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preponderance of the evidence.

In construing the applicability of the two tests, a court must look to the congressional intent behind the statutes as well as to the entire context of the acts.[36] Since the two provisions involve essentially the same subject matter, scope, and aim, it seems that the court properly read them together in construing their meaning.[37]

V. Conclusion

In addition to the validity of the analogy drawn by the *Donruss* court, the "dominant, controlling, or impelling purpose" test set out in *Donruss* should be preferred over the "a purpose" test of *Barrow* and the "sole purpose" *Duke Laboratories* test for practical reasons as well. First, it would be almost impossible for a taxpayer to prove that not even "a" purpose to avoid personal taxes was involved in the decision to accumulate earnings. Under the "a purpose" test the tax avoidance motive need only be one of taxpayer's motives,[38] and almost any corporate director realizes that by accumulating earnings the corporation will be saving personal income taxes for its shareholders. Mere realization of such an advantage would make the avoidance purpose one of the taxpayer's motives, notwithstanding the significance of this particular motive in the ultimate decision to accumulate earnings.

Similarly, if the "sole purpose" test were used, the taxpayer would not find it difficult to show that at least one other motive was involved in the decision to accumulate earnings. If the taxpayer need only show by the preponderance of the evidence that the tax avoidance purpose was not his only purpose, his burden of proof would be easily met, and the statute would fail to accomplish its designed objective.

T. Winston Weeks

Mechanics' Liens: Statutory Retainage Versus Holder in Due Course

Another conflict in the long struggle for priority among competing mechanics' lien claimants was recently waged in a Texas court. It has long been the practice for an owner to execute to his general contractor a negotiable note secured by a lien on his property, both of which the contractor

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[36] Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948); United States v. Cooper, 312 U.S. 600 (1941).

[37] United States v. Korpan, 237 F.2d 676 (7th Cir. 1956), *rev'd on other grounds*, 354 U.S. 271 (1957); Northern Pac. Ry. v. United States, 156 F.2d 346 (7th Cir. 1946), *aff'd*, 330 U.S. 248 (1947).

[38] Barrow Mfg. Co. v. Commissioner, 294 F.2d 79 (2d Cir.), *cert. denied*, 369 U.S. 817 (1961); World Publishing Co. v. United States, 169 F.2d 186 (10th Cir.), *cert. denied*, 335 U.S. 911 (1948).

discounts to a financier. The contractor is thus paid in advance, and the financier is a holder in due course of the note and lien, entitled to priority in the enforcement of them. However, a 1961 amendment of the lien laws now requires an owner to retain a certain percentage of contract payments for the benefit of all subcontractors, who have a preference lien upon this fund or upon the owner's property for the same amount if he fails to retain it.[1] With the lines thus drawn, a Texas court of civil appeals recently reached a novel and unexpected decision to solve the dilemma posed by a suit between two preferred claimants.

Gail Gafford and his wife entered into a mechanics' and materialmen's lien contract with James Sterling for the construction of a residence. The contract was executed before any work had been begun by the contractor. The Gaffords gave Sterling a negotiable note for the full contract price of $17,627, secured by the contract. The lien was properly recorded. Before the note reached maturity, Sterling assigned the note and lien contract to Project Acceptance Company for consideration.

In the process of construction Sterling engaged W & W Floor Covering Company to install carpet and lay tile in Gafford's house. Subsequently, Sterling abandoned the contract and construction without paying W & W Floor for the labor and materials it had furnished. Project Acceptance Company finished construction of the residence. Prior to completion, W & W Floor gave notice of its claims to the Gaffords and Sterling and filed its mechanics' and materialmen's lien in conformance with statutory requirements.

W & W Floor sued to recover a debt of $703.85 from Sterling, to foreclose its lien against the Gafford property in the same amount, and to establish its lien as superior to that of Project. The company contended that because the Gaffords had paid Sterling in full (by means of the negotiable note and lien which were assigned for consideration), the statutory ten per cent retainage requirement of article 5469 had been violated.[2] W & W Floor argued that violation of the retainage statute entitled it to a lien on the Gaffords' property.

In a separate proceeding, Project sued the Gaffords, Sterling and W & W Floor to recover on the note and to foreclose its lien on the property. Project agreed that the Gaffords had violated the retainage statute by making full payment in advance. Nevertheless, it maintained that because the full payment left nothing owing from the Gaffords to the contractor, there were no funds in the Gaffords' hands that W & W Floor could trap by filing its notice and lien. Thus the possibility of W & W Floor's foreclosing a derivative lien against the Gaffords' property was precluded.

After the two suits were consolidated for trial, a $20,236.85[3] judgment was rendered for Project against the Gaffords, and Project's lien was ordered foreclosed in the amount of the note. The court also granted W & W Floor a personal judgment of $703.85 against Sterling, but the company

[1] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1967).

[2] *Id.*

[3] The amount recovered above the $17,627 note is attributable to interest of $847.15 and attorneys' fees of $1,762.70.

was denied a lien against the Gaffords' property. On appeal, the court of civil appeals held that where a mechanics' lien contract on a homestead and a negotiable note executed by the owners are assigned by the contractor for consideration before maturity, payment is made in full. Since there is nothing left owing from the owner to the contractor, derivative claimants can fix no liens against the property. Neither can derivative claimants fix a lien under the retainage statute in this situation, since the holder of the lien and note is a holder in due course of both and entitled to priority in the enforcement of them. However, derivative claimants may obtain personal judgments for up to ten per cent of the purchase price against the owners because of their failure to comply with the retainage statute.[4]

I. Mechanics' Lien Laws—Their Background and Problems

Mechanics' Liens Generally. Mechanics' liens are creatures of statutes enacted out of a desire to prevent the unjust enrichment of those who benefit from the furnishing of labor and materials. Naturally, the statutes are as varied as the states enacting them, but they break down into two general categories: the "New York system" and the "Pennsylvania system." Under the New York system, the mechanics' lien of a subcontractor[5] is derived from the rights of the principal contractor.[6] Under the Pennsylvania system the mechanics' lien is direct and independent of the principal contractor's rights.[7] The major difference is that under the New York system a subcontractor may not recover more than the amount due from the owner to the principal contractor,[8] a limitation not found under the Pennsylvania system. Texas mechanics' lien laws are patterned after the New York system.

As derivative mechanics' liens under the New York system depend upon the owner owing money to the principal contractor, the protection is not effective unless there is some means by which a subcontractor can insure that money will remain owing when he files his lien. Commonly the lien statutes, including those of Texas, provide that upon proper notice from the subcontractor to the owner, the owner is required to withhold from his payments to the principal contractor a sum sufficient to meet the subcontractor's claim.[9] Payment after receipt of such notice does not destroy the mechanics' lien up to whatever amount was unpaid at the time of receipt.[10] Consistent with the New York system, all payments made by

[4] W & W Floor Covering Co. v. Project Acceptance Co., 412 S.W.2d 379 (Tex. Civ. App. 1967), *reforming and aff'g as reformed the trial court decision.*

[5] In the Note the term "subcontractors" will be used to denote subcontractors, mechanics and materialmen. For application of the distinctions, see Marek v. Goyen, 346 S.W.2d 926 (Tex. Civ. App. 1961).

[6] N.Y. Lien Law § 4 (McKinney 1966); Larkin v. McMullin, 120 N.Y. 206, 24 N.E. 447 (1890).

[7] Idaho Code Ann. § 45-501 (1951); Boise Payette Lumber Co. v. Weaver, 40 Idaho 546, 234 P. 150 (1925); Weeter Lumber Co. v. Fales, 20 Idaho 255, 118 P. 289 (1911).

[8] Weeter Lumber Co. v. Fales, 20 Idaho 255, 118 P. 289 (1911).

[9] Tex. Rev. Civ. Stat. Ann. art. 5453 (Supp. 1967); *cf.* N.J. Stat. Ann. 2A:44-77 (1951).

[10] Meyer v. Standard Accident Ins. Co., 114 N.J.L. 483, 177 A. 255 (Ct. Err. & App. 1935). Some statutes, as the above case illustrates, grant only a personal judgment, but Texas statutes give a lien. Tex. Rev. Civ. Stat. Ann. art. 5463 (Supp. 1967); Fox v. Christopher & Simpson Iron

the owner before receiving notice have been held to extinguish the owner's liability to that extent.[11] Obviously, the way for an owner to eliminate troublesome derivative lien claimants is to make full payment at the outset.

To prevent destruction of derivative mechanics' liens in this fashion, states have imposed additional requirements upon owners. Some require an owner to see that claims of laborers and materialmen are satisfied out of his payments to the contractor.[12] Others call for an owner to obtain from the principal contractor, before he pays him, a statement setting out those who have furnished labor or materials at his instance and the amounts due or to become due them.[13] Owners failing to comply with the statutes are liable to derivative claimants notwithstanding payment prior to notice. Texas follows a third method, a statutory retainage requirement. An owner must retain ten per cent of contract payments for the benefit of derivative claimants.[14]

Texas Mechanics' Lien Statutes.[15] In 1961 the legislature made a major overhaul of the Texas mechanics' lien statutes. The importance of *W & W Floor Covering Co. v. Project Acceptance Co.*[16] lies largely in its interpretation of the statutory changes. The 1961 legislature substantially stiffened the notice which a subcontractor is required to give an owner before the

Works Co., 199 S.W. 833 (Tex. Civ. App. 1917). A personal judgment may be given in addition to a lien, Wilson v. Sherwin-Williams Paint Co., 110 Tex. 156, 217 S.W. 372 (1919), but apparently not in absence of it, Muller v. McLaughlin, 84 S.W. 687 (Tex. Civ. App. 1904).

[11] Fullenwider v. Longmoor, 73 Tex. 480, 11 S.W. 500 (1889).

[12] GA. CODE ANN. § 67-2001(2) (1956); Green v. Farrar Lumber Co., 119 Ga. 30, 46 S.E. 62 (1903); Roberts v. Georgia S. Supply Co., 92 Ga. App. 303, 88 S.E.2d 554 (1955).

[13] ILL. STAT. ANN. ch. 82, §§ 22, 32 (1903); Liese v. Hentze, 326 Ill. 633, 158 N.E. 428 (1927).

[14] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1967), which reads:

> Whenever work is done whereby a lien or liens may be claimed under Article 5452 hereof, it shall be the duty of the owner . . . to retain in his hands during the progress of such work and for thirty (30) days after the work is completed, to secure the payment of artisans and mechanics who perform labor or service, and to secure the payment of any other claimants furnishing material, or material and labor . . . ten per cent (10%) of the contract price to the owner . . . or ten per cent (10%) of the value of same, measured by the proportion that the work done bears to the work to be done, using the contract price, or, if none, the reasonable value of the completed work as a basis of computing value. All persons who shall send notices in the time and manner required by this Act and shall file affidavits claiming a lien not later than thirty (30) days after the work is completed shall have a lien upon the fund so retained by the owner . . . with preference to artisans and mechanics, who shall share ratably therein to the extent of their claims; with any remaining balance to be shared ratably among all other claimants. If the owner . . . fails to comply with the provisions of this Article, then all claimants complying with the provisions of this Act shall share ratably among themselves, with preference to artisans and mechanics as above specified, liens at least to the extent of the aforesaid fund of ten per cent (10%) which should have been retained, as against the house, building, structure, fixture, or improvement and all of its properties, and on the lot or lots of land necessarily connected therewith, to secure payment of such liens.

[15] TEX. CONST. art. 16, § 37 provides that "mechanics, artisans and materialmen, of every class, shall have a lien upon the buildings and articles made or repaired by them, for the value of their labor done thereon, or material furnished therefor . . . ." Directions are given to the legislature to implement the constitutional lien through appropriate legislation. Although the constitutional lien is regarded as self-executing with regard to those in privity with an owner, Keating Implement & Mach. Co. v. Marshall Elec. Light & Power Co., 74 Tex. 605, 12 S.W. 489 (1889), it is not so regarded with respect to derivative claimants, who must look to the statutes for their remedies, Berry v. McAdams, 93 Tex. 431, 55 S.W. 1112 (1900).

[16] 412 S.W.2d 379 (Tex. Civ. App. 1967).

owner must retain funds. Among other additions, article 5453[17] now requires that the owner be warned that unless he retains funds necessary to meet the claims of subcontractors "he may be *personally liable* and his property subjected to a lien . . . ."[18] However, Texas courts construed the operation of old article 5453 as a type of garnishment proceeding,[19] and allowed a personal judgment only when accompanied by a lien.[20] Thus, one wonders whether the new statutory language merely codifies the court-made rule, or purports to permit disjunctive remedies, one not dependent upon the other. The question arises in *W & W Floor* with regard to the retainage requirement, not the stop notice, but the problem should remain the same.

Moreover, article 5463,[21] the new fund-trapping statute, may also mention personal liability. Article 5463 now reads that if article 5453 notices have been properly received, and the lien has been reduced to a final judgment, then "the owner shall be required to pay, and his property shall be liable for, any money that he may have paid to the contractor after he is authorized to retain such money by virtue of this Article, as well as any money he is required to retain by the provisions of Article 5469 hereof."[22] Is a personal judgment now authorized, without a lien, when an owner fails to comply with the retainage statute? Article 5469[23] grants a preference lien, but says nothing about personal liability. Neither does article 5452,[24] the lien-prescribing statute. Nevertheless, the court of civil appeals in *W & W Floor* found in the language of article 5463 the authority to grant a personal judgment, a decision which will be examined in more detail later.[25]

Prior to 1961 the protection of article 5469 applied only to mechanics and artisans. Now the protection has been extended to "artisans and mechanics . . . and . . . any other claimants furnishing material, or material and labor . . . ."[26] Artisans and mechanics are still preferred by the statute, however, and must be satisfied out of the retainage before other claimants. Since 1961 this article has been increasingly used, presumably because of its wider coverage.[27]

A boon was granted to owners by the addition of article 5472d[28] to the lien chapter. If there is a written contract between the owner and the principal contractor, and the owner requires the contractor to put up a bond payable to the owner for 115 per cent of the contract (the price plus a maximum fifteen per cent *contractual retainage*), derivative claimants

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[17] TEX. REV. CIV. STAT. ANN. art. 5453 (Supp. 1967).
[18] *Id.* (emphasis added).
[19] Fullenwider v. Longmoor, 73 Tex. 480, 11 S.W. 500 (1889).
[20] Wilson v. Sherwin-Williams Paint Co., 110 Tex. 156, 217 S.W. 372 (1919); Muller v. McLaughlin, 84 S.W. 687 (Tex. Civ. App. 1904).
[21] TEX. REV. CIV. STAT. ANN. art. 5463 (Supp. 1967).
[22] *Id.*
[23] *Id.* art. 5469.
[24] *Id.* art. 5452.
[25] See text following note 38 *infra.*
[26] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1967).
[27] Before 1961 the statute had only been used once with success. Miller v. Harmon, 46 S.W.2d 342 (Tex. Civ. App. 1932).
[28] TEX. REV. CIV. STAT. ANN. art. 5472d (Supp. 1967).

must look to the bond for their remedy, and the owner is not liable for more than the bond. Thus, owners have a sure way to prevent derivative liens from attaching to their property.

Article 5460[29] was left unchanged by the statutory revision, but is important because it provides derivative liens for those furnishing labor and materials for homesteads. The constitution of Texas[30] makes homesteads exempt from all types of forced sale except those specifically named. Among those named are forced sales for debts for work and materials used in constructing improvements, but these are permitted only when the contract is in writing, signed by the owner with the consent of his wife. Article 5460 adds additional requirements: the contract must be signed by *both* the owner and his wife and recorded. Once a contract is entered into observing all the statutory formalities, the contract inures to the benefit of all persons who furnish material and labor on the homestead for the contractor.

Negotiable Note Given in Payment. As pointed out earlier, the effectiveness of a derivative lien depends upon there being something due from the owner to the principal contractor at the time the owner is given notice of a subcontractor's claims.[31]

McCutcheon v. Union Mercantile Co.[32] is representative of the cases holding that payment in advance by a negotiable note and lien assigned for consideration extinguishes the rights of derivative claimants. The essential facts were exactly like those in *W & W Floor*. The property in question was homestead. The materialmen having no contract with the homeowners, their right to a lien had to be derived from the lien created by the contract between the owners and the principal contractor. Because the contractual lien and the accompanying negotiable note in full payment from the owners had been assigned to a bank for consideration, the owners owed the contractor nothing at the time the notices were served on them, and therefore the materialmen could fix no liens. Although the facts of *McCutcheon* have not been duplicated exactly with regard to nonhomestead property, the prior payment principle should apply equally well in both cases.[33]

A negotiable note and lien constitutes full payment because the assignee is a holder in due course of both, the attributes of negotiability in the note being imparted to the lien.[34] As a holder in due course he takes free of any defenses the owner-drawer may have had against the contractor-payee.[35] However, in no case in which the prior payment effect of assignment had been applied was violation of statutory retainage pleaded. In *W & W Floor* the court of civil appeals was faced squarely with the problem of what influence statutory retainage has on the effect of assignment of a negotiable

[29] *Id.* art. 5460 (1964).
[30] TEX. CONST. art. 16, § 50.
[31] *See* text accompanying note 7 *supra.*
[32] 267 S.W.2d 916 (Tex. Civ. App. 1954), *error ref.*
[33] *See* Continental Nat'l Bank v. Conner, 147 Tex. 218, 214 S.W.2d 928 (1948).
[34] *Id.*
[35] UNIFORM COMMERCIAL CODE § 3-305.

note and lien.

II. W & W Floor Covering Co. v. Project Acceptance Co.

The decision of the court of appeals in *W & W Floor* began routinely enough. Citing *McCutcheon v. Union Mercantile Co.*,[36] the court reiterated the long-established rule that when a negotiable note and lien are assigned for consideration by a contractor, the owner is deemed to have made full payment. Therefore, W & W Floor was unable to trap any funds in the hands of the Gaffords by giving notice and was not entitled to a lien.

Turning to the retainage statute, the court recited the rule that when a negotiable note and accompanying lien securing it are assigned for consideration, the attributes of negotiability in the note are imparted to the lien, and the assignee becomes a holder in due course of both. Thus, Project, the assignee, had the right to priority in the enforcement of its lien and, as a holder in due course, was not subject to any defenses the Gaffords might have had against Sterling, nor to competing claims of subcontractors. The lien of Project being for the full contract price, the derivative lien which W & W Floor claimed was defeated.

It is unfortunate that the court of civil appeals did not discuss more fully the effect of statutory retainage on the rights of a holder in due course of a lien, for the problem is one of first impression in Texas. Two powerful forces are in opposition. On the one side is the policy of preserving the sanctity of negotiable paper, and on the other, the policy of protecting the right of subcontractors to be paid for their labor and materials. Thorny conceptual difficulties are also encountered. The retainage requirement of article 5469 operates much like the article 5453 stop notice, except that the retainage requirement is imposed automatically from the beginning of the relationship between an owner and his principal contractor. When a stop notice is served on an owner, funds sufficient to meet the claims of the subcontractor serving the notice are trapped in his hands, and even if the owner pays the trapped funds, he does not escape the subcontractor's lien.[37] Seemingly, the retainage statute should operate in a similar manner, trapping ten per cent of the contract price from the outset. Since the owner is charged with notice of the statute, should he be permitted to pay impounded funds in violation of it and escape the liens of subcontractors? However, from the viewpoint of a financier who holds the lien in due course, should a subcontractor who is not even privy to the contract between the owner and the principal contractor be able to defeat part of the lien when the owner may not? Answers to these questions would have been enlightening.

Although the court of civil appeals affirmed the denial of a lien to W & W Floor, it found error in the trial court's failure to grant the floor company a personal judgment against the Gaffords. This decision was reached by examining the language of article 5463, with the court apparently relying on the statutory phrase "the owner shall be required to

[36] 267 S.W.2d 916 (Tex. Civ. App. 1954), *error ref.*

[37] *See* text accompanying note 10 *supra.*

pay . . . ."[38] Because the claim of W & W Floor was for less than ten per cent of the contract price, and there were no other claimants, the company was awarded full compensation.

Whether the lien statutes allow subcontractors to obtain personal judgments, and, if so, in what instances, are purely constructional problems. As to whether personal judgments are allowed, plausible arguments may be made either way. Article 5452, the lien-prescribing statute, mentions only a *lien* on an owner's property. Article 5469, the retainage statute, also mentions only a lien. The notice statute, article 5453, requires a warning of personal liability for failure to retain funds trapped by proper notice. Arguably, the article 5453 warning was included to inform owners of an already existing state of the law, that personal judgments can be rendered along with a lien when owners have made improper payments after notice.[39] The phrase "the owner shall be required to pay" in article 5463 could be interpreted as mere surplusage, emphasizing an owner's liability for improper payments, rather than granting a distinct remedy. As articles 5453 and 5463 are the only ones with any implications of personal liability, after they have been construed away only liens would be left.

On the other hand, a normal reading of article 5463 gives the impression that it imposes personal liability. The common interpretation of an owner being "required to pay" is personal liability, and especially so when the words are used disjunctively, offset by commas from the language about liability of an owner's property. Ordinary rules of interpretation require the presumption that the legislature intended any language used, and meant for the language to be given effect.[40] The court of civil appeals chose the more natural interpretation of the article.

If in the fact situation of *W & W Floor* a subcontractor cannot foreclose a lien even though he has followed the statutory steps, the answer to the second issue will be crucial. A personal judgment independent of a lien will be the only protection available for the subcontractor. Do the new statutes grant disjunctive relief? Although in many states the fund trapped for the benefit of subcontractors is independent of the remedy of a lien,[41] heretofore the Texas lien laws have not been so interpreted.[42] The problem can only be solved by examining the new statutes. Although they provide that the lien must be reduced to judgment,[43] there is nothing in them to indicate that a personal judgment is conditional upon ability to foreclose the lien. Neither is there any reason to interpret them to provide a dependent remedy. Little is accomplished by giving additional protection to a subcontractor if a lien is available to him, but no protection if a lien is not. The legislature surely did not intend to make the lien laws a double or nothing proposition.

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[38] TEX. REV. CIV. STAT. ANN. art. 5463 (Supp. 1967).
[39] Wilson v. Sherwin-Williams Paint Co., 110 Tex. 156, 217 S.W. 372 (1919).
[40] Gulf, C. & S.F. Ry. v. Blum Independent School Dist., 143 S.W. 353 (Tex. Civ. App. 1912).
[41] Douglas Lumber Co. v. Chicago Home for Incurables, 380 Ill. 87, 43 N.E.2d 535 (1942).
[42] Muller v. McLaughlin, 84 S.W. 687 (Tex. Civ. App. 1904).
[43] TEX. REV. CIV. STAT. ANN. art. 5463 (Supp. 1967).

Unless the interpretation of the court of civil appeals is erroneous in permitting personal judgments, a Florida decision interpreting similar statutes casts doubt on the constitutionality of the new Texas laws. Florida enacted statutes requiring an owner to obtain from his principal contractor a bond of at least the contract price to insure payment of laborers, subcontractors and materialmen.[44] If an owner failed to require the bond, he could make no payments to the contractor until construction had been started, and he was required to withhold twenty per cent of all contract payments when they became due. For noncompliance the statute provided that the owner "shall be liable for, and the property improved subject to, a lien in the full amount of any and all outstanding bills for labor, services, or materials furnished for such improvement regardless of the time elements set forth in this chapter."[45] In *Greenblatt v. Goldin*[46] the owners had not required a bond nor met the retainage requirements, but defended on the grounds that the statutes impaired their liberty of contract and subjected them to a penalty "so unreasonable and unconscionable as to deprive them of their property without due process of law."[47] Their contentions were sustained, the court holding that the legislation amounted to the mere arbitrary exercise of the powers of government.[48]

The new Texas statutes are quite similar to the Florida ones under consideration in *Greenblatt v. Goldin*. However, at least two differences should be noted. First, the Texas statutes limit the lien and personal judgment against an owner to ten per cent of the contract price,[49] while in Florida the owner was liable for all claims of subcontractors. Secondly, in Texas the time limits for perfecting liens have not been suspended with regard to the bond and retainage provisions as they were in Florida. These differences should go far in meeting the "unreasonable and unconscionable" penalty argument in *Greenblatt*. Nevertheless, personal liability is a serious penalty, for when an owner does not comply with the bond and retainage provisions, he may have to pay more than he contracted to pay. True, an owner always had to pay more than the contract price to free his property from the liens of subcontractors, even under the old statutes, but he at least had the option to forfeit his property and lose no more than the value of it. Now, because of *W & W Floor*, he may no longer have that option.

No argument about impairment of freedom of contract should be seriously entertained. Texas does not require a bond, but only permits it.[50]

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[44] FLA. STAT. ANN. § 84.05(11)(a) (1953).

[45] *Id.*

[46] 94 So. 2d 355 (Fla. 1957).

[47] *Id.* at 357.

[48] *Id.*, citing Jones v. Great Southern Fireproof Hotel Co., 86 F. 370 (6th Cir. 1898). It should be noted that the Florida application of the due process clause to an economic matter is much stricter than the federal application would be. Ferguson v. Skrupa, 372 U.S. 726 (1963); Nebbia v. New York, 291 U.S. 502 (1934).

[49] TEX. REV. CIV. STAT. ANN. art. 5469 (Supp. 1967); Miller v. Harmon, 46 S.W.2d 342 (Tex. Civ. App. 1932).

[50] Statutes which permit an owner to require a bond from his principal contractor pose no constitutional problems. Roystone Co. v. Darling, 171 Cal. 526, 154 P. 15 (1915). Neither do statutes that require retainage, Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 P. 262 (1907). When statutes have required an owner to obtain a bond, different results have been reached: Unconstitutional—Gibbs v. Tally, 133 Cal. 373, 65 P. 970 (1901). A similar Texas statute was declared unconstitutional in Hess v. Denman Lumber Co., 218 S.W. 162 (Tex. Civ. App. 1920), *error ref.*, the

Should an owner elect not to exact a bond from the contractor, he is simply subject to the requirements of retainage, which he did not escape under the old statutes and which are clearly constitutional insofar as noncompliance subjects an owner's property to a lien.[51] Insofar as noncompliance may subject him to personal liability, an owner's argument would have to be that the statute imposes an unreasonable penalty amounting to deprivation of property without due process of law.

III. Conclusion

The court of civil appeals has made two significant decisions regarding mechanics' liens: first, denying subcontractors liens when a negotiable note and lien are assigned for consideration in violation of statutory retainage, and, secondly, awarding subcontractors personal judgments for up to ten per cent of the contract price. This interpretation and application of the new Texas lien statutes by the court may be exactly what the legislature intended when it enacted them. Perhaps the legislature, intending that the rights of a holder in due course of the lien would defeat the rights of subcontractors, meant to allow a personal judgment to keep subcontractors from suffering a complete loss. In this way the rights of all parties would be in some measure protected.

Nevertheless, the best protection for a subcontractor is a lien, and in a fact situation such as *W & W Floor* a lien probably is his only possibility of recovery. A personal judgment against an owner who has defaulted on his note is a hollow remedy, and adding this to the personal judgment against the defaulting principal contractor does not significantly increase the subcontractor's protection. In a case decided prior to *W & W Floor* the owner had violated the retainage statute by making full payment *in cash* before the retainage period had expired. There the court had no trouble in allowing the subcontractor a lien for up to ten per cent of the contract price.[52] Similarly, a subcontractor should be allowed a lien when payment is made by assignment of the note and lien contract for value. Perhaps an arbitrary decision that the statutory rights of subcontractors are superior to the rights of a holder in due course (who would only take free of the defenses of the owner) is what is needed. Such a decision would be sound, for it is incomprehensible that an owner can pay funds trapped by the retainage statute and escape liability, or that assignment of trapped funds can create in a third party rights in the funds superior to that of a subcontractor. If this direct approach is unsatisfactory, the courts could hold that enforcement of more than ninety per cent of the lien is conditional upon perfection of the lien by payment of the subcontractors by the principal contractor.[53] Surely banks and other financiers will not be damaged extensively by being able to finance with security only ninety per

reason given being interference with freedom of contract. Constitutional—Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P. 241 (1917).

[51] Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 91 P. 262 (1907).

[52] Hunte Developers, Inc. v. Western Steel Co., 409 S.W.2d 443 (Tex. Civ. App. 1966).

[53] Perhaps the decision can rest by analogy on cases which hold that the principal contractor must substantially perform his contract with the owner of homestead property before a holder in due course of the lien may enforce it. Murphy v. Williams, 103 Tex. 155, 124 S.W. 900 (1910).

cent of building contracts. If they should finance more than ninety per cent, they would be in no worse shape than subcontractors are after the decision in *W & W Floor*, for they could still collect a personal judgment against the owner on the note for the remaining ten per cent. Further, they are in a better position than subcontractors to put pressure on principal contractors to execute bond agreements in their contracts with owners and thus still safely finance one hundred per cent. In the final analysis, the policy of providing adequate protection to subcontractors should outweigh the difficulty, if any, with the law of negotiable instruments.

Finding authority to grant personal judgments in the language of article 5463 is the least strained interpretation of the statute, and more than likely will be found inoffensive to the constitution. Should, however, personal judgments not be authorized by the statutes, or if authorized declared unconstitutional, the need of subcontractors for liens will be heightened, for denying them liens will often reduce their protection from little to none.

Hugh T. Blevins

Occupant's Duty To Warn Employee of Independent Contractor Discharged by Warning the Independent Contractor

Will Ray Henry, an employee of an independent contractor, the Roy Vickers Lease Service, was severely burned on premises controlled by the Delhi-Taylor Oil Corporation.[1] Delhi-Taylor had employed the independent contractor to extend casings on sixteen pipelines passing under a private roadway.[2] In negotiating the contract with Vickers, Delhi-Taylor's representative had warned both Vickers and his superintendent-foreman[3] that they should treat all the pipelines "as if they were under pressure" and "as though they were loaded"[4] (*i.e.*, that the lines were dangerous and could be carrying flammable material). After a large and deep ditch was dug to expose some of the pipelines and while Henry was engaged in welding operations in the ditch, a dragline operator excavating the ditch punctured a pipeline.[5] This pipe contained toluene, a highly flammable

[1] The land was owned by the Columbia Southern Corporation. Delhi-Taylor owned an easement through this land for the purpose of running its pipelines underground from its refinery to docks on the coast a few miles distant.

[2] The sixteen pipelines varied from two to sixteen inches in diameter and were buried at depths varying from four inches to ten feet. To extend the casings around each of the pipelines simply means placing a larger pipe around each pipeline so that any of the pipelines could be removed from under the roadway at any time without disturbing the road material.

[3] Hereinafter called superintendent.

[4] Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390, 393 (Tex. 1967).

[5] The punctured pipe was unexposed by the ditch and lay a few inches beneath the ground. The question was raised by Delhi-Taylor whether Henry's injury was caused by the negligence, if not the sole negligence, of the independent contractor's employee. The jury found the dragline operator, a fellow-servant of Henry, to be free of negligence.