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Coping with Texas Mechanics' Liens: A Lender's Guide to Priorities Symposium - Real Estate Finance - An Emphasis on Texas Law.

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COPING WITH TEXAS MECHANICS' LIENS: A LENDER'S GUIDE TO PRIORITIES

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I. INTRODUCTION

The mechanics' lien priority statute provides two means by which a contractor or materialman can achieve priority over a mortgage lien on real estate.¹ First, if he can cause his lien to have its "inception" prior to the recordation of a competing mortgage,

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1. TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980-1981) states:

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

The terms, "contractor's lien" and "mechanic's lien," are used in this article to refer to the statutory lien afforded to workmen and materialmen alike. The term, "contractor," is used to refer to both original contractors and subcontractors.

his mechanic's lien, when perfected,² will be superior to the mortgage lien on the land and all improvements. Secondly, irrespective of the time of inception relative to a competing mortgage lien, the statute gives to the mechanic's lien claimant a preferential first lien on "removable" improvements—those which can be severed from the realty without injuring the land, the remaining improvements, or the improvements being removed. Once perfected, the preference lien on such improvements is superior to the lien created by any previously recorded mortgage.

This article examines some important issues which arise in connection with priority contests between mortgage lenders and claimants holding statutory mechanic's liens.³ Its purpose is to impart to counsel for mortgage lenders a better understanding of the rights of contractors and materialmen to priority by "prior inception" and "statutory preference."

II. PRIORITY BY PRIOR INCEPTION

The term "inception" is defined in section 2 of the priority statute⁴ to mean the occurrence of the earliest of one of three categories of events: (1) recordation of the contractor's written contract for construction of improvements or delivery of material;⁵ (2) recordation of an affidavit as to any oral contract for the construction of improvements or delivery of material;⁶ or (3) "[t]he actual com-

2. The procedures for the perfection of mechanics' liens are set forth in TEX. REV. CIV. STAT. ANN. art. 5453 (Vernon Supp. 1980-1981).

3. The question whether the priority statute applies to constitutional liens authorized by TEX. CONST. art. XVI, § 37 has not been addressed by the Texas Supreme Court. One court of civil appeals has suggested on two occasions, however, that the priority statute applies only to statutory liens. See *Home Sav. Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386, 389 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); *McConnell v. Mortgage Inv. Co.*, 292 S.W.2d 636, 640-41 (Tex. Civ. App.—El Paso 1955), *aff'd*, 157 Tex. 572, 305 S.W.2d 280 (1957).

4. TEX. REV. CIV. STAT. ANN. art. 5459, § 2 (Vernon Supp. 1980-1981). Enacted in 1971, the statutory definition was the result of emergency legislation designed to circumvent the effects of the first opinion issued by the supreme court in the case of *Irving Lumber Co. v. Alltex Mortgage Co.*, 14 Tex. Sup. Ct. J. 212, 213 (February 2, 1971), which declared that a mechanic's lien could have its inception on the date of an unrecorded oral contract for a portion of the work necessary to complete a dwelling. The opinion was later withdrawn, and the case was disposed of on other grounds. *Irving Lumber Co. v. Alltex Mortgage Co.*, 468 S.W.2d 341, 343 (Tex. 1971).

5. TEX. REV. CIV. STAT. ANN. art. 5459, § 2(b) (Vernon Supp. 1980-1981).

6. *Id.* § 2(c). The statute directs that the affidavit should state that the oral contract is one for construction of improvements but, of course, that is inappropriate if the contract is

mencement of construction of the improvements or the delivery of material to the land upon which the improvements are to be located for use thereon for which the lien herein provided results, provided such commencement or material is actually visible from inspection of the land upon which the improvements are being made.”⁷

Contractors seldom utilize the recordation alternatives for causing the inception of their liens. The expense and inconvenience of recording contracts and affidavits are considered by most contractors to be prohibitive. Further, many contractors believe that recordation is an exercise in futility. If a contractor records his contract prior to recordation of a construction lender's mortgage, it is likely that the lender will merely refuse to close the construction loan until the contractor's lien is subordinated to the mortgage lien.⁸ As a practical matter, then, the event of inception which is most likely to threaten a mortgage lender's priority position is the actual commencement of construction or delivery of material to the site.

Ideally, a mortgage lender will make a careful inspection of the construction site immediately prior to closing and ascertain that there is no visible evidence of construction or delivery of material. If there has been no previous recordation of contracts or affidavits, he may proceed to close and fund his loan, secure in the knowledge that he has a first lien on the land and all non-removable improvements. Occasionally, however, the lender may find that some kind of activity has commenced on the site prior to recordation of the mortgage. In order to evaluate the significance of that on-site activity, he must be acutely aware of the specific events which constitute “commencement of construction” and “delivery of material.”

Commencement of Construction

Texas courts have been slow to develop a definitive test for commencement of construction, probably because the making of the

for the delivery of materials. This ambiguity is apparently the result of an oversight. See Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 694 (1972).

7. TEX. REV. CIV. STAT. ANN. art. 5459, § 2(a) (Vernon Supp. 1980-1981).

8. It should be noted, however, that even if the first contractor to perform on the project subordinates his lien to the mortgage, the liens of subsequent, non-waiving contractors may nevertheless “relate back” to the time of the recordation of the contract or the performance of work by the first contractor. See text accompanying notes 49-98 *infra*.

contract was the usual focal point of the inception inquiry, rather than the beginning of work,⁹ until the enactment of section 2 of the priority statute in 1971. The first significant attempt at a definition was made by the Corpus Christi Court of Civil Appeals in *S.K.Y. Investment Corp. v. H. E. Butt Grocery Co.*,¹⁰ where site-clearing activities were held insufficient to constitute the commencement of construction of a building.¹¹ The court sought to align Texas with the majority of other United States jurisdictions, relying substantially on a 1965 A.L.R. Annotation¹² which compared decisions from various states on the issue. As representative of the majority rule, the court quoted from the Maryland case of *Rupp v. Earle H. Cline & Sons, Inc.*:¹³

[T]here must be (1) a manifest commencement of some work or labor on the ground which everyone can see and recognize as a commencement of a building and (2) the work done must have been begun with the intention and purpose then formed to continue the work until the completion of the building.¹⁴

The *Rupp* test was relied upon in *Perkins Construction Co. v. Ten-Fifteen Corp.*¹⁵ to defeat the claim of a contractor whose work consisted of general site clearance¹⁶ and in *Justice Mortgage Investors v. C. B. Thompson Construction Co.*¹⁷ to deny priority to a contractor who had staked the site and moved a tool shed on the

9. In 1887, the supreme court held in *Thomas Trammell & Co. v. Mount*, 68 Tex. 210, 4 S.W. 377 (1887), that although a mechanic's lien is not perfected until compliance with the statutory filing and notice requirements, it "relates back" for priority purposes to the time when the materials were furnished or the labor performed by the lien claimant. *Id.* at 215, 4 S.W. at 379. At that time article 5459 provided that a mechanic's lien was superior to any other lien on the land except a lien existing at the time of the "accrual" of the mechanic's lien. Shortly thereafter, the statute was amended to substitute the phrase "inception of the lien" for "accrual of the lien." In *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S.W. 652 (1895), the supreme court held that the legislature intended by that change to permit relation back not only to the beginning of work, but even to the time that the work was contracted for. *Id.* at 583-86, 33 S.W. at 661-63. See Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 689 (1972).

10. 440 S.W.2d 885 (Tex. Civ. App.—Corpus Christi 1969, no writ).

11. *Id.* at 889.

12. *Id.* at 889 (citing Annot., 1 A.L.R.3d 822 (1965)).

13. *Id.* at 889 (citing *Rupp v. Earle H. Cline & Sons, Inc.*, 230 Md. 573, 188 A.2d 146 (1963)).

14. *Rupp v. Earle H. Cline & Sons, Inc.*, 230 Md. 573, 188 A.2d 146, 149 (1963).

15. 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ).

16. See *id.* at 499.

17. 533 S.W.2d 939 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.).

property.¹⁸

Later, in *Blaylock v. Dollar Inns of America, Inc.*,¹⁹ the Tyler Court of Civil Appeals resisted the promulgation of a standard such as the *Rupp* test, which it construed to require construction of a component part of a building, and declared that the matter should be left to a case-by-case analysis.²⁰ Perceiving the essential issue to be the visibility of commencement of work, the court expressed the view that the activities need only be of a character to put anyone inspecting the land on notice that construction work has commenced.²¹ Under its "notice test," visible preparatory activities, such as staking and erecting batter boards, were held sufficient to constitute the commencement of construction.²² On the appeal of the case—in *Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc.*²³ (*Blaylock*)—the supreme court partially reversed the Tyler court, and, in doing so, tran-

18. *See id.* at 944.

19. 548 S.W.2d 924 (Tex. Civ. App.—Tyler 1977), *rev'd in part*, 576 S.W.2d 794 (Tex. 1978).

20. *Id.* at 931.

21. *Id.* at 931.

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

Id. at 931.

22. *Id.* at 931. The following decisions from other jurisdictions set forth a "notice test" similar to that expressed by the Tyler court: *Louisiana Nat'l Bank v. Triple R Contractors, Inc.*, 345 So. 2d 7, 11 (La. 1977) ("work begun" must be visible upon inspection, so that a prospective lender might be warned that his mortgage would be subordinate to mechanics' liens; therefore, a four-inch submerged sewerage line insufficient for commencement); *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E.2d 785, 791-92 (1978) (partial clearing of the site and staking of the outlines of the building enough for commencement as it is a visible commencement of an improvement sufficient to put a prudent man on notice that a possible improvement is underway); *Liberty Nat'l Bank & Trust Co. v. Kaibab Indus. Inc.*, 591 P.2d 692, 693-94 (Okla. 1978) (visual examination of the site relied upon for finding on commencement; where site overgrown with grass and weeds, no commencement found).

The drafters of the mechanic's lien provisions of the Uniform Simplification of Land Transfers Act (USLTA) incorporated a notice test in their proposed legislation. Section 5-207 of USLTA permits preparation of the real estate, if readily visible on a reasonable inspection of the site, to constitute "visible commencement." For a thorough discussion of article 5 of USLTA, see Comment, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 St. MARY'S L.J. 113 (1980).

23. 576 S.W.2d 794 (Tex. 1978).

scended both its "notice test" and the *Rupp* test, as well.

The supreme court found that the Tyler court had erred by exalting "visibility" as if it were the only statutory requirement. To determine the character of activities which will cause the inception of the lien, the *Blaylock* court deemed it essential to ascertain the precise meaning of the phrase, "the actual commencement of construction of the improvements," as used by the legislature in article 5459.²⁴ The court concluded that the statutory phrase does not encompass work merely preparatory to the construction of an improvement, such as erecting stakes and batter boards.²⁵

The court declared that "where a building or structure is the principal 'improvement' involved," a test is needed which excludes activities merely preparatory to the construction of the building or structure.²⁶ That conclusion was based on its observation that, by use of the term "actual commencement"²⁷ in the priority statute, the legislature must have intended to require "the placing of something of permanent value on the land, as opposed to preliminary or preparatory activities or structures"²⁸ and that preparatory activities are excluded by a majority of other jurisdictions. Noting that "under most circumstances" the construction of a building or structure entails excavation or the laying of a foundation, the court held that if the improvement is a building or structure, the excavation for, or the laying of, the foundation constitutes the commencement of construction.²⁹

The *Blaylock* court further found that performance of a specific

24. *Id.* at 801.

25. *Id.* at 802.

26. *Id.* at 802.

27. *Id.* at 802. TEX. REV. CIV. STAT. ANN. art. 5459, § 2 (Vernon Supp. 1980-1981) provides in part that inception occurs upon "the actual commencement of construction."

28. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 802 (Tex. 1978).

29. *Id.* at 802. It has been held in several other jurisdictions that if a building is involved, the excavation for, or the laying of a foundation, constitutes commencement of construction. See *George M. Newhall Eng'r Co. v. Egolf*, 185 F. 481, 483-84 (3d Cir. 1911) (applying Pennsylvania law); *Simons Brick Co. v. Hetzel*, 72 Cal. App. 1, 236 P. 357, 358 (1925); *Scott v. Goldinhorst*, 123 Ind. 268, 24 N.E. 333, 334 (1890); *Kiene v. Hodge*, 90 Iowa 212, 57 N.W. 717, 719 (1894); *Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co.*, 184 Kan. 202, 336 P.2d 463, 466 (1959); *National Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 87 N.W.2d 32, 36 (1957); *Dickason Goodman Lumber Co. v. Foresman*, 120 Okla. 168, 251 P. 70, 72 (1926); *Lansing v. Campbell*, 41 R.I. 347, 101 A. 1, 1-2 (1917); *Williams Lumber & Supply Co. v. Poarch*, 221 Tenn. 540, 428 S.W.2d 308, 311 (1968).

activity defined in article 5452³⁰ as an “improvement” constitutes an event of inception.³¹ That statute prescribes a lien for construction or repair of any “house, building or improvement whatever,”³² which, in *Fagan & Osgood v. Boyle Ice Machine Co.*,³³ was construed to mean any structure permanently attached to real estate.³⁴ Thereafter, however, the statute was amended from time to time so that the term “improvement” was specifically defined to encompass the following specific structures and activities:

[A]butting sidewalks and streets and utilities therein; *clearing, grubbing, draining or fencing of land*; wells, cisterns, tanks, reservoirs, or artificial lakes or pools made for supplying or storing water; all pumps, siphons, and windmills or other machinery or apparatus used for raising water for stock, domestic use or for irrigation purposes; *and the planting of orchard trees, grubbing out of orchards and replacing trees, and pruning said orchard trees.* [Emphasis added.]³⁵

The italicized items in the above-quoted portion of the statute are presumably the activities to which the *Blaylock* court alluded. It held that merely beginning the performance of any such activity will constitute the commencement of the construction of an “improvement” within the meaning of the priority statute.³⁶

Blaylock thus promulgated a more inclusive and objective formula than any of the courts of civil appeals had devised:

[U]nder the commencement of construction category in Article 5459, the inception of the mechanic's and materialman's lien occurs only when the activity (1) is conducted on the land itself; (2) is visible upon the land; and (3) constitutes either (a) an activity which is defined as an improvement under the Texas statute, or (b) the excavation for or the laying of the foundation of a building or a structure.³⁷

30. TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980-1981).

31. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 801-02 (Tex. 1978).

32. TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980-1981).

33. 65 Tex. 324 (1886).

34. *Id.* at 331-32.

35. TEX. REV. CIV. STAT. ANN. art. 5452, § 1 (Vernon Supp. 1980-1981).

36. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 802 (Tex. 1978).

37. *Id.* at 802.

One can conceive of problems in applying the *Blaylock* test. A minor difficulty is that it apparently will not permit inception to occur, at least under the "commencement of construction" category, if the erection of a structure entails neither an activity specifically defined as an improvement nor the excavation or laying of a foundation. A lien is provided by article 5452 for construction or repair of any structure permanently attached to realty, but the lien is of little value if it has no inception.³⁸ The court's assurance that "under most circumstances" the structure will require excavation or laying of a foundation is of small comfort.

The most confusing aspect of the court's holding is that, having stated its intention to exclude activities preparatory to construction if a building is the *principal* improvement, it was willing to permit preparatory activities to mark the inception of liens on a building if they may be equated with "improvement" activities defined in article 5452. On one of the sites involved in the case, the performance of site-clearing activities, including removal of trees and a swimming pool—all of which took place prior to excavation for the foundation—was held to constitute the commencement of construction of a building. These activities were found to be encompassed by the definition of "improvement" because they are in the nature of "clearing" and "grubbing" land.³⁹ Yet it is obvious that these activities, although they may constitute a separate "improvement" under the statutory definition, were merely preparatory to the construction of the building itself.

The court was caught in an interesting dilemma. It could not strictly adhere to the view that, if the *principal* improvement is a building, all liens have their inception upon the commencement of foundation work, lest contractors who perform an earlier "improvement" activity have their priorities postponed until the commencement of the foundation. On the other hand, to treat the earlier activity as a separate improvement from the building would result in an awkward dichotomy of lien priorities: the lien of a contractor

38. In some cases, of course, delivery of material may provide the inception of the lien for work on such a structure. A contractor who provides only labor on the structure would not benefit from that event of inception, however—unless it should be held that all claimants have a common lien which has its inception upon the beginning of the first work.

39. *Id.* at 803. See also *Reliable Life Ins. Co. v. Brown & Root, Inc.*, 607 S.W.2d 621, 629 (Tex. Civ. App.—Waco 1980, no writ) (bulldozing road deemed to be "clearing" and "grubbing").

engaged in site-clearing would have its inception upon the commencement of that activity, while the inception of the lien for contractors involved in excavation for the foundation and other work on the building could not occur prior to the beginning of the excavation.⁴⁰ The necessary compromise was that the court accept preparatory "improvement" activities as marking the commencement of construction of the building.

The language used in the statute to specify the improvement activities invites many analogies. Can the erection of forms for pouring the foundation or boundary stakes connected by string be in the nature of "fencing" land? Is landscaping with plants the rough equivalent to planting orchard trees? Or must fruit-bearing plants be used? Is clipping hedges, cutting tree limbs, or mowing grass the equivalent of clearing and grubbing, or the pruning of orchard trees? Resourceful counsel will, no doubt, see similarities between many preparatory activities and the improvement activities defined in article 5452.

Delivery of Material

Having found the definition of "improvement" to be the key to a determination whether construction has commenced, the *Blaylock* court saw the statutory definition of "material" as the pivotal inquiry in determining whether "delivery of material" has occurred.⁴¹ It rejected the premise of the Tyler court that the term "material" should be given a liberal construction and that the sole criterion is the adequacy of notice on inspection of the site.⁴² It held that in

40. The equality principle of the "common lien doctrine," discussed in the text accompanying notes 49 through 118 *infra*, would be violated if differing priorities are assigned to contractors on the same project.

41. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 803-04 (Tex. 1978). TEX. REV. CIV. STAT. ANN. art. 5452, § 2(b) (Vernon Supp. 1980-1981) defines the term "material" as follows:

(1) Material, machinery, fixtures or tools incorporated in work, or consumed in the direct prosecution of the work, or ordered and delivered for such incorporation or such consumption.

(2) Rent at a reasonable rate and actual running repairs at a reasonable cost for construction equipment, used in the direct prosecution of the work at the site of the construction or repair, or reasonably required and delivered for such use.

(3) Power, water, fuel and lubricants, when such items have been consumed or ordered and delivered for consumption in the direct prosecution of the work.

42. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 802-03 (Tex. 1978).

order for delivery of material to cause the inception of the lien, the items delivered must constitute "material" within the strict definition of that term under article 5452.⁴³ For example, a barrel of water or fuel will qualify, but batter boards, stakes, or a sign announcing commencement of the project will not. Moreover, in accordance with the statute, the items must be intended to be consumed during the direct prosecution of the work or incorporated in the permanent structure.⁴⁴ The court's test was succinctly framed:

In order for the delivery of material to constitute inception of a lien, the court must find (1) that there has been a delivery of material to the site of construction, (2) that such material is visible upon inspection of the land, and (3) that such material constitutes either (a) material which will be consumed during construction, or (b) material which will be incorporated in the permanent structure.⁴⁵

In devising its tests for commencement of construction and delivery of material, the *Blaylock* court obviously was striving to implement the presumed intent of the legislature derived from a literal reading of the statutes. It is probable, however, that when the legislature evolved its statutory definitions of "improvement" and "material," it gave no consideration to the impact those provisions might have on the definition of inception.⁴⁶ It is also questionable whether the 62d legislature, in defining inception to include commencement of "improvements" and delivery of "material," meant to incorporate the definitions of those terms as set forth in article 5452.⁴⁷ The result of *Blaylock's* having compelled that incorpora-

43. *Id.* at 803.

44. *Id.* at 803-04. The court does not explain how a lender is to determine whether a pile of lumber, or any other materials on the site at the time of his inspection, will eventually be consumed or incorporated in the work. Under the *Blaylock* test, delivery of material used for batter boards and other preliminary work is not an event of inception. *Id.* at 803-04.

45. *Id.* at 803-04.

46. The activities defined as "improvement" were added to the statute at different times. "Clearing, grubbing, draining and fencing land" was added in 1917. 1917 Tex. Gen. Laws, ch. 171, § 1, at 383. In 1951, article 5452 was amended to include "grubbing out of domestic orchards, replacing trees, pruning, cultivating and caring for orchard trees." 1951 Tex. Gen. Laws, ch. 348, § 1, at 593. "Material" was not specifically defined prior to the Hardeman Act Amendment of 1961. Until that time the lien was given for delivery of "material, machinery, fixtures or tools." 1889 Tex. Gen. Laws, ch. 98, § 1, at 110, 9 H. GAMMEL, LAWS OF TEXAS 1138 (1898).

47. Article 5459, section 2 was enacted in great haste, principally to avoid the effects of the supreme court's initial opinion in *Irving Lumber Co. v. Alltex Mortgage Co.*, 14 Tex.

tion is that the event of inception may sometimes be determined by technicalities which have little relation to the notice function which the commencement rule is intended to perform.⁴⁸

The task of the lender inspecting the land prior to funding his mortgage loan has become more difficult. His inspection must be a careful one if he is to ascertain whether a swimming pool has been drained and covered over with dirt, trees cut down, or orchard trees planted. In addition, it may be necessary to inquire whether a can of fuel or water which was delivered to the site will be consumed during construction or whether a stack of lumber will be incorporated in the permanent structure. That inspection and inquiry must be undertaken in earnest because it will reveal not only the inception of the lien of any claimant who performed work antedating the recording of the mortgage, but, quite possibly, the liens of all subsequent workmen and materialmen, as well.

Sup. Ct. J. 212 (February 2, 1971), which declared that the making of an oral, non-general contract constituted the inception of a mechanic's lien. *Id.* at 213-14. The major concern of its draftsmen was to require notice placed of record before a contract could provide the inception of a lien. See TEX. REV. CIV. STAT. ANN. art. 5459, § 2 (Vernon Supp. 1980-1981); 1971 Tex. Gen. Laws, ch. 231, § 2, at 1082-83.

48. That the commencement rule is intended to serve a notice function cannot be doubted. See *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 583, 33 S.W. 652, 662 (1895) and text accompanying notes 54-67 *infra*. Historically, other jurisdictions have taken this view in construing statutes similar in effect to article 5459. For example, in *Mutual Benefit Life Ins. Co. v. Rowand*, 26 N.J. Eq. 389 (1875), *rev'd on other grounds sub nom. Jacobus v. Mutual Benefit Life Ins. Co.*, 27 N.J. Eq. 604 (1876), the court wrote:

The legislature intended to make the actual and visible commencement of the building, notice to all who might propose either to purchase or acquire liens upon the property. The commencement of actual operations on the ground for the erection of a building, is constructive notice to all such persons of the claims which those who may contribute work or materials for the building, may thereafter make against the property by virtue of the mechanics lien law.

Id. at 391-92.

For more recent cases which have exalted the notice function of the commencement rule, see *Diversified Mortgage Investors v. Gepada*, 401 F. Supp. 682, 685-86 (S.D. Iowa 1975); *Jim Walter Homes, Inc. v. Bowling*, 258 Ark. 28, 521 S.W.2d 828, 829 (1975); *Sheridan, Inc. v. Palchanis*, 172 So. 2d 872, 873 (Fla. Dist Ct. App. 1965); *Louisiana Nat'l Bank v. Triple R Contractors, Inc.*, 345 So. 2d 7, 11 (La. 1977); *Frank J. Klein & Sons, Inc. v. Laudeman*, 270 Md. 152, 311 A. 2d 780, 783 (1973); *Kloster-Madsen, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 226 N.W.2d 603, 607 (1975); *United Lumber Co. v. Minmar Inv. Co.*, 472 S.W.2d 630, 632-33 (Mo. Ct. App. 1971); *Aladdin Heating Corp. v. Trustees of the Central States*, 93 Nev. 257, 563 P.2d 82, 84 (1977); *Wayne Bldg. & Loan Co. v. Yarbrough*, 11 Ohio St. 2d 195, 40 Ohio Op. 2d 182, 228 N.E.2d 841, 857 (1967); *Goebel v. National Exchangers, Inc.*, 88 Wis. 2d 596, 277 N.W.2d 755, 760-63 (1979).

Whose Commencement or Delivery Provides the Inception of a Mechanic's Lien?

It is not yet clear to what extent Texas courts will permit the inception of a claimant's mechanic's lien to occur upon the commencement of work on a project by another. On some construction projects there is a single original contract covering all of the work to be accomplished. There are suggestions in the cases, but no clear holdings on proper facts, that the inception of the liens for subcontractors performing work required by such a "general" contract will occur upon the first performance by any workman or supplier.⁴⁹ Often, however, there is more than one original contractor in connection with a single project. The question arises whether an original contractor's lien has its inception upon the commencement of work under his own original contract, or the first performance of work on the project by anyone. On this issue, there is a considerable difference of opinion.⁵⁰

The inception issue becomes especially relevant in cases with the

49. Prior to the enactment of section 2 of the priority statute, a number of courts had been reluctant to permit an original contractor's lien to relate back to the making of the contract, or commencement of work, of another, but nevertheless, declared or implied that liens of subcontractors have their inception at the time a "general" construction contract is entered into. See *Ferris v. Security Sav. & Loan Ass'n*, 545 S.W.2d 208, 212 (Tex. Civ. App.—Eastland 1976, no writ); *Hubert Lumber Co. v. King*, 468 S.W.2d 503, 504 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.); *Finger Furniture Co. v. Chase Manhattan Bank*, 413 S.W.2d 131, 136-37 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *Lubbock Nat'l Bank v. Hinkle*, 397 S.W.2d 285, 287-88 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.); *Regold Mfg. Co. v. Maccabees*, 348 S.W.2d 864, 867 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.); *Newman v. Coker*, 310 S.W.2d 354, 363 (Tex. Civ. App.—Amarillo 1958, no writ); *Quinn v. Dickinson*, 146 S.W. 993, 999 (Tex. Civ. App.—Amarillo 1912, no writ). Since the making of a general contract generally precedes the beginning of work, the question whether the beginning of work could provide that inception was not reached in those cases. The 1971 amendment to the priority statute causes that question to become very important now, of course, because it prevents inception from occurring merely upon the *making* of the contract. Consequently, the beginning of work is often the only event of inception. The logic and policy of the referenced decisions support the view that the first performance of work required by a general contract is an event of inception for all liens arising on the project for the benefit of the general contractor and his subcontractors. It would further seem to follow from these cases that the recordation of a written general contract or an affidavit as to an oral general contract should provide the inception of all such liens.

50. See generally *Roller, Mechanic's Lien Priority Problems*, STATE BAR NEWSLETTER, REAL ESTATE, PROBATE & TRUST LAW SECTION, March, 1978, at 31; *Woodward, The Harde-man Act—Some Unanswered Questions*, 6 ST. MARY'S L.J. 1 (1974); *Youngblood, Mechanics' and Materialmen's Liens in Texas*, 26 SW. L.J. 665 (1972).

following chronology: (1) construction is commenced by a foundation contractor, (2) a deed of trust is recorded on the property by a lender after such commencement, and (3) work subsequently is commenced by a roofing contractor. Is it to be concluded that the lien of the foundation contractor is superior to the deed of trust while the lien of the roofing contractor is inferior? Or does the inception of the lien of the roofing contractor occur on the date of commencement of construction by the foundation contractor so that each has priority over the deed of trust?

Section 2(a) of article 5459 specifies that inception occurs at the moment of the commencement of construction or delivery of materials "for which the lien herein provided results." The resolution of the issue, then, would seem to depend upon the character of "the lien herein provided." Is it a "common lien" for all claimants which "results" from the commencement of work by the first performing workman on the site? Or does each contractor have a separate lien to secure payment for his own work, which results from the commencement of his own work?

If the common lien doctrine prevails, all mechanics' lien claimants on a construction project will have the same priority position. Thus, if a foundation contractor's lien has its inception by commencement of work prior to the recordation of a mortgage, the mortgagee would be in a second-lien position in deference to *all* claimants who work on the project regardless of the time of their contracts or performance relative to the recording of the mortgage. Of course, even if the "lien herein provided" is a common lien requiring a common priority position, a question remains whether the commencement of work by one who is not entitled to a lien—by virtue of waiver, payment, or failure to perfect—will "result" in the common lien. Stated another way, does the common lien "result" from commencement of work at the site by one who does not share in the lien? This issue is significant to mortgage lenders because the commencement of work by a contractor prior to recordation of a mortgage would not necessarily result in an inferior priority position for the lender if, by causing payment to be made for the earlier work, he could terminate the inchoate rights of other contractors to claim that the inception of their liens occurred upon the commencement of work performed anterior to recordation of the mortgage.

Three recent decisions of the courts of civil appeals seem to have

rejected the common lien doctrine, and one of them expressly denied relation back to the commencement of work for which payment had been made—*Ferris v. Security Savings & Loan Association*,⁵¹ *Perkins Construction Co. v. Ten-Fifteen Corp.*,⁵² and *First Continental Real Estate Investment Trust v. Continental Steel Co.*⁵³ Mortgage lenders should not place substantial reliance on this apparent trend, however. There has been a lamentable abundance of confusion in Texas courts concerning the common lien doctrine and the commencement-of-work rule, and these decisions seem more to contribute to that confusion than to resolve it. A review of the historical development of these issues is an essential prerequisite to a clear perspective on these three cases and the viability of the doctrines which they appear to reject.

The Historical Perspective. In the early case of *Oriental Hotel Co. v. Griffiths*,⁵⁴ the supreme court clearly held that all workmen and materialmen on a building project have a common lien:

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; that in this state of circumstances the lien to secure each has its inception. [Emphasis added.]⁵⁵

The intendment of *Oriental Hotel* scarcely can be doubted. The court squarely addressed the policy considerations, examined the decisions of other jurisdictions, and held that all workmen and materialmen on a building project have a common priority relative to an intervening mortgage lien. It further declared that a mortgage lien which attaches after the beginning of the first work is inferior to the lien of *all* claimants performing work on the project from beginning to completion.

There is no lack of clarity in the court's rationale for its holding

51. 545 S.W.2d 208 (Tex. Civ. App.—Eastland 1976, no writ). See text accompanying notes 99-104 *infra*.

52. 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ). See text accompanying notes 105-109 *infra*. This case expressly refused to permit a contractor to relate the inception of his lien back to the commencement of work for which payment had been made.

53. 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ). See text accompanying notes 110-114 *infra*.

54. 88 Tex. 574, 33 S.W. 652 (1895).

55. *Id.* at 583-84, 33 S.W. at 662.

that mechanics' lien claimants share a common lien. It is rooted in the principle that there must be an equality of priority among mechanics' lien claimants:

By article 3179, Rev. St., [now article 5468] . . . all liens are put upon an equal footing, and each mechanic, material man, or laborer participates in the lien created by the statute, from the foundation to the final completion of the structure. The man who lays the foundation has an equal claim upon the whole structure with all others, and the man who completes the work has an equal claim upon the foundation with him who does the work thereon or furnishes the material therefor. The lien, then, which is secured by statute extends in favor of each, from the beginning to the completion of the work⁵⁶

The appellant-mortgagee had contended that the claimants who contracted for and performed work after the mortgage was recorded held a lien inferior to the mortgage, despite the fact that Griffiths, the principal original contractor, had a prior lien because his contract and performance antedated the mortgage. The court replied that:

If the construction claimed by the plaintiffs in error be given to the statute of this state it would result in many absurd and unjust consequences. . . . Griffiths would have a prior lien upon the entire building including all that the other plaintiffs had furnished, either in material or labor, and yet they who furnished the material or labor would have only a second lien thereon, for the reason that the mortgage intervening would take precedence over them.⁵⁷

In further response to the contention of the mortgagee, the court expressly adopted a construction of the Texas priority statute which gave it the effect accorded by Iowa courts to an Iowa statute by which mechanics' liens attach upon "the commencement of the building, erection, or other improvement."⁵⁸ In doing so the court clearly approved the commencement of first work as the moment of inception for the common lien:

[A]ll persons furnishing material or labor in the construction and completion of any building, erection, or improvement acquire a lien

56. *Id.* at 583, 33 S.W. at 662.

57. *Id.* at 584, 33 S.W. at 662.

58. *Id.* at 584, 33 S.W. at 662.

upon the entire building or improvement, superior to the lien of any mortgage which may be given by the owner upon the lands or improvements *subsequent to the beginning of the work* on such building or improvement. *Neilson v. Railway Co.*, 44 Iowa 73; *Brooks v. Railway Co.*, 100 U.S. 443. [Emphasis added.]⁵⁹

Finally, the court reiterated its holdings at the conclusion of the opinion and provided an eloquent justification for the common lien doctrine and the commencement-of-work rule:

The construction that we place upon the statutes of this state, to the effect that when the erection of any building or construction of any improvement is begun, that constitutes the inception of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject, preserves the equality of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens; for it is but just that he who acquires a lien upon property under such circumstances, and seeks to derive to himself the benefits of the improvement to be made, enhancing in value the security thus obtained, should be charged with notice that those who thereafter perform labor upon or furnish material for the completion of such improvement will be protected, under the law, in the liens created by the statute.⁶⁰

In view of the clarity and detail with which the supreme court's holding is expressed, one would expect little confusion as to its import. But confusion there has been—primarily because of two factual issues.

First, the facts have been misconstrued by some courts to imply that Baker & Smith Company, Eaton & Prince Company, and the other claimants who contracted and performed subsequent to the intervening mortgage were *subcontractors* of Griffiths, the claimant who contracted and performed prior to the mortgage. Thus, it is contended, *Oriental Hotel* doctrines are not valid when the subsequent contractors are original contractors.⁶¹ It is difficult to imagine how this misconstruction could arise from a review of the

59. *Id.* at 584, 33 S.W. at 662.

60. *Id.* at 585, 33 S.W. at 663.

61. See *Ferris v. Security Sav. & Loan Ass'n*, 545 S.W.2d 208, 212 (Tex. Civ. App.—Eastland 1976, no writ); *Regold Mfg. Co. v. Maccabees*, 348 S.W.2d 864, 866 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.); *Quinn v. Dickinson*, 146 S.W. 993, 999 (Tex. Civ. App.—Amarillo 1912, no writ). *Contra*, *University Sav. & Loan Ass'n v. Security Lumber Co.*, 423 S.W.2d 287, 295 (Tex. 1967).

case itself. The court of appeals recited the following chronology in its opinion:

[T]he hotel company [the owner] executed its mortgage, dated May 1 and recorded May 20, 1890, on the hotel lot and improvements. March 19, 1891, Baker & Smith Company contracted *with the hotel company*. . . . July 6, 1891, Eaton & Prince Company contracted *with the hotel company*. . . . [Emphasis added.]⁶²

Furthermore, the supreme court noted the central issue to be a determination of the priority position of *original* contractors, that is, "the priority of the deed of trust over the liens of those plaintiffs who did work or furnished material under *contracts entered into with the hotel company subsequent to the date of the deed of trust*." (Emphasis added.)⁶³

The other major factual issue has been created by the attempts of some courts to construe the case as if a single "general" contract for all of the work on the hotel building had been made prior to the attachment of the intervening mortgage, and thereby to limit its application to such cases.⁶⁴ It is clear from the opinion, however, that Griffiths, the principal contractor, was to construct only "the greater part" of the hotel building and that his work was exclusive of the construction and installation of a boiler by Baker & Smith Company, the delivery and installation of elevators by Eaton & Prince Company, and subsequent work performed by two other original contractors. Moreover, the entire foundation had previously been completed by another contractor.⁶⁵

Surprisingly, these misconstructions of the reported facts of the case appear initially to have emanated from the pen of the author of the *Oriental Hotel* opinion itself, Mr. Justice Brown. His dictum in a case decided six years later—*Sullivan & Co. v. Texas Bri-*

62. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 577, 33 S.W. 652, 657 (1895).

63. *Id.* at 581, 33 S.W. at 660.

64. See *McConnell v. Mortgage Inv. Co.*, 157 Tex. 572, 579, 305 S.W.2d 280, 284 (1957); *Perkins Constr. Co. v. Ten-Fifteen Corp.*, 545 S.W.2d 494, 498 (Tex. Civ. App.—San Antonio 1976, no writ); *Ferris v. Security Sav. & Loan Ass'n*, 545 S.W.2d 208, 212 (Tex. Civ. App.—Eastland 1976, no writ); *Home Sav. Ass'n v. Southern Union Gas Co.*, 486 S.W.2d 386, 390 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); *Regold Mfg. Co. v. Maccabees*, 348 S.W.2d 864, 866 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.). *Contra*, *Abilene Sav. Ass'n v. Roderick*, 418 S.W.2d 695, 697 (Tex. Civ. App.—Eastland 1967, no writ); *Investors Syndicate v. Dallas Plumbing Co.*, 61 S.W.2d 1039, 1040 (Tex. Civ. App.—El Paso 1933, no writ).

65. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 584, 33 S.W. 652, 656 (1895).

*quette & Coal Co.*⁶⁶—refers to the contract of Griffiths in *Oriental Hotel* as one “embracing all work which was subsequently done, or for which material was furnished, by the persons who claimed liens in that case” and that “the liens for all material furnished and labor done in the performance of that contract had their ‘inception’ when the contract was made.”⁶⁷ That language has been construed by some courts to imply that the principal contract in *Oriental Hotel* was a “general” contract covering all of the work necessary to complete the hotel and that all contractors on the project were subcontractors of Griffiths, the principal contractor.

In the *Sullivan* case the issue was not the necessity *vel non* of a general contract; it was whether a mechanic’s lien can have its inception prior to the making of *any* contract and the beginning of the work. The court of civil appeals had held that the mere “contemplation of an improvement or the definite *determination* on the part of the owner of the property to improve it fixes the time when the liens of the material men, laborers, and others attach to the property.” (Emphasis added.)⁶⁸ The critical facts of the case were that there was no evidence of the making of a contract to construct, or deliver material for, a specific improvement and no finding that work had begun prior to the recordation of the mortgage. Justice Brown refused to permit inception to occur upon the owner’s mere unilateral determination to improve, believing that *Oriental Hotel* “went as far as the law justifies to sustain such liens.”⁶⁹

Nonetheless, in distinguishing *Oriental Hotel* from the *Sullivan* facts, Justice Brown did not confine himself to the observation that in the former case all liens were related back to the making of a contract; he characterized it as a contract embracing the work of *all* claimants. It is possible, of course, that Justice Brown’s misstatement of the facts was unintentional. If, on the other hand, six years of reflection had caused him to change his views on the *Oriental Hotel* doctrines, *Sullivan* was certainly not an appropriate vehicle by which to overrule the earlier case, nor is a mere misconstruction of facts the appropriate method by which to do so.

66. 94 Tex. 541, 63 S.W. 307 (1901).

67. *Id.* at 544, 63 S.W. at 308.

68. *Id.* at 545, 63 S.W. at 308.

69. *Id.* at 546, 63 S.W. at 309.

Perhaps, by use of the term “embracing,” Justice Brown meant that Griffiths’ contract, which projected the substantial completion of a hotel building, sufficiently implied the possibility of the performance of the work required of the other original contractors. In a manner of speaking, Griffiths’ contract may be said to have “embraced” the work of the boiler and elevator contractors if, in completing the building according to specifications, he was obliged to provide for a boiler room and an elevator shaft. Viewed in this light, Justice Brown’s dictum may be reconciled with the reported facts.

In any event, while the Brown dictum may influence the issue of the nature of the contract required to produce the event of “inception,” it does not adversely affect the viability of the common lien doctrine or the commencement-of-work rule. Nothing in the *Sullivan* case, including the Brown dictum, suggests that contractors on a building project should have differing priorities relative to an intervening mortgage. The concern of *Sullivan* was the character of the event which constitutes the inception of liens. Inception was not permitted to occur anterior to the making of a contract and the beginning of work.⁷⁰ The case did not portend, nor did Justice Brown imply, any change in the doctrine that all contractors on a building share a common priority which is fixed at the “inception” of the lien—irrespective of an intervening mortgage. Moreover, *Sullivan* does not effect any change in the *Oriental Hotel* declaration that “the beginning of work” can provide the inception of that common lien. Indeed, for more than fifty years thereafter the Brown dictum was relied upon only in cases in which the issue was the character of the *contract* that produces inception—not whether mechanics’ lien claimants have a common priority relative to an intervening mortgage and not whether inception occurs upon the beginning of first work.

Nevertheless, a half-century after *Sullivan*, the Amarillo Court

70. *Id.* at 545, 63 S.W. at 308. On a second appeal of the *Sullivan* case, Justice Brown made it clear that “all of these debts were contracted and material furnished after . . . the deed of trust was recorded.” *Vaughan Lumber Co. v. Martin*, 98 Tex. 80, 82, 81 S.W. 1, 1 (1904). He added that “[t]he facts presented in the record . . . [on the new appeal] do not differ materially from those on which the former decision [in *Sullivan*] was made.” *Id.* at 82-83, 81 S.W. at 2. It is therefore clear that in *Sullivan* there had been no commencement of work before the mortgage was recorded.

of Civil Appeals in *Pierce v. Mays*⁷¹ refused to permit mechanics' lien claimants who performed after recordation of an intervening mortgage to have equal priority with a claimant who performed prior to the recordation of the mortgage.⁷² Apparently, it was the first Texas court to do so.⁷³

The salient facts were as follows: On April 27, 1951, Chessier had furnished to Clynch materials for the construction of a dwelling on each of three lots which Clynch had contracted to buy from Klein; six days later Pierce became the owner of the lots and mortgaged them to Mays; and, thereafter, other original contractors furnished to Pierce labor and materials used in completion of the dwelling.⁷⁴ The court held Chessier's lien to be prior to Mays' mortgage, but, without citation either to *Oriental Hotel* or *Sullivan*, the court found the other contractors' liens to be inferior to the mortgage lien because there was no "general" contract:

As to the remaining mechanic's and materialman's liens, the record reveals no general contract with the owner as to the erection of the improvements. The work and materials were furnished directly to the owner by the various mechanics and materialmen individually. Therefore, these various lien [sic] securing debts as to material and labor furnished had their inception as of the date the same were furnished. *Crabb v. William Cameron & Co., Inc.*, Tex. Com. App., 63 S.W.2d 367.⁷⁵

The court's reliance on *Crabb v. Williams Cameron & Co.*⁷⁶ as the sole authority for its holding is puzzling. In *Crabb* neither the commencement of work nor the making of a contract antedated the recording of the mortgage. The mortgage in *Crabb* was correctly held to be superior to the mechanic's lien under the rule of priority by prior inception,⁷⁷ and there was nothing in the opinion to sup-

71. 277 S.W.2d 155 (Tex. Civ. App.—Amarillo 1954), *aff'd on other grounds*, 154 Tex. 489, 281 S.W.2d 79 (1955).

72. *Id.* at 158-59.

73. *First Continental Real Estate Inv. Trust v. Continental Steel Co.*, 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ) appears to be the only other reported case in which contending mechanics' lien claimants have actually been assigned different priorities relative to an intervening mortgage. *See id.* at 46.

74. *Pierce v. Mays*, 277 S.W.2d 155, 157 (Tex. Civ. App.—Amarillo 1954), *aff'd on other grounds*, 154 Tex. 489, 281 S.W.2d 79 (1955).

75. *Id.* at 157-58.

76. 63 S.W.2d 367 (Tex. Comm'n App. 1933, judgment adopted).

77. *Id.* at 369.

port the result in *Pierce*.

A few months later the El Paso Court of Civil Appeals decided *McConnell v. Mortgage Investment Co.*⁷⁸ In that case work on several lots to construct dwellings had commenced prior to the recordation of the mortgage of Mortgage Investment Company in that, among other things, trenches had been dug, reinforcing steel set in place, and plumbing roughed in.⁷⁹ The contractors performing this work seem to have been paid for their labor and material and did not present claims in the case.⁸⁰ After recordation of the mortgage, various original contractors furnished labor and material on the lots. McConnell purchased the liens of these unpaid contractors and sought to establish their superiority to the mortgage lien of Mortgage Investment Company.⁸¹

The El Paso court held that the claims of the original contractors who performed work after recordation of the mortgage were superior to the mortgage lien. It had no difficulty applying the *Oriental Hotel* doctrine that the commencement of the first work is the inception of a common lien for all claimants:

It is clear at the outset that certain work had started on the project before plaintiff's Deed of Trust was executed. It has been held repeatedly that the liens of materialmen and laborers are superior to any mortgage created after the work has begun, and that all such liens shall be on an equal basis, whether by materialmen or laborers, so long as they are for work done or material supplied for the erection or completion of the building. It has also been established that each lien thereby properly created shall be equal to all other such liens, regardless of inception—that is, the lien for he who completes the last bit of building is equal in time and dignity to the lien of he who has labored on the erection of same, the courts holding that all the liens have their inception at the same time, to-wit, the beginning of the erection or construction of the building or buildings, and that all of said liens are superior to any mortgage executed after the erection of the building is begun.⁸²

On the appeal, the supreme court rejected the holding of the El

78. 292 S.W.2d 636 (Tex. Civ. App.—El Paso 1955), *aff'd on other grounds*, 157 Tex. 572, 305 S.W.2d 280 (1957).

79. *Id.* at 637-38.

80. *Id.* at 637-38.

81. *Id.* at 637-38.

82. *Id.* at 638.

Paso court on this issue⁸³ and exalted the Brown dictum in an unprecedented way. Inexplicably, it construed Justice Brown's remarks to be a repudiation of the *Oriental Hotel* view that the "beginning of work" constitutes the inception of all liens:

It would be necessary to say that the "beginning of work" is the same as "the projection of the building and the execution of a contract for its construction." In 1901 this Court [in *Sullivan*] refused to make a similarly proposed extension—but in effect held that the doctrine announced in the *Oriental Hotel Co.* case "went as far as the law justifies," and hence should not be expanded to apply to factual situations not strictly analogous to those disclosed in the reported opinion.⁸⁴

As previously mentioned, work did not commence in *Sullivan* until after recordation of the mortgage, and Justice Brown's remarks in *Sullivan* were not addressed to the commencement-of-work rule, but to the issue whether inception could occur prior to contracting and performance. Moreover, *Oriental Hotel* had expressly adopted the commencement-of-work rule, which the *McConnell* court characterized as an extension of its doctrine.⁸⁵ It appears that the supreme court in *McConnell* simply refused to follow *Oriental Hotel*, despite the fact that the maverick holding in *Pierce v. Mays* was the only authority on point to the contrary.

In 1967, in *University Savings & Loan Association v. Security Lumber Co.*,⁸⁶ the supreme court devoted a great deal of attention to a reconciliation of *Oriental Hotel* doctrines with the opinions in *Sullivan* and *McConnell*. Under the facts of the case Security Lumber had furnished material to the owner for the improvement of three lots prior to recordation of the mortgage of University Savings.⁸⁷ Thereafter, other materials were ordered by, and delivered to, the owner from time to time for improvement of the three lots. The record did not show that any contract for the furnishing of all material was entered into between the owner and Security Lumber, and each transaction was deemed by the court to be a

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

84. *Id.* at 580, 305 S.W.2d at 285.

85. *Id.* at 580, 305 S.W.2d at 285.

86. 423 S.W.2d 287 (Tex. 1967).

87. *Id.* at 288.

separate credit sale.⁸⁸ The mortgagee sought a holding that each credit sale gave rise to a separate mechanic's lien and that its mortgage was superior to Security Lumber's lien for material furnished after the recordation of the mortgage. Security Lumber claimed that it held one mechanic's lien to secure the total indebtedness arising from all of the sales and that the inception of that lien occurred upon the first delivery of materials prior to the mortgage.⁸⁹

The supreme court agreed with Security Lumber, holding that:

There is no provision in Article 5459 for breaking a single lien into segments, and no authority therein for holding that one segment of a lien is prior to a deed of trust lien and another segment secondary thereto. . . . Giving the lien priority is in accord with our long-standing rule of liberal construction for protection of laborers and materialmen who by their contribution add to the value of the security for the deed of trust debt.⁹⁰

In pursuance of that result the court reviewed the *Sullivan* and *McConnell* holdings against the background of *Oriental Hotel*. The integrity of *Oriental Hotel* was clearly preserved:

Even a casual reading of the opinion in *Oriental Hotel v. Griffiths* makes quite clear that the court *did not* hold (1) that to have priority over a deed of trust or other lien, a mechanic's or materialman's lien must have had its inception in a general bilateral contract antedating recordation of a deed of trust or the date of perfection of such other lien; or (2) that when timely perfected as provided by statute, a mechanic's or materialman's lien for all labor done or material furnished will not relate back to the date when his labor was first performed or his material was first furnished. Neither were any such holdings made in *Sullivan & Co. v. Texas Briquette & Coal Co.*, 94 Tex. 541, 63 S.W. 307 (1901), nor in the recent case, *McConnell v. Mortgage Inv. Co. of El Paso*, 157 Tex. 572, 305 S.W.2d 280 (1957). In *Sullivan & Co.* the trial court and court of civil appeals gave priority to liens of materialmen who furnished material and machinery for erection of a mining plant *after* a deed of trust had been recorded. This court reversed,^o holding that the deed of trust lien was entitled to priority under the provisions of the statute. We rejected the idea that such liens had their inception when the owner *deter-*

88. *Id.* at 290.

89. *Id.* at 292-93.

90. *Id.* at 296.

mined to improve his property, and added: "The rights of the parties in this case are fixed by the statute, and cannot be disposed of upon any supposed equitable ground." In *McConnell*, we denied priority to mechanic's and materialmen's liens for labor done and material furnished *after* recordation of a deed of trust, and refused to relate them back to a date, prior to recordation of the deed of trust, when work which had been paid for was done toward erection of the improvements. We were not called upon to decide, and did not decide, that the lien of a mechanic or materialman will not relate back to the date when his first labor is performed or material is furnished for which payment has not been made.⁹¹

The *University Savings* court did not expressly overrule *McConnell*, but it seems at least to have limited *McConnell's* adverse influence on the commencement-of-work rule to cases where payment has been made for the work performed prior to the intervening mortgage. This limitation neutralizes *McConnell's* effect on the common lien doctrine because in such cases there can be no differing priorities between the unpaid, contending claimants relative to the mortgage and, thus, no prospect of an inequality among mechanics' lien claimants. It is this inequality which the common lien doctrine seeks to prevent.

Significantly, the supreme court departed from *McConnell's* holding that the beginning of work cannot be given the same effect as the projection of the building and the execution of a construction contract. The majority's conclusion that the lien of a single contractor based on separate contracts relates back to the beginning of the first work is so similar in principle to the commencement-of-work rule expressly adopted in *Oriental Hotel* that it is difficult to find a philosophical basis for distinguishing the two. *University Savings* thus undermines the view expressed in *Pierce* and *McConnell* that a "general" contract is required for the application of *Oriental Hotel* doctrines. In his dissent in *University Savings*, Justice Norvell, who had authored the *McConnell* opinion, urged that, there being no general contract, each performance

91. *Id.* at 295. The manner in which the court distinguished *McConnell* has given the latter case a new complexion. The *McConnell* court sought to do away with the commencement-of-work rule altogether, but it is now cited only for the proposition that work which has been paid for cannot furnish the inception of liens. Actually, the fact that the pre-mortgage work had apparently been paid for seemed to be of little consequence to the *McConnell* court.

marked the inception of a separate lien with its own priority position.⁹² By expressly refusing to adopt this reasoning the supreme court apparently freed *Oriental Hotel* from the impediment of the Brown dictum.

Thereafter, in its initial opinion in *Irving Lumber Co. v. Alltex Mortgage Co.*⁹³ the supreme court virtually buried the Brown dictum by expressly repudiating the contention that *Oriental Hotel* doctrines require the existence of a general contract:

We do not think the *Oriental Hotel* decision or any of the other cases cited by Alltex may be so narrowly construed. In fact, the *Oriental Hotel* decision is contrary. . . . We held that all of the mechanic's and materialmen's liens were entitled to priority over the deed of trust lien, despite the fact that Griffiths did not have a general contract for the construction of the whole improvement.⁹⁴

In the first *Irving Lumber* the court declared that a contractor could relate his lien back to the date of an oral contract to build a shell home made before recordation of the mortgage even though the contract did not encompass the entire improvement. Although the initial opinion was later withdrawn in favor of a holding for the mortgagee, the mortgagee prevailed under the second opinion⁹⁵ on grounds irrelevant to the issue of the necessity of a general contract.⁹⁶

Shortly after the first *Irving Lumber* opinion, the legislature enacted section 2 of article 5459, defining the term "inception." In doing so it failed to specify its views on the common lien doctrine, enigmatically providing that inception occurs upon the commencement of work "for which the lien herein provided results."⁹⁷

It has been suggested that the interests of the business community would best be served if section 2 of article 5459 were read to effectuate a repudiation of the common lien doctrine by construing "the lien" to refer to "a separate lien for each original contractor, each of which has its own inception date for priority purposes."⁹⁸

92. *Id.* at 296.

93. 14 Tex. Sup. Ct. J. 212 (February 2, 1971).

94. *Id.* at 213.

95. See *Irving Lumber Co. v. Alltex Mortgage Co.*, 468 S.W.2d 341 (Tex. 1971).

96. *Id.* at 344.

97. TEX. REV. CIV. STAT. ANN. art. 5459, § 2 (Vernon Supp. 1980-1981).

98. Woodward, *The Hardeman Act—Some Unanswered Questions*, 6 ST. MARY'S L.J. 1, 10 (1974).

Certainly, such an interpretation would remove a major threat to mortgage lenders.

Irrespective of its desirability, however, that interpretation of the statute is difficult to support with legal analysis. Section 1 of article 5459 refers on three occasions to "the lien herein provided," and that portion of the statute was enacted in its present form prior to *Oriental Hotel*. Since "the lien herein provided" was held in *Oriental Hotel* to be a common lien, the legislature's use of the identical phrase in section 2 of the statute could mean nothing else, unless it can be said that the common lien doctrine of *Oriental Hotel* was overruled prior to the enactment of section 2. As the foregoing discussion demonstrates, however, the doctrine was alive and well after *University Savings* and *Irving Lumber*. Prior to the amendment to the priority statute, only the case of *Pierce v. Mays* was contrary on its facts and holding. Even *McConnell*, as construed by *University Savings*, does not violate the equality principle of the common lien doctrine, since all of the unpaid and contending mechanics' lien claimants in that case were placed in the same priority position relative to the mortgage lien.

If a change were intended by the legislature, it easily could have been expressed in the statute. Indeed, by specifically permitting relation back to *any* recorded contract, whether general or special, the legislature apparently accepted the repudiation of the Brown dictum by *University Savings* and the first *Irving Lumber* opinion. Stripped of the Brown dictum, there is no basis for confusion about the effect of *Oriental Hotel* on this issue. It clearly embraces the common lien doctrine; it has never been overruled; and the various attempts to limit its viability have apparently failed.

The Recent Cases. As previously noted, there are three recent cases from the courts of civil appeals which tend to reject the common lien doctrine. The first of these, *Ferris v. Security Savings & Loan Association*,⁹⁹ was decided on the law in effect prior to the 1971 amendment to the priority statute. The facts were similar to *Oriental Hotel*: a construction contract for the greater part of the work antedated the recordation of a construction mortgage, but, subsequent to the filing of the mortgage, the owner let a separate original contract to York for the installation of air conditioning

99. 545 S.W.2d 208 (Tex. Civ. App.—Eastland 1976, no writ).

equipment.¹⁰⁰ In determining the relative priorities between the deed of trust lien and York's mechanic's lien, the court refused to relate the inception of York's lien back to the making of the principal contract on the stated basis that York was not a subcontractor of the principal contractor.¹⁰¹ Obviously, the court believed that the successful mechanic's lien claimants in *Oriental Hotel* had been *subcontractors* of a general contractor.¹⁰² On the contrary, as previously noted, they were original contractors whose contracts were executed and whose work was performed after the recordation of the deed of trust, just as in *Ferris*.¹⁰³ The court was in error in its interpretation of the controlling facts of the case on which it sought to rely.

It does not appear that the principal contractor or any of his subcontractors in *Ferris* were unpaid, contending claimants. Thus, the court's holding resulted in no inequality of priorities among unpaid lien claimants relative to the mortgage, but it did imply that two separate liens had been created: one having its inception in the principal construction contract, and York's, which arose after the recordation of the deed of trust.¹⁰⁴

In *Perkins Construction Co. v. Ten-Fifteen Corp.*,¹⁰⁵ the San Antonio Court of Civil Appeals determined that, absent a "general" construction contract, a contractor's lien relates back for priority purposes to the beginning of his own work under his own con-

100. *Id.* at 210.

101. *Id.* at 212.

102. *See id.* at 212. The explanation for the court's ruling was succinct:

Texas has long followed the rule a subcontractor's lien relates back to the time of the original contract. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S.W. 652 (1895).

York, however, is not a subcontractor of the original contractor nor is its obligation one required by the general contract to which the lien may relate back.

Ferris v. Security Sav. & Loan Ass'n, 545 S.W.2d 208, 212 (Tex. Civ. App.—Eastland 1976, no writ).

103. *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 578, 33 S.W. 652, 656 (1896). It is interesting that on an earlier appeal of the *Ferris* case, prior to a remand which resulted in the *Ferris* appeal to the Eastland court, the Houston Court of Civil Appeals had held that York's lien had its inception in the first contractor's contract based squarely on the common lien doctrine of *Oriental Hotel*. The opinion was withdrawn, however, and the issue was not raised in its subsequent opinion. *York Div., Borg-Warner Corp. v. Security Sav. & Loan Ass'n*, No. 15,771 (Tex. Civ. App.—Houston [1st Dist.] May 11, 1972), *opinion on rehearing*, 485 S.W.2d 327 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

104. *See Ferris v. Security Sav. & Loan Ass'n*, 545 S.W.2d 208, 212 (Tex. Civ. App.—Eastland 1976, no writ).

105. 545 S.W.2d 494 (Tex. Civ. App.—San Antonio 1976, no writ).

tract, relying on *McConnell v. Mortgage Investment Co.*¹⁰⁶

The case involved claims of three original contractors. Winkler had performed work, for which he was paid, prior to the recording of a mortgage, and after the recording of the mortgage Perkins and Cobb commenced their work. Winkler also performed "extra" work on the site after the mortgage was recorded for which he was not paid.¹⁰⁷ The court refused the contentions of Perkins and Cobb that their liens had their inception upon the commencement of the pre-mortgage work by Winkler for the reason that there was no general contract.¹⁰⁸ It also refused the contention of Winkler that his lien for the extra work had its inception upon his first performance because the work antedating the mortgage was completed and paid for before the extra work was done.¹⁰⁹

Like *Ferris* and *McConnell* this is not a case where the actual holdings traversed the equality principle of the common lien doctrine. The facts did not compel the court to resolve the question whether unpaid, contending contractors on a building project should have differing priorities relative to a mortgage lien. Nevertheless, the implication of the opinion is clearly that if Winkler had not been paid for his pre-mortgage work, the court would have held his lien to be superior to that of Perkins and Cobb. Undoubtedly, its view was that the common lien doctrine does not apply in cases where there is no "general" contract and that inception does not relate back to the beginning of work for which payment has been made.

In *First Continental Real Estate Investment Trust v. Continental Steel Co.*,¹¹⁰ several original contractors who had supplied material to the owner at various times for the completion of dwellings claimed liens superior to that created by a mortgage on the sites.¹¹¹ An unpaid steel supplier, among others, had performed prior to recordation of the mortgage, and his lien was given priority over the mortgage due to that fact.¹¹² Krestmark's performance, how-

106. *Id.* at 498.

107. *Id.* at 499.

108. *Id.* at 498-99.

109. *Id.* at 499.

110. 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ).

111. *Id.* at 44.

112. *Id.* at 45-46.

ever, was commenced subsequent to the mortgage,¹¹³ and the court refused to permit Krestmark to relate its lien back to the first delivery by the steel supplier on the ground that Krestmark's "dealings were with the owner . . . and not through a general contractor under a general contract."¹¹⁴ The holding of this case, like that of *Pierce v. Mays*, results in the assignment of differing priorities among unpaid, contending claimants relative to an intervening mortgage. It is thus in direct conflict with the equality principle of the common lien doctrine of *Oriental Hotel*.

Like the *Ferris* court, the Fort Worth Court of Civil Appeals in *First Continental* ignored the fact that *Oriental Hotel* involved an original contractor who did not claim through a general contractor. Like the *Perkins* court, it failed to consider the shadow on *McConnell* and the Brown dictum cast by *University Savings* and *Irving Lumber*. Although the court cited *University Savings* in approving one of the supplier's claims that his first delivery provided the inception of a single lien to secure all of his separate sales, it did not allude to the limitation which *University Savings* apparently placed on *McConnell* in confining its application only to cases where payment has been made for the work antedating the mortgage.

Mortgage lenders should expect the supreme court's analysis to be very thorough when a proper case is presented to it for consideration of the common lien doctrine and the commencement of-work-rule. That analysis will reveal little precedent to support a refutation of the common lien doctrine, that is, the principle that mechanic's lien claimants should have a common priority relative to other competing liens. Only *Pierce v. Mays* and *First Continental* constitute actual holdings to the contrary. Measured against the supreme court's views in *Oriental Hotel* and *University Savings*, the weight of these lower court holdings is doubtful, to say the least.

If *McConnell* is still viable, however, as limited by *University Savings*, the deleterious effect of the common lien doctrine on the priority of an intervening mortgage could be substantially ameliorated. A mortgagee could ensure first-lien priority by causing the work performed prior to recordation of his mortgage to be paid,

113. *Id.* at 46-47.

114. *Id.* at 47.

and, presumably, such payment could be made long after the mortgage is recorded. A mortgagee would then have it in his power to realign the priorities of mechanics' lien claimants relative to his mortgage with the stroke of a pen. No violence is done to the equality principle of the common lien doctrine, since all of the liens existing after such payment would have a common priority—inferior to that of the mortgage lien.

Is this solution consistent with the commencement-of-work rule? The commencement-of-work rule, as construed by *Oriental Hotel* and *University Savings*, is based on two complementary concepts: (1) the rule of liberal construction favoring laborers and materialmen, and (2) the notice effect of the beginning of work. In other words, the law favors priority for mechanics' lien claimants so long as competing lienholders have notice of those claims sufficient for their protection, and the commencement of the first work adequately provides that notice. There can be no reason to suppose that paying for work commenced prior to the mortgage changes the character of the notice which that commencement provides. Consequently, there would seem to be no philosophical grounds on which to support the *McConnell* exception to the commencement-of-work rule.

Moreover, there is nothing in the priority statute to support the *McConnell* exception. It does not imply that work which has been paid for has not commenced. To read into the statute that the common lien does not "result" from commencement of work by one who does not share in the lien because of prior payment merely assumes the resolution of the question under consideration. That resolution must be governed by the fact that the *McConnell* exception cannot be reconciled with the notice principle underlying the commencement-of-work rule.

Some practitioners suggest that the solution for the intervening mortgagee may be to require the owner to pay off and terminate the contract of the early-performing contractor, and subsequently to make a new contract encompassing the remaining work. That procedure will produce a factual context somewhat similar to cases in which the inception of the lien of a post-mortgage workman was not permitted to be related back to the commencement of work which was terminated and later recommenced.¹¹⁵ Unless the termi-

115. See *Quinn v. Dickinson*, 146 S.W. 993, 999 (Tex. Civ. App.—Amarillo 1912, no

nated contractor is a lien claimant, the equality principle of the common lien doctrine is not affected in such cases. But how does the suggested procedure comport with the commencement-of-work rule and its underlying notice principle? When does the fact that a construction project has begun cease to be notice that further construction activities should be expected? Perhaps the notice function is inoperative when the earlier work has been abandoned and lays dormant for a substantial period of time.¹¹⁶ It is questionable, however, that merely paying for the earlier work and substituting a new contract is sufficient if the continuity of the construction effort is not substantially interrupted.¹¹⁷ It would appear, then, that the only promising solution to the dilemma of a mortgagee intervening after the commencement of work is to attempt to relieve the property of subcontractor mechanics' liens altogether by causing the construction project to be bonded with a Hardeman Act bond.¹¹⁸

Can Inception Occur Prior to the Attachment of a Purchase Money Lien?

Before the *Blaylock* case, it was generally believed that a lender

writ). See also *Geiser v. Permacrete, Inc.*, 90 So. 2d 610, 613 (Fla. 1956); *Mack Indus., Inc. v. Donald W. Nelson, Inc.*, 134 So. 2d 821, 824 (Fla. Dist. Ct. App. 1961); *May v. Mode*, 42 Mo. App. 656, 123 S.W. 523, 525-27 (1909); Annot., 1 A.L.R.3d 822, 837-39 (1965).

116. See *May v. Mode*, 42 Mo. App. 656, 123 S.W. 523, 525-27 (1909); *Quinn v. Dickinson*, 146 S.W. 993, 999 (Tex. Civ. App.—Amarillo 1912, no writ); Annot., 1 A.L.R.3d 822, 837-39 (1965).

117. See *Brettschneider v. Wellman*, 230 Minn. 225, 41 N.W.2d 255, 260 (1950). It may be argued, of course, that when a new contract is entered into for the remainder of the work a new "improvement" is contemplated, the commencement of which is the "commencement of construction of the improvements . . . for which the lien herein provided results" pursuant to article 5459. This argument, however, must disclaim any recognition on the part of the legislature of the notice principle underlying the commencement-of-work rule.

118. The "Bond to Pay Liens or Claims" provided by TEX. REV. CIV. STAT. ANN. art. 5472d (Vernon Supp. 1980-1981), when filed in accordance with the statutory requirements, insulates the owner and his property from the mechanics' lien claims of subcontractors of the original contractor executing the bond. Although there is no clear authority on the question, the statute would seem to permit filing of the bond after work has commenced, since it is directed to be filed in the county where the property is situated on which work "is being performed, or is to be performed." *Id.* This device, however, will not protect against original contractor claims nor claims of contractors performing work referable to original contracts which are not covered by the bond. See *Trinity Universal Ins. Co. v. Barlite, Inc.*, 435 S.W.2d 849, 853 (Tex. 1968); *Finger Furniture Co. v. Chase Manhattan Bank*, 413 S.W.2d 131, 137 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.).

taking a deed of trust to secure purchase money at the closing of a sale of real estate would have a lien superior to any mechanic's lien which might arise by virtue of work commenced or a contract executed before the sale.¹¹⁹ In *Irving Lumber Co. v. Alltex Mortgage Co.*,¹²⁰ the supreme court denied priority to a contractor whose contract was made prior to the attachment of a purchase money mortgage given at the sale on the basis that "the priority of a security interest is not determined on the date of the 'inception' of an agreement between the contractor and a prospective owner."¹²¹ The court held that the property passed to the owner instantly burdened by the purchase money lien as if the prior owner had so encumbered it, and that to the extent of the purchase money advanced, the mortgagee held a "superior title" to the mechanic's lien.¹²² The subsequent foreclosure of the purchase money lien was held to be the foreclosure of a senior lien which extinguished the junior mechanic's lien.¹²³ Indeed, *Irving Lumber* seemed to set up a rule which gave preferential status to purchase money liens.

In *Blaylock*,¹²⁴ the facts were similar to *Irving Lumber* except that (1) the event of inception was the commencement of work rather than the making of a contract, and (2) there was clear proof that an executory contract of sale was in existence between the owner and the prospective purchaser. The court held that commencement of work under a contract with a prospective owner will determine priority as against a subsequent purchase money lien if the prospective owner has some legal or equitable interest in the property at the time of contracting to which the mechanic's lien can attach. The equitable interest of a purchaser under an executory contract of sale was declared to be sufficient. The lien enlarges to cover the fee interest at closing by application of the doctrine of after-acquired title.¹²⁵ *Irving Lumber* was distinguished on the ba-

119. Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 697-98 (1972). See *Development Design, Inc. v. Rainbow Dev., Inc.*, 444 F. Supp. 155, 158-59 (E.D. Tex. 1978); *Yeager Elec. & Plumbing Co. v. Gaines Bldg., Inc.*, 492 S.W.2d 921, 924 (Tex. Civ. App.—Corpus Christi 1973, no writ).

120. 468 S.W.2d 341 (Tex. 1971).

121. *Id.* at 343 (emphasis added).

122. *Id.* at 343-44.

123. *Id.* at 344.

124. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794 (Tex. 1978).

125. *Id.* at 805-06.

sis that the owner in that case was not shown to have had an interest to which the mechanic's lien could attach prior to the recordation of the purchase money deed of trust.¹²⁶

Blaylock clearly repudiated the notion that purchase money liens hold a favored status. Under the *Blaylock* rule, the whole question is one of chronology. If the date of inception and attachment of a mechanic's lien precedes execution and recordation of a mortgage lien—whether it secures purchase money, construction funds, or both—foreclosure of the mortgage will not extinguish the mechanic's lien.

Of course, if a lender is subrogated to a *preexisting* lien, whether a purchase money lien or otherwise, by virtue of having furnished loan funds to purchase the lien, the lien securing the repayment of the loan funds stands in the same priority position as the preexisting lien. Foreclosure of the mortgage forecloses the preexisting lien and extinguishes all liens junior to the preexisting lien, including junior mechanics' liens. Such was the case in *Blaylock*. The lender was subrogated to a recorded lien which preceded the inception of the mechanic's lien. A single deed of trust thus evidenced two priority positions: the portion of the lien attributable to the preexisting lien was prior to the contractor's lien, and the remainder was inferior. Accordingly, the court was obliged to examine the validity of the so-called *Habitat* rule¹²⁷ and decide what should be done about proceeds of the foreclosure sale in excess of the preexisting lien.

The *Blaylock* court gave its stamp of approval to a modified *Habitat* rule, holding that although the foreclosure of a deed of trust securing funds used for the purchase of a preexisting lien and for payment of construction costs will cut off the mechanic's lien on the land, the mechanic's lien claimant may pursue in the hands of the mortgagee that portion of the proceeds of the foreclosure sale which exceeds the amount of the preexisting lien.¹²⁸ The court

126. *Id.* at 805.

127. *Habitat, Inc. v. McKanna*, 523 S.W.2d 787 (Tex. Civ. App.—Eastland 1975, no writ). This case held that upon the foreclosure of a deed of trust evidencing both a prior purchase money lien and an inferior lien to secure a construction loan, the holder of the mechanic's lien could pursue in the hands of the mortgagee those proceeds of the foreclosure sale which were in excess of the amount secured by the purchase money lien. *Id.* at 790.

128. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978).

reasoned that the foreclosure sale transferred the land free of all liens, but that the mechanic's lien claimant's security interest was "transferred to the excess proceeds of the sale, which stand in the place of the property."¹²⁹ It is significant, however, that, unlike in *Habitat*,¹³⁰ the extent of the lender's priority in *Blaylock* was governed not by the amount of the purchase money lent, but by the amount of the preexisting lien to which he was subrogated, demonstrating that the court is giving no special priority to purchase money liens, but is merely acknowledging the lender's subrogation to a preexisting lien with an earlier priority position.

III. PRIORITY BY STATUTORY PREFERENCE

Under the priority statute, mechanics' liens have a preferential priority over all competing liens on those improvements which are "removable" from the construction project.¹³¹ Even though a lender's deed of trust is recorded before the inception of any mechanic's lien shall have occurred, his mortgage lien may nevertheless be inferior to perfected mechanics' liens on those improvements which can be removed without material injury to the land, the preexisting improvements, and the improvements being removed.¹³²

The issue whether an improvement is removable or not is one for the trier of fact, and in recent years the trend seems to be toward

129. *Id.* at 808. The court relied principally on *Jeffrey v. Bond*, 509 S.W.2d 563 (Tex. 1974), and *Pearson v. Teddlie*, 235 S.W.2d 757 (Tex. Civ. App.—Eastland 1950, no writ). See *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978).

130. *Habitat, Inc. v. McKanna*, 523 S.W.2d 787 (Tex. Civ. App.—Eastland 1975, no writ).

131. See TEX. REV. CIV. STAT. ANN. art. 5459, § 1 (Vernon Supp. 1980-1981). Article 5459 causes the mechanic's lien to attach to the improvements "in preference to any prior lien," and it permits the removal and sale of such improvements provided that the prior lien is not "affected thereby." *Id.*

132. See *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 266 (Tex. 1974); *Hamman v. McMullen & Co.*, 122 Tex. 476, 482-83, 62 S.W.2d 59, 62 (1933); *Cameron County Lumber Co. v. Al & Lloyd Parker, Inc.*, 122 Tex. 487, 490-91, 62 S.W.2d 63, 64 (1933). Prior to *Whirlpool*, the test was usually stated to be whether removal would materially injure the land or the improvement which was in existence at the time the improvement to be severed was affixed. See *Freed v. Bozeman*, 304 S.W.2d 235, 240-41 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.); *Quinn v. Dickinson*, 146 S.W. 993, 999-1000 (Tex. Civ. App.—Amarillo 1912, no writ). In *Whirlpool* the supreme court added the requirement that the improvement itself must not be materially injured. *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 269 (Tex. 1974).

expanding the scope of items which fall into the removable category.¹³³ For example, in *First Continental Real Estate Investment Trust v. Continental Steel Co.*,¹³⁴ windows and doors which could be removed by temporarily displacing the brick and trim around them, materially undamaged, were characterized as removable improvements.¹³⁵ This would appear to be the first case in which improvements were held to be removable even though non-removable improvements had to be dismantled in order to accomplish their severance.

Another example of the trend is *Monocrete Pty. Ltd. v. Exchange Savings & Loan Association*¹³⁶ in which concrete roofing tiles, 20% of which would be destroyed in the removal process,

133. Improvements which have been held to be removable and thus subject to a preference lien include: a ticket booth, a speaker stand, and a screen at a drive-in theatre, *Freed v. Bozeman*, 304 S.W.2d 235, 241 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.); a partially completed structure attached to a concrete foundation, *Mogul Prod. & Ref. Co. v. Southern Engine & Pump Co.*, 244 S.W. 212, 214 (Tex. Civ. App.—Galveston 1922, no writ); a frame building, *Wallace Gin Co. v. Burton-Lingo Co.*, 104 S.W.2d 891, 892 (Tex. Civ. App.—Austin 1937, no writ); a rock house, *R. B. Spencer & Co. v. Brown*, 198 S.W. 1179, 1180 (Tex. Civ. App.—El Paso 1917, writ ref'd); garbage disposals and built-in dishwashers, *First Nat'l Bank v. Whirlpool Corp.*, 517 S.W.2d 262, 266 (Tex. 1974); heating and air conditioner systems, *Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.*, 517 S.W.2d 593, 595 (Tex. Civ. App.—Waco 1974, no writ); compressors and air-handling units inside of air conditioning units, *American Amicable Life Ins. Co. v. Jay's Air Conditioning & Heating, Inc.*, 535 S.W.2d 23, 25 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); windows and doors which could be removed by taking out brick and trim from around them and replacing brick and trim, materially undamaged, after removal, *First Continental Real Estate Inv. Trust v. Continental Steel Co.*, 569 S.W.2d 42, 45-46 (Tex. Civ. App.—Fort Worth 1978, no writ); and concrete roofing tiles, 20% of which would be destroyed in the removal process, *Monocrete Pty. Ltd. v. Exchange Sav. & Loan Ass'n*, 601 S.W.2d 448, 452-53 (Tex. Civ. App.—Dallas 1980, no writ).

Improvements which have been held not to be removable include: lumber used to build a house, *Cameron County Lumber Co. v. Al & Lloyd Parker, Inc.*, 122 Tex. 487, 489, 62 S.W.2d 63, 64 (1933); painting and plastering, *R. B. Spencer & Co. v. Brown*, 198 S.W. 1179, 1180 (Tex. Civ. App.—El Paso 1917, writ ref'd); roof repairs, *Citizens Nat'l Bank v. Strauss*, 69 S.W. 86, 88-89 (Tex. Civ. App.—1902, writ ref'd); window frames, *McCallen v. Mogul Prod. & Ref. Co.*, 257 S.W. 918, 923 (Tex. Civ. App.—Galveston 1923, writ disp'd); a shell home, *Irving Lumber Co. v. Alltex Mortgage Co.*, 446 S.W.2d 64, 69 (Tex. Civ. App.—Dallas 1969), *aff'd*, 468 S.W.2d 341 (Tex. 1971); brick used to veneer house and construct fireplace and chimney, *Chamberlain v. Dollar Sav. Bank*, 451 S.W.2d 518, 519-20 (Tex. Civ. App.—Amarillo 1970, no writ); and cabinets, *Houk Air Conditioning, Inc. v. Mortgage & Trust, Inc.*, 517 S.W.2d 593, 595 (Tex. Civ. App.—Waco 1974, no writ).

134. 569 S.W.2d 42 (Tex. Civ. App.—Fort Worth 1978, no writ).

135. *Id.* at 46-47.

136. 601 S.W.2d 448 (Tex. Civ. App.—Dallas 1980, no writ).

were held, nevertheless, to be removable from a dwelling.¹³⁷ The Dallas Court of Civil Appeals enunciated an "economic benefit" test, holding that the fact that a portion of the items being removed may be destroyed does not adversely affect the removability of the item if the net result is a reasonable economic benefit to the contractor.¹³⁸

In *Monocrete* the court also held that relatively minor injury to the preexisting improvement—consisting of nail holes, cracking of paint, and tearing of felt paper—did not constitute *material* injury. It further expressed the view that any injury which might result from exposing the remaining structure to the elements after removal of the roof was not a relevant consideration.¹³⁹

The most significant development, however, insofar as the interest of lenders is concerned, is presented by *Richard H. Sikes, Inc. v. L & N Consultants, Inc.*¹⁴⁰ In that case, the Waco Court of Civil Appeals held that an original contractor who had furnished only non-removable carpentry and concrete had a preferential lien on removable improvements furnished not by him, but by his *subcontractors*, to secure payment for his work. The court further deemed it irrelevant to its holding that the subcontractors had not been paid for the removable items which they had furnished. The court saw no basis either in case law or statute to limit the preferential lien rights of a contractor only to removable items which were furnished by him.¹⁴¹

137. *Id.* at 452-53.

138. *See id.* at 453. The function of the *Whirlpool* requirement that the removable improvement itself not be materially injured was explained by the Dallas court as a safeguard against "spiteful" removals. The court suggested that if removal of an item is not economically feasible because of damage to it which would be incurred in the removal process, the removal may be presumed to be motivated by a desire to injure another rather than to benefit the removing claimant. *See id.* at 452-53.

139. *Id.* at 452.

140. 586 S.W.2d 950 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

141. *Id.* at 956.

It is clear under the statute [article 5452] that a perfected mechanic's and materialmen's lien extends to all of the improvements without regard to who placed them there. The cases so hold. *See, Wilson v. Hinton*, 131 Tex. 593, 116 S.W.2d 365, 367 (1938); *Wallace Gin Co. v. Burton-Lingo Co.*, 104 S.W.2d 891, 892 (Tex. Civ. App.—Austin 1937, no writ). Therefore, plaintiff's lien for labor and materials directly contributed by it would cover all of the improvements.

Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950, 956 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

The holding of the Waco court is anticipated by *Wallace Gin Co. v. Burton-Lingo Co.*¹⁴² A few cases, however, have suggested that the preference lien is limited to removables which were furnished only by the claimant himself.¹⁴³ In *Kaspar v. Cockrell-Riggins Lighting Co.*,¹⁴⁴ it was held that a claimant must identify materials as having been furnished by him in order to remove and sell them.¹⁴⁵ Removable items, consisting of lighting fixtures, cabinets, chimes, buttons, mail boxes, and lamps, had been furnished by the claimant in connection with the construction of an apartment building.¹⁴⁶ The jury had found, however, that the items furnished by him could not be identified and segregated from like items furnished by other original contractors.¹⁴⁷ The fact that the other original contractors were apparently paid and were not asserting liens was given no consideration by the court.

The supreme court refused the writ in *Sikes* with the notation "no reversible error," apparently acquiescing in the view that an original contractor has a preferential lien on removables furnished by his subcontractors. If the *Sikes* rationale should be applied to permit all original contractors and subcontractors to claim a preferential lien on items furnished by any of them, clearly lenders have cause for concern. It would mean that on a building project, all removables on the site stand as first-lien security for the payment of every unpaid mechanic's lien claim, regardless of the nature of the work performed by the claimant. Moreover, as in *Sikes*, merely paying for a removable item furnished by one contractor will not exempt it from the preferential lien of other unpaid contractors on the project.

In *Suburban Homes Lumber Co. v. Lomas & Nettleton Finan-*

142. 104 S.W.2d 891 (Tex. Civ. App.—Austin 1937, no writ). In *Wallace Gin Co.* the claimant had furnished part of the material for the erection of a cotton house on land which was subject to a prior mortgage lien. The court allowed the removal and sale of the entire building in satisfaction of the debt to the claimant and expressly refused to require the segregation or identification of material furnished by him. *Id.* at 892. See also Woodward, *The Hardeman Act—Some Unanswered Questions*, 6 ST. MARY'S L.J. 1, 31-32 (1974).

143. See *Cisco Banking Co. v. Keystone Pipe & Supply Co.*, 277 S.W. 1060, 1062-63 (Tex. Comm'n App. 1925, judgment adopted); *McCallen v. Mogul Prod. & Ref. Co.*, 257 S.W. 918, 922 (Tex. Civ. App.—Galveston 1923, writ dismissed).

144. 511 S.W.2d 109 (Tex. Civ. App.—Eastland 1974, no writ).

145. *Id.* at 110.

146. *Id.* at 109.

147. *Id.* at 109-10.

cial Corp. (In re Jamail),¹⁴⁸ the Fifth Circuit attempted to limit the *Sikes* case to its facts and to exalt the *Kaspar* rule as applicable in situations other than that where an original contractor is attempting to claim a preferential lien on items furnished by his own subcontractors. Suburban had furnished the owner with lumber, roofing, nails, hardware, reinforcing mesh, and rebar steel but could not distinguish its materials from similar items furnished by others.¹⁴⁹ The Fifth Circuit noted the conflict of principles existing between *Wallace Gin Co.* and *Sikes*, on the one hand, and *Kaspar* on the other.¹⁵⁰ It reasoned, however, that if it did not require identification in cases where several subcontractors supply similar materials, the first suppliers who foreclose their liens could have a "disproportionate satisfaction to the detriment of later filing suppliers."¹⁵¹

The Fifth Circuit's rationale would seem also to apply with some force to cases like *Sikes*, where an original contractor seeks to foreclose a lien on removables furnished by his subcontractors. There, too, the possibility exists that a foreclosure by the more diligent original contractor could leave his subcontractors with insufficient security for their claims.¹⁵² Of course, the original contractor would normally have personal liability for payment of his subcontractors, but the original contractor's liability is often of little value to the subcontractor compared to his lien on the removable improvement itself.

148. 609 F.2d 1387 (5th Cir. 1980).

149. *Id.* at 1388.

150. *Id.* at 1389-90.

151. *Id.* at 1391.

152. The Waco court in *Sikes* attempted to demonstrate that its holding would not adversely affect the interests of owners:

[A]llowing the contractor's lien to extend to the improvements (including removals) furnished by his unpaid subcontractors does not expose the owner (or his successor in interest) to an unwarranted risk of double liability. In the event of suit against the owner by a subcontractor with a perfected lien, the contractor must defend the suit at his own expense under the provisions of Article 5463, and the owner is granted protection against double payment under the statute. If the contractor brings the suit, the subcontractors may be brought in as additional parties under the provisions of Rule 39 Vernon's Tex. Civ. St. Under the provisions of Article 5472e, all funds paid to the contractor under his lien based on the improvements made by his subcontractors are trust funds held by him for the benefit of the subcontractors; and the contractor is subject to penal sanctions for a violation of the trust.

Richard H. Sikes, Inc. v. L & N Consultants, Inc., 586 S.W.2d 950, 956 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

Since the rationale of *Suburban* argues strongly against the *Sikes* result as well, the supreme court's refusal of the writ in *Sikes* may evidence a disposition unfavorable to the Fifth Circuit's views. Certainly, there appears to be nothing in the priority statute to justify the continued coexistence of the holdings in *Sikes* and *Suburban*. There is no distinction made in article 5459 between the lien for original contractors and subcontractors or their rights of enforcement.

Indeed, if "the lien" referred to in the priority statute is a common lien for all claimants on the entire improvement, it clearly would not matter whether the contending claimants are original contractors or subcontractors. The common lien doctrine virtually compels that all removables constitute security for the claim of every claimant. Ultimately, then, the scope of the statutory preference—like many other issues—may prove to be governed by the venerable and tenacious *Oriental Hotel Co. v. Griffiths*.

IV. CONCLUSION

The law pertaining to mechanics' liens seems particularly subject to change from time to time. Perhaps change is to be expected inasmuch as the governing legal principles preserve a very delicate balance between competing economic interests in a large and dynamic industry. The legislature has adjusted this balance between contractors, subcontractors, mortgage lenders, and owners on many occasions,¹⁵³ and it will undoubtedly continue to do so.

The foregoing discussion suggests that the judiciary also affects that balance from time to time. When judicially declared adjustments proceed from the application of accepted rules of statutory construction and the principles of *stare decisis*, conflicts between appellate courts and confusion as to the governing principles remain at a tolerable minimum. But when controlling precedent is ignored or when strained constructions are contrived to achieve what is thought to be a desirable result, we have many conflicts in the cases and the uncertainty which conflicts inevitably create.

Conflicting decisions have resulted in substantial uncertainty concerning the viability of the common lien doctrine and the scope

153. See Youngblood, *Mechanics' and Materialmen's Liens in Texas*, 26 Sw. L.J. 665, 667-70 (1972).

of the commencement-of-work rule, and as to the availability of the preference lien to all contractors. These issues are in need of immediate resolution. If they are to be resolved judicially, however, the decision-making process should be guided by sound rules of statutory construction and the principles of *stare decisis*—an essential bulwark against uncertainty—rather than the desirability of any particular result. To be sure, the welfare of the construction industry and the lending community requires none of the alternative solutions to the issues so much as it requires certainty in the law.