien. Continental Nat'l Bank v. Conner, 147 Tex. 218, 214 S.W.2d 928 (1948). See Note, Mechanics' Liens: Statutory Retainage Versus Holder in Due Course, 22 Sw. L.J. 500 (1968).


167 See note 31, supra, and accompanying text. For an elaborate discussion of W & W Floor Covering and the issues it raises, see Note, supra note 165.


169 Lonergan v. San Antonio Loan & Trust Co., 101 Tex. 63, 104 S.W. 1061 (1907); Dudley v. Jones, 77 Tex. 69, 14 S.W. 335 (1890); Fullenwider v. Longmoor, 73 Tex. 480, 11 S.W. 500 (1889).
The balancing of interests required to arrive at a just result in the factual contest of the *Lennox* case is a delicate one. Should the subcontractor or the owner bear the loss resulting from the contractor's default? If the owner cannot utilize funds withheld, he may not be able to continue the project. On the other hand, if the owner had withheld ten percent at all times during the progress of the work, he theoretically should be holding ten percent of the monies actually earned by the contractor at the time of abandonment and his loss should, therefore, be limited to the expenses resulting from a substitution of personnel. Furthermore, the owner chose to deal with the contractor in a complex, intimate contractual relationship and perhaps should be held to a higher duty of care than the subcontractor, who is often a mere vendor of merchandise. Finally, an owner could protect himself entirely by requiring a payment bond of his contractor pursuant to article 5472d. While doing some violence to a traditional principle, the *Lennox* court seems to have reached an equitable result in construing article 5469.

As previously mentioned, article 5469 requires the owner to withhold "ten per cent (10%) of the contract price to the owner... or ten per cent (10%) of the value of same" until thirty days "after the work is completed." Where an owner enters into a single, turnkey contract for the erection of a building with one original contractor, the statute is not difficult to interpret. If the price of the building is $100,000, he is bound to retain a total of $10,000 for the benefit of subcontractors for at least thirty days after all work is completed on the building. But suppose the owner acts as his own general contractor and makes three separate original contracts—with a foundation contractor for $25,000, a shell home builder for $60,000, and a roofer for $15,000. Assume further that the foundation contractor defaults in his obligations to his subcontractors, whereas the other two original contractors pay their bills in full. How much should the owner retain and for how long? Do the terms "contract price to the owner" and "work" refer separately to each original contract, so that subcontractors of the foundation contractor have a claim for only $2,500 (10% x $25,000) which the owner need retain no longer than thirty days after completion of the foundation work? Or, do such terms refer to the aggregate of all three original contracts, so that $10,000 (10% x $100,000) must be retained for thirty days after completion of the entire building? Two courts of civil appeals split on this issue, but a five-to-four majority of the supreme court in *Hayek v. Western Steel Co.* interpreted the statute to require the owner to retain ten percent of the price of all original contracts or

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170 The court held that the authorities cited in note 169 *supra* were irrelevant since they were decided prior to the Hardeman Act change. TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1972). The *Lennox Industries* case was overruled sub silentio on other grounds in *Hayek v. Western Steel Co.*, 478 S.W.2d 786 (Tex. 1972). See text accompanying notes 172, 173 *infra*.

171 See part IV *infra*.


173 478 S.W.2d 786 (Tex. 1972).
of the value of the building for thirty days after completion of the structure.

The majority's rationale in Hayek was relatively straightforward. The court noted that prior to the 1961 amendments, article 5469 set forth the required amount of statutory retainage to be "ten per cent of the contract price of such building, fixture or improvement, or the repair thereof, or ten per cent of the value of such building, fixture or improvement, or the repair thereof..." It observed that although the Hardeman Act changed the wording to "ten per cent (10%) of the contract price to the owner... of such work, or ten per cent (10%) of the value of same," the term "work" is further defined by article 5452, as amended by the Hardeman Act, as "any construction or repair referred to in paragraph 1" thereof, namely, of a "building, house, or improvement." Reading these statutes together, the court refused to infer a legislative intent to change the impact of the earlier provision. To hold otherwise, argued the majority, would produce a discriminatory fragmentation of the retainage fund.

The dissent lined up with the view of the Austin Court of Civil Appeals that by referring to "contract price to the owner," the legislature intended that each original contract should control its own retainage fund, and that the term "work" as defined in article 5452 merely referred to construction or repair of the improvement contemplated by a single original contract. Irrespective of the merits of its view of the legislative intent, the dissent clearly pointed out a yet unsolved dilemma raised by the majority's opinion:

[Either (1) the owner will be required to pay more than the total of the contractual obligations incurred by him for the construction of the improvement, or (2) original contractors who fully perform and pay their bills will ultimately receive less than the amounts stipulated in their contracts with the owner.]

In the hypothetical situation, the owner would be required to retain ten percent of each of the three contracts (a total of $10,000.00), and the subcontractors of the defaulting foundation contractor would be entitled to have their claims paid from that fund. If their claims should exceed the foundation contractor's share of the retainage ($2,500.00), who should bear the resulting loss? If the owner is obligated to return the retainage allocable to the other contracts, is not that a violation of the principle that the owner who complies with his statutory duties cannot be required to pay more than the contract price? On the other hand, must the two innocent contractors suffer a loss of their earnings, perhaps their entire profit margin, because of the default of a contractor with whom the owner freely chose to deal, but with whom they have no privity of contract? On purely equitable grounds, it would seem to be the owner who should bear the risk. He is in the best position to minimize the loss by using a turnkey contractor, by requiring periodic proofs of payment to...

\[174\] Ch. 103, §§ 1-4, (1909) Tex. Laws 184.
\[175\] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1972).
\[177\] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1972).
\[178\] Hayek v. Western Steel Co., 478 S.W.2d 786, 796 (Tex. 1972).
\[179\] See note 31 supra, and accompanying text.
subcontractors, or by exacting a payment bond from the original contractors as authorized by article 5472d.

There is some confusion as to the requisite form of subcontractor notices capable of perfecting an article 5469 claim. That statute requires that in order to qualify for statutory retaiination a claimant must, in addition to filing a timely affidavitt, "send notices in the time and manner required by this Act." It is not clear whether the warning required by article 5453 is necessary to perfect a statutory lien. Until this conflict is resolved, every subcontractor notice for labor performed or materials actually delivered should contain the warning.

The Trust Fund Statute. The unpaid subcontractor is often in a rather precarious position, waiting for money to trickle down to him from the owner or from the original contractor, but in 1967 the legislature gave him a little more muscle. Article 5472e, enacted that year, provides that all monies or funds paid to a contractor or subcontractor under a construction contract and all construction funds borrowed by the contractor, subcontractor, or owner constitute trust funds for the benefit of contractors and subcontractors. The statute makes a misapplication of these trust funds "with intent to defraud," punishable by fine or imprisonment. The act does not apply to any lender, title company, or closing agent, and the Texas Trust Act is made inapplicable. So far there has been only one reported case construing this statute. In Owens v. Drywall & Acoustical Supply Corp. funds unpaid but due to a contractor from an owner were held not subject to a levy of a lien for federal taxes due the contractor, since they were trust funds held by the owner for the benefit of employee-laborers of the contractor. It remains to be seen whether this provision will measurably improve the mechanic's lien claimant's chances of collecting his receivables. Conceivably, it can be interpreted to impose personal liability on original contractors and owners for debts to contractors and subcontractors, to the extent of misapplied funds, even though the claimant may have failed to perfect his statutory lien.

II. THE CONSTITUTIONAL LIEN

Article XVI, section 37 of the Texas Constitution created a mechanic's lien which exists and is enforceable independently of the statutory provisions. It is not clear whether the warning required by article 5453 is necessary to perfect a statutory lien. Until this conflict is resolved, every subcontractor notice for labor performed or materials actually delivered should contain the warning.

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has long been held that, as between the owner and the contractor, the constitutional lien is “self-executing.” Accordingly, unlike the statutory lien, it is not conditioned on compliance with the requirement that a lien affidavit be filed with the county clerk and sent to the owner; it exists by operation of law.

But not every claimant is entitled to the constitutional lien. He must be in direct contractual privity with the owner of the realty or his agent, i.e., an original contractor; subcontractors do not qualify. However, it would seem that if the apparent original contractor is deemed to be a “sham contractor” pursuant to article 5451-1, the technical subcontractor will be entitled to the constitutional lien.

The great Achilles’ heel of the constitutional lien is that it cannot be enforced against a bona fide purchaser for value without notice. Accordingly, if a claimant does not file the statutory lien affidavit, he may easily come out last in a contest for lien priority. But if there are no intervening purchasers or encumbrancers without notice, the contractor is free to enforce his constitutional lien in the same manner as a statutory lien. There is authority that actual notice or knowledge of the presence of materials or construction at the job site is sufficient to put third parties on inquiry and, thus, is the equivalent of notice.

As is the case with the statutory lien, marital homestead property cannot be subjected to forced sale unless the work and materials have been contracted for in a writing signed by the husband and wife and recorded with the county clerk, and the constitutional lien will not attach to public buildings or structures erected on public ground.

The constitutional lien is given only for work on an “article” or “building,” and its application is thus more limited than the statutory lien. When the

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188 Horan v. Frank, 51 Tex. 401 (1879); First Nat’l Bank v. Lyon-Gray Lumber Co., 194 S.W. 1146 (Tex. Civ. App.—Texarkana 1917), aff’d, 110 Tex. 162, 217 S.W. 133 (1919); cf. Berry v. McAdams, 93 Tex. 431, 55 S.W. 1112 (1900). To qualify for the constitutional lien the original contractor must be a mechanic, artisan, or materialman. The terms “mechanic” and “artisan” are defined in Warner Memorial Univ. v. Ritenour, 56 S.W.2d 236 (Tex. Civ. App.—Eastland 1933), error ref. “Materialman” is defined in Huddleston v. Nislar, 72 S.W.2d 959 (Tex. Civ. App.—Amarillo 1934), error ref. A laborer for a daily wage was held not to qualify for a constitutional lien for current wages in McQuerry v. Glenn, 1 S.W.2d 339 (Tex. Civ. App.—Fort Worth 1927), error dismissed. A subcontractor who did no more than supervise other laborers was held not to be a mechanic or artisan in Mood v. Methodist Episcopal Church, 300 S.W. 30 (Tex. Comm’n App. 1927), holding approved.
189 See note 54 supra. Article 5452-1 should be applicable to the constitutional lien as well as the statutory lien, pursuant to the delegation of authority contained in the constitutional provision. See note 20 supra.
194 Activities which have been held not to constitute construction or repair of a “building” or “article” include: setting an oil well casing in place (Oil Field Salvage Co. v. Simon, 140 Tex. 456, 168 S.W.2d 848 (1943); Ball v. Davis, 118 Tex. 534, 18 S.W.2d 1063
 lien attaches to a "building" or other fixture, it includes so much of the land on which it is situated as may be necessary for its enjoyment.5

Primarily, the constitutional lien is useful as a "back-up system" in the event the original contractor fails to comply with the technicalities of the Hardeman Act. Obviously, anyone entitled to the constitutional lien is also entitled to perfect a statutory lien. The careful practitioner will attempt to perfect a statutory lien whenever possible.

III. PRIORITIES

A. The General Rule

The general rule of lien priorities is embodied in the maxim "first in time, first in right." Where no special statutory preference is applicable, mechanics' liens are accorded priority in accordance with the chronological order of their attachment to the realty relative to other encumbrances.7

Article 5459, section 117 is the starting point for any discussion of mechanic's lien priorities. Enacted in its present form in 1889,8 this statute accords a preference lien to mechanics' liens on severable improvements over prior encumbrances on the land or such improvements.9 In addition, it has provided the impetus for the rule that, for purposes of determining its chronological ranking with other liens, a perfected mechanic's lien "relates back" to an earlier date, namely "the inception of the lien."10

(1929); repairing a grave washed away by a flood (Black, Sivalls & Bryson, Inc. v. Operators Oil & Gas Co., 37 S.W.2d 313 (Tex. Civ. App.—Eastland 1931), error dismissed); erecting a fence (In re Wigzell, 7 F. Supp. 465 (W.D. Tex. 1933). However, if the fence is appurtenant to a house built under the same contract, the lien may attach. See Strang v. Pray, 89 Tex. 525, 35 S.W. 1054 (1896)); installing sewer lines and water mains (Campbell v. City of Dallas, 120 S.W.2d 1095 (Tex. Civ. App.—Waco 1938), error ref.); building a road (National W. Life Ins. Co. v. Acreman, 415 S.W.2d 265 (Tex. Civ. App.—Beaumont 1967), aff'd in part, modified in part, 425 S.W.2d 815 (Tex. 1968)); and slotting a water well casing (Eoff v. Skinner, 244 S.W.2d 991 (Tex. Civ. App.—San Antonio 1952)). Activities which qualify as construction or repair of a "building" or "article" include: the construction of a pier anchored on dry land and permanently affixed over water by means of steel pipes (Ambrose & Co. v. Hutchinson, 356 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1962)); constructing a sidewalk in front of a building (Waples-Platter Co. v. Ross, 141 S.W. 1027 (Tex. Civ. App.—Fort Worth 1911), rev'd on other grounds, 107 Tex. 215, 176 S.W. 47 (1915)); furnishing ice and refrigeration machinery which is bolted to a building (Reeves v. New York Eng. & Supply Co., 249 F. 513 (5th Cir. 1918)); and installing vinyl tile firmly glued to a house (Enlow v. Brown, 357 S.W.2d 608 (Tex. Civ. App.—Dallas 1962)).


21) A general discussion of the degree of severability which gives rise to the preference lien on improvements is undertaken in notes 237-51 infra, and accompanying text.

22) The relation-back rule had its origin in the case of Trammell v. Mount, 68 Tex. 210, 4 S.W. 377 (1887), which was decided at a time when the priority statute contained the words "accrual of the lien" in place of the phrase "inception of the lien." In that case the supreme court held that although the mechanic's lien is not perfected until a proper filing is accomplished, when perfected the lien relates back to the time when the materials were furnished or labor performed. As discussed in text accompanying notes 201-05 infra, the seemingly innocuous one-word amendment of 1889 led the court in Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 35 S.W. 552 (1896), to impute a legislative intent to change the result of Trammell and hold that the lien related back to the time of the making of the contract. During the period between inception and perfection of the lien, every person dealing with the property is charged with notice of the existence of the lien, irrespective of
In the landmark case of Oriental Hotel Co. v. Griffiths, the supreme court considered for the first time what is meant by the statutory phrase "the inception of the lien." In that case, the Oriental Hotel Company, owner of a city block in Dallas, having had the excavation work done and the foundation for a hotel building laid, entered into a contract with Griffiths on February 24, 1890, to complete a hotel building on the property. On May 1, 1890, the hotel company executed a deed of trust to the hotel property for its mortgagee, St. Louis Trust Company, which was duly recorded. After the hotel was completed, Griffiths and certain contractors who had made and performed contracts with the owner after recordation of the deed of trust, sought to foreclose their liens. The mortgagee opposed the claims of priority urged by the contractors, other than Griffiths, on the ground that their liens attached on the dates of their performance and thus after the recordation of its deed of trust. But the supreme court held that the two contractors' liens related back to the date of Griffiths' contract, and thus had priority over the deed of trust lien, primarily because of its interpretation of the word "inception":

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'.

Subsequent cases reasserted the holding of Oriental Hotel that a materialman's lien has its inception in the contract for the erection of the improvement.

For seventy-five years there was widespread confusion as to the essential nature of the contract required by Oriental Hotel for the operation of its relation-back rule: (1) whether the rule applied only where there was a general turnkey contract, or if it also applied where the contract was for only a part of the work; (2) whether the rule required a contract for construction, as opposed to a mere supply contract; (3) whether the contract could be actual notice. Keating Implement & Mach. Co. v. Marshall Elec. Light & Power Co., 74 Tex. 605, 12 S.W. 489 (1889).

2018 Tex. 574, 33 S.W. 652 (1896).


203 Of course, the mortgagee relied principally on Trammell v. Mount, 68 Tex. 210, 4 S.W. 377 (1887), discussed in note 200 supra.

204 Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 652, 33 S.W. 652, 662 (1896).


oral as well as written; whether it was required that the contract be with the holder of legal title to the real estate, as opposed to a contract with a mere prospective purchaser who later obtained title; and (5) whether a claimant may relate his lien back to an original contract other than that under which his work was performed.

These questions arose again and again, especially in the typical priority contest between a materialman and a lender-mortgagee claiming under a deed of trust. Assume, for example, the following fact situation: (1) The developer, intending to erect a dwelling, executes a contract for the purchase of Blackacre with the seller on June 1. (2) Prior to the closing, the developer makes an oral contract with X contractor for the construction of a dwelling foundation on Blackacre; he then contracts with Y contractor for the house framing; and, thereafter, he contracts with Z contractor for the roofing. (3) The developer arranges a loan from the mortgagee to finance both the cost of the land ($10,000) and the cost of construction of the dwelling ($25,000). (4) On July 1, at a closing, the developer takes a deed to Blackacre from the seller, and the mortgagee loans $35,000 to the developer ($10,000 of which goes to the seller and $25,000 of which goes to the developer for construction costs), the loan being evidenced by a note secured by subrogation to the seller's vendor's lien and a lien created by a deed of trust with a power of sale which was that day recorded. (5) On July 15, Y contractor begins the construction of the house framing on Blackacre, furnishing labor and materials throughout the months of July and August pursuant to his contract. (6) On October 1, Y contractor, having received no payment for his work, files his statutory lien affidavit to perfect his mechanic's lien. (7) The developer becomes insolvent and defaults on his contract with Y contractor and on his note and deed of trust with the mortgagee. (8) On November 1, the mortgagee forecloses its deed of trust by exercising its power of sale, and subsequently Y contractor brings suit to enforce its mechanic's lien. The resolution of the ensuing priority contest rests on a determination of the issue: When did the lien of Y contractor have its "inception"?

This fact situation is essentially that of Irving Lumber Co. v. Alltex Mortgage Co., decided by the supreme court on May 12, 1971. This landmark decision and the legislation it engendered put to rest most of the questions left in doubt following Oriental Hotel.

Irving Lumber Company (Y contractor) argued that its lien had its inception on the date of its contract with the developer and that its lien was therefore superior to the lien thereafter created by Alltex's (the mortgagee's) deed of trust. While the lumber company conceded that the $10,000 vendor's

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211 468 S.W.2d 341 (Tex. 1971).
lien to which Alltex was subrogated was superior to its lien, it contended that the lien created by the deed of trust, not the vendor's lien, was foreclosed by the power of sale given by the deed of trust. Alltex urged that the lumber company's lien had its inception only when construction was undertaken subsequent to the recording of the deed of trust. It further contended that the sale under the deed of trust foreclosed its vendor's lien as well as its deed of trust lien, and being superior, thus extinguished the "junior" lien of the lumber company.

The Dallas Court of Civil Appeals affirmed the trial court's judgment for the mortgagee, holding that Irving Lumber Company could not relate its lien back to the date of its contract with the developer because (1) the contract was not a "general" contract, (2) construction had not commenced at the job site, and (3) the developer was not the holder of legal title to the property at the time the contract was made. The date of the "inception" of its mechanic's lien was held to be the date Irving Lumber Company undertook construction, and, thus, after the recordation of the deed of trust. The court further held that the sale under the power created by the deed of trust foreclosed the prior vendor's lien to which Alltex was subrogated and, therefore, extinguished the "junior" lien of Irving Lumber Company.

The supreme court, in an opinion dated February 2, 1971, unanimously reversed the court of civil appeals on all grounds, holding that the inception of the lumber company's lien occurred on the date of its contract and, thus, prior to the liens created by the deed of trust, and that the foreclosure under the power of sale did not extinguish the lumber company's liens. However, on motion for rehearing, the court withdrew that decision and issued a new opinion affirming the court of civil appeals. The opinion on rehearing was based on the rationale that Alltex held a superior title to the extent of the purchase money it lent; the superior title was secured by the deed of trust; and foreclosure of the superior title by the sale under the deed of trust cut off the lumber company's lien. The court further concluded that "the priority of a security interest is not determined on the date of the 'inception' of an

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216 Since it rejected the contract as the "inception," the court was relegated to the rule of Trammell v. Mount, 68 Tex. 210, 4 S.W. 377 (1887). See note 200 supra.
217 The court never addressed itself to the question whether the sale under the deed of trust actually foreclosed the prior vendor's lien or whether it foreclosed a separate contract lien, given in part for purchase money, which was created by the deed of trust. See notes 257, 258 infra, and accompanying text.
219 The title of these lots passed to [the developer] burdened by the deed of trust and security interest of Alltex in the same manner as if the prior owner had conveyed a partial interest before [developer] acquired its ownership in the lots. At least to the extent of the purchase money advanced, a superior title was held by Alltex. That superior title was secured by the deed of trust, and foreclosure and sale thereunder was effective to cut off any inferior lien on the land.

Id. at 343-44.
agreement between the contractor and a prospective owner." Nonetheless, the majority did not disturb its earlier conclusion that a lien may relate back to a contract which is oral and for construction of only a part of a building, and thus not "general."

Following the first opinion, there was widespread unrest among mortgage lenders and title companies in Texas. Although it had been well established since Oriental Hotel that a written, general contract with an owner would provide the inception of a mechanic's lien, the prospect of having piecemeal, oral, executory contracts give rise to secret, inchoate liens prior to the beginning of any construction on the real estate was deemed a commercially unacceptable risk. The task of the lender seeking to assure itself of a first lien position prior to advancing funds seemed impossible.

Accordingly, a bill was introduced in the Texas Senate which was destined to settle seventy-five years of ambiguity as to the meaning of the term "inception of the lien." The emergency clause of the bill referred to the "problems and confusion created by the Texas Supreme Court's recent decision in the case of Irving Lumber Company v. Alltex Mortgage Company." Ultimately, it became section 2 of article 5459, executed into law by the Governor on May 17, 1971, and effective from the date of its passage.

The new amendment provides that the "inception" of a mechanic's lien shall be the earliest to occur of three events: (1) the commencement of visible construction or delivery of materials which are visible on the job site; (2) the recordation of a written agreement for the construction of improvements or any part of the improvements or a written agreement to perform labor, furnish material, or provide specially fabricated material; or (3) if there is no written contract, the recordation of an affidavit stating that the claimant has entered into an oral contract. Thus, if a claimant wishes to have the inception of his lien occur prior to the date work has begun or materials have been delivered at the job site, he must give constructive notice of his contract by filing the contract itself with the county clerk, if it is a written contract, or by filing an affidavit describing the contract, if it is merely an oral contract.

The new statute should prove a welcome addition for mortgage bankers and title insurers. For the first time in Texas it is possible to ascertain routinely, and with reasonable certainty, at any given time whether inchoate mechanics' liens exist with reference to a tract of land. Mechanic's lien claimants may take pleasure in the fact that the statute codified the favorable holdings of the ill-fated original opinion of the Supreme Court in Irving Lumber. Thus, the statute clearly sanctions relation-back to any contract, whether it is general or

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220 Id. at 343.
221 14 Tex. Sup. Ct. J. at 212.
223 Id.
225 There is always a modicum of uncertainty involved in ascertaining whether construction of improvements or delivery of materials has commenced, particularly if the improvements constitute additions to other structures. Note, however, that § 2a requires the commencement of construction or delivery of materials to be "actually visible from inspection of the land." Id. § 2a.
226 14 Tex. Sup. Ct. J. 212 (1971); see text accompanying note 221 supra.
special, whether for construction of a building or merely for the delivery of materials, and whether written or oral. But the new amendment is not without shortcomings from the claimant's point of view. For example, the requirement under section 2(b) that the written contract itself be recorded may be burdensome in the extreme, both financially and logistically; an affidavit could have served as well.\footnote{27} Furthermore, preparing an affidavit containing the information required is itself a formidable task for busy, unsophisticated contractors and subcontractors. The likely result is that only the more affluent, sophisticated contractors will routinely take advantage of the opportunity to establish an early lien. The vast majority of workmen and materialmen may effectively be divested of the legacy of Oriental Hotel.

One irregularity in part 2(c) of article 5459 clearly seems to have been unintentional, but it may create a problem. The entire section contemplates that a mere supply contract has the same force as a contract for construction of improvements insofar as providing the inception of the mechanic's lien. Yet, the affidavit is required to state that the oral contract is "for construction of improvements."\footnote{28} This ambiguity undoubtedly crept into the statute when the proposed bill was redrafted. When first introduced and sent to the judiciary committee, it permitted only a contract for, or the beginning of, construction to provide the inception of the lien.\footnote{29} However, in response to suggestions from materialman groups, the statute was changed to provide that the lien should also have its inception when materials had been delivered and, on proper recordation, when there was an agreement to perform any part of the construction, to perform labor, to furnish materials, or to specially fabricate material. Appropriate language was inserted in sections 2(b) and 2(c) to include these additions to the list of agreements which qualified, but the drafters of the bill failed to insert the additions in the description of the form of affidavit required in section 2(c). Surely this was an inadvertent error, and not intended to imply that relation back to an oral contract is permitted only where the contract is for construction of improvements.

The amendment may also be criticized for certain unfortunate omissions. First, the statute fails to clear up an age-old ambiguity and declare whether each contractor's lien relates back to the date of his own contract or the date of the first contract for construction applicable to the building. It is not clear whether a subcontractor's lien relates back to the date of his own contract, the original contract from which his lien is derived, or the first contract applicable to the building.\footnote{30} Oriental Hotel would seem to indicate that all original contractors and all subcontractors on a project may relate their liens back to the date of the first contract which contemplates the construction of the building.\footnote{31} Recently, one court of civil appeals, in its initial opinion on facts analogous to those of Oriental Hotel, after thoroughly examining later authorities pro and

\footnote{27} It is conceivable that the present statute will permit an affidavit to suffice even in cases where a written contract exists, if the contract has been lost. Cf. Blakeney v. Nalle & Co., 101 S.W. 875 (Tex. Civ. App. 1907), error ref.
\footnote{28} Tex. REv. Civ. STAT. ANN. art. 5459, § 2c (Supp. 1972).
\footnote{29} Id. § 2.
\footnote{30} For an extensive discussion of this problem see Comment, supra note 210.
\footnote{31} See text accompanying note 204 supra.
con, determined that the lien of an original contractor had its inception in, and related back to, the date of a general contract between the owner and a prior contractor, noting that the general contract contemplated the work performed by such original contractor. On rehearing, the court omitted its reference to this issue.238

This result is more in keeping with the policy that lien claimants share ratably on the same improvement.239 For example, in the context of the fact situation of Irving Lumber, it would be contrary to that policy for Z contractor (the roofer) to be subordinated to the mortgagee, while X contractor (the foundation man) enjoys a superior lien relative to the intervening mortgage. It seems unfair to discriminate against lien claimants who, because of the nature of their work, customarily make contracts during the later stages of the project. Moreover, the result of Oriental Hotel is not unfair to mortgage lenders or purchasers, because the recordation of the contract puts the world on notice of inchoate mechanic’s lien claims which reasonably may be expected to arise later in connection with the construction contemplated by the contract.

The second omission of the statute is its failure to make clear whether recordation of a contract with a mere prospective owner provides the inception of the lien. Did the amendment codify the holding of the first Irving Lumber opinion in this respect, or the holding of the second opinion? A line of cases234 permitting a contract with a prospective owner to provide the inception of the lien was approved by the supreme court in the first opinion, and the amendment was drafted in final form prior to its withdrawal.235 Since the amendment does not by its terms require a contract with the “owner,” it seems logical to conclude that the legislative intent was contrary to the holding of the court’s second opinion. The opposite conclusion would require a contractor to make a title search before contracting with a developer, since it is common practice in the industry for developers to finalize contracts with their builders before closing a purchase of the site. On the other hand, it may be inequitable to the mortgage lender and his title insuror to require a period of search extending prior to the time title is acquired by the person contracting for improvements.236

B. The Statutory Preference

Thus far, this discussion has encompassed priorities on land and improvements established under the general rule, irrespective of the severability of the improvement from the land. But section 1 of article 5459 gives to mechanic’s lien claimants a preference lien on improvements over all prior liens on the land, provided that such prior liens “shall not be affected thereby.”237

239 See Comment, supra note 210.
234 See note 98 supra, and accompanying text.
235 The first opinion was withdrawn and the second opinion issued on May 12, 1971, 14 Tex. Sup. Ct. J. 350 (1971). S.B. 733 was executed by the Governor on May 17, 1971; the dissenting opinion was filed May 19, 1971, 14 Tex. Sup. Ct. J. 366 (1971), and rehearing was denied on June 9, 1971, 14 Tex. Sup. Ct. J. 388 (1971).
The proviso has been interpreted to mean that a claimant is not entitled to a preference lien on an improvement which is so affixed to the building or land that its severance will result in serious injury to the realty. When an improvement can be removed without harming the remaining land or fixtures, it is treated as if it had never become a part of the real estate and may be sold separately. The priority statute thus gives the claimant some relief in cases where the general rule does not give him a first lien. The policy of the statute is sound; it prevents a windfall accretion to the value of a prior mortgage lien holder’s security at the expense of the mechanic’s lien claimant, but it protects the mortgagee from a decrease in the value of the land and improvements as they existed when he made the commitment to lend.

It has been held that the preference extends to all severable improvements, including improvements which the claimant never worked on or furnished. However, some cases have stated the applicable rule as if the priority extended only to improvements referable to the claimant’s contract. The language of the statute hardly suggests such a limitation, but the policy of the statute is thwarted somewhat if a mortgagee may be divested of improvements to the real estate made at the expense of materialmen other than the lien claimant.

Whether the removal and sale of a specific improvement will seriously injure the realty is generally a question for the trier of fact. The various criteria submitted to the jury or used by the court include whether removal will (1) cause material damage, (2) cause a destruction of value of all improvements, (3) injure the land, (4) cause material detriment or material injury, or (5) cause serious injury and damage to the building and lot.

Some courts have indicated that improvements which are severable never become a part of the realty. It perhaps aids understanding to treat severable improvements as if they remained personalty, but to deem them personalty...
renders such improvements incapable of being subjected to a mechanic's lien. The logical result of this analysis is that a claimant who establishes facts which give his lien a preference has ipso facto established that he is entitled to no lien at all.\textsuperscript{351}

C. Special Relationships

Priorities Against Lender-Mortgagees. The typical priority confrontation is between a mechanic's lien claimant and a lender claiming under a deed of trust or a subrogated vendor's lien.\textsuperscript{352} Some general observations as to the ground rules operative in these confrontations may be helpful.

A vendor's lien, whether acquired by reservation or subrogation, is generally superior to a mechanic's lien. A mechanic or materialman is charged with notice of any vendor's lien even if the deed retaining the vendor's lien was not recorded at the time of the "inception" of the mechanic's lien.\textsuperscript{353} Moreover, a claimant who contracts with a mere prospective purchaser cannot obtain priority over a vendor's lien which encumbers the property when the title is transferred.\textsuperscript{354} Although the operative theory has rarely been articulated, the result is a logical one because the vendor's lien is a part of the original owner's title and, as such, was "on the land" at the time the mechanic's lien claimant made his contract. Consequently, the vendor's lien is always a prior lien on the land which is not to be affected by a subsequent mechanic's lien.\textsuperscript{355}

The majority opinion of the supreme court in Irving Lumber suggested that a lien for purchase money created by a deed of trust is to be treated as a vendor's lien for the purposes of determining priorities.\textsuperscript{356} In that case a non-judicial foreclosure of a deed-of-trust lien by exercise of the power of sale was held to cut off the rights of lienholders which were subordinate to the subrogated vendor's lien of the mortgagee, but not subordinate to the contractual liens created by the deed of trust which he also held. The court refused the contention that a lender who holds a subrogated vendor's lien and a deed of trust lien, given in part to secure the same purchase money debt, is in


\textsuperscript{352} A lender may be subrogated to the lien of an original vendor by virtue of an express assignment of the vendor's lien or by operation of law upon his furnishing purchase money. Harveson v. Youngblood, 38 S.W.2d 781 (Tex. Comm'n App. 1931), holding approved.

\textsuperscript{353} C.D. Schamberger Lumber Co. v. Holbert, 34 S.W.2d 614 (Tex. Civ. App.—Amarillo 1931).

\textsuperscript{354} Harveson v. Youngblood, 38 S.W.2d 781 (Tex. Comm'n App. 1931), holding approved.


\textsuperscript{356} 468 S.W.2d at 343.
possession of two liens, apparently concluding that the vendor's lien is merged into the lien created by the deed of trust and is, thus, capable of being foreclosed by exercise of the power of non-judicial sale therein contained. Accordingly, a lender who loans a sum of money for land acquisition and construction expenses and takes a single deed of trust to secure the aggregate debt may achieve vendor's lien status for his entire debt and thus cut off mechanics' liens which have their inception prior to the recordation of the deed of trust.

Relative Priorities Between Mechanic's Lien Claimants. Article 5468 provides that perfected mechanics' liens are on an equal footing without reference to the date of their filing, and the proceeds at foreclosure are paid pro rata, except where the lien being foreclosed secures an obligation for statutory retainage. Article 5469 gives a preference in the statutory retainage fund to artisans and mechanics, who share pro rata. After the debts of artisans and mechanics are satisfied, the remainder of the fund is distributed pro rata among other claimants. All subcontractors, laborers, and materialmen have a preference over other creditors of the "principal contractor or builder" by virtue of article 5464.

D. Enforcement of Mechanics' Liens

A mechanic's lien can be enforced only by judicial foreclosure. If the foreclosure is on improvements and realty, proper jurisdiction is in the district court in the county in which the land is situated. However, if the foreclosure pertains solely to improvements and not to any real estate, the amount in controversy will determine the appropriate court for the foreclosure suit. Venue is proper in the county where the land is located. The foreclosure may be accomplished in a suit on the underlying debt or, afterwards, in a separate proceeding.

The applicable statute of limitation is that which is applicable to the underlying indebtedness. If the debt is evidenced by a written contract, the

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257 The majority relied primarily on the case of National Western Life Ins. Co. v. Acreman, 415 S.W.2d 265 (Tex. Civ. App.—Texarkana 1967), aff'd in part, modified in part, 425 S.W.2d 815 (Tex. 1968). That case held that a lien created by a deed of trust is impressed by the character of the indebtedness for which it is given to secure and that a lien created by a deed of trust to secure the payment of purchase money has the status of a purchase money lien as well as a deed-of-trust lien.

258 The dissenting opinion in Irving Lumber Co., 468 S.W.2d at 344, criticized this anomaly. The majority reserved the question whether the mechanic's lien claimant could pursue in the hands of the mortgagee that portion of the proceeds at the sale which is attributable to the loan of construction funds.

259 It is important to note that ratable sharing in funds withheld under the fund-trapping statute takes place only between claimants on the same plane of diligence. If an owner receives a subcontractor notice from one or more claimants and retains only enough to pay them, forwarding the rest of the funds to the original contractor, a subcontractor noticing the owner at a later date cannot share in the funds withheld. A payment by the owner of excess funds after receipt of a notice closes the class. Ronsky v. Kelsey Lumber Co., 118 Tex. 180, 228 S.W. 558 (1921).

260 Pratt v. Tudor, 14 Tex. 37 (1855).


262 McConnell v. Frost, 45 S.W.2d 777 (Tex. Civ. App.—Waco 1931), error ref.


four-year statute applies; if the claimant performed under an oral contract, the two-year statute applies.

When foreclosing a mechanic's lien, it is necessary to join every party who may have a claim against the property. No person is bound by a foreclosure decree unless he is made a party. Proper parties include the owner, the original contractor, the claimant's debtor, and all other lien claimants. The owner is considered an indispensable party.

IV. BOND CLAIMS

No treatment of the subject of mechanics' liens is complete without a discussion of the means of perfecting claims against statutory payment bonds. Even if he is conditioned to follow the complicated routine for perfecting his mechanic's lien, a claimant could find himself unsecured after furnishing labor or material for a public improvement or a bonded private project if he is unfamiliar with the requirements necessary to establish and enforce a claim against a payment bond permitted or required by Texas law.

A. Bonds on Private Improvements

Bond To Pay Liens or Claims. There are two kinds of bonds which may be filed with respect to a private improvement. The first of these is referred to as a "Bond to Pay Liens or Claims," and would normally be filed before work commences on a project. When properly filed, the bond prevents any mechanic's lien from arising which would encumber the owner's property. This type of bond is permitted, but not required, to be filed by the original contractor if (1) there is a written contract between the owner and the original contractor; (2) the bond is in a sum not less than the total of the original contract price; (3) it is written by an authorized corporate surety conditioned on prompt payment for all labor and materials plus extras not to exceed fifteen percent; (4) the approval of the owner is endorsed on the bond; and (5) the bond is filed with the county clerk together with the written contract to which it pertains.

After the bond is filed, mechanics' liens cannot be fixed against the realty or improvements, and the owner, as well as mortgagees or purchasers, may deal with the property as if there were no claims of unpaid subcontractors. Subcontractors are relegated to claims on the bond, and the owner is relieved of all obligations to retain funds or to pay undisputed claims, which would normally accrue to him under the mechanic's lien statutes; no subcontractor suits may be brought against him.

There are two alternative procedures for perfecting a claim under a Bond to Pay Liens or Claims. First, a subcontractor may simply follow the requirements for perfecting his statutory lien. Thus, whether or not he knows that a

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271 Id. art. 5526.
272 Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 33 S.W. 652 (1895).
275 Id.
bond exists, his rights are secured by simply following the normal, familiar procedure for perfecting a mechanic's lien. In the alternative, his bond claim can be perfected by following the appropriate notice requirements applicable to perfecting a statutory mechanic's lien, with the exceptions that the owner's notices must be sent to the surety and he does not have to give notice for specially fabricated materials. Following the latter method relieves the subcontractor of the burden of filing the lien affidavit.  

The matter of enforcing a claim against a payment bond is different in some important respects from enforcing a mechanic's lien. Suit on the Bond to Pay Liens or Claims cannot be brought until sixty days have elapsed after the claim has been perfected. Moreover, the statutes of limitations applicable to contracts are not controlling. The claimant must file a suit on a Bond to Pay Liens or Claims within fourteen months after his claim is perfected. An important advantage from the subcontractor's point of view is that court costs and attorney's fees may be recovered against the bond. A mechanic's lien cannot be asserted as security for the payment of attorney's fees.

Bond To Indemnify Against Liens. Existing lien claims may be disposed of by a "Bond to Indemnify Against Liens" authorized by article 5472c. It is permitted, but not required, to be filed by an owner, an original contractor, or a subcontractor for the purpose of releasing perfected mechanic's lien claims. The bond must be made in a sum double the amount of the claim and must refer to the specific claims involved. It must be written by an authorized corporate surety and made payable to the specified lien claimants, conditioned on their lien claims being adjudicated.

When this type of bond is filed with the county clerk, he is required to serve notice on each of the claimants named in the bond. Those persons receiving notice have thirty days in which to file suit to judicially foreclose their mechanics' liens; if they fail to do so, they are relegated to an action on the bond. Suit on the bond may be brought not less than thirty days nor more than one year after service of the notice is received.

B. Bonds and Liens with Respect to Public Improvements

It has long been held that a mechanic's lien cannot be established on any

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272 Id. § 4.
273 § 4.
274 Pursuant to the statute, proper venue lies in the county where the bond was recorded. The contractor must be joined in a suit against the surety except under special circumstances. See TEX. REV. CIV. STAT. ANN. art. 1987 (1964). Jurisdiction depends on the amount in controversy. Cf. The Morris Plan Life Ins. Co. v. Wells, 387 S.W.2d 84 (Tex. Civ. App.—Fort Worth 1965).
275 TEX. REV. CIV. STAT. ANN. art. 5472d, § 6 (Supp. 1972).
276 Attorney's fees are not recoverable against the general contractor and owner in the absence of an agreement to pay such fees, but reasonable attorney's fees are recoverable against the surety bond irrespective of an agreement. University State Bank v. Gifford-Hill Concrete Corp., 431 S.W.2d 561 (Tex. Civ. App.—Fort Worth 1968), error ref. n.r.e.; see note 280 infra, and accompanying text.
278 TEX. REV. CIV. STAT. ANN. art. 5472c, § 1 (1958).
280 Reasonable attorney's fees are recoverable either in a suit upon the lien or upon the bond. TEX. REV. CIV. STAT. ANN. art. 5472c, § 4a (1958).
public building, structure, or grounds. The subcontractor's security on a public project, therefore, is limited to a statutory lien on funds payable under certain small contracts, or a claim against a mandatory payment bond on larger contracts.

Lien on Funds Due Under Contracts for $2,000 or Less. Article 5472a provides a lien for a subcontractor who furnishes labor or materials to a contractor under a prime contract with the State of Texas or a subdivision thereof where the amount of the contract is $2,000 or less. He may perfect a lien on any monies, bonds, or warrants which become due under the prime contract with the public agency.

To perfect this lien the subcontractor must send notice of his claim to the official having the duty to pay the prime contractor. The notice must be sent within thirty days after the tenth of the month next following the month of performance, by certified or registered mail, with a copy to the prime contractor. It must state (1) the amount claimed, (2) the name of the party for whom the materials were delivered or the labor performed, (3) the dates and places of delivery or performance, (4) the work done, (5) the amount due, (6) the project where the materials were delivered or the labor performed, and (7) under oath, that "the amount claimed is just and correct and that all payments, lawful offsets and credits known to the affiant have been allowed." Upon receipt of a proper notice, the public official is required to retain the funds until the subcontractor's right to a lien has been judicially established.

Article 5472b-1 provides that when such lien is perfected, the funds owing to the prime contractor may be released by his furnishing a bond for double the amount of the perfected lien claims. The lien claimant is then relegated to a suit on the bond, which must be brought within six months after the bond has been filed.

Bond on Public Improvements—The McGregor Act. The McGregor Act is a comprehensive statute governing mandatory bonding requirements for the benefit of subcontractors of a contractor having an improvement contract

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281 See notes 83-88 supra, and accompanying text.
283 Id. art. 5160 (1971).
284 There appears to be no difference in meaning between the term "prime" contract and "original" contract. See note 290 infra.
286 Id.
287 Id. art. 5472b (1958).
288 Id. art. 5472b-1.
289 Id. art. 5160 (1971) (originally enacted as ch. 93, §§ 1-5, [1959] Tex. Laws 155). This Act was a comprehensive amendment to ch. 99, [1913] Tex. Laws 185. The emergency clause of the Act stated its purpose: The fact that contractors on public works have suffered enormous losses by virtue of having made regular and timely payments to subcontractors, who in turn fail to pay their suppliers and subcontractors from funds, thus received, on running account in lieu of applying said payments to and for the account of work for which the payment bond is to be made, and the fact that the provisions of the Act are necessary to provide simple direct methods of giving notice and perfecting claims of laborers, materialmen, and subcontractors of all classes . . . .
in excess of $2,000 with any subdivision of the State of Texas or any governmental or quasi-governmental authority which is authorized by law to enter into contractual agreements for construction or repair of a public building or public work.\textsuperscript{850} The bond must be at least for the amount of the contract.\textsuperscript{851} Perfecting a McGregor Act claim requires that notices in proper form be sent by certified or registered mail to the appropriate parties within prescribed time limits.\textsuperscript{852}

Every McGregor Act claimant must, within ninety days after the tenth of the month next following the month when his labor or material is furnished, send written notice of his claim and a sworn account to the prime contractor and the surety on the bond. The sworn statement of account must state that the amount claimed is correct and that all payments and credits known to the affiant have been allowed. The statement should also state the amount of retainage, if any, not yet due. If the work was not performed on a written contract, the notice must include the name of the claimant's employer, the date of performance or delivery, a description of the labor or materials and prices therefor, an itemization of the claim, and copies of invoices or orders showing reasonable identification of the job and the destination of any materials delivered. If a written contract exists, it may be attached to the notice in lieu of reciting the pertinent data which would have been required had no contract existed. If a written unit price agreement is in existence it also may be attached, together with a list of units and prices and a statement of those units completed and those uncompleted.\textsuperscript{853}

In addition, every claimant having a contract which provides for "retainage" (i.e., an amount not required to be paid in the month next following the month of performance or delivery) must send to the prime contractor and surety, within ninety days of completion of the contract, a notice of any retainage called for by such contract. The notice must indicate the amount of contractual retainage, the amount paid, and the balance due.\textsuperscript{854}

Additional requirements are applicable only to claimants other than a wage claimant for labor performed and a claimant having a direct contractual relationship with the prime contractor. Such other claimants must send, by

\textsuperscript{850} Such contractor is referred to in the McGregor Act as a "prime contractor." The term is analogous to the term "original" contractor, as defined in TEx. REV. CIV. STAT. ANN. art. 5452, § 2e (Supp. 1972).

\textsuperscript{851} Id. art. 5160, § A(b) (1971).

\textsuperscript{852} Read literally, the statute makes ineffective a notice sent by regular mail (instead of certified or registered mail) regardless of when it was received. Unlike article 5456 of the Hardeman Act, the McGregor Act does not specify that the method of delivering notice is immaterial if it is actually received. However, the material portions of the McGregor Act have been taken from the Miller Act (40 U.S.C. §§ 270a-270e (1970)), including the requirement that notices be sent by registered mail (id. § 270b), and the Miller Act requirement has long been construed to be for the purpose of assuring receipt of the notice, and not to make registered mail a mandatory method of delivery so as to deny rights to a subcontractor who has caused the notice to be actually received during the prescribed period. Fleisher Eng'r & Constr. Co. v. United States ex rel. Hallenbeck, 311 U.S. 15 (1940). In this connection it has only recently been clearly established that notice by certified or registered mail under the McGregor Act is deemed to have been given when mailed. Johnson Serv. Co. v. Climate Control Contractors, Inc., 478 S.W.2d 643 (Tex. Civ. App.—Austin 1972).

\textsuperscript{853} TEx. REV. CIV. STAT. ANN. art. 5160, § B(a) (1971).

\textsuperscript{854} Id. § B(c).
certified or registered mail, to the prime contractor a notice of the unpaid balance due him for labor furnished or materials delivered. This notice must be sent within thirty-six days after the tenth of the month next following the month in which any labor or materials were furnished, and, as is the case under the mechanic's lien statutes, this provision may entail several periodic notices on a single job. In addition, if the claimant has a retainage agreement, notice thereof must be given to the prime contractor within thirty-six days after the tenth of the month next following the month of performance or delivery. If the claim is for undelivered specially fabricated materials, notice must be given to the prime contractor within forty-five days after receipt and acceptance of an order.293

An unpaid subcontractor may bring suit on a McGregor Act bond only after sixty days have elapsed following the date he has perfected his claim. Suit must be brought within one year and sixty days after such date.294

V. CONCLUSION

Mechanics' liens, being in derogation of the common law,295 were created in the State of Texas for the purpose of fostering growth through improvements to real estate.296 The need for capital improvements led to a public policy favoring liens for workmen and materialmen which found ample expression in the constitution, in the statutes, and in countless opinions of our appellate courts.297 The viability of this purpose, policy, and need in the modern world is rarely questioned.

It is obvious, however, that in providing liens for workmen and materialmen the legitimate interests of other groups, such as owners, lender-mortgagees, title insurers, and third-party purchasers, cannot be disregarded. Just as important, neither the rights of general contractors nor subcontractors should be exalted over the other. In order to develop the ideal mechanic's lien law, these antagonistic interests must be melded into a statutory scheme which serves the underlying purpose, policy, and need, yet keeps to an absolute minimum the resulting deprivations to all parties concerned.

Historically, because of the nature of the legislative process, our melding has produced an imperfect blend. First one group, then another, has held the balance of power necessary to effect changes in the statutes and thus shift the advantage in its favor. The result has been a long series of patchwork amendments which manifest the give and take of interest groups locked in a power struggle rather than the original purpose and policy of the law. Endless compromises have resulted in detail, detail, and more detail, the sheer complexity of which is counterproductive to both purpose and policy. These

290 Id. § G. A 1969 amendment specifically provided for recovery of reasonable attorney's fees. Ch. 422, § 1, [1969] Tex. Laws 1390. It had previously been held that such fees were not recoverable in a McGregor Act suit in the absence of an agreement with respect thereto. Graham Constr. Co. v. Walker Process Equip., Inc., 422 S.W.2d 478 (Tex. Civ. App.—Corpus Christi 1967), error ref. n.r.e.
291 See note 2 supra.
292 Cf. note 6 supra, and accompanying text.
293 See, e.g., Warren Elevator Mfg. Co. v. Maverick, 88 Tex. 489, 30 S.W. 437 (1895); William Cameron & Co. v. Trueheart, 165 S.W. 58 (Tex. Civ. App.—Austin 1914)
statutes must be simplified in order to accomplish the goals which they were originally designed to achieve.

In particular, the requirements for perfecting the subcontractor's lien are in need of revision. The demands of owners, lenders, and general contractors have made the statutory gauntlet too rigorous for the average subcontractor. It has been this writer's experience that fewer than fifty percent of unpaid subcontractor claims are secured by a properly perfected lien, usually because of a failure to send notices promptly enough or in proper form. Often such failure occurs despite strenuous attempts to understand and comply with the formalities of the Hardeman Act.

If we are truly committed to the policy and purpose which mechanics' liens were created to fulfill, we should be striving to free the lien-perfecting process from unnecessary formalities. Ideally, the lien should be given to every workman or materialman, whether an original contractor or subcontractor, by operation of law, without formalities of any kind. This could be accomplished by according the benefits of the constitutional lien to all mechanic's lien claimants and expanding its scope to include construction or repair of any improvement to real estate whatsoever. Unfortunately, a suggestion by Professor Woodward that the range of the constitutional lien be extended went unheeded by the drafters of the Hardeman Act.

Of course, some form of notice requirement is inescapable to protect those third parties who can intelligently direct their affairs only with knowledge of the workman's or materialman's claim, e.g., title insurers, bona fide purchasers, and lender-mortgagees. Presently, knowledge of the claim is imputed from the time of visible construction or delivery of materials on the premises, but the lien affidavit is required to be filed within prescribed time periods in order to afford reasonable constructive notice of particularities to all third parties. The affidavit requirement is reasonable and should be retained as a requirement for asserting the lien against third parties without actual notice, but it can be improved.

The Hardeman Act did a good job of simplifying the form of affidavit required, but it perpetuated some old problems. First, it continued the requirement that subcontractors file their affidavits a month earlier than original contractors, relative to the date the indebtedness accrues. Moreover, it doubled the task of ascertaining the filing period by vastly complicating the criteria for determining when indebtedness accrues.

Standardizing the time periods for filing the affidavit would be a substantial improvement. Both original contractors and subcontractors alike could be required to file the affidavit within ninety days of debt accrual. An even better formula would be to require the affidavit to be filed on the tenth of the month next following the expiration of ninety days after the date indebtedness accrues. In this manner, workmen and materialmen will be conditioned regularly to perfect unpaid claims prior to the tenth of every month. Under the present

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Woodward, supra note 6.


See text preceding note 113.
system, the time period begins on the tenth but the last day for filing may fall on the eighth, ninth, or eleventh of the month, depending on which month is involved. In this connection, "accrual of indebtedness" for both categories of claimant could well be simplified to mean merely the date of last performance.

One other formality of article 5453, § 1 should be modified. That statute requires two copies of the affidavit to be sent to the owner. Presumably, one copy will not do, and the copies must be sent by certified or registered mail (or received) prior to the expiration of the filing period. It would seem that the benefit to the owner does not warrant the rigidity of this requirement. It should be enough that a copy of the affidavit is forwarded promptly. This is particularly true in the case of subcontractors, because the owner has no obligation to subcontractors unless he receives a notice, and if he receives a notice, he is made aware of the identical claim which would be embodied in the affidavit. The affidavit requirement exists primarily for the benefit of third parties; its delivery to the owner should not be accorded so lofty a priority.

Finally, as between the parties to a contract, there seems to be no reason why the filing of the affidavit should be required. Furthermore, as is the case with the constitutional lien, actual knowledge in a third-party purchaser or mortgagee should be tantamount to the constructive notice afforded by filing the affidavit.

After the rights of third parties are protected, the remaining impediment to a no-formality mechanic's lien law is the necessity for limiting the liability of the owner and his property to a scope within his control. The owner can limit the amount of the original contractor's lien by regulating the amount due under the original contract. But, having no contractual privity with subcontractors, the owner has no means of controlling the amount of their aggregate claims, the total of which may far exceed the original price he contracted to pay. Texas long ago attacked the problem by absolving the owner from liability in excess of the original contract price if he pays the original contractor prior to receipt of a subcontractor notice and pays the appropriate noticing subcontractors after notice is received. This solution necessarily places the primary burden on the subcontractor to forward proper, timely notices. The Hardeman Act added a requirement of notice to the original contractor with its own contingent time parameters.

There are other ways to limit the owner's liability. For example, in Utah the burden is on the owner to post notice to workmen on his property of payments made to a contractor. Subcontractors have a lien to the full extent of the contract price less any payments of which they had notice prior to performance. No part of the contract price can be made payable or paid prior to the date set for commencement of the work. In Illinois it is the contractor's duty to supply the owner a verified statement of the names of all parties

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304 The present statute sets forth a profusion of alternatives. Id.
305 Id. art. 5453, § 1.
306 See note 187 supra, and accompanying text.
furnishing labor and materials and the amount due each. The owner is required to withhold payment until such statement is furnished him. Unless written protest is made by the owner, subcontractors so named have a lien for their entire debt.

While the procedures adopted in the states of Utah and Illinois leave much to be desired, they avoid problems created by limiting the owner’s liability to the original contract price. In many states where the owner’s liability is so limited, subcontractors’ liens are entirely avoided by payments made to the contractor prior to the receipt of notice. Texas alleviated this problem, to some extent, with the ten percent statutory retainage requirement. A very few other states, notably Florida, also employ a mandatory retainage requirement to hold a fund for unpaid subcontractors.

The concept of trapping funds with notice, coupled with a mandatory percentage retainage requirement, is as workable as any and better than most. Unfortunately, technicalities in the Texas statute have severely handicapped an otherwise sound concept.

The form of subcontractor notice was agreeably simplified by the Hardeman Act, but the confusion as to the circumstances in which a warning is required should be eliminated. The main difficulty, however, lies in the profusion of alternative kinds of notices with differing time limits. There seems to be no compelling reason for the separate notice requirements applicable to specially fabricated materials and retainage contracts. In the instances now dealt with under these statutory categories, notice given after performance should suffice. The advance notice required for specially fabricated materials serves only to guard against false claims, but proof of the falsity of such claims that special fabrication was ordered seems no more difficult than proof of the falsity of claims that materials were delivered but misdirected to another job site. Furthermore, the sparse benefits of the optional notice available for retainage contracts hardly merit the space it occupies in the statutes.

Undoubtedly, the most burdensome technicality introduced by the Hardeman Act is the requirement that subcontractors who contract with subcontractors must give notice of unpaid accounts to the original contractor within thirty-six days of the accrual of indebtedness. The time period for sending the contractor notice is so brief that a claimant may scarcely be aware of the delinquency of the account before it expires. Furthermore, the requirement places the burden entirely on the subcontractor to determine who the original contractor is, and gives him little time to do so.

The purpose of the contractor notice is to spare the original contractor from the risk of paying twice for the same materials. If he pays his subcontractor at a time when the latter has not paid his suppliers, the suppliers may nevertheless cause withholding by the owner to pay their claims; the notice is supposed to keep the contractor advised of such unpaid bills. But a notice received thirty-six days after accrual of the suppliers’ debt comes too late to permit withholding from the subcontractor whose account falls due and payable on a thirty-day basis, as is customary. Moreover, the statute does not permit

withholding by an original contractor, as it does in the case of an owner. A far better device would be a requirement that subcontractors furnish proof of payment of their suppliers before becoming entitled to payment by the contractor.

Deleting the thirty-six-day contractor notice would go a long way toward reducing the frequency of incidents in which subcontractors lose their liens through technicalities. Under the current procedure owners may defeat legitimate lien claims under the fund-trapping or statutory retainage provisions because of a subcontractor’s failure to give the contractor notice, even though owner notices were given properly and the contractor suffered no detriment from lack of such notice. Often contractors may have actual notice of the subcontractor’s claim, but defeat the lien for lack of the formal notice. Even if the provision is retained, surely no one should be heard to complain of a lack of formality except one for whose protection the formality is required.

The fund-trapping procedure would benefit from simplification by making the authorization to withhold accrue in every case on receipt of the notice. The contingent alternatives of article 5463 contribute little but confusion to the overall scheme.

Article 5469, the statutory retainage provision, is in need of a more thoroughgoing revision. Now that the mandatory retainage fund is available to all subcontractors, it holds substantial promise as a means of securing subcontractor claims. But the percentage required could profitably be made higher—at least during the period prior to completion. To require a fifteen percent or twenty percent retainage prior to completion and ten percent for thirty days thereafter would substantially improve the prospects for unpaid subcontractors. Moreover, the preference now given to artisans and mechanics requires close scrutiny. If a preference is to be given to workmen over materialmen, perhaps it should be limited to laborers on an hourly, daily, or weekly wage. Also, some pressing ambiguities in article 5469 can best be solved by legislative action. The dilemma of the Hayek case and the issues of the Lennox Industries, Hunt, and W & W Floor Covering cases should be dealt with after careful deliberation to arrive at solutions compatible with public policy. It is awkward to have such questions judicially determined on the basis of presumed legislative intent.

Finally, the preeminent necessity is to simplify the statutes. In drafting legislation the benefits of simplicity can outweigh the minor equities of multifarious, complex provisions. This is particularly true with lien-perfecting procedures, which, for the most part, are routinely administered by laymen. The development of our mechanic’s lien laws has been a relentless progression from the simple to the complex, which is not to be equated with qualitative progress. To reverse the direction will be a prodigious undertaking, but it will be worth the effort.

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31 Hayek v. Western Steel Co., 478 S.W.2d 786 (Tex. 1972); see text accompanying note 173 supra.
32 Lennox Indus., Inc. v. Phi Kappa Sigma Educ. & Bldg. Ass’n, 430 S.W.2d 405 (Tex. Civ. App.—Austin 1968); see text accompanying note 168 supra.
33 Hunt Developers, Inc. v. Western Steel Co., 409 S.W.2d 443 (Tex. Civ. App.—Corpus Christi 1966); see text accompanying note 131 supra.