THE MECHANICS' LIEN IN ARIZONA: IS IT A PRACTICAL REMEDY?[1]

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The mechanics' lien is a security device to insure the mechanic or materialman payment for work performed or materials furnished in the erection, improvement, or repair of buildings or other structures on real property, or for work performed or materials furnished for improvement of the land itself.[2] The primary purpose of the mechanics' lien law, as viewed by the Arizona Supreme Court, is to assure to the laborer or materialman the payment of his accounts.[3] This purpose can be accomplished only if the mechanic or materialman is able to determine without serious difficulty which section of the lien law to consult for his remedy, and, having accomplished this, to determine the extent of real property to which his lien will attach under the applicable section. Quite obviously, the purpose of the statute is defeated if the aggrieved party must resort to judicial process to determine the answer to a problem which good statutory construction and design could easily have disclosed. However, as this comment will illustrate, the mechanic or materialman, upon consulting the Arizona statute, is presented with numerous problems regarding which sections apply in any given case and the amount of real property to which his lien attaches under these sections.

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[1] The scope of this comment is limited to the problem of determining the extent of real property subject to the mechanics' lien, but this limitation is not an inference that this is the only imperfection within our mechanics' lien statute. Reference to the statutes of other states will disclose the absence of certain common provisions from the Arizona statute which, in the opinion of this author, should be enacted to solve problems which frequently arise in the normal course of business. To mention only a few, the omissions include: (1) a section specifying definitions of important words and phrases within the statute, *e.g.*, FLA. STAT. ANN. § 84.011 (1963); N.Y. LIEN LAW § 2; (2) a provision to answer questions created by the removal or destruction of the improvement or a portion thereof, see N.Y. LIEN LAW § 4; Annot., 74 A.L.R. 428 (1931); (3) a provision explaining the mechanic or materialman's remedy when the party requesting the improvement owns an interest less than fee, *e.g.*, LAWS OF ARIZ. 1885, No. 93, § 3; ORE. REV. STAT. § 97.015(1) (1953); and, a complementary provision subjecting the feeholder's interest to the lien if the construction was made with his knowledge, unless he posts notice in a conspicuous place, see CAL. CODE OF CIVIL PROC. § 1183.1(b); and (4) a provision regarding after-acquired title by the requesting party, *e.g.*, N.Y. LIEN LAW § 4.

[2] 36 AM. JUR. *Mechanics Liens* § 2 (1941); AMERICAN LAW OF PROPERTY § 16.106F (1952); 57 C.J.S. *Mechanics Liens* § 1 (1948); 3 POWELL, REAL PROPERTY § 483 (1952); 5 TIFFANY, REAL PROPERTY § 1575 (3d ed. 1939).

[3] Arizona Eastern R. Co. v. Globe Hardware Co., 14 Ariz. 397, 129 Pac. 1104 (1913).

HISTORICAL BACKGROUND

Although evidence indicates that it has known a historic past,[4] the mechanics' lien was unknown in England, either at common law or in equity,[5] and, so far as our present laws are concerned, only in the past one hundred and seventy years have creditors, who contribute work or materials to the improvement of real property, gained special treatment and extraordinary protections.[6] Today, every state affords the mechanic and materialman these privileges by either constitutional[7] or statutory provision.[8] Although without constitutional authority, the mechanics' lien concept has prevailed in our statutory history since Arizona's territorial days.[9] Ironically, with regard to the portion of the statute discussed herein,[10] the first adoption and its immediate successor afforded the mechanic or materialman a simpler task of determining his remedy than does the present-day statute.[11]

DISCREPANCIES WITHIN OUR STATUTE

Besides several miscellaneous liens not within the province of this comment,[12] the Arizona mechanics' lien statute provides three separate and seemingly distinct liens for labor and materials furnished on real

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[4] A form of the modern mechanics' lien statute existed in the Roman law, MACKELDY, ROMAN LAW 274 (Dropsie's transl. 1883), was well developed in the civil law, Canal Co. v. Gordon, 73 U.S. 561 (1867), and was incorporated into the CODE NAPOLEON, *Privileges and Mortgages*, § 2, art. 2103.

[5] Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128 (1891). See also, 36 AM. JUR. *Mechanics Liens* § 3 (1941); 57 C.J.S. *Mechanics Liens* § 1(c) (1948).

[6] ACTS OF GENERAL ASSEMBLY OF MARYLAND, ch. 45, § 10 (1791). The origin of such laws in America arose from the desire to establish and improve, as readily as possible, the city of Washington. In 1791, at a meeting of the commissioners appointed for such purpose, both Thomas Jefferson and James Madison were present, and a memorial was adopted urging the General Assembly of Maryland to pass an act securing to master-builders a lien on houses erected and land occupied. The requested law was enacted December 19, 1791. It wasn't until twelve years later that a second state, Pennsylvania, followed the example of its sister state. See Cushman, *The Proposed Uniform Mechanics Lien Law*, 80 U. PA. L. REV. 1083, n. 3 (1932).

[7] *E.g.*, CAL. CONST. art. 20, § 15: "Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." See also, 57 C.J.S. *Mechanics Liens* § 1(c) (1948); 3 POWELL, REAL PROPERTY § 484 (1952).

[8] THE CREDIT MANUAL OF COMMERCIAL LAWS 409-468 (42d ed. 1950).

[9] LAWS OF ARIZ. 1885, No. 93, §§ 3-5.

[10] See sections cited notes 13-16 *infra*.

[11] *Compare* LAWS OF ARIZ. 1885, No. 93, §§ 3-5, and REV. STAT. OF ARIZONA §§ 2258, 2263, 2264, 2265, 2277 (1887), *with* ARIZ. REV. STAT. ANN. §§ 33-981 (1956), 33-983 (Supp. 1963), 33-987 (1956), 33-991 (Supp. 1959).

[12] ARIZ. REV. STAT. ANN. §§ 33-984 (1956) (Lien for labor or materials furnished mill, factory or hoisting works), 33-985 (1956) (Lien for labor or materials furnished domestic vessel), 33-986 (1956) (Lien for labor in cutting wood, logs or ties), 33-988 (1956) (Lien for labor or materials furnished railroad), and 33-989 (1956) (Lien for labor or materials furnished mines and mining claims).

property: Section 33-981, for labor or materials furnished on a building or other improvement, the lien extending *only* to the improvement involved;[13] Section 33-983, for labor or materials furnished upon the lot, or any parcel not exceeding 160 acres, such lien extending to the lot or parcel of contiguous land not exceeding 160 acres, *and* to the buildings and improvements thereon;[14] and Section 33-987, for labor or materials furnished for the construction, alteration or repair of canals, roads, etc., or other structure or improvement, or for the leveling, ditching, bordering, or clearing of land, this lien extending to the *property* only.[15] In conjunction with the above three sections, Section 33-991 also must be considered. This section states that if the land improved lies within a city, a recorded plat of a townsite, or subdivision, the lien will attach to the lot or lots upon which the improvement was made. However, if the land lies outside these designated boundaries, the lien attaches to an area not to exceed ten acres of the property upon which the improvement was made.[16]

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[13] ARIZ. REV. STAT. ANN. § 33-981 (1956):

Lien for labor or materials used in construction, alteration or repair of structures.

(A) Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done or materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

[14] ARIZ. REV. STAT. ANN. § 33-983 (Supp. 1963):

Lien for improvements to city lots, or other land.

(A) A person who furnishes material or labors upon a lot in an incorporated city or town, or any parcel of land not exceeding one hundred sixty acres in the aggregate, or fills in or otherwise improves the lot or such parcel of land, or a street, alley or proposed street or alley, within, in front of or adjoining the lot or parcel of land at the instance of the owner of the lot or parcel of land, shall have a lien on the lot or parcel of contiguous land not exceeding one hundred sixty acres in the aggregate, and the buildings, structures and improvements thereon for material furnished and labor performed.

Subsection B is not applicable to this comment.

[15] ARIZ. REV. STAT. ANN. § 33-987 (1956):

Lien for labor or materials furnished on waterways, highways, excavations or land. A person who labors or furnishes labor or materials in the construction, alteration or repair of any canal, water ditch, flume, aqueduct or reservoir, bridge, fence, road, highway, cellar, excavation or other structure or improvement, or in the clearing, ditching, bordering or leveling of land, and to whom wages or monies are due or owing therefor, shall have a lien upon such property for all amounts due and unpaid. . . ..

[16] ARIZ. REV. STAT. ANN. § 33-991 (Supp. 1959):

Lands to which liens extend; rural lands; city lots; subdivision lots; mining claims.

(A) If the land upon which an improvement is made and labor has been performed lies outside of the limits of the recorded map or plat of a townsite, an incorporated city or town, or a subdivision, the lien shall extend to and include not to exceed ten acres of the land upon which the improvement is made and the labor has been performed.

(B) If the land on which an improvement is made or labor has been performed lies within the limits of a recorded map or plat of a townsite, an incorporated city or town, or a subdivision, the lien shall extend to and include only the particular lot or lots upon which the improvement is made and the labor has been performed.

It should become obvious from the foregoing description of these sections that not only is the mechanic or materialman frequently incapable of determining which section applies to his particular case, due to the overlapping provisions pertaining to the type of property improved, but, even if such a determination were feasible, it may be impossible for him to determine precisely the amount of real property to which his lien will attach. The practical difficulties presented are best illustrated by the following examples .

Example 1. Herman, a bricklayer, is employed by Fred to construct an addition on Fred's urban home, but fails to receive payment for his services. Which section does Herman consult for his remedy and to what portion of Fred's real property does his lien attach?

Section 33-981 clearly applies as it provides a lien for labor or material furnished upon a building, structure or improvement, but this lien extends to the building or improvement only, and not to the land upon which it is situated. Further analysis illustrates that additional sections may also apply. Section 33-983 provides a lien for materials or labor furnished upon the lot in an incorporated city, such lien extending to the improvement and the lot upon which it stands. It would seem that when Herman performs his art of bricklaying, he is providing labor "upon the lot." Could this apply also? In addition, Section 33-987, which allows a lien on the "property" for labor or materials furnished "upon . . . other structures or improvements . . . ," could be argued to have application here. Finally, Section 33-991(B) provides that, since Fred's home is within a city, "the lien" shall extend to the lot or lots upon which the improvement was made and labor performed.

Therefore, Herman has the possibility of an applicable lien only on the addition he constructed,[17] or the lot upon which Fred's home is situated *and all* the improvements thereon,[18] or the "property,"[19] or the lot only.[20] Which section is Herman to consult for his redress? This question has been unanswered by the legislature.[21] As a result Herman must apply to the court to determine which section is applicable and to what extent Fred's property is subject to his lien. The purpose of the mechanics' lien statute is thereby frustrated.

Example 2. Assuming the same facts as described in Example 1 except that Fred lives on a 150 acre farm, rather than within an incor-

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[17] ARIZ. REV. STAT. ANN. § 33-981 (1956).
[18] ARIZ. REV. STAT. ANN. § 33-983 (Supp. 1963).
[19] ARIZ. REV. STAT. ANN. § 33-987 (1956).
[20] ARIZ. REV. STAT. ANN. § 33-991(B) (Supp. 1959).
[21] In addition to the lack of legislative guidance, it should be mentioned that the Arizona Supreme Court has not been presented with these problems, and therefore provides no solution to our difficulties. However, should the court have an opportunity to construe these sections in the near future, it is the opinion of this author that the court would be stymied in its efforts as these problems are irreconcilable.

porated city, which section does Herman now consult and what portion of Fred's farm is subject to Herman's lien?

Herman's lien would attach to the improvement he constructed under Section 33-981 as in the previous example. Section 33-983 furnishes a lien not to exceed an area of 160 acres if the parcel of land is not within an incorporated city or town, with the lien also extending to the improvements. Under this section Herman's lien would attach to the 150 acres owned by Fred and all the improvements thereon. Section 33-987 provides a lien upon the "property" improved. Does "property" mean the land alone, or does it include the land and improvement worked upon, or the land and all the improvements thereon? Under this section, due to lack of judicial guidance, Herman would be unable to determine to what portion of Fred's farm his lien attaches. Furthermore, Section 33-991(A) extends "the lien" to an area not to exceed 10 acres if the land improved is not within the boundaries of a city or subdivision.

As a result, under one section or another, Herman's lien could extend to the improvement alone,[22] or to 150 acres *and all* the improvements thereon,[23] or "the property,"[24] or to 10 acres.[25] Should Herman be put to a decision of determining which section he thinks is most advantageous to him? And what would happen if, in the eyes of the court, he chooses the incorrect section?[26] As before, these questions are unanswered by proper authority in Arizona.

Example 3. Herman, in addition to being a bricklayer, is also skilled at preparing land for subdivision. He is employed by Fred to clear and level a portion of Fred's 5,000 acre ranch, and to construct a real estate office thereon. The portion of the ranch which Herman is improving occupies the extreme southwest corner, whereas Fred's ranch house and valuable improvements are at the opposite corner, five miles away. Which section or sections apply here and to what quantity of real property does the lien attach?

Section 33-981 would provide Herman with a lien on the building he constructed; however, since this lien is restricted to labor or materials furnished for construction, alteration, or repair of improve-

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[22] ARIZ. REV. STAT. ANN. § 33-981 (1956).
[23] ARIZ. REV. STAT. ANN. § 33-983 (Supp. 1963).
[24] ARIZ. REV. STAT. ANN. § 33-987 (1956).
[25] ARIZ. REV. STAT. ANN. § 33-991(A) (Supp. 1959).
[26] It has been held that when the statute extends the lien to one acre, and the tract of land is larger than one acre, the particular acre on which the lien is charged must be pointed out, and designated by a description sufficiently certain to identify and separate it from the balance of the tract. Fowler v. MacKentepe, 233 Ala. 458, 172 So. 266 (1937). Quaere, if the mechanic or materialman selects the wrong section under which to pursue his lien in Arizona, and thereby incorrectly designates the extent of real property to which his lien will attach, could his lien be forfeited? See also note 32 *infra*.

ments, the section would not provide Herman with a remedy for clearing and leveling the land. Section 33-983 would not apply to either the construction of the improvement or the clearing and leveling of the land for its application to rural property is restricted to parcels of land not exceeding an area of 160 acres. Section 33-987 provides a lien on the "property" for the construction of the real estate office, and, in addition, specifically designates that a lien shall be created for "leveling . . . or clearing . . ." of land, such lien extending to the "property" also. As to whether this extends a lien to the improvement only, to the land only, or to the entire 5,000 acres including all the improvements thereon, is a matter of conjecture. Reference to Section 33-991(A) reveals that "the lien," or both of them in this case, that is, the lien for constructing the building and the lien for leveling and clearing, shall extend to an area not to exceed 10 acres.

Therefore, for construction of the real estate office, it is possible that the lien could extend to the building alone,[27] to 10 acres,[28] or the "property";[29] whereas the lien created for clearing and leveling the ground may extend to either 10 acres[30] or to the "property".[31] Again an enigma is created for which there is no apparent solution.

Additional problems arise when, as here, rural property is considered. If Section 33-991 were to apply and only 10 acres are allocated to the lien, to which 10 acres of the 5,000 acre ranch is the mechanic or materialman entitled?[32] Must it apply to the 10 acres immediately surrounding the improvement, which, in this example, would render the lien useless because all the valuable improvements are on a portion of the ranch further removed than 10 acres from the site of the improvement labored upon, or can it apply to any 10 acres of the ranch so as to include the valuable structures and improvements? If the 10 acres could include any 10 acres upon Fred's ranch, can Herman pick which 10 acres he desires or should this

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[27] ARIZ. REV. STAT. ANN. § 33-981 (1956).

[28] ARIZ. REV. STAT. ANN. § 33-991(A) (Supp. 1959).

[29] ARIZ. REV. STAT. ANN. § 33-987 (1956).

[30] ARIZ. REV. STAT. ANN. § 33-991(A) (Supp. 1959).

[31] ARIZ. REV. STAT. ANN. § 33-987 (1956).

[32] What is the effect of his failure to adequately designate the acreage encumbered by his lien? *Compare* Fowler v. MacKentepe, 233 Ala. 458, 172 So. 266 (1937), note 26 *supra, with* Swope v. Stantzenberger, 59 Tex. 387 (1883) where the court held that the mechanic's failure to describe by metes and bounds the fifty acres upon which he was entitled to have a lien under the statute, did not vitiate his lien. The court felt it was not the legislative intent to allow the mechanic the right to designate the particular 50 acres for in many cases this would permit the mechanic to exercise his right of designation in a manner which could injure the balance of the tract. *But see* Williams v. Porter, 51 Mo. 441 (1873) where the court held that a lien described as embracing more than the one acre allotted by the statute was insufficient where no attempt was made to describe the particular acre, under a statute requiring detailed description.

be left to the judge or jury? In various other states[33] having statutes similar to Section 33-991, which limit liens to a designated number of acres, the courts have permitted the lien to extend to the entire farm or ranch to achieve an equitable result.[34] Was this result contemplated by our legislature when the section was adopted? If so, why did the legislature restrict the property exposed to only 10 acres as stated within the section? And if the lien is to be restricted definitely to an area not to exceed 10 acres, can the 10 acres assume any shape desired by the mechanic or materialman so as to include valuable buildings or improvements or must it be a square 10 acres?[35] It seems only logical to suggest that the legislature should consider revision of our statutes to provide solutions to these problems.

POSSIBLE SOLUTIONS TO THE DISCREPANCIES DESCRIBED

What Is the Status of Section 33-991?

This section, adopted in 1887,[36] exists today in substantially the same form as at its inception,[37] and, while similar statutes existed during that period elsewhere,[38] it seems to have been an Arizona legislative creation.[39] Parallel statutes are still in existence today in other

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[33] See, *e.g.*, REV. CIVIL STAT. OF TEX. § 5458 (1925):

> What included on property in city and country. If this lien is against land in a city, town or village, it shall extend to or into the lot or lots upon which such house, building, or improvement is situated . . .; and if the lien is against land in the country, it shall extend to and include fifty acres. . . .

See also, MO. STAT. ANN. § 429.010 (1952); Annot., 84 A.L.R. 123 (1933).

[34] Caltrider v. Isberg, 148 Md. 657, 130 Atl. 53 (1925); Swope v. Stantzenberger, 59 Tex. 387 (1883). *Contra,* Dusick. v. Meilselback, 118 Wisc. 240, 95 N.W. 144 (1903) where, under a statute stating that the lien should extend to land "not exceeding one acre . . .', WISC. REV. STAT. § 3314 (1898), the appellate court held that a trial court judgment allotting the mechanic a lien on 3.03 acres was erroneous at least to the extent of the excess over the statutory allotment. See also 57 C.J.S. *Mechanics Liens* § 186(c) (1948); *Annot.,* 84 A.L.R. 123 (1933).

[35] North Star Iron Works v. Strong, 33 Minn. 1, 21 N.W. 740 (1884) where the court reasoned that if the mechanic is bound to carve out and describe the exact statutory area, he would have a right to take it in any shape he pleased, and his selection would be absolutely binding upon the court in rendering its judgment and that cases can be imagined where he might carve it out in a shape that would be highly injurious to the remainder of the tract, and yet wholly unnecessary for the protection of his lien. See also Swope v. Stantbenberger, 59 Tex. 387 (1883), note 32 *supra.*

[36] REV. STAT. OF ARIZONA § 2263, 2264 (1887), but was later converted into one lien section, REV. CODE OF ARIZ. § 2022 (1928).

[37] REV. STAT. OF ARIZ. § 2263 (1887) read: "The lien herein provided, if in the country shall extend to and include ten acres upon which such labor has been performed, or upon which the houses or improvements are made." REV. STAT. OF ARIZ. § 2264 (1887) stated: "If in a city, town or village it shall extend to and include such lot or lots upon which such houses . . . or improvements are situated, or upon which such labor was performed."

[38] See the predecessors to the statutes cited note 33 *supra.*

[39] The source note accompanying ARIZ. REV. STAT. ANN. § 33-991 (Supp. 1959) indicates its originality as does a diligent search of the notes accompanying REV. STAT. OF ARIZONA § 2263, 2264 (1887).

states,[40] but these states do not experience difficulties similar to Arizona's problems for they are not plagued with independent sections which allot differing portions of real prperty to which the lien may attach.[41]

This section, it will be noted, refers to "the lien,"[42] a term strongly indicating its relation back to and supplementation of one specific lien provided within the statute. Of course, the question is immediately raised, which of the several liens is supplemented? Conceivably, "the lien" could relate back to any or all of the lien sections discussed herein,[43] or, for that matter, to any of the numerous liens provided for within the mechanics' lien statute.[44] The legislature has failed to offer any assistance in solving this problem.[45]

Initially, reference to the wording of Section 33-991 discloses that it does not refer to "the liens" or any other form of plurality, but states only "the lien." Due to the singular form used, it appears that the section must relate back to and supplement only one lien section within the mechanics' lien statute, to the exclusion of all other sections. Assuming this to be true, to which one lien section does its relate?

It is difficult to escape the notion that the legislative intent in designing Section 33-991 was to supplement the inadequacies of Section 33-981, which provides a lien on the improved structure *only*. Thus, this section would provide the mechanic or materialman a lien including not only the improved structure itself, but also the land upon which the work was performed or materials furnished. To lend authority to this construction, it will be noted that most jurisdictions have decided there cannot be, except in cases where the lien attaches to an estate less than fee,[46] a mechanics' lien on the building or improvement alone, where such is not reasonably detachable, but that

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[40] *E.g.*, MINN. STAT. ANN. § 514.03 (1945); MO. STAT. ANN. § 429.010 (1952); REV. CIVIL STAT. OF TEX. § 5458 (1925); WIS. STAT. ANN. § 289.01(2) (1958).

[41] An analysis of the various state statutes cited note 40 *supra* will sufficiently reveal this fact. Each of these states has only one section allocating an amount of real property to the liens designated within their mechanics' lien sections, that is, with regard to the type of lien discussed in this comment.

[42] ARIZ. REV. STAT. ANN. § 33-991(A) (Supp. 1959): "If the land upon which an improvement is made and labor has been performed lies outside of the limits of the recorded map or plat of a townsite, an incorporated city or town, or a subdivision, *the lien* shall extend to and include not to exceed ten acres of the land upon which the improvement is made and labor has been performed." (Emphasis added.) A reading of the section requires the question: What lien?

[43] See sections cited notes 13-16 inc. *supra.*

[44] See sections cited note 12 *supra.*

[45] See author's comment note 21 *supra.* The statements made in that note are equally applicable here.

[46] Ernest v. Deister, 42 Ariz. 379, 26 P.2d 648 (1933); Demund Lumber Co. v. Franke, 40 Ariz. 461, 14 P.2d 256 (1932); Breman v. Foreman, 1 Ariz. 413, 29 Pac. 539 (1883); 57 C.J.S. *Mechanics Liens* § 191 (1948); 3 POWELL, REAL PROPERTY § 486 (1952); Note, 36 IND. LAW J. 526 (1961).

the lien must also attach to the land upon which it is situated.[47] In addition a search of mechanics' lien statutes in other states will reveal the rarity of a statute which fails to provide a mechanic or materialman a lien on both the land and building so improved. Therefore, since the wording of the section demands that it relate back to and supplement only one lien (Section 33-981), the inconsistencies between Section 33-991, and Sections 33-983 and 33-987 are solved, and the relative position of Section 33-991 is determined.

However, the above conclusion is vulnerable to a basic argument to which there is no decisive rebuttal. If the legislature had intended Section 33-991 to relate back to and supplement Section 33-981 to the exclusion of all other sections, it would have so provided by either amending Section 33-981 to that effect or so indicated in the separately enacted section, neither of which was done. It can only be asserted, to thwart this contention, that, as has been illustrated by the inconsistencies raised in the examples, Section 33-991 cannot possibly exist independently with the other sections within our mechanics' lien statute, but must, to lend a reasonable construction to our statute, relate back to and supplement *only* the lien provided in Section 33-981. Once again, it is relatively obvious that the legislature should revise these sections to achieve the intent manifested by their adoption.

Possible Solutions to the Problems Created by Sections 33-981, 23-983 and 33-987.

Even after determining the relative position of Section 33-991, the mechanic or materialman is confronted with confusion caused by attempted interpretation of the three separate liens outlined in Sections 33-981, 33-983 and 33-987. The primary difficulty, of course, is that the legislature adopted these three seemingly separate and distinct liens to cover diverse situations, but designed the sections so that the terminology of each allows certain fact situations to fall within the provisions of one or both of the other sections, and thus create the conflict regarding the extent of real property to which a given lien will attach.

Admittedly, several statutory construction principles aid the interpretation of these poorly drawn provisions. The mechanics' lien statute is to be construed strictly as to whether or not the lien attaches to the property in question, due to its derogation from common law principle, but may be liberally construed as to the remedial and pro-

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[47] Green v. Tenold, 14 N.D. 46, 103 N.W. 398 (1905); Zabriskie v. Greater American Exposition Co., 67 Neb. 581, 93 N.W. 958 (1903). *Contra*, Rees v. Ludington, 13 Wisc. 308, 80 Am. Dec. 741 (1860). See generally, 57 C.J.S. *Mechanics Liens* § 186 (1948).

cedural provisions.[48] Therefore, in applying this principle, the Arizona courts might allow the mechanic or materialman, in a given case, to exert his lien under the section providing him the maximum security and thereby eliminate the problem. However, extensive application of this principle would not only permit arbitrary "legislating" by the courts, but, if this were the result in every case, there would be little purpose in providing a limitation within each section regarding the quantity of real property encumbered, an intent manifested by the legislature.

A second principle of statutory construction declares that where the provisions of two sections of a mechanics' lien statute conflict, the specific provisions will qualify the general provisions, and control the application thereof.[49] However, even this principle may be of dubious assistance in Arizona, for in most instances, our sections are designed either in a very general fashion with regard to each other or are equally specific, causing the courts difficulty in determining which section or provision is most specifically applicable. Regardless of whether these principles assist our courts in resolving the inherent problems present, it should be realized that if such principles must continually be utilized to achieve a rational result, our statutes are inadequately constructed and revision is imperative.

Section 33-981 was obviously intended to provide a laborer or materialman's lien in compliance with the practice unanimously followed in other jurisdictions.[50] Evidently, Section 33-983 was designed to provide a subdivision type lien, similar to that found in several other states,[51] to apply when labor or materials are expended to prepare a parcel of land for subdivision by any of several means, very few of which are itemized within the section. Assuming this to be the purpose, the section needs revision so that this intent is more explicit. Section 33-987 is enigmatic for it provides a lien for work,

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[48] Davis v. Alvord, 94 U.S. 545 (1876); Leeson v. Bartol, 55 Ariz. 160, 99 P.2d 485 (1940); Robert V. Clapp Co. v. Fox, 124 Ohio St. 331, 178 N.E. 586 (1931); Skyrme v. Occidental Mill and Mining Co., 8 Nev. 219 (1873); 57 C.J.S. *Mechanics Liens* § 4(b) (1948); 5 TIFFANY, REAL PROPERTY § 1571 (3d ed. 1939).

[49] Townsend v. Little, 109 U.S. 504, 512 (1883) where the court observed "that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general...." See also, Caldwell v. Steinfeld, 294 Fed. 270 (9th Cir. 1923).

[50] 3 POWELL, REAL PROPERTY § 483 (1952).

[51] *E.g.*, ORE. REV. STAT. § 87.265 (1953):

> Lien for preparing land for cultivation or construction; priority. Every person who is employed to . . . survey, clear, ditch, dike, till, level, check, border, excavate, grade, pave or otherwise prepare any land for irrigation, cultivation, construction or for any other purpose . . . shall have a lien on the land so worked upon. . . .

See also FLA. STAT. ANN. § 84.041 (1963).

most of which is included in the above two liens.[52] However, having three separate liens would not be troublesome were it not that each of the three sections provides a lien on a different quantity of real property.

Although several alternative methods could be utilized to eliminate the problems raised by these three sections,[53] in the final analysis the best solution would be to consolidate all of the liens into one section, thus providing one composite lien, with a single provision therein regarding the amount of real property to be encumbered by the lien. This method, which is utilized by several states,[54] is, in the opinion of this writer, the simplest approach to the correction of an otherwise difficult problem. Such a lien section would not only be the easiest to design but would also enable the mechanic or materialman to determine his statutory rights with greater speed and assurance.

Having determined which mechanical method of construction should be adopted, it is still necessary to determine how large an accumulation of real property should be allocated to this consolidated lien to establish an equitable result for all those interested. Although the section could be designed to allow the lien to attach to a designated combination of improvements and acreage, the court, in the interest of justice and to fully insure the mechanic or materialman adequate redress, might very likely alter the statutory allotment if the facts of a particular case necessitated. If this is to be an inevitable result, why not allow the judge to do so in every case, and so provide within the statute? Several states, including California[55] and Oregon,[56] have adopted this approach and permit the judge, upon foreclosure of the lien, to determine the extent of real property to which the lien should attach, depending on the merits of each particular case. As a

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[52] The attorney general of Arizona has ruled that "road(s), highway(s)" does not include improvement to public roads or highways, but only to those on private property. See OPS. ARIZ. ATT'Y GEN., Op. 58-90, 1958.

[53] The separate sections could each provide a uniform quantity of real property; or each section could be designed to prevent overlaps as to the type of property improved so that differing provisions as to the amount of property to which the lien would attach would be inconsequential. In the opinion of the author, however, these approaches are not desirable as they would not only be difficult to design, but could create inequities in many cases.

[54] *E.g.*, ILL. REV. STAT. ch. 82, § 1 (1959); IND. ANN. STAT. § 43-701 (Supp. 1964); ORE. REV. STAT. § 87.015 (1953).

[55] CAL. CODE OF CIVIL PROC. § 1183.1:

> Land Subject to Lien. The land . . . together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien. . . .

[56] ORE. REV. STAT. § 87.015 (1953):

> Land and interests thereon subject to lien; leasehold. (1) The land . . . together with such space as may be required for the convenient use and occupation thereof, to be determined by the court at the time of the foreclosure of the lien, shall . . . be subject to the liens created. . . .

result the mechanic or materialman's lien would attach to only that sum of real property necessary to foreclose his lien, as prescribed by the judge, and would not needlessly encumber a greater amount of the owner's property than is warranted.[57]

Regardless of what means are employed to achieve the desired result, it would be advisable for the legislature to conduct an extensive study of our mechanics' lien statute with an eye to modernization. The present state of confusion revolving about this statute is unnecessary, and should be immediately curtailed by the Arizona lawmakers.

[57] For a seemingly unique approach to this problem, see N.Y. LIEN LAW § 4:
Extent of lien.
(1) Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien. . . .