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M. K. Woodward

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THE ACQUISITION OF MECHANICS' AND MATERIALMEN'S LIENS ON NON-HOMESTEAD PROPERTY

by
M. K. Woodward*

I. INTRODUCTION

FOR a period of several years attorneys for trade associations representing the building industries have manifested an interest in a simplification of the statutes governing the liens of mechanics and materialmen. An effort will be made in this Article to suggest some problems which should be considered by those undertaking a study of the statutes with a view toward their improvement. While it is hoped that the materials presented here will be of assistance to those practicing under the present statutes, it will be even more gratifying if this Article plays a part in bringing about needed changes. Limitations on space prevent a complete study in one article. As a consequence, major attention will be directed toward the methods by which the various types of liens may be acquired on nonexempt property. The special problems relating to liens on the homestead cannot be treated.¹ Only cursory mention is made of the special statutes dealing with liens on mineral properties and pipelines. While some discussion of priority questions is essential, it has been possible to outline only a few of the basic principles.

By way of historical introduction, it can be said that the lien of the mechanic and materialman upon real property is wholly statutory in origin, there having been nothing comparable at common law.² There are occasional statements that our American statutes were borrowed from the civil law,³ but it seems more probable that they are domestic in origin and were enacted to encourage the develop-

* B.A., University of Texas; M.A., West Texas State College; LL.B., University of Texas; Author, *Texas Cases and Materials on Real Property Security*, 2d ed. 1954; Co-author (with Huie and Walker), *Cases and Materials on Oil and Gas*, 1960; Professor of Law, University of Texas.

The substance of this Article was presented at the First Annual Shipboard Institute of the Houston Bar Association, April 16-22, 1960. The basic research was done while the writer was the recipient of a Sterling Fellowship in Law at Yale University.

¹ For brief discussions of some of these problems see Cole, *The Homestead Provisions in the Texas Constitution*, 3 *Texas L. Rev.* 217 (1925); Woodward, *The Homestead Exemption: A Continuing Need for Constitutional Revision*, 35 *Texas L. Rev.* 1047 (1957); Comment, 7 *Baylor L. Rev.* 433 (1955); Comment, 17 *Texas L. Rev.* 469 (1939).

² *Timber Structures, Inc. v. C.W.S. Grinding & Mach. Works*, 191 Ore. 231, 229 P.2d 623 (1951); *Lippencott v. York*, 86 Tex. 276, 24 S.W. 275 (1893).

³ *Canal Co. v. Gordon*, 73 U.S. (6 Wall.) 561 (1867). See also 36 *Am. Jur. Mechanics Liens* § 3, at 19 (1941).

ment of cities under conditions peculiar to this country during the last century.⁴

The first American statute was enacted to expedite the development of the new capitol city of Washington, but it protected only those master builders who contracted directly with the owner of the property.⁵ In time the statute was enlarged for the protection of certain derivative claimants against the insolvency or dishonesty of a prime contractor.⁶ Protection for derivative claimants can come, of course, only through the imposition of burdens on the owner of the property for the benefit of persons with whom he has had no direct dealings. With this development it was inevitable that there should be difficulties for both legislators and judges in attempting to bring about some fair and reasonable balance between the conflicting interests of the owner and the derivative claimants. Complexity necessarily resulted. The following discussion proves that Texas has not escaped a fair share of the difficulties.

II. THE NATURE OF THE CONSTITUTIONAL LIEN

The unusual complexity of the Texas law of mechanics' liens can be explained in part by the fact that in addition to the lien created by statute, there exists independently a lien created by the constitution. Article XVI, § 37, of the Texas Constitution provides:

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

It is now established beyond question that this provision is self-executing and that it exists independently of any statute.⁷

⁴ In *Macondray v. Simmons*, 1 Cal. 393, 395 (1851), the court said:

We find it laid down in the Mexican books, that he who loans money for the purpose of building, repairing, or supplying a ship, house, or other building, has a tacit lien thereon for the reimbursement of his loan. . . . But we do not find . . . that a person who furnishes materials for the erection of a building has any lien. . . . There is nothing, therefore, in the Mexican law, which countenances the plaintiff's claim of lien, and though it might be inferred from *Browne* that such a lien would be sanctioned by the civil law, yet the inference is equally strong from *Mackeldy* that it would not.

In *Kneeland, A Treatise Upon the Principles Governing the Acquisition and Enforcement of Mechanic's Liens* 12 (2d ed. 1882), the writer, after stating that the lien did not exist in England, observed, "But in a country where improvements are gradual, and real estate is held by a wealthy and conservative class, no real demand arises for such a law."

⁵ See *Monroe v. Hannan*, 3 L.R.A. 549, 551 (D.C. 1889); *Kneeland*, op. cit. supra note 4.

⁶ See *Winder v. Caldwell*, 20 U.S. (14 How.) 272 (1852).

⁷ *Farmers & Merchants Nat'l Bank v. Taylor*, 91 Tex. 78, 40 S.W. 876 (1897); *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896); *Ferrell v. Ertell*, 100 S.W.2d 1084

Although the impression to be gained from article 5453⁸ is that one claiming the constitutional lien must follow the statutory procedure in order to make it effective,⁹ the contrary intention has been ascribed to the legislature in order to avoid a construction which would render the statute unconstitutional.¹⁰ In a leading case the court said:

The lien does not depend upon the statute, and the legislature has no power to affix to that lien conditions of forfeiture. It may, under the constitution, provide means for enforcing the lien, and, in doing so, may prescribe such things to be done as may be deemed necessary for the protection of the owner or purchasers of such property—a limitation on the time for the enforcement of such lien, and such other things as pertain to the remedy.¹¹

Thus, on the occurrence of the facts mentioned in the constitution, a lien which is valid as between the parties¹² and as to all third persons with notice¹³ is created irrespective of compliance with the statutes.

It is settled, of course, that the more specific provision of the constitution relating to the formalities necessary to create a lien for improvements on the homestead¹⁴ overrides the general terms of article XVI, § 37, so that there can be no lien on the homestead in the absence of a written contract executed with all of the formalities required by the constitution and the statutes.¹⁵ Similarly, the statutory formalities are necessary to create a lien on the wife's separate property.¹⁶

It should be noted that the constitutional lien is not limited in its application to real property, but exists as well for the benefit of artisans who make or repair chattels or one who furnishes material

(Tex. Civ. App. 1936) error dism. The opposite result was reached in *Spinney v. Griffith*, 98 Cal. 149, 32 Pac. 974 (1893), which construed an almost identical provision in the Constitution of California.

⁸ Tex. Rev. Civ. Stat. Ann. (1958).

⁹ It seems probable that this was the legislative intent. See *Huck v. Gaylord*, 50 Tex. 578 (1879).

¹⁰ *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896).

¹¹ *Id.* at 1056.

¹² See *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896); *Rifkin v. Overbey*, 171 S.W.2d 175 (Tex. Civ. App. 1943) error ref.; *Ferrell v. Ertell*, 100 S.W.2d 1084 (Tex. Civ. App. 1936) error dism.

¹³ *Reeves v. York Eng'r & Supply Co.*, 249 Fed. 513 (5th Cir. 1918); *Farmers & Merchants Nat'l Bank v. Taylor*, 91 Tex. 78, 40 S.W. 876 (1897).

¹⁴ Tex. Const. art. XVI, § 50.

¹⁵ See *Kepley v. Zachry*, 131 Tex. 554, 116 S.W.2d 699, 121 S.W.2d 595 (1938).

¹⁶ *Mann Elec. Co. v. Phillips*, 177 F.2d 841 (5th Cir. 1949). See *Brick & Tile Co. v. Parker*, 143 Tex. 383, 186 S.W.2d 66 (1945). The result may be different if the wife has elected to manage her separate property under the procedure permitted by article 4614, as amended, Tex. Rev. Civ. Stat. Ann. (Supp. 1958).

for such work.¹⁷ Unlike the common-law artisan's lien, the constitutional lien is in no way dependent upon retention of possession of the chattel. The application of the constitutional lien to chattels has received separate treatment elsewhere and will receive only incidental attention in this Article.¹⁸

III. SCOPE OF PROTECTION OF THE CONSTITUTIONAL LIEN

The constitutional provision quoted above is couched in plain and simple language; yet the courts have had numerous occasions to construe it. It will be noted that it does not provide for a lien for anyone who makes a contribution toward the improvement of real property. Only "mechanics, artisans, and materialmen, of every class," are favored. Moreover, the lien arises only when "buildings or articles" have been "made or repaired," although the claimant who does no labor may have a lien if he furnishes material for such making or repairing.

At first glance, it would seem to be easy to distinguish between those claimants who are entitled to a constitutional lien and those who are beyond the scope of the language granting it. For example, it could be stated categorically that no lien would arise in favor of a person who did nothing but haul materials to the building site. Yet, in the first case in which it was established that the constitution itself created a lien, it was held that a claimant who had entered into a contract to furnish all labor and materials and to construct a house in accordance with certain specifications was entitled to a lien for the entire contract price; and this decision has never been questioned.¹⁹ It seems obvious that a number of items must have been included in that price which standing alone could not give rise to the lien. To illustrate, it seems that the contractor must have included in the price, of necessity, the cost of transporting the materials to the lot where the house was erected. As a practical matter, it would be almost impossible for the contractor to separate from the contract price those items of cost which are expressly covered by the constitutional language and to establish his lien for these items only. Certainly, at the time the cases were first arising, and probably even today, few contractors could ascribe with any accuracy the portion of the price attributable to the skilled labor of

¹⁷ *Shirley-Self Motor Co. v. Simpson*, 195 S.W.2d 951 (Tex. Civ. App. 1946); *Lintner v. Neely*, 97 S.W.2d 349 (Tex. Civ. App. 1936) error dismissed; *Wichita Falls Sash & Door Co. v. Jackson*, 203 S.W. 100 (Tex. Civ. App. 1918).

¹⁸ See Woodward, *The Constitutional Lien on Chattels in Texas*, 28 *Texas L. Rev.* 305 (1950).

¹⁹ *Strang v. Pray*, 89 *Tex.* 525, 35 S.W. 1054 (1896).

the artisan and mechanic, which is covered by the language quoted, and the portion performed by the unskilled laborer, which standing alone is not. Entirely aside from the practical aspects, however, it seems that the inclusion of some items within the coverage of the lien presents no very difficult problem of interpretation when the claimant has agreed to a "turn-key" job. The substance of a single transaction may be described in different terms with possible differences in result. Stated in one way, the contract price includes the costs of hauling materials, an item not covered by the language of the constitution. Stated in another, the value of the materials is covered by the express language of the constitution, and this must mean their value at the place where they are incorporated into the building. In other words, the transportation cost is a proper part of the value of the materials at the site.

It may be more difficult to make a justification on this same level of all other items necessarily included in the ordinary general contract. To illustrate, unskilled work of the common laborer is a necessary part of the construction of every building, and it would have been arguable, as an initial proposition, that the constitutional lien secures only the value of the skilled labor of the artisan or mechanic. Even in this instance, however, it can be said that the contractor is an artisan, and all of the labor furnished by him, skilled or otherwise, is attributable to his status. Surely, the brickmason, working under a direct contract with the owner, should have a lien, not only for his own services but also for the value of the labor of his assistants, which was necessary to make his own skills effective. In any event, these questions have caused no trouble and are likely to cause none in the future since there have been too many decisions in which a general contractor has been held to have a constitutional lien to secure the entire contract price.

Frequently there is no general contract for the construction of a building, and the owner enters into direct contractual relations with materialmen and those who would normally be subcontractors, or sometimes with persons who would be employed, under more usual circumstances, by either the general contractor or subcontractors. Thus, the owner may buy materials directly from a number of materialmen; may enter into separate contracts for plumbing and electrical work; employ carpenters, masons, and painters; and, in effect, act as his own general contractor. Here definitions may become important.

There has been no particular difficulty in determining who is a

materialman.²⁰ In order for a sale of materials to create a lien, however, they must have been sold with reference to a particular parcel of land, or stated differently, they must have been sold with the expectation on the part of the seller that they would be incorporated into a building upon a particular tract.²¹ Even so, it is not essential that all of the materials actually be used for the contemplated purpose. Where the materialman delivers the materials to the building site, or other place designated by the owner, he is entitled to a lien for the entire amount although the owner may have re-sold part of the materials or put them to other uses.²²

The word materials, as used in the constitution, has been held to include not only such raw materials as lumber, which may require further fabrication before use, but also machinery and other finished, manufactured articles.²³ An example is found in *Reeves v. York Eng'r & Supply Co.*,²⁴ in which machinery for the manufacture of ice was installed, under the supervision of the seller, on a concrete slab adjacent to a building which was used as an ice plant. It was bolted to the slab and was thus easily removable. However, in view of the fact that the machinery was essential to the operation of the plant as a functioning institution, it was regarded by the court as an integral part of the building. In determining whether a lien on the real estate will result in such a case, the courts will apparently apply the same nebulous tests that would be employed in determining whether the chattel became a fixture.²⁵ In some of the cases it has been unnecessary to give careful consideration to the question whether the sale or installation of such fixtures as plumbing equip-

²⁰ For definitions of "materialman" see *Huddleston v. Nislar*, 72 S.W.2d 959, 962 (Tex. Civ. App. 1934) error ref. The case, and the authorities cited in it, distinguish contractors and subcontractors from materialmen who sell or furnish material "without performing any work or labor in installing or putting them in place." See also *St. Louis A. & T. Ry. v. Matthews*, 75 Tex. 92, 12 S.W. 976 (1889).

²¹ *In re Wigzell*, 7 F. Supp. 463 (W.D. Tex. 1933). See *Reeves v. York Eng'r & Supply Co.*, 249 Fed. 513, 517 (5th Cir. 1918); *Campbell v. Teeple*, 273 S.W. 304 (Tex. Civ. App. 1925).

²² *Brick & Tile Co. v. Parker*, 143 Tex. 383, 186 S.W.2d 66 (1945); *Trammel v. Mount*, 68 Tex. 210, 4 S.W. 377 (1887). In the latter case a part of the materials were prepared for delivery and stored at a place near the building site, but the owner wrongfully refused to accept delivery. In the *Parker* case, the court makes the point that the land involved was not homestead.

²³ *Reeves v. York Eng'r & Supply Co.*, 249 Fed. 513 (5th Cir. 1918); *Dallas Plumbing Co. v. Harrington*, 275 S.W. 190 (Tex. Civ. App. 1925). See *Interstate Trust & Banking Co. v. West Texas Util. Co.*, 88 S.W.2d 1110 (Tex. Civ. App. 1935). See also *Fagan & Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324 (1886).

²⁴ *Supra* note 23.

²⁵ In addition to the *Reeves* case, see *Carter v. Straus-Frank Co.*, 297 S.W.2d 195 (Tex. Civ. App. 1956) error ref. n.r.e.; *McConnell v. Frost*, 45 S.W.2d 777 (Tex. Civ. App. 1932) error ref.; *Black, Sivalls & Bryson v. Operators' Oil & Gas Co.*, 37 S.W.2d 313 (Tex. Civ. App. 1930) error dism. But see *Freed v. Bozman*, 304 S.W.2d 235 (Tex. Civ. App. 1957) error ref. n.r.e.

ment, fans, and other manufactured articles created a lien on the real estate itself or only on the chattels,²⁶ since the dispute has centered on the right of the supplier, as against one holding a prior lien on the real estate, to remove the chattel and have it sold apart from the land under article 5459.²⁷ On analysis it would appear that the lien in such cases attaches to the land²⁸ although the priority of the supplier is limited to the chattel alone and is conditioned on his ability to remove it without material injury to the real estate.²⁹

As far as labor is concerned, only that of the artisan and mechanic is mentioned by the constitution. A mechanic has been defined as one who is "skilled in the practical use of tools," and, similarly, an artisan has been defined as "one trained for manual dexterity in some mechanic art or trade."³⁰ Both definitions seem to embody the components of skill in craftsmanship and of manual labor. Hence, it would seem that a common laborer could not qualify as an artisan or mechanic because his work is unskilled.³¹ Conversely, it would seem that the architect who plans or designs a building could not qualify since his work arises above that which is purely mechanical and because the element of manual labor is missing.³² On the other hand, it has been held that a person employed to hire and supervise workmen may be regarded as a mechanic or artisan.³³

On the whole, the cases have not yet given careful consideration to the types of vocations protected by the words "mechanics and artisans," and a good deal is left open to speculation. An illustration is found in *Hill v. The Praetorians*,³⁴ where the claimant, acting under a contract with the owner of the property, hauled materials

²⁶ See, e.g., *Freed v. Bozman*, supra note 25; *Dallas Plumbing Co. v. Harrington*, 275 S.W. 190 (Tex. Civ. App. 1925).

²⁷ Tex. Rev. Civ. Stat. Ann. (1958).

²⁸ This must be true since the constitutional lien on a chattel, apart from real estate, arises only when a chattel is made or repaired. See *Woodward*, supra note 18, at 318.

²⁹ See *Hamman v. H.J. McMullen & Co.*, 122 Tex. 476, 62 S.W.2d 59 (1933).

³⁰ *Warner Memorial Univ. v. Ritenour*, 56 S.W.2d 236 (Tex. Civ. App. 1933) error ref.

³¹ See *Warner Memorial Univ. v. Ritenour*, supra note 30; *McQuerry v. Glenn*, 1 S.W.2d 339 (Tex. Civ. App. 1927) error dism.

³² See *Sanguinett & Statts v. Colorado Salt Co.*, 150 S.W. 490 (Tex. Civ. App. 1912) error ref. (dealing with the statute of 1897, Sayles Ann. Civ. Stat. art. 3924). In *Warner Memorial Univ. v. Ritenour*, 56 S.W.2d 236 (Tex. Civ. App. 1933) error ref., the court distinguishes between an artisan and an artist with the following quotation at 237:

A portrait painter is an artist; a sign painter is an artisan, although he may have the taste and skill of an artist. The occupation of the former requires a fine taste and delicate manipulation; that of the latter demands only an ordinary degree of contrivance and imitative power.

³³ *Mood v. Methodist Episcopal Church*, 300 S.W. 30 (Tex. Comm. App. 1927). Cf. *Texas Bldg. Co. v. Collins*, 187 S.W. 404 (Tex. Civ. App. 1916) error ref. See *Huffman v. McDonald*, 261 S.W. 146 (Tex. Civ. App. 1924), holding that a subcontractor who performed no labor himself but who supervised others was not a mechanic or artisan within the meaning of article 5469, Tex. Rev. Civ. Stat. Ann. (1958).

³⁴ 219 S.W.2d 564 (Tex. Civ. App. 1949) error ref. n.r.e.

(which he did not sell) for the construction of the building. He also furnished the labor and equipment for cutting pipe for the building. It was held, as an alternative ground for decision, that he was entitled to a constitutional lien for both items. It seems doubtful that a truck driver should be classed as either a mechanic or materialman,³⁵ or that the hauling of materials should be regarded as the "furnishing" of materials, or that one performing this service alone could be regarded as a materialman.³⁶ The decision seems correct as to the claim for cutting pipe. Although the agreement was to pay for the labor at a certain rate and for the use of the cutting equipment at another, the fact that the total charge was thus broken down should not defeat the right to a lien for a portion of it, even though the mere rental of equipment without the labor would not have given rise to a lien. Artisans frequently supply their own tools and equipment, and, if in an unusual agreement, they assign separate values to their labor and to the use of the tools employed by them, this should not defeat the lien for a portion of the claim, which would have been allowed in full if a lump-sum amount had been agreed upon.

As previously observed, the constitution purports to give the lien only when "buildings or articles" are "made or repaired." If the improvement on real property cannot be regarded as either an article or building, then no lien arises out of the constitution. Thus, the installation of sewer lines and water mains in a subdivision, entirely unconnected with any building then existing or under construction, creates no constitutional lien because such improvements are neither buildings nor articles.³⁷ Under ordinary circumstances, one who builds a fence or furnishes materials therefor is not entitled to the constitutional lien, for a fence is neither a building nor an article.³⁸ It appears, however, that if a fence and house are constructed as a part of a single contract, and the fence is considered to be a part of and appurtenant to the house, then the lien may attach to secure the entire contract price.³⁹ It has been suggested, although not authoritatively determined, that the word "building," as used in the constitution, "includes only those structures which have the capacity

³⁵ In *Warner Memorial Univ. v. Ritenour*, 56 S.W.2d 236, 237 (Tex. Civ. App. 1933) error ref., one of the definitions of mechanic is "a workman who shapes and applies material in the building of a house or other structure. . . ." Similarly, one of the definitions of an artisan is a "handicraftsman."

³⁶ See *Huddleston v. Nislar*, 72 S.W.2d 959 (Tex. Civ. App. 1934).

³⁷ *Campbell v. City of Dallas*, 120 S.W.2d 1095 (Tex. Civ. App. 1938) error ref.

³⁸ In *re Wigzell*, 7 F. Supp. 463 (W.D. Tex. 1933).

³⁹ See *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896), distinguished in the *Wigzell* case, *supra* note 38. The facts in *Strang v. Pray* do not suggest that there was any physical connection of the house and fence.

to contain and are designed for the habitation of man or animals or the shelter of property."⁴⁰ The furnishing of labor or material for most of the ordinary work done in connection with drilling oil, gas, or water wells cannot be the foundation for constitutional liens.⁴¹ Again, while such wells are undoubtedly improvements, they are not classified as either buildings or articles.⁴² Moreover, the casing which has been set in a well, even if regarded as an "article," has not been "made or repaired" by those who have set it into place.⁴³ The point is further illustrated by *Byrne v. Williams*,⁴⁴ in which an artisan repaired a gas engine and, at the request of the owner, installed it for demonstration purposes in the building of a prospective purchaser to whom the owner hoped to sell it. While recognizing the artisan's constitutional lien for the value of his services in making the repairs, the court stated that the value of the installation was not part of the value of the repair of the article. Obviously there could be no lien on the building of the prospective purchaser under the circumstances.

The constitution purports to give a lien to artisans, mechanics, and materialmen "of every class," and the language contains no suggestion that the grant of the lien is restricted to those who have direct contractual dealings with the owner of the property. It is settled, however, that it is only such persons (who are denominated "original contractors") who may claim the benefits of the con-

⁴⁰ *Peterson v. Stolz*, 269 S.W. 113 (Tex. Civ. App. 1925) error ref., in which the court refused to declare and enforce a constitutional lien upon a mausoleum primarily upon the ground of public policy.

⁴¹ *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929); *Eoff v. Skinner*, 244 S.W.2d 991 (Tex. Civ. App. 1951); *Mulloy v. Humble Oil & Ref. Co.*, 250 S.W. 792 (Tex. Civ. App. 1923).

⁴² The court in *Mulloy v. Humble Oil & Ref. Co.*, supra note 41, stated: "Certainly an oil well is not a building. The word 'article' is of broad significance, but if an oil and gas well is to be regarded as a mere 'article,' then it would be difficult to imagine an instance of labor done or material furnished which would not fall within the meaning of the term."

⁴³ In *Ball v. Davis*, 118 Tex. 534, 545, 18 S.W.2d 1063, 1067 (1929), the court said: "[W]e are convinced that no one would class a well casing put together and set in a well as an 'article made.' In this particular instance the casing was set in the well in the usual way, each joint being attached to the other by threads, . . . and we are convinced that the common and general understanding of men would not be that in thus setting a casing in a well those engaged in performance of the duty had 'made' a well casing. . . . The well casing was well casing before it was placed in the well, and was well casing afterwards. Nothing has been made in the usual and ordinary meaning of the word 'made' but only a use has been made of articles completely manufactured.

The situation is the same when casing is perforated or slotted by the contractor, in addition to being set in place. *Eoff v. Skinner*, 244 S.W.2d 991 (Tex. Civ. App. 1951).

⁴⁴ 45 S.W.2d 336 (Tex. Civ. App. 1931) error ref.

stitutional lien.⁴⁵ Those with whom the owner has contracted directly for either labor or materials, or both, are called original contractors.⁴⁶ Actually, it has not been determined whether those who furnish labor or materials to a contractor or subcontractor, rather than the owner, obtain the lien by virtue of the constitution but cannot enforce it without compliance with the statutes, or whether no lien arises in their favor.⁴⁷ Insofar as the lien on real property is concerned, the question seems to be of academic interest only.⁴⁸ If the lien arises, but is unenforceable even as against the owner and others having knowledge of the claim, unless the lien is fixed by timely notice to the owner and by filing, it is equivalent to saying that such persons can obtain a statutory lien only. This construction which gives an enforceable lien only to original contractors and those who follow the statutory procedures is the only one which could be given as a practical matter. Otherwise, the owner might find his property subjected to liens for amounts far in excess of the contract price, and in favor of persons of whom he had never heard until after he had paid the full contract price to the original contractor.

In the event that the statutes are revised, it would be desirable to broaden the benefits of the constitutional lien. While no lien could be given to a larger class of persons by the constitution without an amendment to that document itself, a statutory lien having the same incidents, and requiring no formalities insofar as the parties to the contract and third persons with notice are concerned, could be given by legislative enactment. It would seem that those who supply machinery, fuel, or tools, and all who perform work, whether they be architects or unskilled laborers, should have the same protection. Moreover, it should be immaterial whether the improvement is a building or some other valuable permanent improvement.

IV. SCOPE OF THE STATUTORY LIEN

While the constitutional lien is limited to a specified class of persons and, as applied to real property, arises only out of the making and repairing of buildings, the statutes are much broader. Article 5452⁴⁹ grants a lien to almost anyone who contributes to the improvement of real property, provided proper steps are taken to affix

⁴⁵ First Nat'l Bank v. Lyon-Gray Lumber Co., 110 Tex. 162, 217 S.W. 133 (1919); *Baumann v. Cibolo Lumber Co.*, 226 S.W.2d 210 (Tex. Civ. App. 1950) error ref.

⁴⁶ See *Brick & Tile, Inc. v. Parker*, 143 Tex. 383, 186 S.W.2d 66 (1945).

⁴⁷ *Berry v. McAdams*, 93 Tex. 431, 55 S.W. 1112 (1900). See also *Bassett v. Mills*, 89 Tex. 162, 34 S.W. 93 (1896).

⁴⁸ The question may have practical importance insofar as the lien on chattels is concerned. See *Woodward*, *supra* note 18, at 317.

⁴⁹ Tex. Rev. Civ. Stat. Ann. (1958).

and perfect it. While no attempt will be made here to paraphrase the statute, it may be mentioned that it protects not only those who furnish labor or material, but also those furnishing machinery, fixtures, or tools for the erection or repair of any improvement.

While the wording leaves something to be desired, it is clear that the words "erection or repair" are used in a very broad sense. The improvement may be "any improvement whatever," and it is specified that the word shall include, among other things, wells, cisterns, tanks, reservoirs, and devices for raising and storing water. By express provision, the reclamation of land from overflow, the clearing and grubbing of land, and the planting, pruning, and replacement of orchard trees are all items covered by the statutory lien. The lien exists not only in favor of artisans, mechanics, and materialmen, but is for the benefit of any person, firm, or corporation which may make any of the specified contributions to the improvement. Sub-contractors are expressly mentioned and it is clear that derivative claimants⁵⁰ as well as original contractors are protected. Special statutes,⁵¹ also very broad in terms, have been enacted for the protection of those who do work or haul or furnish materials, tools, or supplies for most of the work done in connection with the drilling or digging of oil or gas wells, mines or quarries, or the operation of such properties.⁵² Space limitations will not permit an exploration of these statutes which deal specifically with mineral properties. While the statutes are very comprehensive, neither they nor the constitution protect one who merely advances money to pay for labor or materials.⁵³

V. PROCEEDINGS NECESSARY FOR THE PERFECTION OF LIENS

A. *Original Contractors*

As already observed, the constitutional lien arises automatically, and nothing need be done by the claimant in order to make it

⁵⁰ *Bassett v. Mills*, 89 Tex. 162, 34 S.W. 93 (1896).

⁵¹ Tex. Rev. Civ. Stat. Ann. arts. 5472, 5473 (1958). While article 5479, Tex. Rev. Civ. Stat. Ann. (1958), states that these special statutes relating to mineral properties "shall not be construed to deprive or abridge . . . any rights given to claimants under other statutes," and that the special statutes "shall be cumulative of the present lien laws," the special statutes have nevertheless been held to provide the exclusive remedy in the area of their coverage. *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929).

⁵² While these statutes are very comprehensive they do not cover all work. An example is found in *Big Three Welding Equip. Co. v. Crutcher, Rolfs, Cummings, Inc.*, 149 Tex. 204, 229 S.W.2d 600 (1950), which holds that work done in dismantling a pipeline, including hauling and conditioning of pipe, is not protected by the lien. Although the statute covers work done in operating and maintaining a pipeline, it does not include work done in dismantling.

⁵³ *Gaylord v. Loughridge*, 50 Tex. 573 (1879); *Owen v. Griffin*, 34 S.W.2d 333 (Tex. Civ. App. 1931). Circumstances under which a lender might be subrogated to constitutional and statutory liens are not considered in this Article.

effective against the owner of the property and third persons with notice.⁵⁴ If the lien is to be enforceable against subsequent bona fide purchasers for value, however, the claimant must follow the statutory procedure for the perfection of the lien. If the claimant had a written contract with the owner, he must file it for recording in the county where the land is located.⁵⁵ If there were no written contract, an itemized account of the claim, supported by an affidavit showing that the account is just and correct and that all just and lawful offsets and payments have been allowed, must be filed.⁵⁶ The form of the affidavit is prescribed by statute.⁵⁷

Although there is little authority on the subject, it appears that substantial compliance with the statute will be sufficient,⁵⁸ as the courts have generally construed the constitution and the statutes liberally in favor of the claimant of the constitutional lien.⁵⁹ It seems to be enough to state the nature of the claim and the total amount due without an itemization.⁶⁰ If a written contract is filed, it must be accompanied by a description of the improvement and the land on which it is located, but the description need not be under oath. The statutory form for the itemized account which is filed in the absence of a written contract likewise provides for a description of the land. While the same rules which are used to test the sufficiency of the description in a conveyance are generally stated by the courts as applicable to this statute, they have indulged a greater liberality than is generally shown in the conveyancing cases.⁶¹ An original contractor must file his contract or itemized account within four months after the indebtedness accrues.⁶²

It is significant that the date from which the time begins to run is the date of the accrual of the indebtedness rather than the date

⁵⁴ See text accompanying notes 11, 12 *supra*.

⁵⁵ Tex. Rev. Civ. Stat. Ann. art. 5453 (1) (1958).

⁵⁶ Tex. Rev. Civ. Stat. Ann. art. 5453 (2) (1958).

⁵⁷ Tex. Rev. Civ. Stat. Ann. art. 5455 (1958).

⁵⁸ *Newman v. Coker*, 310 S.W.2d 354 (Tex. Civ. App. 1958); *Hill v. The Praetorians*, 219 S.W.2d 564 (Tex. Civ. App. 1949) error ref. n.r.e.

⁵⁹ See, e.g., *Reeves v. York Eng'r & Supply Co.*, 249 Fed. 513 (5th Cir. 1918); *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054 (1896); *Bassett v. Mills*, 89 Tex. 162, 34 S.W. 93 (1896).

⁶⁰ *Reeves v. York Eng'r & Supply Co.*, *supra* note 59; *Newman v. Coker*, 310 S.W.2d 354 (Tex. Civ. App. 1958).

⁶¹ See, e.g., *Reeves v. York Eng'r & Supply Co.*, 249 Fed. 513 (5th Cir. 1918); *Myers v. Houston*, 88 Tex. 126, 30 S.W. 912 (1895); *Scholes & Goodall v. Hughes & Boswell*, 77 Tex. 482 (1890). See also *Warren Cent. R.R. v. Texas Creosoting Co.*, 62 S.W.2d 691 (Tex. Civ. App. 1933).

⁶² Tex. Rev. Civ. Stat. Ann. art. 5453 (1) (1958). It should be noted that under the special statutes relating to liens on mineral properties the original contractor may obtain a statutory lien by filing his verified account within six months after the indebtedness accrues.

of the contract, or when the work was performed, or the material furnished,⁶³ although it is possible that these times may coincide. Thus, if the owner and a contractor should enter into a contract for the building of a house and should provide that payment should be made one year after the work was completed, the contractor has four months after the date of the accrual of the indebtedness, which, in the hypothetical situation, would be sixteen months from the time of completion of the house, in order to file his contract. The four-month period is calculated on the basis of calendar months. Thus, if the indebtedness fell due on February 28, the last day for filing would be June 28.⁶⁴

In making a study of the steps necessary to acquire the statutory lien, it is necessary to distinguish between original contractors, or those dealing directly with the owner, and derivative claimants. The statutory procedure discussed above, by which the constitutional lien can be perfected, also governs the acquisition of statutory liens by original contractors. One who furnishes tools or who makes or repairs some improvement other than an article or building, as has been observed, does not obtain a constitutional lien even though he may be an original contractor. Yet, if he files his written contract or itemized account within four months after the accrual of the indebtedness, he obtains a statutory lien.⁶⁵ When the statutory lien is sought, however, the liberal construction indulged in the case of the constitutional lien is abandoned and a strict construction of the statutory requirements substituted, even in the case of original contractors.⁶⁶ The statutes do not seem to require that an original contractor give any type of notice to the owner in order to affix a statutory lien, nor would such notice serve any purpose since the owner contracted directly with the claimant and presumably knows the terms of his contract.⁶⁷

⁶³ Examples are seen in *Hill v. The Praetorians*, 219 S.W.2d 564 (Tex. Civ. App. 1949) error ref. n.r.e.; *Investor's Syndicate v. Dallas Plumbing Co.*, 61 S.W.2d 1039 (Tex. Civ. App. 1933).

⁶⁴ See *Pitcock v. Johns*, 326 S.W.2d 563 (Tex. Civ. App. 1959) error ref.

⁶⁵ See *Lewis v. Phillips*, 131 Tex. 313, 114 S.W.2d 864 (1938); *Denny v. White House Lumber Co.*, 150 S.W.2d 296 (Tex. Civ. App. 1941) error dism. judgm. cor.

⁶⁶ See, e.g., *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929). See also *Pacific Indem. Co. v. Bowles & Edens Supply Co.*, 290 S.W.2d 353 (Tex. Civ. App. 1956) error ref. n.r.e.

⁶⁷ See Tex. Rev. Civ. Stat. Ann. art. 5453 (3) (1958) which requires notice to the owner only from those "who furnished material to or performed labor for a contractor or subcontractor." See also the special statutes governing liens on mineral properties which require both original contractors and derivative claimants to file itemized accounts, but provide for notice to the owner to be given by derivative claimants only. Tex. Rev. Civ. Stat. Ann. arts. 5476a, c (1958).

B. *Derivative Claimants*

In the case of derivative claimants the procedure differs. Not only must an itemized and verified account be filed, but there must be one or more notices given to the owner. Notice must be in writing. Oral notice, although admittedly received, will not suffice.⁶⁸ The first notice mentioned in the statutes is that required by article 5453 (3).⁶⁹ Presumably, it must be given by all derivative claimants, *i.e.*, by everyone except an original contractor.⁷⁰ No special form for this notice is specified by the statute, but it is essential that it contain an itemization of the materials and labor and that it show how much is due and unpaid. It has been held that a copy of the contract between the materialman and the contractor will not substitute for an itemized notice.⁷¹ Similarly, a letter to the owner, stating the balance owing by the contractor to the materialman, is not sufficient.⁷² This particular statute does not require a statement in the notice that a lien is being claimed, and since it alone seems to govern the notice to be given by a materialman, it appears that no such statement is required of him.⁷³

While it seems doubtful to the writer that the itemization of the claim is of any practical benefit to the owner, it is believed that all derivative claimants, including materialmen, should be required to warn the owner that enough should be retained out of the money owing to the contractor to cover the claim. Otherwise, an inexperienced owner, who is not advised, might be unaware of the significance of the notice. The notice discussed above, which must be given by all derivative claimants, must be given within ninety days after the indebtedness accrues.⁷⁴ Within the same time period all derivative claimants must file their claims for recording as hereinafter dis-

⁶⁸ *Berry v. McAdams*, 93 Tex. 431, 55 S.W. 1112 (1900).

⁶⁹ Tex. Rev. Civ. Stat. Ann. (1958).

⁷⁰ It is believed that there is little question about the accuracy of this conclusion if the phrase "each person, firm or corporation who furnished material to or performed labor for a contractor or subcontractor . . ." includes a subcontractor, *i.e.*, one who has furnished labor and materials to the original contractor under a subcontract. The use of the phrase "firm or corporation" suggests an intention to include a subcontractor. It is possible that one furnishing only tools or equipment would not be included.

⁷¹ *Spann v. King*, 121 S.W. 207 (Tex. Civ. App. 1919) error ref.

⁷² *Owen v. Griffin*, 34 S.W.2d 333 (Tex. Civ. App. 1931). The special statutes relating to mineral properties underwent substantial revision in 1957. Among other things they require a statement that a lien is claimed and a description of the property. The requirement that the claim be itemized has been eliminated. Tex. Rev. Stat. Ann. art. 5476c (1958).

⁷³ In the case of mineral properties all derivative claimants must state in the notice to the owner that a lien is claimed. Tex. Rev. Civ. Stat. Ann. art. 5476c (1958).

⁷⁴ Tex. Rev. Civ. Stat. Ann. art. 5453 (3) (1958). The claimant under the mineral properties statute must give notice to the owner ten days before filing the statement of his lien, but has a six months' period within which to file. Tex. Rev. Civ. Stat. Ann. arts. 5476b, c (1958).

cussed. It seems clear that a materialman may file his claim of lien with the county clerk at the same time he gives the notice to the owner, or he may even give the notice after the account is filed, so long as he does both within the ninety-day period.⁷⁵ No further notice is required of him.

To be safe, all derivative claimants other than materialmen should either give two separate notices, differing somewhat in content, or should give a single notice containing the additional information required by article 5461,⁷⁶ and should realize that an additional time limitation is imposed. This is because article 5461 requires every person "except the original contractor or builder, or those claiming under Section 3 of Article 5453," to give to the owner notice in writing that he holds a claim against the improvement, and to state the amount of the claim and from whom it is due, at least ten days prior to filing the claim of a lien with the county clerk. Undoubtedly, a single notice which complies with the requirements of both article 5453 (3) and 5461 will suffice, provided it is given within eighty days after the indebtedness accrues, so that there may be timely filing within ten days thereafter. A separate and additional notice designed to comply with article 5461, if timely, would also meet the statutory requirement.⁷⁷ The only real difficulty is in determining who is within the terms of this statute. In the one case which has involved the question, it was held that laborers who failed to give notice to the owner ten days prior to filing their accounts obtained no liens.⁷⁸

Article 5461, when read in connection with article 5453 (3), appears to be without meaning. It will be recalled that article 5461 excludes original contractors and also all those who claim under article 5453 (3). The latter statute includes "each person, firm or corporation who furnished material to or performed labor for a contractor or subcontractor." With the conceivable exception of one who furnished only tools, machinery, or equipment, no one is left to be affected by article 5461.⁷⁹

Although the resolution of the hiatus is not easy, the way it came

⁷⁵ *Wilson v. Sherwin-Williams Paint Co.*, 160 S.W. 418 (Tex. Civ. App. 1913), *aff'd*, 110 Tex. 156, 217 S.W. 372 (1919). The *Wilson* case shows that the statement is true of materialmen who supply subcontractors as well as to those who deal with the original contractor.

⁷⁶ Tex. Rev. Civ. Stat. Ann. (1958).

⁷⁷ See 6 *Stayton*, Texas Forms §§ 3341, 3344, at 324, 327 (rev. ed. 1960).

⁷⁸ *Hayden v. Tyler Oil Corp.*, 6 S.W.2d 777 (Tex. Civ. App. 1928) error *dism.* See also *McQuerry v. Glenn*, 1 S.W.2d 339 (Tex. Civ. App. 1927) error *dism.*

⁷⁹ It is assumed that a subcontractor is embraced within article 5453 (3), Tex. Rev. Civ. Stat. Ann. (1958). See note 70 *supra*.

about may be easily explained. When what is now article 5461 was enacted into its present form in 1889, the statute which is now article 5453 (3) covered only those who furnished material to a contractor.⁸⁰ Thus, only materialmen were required to give an itemized notice. Other derivative claimants were required to give the different form of notice provided for in article 5461, and to do so ten days in advance of filing their claims.⁸¹ Later, when article 5453 (3) was amended to require itemized notices of all derivative claimants, the inconsistent provisions of article 5461, and especially its internal reference to article 5453 (3), were overlooked. A sensible argument can be made that the amendment to article 5453 (3) repealed article 5461 by implication, so that it now has no operative effect. Since this argument has not been considered by the courts, however, all derivative claimants other than materialmen should observe the statute.

Article 5456⁸² sets out the form for the affidavit which must be filed for recording. It states, in part, that when the claimant is a materialman, "affiant shall further swear that he has given to the owner . . . notice in writing of each item of said account as required in this chapter *as the same was furnished*. . . ." (Emphasis supplied.) Moreover, in the case of the lien on the homestead, article 5465 states that "a copy of each bill of lumber furnished to the contractor . . . *as the same is furnished* shall be delivered to the owner." (Emphasis supplied.)⁸³ While the language seems to be mandatory, it is settled with respect to both homestead and non-homestead property that failure to comply does not prevent the acquisition of a statutory lien.⁸⁴ On the other hand, it is true that failure to give early notice, even though it be given within the ninety-day period, may affect the priority of the claim, or, in some instances, result in a complete loss of any substantial rights.⁸⁵

It is important to note that notice must be given while the owner still has in his hands money which is owed, or which will be owed, to the contractor. The notice operates like a writ of garnishment, and if it comes too late it impounds nothing, so that the lien, although in

⁸⁰ Acts, 21st Leg., 1889, ch. 98, p. 110, § 3.

⁸¹ Acts, 21st Leg., 1889, ch. 98, p. 110, § 12.

⁸² Tex. Rev. Civ. Stat. Ann. (1958).

⁸³ Tex. Rev. Civ. Stat. Ann. (1958).

⁸⁴ MacAtee & Sons v. House, 137 Tex. 259, 153 S.W.2d 460 (1941); Nichols v. Dixon, 99 Tex. 263, 89 S.W. 765 (1905).

⁸⁵ See, e.g., First Nat'l Bank v. Lyon-Gray Lumber Co., 110 Tex. 162, 217 S.W. 133 (1919).

theoretical existence, is unenforceable.⁸⁶ If the owner gives the contractor a negotiable note for the full amount of the contract price at the time the contract is executed and the note is immediately transferred to a holder in due course, this is regarded as payment by the owner to the contractor, so that no materialman or other derivative claimant can thereafter secure a lien against the owner's property.⁸⁷ Similarly, if the contractor abandons the work and the owner has to spend the unpaid balance of the contract price to complete the job, no lien attaches.⁸⁸

Oddly enough, a materialman who fails to comply with the statute in giving notice of each item of material as it is furnished is preferred over the contractor in a situation where one of the two innocent parties must suffer a loss. This occurs when the contractor pays a subcontractor in full before the materialman who has supplied the subcontractor has given notice of his claim. It is well settled that if the owner still has on hand money owing to the contractor when the notice is received, the notice impounds it for the benefit of the materialman.⁸⁹ Stated differently, the right to obtain the lien does not depend upon the state of accounts between the contractor and the subcontractor who is the debtor of the materialman. This rule was applied even in the extreme case where a substantial portion of the materials which were sold to the subcontractor for use on the particular job were in fact used elsewhere by him.⁹⁰ These decisions are predicated upon the reasoning that the contractor selected the subcontractor to do the work and should therefore be the one to suffer the loss.⁹¹ It would be more logical to say

⁸⁶ *First Nat'l Bank v. Lyon-Gray Lumber Co.*, supra note 85; *Loneragan v. San Antonio Trust Co.*, 101 Tex. 63, 104 S.W. 1061 (1907); *Spann v. King*, 121 S.W. 207 (Tex. Civ. App. 1919) error ref.

⁸⁷ *Modern Plumbing Co. v. Armstrong Bros.*, 36 S.W.2d 1011 (Tex. Comm. App. 1931); *Borden v. Tapp*, 333 S.W.2d 417 (Tex. Civ. App. 1960); *McCutcheon v. Union Merc. Co.*, 267 S.W.2d 916 (Tex. Civ. App. 1954) error ref. See also *Continental Nat'l Bank v. Conner*, 147 Tex. 218, 214 S.W.2d 928 (1948).

⁸⁸ See, e.g., *First Nat'l Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S.W. 133 (1919); *Harris v. Interstate Lumber Co.*, 303 S.W.2d 950 (Tex. Civ. App. 1957).

⁸⁹ *MacAtee & Sons v. House*, 137 Tex. 259, 153 S.W.2d 460 (1941); *Wilson v. Sherwin-Williams Paint Co.*, 110 Tex. 156, 217 S.W. 372 (1919); *Watson Co. v. Ogburn Gravel Co.*, 110 Tex. 161, 217 S.W. 373 (1919); *Padgitt v. Dallas Brick & Constr. Co.*, 92 Tex. 626, 50 S.W. 1010 (1899).

⁹⁰ *MacAtee & Sons v. House*, supra note 89.

⁹¹ In *Wilson v. Sherwin-Williams Paint Co.*, 110 Tex. 156, 160, 217 S.W. 372, 373 (1919), the court stated:

The duty to furnish and pay for the material is primarily imposed on the contractor by the ordinary building contract, such as that here involved. The contractor selects the subcontractor. If loss must fall on materialman, owner, or contractor, by reason of the default of one chosen by the contractor to perform his obligation, and of one whose acts are, or ought to be, directly under the contractor's supervision, surely the loss ought to fall on the contractor.

that the materialman selected the subcontractor as a person to whom he would extend credit, and since the loss was due to the selection of a bad credit risk, it should be the materialman who loses. As a practical matter, the contractor would seldom have access to the same credit information available to most dealers in materials. His normal concern in selecting a subcontractor would be limited to an investigation of competence. In any event, the extension of the rule which grants a lien even for materials not used on the premises presents grave dangers for the contractor and possibilities of at least serious inconvenience to the owner. Of the innocent parties involved, it is only the materialman who has any means of preventing the loss, and that is by giving the notice as he furnishes the materials.

The ninety-day period within which the derivative claimant must give notice to the owner and file his account is computed from the date the indebtedness accrues.⁹² In the case of the sale of materials, the indebtedness is deemed to accrue when the last item of material is delivered.⁹³ The parties may contract for a different due date, but the contract must be specific and definite.⁹⁴ Material is delivered when it is physically placed on the building site or within the purchaser's control, even though it must be further conditioned by the seller before it is in a state to be used.⁹⁵ When labor is performed by the day or week, the debt is deemed to accrue at the end of each week, and the statute leaves some doubt as to whether the accrual date may be changed by contract.⁹⁶

The requirement that all derivative claimants must file their itemized and verified accounts within the ninety-day period⁹⁷ has been a prolific source of litigation. While the statute⁹⁸ states only that the account must be "itemized," it has been held that to satisfy this requirement the date on which each item was furnished must be shown.⁹⁹ As stated in one case, "an account without a date would leave the owner with no means of ascertaining with any certainty whether the transaction came within the limits of the contract he

⁹² Tex. Rev. Civ. Stat. Ann. art. 5453 (3) (1958).

⁹³ Tex. Rev. Civ. Stat. Ann. art. 5467 (1958). Compare Tex. Rev. Civ. Stat. Ann. art. 5476b (1958) dealing with mineral properties.

⁹⁴ See *Matthews v. Waggenhauser Brewing Ass'n*, 83 Tex. 604, 19 S.W. 150 (1902).

⁹⁵ See *Aetna Cas. & Sur. Co. v. Hawn Lumber Co.*, 128 Tex. 296, 97 S.W.2d 460 (1936); *Pacific Indem. Co. v. Bowles & Edens Supply Co.*, 290 S.W.2d 353 (Tex. Civ. App. 1956) error ref. n.r.e.

⁹⁶ Tex. Rev. Civ. Stat. Ann. art. 5467 (1958).

⁹⁷ Note that the period is six months under the mineral lien statute. Tex. Rev. Civ. Stat. Ann. art. 5476a (1958).

⁹⁸ Tex. Rev. Civ. Stat. Ann. art. 5453 (3) (1958).

⁹⁹ *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929); *Meyers v. Wood*, 95 Tex. 67, 65 S.W. 174 (1901); *Pacific Indem. Co. v. Bowles & Eden Supply Co.*, 290 S.W.2d 353 (Tex. Civ. App. 1956) error ref. n.r.e.

had with the builder."¹⁰⁰ It has also been explained that without a showing of dates it is impossible for the owner and third persons to determine whether the filing is timely, and, if so, as to which items it is timely.¹⁰¹ An account, which omits the dates upon which particular items were furnished but which does show that the filing was timely as to all items, may be sufficient.¹⁰² Although the supreme court once took the position that the affidavit or claim must show the date upon which the claim became due,¹⁰³ this was later repudiated.¹⁰⁴

It seems to be established, at least in those cases where the claimant had no written contract, that the account must set out each item of labor and material separately, and must give a unit price for each item.¹⁰⁵ An example of an account held to be fatally defective for failure to itemize involved the claim of a subcontractor for cement work in the construction of a service station. The account read as follows:

November 12, 1956	
Original Slab	\$7,300.00
Additional 10' x 140' Slab on North side at 40¢	560.00
Additional 10' x 10' Ramp Section at 42¢	42.00
	Sub-total \$7,902.00
Credits Received	1,500.00
	\$6,402.00

In holding the itemization insufficient, the court said: "Here there is no itemization of price or value. Furthermore, there was no itemization of labor or materials, in fact labor is not mentioned at all. Neither is there stated the site or dimensions of the 'original slab' of what we presume to be concrete."¹⁰⁶

The cases are in conflict on the question which arises when the contractor and subcontractor have a written contract for the fur-

¹⁰⁰ *Myers v. Wood*, supra note 99.

¹⁰¹ *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929).

¹⁰² It was so held in *Hill v. The Praetorians*, 219 S.W.2d 564 (Tex. Civ. App. 1949) error ref. n.r.e., although the case may be distinguishable since it involved the claim of an original contractor who was regarded by the court as being entitled to a constitutional lien. For a recent case applying the same rule to a derivative claimant see *Maryland Cas. Co. v. Barron-Britton, Inc.*, 327 S.W.2d 769 (Tex. Civ. App. 1959), aff'd on other grounds, ___ Tex. ___, 336 S.W.2d 622 (1960). See *Myers v. Wood*, 95 Tex. 67, 65 S.W. 174 (1901); *Stuart v. Broome*, 59 Tex. 466 (1883).

¹⁰³ *Ball v. Davis*, 118 Tex. 534, 18 S.W.2d 1063 (1929).

¹⁰⁴ *Oil Field Salvage Co. v. Simon*, 140 Tex. 456, 168 S.W.2d 848 (1943).

¹⁰⁵ *Union Indem. Co. v. Rockwell*, 57 S.W.2d 90 (Tex. Comm. App. 1933); *Lebo v. Dochen*, 310 S.W.2d 715 (Tex. Civ. App. 1958); *Capitol Steel & Iron Co. v. Standard Acc. Ins. Co.*, 299 S.W.2d 738 (Tex. Civ. App. 1957); *Trinity Universal Ins. Co. v. Woitaske*, 148 S.W.2d 235 (Tex. Civ. App. 1941) error dism. judgm. cor.

¹⁰⁶ *Lebo v. Dochen*, supra note 105.

nishing of specified labor or material, or both, for a lump-sum price. Among the cases holding that filing a copy of the contract is not enough is *Turner Roofing & Supply Co. v. Union Pac. Ins. Co.*,¹⁰⁷ in which the court said: "The objects sought to be achieved by itemization are defeated by a grouping of items so they can not be analyzed, investigated, and disputed by the owner or surety charged with the lien."¹⁰⁸ The preferable view is taken in *Maryland Cas. Co. v. Barron-Britton, Inc.*,¹⁰⁹ in which a derivative claimant who had furnished labor and material to the prime contractor filed an itemized account which consisted of his contract to install certain ventilating equipment. The items were set out in detail by manufacturers' model numbers, but there was no breakdown as to price, which was given as a total sum, and there was no itemization of labor. Distinguishing cases which did not involve lump-sum contracts, the court held this to be sufficient. It reasoned that it would be artificial to require a claimant to make an arbitrary assignment of portions of the contract price to individual items. The court said: "If any unit cost more or less than he anticipated, he would be required to juggle the reckoned cost of some other item to produce the total figure. This would obviously make his affidavit farcial, and hoodwink the surety if it seeks for truth."¹¹⁰

If the statutes are to be revised, it is seriously doubted that the requirement of itemization should be retained. In its most recent expression on the subject, the Supreme Court of Texas stated the reason behind the requirement as follows:

If, upon the default of the prime contractor, a subcontractor seeks to fix a lien against private property under the provisions of Section 3, Article 5453, it is important that the owner of the property be advised as to the items of material and labor furnished, and the prices thereof, for the reason that he cannot be held liable for more than the reasonable value of such items.¹¹¹

While the protection to the owner should not be diminished, it seems that it could be insured by more practical means. It is unlikely that the owner will be able to evaluate the reasonableness of the prices assigned to various items. Certainly, he would be guilty of rash action if he made an independent judgment, based solely on

¹⁰⁷ 289 S.W.2d 407, 410 (Tex. Civ. App. 1956) error ref. n.r.e.

¹⁰⁸ Accord: *Capitol Steel & Iron Co. v. Standard Acc. Ins. Co.*, 299 S.W.2d 738 (Tex. Civ. App. 1956).

¹⁰⁹ 327 S.W.2d 769, 771 (Tex. Civ. App. 1959), aff'd on other grounds, ___Tex.___, 336 S.W.2d 622 (1960).

¹¹⁰ In accord, see the carefully reasoned opinion by Judge McClendon in *Royal Indem. Co. v. American Dist. Steam Co.*, 88 S.W.2d 1091 (Tex. Civ. App. 1935) error ref.

¹¹¹ *Maryland Cas. Co. v. Barron-Britton, Inc.*, ___Tex.___, 336 S.W.2d 622 (1960).

the information contained in the itemized account, that the prices coincided with value and that the account was accurate and the claim just. Although a formal procedure is provided by statute by which he may assume that the claim is accurate and valid, and pay the same when due if the contractor does not object to it within ten days after receiving a copy of the notices,¹¹² it is unlikely that this procedure is often followed. Undoubtedly, in most cases, the owner will pay nothing more to the contractor until any dispute between the contractor and the derivative claimant has been settled and arrangements made for releasing the lien.

An unduly strict interpretation of the requirements of article 5456,¹¹³ which is the statutory form for the affidavit which must be filed with the itemized account, has also resulted in the loss of the lien in a number of cases.¹¹⁴ The description of the property is a requirement which should be retained for the protection of third parties subsequently dealing with the property, but the most general kind of identification should serve in a dispute between the owner and the lien claimant. The statutory form contains the allegation that "all just and lawful offsets, payments and credits known to affiant" have been allowed.¹¹⁵ Failure to include this statement is fatal.¹¹⁶ Omission of the statement that the prices are "just and reasonable" results in a denial of the lien.¹¹⁷ A statement that "said account is just, due, and unpaid," is not equivalent to a statement that the prices are just and reasonable.¹¹⁸ Similarly, a statement that "the foregoing list of materials and prices is correct" is not a substantial compliance with the requirement that the affidavit state that the prices are "just and reasonable and that the same is unpaid. . . ."¹¹⁹

The statutes should be amended to obviate the necessity for these formal requirements. Questions concerning the reasonableness of price, the justness of the debt, the allowance of offsets, and similar matters are ones appropriate for litigation, but no useful purpose can be seen in requiring the claimant to allege his conclusions on them in the affidavit which he files.

¹¹² Tex. Rev. Civ. Stat. Ann. art. 5454 (1958). See also Tex. Rev. Civ. Stat. Ann. art. 5463 (1958).

¹¹³ Tex. Rev. Civ. Stat. Ann. (1958). For the requirements as to the lien on mineral properties, see Tex. Rev. Civ. Stat. Ann. art. 5467a (1958).

¹¹⁴ See, e.g., *Southern States Steel Corp. v. Fidelity & Deposit Co.*, 80 F.2d 466 (5th Cir. 1935); *Detroit Fid. & Sur. Co. v. State*, 124 Tex. 145, 76 S.W.2d 492 (1935).

¹¹⁵ Tex. Rev. Civ. Stat. Ann. art. 5456 (1958).

¹¹⁶ *Lebo v. Dochen*, 310 S.W.2d 715 (Tex. Civ. App. 1958).

¹¹⁷ *Detroit Fid. & Sur. Co. v. State*, 124 Tex. 145, 76 S.W.2d 492 (1934).

¹¹⁸ *Ibid.*

¹¹⁹ *Southern States Steel Corp. v. Fidelity & Deposit Co.*, 80 F.2d 466 (5th Cir. 1935).

VI. PROTECTION OF OWNER AGAINST UNKNOWN CLAIMS OF DERIVATIVE CLAIMANTS

As a general proposition, the owner may safely pay the contractor any money due him under the terms of the contract, so long as the owner has received no written notices of claims by derivative claimants.¹²⁰ Even if notices have been received, the owner will be protected if he makes payments to the contractor according to the terms of the contract, so long as he retains a sufficient amount to pay the claims asserted in the notices received by him.¹²¹ This is because, as previously mentioned, the notice to the owner by a derivative claimant operates in much the same way as a writ of garnishment.¹²² It can impound no more than the amount which the owner still owes to the contractor at the time the notice is received. Moreover, article 5463 expressly provides that "the owner in no case shall be required to pay, nor his property be liable for, any money that he may have paid to the contractor before the fixing of the lien or before he has received written notice of the debt."¹²³ It appears, however, that an exception to this general rule is created by article 5469,¹²⁴ which requires the owner to retain in his hands ten per cent of the contract price until thirty days after the completion of the job for the benefit of artisans or mechanics. In the one case construing this statute it was held that the owner was liable to artisans and mechanics to the extent of ten per cent of the price when she had paid the contractor in full on completion, in accordance with the terms of the contract, even though she had received no notice of the unpaid claims at the time of her payment.¹²⁵ All parties apparently assumed this result on the particular point, and the conflict between this decision and article 5463, quoted above, was not called to the attention of the court.

Even those owners who have the benefit of legal counsel are reluctant to insist on retention of ten per cent of the contract price for a period of thirty days after completion when the contract is otherwise. Yet, it seems to be the only way that the owner can be fully protected. It seems unreasonable to require this retention, which

¹²⁰ See *First Nat'l Bank v. Lyon-Gray Lumber Co.*, 110 Tex. 162, 217 S.W. 133 (1919); *Nichols v. Dixon*, 99 Tex. 263, 89 S.W. 765 (1905); *Rotsky v. Kelsay Lumber Co.*, 228 S.W. 558 (Tex. Comm. App. 1921).

¹²¹ *Ibid.*

¹²² See authorities cited *supra* note 86.

¹²³ Tex. Rev. Civ. Stat. Ann. (1958). To the same effect see the statutes relating to liens on mineral properties, Tex. Rev. Civ. Stat. Ann. arts. 5476c, 5478 (1958).

¹²⁴ Tex. Rev. Civ. Stat. Ann. (1958).

¹²⁵ *Miller v. Harmon*, 46 S.W.2d 342 (Tex. Civ. App. 1932).

results in inconvenience to the owner, the lender, and the contractor, to say nothing of interest costs to the contractor, for the benefit of the artisan or mechanic who failed to give notice of his claim prior to the completion of the project; and this is especially true in light of the almost universal custom, on small jobs at least, to pay in full upon completion.

VII. PRIORITIES

Although any comprehensive treatment of the priority of liens is beyond the scope of this Article, it is necessary to set out some of the basic principles in order to give practical meaning to the discussion of the manner in which liens are acquired. What follows is necessarily a sketchy outline.

Article 5468 states that aside from the preference lien for artisans and mechanics, to the extent of ten per cent of the contract price, which is provided for in article 5469, "the liens for work and labor done or material furnished . . . shall be upon an equal footing without reference to the date of filing the account or lien."¹²⁶ As a practical matter, the courts have found it impossible to give a literal interpretation to this statute under some circumstances. If there is a general contract for the construction or repair job, all derivative claimants who give timely notice and perfect liens by proper filing are entitled to have their claims relate back to the date of the general contract.¹²⁷ If the owner has sufficient funds on hand, owing to the general contractor, at the time the notices are received, all claimants will be paid in full.¹²⁸ This, of course, is seldom the situation in the litigated cases. More often the amount retained by the owner is insufficient. In such a case, if the owner makes no further payment to the contractor after receiving the first notice, all claimants will share in the amount on hand equally on a pro rata basis.¹²⁹ If, however, after receiving notice from one or more claimants, the owner retains enough to pay them, and then makes a proper payment to the contractor in accordance with the terms of the contract, this closes a class; and those who gave the early notice (*i.e.*, before the payment) will share on a pro rata basis equally among themselves, but those subsequently giving notice will be in an inferior class and

¹²⁶ Tex. Rev. Civ. Stat. Ann. (1958).

¹²⁷ Oriental Hotel Co. v. Griffiths, 88 Tex. 574, 33 S.W. 652 (1895).

¹²⁸ See cases cited *infra* note 129.

¹²⁹ First Nat'l Bank v. Lyon-Gray Lumber Co., 110 Tex. 162, 217 S.W. 133 (1919); Rotsky v. Kelsay Lumber Co., 228 S.W. 558 (Tex. Comm. App. 1921). See Nichols v. Dixon, 99 Tex. 263, 89 S.W. 765 (1905).

will share only in such excess as the owner may then have on hand free from the claims of the earlier class.¹³⁰ If there is no general contract, so that the owner is dealing directly with materialmen and those who would normally be subcontractors, then the date of priority of each claimant is the date when he furnishes labor or materials;¹³¹ or if he does so under a contract with the owner, then presumably the date of the contract.¹³²

The distinction between the situation where there is a general contract and where no such contract exists, seems to have been drawn by the court for the purpose of limiting, in so far as possible, the danger to subsequent encumbrances and purchasers which arises out of the application of the relation-back doctrine.¹³³ It has long been established that where there is a general contract for the work, all derivative claimants who perfect their liens within the time prescribed by statute will take precedence over a subsequent mortgagee or purchaser, even though such person may record his deed or mortgage before any lien claimant has filed his claim.¹³⁴ This is because all such liens have their "inception" prior to the date of the subsequent deed or mortgage. If there is no general contract, a deed of trust taken and recorded after the work begins will take precedence over the liens of claimants who furnish labor or materials after the recording of the deed of trust.¹³⁵

The cases seem to be almost uniform in the view that within the time permitted for the perfection of liens, there can be no such thing as a bona fide purchaser or mortgagee. As stated in *Keating Implement & Mach. Co. v. Marshall Elec. Light & Power Co.*,¹³⁶ "Within the period of time allowed by the statute for the lien to be fixed by being recorded, we think every person dealing with the

¹³⁰ *Ibid.*

¹³¹ *McConnell v. Mortgage Inv. Co.*, 157 Tex. 572, 305 S.W.2d 280 (1957); *Pierce v. Mays*, 277 S.W.2d 155 (Tex. Civ. App. 1954), *aff'd* on other grounds, 154 Tex. 487, 281 S.W.2d 79 (1955). It seems that if there is a general contract, all liens arising out of the job, even though not based on derivative claims under the general contract, will relate back to and take a priority date as of the date of the contract. *Newman v. Coker*, 310 S.W.2d 354 (Tex. Civ. App. 1958).

¹³² See *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S.W. 652 (1895); *Investor's Syndicate v. Dallas Plumbing Co.*, 61 S.W.2d 1039 (Tex. Civ. App. 1933).

¹³³ See *McConnell v. Mortgage Inv. Co.*, 157 Tex. 572, 305 S.W.2d 280 (1957).

¹³⁴ *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S.W. 652 (1895); *D. Sullivan & Co. v. Texas Briquette & Coal Co.*, 94 Tex. 541, 63 S.W. 307 (1901).

¹³⁵ *McConnell v. Mortgage Inv. Co.*, 157 Tex. 572, 305 S.W.2d 280 (1957); *Pierce v. Mays*, 277 S.W.2d 155 (Tex. Civ. App. 1954), *aff'd* on other grounds, 154 Tex. 487, 281 S.W.2d 79 (1955).

¹³⁶ 74 Tex. 605, 608, 12 S.W. 489, 490 (1889). See also *Denny v. White House Lumber Co.*, 150 S.W.2d 296 (Tex. Civ. App. 1941) *error* *dism. judgm. cor.*; *Longhart Supply Co. v. Keystone Pipe & Supply Co.*, 26 S.W.2d 389 (Tex. Civ. App. 1930) *error* *ref.*

property is charged with notice of the existence of the lien, without evidence of the existence of actual notice."

In *Tomlinson v. Higginbotham Bros. Co.*¹³⁷ it was held that there can be no bona fide purchaser of property while construction on such property is in progress. The court suggests in dictum, however, that this would not be true had the work been completed at the time the deed of trust was taken, but the cases cited in support of the statement are not in point. The dictum of the *Tomlinson* case is worthy of study. Ideally, all claims to real property should appear upon the records. There seems to be no probability that this ideal can be realized, and since a purchaser or mortgagee is put upon inquiry as to the rights of persons in actual possession of land, there would be little additional hazard to the general public in a rule which would also give constructive notice of incipient liens from the fact that visible work in construction or repair is in progress, if the rule were limited to that situation. This would spare the materialman or workman the expense and inconvenience of immediately filing a claim in every case, and at the same time give a measure of protection to those subsequently dealing with the property. It must be remembered that the time period within which the lien must be filed begins to run from the date of the accrual of the indebtedness, rather than from the completion of the job, so that under the present law there is always the danger of incipient liens even though the work may have been completed months, or even years, previously. A maximum period should be specified.

The present rules governing the priorities between the holder of a prior deed of trust or vendor's lien and subsequent mechanics' and materialmen's liens seem as satisfactory and fair as any that could be devised. Article 5459 provides that mechanics' and materialmen's liens shall have preference over prior liens on the real estate, insofar as the improvements resulting in the liens are concerned, and that the liens on such improvements may be foreclosed and sold apart from the real estate, provided that the pre-existing lien "shall not be affected thereby."¹³⁸ There was conflict in the early cases as to whether the mechanics' lien could receive a priority to the extent that the improvement had enhanced the value of the real estate when the entire property, including the improvement, was sold under foreclosure. The doubts were resolved by the supreme court in *Hamman v. McMullen*¹³⁹ in which it was held that the subsequent mechanics'

¹³⁷ 229 S.W.2d 920 (Tex. Civ. App. 1950).

¹³⁸ Tex. Rev. Civ. Stat. Ann. (1958).

¹³⁹ 122 Tex. 476, 62 S.W.2d 59 (1933).

lien is entitled to priority only if it is possible to remove the improvement and sell it apart from the real estate without substantial or material damage to the real estate. In the recent case of *Freed v. Bozman*,¹⁴⁰ it is made clear that the test is not whether the item is annexed in such a way as to become a fixture, but whether it can be removed without material damage to the land.

VIII. CONCLUSION

There seems to be a complete agreement among attorneys who have occasion to use the lien statutes that a general revision is long overdue. It is debatable as to whether a clean sweep should be made of the existing statutes and an entirely new code drafted. It is the view of the writer that since many aspects of our present law are settled and are familiar to both attorneys and laymen directly concerned, it would be preferable to retain the existing structure as a basic outline. This method would have the additional advantage of less resistance from groups fearful of loss of benefits enjoyed under the present statutes. While the drafting of amendments should be done by a committee of the state bar, it should not be undertaken without close and constant consultation with representatives of the trade associations in the building industries. There should also be a partisan representation of the general public or the hypothetical "owner." It would be too much to expect that any revision could completely satisfy the demands of all interests or that there would be any general agreement with the solutions suggested in this Article. Even so, the product of any careful study would inevitably lead to some improvement.

¹⁴⁰ 304 S.W.2d 235 (Tex. Civ. App. 1957) error ref. n.r.c.