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Mechanics' Liens in South Carolina

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MECHANICS' LIENS IN SOUTH CAROLINA

I. INTRODUCTION

South Carolina is experiencing the greatest construction boom in its history. Construction permits for the first six months of 1973 totaled $110,911,600 compared with $86,773,900 during the same period in 1972.[1] Over 50,000 South Carolinians are employed in the construction industry, and employment is expected to reach 64,500 by 1975.[2] The only insurance most of these individuals have that they will be paid for their labor or materials furnished and used in the improvement of real estate is the lien granted by the South Carolina mechanics' lien statutes.[3]

The statutes which now comprise chapter 5 of title 45 of the South Carolina Code were not enacted at the same time, and their joinder has resulted in inconsistencies not yet reconciled by judicial interpretation. No other statutes in the South Carolina Code govern the disposition of so much money and affect the rights of so many individuals, while remaining a monument dedicated to "the inaccuracy of language."[4] It is the purpose of this article to explore the scope and operation of the South Carolina mechanics' lien statutes and the priorities accorded the parties affected.

II. SCOPE AND OPERATION OF THE MECHANICS' LIEN STATUTES

A mechanic's lien is

> a charge on land, given by statute to the persons named therein, to secure a priority or preference of payment for the performance

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1. UNIVERSITY OF SOUTH CAROLINA BUREAU OF BUSINESS & ECONOMIC RESEARCH, 20 BUS. & ECON. REV. 16 (Oct. 1973).

2. SOUTH CAROLINA EMPLOYMENT SECURITY COMM'N, MANPOWER: REQUIREMENTS AND RESOURCES IN S.C. 7 (Supp. Rpt. 1971). These figures are taken from the contract construction industry division which includes:

> (1) general building (residential, industrial, commercial and other buildings); (2) heavy construction (highways and streets, bridges, sewers, and other heavy construction); and (3) special trade contractors (plumbing, heating, masonry, carpentry, plastering, painting and other special trades).

Id. Significantly, these figures do not reflect the large number of suppliers and materialmen whose rights are also governed by the mechanics' lien statutes, but they do include mechanics who labor and supply on public improvements that are exempt from the statutes.

3. S.C. CODE ANN. §§ 45-251 to -293 (1962).

4. "[T]here is not a more fruitful source of error in law than the inaccuracy of language." Williamson v. Hotel Melrose, 110 S.C. 1, 29, 96 S.E. 407, 414 (1918). This statement was precipitated by a conflict between the mechanics' lien statutes and the Recording Act, S.C. CODE ANN. §§ 60-101 *et seq.* (1962).

> of labor or supply of materials to buildings or other improvements to be enforced against the particular property in which they have become incorporated . . . .[5]

Without the mechanics' lien statutes, suppliers of materials and labor to improvements of real property possess only a contractual remedy to secure payment. When the mechanic contracts directly with the owner, the statutes create a lien against real property for the value of the labor or materials furnished to the improvement without the necessity of the supplier first obtaining a personal judgment.[6] Frequently the laborers and suppliers have dealt with a contractor or some similar person and have no right to collect against the owner who has received the benefit of their services. The statutes also protect these people by granting a lien against the owner's property, even though they would not be entitled to a personal judgment.[7]

A. Creation of the Mechanic's Lien

The mechanic's lien is purely a statutory right; hence its creation is governed by the terms of the statute. Although the terms of the two types of liens in South Carolina differ slightly, both liens are created at the time labor or material is furnished. Under section 45-251, "a lien founded on a debt due for labor performed or for materials furnished is not created until the labor is performed or the material furnished."[8] "The instant the labor or material is furnished, that instant the lien is created betwixt the two parties to the transaction."[9] Under section 45-252, "[t]he materialman's lien, or rather his right to a lien, arises, inchoate, when the material is furnished . . . ."[10] In both cases, however, little or no effect is given to the naked right; to enforce this right the lienor must notify the owner, serve and record a certificate of lien within ninety days after he ceases to furnish labor or materials, and bring suit to foreclose the lien within six months of the date he last furnishes labor or materials.[11]

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5. S. PHILLIPS, MECHANICS' LIENS § 9 (3d ed. 1893) [hereinafter cited as PHILLIPS].

6. S.C. CODE ANN. § 45-251 (1962).

7. *Id.* § 45-252.

8. Willard v. Finch, 123 S.C. 56, 59, 116 S.E. 96, 97 (1923).

9. Williamson v. Hotel Melrose, 110 S.C. 1, 30, 96 S.E. 407, 414 (1918).

10. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 629, 93 S.E.2d 855, 860 (1956).

11. The enforcement procedures are the same for either of the two types of liens. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 93 S.E.2d 855 (1956)

B. Persons Entitled to a Mechanic's Lien

The South Carolina statutes recognize two types of mechanics' liens—the section 45-251 lien designed to protect the mechanic who deals directly with the owner and the section 45-252 lien designed to protect the mechanic who deals with the general contractor (hereinafter referred to as contractor) or some person other than the owner or his agent. These liens differ not so much in terms of the class of persons protected as in the degree of protection afforded. The significant distinction between the section 45-251 lien and the section 45-252 lien is that the latter is limited to the "amount due by the owner on the contract price of the improvement made."[12] It is therefore advantageous for a mechanic to qualify for a section 45-251 lien and avoid the owner's limited liability.

Section 45-251[13] requires that a debt be due for labor performed or materials furnished by virtue of an agreement with, or by consent of, the owner. If the mechanic has not contracted directly with the owner, his sole basis for entitlement to a section 45-251 lien is the furnishing of labor or materials "by consent of, the owner." The meaning of "consent" has caused much of the litigation surrounding entitlement to this lien. When an owner authorizes the improvement of his real estate, all labor or materials furnished to that end could be viewed as having been performed by consent of the owner. In a series of cases[14] culminating in *Guignard Brick Works v. Gantt*,[15] however, the court has defined "consent" to require a contract between the mechanic and

(lien under § 45-252); Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407 (1918) (lien under § 45-251).

12. S.C. CODE ANN. § 45-254 (1962).

13. Section 45-251 of the code provides:

> Any person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration or repair of any building or structure upon any real estate or the boring and equipping of wells, by virtue of an agreement with, or by consent of, the owner of such building or structure, or any person having authority from, or rightfully acting for, such owner in procuring or furnishing such labor or materials shall have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated to secure the payment of the debt so due to him, and the costs which may arise in enforcing this lien under this chapter, except as is otherwise provided herein.

14. Metz v. Critcher, 86 S.C. 348, 68 S.E. 627 (1910); Builders Supply Co. v. North Augusta Elec. & Improvement Co., 71 S.C. 361, 51 S.E. 231 (1905); Geddes v. Bowden, 19 S.C. 1 (1882); Gray v. Walker, 16 S.C. 143 (1881).

15. 251 S.C. 29, 159 S.E.2d 850 (1968).

the owner.

> Consent . . . implies something more than a mere acquiescence in a state of things already in existence. It implies an agreement to that which, but for the consent, could not exist, and in which the party consenting has a right to forbid.[16]

The facts in *Guignard* demonstrate the difficulty of judicially interpreting a statutory scheme designed to protect both the owner and the mechanic. Gantt, the owner, hired Van Builders, Inc., to construct a house for $19,000. Van began construction and Guignard sold it 22,000 bricks on open account. Thereafter, Van abandoned construction and Gantt, knowing Van had not paid Guignard,[17] completed his home with the bricks. Guignard contended that this action constituted consent of the owner under section 45-251.[18] The court rejected this contention, relying in part on the above quoted definition of consent.

This definition of consent demonstrates Guignard's predicament under section 45-251. To qualify for a mechanic's lien, Guignard had to have furnished the bricks by consent of Gantt. Guignard, however, only contended that Gantt's consent arose when the bricks were used by Gantt with knowledge that they had not been paid for.[19] Because this consent was subsequent to the furnishing of the bricks, the court held that there was no section 45-251 consent. The court's definition of consent, "acquiescence in a state of things already in existence," hints that the alleged consent arose after the furnishing. It thus appears that to qualify for a mechanic's lien under section 45-251 the consent must be obtained before the labor or materials are furnished. This requirement implies that the mechanic must contract with the owner and renders the words *by consent of the owner* meaningless.[20]

The court stated, "[I]t is clear that at the time the contract

16. Gray v. Walker, 16 S.C. 143, 147 (1881), *quoted in* Guignard Brick Works v. Gantt, 251 S.C. at 32, 159 S.E.2d at 851.

17. Gantt knew that Guignard had not been paid because: "He called [Guignard's] office and ascertained that no amount had been paid on any of the brick, on the yard or in place. *At his request* Guignard sent him a bill for the entire 22,000 brick, totaling $921.85." Record at 4 (emphasis added). This statement is a clear manifestation of Gantt's consent to the *use* of the bricks.

18. *See* pp. 829-31 *infra* for a discussion of why Guignard's possible section 45-252 lien would have been unenforceable.

19. 251 S.C. at 31, 159 S.E.2d at 851.

20. This argument was raised by Guignard on appeal to the supreme court. "It is respectfully submitted that the word 'consent' must mean something less than agreement or the legislature would not have included it in the act." Brief for Appellant at 3.

was abandoned by Van, Guignard had no even inchoate right to a mechanic's lien."[21] Instead of attempting to ascertain what, if any, action by Guignard would entitle it to a section 45-251 lien, however, the court decided to base its reasoning on the passing of title. Title is not an element of section 45-251; all that is required is a debt due for furnishing materials by consent of the owner. The court is on firm ground when it speaks of there having been no consent at the time of furnishing, but to talk of title to the bricks as if that governed the lien is both unnecessary and confusing.[22]

Under previous South Carolina cases it was clear that the owner's consent to the improvement of his land was not sufficient to create a section 45-251 lien for all those who furnished labor and materials. The significance of *Guignard* is that, once materials have been furnished, the owner's consent to the use of specific materials with knowledge that the supplier has not been paid will not entitle the mechanic to a section 45-251 lien.[23] The court has therefore not deviated from its earlier interpretation that the mechanic must contract with the owner.

> "[I]t is difficult to understand how a lien can be created unless there be some debt to be secured by it, and to create a debt there must be some contract (agreement), either express or implied."
>
> It may, therefore, be assumed, as matter of course, as between the furnisher and the landowner dealing directly with each other, that there can be no lien except there shall first be a contract betwixt him who furnishes and him who receives.[24]

In *Gantt v. Van der Hoek*,[25] a materialman claimed entitlement to a section 45-251 lien on the basis of a contract with

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21. 251 S.C. at 32, 159 S.E.2d at 851. The court must mean that Guignard had no even inchoate right to a section 45-251 mechanic's lien because it could have qualified for an unenforceable section 45-252 mechanic's lien. *See* discussion pp. 829-31 *infra*.

22. The title reasoning was probably used only to distinguish the case of Rapid Fireproof Door Co. v. Largo Corp., 243 N.Y. 482, 154 N.E. 531 (1926) which had been cited by Guignard. The discussion of title could be justified if it was meant to refute the idea that there was a second furnishing by Guignard after receipt of Gantt's phone call. If this was the court's concern it should have discussed the concept of furnishing and the party most deserving protection in this situation, rather than the passing of title.

23. Although many states use the words contract or agreement with "consent," there is a split of authority as to whether consent will be valid to take the place of contracting. 53 AM. JUR. 2d *Mechanics' Liens* §§ 115-18 (1970); 57 C.J.S. *Mechanics' Liens* § 52 (1948).

24. Williamson v. Hotel Melrose, 110 S.C. 1, 30, 96 S.E. 407, 414 (1918), *quoting in part from* Geddes v. Bowden, 19 S.C. 1, 5 (1882).

25. 251 S.C. 307, 162 S.E.2d 267 (1968).

Gantt. Atlas Lumber Company refused to furnish materials to Van der Hoek (Van Builders) unless Gantt guaranteed to pay $6,000 jointly to Atlas Lumber Company and Van Builders. Gantt so agreed in the following statement: "I, William A. Gantt, agrees [sic] with the abovenamed Corporation to pay *at completion of contract* a part of the total sum to Atlas Lumber Co., Inc., and Van's Builders Inc. jointly for the amount of Six Thousand Dollars ($6,000.00)."[26] This agreement was drafted by Van der Hoek and signed by Gantt. Although Atlas furnished all materials because of this agreement with Gantt, the supreme court held that Atlas was not entitled to a mechanic's lien.[27]

The supreme court reasoned that a condition of the agreement, Van's completion of the contract, never occurred.[28] In South Carolina a mechanic must not only contract with the owner, but the contract must also be enforceable. The existence of the contract between Atlas and Gantt was not sufficient to evidence Gantt's "consent" within the meaning of section 45-251 because the only consent or agreement given was that contained in the statement quoted above. "Since the condition contained in the statement signed by Gantt never occurred, no liability arose against Gantt in favor of Atlas under Section 45-251 of the Code."[29]

The cases of *Guignard* and *Van der Hoek* indicate that the

26. *Id.* at 311, 162 S.E.2d at 269 (emphasis added).

27. The court first determined that Van Der Hoek was not the agent of Gantt. This finding was necessary for the purpose of construing the ambiguity in the agreement—an ambiguous clause in a contract is construed against the drafter. The supreme court held that Van der Hoek was an independent contractor who "assumed the responsibility and risk incident to the construction of the residence," and not Gantt's agent. 251 S.C. at 314, 162 S.E.2d at 271.

Although the court was only concerned with general agency law and not the mechanics' lien statutes, a contractor should never be considered the agent of the owner under section 45-251. If the contractor is considered a person "having authority from, or rightfully acting for" the owner, all mechanics would be entitled to section 45-251 liens thereby circumventing the section 45-254 requirement that the aggregate amount of liens not exceed the contract price. Section 45-251 should be interpreted to mean *any person other than the contractor.*

See ORE. REV. STAT. § 87.005 (1971) for treatment of all contractors and subcontractors as statutory agents of the owner.

28. 251 S.C. at 319, 162 S.E.2d at 273.

29. *Id.* This is an overly restrictive interpretation of section 45-251. Even though a condition of the agreement never occurred, the agreement itself should be sufficient evidence of Gantt's consent to the furnishing of materials by Atlas. It is apparent that the court is determined to give no legal effect to the words "by consent of, the owner" unless the mechanic possesses an enforceable contract.

supreme court is greatly concerned with the protection of owners and the granting of liens to mechanics not contemplated by the legislature. The golden rule of intepretation of the mechanics' lien statutes for entitlement to a lien is: "It is elementary that statutory liens may not be extended by courts to include the claims of persons not specified by the statute. He who sets up such a lien must bring himself fairly within the expressed intention of the lawmakers."[30] The supreme court has determined that the expressed intention of the lawmakers is that the owner must have entered into an enforceable contract with a mechanic to entitle the mechanic to a section 45-251 lien.

C. Labor and Materials for Which the Mechanic's Lien is Given

There has been little litigation in South Carolina concerning the type of labor and materials for which a mechanic is entitled to a lien. Under section 45-251 a mechanic is entitled to a lien "for labor performed or furnished or for materials furnished and actually used in the erection, alteration or repair of any building or structure upon any real estate or the boring and equipping of wells . . . ."[31] Section 45-252 authorizes a lien by a "laborer, mechanic, subcontractor or person furnishing material for the improvement of real estate . . . to the value of the labor or material so furnished."[32] There is some ambiguity in measuring mechanic lien applicability by the standard of "material or labor;"[33] however, there appears to be sufficient flexibility to allow the mechanic recovery for closely related incidental expenses.[34]

The South Carolina General Assembly has recently elimi-

30. Guignard Brick Works v. Gantt, 251 S.C. at 32, 159 S.E.2d at 851 (1968), *quoting* Williamson v. Hotel Melrose, 110 S.C. 1, 34, 96 S.E. 407, 415 (1918).

31. S.C. CODE ANN. § 45-251 (1962).

32. *Id.* § 45-252.

33. In construing the class of persons contemplated by the mechanics' lien statutes, the South Carolina Supreme Court has held that an architect furnishing plans and supervising construction of the building and also a person supervising the purchase of materials and the employment of laborers are entitled to liens. Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407 (1918). Nineteenth century cases held that a subcontractor of a subcontractor, Geddes v. Bowden, 19 S.C. 1 (1882), and a laborer employed by the builder, Gray v. Walker, 16 S.C. 143 (1881), were not entitled to mechanics' liens. Subsequently section 45-252, protecting mechanics dealing with some person other than the owner, was adopted to extend coverage to subcontractors. *See* S.C. CODE ANN. § 45-254 (1962); Lowndes Hill Realty Co. v. Greenville Concrete Co., 299 S.C. 619, 632, 93 S.E.2d 855, 861 (1956).

34. *See* PHILLIPS §§ 153-75 for a discussion of the problems other courts have faced in determining what expenses are secured by mechanics' liens.

nated a possible problem area by granting a lien for pre-construction labor. Section 45-251 was amended to provide:

> As used in this section, labor performed or furnished in the erection, alteration or repair of any building or structure upon any real estate shall include the work of making such real estate suitable as a site for such building or structure. Such work shall be deemed to include, but not limited to, the grading, bulldozing, leveling, excavating and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks, the construction of ditches and other drainage facilities and the laying of pipes and conduits for water, gas, electric, sewage and drainage purposes.[35]

Unfortunately section 45-252 was not so amended. This inconsistency raises the issue of whether a mechanic who deals with the owner's contractor is also entitled to a lien for the above-mentioned pre-construction expenses. Strict statutory interpretation would deny a section 45-252 lien for this type work, but there is no justification for not extending coverage to the mechanic who deals with the contractor. The language of section 45-252, "laborer, mechanic, subcontractor or person furnishing material for the *improvement of real estate* . . ."[36] is certainly broad enough to include these expenses. In addition, both sections 45-251 and 45-252 were amended to include the costs which may arise in enforcing the lien plus reasonable attorneys' fees in an amount determined by the trial judge. The attorneys' fees and court costs cannot exceed the amount of the lien.[37]

Those who furnish fixtures[37.1] in connection with the erection, alteration or repair of any building,[38] or to the improvement of any real estate[39] are entitled both to a mechanic's lien and to a security interest under article 9 of the Uniform Commercial Code.[40] The supplier should perfect a security interest because

35. No. 75, [1973] S.C. Acts & Jt. Res. 80.

36. S.C. CODE ANN. § 45-252 (1962).

37. No. 75, [1973] S.C. Acts & Jt. Res. 80.

37.1. *See* Carroll v. Britt, 227 S.C. 9, 86 S.E.2d 612 (1955) for a definition of fixtures in South Carolina. *See generally* 3 S.C.L.Q. 178 (1950).

38. S.C. CODE ANN. § 45-251 (1962).

39. *Id.* § 45-252.

40. S.C. CODE ANN. § 10.9-313(2) (Spec. Supp. 1966) states: "A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4)." The exception referred to appears in S.C. CODE ANN. § 10.9-313(4) (Spec. Supp. 1966):

under the U.C.C he may take priority over some creditors[41] to whom he would be subordinate if he had only a mechanics' lien.

D. Property Subject to a Mechanic's Lien

Section 45-251 grants a mechanic's lien upon the building or

The security interests described in subsections (2) and (3) do not take priority over

. . . .

(c) a creditor with a prior encumbrance of record on the real estate *to the extent that he makes subsequent advances*

if . . . the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected.

41. Although the South Carolina Supreme Court has not interpreted this section, one court has concluded that a mortgage has priority over the security interest in the fixture only for the advances made subsequent to the attachment of the security interest. In re Royer's Bakery, Inc., 1 UCC Rep. Serv. 570 (E.D. Pa. 1963). The subsequent advance, however, must be made or contracted for without knowledge of the security interest and before it is perfected. *See* Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962). Professor Coogan persuasively maintains that a subsequent advance means subsequent to both attachment *and affixation*. The practical effect of section 10.9-313(4)(c) is full protection of the fixture secured party. Fixtures are normally among the last items used in the improvement of real estate, and the fixture secured party has priority over all amounts disbursed prior to the attachment of the security interest and the affixation of the fixture. Because the bulk of the construction loan is usually disbursed before affixation of the fixture, the fixture secured party will recover the full amount of his security interest in the fixtures themselves.

Revisions to Article 9 by the National Conference of Commissioners on Uniform State Laws and the American Law Institute were approved in 1972. The revisions to section 9-313 would grant priority to the construction mortgagee over a security interest in fixtures if the mortgage is recorded before the goods become fixtures and if the goods become fixtures before the completion of the construction. UNIFORM COMMERCIAL CODE § 9-313(6) (1972 version) provides:

> Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods becomes fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

The mortgagee is granted priority even over perfected security interests. The fixture secured party can only attain priority by obtaining the mortgagee's written consent or by retention of the right to remove the goods as against the mortgagee or owner. UNIFORM COMMERCIAL CODE § 9-313(5) (1972 version). If the South Carolina legislature considers adoption of these revisions, it is recommended that the mortgagee's protection not extend to advances made after he has actual knowledge of the perfected security interest in the fixtures. The basic issue is protection of either the mechanic or mortgagee. The mortgagee has inadequate protection under present section 10.9-313(4)(c), but there is little reason to grant the mortgagee priority for disbursements made to others after receiving notice of a perfected security interest in fixtures. *See* Fulmer Bldg. Supplies, Inc. v. Martin, 251 S.C. 353, 162 S.E.2d 541 (1968), and discussion pp. 848-51 *infra*.

structure and upon the owner's interest[42] in the land upon which it is situated.[43] The section 45-252 lien "shall attach upon the real estate improved."[44] The amount of property subject to a mechanic's lien should be the same under both types of liens. Even though the wording of the two sections differs, a lien should always attach to the improvement and to so much of the owner's contiguous property as is necessary for reasonable use and enjoyment of the structure for which labor or material is supplied. Any other interpretation would so limit the efficacy of foreclosure and sale as to render the lien meaningless.

In *Ex parte Davis*[45] the South Carolina Supreme Court adopted this reasoning in determining how much land should be included in a mechanic's lien. The contractor, who built a judges' stand and a reviewing stand, claimed a lien against all of four tracts of land which had been joined to build a racetrack. The buildings, however, were on only two of the tracts. Granting the lien to all the land, the court noted that the lien extended to "the building and the land upon which it is situated, not upon which the foundation of the building stands, but the land . . . over which the purposes for which the building was avowedly erected extends and on which the usefulness of the building depends."[46] The court observed that inclusion in the lien of either too much or too little land would be erroneous because: "In the latter the security intended by the statute would be deprived of all value, while in the former the law would be unreasonable and oppres-

42. One question that has not been litigated in South Carolina is the type of estate subject to a mechanic's lien. Section 45-253 appears flexible enough to include all interests of the owner in land including equitable estates. S.C. CODE ANN. § 45-253 (1962) provides:

> If the person for whom the work is done or materials are furnished has an estate for life or any other estate less than a fee simple in the land or if the property, at the time of recording the statement, is mortgaged or under any other encumbrance, the lien before provided for shall bind his whole estate and interest therein in like manner as a mortgage would have done and the creditor may cause the right of redemption or whatever other right or estate the owner had in the property to be sold and applied to the discharge of his debt, according to the provisions of this chapter.

See generally PHILLIPS §§ 186-96 for a discussion of the applicability of mechanics' liens to various estates in land. *See* S.C. CODE ANN. § 57-516 (Cum. Supp. 1971) which authorizes mechanics' liens on the common elements of a condominium.

43. S.C. CODE ANN. § 45-251 (1962).

44. *Id.* § 45-254.

45. 9 S.C. 204 (1877).

46. *Id.* at 207.

sive."[47] The supreme court subsequently reaffirmed the *Ex parte Davis* holding and indicated it might extend the coverage of a single section 45-251 lien to include separate buildings on lots which are not contiguous, when the mechanic's material or labor is used in the improvement of each lot and the statement of account describes all the lots.[48]

Public property and property used essentially for the benefit of the public are exempt from the South Carolina mechanics' lien statutes[49] because of the absence of specific statutory authority to grant the lien.[50] Even if granted the lien would be useless since public property is not subject to levy and sale in South Carolina.[51] Frequently property used for public purposes, although not owned or operated by a governmental unit, qualifies for a similar exemption on the basis of public policy.[52] Privately owned property should be exempted, however, only when the inconvenience caused the general public by the sale of the property and consequent withdrawal from public service outweighs the interest of the individual mechanic asserting a lien.[53] Although this issue has not been squarely presented in South Carolina, the decisions indicate that property such as railroads and utilities are not subject to mechanics' liens.[54]

Similarly, property owned by the United States is exempt from mechanics' liens.[55] The mechanic furnishing for the improvement of federal property is adequately protected, however, because under the Miller Act[56] the United States requires that surety bonds be posted before any contract exceeding $2,000 is awarded for the construction, alteration or repair of any public building or public work. The Miller Act preempts the South Carolina mechanics' lien statutes, and a mechanic furnishing under

47. *Id.* at 206.

48. National Loan & Exch. Bank v. Argo Dev. Co., 141 S.C. 72, 83, 139 S.E. 183, 188 (1927).

49. Although there is a homestead exemption provision in the South Carolina Constitution, S.C. CONST. art. III, § 28 (1895), it does not apply to obligations for the repair, improvement or erection of buildings on real estate. *See, e.g.,* Brooklyn Sav. & Trust Co. v. Barnett, 243 S.C. 481, 134 S.E.2d 569 (1964).

50. Atlantic Coast Lumber Corp. v. Morrison, 152 S.C. 305, 149 S.E. 243 (1929).

51. Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42 (1939).

52. PHILLIPS § 180.

53. *Id.*

54. *Compare* Greenwood, A. & W. Ry. v. Strange, 77 F. 498 (1896) *with* Watson v. Columbia Bridge Co., 13 S.C. 434 (1879).

55. Armstrong v. United States, 364 U.S. 40 (1960).

56. Miller Act, 40 U.S.C. §§ 270a *et seq.* (1970).

a United States Government contract must seek his remedy under the contractor's surety bond.[57]

E. Amount Secured by the Lien

Under section 45-251 the mechanic who has contracted with the owner has a lien in the amount of the debt due to him under this contract.[58] If the mechanic has not contracted with the owner, however, his lien under section 45-252 is limited by section 45-254 which provides in part: "But in no event shall the aggregate amount of the liens set up hereby exceed the amount due by the owner on the contract price of the improvement made."[59] Thus, when the mechanic has dealt with the contractor, the mechanic has a lien for no more than the amount owed the contractor by the owner. Since the mechanic has no control over this amount, section 45-255 attempts to protect the mechanic by entitling him to payment in preference to the contractor after he notifies the owner in writing of labor or materials furnished.[60] In effect the mechanic is granted a lien on the funds remaining to be disbursed under the contract after this notice is given.[61] When the contractor abandons the project and the mechanic then gives notice of his furnishing, the mechanic is not entitled to preferred payment up to the unpaid balance of the contract price but only in the "amount due by the owner on the contract price of the improvement made."[62] In *Wood v. Hardy*[63] this phrase was held to entitle the mechanic to a lien only up to the amount due the contractor for work completed at the time of abandonment. If the contractor receives payment for more work than he has com-

57. United States v. F.D. Rich Co., 285 F. Supp. 572, 576 (D.S.C. 1968). "This court finds that the Miller Act does preempt remedies under state laws or lien statutes where a United States Government contract involves claims for workmanship and materials furnished."

58. S.C. CODE ANN. § 45-251 (1962); *see* Builders Supply Co. v. North Augusta Elec. & Improvement Co., 71 S.C. 361, 51 S.E. 231 (1905). *See generally,* PHILLIPS § 204.

59. S.C. CODE ANN. § 45-254 (1962).

60. S.C. CODE ANN. § 45-255 (1962) provides:

> Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be paid in preference to the contractor at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.

61. *See* Fulmer Bldg. Supplies, Inc. v. Martin, 251 S.C. 353, 162 S.E.2d 541 (1968), and discussion pp. 848-51 *infra.*

62. S.C. CODE ANN. § 45-254 (1962).

63. 235 S.C. 131, 110 S.E.2d 157 (1958).

pleted, the mechanic's section 45-252 lien is rendered unenforceable.[64]

> [T]he issue [is] how much, if anything, the appellant [Owner] owed Duckworth [Abandoning Contractor] at the time when respondent [Mechanic] gave him notice of the lien. This can be determined by the taking of testimony as to the amount of damages sustained by [Owner] due to the breach of the construction contract by [Abandoning Contractor] so as to determine what amount, if any, is due to [Abandoning Contractor] for work done or materials furnished prior to the abandonment of the contract. Whatever amount the lower Court finds to be due by the appellant to [Abandoning Contractor] at the time he abandoned the contract, the [Mechanic] would be entitled to a mechanic's lien for such amount.[65]

Because the owner may add any damages resulting from breach of the contract to the amount already paid the contractor, the mechanic has little hope of enforcing his section 45-252 lien. The risk of the loss resulting from the contractor's abandonment is effectively shifted to the mechanic. This shift is perhaps justified when the owner has already paid the contractor for the mechanic's labor or materials but seems illogical if the owner is allowed to receive materials for which he has not yet paid. Assume contractor has completed $7,000 worth of improvements pursuant to a $19,000 contract and has been paid $5,000 by the owner. Materialman then delivers $1,000 worth of bricks to the construction site under his contract with contractor. Contractor abandons the project, and materialman then notifies owner of the furnishing of the bricks. Owner uses the bricks but suffers $3,000 in damages by virtue of contractor's abandonment. Under *Wood* the mechanic has an unenforceable section 45-252 lien because only $2,000 was due to the contractor when he abandoned, and the owner suffered $3,000 in damages caused by contractor's breach of contract. These facts are similar to those in *Guignard Brick Works v. Gantt*[66] and *Gantt v. Van der Hoek*.[67] In both cases the mechanics were forced to argue that they possessed section 45-251 liens because their section 45-252 liens became unenforceable upon the contractor's abandonment.

64. *See* text accompanying notes 169-71 *infra* for a discussion of mechanic's cause of action against contractor.

65. 235 S.C. at 147, 110 S.E.2d at 164 (1959).

66. 251 S.C. 29, 159 S.E.2d 850 (1968).

67. 251 S.C. 307, 162 S.E.2d 267 (1968).

One of the most difficult tasks confronted by a court is allocation of the risk of loss between two innocent parties. The mechanic has much more expertise in the construction industry and is much better able to bear the risk of loss than an owner such as Mr. Gantt. Both Guignard and Atlas Lumber Company were therefore probably the proper parties to shoulder the loss caused by Van's abandonment. If the owner is a bank or another large institution knowledgeable in the ways of the construction industry, the result in these cases appears less justifiable, and perhaps the mechanic should be entitled to a section 45-252 lien up to the amount of the unpaid balance at the time he notifies the institution of his furnishing. In any event, the mechanic should not bear the risk of loss when he furnishes labor or materials for which the contractor has not been paid. In this situation the owner should bear the risk of loss for his own contractual damages. The owner should not be able to avoid the mechanics' lien statutes by setting off his damages, caused by contractor's breach of contract, against his unpaid balance.

F. Enforcement of the Mechanic's Lien

The enforcement procedures under the mechanic's lien statutes are the same for liens under sections 45-251 and 45-252.[68] While these provisions are fairly straightforward, recent developments in federal statutory and constitutional law make it imperative to scrutinize the enforcement scheme. Once created, the lien "continues until extinguished by payment, dissolved by the limitation of the statute, or consummated when the lien claimant takes the steps required by law . . . ."[69] The steps required for enforcement of a section 45-252 lien were summarized in *Lowndes Hill Realty Co. v. Greenville Concrete Co.*[70] as follows:

> [I]n order to perfect and enforce it he must: (1) give [written] notice to the owner "of the furnishing of such material and the amount or value thereof," Section 45-254; (2) serve and record a certificate of lien within ninety days after he ceases to furnish material, Section 45-259; and (3) bring suit to foreclose the lien within six months after he ceases to furnish material, Section 45-262.[71]

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68. *See* S.C. CODE ANN. § 45-259 (1962).

69. Williamson v. Hotel Melrose, 110 S.C. 1, 10, 96 S.E. 407, 409 (1918) (circuit court opinion).

70. 229 S.C. 619, 93 S.E.2d 855 (1956).

71. 229 S.C. at 629, 93 S.E.2d at 860. Although the South Carolina Supreme Court

Lowndes Hill held that service of the certificate of lien upon the owner under section 45-259 could also suffice as written notice of the furnishing of labor or materials under section 45-254.[72] Therefore, a mechanic need only serve a certificate of lien within ninety days after he ceases furnishing labor or materials.[72.1] This decision made the enforcement requirements of a section 45-252 lien and a section 45-251 lien identical.

To initiate suit within six months the mechanic must file a petition in the "court of common pleas for the county in which the building or structure is situated . . . ."[73]

> The petition shall contain a brief statement of the contract on which it is founded and of the amount due thereon, with a description of the premises subject to the lien and all other material facts and circumstances, and shall pray that the premises may be sold and the proceeds of the sale applied to the discharge of the demand.[74]

The courts have decreed that the petition shall be liberally construed to make all necessary allegations and in fact need not contain an allegation of the contract.[75] Although the owner may counterclaim to recover damages for the mechanic's failure to

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has used the term "perfection" in numerous cases, this writer has found the term to be of little legal significance and quite confusing. The lien is created; it attaches for the purpose of priority over other encumbrances; and the statutes require certain procedures for the enforcement of the lien. If the mechanic follows all the necessary procedures for enforcement, thereby avoiding dissolution of the lien, he has brought suit to foreclose the lien. Therefore, the only time at which a "perfected lien" has any legal significance is between the commencement of the suit and foreclosure. From the cases in which the court refers to a lien as "perfected," it appears that the court means it has not yet been dissolved by virtue of a failure to meet the enforcement requirements.

72. 229 S.C. at 636, 93 S.E.2d at 863.

72.1. The ninety day requirement necessitates a determination of when the mechanic ceases to furnish labor or materials. In Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959) the mechanic completed construction on September 8, 1956. On October 8, 1956, he connected the kitchen sink to the septic tank with two joints of pipe. The mechanic recorded and served his lien on December 18, 1956, within the required ninety days from October 8, but more than ninety days from September 8. The South Carolina Supreme Court held that the mechanic's lien was perfected because the additional work was necessary for the completion of the mechanic's contract. This is the correct result because the contest was between the mechanic and the owner. However, as discussed *infra* at pp. 838-45, the ninety day requirement is primarily for the protection of third parties desiring to deal with the owner. Had the suit in the Wood case been between the mechanic and a third party dealing with the owner on December 10, 1956, the lien should be dissolved.

73. S.C. CODE ANN. § 45-264 (1962).

74. *Id.* § 45-266.

75. National Loan & Exch. Bank v. Argo Dev. Co., 141 S.C. 72, 139 S.E. 183 (1927).

perform his contractual obligations,[76] setoff is not permitted.[77] Therefore, the mechanic should complete his work as specified in a timely fashion before launching a suit to enforce his lien.

The essential enforcement provision is the power of the court to order a sale of the property under section 45-276.[78] Supplemental provisions permit the sale of part of the property if it will be sufficient to extinguish the lien,[79] and also govern the distribution of the proceeds.[80] Under section 45-261 the owner may pay the amount of the alleged lien to the clerk of court, and thereafter the lien on the property is discharged and the money deposited becomes subject to the lien.[81] The owner usually avails himself of this procedure rather than risk the possibility of a forced sale.

In addition to these procedural concerns, a crucial consideration in the enforcement of a mechanic's lien is compliance with the fourteenth amendment of the United States Constitution. In *Fuentes v. Shevin*[82] the United States Supreme Court held that prejudgment replevin statutes in Pennsylvania and Florida "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from the possessor."[83] In the context of mechanics' liens, the critical question is whether the attachment of the lien deprives the owner of a significant property interest, requiring that he be afforded notice and an opportunity to be heard. A recent federal district court case[84] held the Massachusetts prejudgment attachment scheme to be in violation of the fourteenth amendment:

> [E]ven viewing the attachment as a non-possessory lien . . . or as merely an encumbrance or cloud on the title, . . . the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching

76. Spears v. Du Rant, 76 S.C. 19, 56 S.E. 652 (1907); Tenney v. Anderson Water, Light & Power Co., 69 S.C. 430, 48 S.E. 457 (1904).

77. W.L. Brissey Lumber Co. v. Crowther, 135 S.C. 131, 133 S.E. 208 (1926).

78. S.C. CODE ANN. § 45-276 (1962) states: "If the lien is established in favor of any of the creditors whose claims are presented the court shall order a sale of the property to be made by such officer as may be authorized by law to make sales of property."

79. *Id.* § 45-277.

80. *Id.* §§ 45-279 to -281.

81. *Id.* § 45-261.

82. 407 U.S. 67 (1972).

83. *Id.* at 96.

84. Bay State Harness Horse Racing & Breeding Ass'n v. PPG Indus., Inc., 42 U.S.L.W. 2132 (D. Mass. Aug. 11, 1973).

> creditors, and thus restricts the owner's ability to sell or mortgage the property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest significant not only to him in his use of the property but to the attaching party as well.[85]

The language of both the Massachusetts case and *Fuentes* is broad enough to include the mechanic's cloud on owner's title after attachment of the lien. Apparently the fact that the mechanic is theoretically improving the value of the owner's property in the amount of his lien is of little consequence. If the right to freely alienate one's property is a significant property interest, the owner must be afforded an opportunity to be heard when this interest is restricted by the attachment[86] of a mechanic's lien.[87] Until the uncertainty surrounding *Fuentes* is clarified by future decisions,[88] it is recommended that the mechanic hold a *Fuentes* judicial hearing[89] with the owner before recordation of the statement of account to ensure compliance with the fourteenth amendment.

In addition to this federal constitutional problem certain mechanics must make disclosures concerning any finance charge and the consumer's right of rescission in accordance with title I of the Federal Consumer Credit Protection Act (CCPA).[90] Title I of the CCPA is better known as the Truth in Lending Act. Section 105 of the Truth in Lending Act[91] authorizes the Federal Reserve Board to promulgate regulations enforcing the Act. Sections

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85. *Id.*

86. *See* discussion at pp. 838-45 *infra* stating that the South Carolina mechanics' lien attaches upon recordation of the statement of account.

87. *See* 1973 LAW & SOC. O. 497 for an extended discussion of this problem by a writer who concludes that the Arizona mechanics' lien statutes are unconstitutional. The Arizona and South Carolina statutes are substantially the same.

88. *Compare* Mason v. Garris, 360 F. Supp. 420 (N.D. Ga. 1973), *with* Hernandez v. European Auto Collision, Inc., 346 F. Supp. 313 (E.D.N.Y. 1972), for an illustration of conflicting views concerning the application of *Fuentes* to liens for auto repairs.

89. Apparently at such a hearing the mechanic must prove that he has labored or furnished materials and is therefore entitled to a lien.

90. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-77 (1970). The Act is implemented by FRB Reg. Z, 12 C.F.R. § 226 (1973).

91. 15 U.S.C. § 1604 (1970) provides:

> The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

226.6, 226.7, 226.8 and 226.9 of regulation Z describe the various disclosures required concerning the charging of interest and finance charges.[92] The consumer is also entitled to receive notice that he has three days within which to rescind the contract without penalty or obligation,[93] and the creditor cannot perform or permit the performance of any work or service for the consumer until the creditor has reasonably satisfied himself that the consumer has not exercised the right of rescission.[94] Failure by the creditor to make any disclosure required by the Act results in liability to the consumer in an amount equal to the sum of twice the amount of the finance charge in connection with the transaction, in addition to the costs of the action with a reasonable attorney's fee.[95] Moreover, violation of the rescission disclosure entitles the consumer to tender the property or its reasonable value to the mechanic.[96]

Section 226.9(a) of regulation Z expanded the scope of the Truth in Lending Act to include a security interest that "*is or will be retained or acquired* in any real property which is used or is expected to be used as the principal residence of the customer . . . ."[97] Regulation Z also specifically includes mechanics' liens in its definition of security interest.[98] The initial decision on the applicability of the Truth in Lending Act to mechanics' liens held that section 125(a) only applied to consensual liens and did not include liens which arose by operation of law, as a mechanic's

92. FRB Reg. Z, 12 C.F.R. §§ 226.6 to .9 (1973). Significantly first mortgages on a dwelling are exempt from the requirements of disclosing "total of payments," 12 C.F.R. § 226.8(b)(3), and total amount of finance charge, 12 C.F.R. § 226.8(d)(3).

93. *Id.* § 226.9(b) (1973).

94. *Id.* § 226.9(c) (1973).

95. 15 U.S.C. § 1640 (1970). The creditor's liability for twice the amount of the finance charge cannot be less than $100 nor greater than $1000.

96. FRB Reg. Z, 12 C.F.R. § 226.9(d) (1973).

97. *Compare* FRB Reg. Z, 12 C.F.R. § 226.9(a) (1973) *with* 15 U.S.C. § 1635(a) (1970).

98. FRB Reg. Z, 12 C.F.R. § 226.2(z) (1973) provides:

> "Security interest" and "security" mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust, and other consensual or confessed liens whether or not recorded, *mechanic's, materialmen's, artisan's, and other similar liens*, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment or performance of an obligation. [emphasis added.]

lien.[99] This decision was recently reversed by the United States Court of Appeals for the Second Circuit,[100] and an intervening case has also upheld the application of the Truth in Lending Act to mechanics' liens.[101] It is recommended that all home improvement contractors who extend credit for improvements covered by the mechanics' lien statutes make the proper disclosures to consumers under the Truth in Lending Act.

III. PRIORITY ACCORDED A MECHANIC'S LIEN

The key concepts for determining the time at which the mechanic is afforded protection are attachment and relation back. Once the lien attaches, the mechanic has priority over all subsequent encumbrancers except other mechanic lienors.[102] In many jurisdictions, however, the lien will relate back from the time of attachment to a previous event such as the date of furnishing or the date of contracting. The mechanic is then protected from that date.

> The period fixed has not been uniform in the several States. The larger number have established the commencement of the work upon the premises as the moment when the rights of the mechanic are to be protected; others have made the filing of a notice, in some public office of the jurisdiction where the building is situate, of intention to hold a lien, the time when it will attach; while a few have adopted the date of the contract or the completion of the work. To determine which of these periods is the most consonant with sound policy, much depends upon the favor with which it is the interest of the State to regard the claims of mechanics.[103]

Before discussing the priority scheme in South Carolina, it is important to outline the practical effect of the adoption of each of the most commonly used dates from which the mechanic is protected. The mechanic receives adequate protection when he is

99. N.C. Freed Co. v. Board of Governors, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,356 (W.D.N.Y. 1971). In South Carolina it appears that the section 45-251 lien is consensual, and the section 45-252 lien arises by operation of law.

100. N.C. Freed Co. v. Board of Governors, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,079 (2d Cir. 1973).

101. Gardner & North Roofing & Siding Corp. v. Board of Governors, 464 F.2d 838 (D.C. Cir. 1972).

102. S.C. CODE ANN. § 45-286 (1962) states the rule of priority among mechanics. *See* text accompanying notes 161-65 *infra*.

103. PHILLIPS § 215.

granted priority from the date at which he contracts to furnish; he has priority over everyone who has not yet recorded. This date, however, works a hardship upon subsequent encumbrancers because they have no actual or constructive notice of the mechanic's priority until he records or begins furnishing. Relation back to the date of contract, therefore, might create a secret lien which is "justly abhorrent to law."[104] The mortgagee and owner receive maximum protection when the mechanic is granted priority from the date of recordation of some notice. As a practical matter the mechanic does not wish to risk antagonizing his contractor or the owner and therefore will not encumber the property through recordation until it is too late to effectively protect himself.[105] Protecting the rights of the mechanic from the date of commencement of work upon the premises is the most equitable solution. The mechanic is protected before recordation and subsequent creditors need only inspect the owner's real estate to determine the creation of any mechanics' liens. This date gives effect to inquiry notice;[106] no secret lien is created, but a person with knowledge of the furnishing of labor or materials is prevented from taking advantage of the mechanic's reluctance to record.

There is no issue of prority between the mechanic lienor and the owner because the owner is the debtor of all parties attempting to attain priority. Priority is only important in contests between the mechanic and other creditors of the owner. This discussion, therefore, will resolve priority for each of the cases that may arise between the mechanic and another creditor of the owner.

A. Priority Between Mechanic and Mortgagee

Section 45-257 is the only provision in the South Carolina Code evidencing an intent to create a relation back for the purpose of protecting the mechanic. "Such a lien shall not avail or be of force against any mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed."[107] Unfortunately this section implies a relation back to the time of contract, a situation which affords the mortgagee little

104. Williamson v. Hotel Melrose, 110 S.C. 1, 14, 96 S.E. 407, 410 (1918), (circuit court opinion).

105. *See* text accompanying notes 183 & 184 *infra*.

106. *See* pp. 845-48 *infra* for a discussion of inquiry notice in South Carolina.

107. S.C. CODE ANN. § 45-257 (1962). This section has remained unchanged since its adoption in 1869.

protection against the creation of secret liens. The South Carolina Supreme Court has avoided this problem by resolving the conflict between section 45-257 and the Registry Act in favor of the latter—giving priority only from the date of recordation.[108] It is therefore necessary to discuss this priority issue in terms of the circumstances giving rise to possible conflicts between section 45-257 and section 60-101.

1. Mortgagee Records-Mechanic Contracts-Mechanic Records[109]

If the mortgagee records before the mechanic contracts, section 45-257 clearly grants priority to the mortgagee.[110] The mortgagee need only be concerned about subsequent disbursements under a future advance clause which are made after the mechanic records and notifies the mortgagee.[111]

2. Mechanic Contracts-Mechanic Records-Mortgagee Records

In this situation the mechanic will always have priority over the mortgagee. Recording the statement of account gives record notice to all subsequent encumbrancers, entitling the mechanic to protection from the date of recordation.[112]

3. Mechanic Contracts-Mortgagee Records-Mechanic Records

This situation poses the problem of relation back from the time of attachment to a prior date for the purpose of granting the mechanic priority over intervening encumbrancers. The landmark South Carolina decision on the time of attachment and relation back of a mechanic's lien is *Williamson v. Hotel Melrose,*[113] in which the supreme court in a 3-1 decision held that the mechanic's lien attaches upon recordation in accordance with the registry statutes and does not relate back to the date of the contract under which the lien is claimed. During the first six

108. *Id.* § 60-101. *See* Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407 (1918).

109. Recordation by the mechanic is recordation of the statement of account of the amount due under section 45-259. *See* discussion pp. 838-45 *infra.*

110. Williamson v. Hotel Melrose, 110 S.C. at 22, 96 S.E. at 412 (circuit court opinion). This interpretation of section 45-257 is unaffected by the conflict with the Registry Act.

111. Fulmer Bldg. Supplies, Inc. v. Martin, 251 S.C. 353, 162 S.E.2d 641 (1968). *See* discussion accompanying notes 150-60 *infra.*

112. S.C. CODE ANN. § 60-101 (1962).

113. 110 S.C. 1, 96 S.E. 407 (1918).

months of 1914, Hotel Melrose, a South Carolina corporation, entered into several contracts with various persons for materials to be furnished and labor to be performed in the construction of a hotel. Several mechanics entered into contracts with Hotel Melrose between July 5, 1913, and May 19, 1914. Work on the building was begun in early 1914 and completed in 1915. On July 1, 1914, Hotel Melrose executed to Williamson and others as trustees a $35,000 mortgage, secured by that portion of the hotel site upon which the building was erected. All mechanics furnished materials and labor before and after July 1, 1914, but the statements of material furnished and labor done were recorded after that date.

The mechanic lienors contended "that their liens relate[d] to the date of the contracts under which labor was performed or materials furnished, and that, therefore, they [were] prior in rank to the mortgage."[114] The mortgagee argued that the Registry Act[115] required mechanics to record their liens to render them effective against subsequent creditors and that section 4117[116]

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114. *Id.* at 8, 96 S.E. at 409 (circuit court opinion).

115. S.C. CODE § 3542, Vol. 1 (1912) provides in part:

> [A]ll statutory liens on buildings and lands for materials or labor furnished on them . . . shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, only when recorded within ten days from the time of such delivery or execution . . . . *Provided nevertheless*, That the recording and record of the above mentioned deeds or instruments of writing subsequent to the expiration of said ten days shall, from the date of such record, operate as notice to all who may subsequently thereto become creditors or purchasers.

The only major alteration to this section in the 1962 Code is the elimination of the ten day requirement.

> [A]ll statutory liens on buildings and lands for materials or labor furnished on them . . . shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice only from the day and hour when they are recorded . . . . S.C. CODE ANN. § 60-101 (1962).

116. S.C. CODE ANN. § 45-259 (1962) provides:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner or, in the event the owner cannot be found, upon the person in possession and files in the office of the register of mesne conveyances or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone

[now section 45-259] of the mechanics' lien statutes required mechanics to file and record a statement of account. Therefore the mechanics' liens could not attach until the section 45-259 statement was filed and recorded, and the Registry Act prevented the liens from relating back to the time of contracting. Circuit Court Judge Spain, in a thorough opinion,[117] concluded that the clear intent and meaning of the mechanics' lien statutes prevailed over the inconsistent language of the Registry Act and held that for priority purposes a mechanic's lien must relate back from the time of recordation of the statement of account to the date of entering the contract. Any other interpretation would render section 4515[118] [now section 45-257] meaningless. Viewing the Registry Act conflict in this light, the question becomes: should the mechanics' lien statutes be rendered internally inconsistent by a later enacted statute, or should the later statute be interpreted to give effect to the clear meaning of the existing mechanics' lien statutes? The supreme court reversed Judge Spain and followed the former alternative, concluding that section 45-259 was strictly an enforcement provision and that the amendments to section 45-259 required reference to the Registry Act to ascertain all rules of notice. Both conclusions are open to criticism.

First, the court's characterization of section 45-259 refused to recognize it as a notice provision designed to protect third parties who deal with the owner.

> The lien statute made no sufficient provision for registry to give notice to other persons, nor did any other statute at that time do so. Those parts of the lien statute which provided for filing in the clerk's office a "statement" of the amount due the lienee

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in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. *Provided*, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. The delivery on the register or clerk for filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 60 of this Code.

This section is substantially the same as section 4117 of the 1912 Code of Laws. Section 4117, however, did not contain the clause "serves upon the owner or, in the event the owner cannot be found, upon the person in possession," nor did it contain the second sentence providing for service in the event the owner cannot be located.

117. 110 S.C. 7-26, 96 S.E. 407-13.

118. S.C. CODE ANN. § 45-257 (1962) as set forth in text accompanying note 107 *supra*.

> . . . were on their face intended for *part of the procedure to enforce the lien and for no other purpose.*[119]

A real purpose behind the dissolution of the mechanic's lien under section 45-259 is protection of people subsequently dealing with the owner of a completed improvement. The statute provides for filing a statement of account *and* "a description of the property intended to be covered by the lien sufficiently accurate for identification" which "shall be recorded in a book kept for the purpose by the register or clerk."[120] If the court is correct that the statute is intended simply to be a part of an enforcement procedure, the legislature would not have required recordation of a description sufficiently accurate for identification. It is therefore apparent that a major purpose of section 45-259 is protection of people subsequently dealing with the owner of a completed improvement. If the statement of account is not recorded within ninety days after completion of the improvement, third parties may safely deal with the owner. In light of this purpose, third parties have no right to rely on the fact that no mechanic's lien has been recorded until the ninety day period has lapsed. Under this analysis the relation back principle implicit in section 45-257 is made effective, and the mechanics' lien statutes are internally consistent.

Second, the court's conclusion that the amendments to section 45-259 require reference to the Registry Act to ascertain all rules of notice is contrary to prior case law and is not as equitable as might be desired. This issue is crucial because if reference must be made to the registry statutes there can never be a relation back to a prior event for the purpose of priority. The Registry Act was substantially amended in 1876 to provide that:

> [A]ll statutory liens on buildings and lands for labor furnished or performed on them . . . shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of Register of Mesne Conveyances where the property affected thereby is situated in the case of real estate. . . .[121]

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119. 110 S.C. at 30-31, 96 S.E. at 414 (emphasis added).

120. S.C. CODE ANN. § 45-259 (1962).

121. No. 104, [1876] S.C. Acts & Jt. Res. 92-3. *See* note 106 *supra* for the present wording of this section in S.C. CODE ANN. § 60-101 (1962).

In South Carolina a mortgagee is considered a purchaser,[122] and therefore the conflict between section 60-101 and section 45-257 is inescapable. The necessary inference from section 45-257 is that a mechanic's lien will "avail" and "be of force" against a mortgage recorded after the date of the mechanic's contract.[123] The supreme court characterized the necessary inference in section 60-101 as follows:

> The registry statute, then, by necessary inference, declares that the statutory lien, good betwixt the contracting parties before any "statement" of it is made in writing, shall not affect mortgage liens acquired by third persons (without notice and for valuable consideration) subsequent to the statutory liens unless the evidences of the statutory liens had been reduced to a "statement" and recorded before the mortgage liens took effect.[124]

To resolve this conflict, one could simply look at the most recently enacted statute and treat it as the controlling expression of legislative intent. This interpretation, however, creates problems in light of the many amendments that have been made to both mechanics' lien statutes and the Registry Act.

In 1882 the predecessor to present section 45-259 was amended by the addition of the following clause: *"[P]rovided*, that said lien shall not be valid to affect the rights of subsequent creditors, or purchasers for valuable consideration without notice, unless the statement be recorded within 40 days from the time of delivery to the clerk."[125] This clause was replaced in 1884 by the following sentence: "The delivery to the register for filing, as hereinbefore provided, shall be and constitute the delivery contemplated with regard to such liens in [the Registry Act]." The 1884 amendment contained the standard clause repealing all acts and parts of acts inconsistent with it. In *Murphy v. Valk*[127] the court held that this amendment entitled the mechanics' lien statutes to be treated as being enacted more recently than the Registry Act. The conflict in that case involved the requirement in the Registry Act that the execution of the statement be proved by the

122. *See* note 139 *infra*.

123. S.C. CODE ANN. § 45-257 (1962) as set forth in text accompanying note 107 *supra*.

124. 110 S.C. at 132, 96 S.E. at 410.

125. S.C. GEN. STAT. § 2354 (1882).

126. No. 505, [1884] S.C. Acts & Jt. Res. 822.

127. 30 S.C. 262, 9 S.E. 101 (1889).

affidavit of a subscribing witness,[128] while the mechanics' lien statutes required only that the statement be subscribed and sworn to by the person claiming the lien.[129] The court initially found that there was no conflict between the statutes but as an alternative holding described the effect of the 1884 amendment as follows:

> But if we are mistaken in this, and there is real conflict betwen the acts as to the proof necessary for recording a mechanic's lien, we suppose that there can be no doubt that the amendment of the mechanic's act (1884), being subsequent to the registry law (1876), repealed any provision in that law which was inconsistent with it. The second section of the amendment declares "that all acts and parts of acts inconsistent with this act, are hereby repealed." The special provisions of this act, as to the manner of recording a mechanic's lien, is the law which must govern, and as we think this has been the unvarying practice heretofore to all such cases, we cannot say that the judge below committed error in holding that the lien was legally "recorded."[130]

Looking exclusively at the time of enactment or amendment to resolve statutory conflicts is an exercise in futility, with the travelling trophy being awarded to the most recently amended statute. Priority between the mechanic and mortgagee would change each time the Registry Act or the mechanics' lien statutes were amended. Perhaps realizing the commercial impracticability of such a solution, the supreme court in *Williamson* made no reference to the *Murphy* decision.

The supreme court also failed to mention another seemingly contrary case decided only seven years before *Williamson*. In *Drewery v. Columbia Amusement Company*[131] the court granted a mechanic's lien priority over a mortgage even though the mechanic's statement of account was probably recorded after the recordation of the mortgage.[132] Circuit Judge Spain concluded in

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128. REV. STAT. §§ 1776-1777 (1876).

129. REV. STAT. § 2354 (1876), *as amended* No. 505, [1884] S.C. Acts & Jt. Res. 822-23. *See* note 107 *supra* for a comparison of this section with the current S.C. CODE ANN. § 45-259 (1962).

130. 30 S.C. at 269-70, 9 S.E. at 104.

131. 87 S.C. 445, 69 S.E. 879, 1094 (1911).

132. The facts in this case are unclear, but the court's failure to mention the Registry Act indicates that the mechanic's statement of account was recorded after the mortgage.

> The master finds that the last item in the account of that company, for materials furnished, is dated the 22d of May, 1909; the mortgage was executed on the 14th and recorded on the 15th of June, 1909; the said company filed its state-

Williamson that *Drewery* mandated that mechanics be granted priority over the mortgagee,[133] as did Chief Justice Gary who authored the *Drewery* opinion and dissented in *Williamson*. Perhaps the supreme court's failure to mention *Drewery* was motivated by the lack of any reasoning behind the naked result in that case. The supreme court summarily dismissed contrary results under similar statutes in other jurisdictions[134] because "[t]he construction of our statutes does not depend upon what other courts have concluded about the statutes of other states; and we have, therefore, not considered those matters."[135] This reasoning is apparently also true of Massachusetts decisions, even though our mechanics' lien statutes were copied virtually verbatim from the statutes of that state.[136]

The language of the statutes, the dates of enactment or amendment and prior cases offer little aid in the resolution of the conflicting priorities. The circuit court gave effect to the notice provisions in the mechanics' lien statutes at the expense of the Recording Act, and the supreme court gave effect to the Recording Act at the expense of the mechanics' lien statutes. Both decisions are reasonable but reflect differing policy considerations. It is unfortunate that neither decision can be characterized as reaching the most equitable result because the policy considerations conflict as harshly as the statutory language. The circuit court opinion would allow the existence of secret liens at the mechanic's date of contract. The mortgagee might not discover these liens by checking the record or viewing the owner's property, and therefore his recorded mortgage could later be subordinated to numerous mechanics' liens. The supreme court decision forces the mechanic to record to attain priority, thereby stripping him of any realistic protection.[137] As discussed above, the most

ment within the time prescribed by statute, and began its action, within the required time, to enforce payment of its lien. 87 S.C. at 448, 69 S.E. at 880.

133. 110 S.C. at 13, 96 S.E. at 410.

What made the mortgage in that case inferior to the lien for materials? It was because the date of the contract for furnishing such materials was prior to the date of the mortgage, and the lien therefore was preserved when the statement of account was filed and recorded as prescribed by law.

134. *Id.* at 15, 96 S.E. at 410-11.

135. *Id.* at 33, 96 S.E. at 415. *See* Libbey v. Fidden, 192 Mass. 175, 78 N.E. 313 (1906); Carew v. Stubbs, 155 Mass. 549, 30 N.E. 219 (1892); Batchelder v. Rand, 117 Mass. 176 (1875); Dimkler v. Crane, 103 Mass. 470 (1870).

136. 110 S.C. at 15, 96 S.E. at 410.

137. *See* notes 183-84 *supra*.

equitable alternative, unfortunately not available under the South Carolina statutes, is to accord the mechanic priority from the commencement of work on the improvement. *Williamson* has never been directly challenged and, unless it is reversed, the mortgagee does have priority in this situation. The discussion of situations 4 and 5 indicates that *Williamson* might be limited or overruled if the same facts were before the supreme court today.

4. Mechanic Contracts-Mortgagee Views Construction in Progress-Mortgagee Records- Mechanic Records

This situation presents the problem of notice by the mortgagee of labor and materials furnished by mechanics before recordation of the mortgage. Although, as discussed above, record notice is extremely important under the Recording Act, South Carolina courts also recognize notice other than from the record.

> Since a relatively early date in the state's judicial history the law has been settled that notice of an unrecorded instrument will supply the want of registration, that is, a person who purchases with notice of an unrecorded instrument will not be protected therefore by the recording act. Thus the notice which will deprive a subsequent purchaser of protection under the recording act may be either record notice or notice other than from the record.[138]

A mortgagee is a purchaser under the South Carolina Recording Act[139] and therefore subject to the common law rules of notice other than from the record.

The mortgagee in *Williamson* did not record his mortgage until a substantial portion of the construction had been completed. Although the opinions do not so state, it may be assumed that the mortgagees inspected the building site before granting the mortgage and therefore viewed the partially completed construction.[140] Assuming arguendo the validity of *Williamson*, the registry statutes must also be consulted to determine the effect of mortgagee's notice of construction on the land.[141] Section 60-

138. Means, *The Recording of Land Titles in S.C.*, 10 S.C.L.Q. 346, 388 (1958) [hereinafter cited as Means].

139. Norwood v. Norwood, 36 S.C. 331, 15 S.E. 382 (1892); Haynesworth v. Bischoff, 6 S.C. 159 (1875). *See* Means at 368, n.85.

140. All mortgagees appraise the owner's real estate before granting a mortgage.

141. The *Williamson* court was interpreting section 3543 of the Code of Laws of 1912 which contained only one sentence:

109 states that actual notice will take the place of recordation only when such notice is of the instrument itself or of its nature and purport. The supreme court in *Williamson*, however, stated that section 60-109 (formerly section 3543 of the 1912 Code of Laws) was irrelevant because the mechanics were not in possession of the real property in issue.[142] This holding appears correct since section 60-109 only attempts to refute the concept of possession as notice and to state the requirements incumbent upon a possessor to establish notice without recordation. The mechanic is never in possession of the owner's property, and therefore the question becomes: is actual notice by the mortgagee of work performed and materials furnished sufficient to supply the place of recordation under the common law?

South Carolina courts have used the concept of actual notice to supply the place of recordation in two analogous situations that indicate the mechanic should be protected when the mortgagee inspects the owner's property and sees construction in progress. First, an innocent purchaser for value without notice is protected by the Recording Act. One cannot claim that he is an innocent purchaser for value, however, when he has notice of circumstances sufficient to put him on inquiry of an outstanding interest in the land.

No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself or of its nature and purport. Code of Laws of South Carolina § 3542, Vol. 1 (1912).

In S.C. CODE ANN. § 60-109 (1962) this provision now states:

No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument. Actual notice shall be deemed and held sufficient to supply the place of registration *only when such notice is of the instrument itself or of its nature and purport.* [emphasis added.]

It could be argued that because section 3543 was amended into two sentences actual notice is no longer dependent upon having a possessory interest.

142. 110 S.C. at 33, 96 S.E. at 415.

The appellants cite [section 60-109] of the Code, and suggest that such section requires that actual notice shall be deemed sufficient to supply constructive notice, only when such actual notice is of the "stated" statutory lien instrument itself, and they say there was no such actual notice. The respondents suggest, in answer, that their contract was not "required by law to be recorded," and therefore the cited section has no reference to them. But a "statement" of the statutory lien was required to be recorded, and therefore in writing, for purposes of notice. We, however, are of the opinion that the cited section has no relevancy to the case, for the statutory lienees were not "in possession of the real property" in issue.

> One cannot successfully interpose this defense [purchaser for value without notice], where the circumstances are sufficient to put one upon inquiry, or where one might by due diligence have ascertained the facts. One is charged with notice of every fact which such inquiry and such diligence will certainly disclose.[143]

Applying the inquiry notice theory to the mortgagee who inspects the owner's real estate and discovers construction in progress, it appears that the mortgagee should be charged with knowledge of sufficient circumstances to require due diligence in ascertaining the facts—the creation of mechanics' liens.

Charging the mortgagee with notice sufficient to supply the place of recordation is also supported by South Carolina cases holding that the physical condition of land is notice of an unrecorded easement.[144] The easement decisions are of particular importance to mechanics' liens because neither the mechanic nor the holder of an easement have possessory interests in the land. One authority maintains that none of these cases expressly passed on the applicability of section 60-109 of the Recording Act to the common law rule of notice of an easement from the physical condition of the land.[145] He further indicates that section 60-109 speaks only of possession of real property, and therefore the common law rule seems unaltered for nonpossessory interests. This interpretation appears to be correct in light of the limited scope of section 60-109 and the equitable foundation of the common law rule. Therefore, even if one accepts the *Williamson* court's proposition that the Registry Act must be consulted to determine all rules of notice, if the concepts of inquiry notice and notice from the physical condition of the land are given effect the mortgagee should not be accorded priority over a mechanic who has labored or furnished before recordation of the mortgage. Although such a result does not technically constitute relation back to the date of the mechanic's commencement of furnishing, in priority contests with the mortgagee he is provided with the same protection afforded by that principle.

143. Kirton v. Howard, 137 S.C. 11, 36-37, 134 S.E. 859, 868 (1926). *See* Means at 384, n.160 for further cases recognizing the inquiry notice rule.

144. Atlanta & C.A.L. Ry. v. Limestone Globe Land Co., 109 S.C. 444, 96 S.E. 188 (1918); Beck v. Northwestern R.R., 99 S.C. 310, 83 S.E. 335 (1914); Southern Ry. v. Howell, 79 S.C. 281, 60 S.E. 677 (1908); Harmon v. Southern Ry., 72 S.C. 228, 51 S.E. 689 (1905).

145. Means at 390.

There is little justification for granting priority to a mortgagee who views construction in progress on the owner's real estate and then records his mortgage before the mechanics record their statements of account. Several states give effect to common law actual notice by protecting the mechanic from the time of "visible" commencement of work on the owner's real estate.[146] South Carolina could avoid the problem of notice other than from the record by giving effect to section 45-257,[147] thereby protecting the mechanic from the date of his contract. The *Williamson* decision not only creates the actual notice problem in South Carolina but also protects both the owner and the mortgagee at the expense of the mechanic. The owner is now able to mortgage his real estate and assure the mortgagee of priority so long as the owner can prevent the mechanic from recording his statement of account. The mechanic will obviously be reluctant to encumber the owner's land and risk losing the goodwill of both the owner and contractor.[148] The effect of common law actual notice by the mortgagee upon his priority over a mechanic will ultimately depend on which party the supreme court desires to protect—which party should bear the risk of loss. Older decisions indicate that the mortgagee and owner will be protected, but the recent case of *Fulmer Building Supplies, Inc. v. Martin*[149] indicates that the court might now sympathize with the mechanic.

5. *Mortgagee Records-Mechanic Records-Mortgagee Disburses Under a Future Advance Clause*

Priority in this situation is governed by the *Fulmer*[150] case. In *Fulmer* the supreme court considered the conflict between the mortgagee's rights under sections 45-55[151] and 45-257,[152] and the

146. *See* HAWAII REV. STAT. § 507-46 (1968); MINN. STAT. ANN. § 514.05 (1947); PA. STAT. ANN. tit. 49, § 1508 (1965); S.D. COMPILED LAWS ANN. § 44-9-8 (1967); WIS. STAT. ANN. § 289.01(4) (Cum. Supp. 1973).

147. S.C. CODE ANN. § 45-257 (1962) set forth in text accompanying note 107 *supra*.

148. *See* text accompanying notes 183-84 *infra*.

149. 251 S.C. 353, 162 S.E.2d 641 (1968).

150. *Id.*

151. S.C. CODE ANN. § 45-55 (1962) provides in part:

> Any mortgage conveying an interest in or creating a lien on . . . real estate, securing existing indebtedness or future advances to be made, . . . shall be valid from the day and hour when recorded so as to affect the rights of subsequent creditors, whether lien creditors or simple contract creditors, . . . to the same extent as if such advances were made as of the date of the execution of such mortgage for the total amount of advances made thereunder . . . .

152. *Id.* § 44-257, set forth in text accompanying note 107 *supra*.

materialman's rights under the mechanics' lien statutes. The mechanic's lien was held to take priority over the mortgagee's advances made subsequent to recordation of the mechanic's lien. The mortgagee paid the first three of four installments directly to the contractor, leaving a balance of approximately $3,700 to be disbursed in the last installment. Thereafter, Fulmer recorded a mechanic's lien in the amount of $3,800 and gave written notice of the lien to the owner, mortgagee, and contractor. Three days later the mortgagee disbursed the last installment, sending Fulmer only $800. The supreme court understandably had difficulty circumventing the clear statutory language of sections 45-55 and 45-257 that accord priority to the mortgagee. The decision hinged on section 45-255[153] which entitles a mechanic with a perfected lien to be paid in preference to the contractor and provides that after the mechanic's lien attaches, no payment by the owner to the contractor can lessen the amount recoverable by the mechanic.

The statutory problem in applying section 45-255 to the transaction in *Fulmer* is that payment was made by the mortgagee to other creditors and not "by the owner to the contractor." The court, however, demonstrated its ability to interpret the mechanics' lien statutes flexibly in favor of the mechanic. The mortgagee in this case was held to occupy the same position as the owner.

> When the mortgagee assumed absolute control of the disbursement of the proceeds of the construction loan, it occupied the same position as the owner with respect to the duties and obligations imposed by statute as to the payment of the remaining funds after the perfection of the mechanic's lien. The failure, under such circumstances, of the mortgagee to protect the mechanic's lien to the extent of the funds remaining in its hands gave the mechanic's lien priority over the mortgage lien to the extent of the subsequent advance.[154]

Even though the majority of the last disbursement was paid to

153. *Id.* § 45-255 provides:
Any person claiming a lien under the provisions of this chapter who shall have given the notice provided for herein shall be entitled to be paid in preference to the contractor at whose instance the labor was performed or material furnished and no payment by the owner to the contractor thereafter shall operate to lessen the amount recoverable by the person so giving the notice.
154. 251 S.C. at 359, 162 S.E.2d at 544.

other creditors, the court held that it was "in effect" paid to the contractor.[155]

The supreme court in *Fulmer* made no reference to *Williamson*, even though appellant argued that section 60-101 and the *Williamson* rationale demanded priority be given the first party to record.[156] Rather than resort to the Recording Act for a determination of the appropriate notice and its attendant priority, the supreme court has indicated that it will seek resolution of priority issues within the framework of the mechanics' lien statutes. If the court utilizes this approach in future cases, it is possible that *Williamson* will be overruled as contrary to the clear intent and meaning of the mechanics' lien statutes. The mechanic would then be protected from the date he enters the contract under which his lien is claimed.

Unfortunately *Fulmer* does not resolve the issue of priority when the mortgagee has actual notice that construction has commenced but no notice of the mechanic's statutory lien. It is apparent that the mechanic in *Fulmer* prevailed because he gave actual notice of his statutory lien to the mortgagee after recordation.[157] This result raises the question whether notice to the mortgagee by itself would be sufficient to grant the mechanic priority, or whether the mechanic should also be required to record to attain priority over subsequent advances. Is it possible to treat all disbursements to the contractor by the mortgagee who records after receiving written notice of the furnishing of labor or materials as violating section 45-255? Section 45-255 requires the mechanic to give "the notice provided for herein."[158] The required notice apparently is the section 45-254 written notice to the owner of furnishing, and not the section 45-259 notice of recordation of the statement of account.[159] Therefore, a mechanic can attain

155. *Id.*

156. Brief for Appellant at 507.

157. The mortgagee had notice that these funds could not be lawfully paid by the owner to the contractor and that the holder of the mechanics' lien held a preference. Yet, the mortgagee paid most of the funds over as the contractor directed and they were not applied to the payment of the mechanics' lien. Sections 45-55 and 45-257 were not designed to afford a shield to protect such disbursement of construction funds by a mortgagee. If such were sanctioned, the payment of the recorded liens of laborers and materialmen could be circumvented by the simple device of disbursing the funds through the mortgagee who holds a prior recorded mortgage. 251 S.C. at 359, 162 S.E.2d at 544.

158. S.C. CODE ANN. § 45-255 (1962), set forth in note 153 *supra*.

159. Section 45-255 immediately follows the provisions concerned with a mechanic

priority over a mortgagee without recording first, if he gives the mortgagee written notice of furnishing before the mortgagee disburses.[160]

B. Priority Among Mechanics

If the amount of outstanding mechanics' liens exceeds the owner's contract price under section 45-256,[161] each mechanic is entitled to a pro rata share of the amount remaining to be disbursed. In South Carolina there is no advantage in being the first mechanic to record a lien, but one must record his lien and bring suit within six months[162] to "have equal rights" with other mechanic lienors. This approach is an equitable solution to the issue of priority among mechanics. It would be unfair to grant the structual materialmen and laborers priority over the materialmen and laborers who complete the finishing work merely because the former are able to complete their work before the latter begin furnishing.

In *Lowndes Hill*,[163] the South Carolina Supreme Court had to determine which mechanics were entitled to a pro rata share of the fund remaining to be disbursed. The court held:

> At the commencement of the instant case the materialmen who had in writing notified the owner of the furnishing of such materials, Section 45-254, and had within the time limited by Section 45-259 [ninety days] recorded and served the certifi-

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who deals with the contractor and entitles this mechanic to be paid in preference to the contractor. Section 45-255 was therefore intended to supplement the section 45-254 notice provision and protect the mechanic after he notifies the owner of furnishing. Recordation should not be necessary for the mechanic to protect himself under section 45-255 so long as he records within ninety days after ceasing to furnish. The mechanic's protection will date from the time of notification and not the time of recordation.

160. *See* pp. 856-57 *infra* for a discussion of this problem when the owner and not the mortgagee is notified of the furnishing.

161. S.C. CODE ANN. § 45-256 (1962) provides:

> In the event the amount due the contractor by the owner shall be insufficient to pay all the lienors acquiring liens as herein provided it shall be the duty of the owner to prorate among all just claims the amount due such contractor.

Section 45-286 provides:

> When there are several attaching creditors, they shall, as between themselves, be entitled to be paid according to the order of their attachments. But when several creditors who are entitled to the lien provided for in this chapter have equal rights as between themselves and the fund is insufficient to pay the whole, they shall share it equally in proportion to their respective debts.

162. *Id.* §§ 45-259, -262.

163. 229 S.C. 619, 93 S.E.2d 855 (1956).

> cate of lien thereon prescribed, and against whom the six-months statute of limitation upon the commencement of suit to foreclose, Section 45-262, had not run, had perfected liens against the property and were entitled to enforce them to the extent, in the aggregate, of the balance due by the owner to the contractor.[164]

If the lien has attached without dissolution by failure to conform with the enforcement requirements, the mechanic is entitled to share ratably with other mechanics so situated.

While section 45-256 is both equitable and straightforward, it is in obvious conflict with section 60-101 of the Recording Act.[165] After one mechanic records, all mechanics thereafter recording are subsequent creditors within the meaning of section 60-101. The first mechanic to record should therefore be entitled to priority over all subsequently recording mechanics under the reasoning of *Williamson.* However, there is no justification for protecting one mechanic over another through recordation. All mechanics are bound to fulfill their contracts and should not be allowed to prevail as a result of earlier completion and recordation. It is doubtful that the courts would negate the clear language of section 45-256, but until this issue is resolved the first mechanic to record should certainly raise this argument.

C. Priority Between Mechanic and Attaching Creditor

The South Carolina Supreme Court has not yet had occasion to construe the protection afforded attaching creditors in priority contests with mechanics. For the purpose of priority over attaching creditors, the statutes on their face protect the mechanic from the date of recordation of his statement of account. Section 45-282 provides that a prior attaching creditor shall be paid in preference to a mechanic who later attaches by recording his statement of account:

> If the interest of the owner in the building, structure or land is under attachment at the time of filing and recording the statement of the account, the attaching creditor shall be preferred to the extent of the value of the buildings and land as they were when the statement was recorded and the court shall ascertain, by a jury or otherwise as the case may require, what proportion

164. *Id.* at 639, 93 S.E.2d at 865.

165. S.C. CODE ANN. § 60-101 (1962), set forth in note 108 *supra.*

of the proceeds of the sale shall be held subject to the attachment as derived from the value of the property when the statement was recorded.[166]

On the other hand, section 45-284 provides that if the mechanic records before the other creditor attaches, he is entitled to priority.[167] Among themselves, attaching creditors are "entitled to be paid according to the order of their attachments."[168]

Until the mechanic records, attaching creditors should be protected for several reasons. The attaching creditor's transaction is normally unrelated to the improvement of the owner's real estate, and therefore the creditor should not be charged with the burden of inspecting the owner's real estate to determine if there are any possible contracts with mechanics. This result also assists the owner in obtaining credit. In this respect the attaching creditor is in a much different position from that of the mortgagee who is financing the precise improvement for which the mechanics are furnishing labor and materials.

D. Priority Between Mechanic and Contractor

The contractor is entitled to a section 45-251 mechanic's lien, and therefore his priority would appear to be equal to that of other mechanic lienors. Section 45-255, however, requires the owner who receives notice of a lien to pay it in preference to the contractor.[169] Moreover, in a chapter separate from the mechanics' lien statutes,[170] the mechanic is given a first lien on the money

166. *Id.* § 45-282.

167. S.C. CODE ANN. § 45-284 (1962) provides:

If the interest of the owner of the property is attached after the recording of the statement, the proceeds, after discharging all prior liens and claims, shall be applied to satisfy the execution of such attaching creditor.

168. *Id.* § 45-286.

169. *Id.* § 45-255, set forth in note 153 *supra*.

170. *Id.* §§ 45-301 to -303. The key statute for the creation of this lien is section 45-301, which provides:

Any contractor in the erection, alteration or repairing of buildings in this State shall pay all laborers, subcontractors and materialmen for their lawful services and material furnished out of the money received for the erection, alteration or repairs of buildings upon which such laborers, subcontractors and materialmen are employed or interested and such laborers, as well as all subcontractors and persons who shall furnish material for any such building, shall have a first lien on the money received by such contractor for the erection, alteration or repair of such building in proportion to the amount of their respective claims. Nothing herein contained shall make the owner of the building responsible in any way and nothing contained in this section shall be construed to prevent any contrac-

paid by the owner to the contractor. After the contractor has been paid for the work performed by any laborer, subcontractor or materialman, section 45-302[171] makes it a misdemeanor for him to withhold payment from them.

IV. ATTEMPTING TO PROTECT THE PARTIES

It is the practitioner's responsibility to advise his client of statutory rights and duties. When dealing with mechanics' lien statutes, attorneys must work within the framework of *Williamson* in protecting the interests of owners, mortgagees, contractors and mechanics. There are certain precautionary measures available to each party in his attempt to obtain priority in the context of modern commercial practices.

A. The Owner

The owner is the party most protected under the South Carolina mechanics' lien statutes. His liability under the section 45-252 lien is limited to the contract price of the improvement,[172] and the supreme court has construed section 45-251 to mean that the owner is not liable unless he contracts with the mechanic.[173] Moreover, section 45-258 appears to permit the owner to avoid the attachment of any section 45-252 lien by giving notice to the mechanic that he will not be responsible for labor or materials "not at the time performed."[174] The owner might also defeat a

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tor or subcontractor from borrowing money on any such contract.

171. S.C. CODE ANN. § 45-302 (1962) provides:

Any contractor or subcontractor who shall, for other purposes than paying the money loaned upon such contract, expend and on that account fail to pay to any laborer, subcontractor or materialman out of the money received as provided in § 45-301 shall be guilty of a misdemeanor and, upon conviction, when the consideration for such work and material shall exceed the value of one hundred dollars shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than three months nor more than twelve months and when such consideration shall not exceed the value of one hundred dollars shall be fined not more than one hundred dollars or imprisoned not longer than thirty days.

172. *Id.* § 45-254.

173. *See* text accompanying notes 12-30 *supra.*

174. S.C. CODE ANN. § 45-258 (1962) provides:

The owner of any such building or structure in process of erection or being altered or repaired, *other than the person by whom or in whose behalf a contract for labor or materials has been made,* may prevent the attaching of any lien for labor thereon not at the time performed or materials not then furnished by giving notice, in writing, to the person performing or furnishing such labor or

mechanic's lien by claiming that the mechanics' lien statutes are unconstitutional because they allow a taking of a significant property right without a prior opportunity to be heard.[175]

Despite the protection afforded the owner, he must be careful not to subject himself to liability in excess of his contract price. First, the owner's primary concern is to avoid entering into a contract with a mechanic, either in person or through an agent. The lien arising from such a contract is enforceable for the full contract price regardless of the amount of the contract between the owner and general contractor. The owner, therefore, should only deal directly with his contractor and mortgagee.

The owner must also avoid the imposition of personal liability. Section 45-292 states that "nothing contained in this chapter shall be construed to prevent a creditor in such contract from maintaining an action thereon in like manner as if he had no such lien for the security of his debt."[176] This section authorizes a suit by the mechanic or contractor to enforce the terms of his contract with the owner.[177] There is no personal liability, however, if the mechanic only attempts to avail himself of the statutory lien.

> It does appear from our decisions that the respondents are correct in their position that in a proceeding strictly to enforce a

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furnishing such materials that he will not be responsible therefor. [emphasis added.]

This section is an excellent example of the internal inconsistencies of the mechanics' lien statutes. The source of this section as now codified is No. 144, [1869] S.C. Acts, 14 S.C. Stat. 221, the act creating the section 45-251 lien. This section cannot apply to section 45-251, however, because it excludes owners "by whom or in whose behalf a contract for labor or materials has been made," and as was noted in the discussion at pages 820-24 *supra*, a mechanic is not entitled to a section 45-251 lien unless he has contracted with the owner or his agent. The only case construing section 45-258 would limit its application to instances where the owner consents or agrees to the subcontractor's contract with the contractor—a once in a lifetime situation. Metz v. Critcher, 86 S.C. 348, 351, 68 S.E. 627, 628 (1910).

Even though section 45-252 was enacted in 1896 and codified in 1916, it appears to be the only section to which 45-258 would apply with any degree of regularity in light of *Metz*. In South Carolina when two separate acts are codified, the code is the ultimate authority and the provisions of one are applicable to the other even though the result produced would not have obtained in the original act. Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S.C. 619, 635, 93 S.E.2d 855, 863 (1956); Town of Forest Acres v. Seigler, 224 S.C. 166, 173, 77 S.E.2d 900, 903 (1953).

175. *See* text accompanying notes 82-9 *supra*.

176. S.C. CODE ANN. § 45-292 (1962).

177. *See* Atlantic Coast Lumber Corp. v. Morrison, 152 S.C. 305, 149 S.E. 243 (1929). Although a public school building could not be subject to a mechanic's lien, the mechanic's complaint alleged facts sufficient to state a cause of action for recovery of money under a contract.

> mechanic's lien, the petitioner may not recover a personal judgment against the owner of the property or such judgment for any deficiency that may result from its sale.[178]

Fulmer raises the important personal liability issue in South Carolina. Assume that Mechanic furnishes and notifies Owner of the furnishing, but Owner fails to inform Mortgagee who controls the disbursement of the construction loan proceeds. Is Owner personally liable for breach of the section 45-255[179] statutory duty to pay Mechanic Lienor in preference to Contractor?[180] Section 45-255 would appear to impose liability on Owner for any further disbursements by Mortgagee. After Owner receives section 45-254 notice, section 45-255 appears to authorize a lien on any monies remaining to be disbursed under Owner's contract; no payment by Owner can lessen the amount recoverable by Mechanic. The fact that Mortgagee makes the disbursements on behalf of Owner should not affect Owner's liability to Mechanic. The mortgagee in *Fulmer* lost priority only because he received actual notice of the lien.[181] In this situation Owner is the only party with actual notice, and therefore he, not Mortgagee, is the proper party to bear the loss. Under this personal liability analysis, Owner could be liable for an amount exceeding his contract price.[182]

Mortgagees and owners both desire to avoid paying unsecured parties in preference to mechanic lienors. Thus, if the mortgagee is disbursing the construction loan payments, the owner must inform the mortgagee of any recorded mechanics' liens of which the owner has received notice. Sections 45-254 and 45-259 only require that notice be given the owner, and therefore the owner should immediately notify the mortgagee of any recorded

178. *Id.* at 309-10, 149 S.E. at 245; *accord*, General Constr. Co. v. Hering Realty Co., 201 F. Supp. 487 (E.D.S.C. 1962).

179. S.C. CODE ANN. § 45-255 (1962), set forth at note 153 *supra.*

180. California imposes a duty upon the owner to withhold funds sufficient to satisfy the mechanic's lien when the mechanic files a stop notice. The stop notice is a lien against the construction funds remaining to be disbursed. CAL. CIV. CODE § 3161 (West Supp. 1973). Section 45-254 is South Carolina's equivalent to a stop notice provision although the notice need not be filed. Section 45-255 requires that to avoid liability the owner withhold payments to the contractors after receiving the stop notice.

181. *Supra* note 157.

182. If Owner receives notice of the lien and Mortgagee then disburses all remaining construction loan proceeds, section 45-255 envisions imposing personal liability on Owner even though he is normally not liable for an amount exceeding the contract price. This result falls within the *Fulmer* reasoning that the mechanics' lien statutes should not "be circumvented by the simple device of disbursing the funds through the mortgagee . . . ." 251 S.C. at 359, 162 S.E.2d at 544.

liens. Otherwise the owner could be held liable for the mechanic's lien because he is the only party with notice of the lien and the mechanic has done all that is required under the statute.

B. The Mechanic

Other than in the strictest legal sense, the mechanic is afforded no realistic protection under the South Carolina mechanics' lien statutes because his position is untenable if he desires to engage in any repeat business with the owner or contractor. Any statutory scheme in which priority dates from the time of recordation will not adequately protect the mechanic.

> It seems unfair to allow—indeed, to require—the contractor to impair an owner's title, when the owner is prepared to pay his contractor promptly. The contractor has little notion, when he begins, whether he will be paid on time. Thirty, sixty, or ninety days after he has completed the job, he is in a better position to know if he needs to perfect his lien.
>
> Still, a contractor or subcontrator may not file a mechanic's lien unless he is willing to take the chance that he may never be employed again by the developer or contractor against whom he files. Forcing a mechanic or supplier to make this decision early may be compelling many who value good-will to forego the protection of mechanic's lien laws altogether. Hence the early filing is unnecessary if not ineffectual, in most states.[183]

The dilemma of mechanics who must record to attain priority was best summarized by Phillips in 1893:

> If the lien is to take effect only from filing notice in a public office, the mechanic, when dealing with the designing, may in every instance be deprived of the security by intervening mortgages and judgments. It is no answer that the mechanic may give notice as soon as he commences work. There is nearly always, at the inception of the enterprise, a confidence on the part of the mechanic that the owner will, upon a fair completion of his contract, pay the stipulated price; and a party not only hesitates, as showing a want of this confidence, to lay a lien upon a house, when the owner has, as far as the work has progressed, promptly met his engagements, but it would be ruinous to his business in ordinary transactions, by deterring many honest men from contracting with one whom they knew in advance would unnecessarily encumber their property with this lien. In

183. G. LEFCOE, LAND DEVELOPMENT LAW 941 (1966).

> the large majority of instances in real life, those considerations prevail with the mechanic, and as long as the person with whom he has contracted responds to his obligations he files no lien.[184]

In "real life" the mechanic in South Carolina generally does not file his lien until it is too late to attain effective protection.[185]

In light of *Williamson* the only sound advice an attorney can give his mechanic client is to record a statement of account immediately, whether he has contracted directly with the owner or with the owner's contractor. The mechanic's priority will date from the time his statement of account is recorded. It is preferable for the mechanic to contract with the owner if possible, as this lien is not limited to the amount of the contract price between the owner and contractor. The decision by the mechanic to encumber the owner's land will naturally depend on both the financial stability of the contractor and the mechanic's desire to work on subsequent projects for the owner.

Since the mechanic will normally not desire to record his lien absent some showing of bad faith by the owner or contractor, the only effective protection a South Carolina mechanic will have is dependent upon the terms of his contract with the contractor. Before entering into such a contract the mechanic or his attorney should investigate the financial stability of the contractor, the number of jobs which the contractor is currently committed to complete, and most importantly the reality of the contractor's obligation to the owner in light of the agreed upon price for the improvement.

The contract itself must specify that payment is contingent solely upon the satisfactory completion of the labor or delivery of materials. It should contain a clause providing for part payment in the event any party prevents the mechanic from completely performing his part of the construction.[186] Payment under the contract must not be contingent upon payment to the contractor

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184. PHILLIPS § 215.

185. *See* Gantt v. Van der Hoek, 251 S.C. 307, 162 S.E.2d 267 (1968); Guignard Brick Works v. Gantt, 251 S.C. 29, 159 S.E.2d 850 (1968).

186. S.C. CODE ANN. § 45-275 (1962) provides:

> When the owner fails to perform his part of the contract and by reason thereof the other party, without his own default, is prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much as he has performed in proportion to the price stipulated for the whole and the court shall adjust his claim accordingly.

The mechanic should draft a clause similar to this section to provide for the contractor's failure to perform.

from either the owner or mortgagee. By failing to record before the mortgagee, the mechanic is forced to look to his contractor for payment,[187] and any contingencies resting on other contractual obligations of the contractor could only lead to avoidance of liability by the contractor.

A problem could develop under section 45-258[188] if the owner gives the mechanic notice that he will not be responsible for any further labor or materials furnished by the mechanic. If the mechanic does not desire to furnish without the protection of the mechanics' lien statutes, he is placed in the dilemma of risking a breach of his contract with the contractor. Therefore, the mechanic should include a clause in his contract stating that he is relieved of all obligations should the owner give section 45-258 notice.

Once the mechanic decides to record his lien, it is essential that he give notice to the mortgagee and contractor as well as the owner. *Fulmer* applies to "the particular facts of this case . . . ,"[189] and the most important fact was the mortgagee's receipt of notice of the lien. The mechanic, therefore, should serve written notice upon both the mortgagee and the contractor. This notice enables the mechanic to obtain priority as to subsequent advances from the mortgagee and subjects the contractor to possible liability under sections 45-301 to 45-303.[190]

Unfortunately, most mechanics will not be greatly concerned with protection until the deal has fallen through and all parties begin fighting for priority. If the mechanic contracted before the mortgage was recorded, it is recommended that the mechanic's attorney claim priority by arguing that *Williamson* be overruled as an unjustified limitation on the plain intent of the drafters of the mechanic's lien statutes. In light of *Guignard* and *Van der Hoek* this approach is preferable to asserting a section 45-251 lien unless the mechanic contracted directly with the owner and all conditions of the contract have been met. If the construction

187. The mechanic will only be able to recover the amount of the owner's contract price. S.C. CODE ANN. § 45-254 (1962).

188. S.C. CODE ANN. § 45-258 (1962), set forth at note 174 *supra*.

189. 251 S.C. at 369, 162 S.E.2d at 544.

190. Section 45-301 requires the contractor pay mechanics "in proportion to the amount of their respective claims" rather than according to the priority of their respective claims. It is extremely doubtful that the courts would or should require contractors to pay perfected lienholders in preference to others, since section 45-301 is a criminal statute and should not subject contractors to liability unless they come within the clear statutory prohibition. However, by serving notice on the contractor, the mechanic should be entitled to a proportionate share of subsequent advances, and the contractor should not be able to pay the entire amount to other mechanics.

mortgagee has actual notice of the mechanic's laboring or furnishing before the mortgage is recorded, the mechanic's attorney should claim priority under the South Carolina common law inquiry notice cases.

C. *The Mortgagee*

The mortgagee is primarily concerned with his priority over mechanics in two situations: first, when the mortgage is recorded before construction commences, and second, when the mortgage is recorded after construction commences, the contractor subordinates his lien to the mortgage for labor and materials furnished up to that point, and then the mechanic subsequently furnishes labor and materials. In both situations the mortgagee's priority over mechanics will depend on the continued validity of *Williamson*. It is therefore recommended that the mortgagee attempt to obtain a waiver of lien from all mechanics who have contracted before the mortgage is recorded.

In light of *Fulmer* it is apparent that recordation of the mortgage before construction commences will not guarantee priority over subsequently recorded mechanics' liens when the mortgagee makes disbursements after receiving notice of the lien. There is no protection for this mortgagee, and therefore he should be advised that the amounts advanced will not take priority over the recorded mechanics' liens. The mortgagee could avoid the *Fulmer* holding by not assuming absolute control of the disbursement of the construction loan proceeds. It is extremely doubtful that a mortgagee would want another person to disburse the funds, however, because this control is the only insurance the mortgagee has that the work will be completed. Moreover, most mechanics in South Carolina will probably give notice of their liens to the mortgagee, who can best circumvent the *Fulmer* problem by paying the mechanic whose lien has attached.

It is not unusual for the mortgagee to enter the picture after construction has begun. In the construction loan agreement the owner subordinates his fee simple title to the equitable interest of the mortgagee. The mortgagee should also obtain a subordination agreement from the contractor and, if possible, a waiver of lien from all mechanics. Under *Williamson* the mortgagee need merely check the record of mesne conveyances to ascertain if there are any prior encumbrances on the land. The mortgagee takes subject to all prior recorded mechanics' liens but has priority over all unrecorded liens. *Williamson*, however, fails to resolve the issue of actual notice. All mortgagees inspect the real estate

before granting a mortgage, and it is possible that this inspection may constitute sufficient notice of possible mechanics' liens to accord those mechanics then furnishing priority over the mortgagee.[191] It is recommended that the mortgagee attempt to obtain both a waiver of lien from all mechanics' furnishing before recordation of the mortgage and also an indemnification agreement from the owner for protection in the event a mechanic's lien is foreclosed.

D. The Contractor

The contractor is entitled to a section 45-251 lien by virtue of his contract with the owner. For that reason the mortgagee usually requires that the contractor subordinate his claim to the mortgage. After the contractor enters into this subordination agreement, there is little that can be done to protect him under the mechanics' lien statutes; the contractor's best protection is derived from the provisions of his contract with the owner. It is beyond the scope of this article to enumerate the countless provisions necessary in this contract to protect the contractor. He should, however, be extremely cautious in subordinating to the mortgagee all his rights in his contract with the owner.[192] The contractor should also require that the owner or mortgagee notify him in writing of any recorded mechanic lienors.

V. CONCLUSION

Contrary to recent legislation,[193] a major problem with the South Carolina mechanics' lien statutes has not been the payment of attorneys representing mechanics, but rather the lack of viable protection for mechanics. Under South Carolina's existing statutes, the only way to afford meaningful protection to mechanics is to have the lien relate back to the time of contracting for the purpose of priority over a mortgagee. The mechanic then has a lien that need not be recorded until the labor or materials have been furnished and avoids the unnecessary ill will created by

191. *See* discussion at text accompanying notes 138-49 *supra*.

192. For example, the contract might include a provision for additions to the building at the owner's option. If the owner exercises this option and thereafter becomes judgment proof, the contractor would not want his claim to the additions subordinate to a mortgage sufficient to finance only the original building without additions.

193. No. 75, [1973] S.C. Acts & Jt. Res. 80.

having to file a lien.[194]

The inconsistencies in the mechanics' lien statutes are so abundant and so widely scattered throughout the Code that a complete revision into a cogent statutory scheme is necessary. The vast majority of other jurisdictions[195] protect the mechanic

194. PHILLIPS § 215 states:

> If it be the intention to offer them [mechanics] a real protection, the commencement of the work is the period from which the lien should date. . . . [W]hen the commencement of the building is adopted as the inception of the lien, the mechanic is secured, without being forced to display this want of confidence, which usually would embitter the parties, and render their subsequent dealings, in the completion of the contract, otherwise than harmonious.

This reasoning also applies to protection extended from the date of the mechanic's contract.

195. The various times from which the mechanic is protected in other jurisdictions may be categorized as follows:

1. Commencement of any work upon the improvement or commencement of the mechanic's work upon the improvement: ALA. CODE tit. 33, § 38 (1958); ALASKA STAT. § 34.35.060(a)(1) (1962); ARIZ. REV. STAT. ANN. § 33-992 (1956); ARK. STAT. ANN. §§ 51-605, -607 (1947); CAL. CIV. CODE § 3134 (West Supp. 1973); COLO. REV. STAT. ANN. § 86-3-6 (1953); CONN. GEN. STAT. REV. § 49-33 (1958); DEL. CODE ANN. tit. 25, § 2718 (1953); IDAHO CODE § 45-506 (Supp. 1973); IND. ANN. STAT. § 43-704 (Burns 1952); IOWA CODE § 572.18 (1973); KAN. CIV. PRO. STAT. ANN. § 60-1101, -1103 (Vernon Supp. 1973); KY. REV. STAT. ANN. § 376.010 (1971); MD. ANN. CODE art. 21, § 9-107(b) (1956); MICH. COMP. LAWS ANN. § 570.9 (1948); MINN. STAT. ANN. § 514.05 (1947); MO. REV. STAT. § 429.060 (1969); MONT. REV. CODES ANN. § 45-509 (1947); NEB. REV. STAT. § 52-101 (1968) (cases interpreting this section grant priority to mechanics from the date of commencement of laboring or supplying); NEV. REV. STAT. § 108.225 (1971); N.M. STAT. ANN. § 61-2-5 (1953); OKLA. STAT. ANN. tit. 42, § 141 (1951); ORE. REV. STAT. § 87.025(1) (1971); PA. STAT. ANN. tit. 49, § 1508 (1965) (date of filing the claim for the alteration or repair of an improvement); S.D. COMPILED LAWS ANN. § 44-9-8 (1967); TEX. REV. CIV. STAT. ANN. art. 5459 (Cum. Supp. 1972) (earliest of the following events: commencement of work on the improvement, filing of contract or filing of affidavit or oral contract); UTAH CODE ANN. § 38-1-5 (1953); VA. CODE ANN. § 43-21 (1950); WASH. REV. CODE ANN. § 60.04.050 (1961); W. VA. CODE ANN. § 38-2-17 (Cum. Supp. 1973); WIS. STAT. ANN. § 289.01(4) (Cum. Supp. 1973) (date of filing for priority over state & federal savings & loan associations per §§ 215.21(4)(a) & 706.11(1)); WYO. STAT. ANN. § 2907 (1957).

2. Commencement of work upon the improvement but mortgagee providing funds for the improvement has priority over the mechanic: D.C. CODE ANN. § 38-109 (1967); HAWAII REV. STAT. § 507-46 (1968); N.D. CONT. CODE § 35-27-03 (1972); N.J. STAT. ANN. § ¶a: 44-87, -88 (1952); OHIO REV. CODE ANN. § 1311.13 (Page 1962).

3. Date of recordation: MASS. GEN. LAWS ANN. ch. 254, § 7 (1932) (but laborer has priority if labor began prior to recordation of mortgage); MISS. CODE ANN. § 85-7-131 (1972); N.Y. LIEN LAW § 13 (McKinney 1966); R.I. GEN. LAWS ANN. § 34-28-25(b) (1969); VT. STAT. ANN. tit. 9, §§ 1921(d) (1970).

4. Miscellaneous: GA. CODE § 67-2002(3) (1972) (priority over every lien except those of which mechanic has actual notice before work done or materials furnished); ILL. REV. STAT. ch. 82, § 16 (Smith-Hurd 1966) (mechanic protected from his date of contract); LA. REV. STAT. ANN. § 9:4801 (Supp. 1973) (must record before commencing work); ME. REV. STAT. ANN. tit. 10, § 3257 (1964) (statute gives courts authority to determine all priority questions); N.H. REV. STAT. ANN. § 447:10 (Supp. 1972) (must attach the property).

from the commencement of the work on the improvement. Any revision of the South Carolina mechanics' lien statutes should adopt this type of protection; it avoids the creation of a secret lien and actual notice problems, while not placing the mechanic in the awkward position of being forced to encumber the owner's land to attain priority.

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