

VIRGINIA'S MECHANICS' AND MATERIALMEN'S LIEN LAW

**REPORT OF THE
VIRGINIA ADVISORY LEGISLATIVE COUNCIL
To
THE GOVERNOR
And
THE GENERAL ASSEMBLY OF VIRGINIA**



COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1967

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REPORT OF THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia, November 27, 1967

To:

HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*

and

THE GENERAL ASSEMBLY OF VIRGINIA

Giving a lien, as a matter of right, on real property to one who has performed labor or furnished materials in the construction and improvement of buildings is one of the oldest concepts in American law. The underlying theory was to assure such mechanics and materialmen payment for their work and supplies in order to encourage the erection of buildings in a country which was largely wilderness. Although the country is now extensively covered with cities, towns and unincorporated communities, and is rapidly becoming more so covered, it remains a part of public policy to charge real property with the burden of ultimately assuring the payment due mechanics and materialmen for their contributions toward improvement thereof.

It is stating the obvious to say that, since the early days of our Country, the rate of building construction has vastly increased, the methods of financing such construction have considerably changed, and more groups of specialists, laborers and suppliers are involved. Such is even more the case in the last several decades. Virginia's Mechanics' and Materialmen's Lien Law has not been essentially changed for many decades.

Realizing the need for a study which might reveal the necessity for changes in this Law in order to adapt it to modern conditions and business practices in the construction industry and the financing thereof, the General Assembly of Virginia, at its 1966 Regular Session, adopted Senate Joint Resolution No. 2 directing the Virginia Advisory Legislative Council to make a study and report on this matter. This Resolution is as follows:

SENATE JOINT RESOLUTION NO. 2

Directing the Virginia Advisory Legislative Council to make a study and report on existing mechanic's lien laws.

Whereas, there has been a consistent legislative policy to enact laws affording protection to persons performing labor or furnishing materials by allowing said persons to perfect liens on improvements erected; and

Whereas, significant changes in the methods and practices of the construction and building industry have occurred since the enactment of existing laws pertaining to the perfection of liens by persons performing labor or furnishing materials; and

Whereas, laws affording protection to persons performing labor or furnishing materials should be revised or amended to conform to the present methods and practices of the building and construction industry; now, therefore, be it

Resolved by the Senate, the House of Delegates concurring, That the Virginia Advisory Legislative Council is directed to study the need for revision or amendment of existing laws pertaining to the perfection of liens by all persons performing labor or furnishing materials. The Council shall consider, among other matters, the methods being used in other states to afford reasonable protection to all persons performing labor or furnishing materials. The Council shall conclude its study and make its findings and recommendations to the Governor and the General Assembly not later than September one, nineteen hundred sixty-seven.

The Council selected Lewis A. McMurrin, Jr., member of the House of Delegates and member of the Council, as Chairman of the Committee to make the initial study and report to it. Selected to serve with Mr. McMurrin on the Committee were: Matt G. Anderson, member of the House of Delegates, Goochland; Lloyd C. Bird, member of the Senate of Virginia, Chesterfield County; Hilton J. Herrmann, President of the Central National Bank, Richmond; Richard B. Johnson, President and Treasurer of the York Supply Co., West Point; George B. Little, Attorney at Law, Richmond; Ben H. McGehee, Vice-President—Finance and Treasurer of the Noland Company, Newport News; Paul W. Manns, member of the Senate of Virginia, Bowling Green; John L. Melnick, Attorney at Law, Arlington; Ernest W. Minson, Secretary of Ruffin & Payne, Incorporated, Richmond; Paul F. Rosenberger, President of John W. Rosenberger & Co., Winchester; James D. Rowe, Counsel, First Mortgage Corporation, Richmond; Carrington Williams, member of the House of Delegates, Fairfax; and Donald D. Williams, Attorney at Law, and Vice-President of Franklin Federal Savings and Loan Association, Richmond.

The Committee organized and elected Senator Bird as Vice-Chairman. G. M. Lapsley and Wildman S. Kincheloe, Jr., were appointed to serve as Secretary and Recording Secretary, respectively, to the Committee.

The Committee held a public hearing at which it heard speakers representative of various groups involved in the construction industry and the financing thereof. The Committee also received comments and recommendations in writing from many individuals and organizations interested in the matters under study.

The Committee met several times and thoroughly considered and discussed the comments and recommendations which had been placed before it. A Drafting Subcommittee was appointed to draft a bill in accordance with certain general directives. The Subcommittee met many times and spent long hours in the drafting of such bill. The members of the Subcommittee were furnished, and thoroughly considered, copies of the mechanics' and materialmen's lien laws, together with annotations, of several of the other states.

The Subcommittee presented its Report and Bill Drafts to the full Committee. The Committee met several additional times and exhaustively examined and amended these Bills. Representatives of interested groups met with the Committee in discussion of the Bills.

The Committee, after completing its deliberations, made its Report to the Council. Having reviewed the Committee's Report, the Council now makes its Report.

RECOMMENDATIONS

After considering evidence of the deficiencies in the present Virginia Mechanics' and Materialmen's Lien Law, the Council was able to agree unanimously on certain refinements which it believes should be enacted effective July 1, 1968. A bill to effect these changes is submitted herewith.

After extensive deliberation, the Committee resolved to recommend to the Council the concept of a limited direct mechanics' lien. Under Virginia's present law, the basic concept is one of an indirect or derivative lien, which limits the lien of a subcontractor to what the owner owes the general contractor when the subcontractor gives notice to the owner of his claim. The general contractor has a direct lien by dealing directly with the owner.

Many states have adopted the concept of a direct lien in one form or another. However, so far as the Committee was able to determine, the approach outlined below is unique to Virginia. It would grant a limited form of direct lien to subcontractors, laborers and suppliers against an owner's real estate.

A second major provision would enable the owner to limit his liability to the amount of his contract by requiring a 50% payment bond, from the general contractor, conditioned upon the payment to all persons supplying labor and/or material of the amounts due them therefor. This is a concept similar to that used on public contracts in Virginia.

A third major departure, and this is the most unique aspect of this proposal, so far as the Committee discovered, is that a full first lien priority would be granted to a construction lender to the extent of 75% of the loan, assuming no prior liens have been filed or notice given the lender of such. In order to perfect a full first lien priority as to the remaining 25% of the loan, the construction lender must meet certain requirements set forth in the proposed bill. The Committee advised us that the 75-25% concept is designed simply to accelerate the settlement process in construction loans since the evidence before the Committee shows that this is the time when most of the troubles and financial shortages occur. The Committee further advised that this concept is also designed to prevent or ameliorate certain of the abuses in the use of mechanics' lien waivers, such as premature and improvident execution thereof.

However, due to the unique character of the limited direct lien concept outlined above, with its accompanying concepts of the optional bond and the 75-25% feature, which carried in the Committee by a substantial majority, the Committee felt that those changes should be made effective March 1, 1970. This would permit time for full consideration by all segments of the construction industry, lenders, owners and the general public so that if any further changes are indicated, they could be made during the Regular Session of 1970.

In view of the unique approach embodied in this bill, and the vast amount of work and time expended by the Committee in arriving at this approach and drafting the bill, the Council decided to present the bill without recommendation, in order that it may be brought to the attention of the General Assembly. We have changed only the effective date of the bill—to January 1, 1970. This bill is, accordingly, attached to this Report as Appendix A.

CONCLUSION

Attached hereto are: (1) an explanatory statement on the bill drafts; (2) a composite version of Chapter 1 of Title 43 of the Code of Virginia, after January 1, 1970, should both bills be enacted by the General Assembly; (3) an outline of the changes which would be made by the two bills in abovementioned Chapter 1; (4) the recommended bill; and (5) Appendix A, the bill presented without recommendation.

ACKNOWLEDGEMENTS

We express our appreciation to the members of the Committee for the very considerable amount of time and effort which they devoted to the study of this complex problem. We also wish to thank those organizations and individuals who, at the public hearing, by correspondence or in conference, gave the Committee the benefit of their views and experience.

Respectfully submitted,

Tom Frost, *Chairman*

Charles R. Fenwick, *Vice-Chairman*

C. W. Cleaton

John Warren Cooke

John H. Daniel

J. D. Hagood

Charles K. Hutchens

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Lewis A. McMurran, Jr.

Sam E. Pope

Arthur H. Richardson

William F. Stone

Edward E. Willey

EXPLANATORY STATEMENT

This statement is presented in order to explain the changes which would be effected by the two bills. References are to Chapter 1 of Title 43 (§§ 43-1 through 43-23) of the Code of Virginia.

The amended, new and repealed sections follow :

1. Effective January 1, 1970. In § 43-1, in order to simplify existing law, the term "subcontractor" is revised to include all persons who deal with a subcontractor as well as with the general contractor. From a practical standpoint this represents a limited change in substance as § 43-9 placed sub-subcontractors or materialmen on the same basis as subcontractors. This substitutes two tiers of lienors for the present three tiers, thus simplifying procedures for perfecting liens. Existing law is continued which states that "general contractor" includes any person who contracts directly with the owner of the property being improved, repaired, etc.

2. Effective July 1, 1968. In § 43-2 the term "structure" has been broadened to include swimming pools; and the term "materials furnished" for improvements has been expanded to include the reasonable rental or use value of equipment used in improving an owner's property.

3. Effective July 1, 1968. § 43-2.1 is new, and is designed to clear up some of the vagueness in existing law by defining the terms "completed" and "the work thereon otherwise terminated", to mean cessation of labor thereon plus: (1) acceptance of the work by an owner; or (2) occupation or use of it by an owner; or (3) continuance of cessation of labor for 60 days.

4. Effective July 1, 1968. § 43-3 is amended to include architectural services (in conformity with case law); increase the minimum lien amount from \$10 to \$100, and is clarified to provide that a lien can attach for repairs or improvements to existing structures only when ordered or authorized by the owner or his agent. This last change is designed to clarify the position of landlords whose tenants contract for changes on leased premises (see § 43-20, which must be read in connection with § 43-3).

5. Effective January 1, 1970. § 43-3.1 is new and effects a major change from existing law in granting a limited direct lien to contractors, laborers and suppliers in connection with the erection of new structures. The idea of a direct lien obligates the owner to make certain that all subcontractors are paid or to see that a bond exists that will assure such payment. If he does not take one or the other of the steps above, he might suffer additional liability by having to pay more than the amount of his contract with the general contractor. In connection with repairs or improvements to existing structures, the concept of an indirect lien is continued to the extent that the owner's liability is limited to the amount he owes the general contractor at the time the memorandum of lien is filed unless the subcontractor gives written notice to the owner, within ten days of commencing the furnishing of labor or materials, of his intention to claim a direct lien.

This is in contrast with existing law on new construction which provides an "indirect" or derivative lien to a subcontractor, i.e., one which reaches only the amount owed by an owner to the general contractor, or the general contractor to a subcontractor, when the lien notice is given or which thereafter becomes due. Protection to an owner is given by limiting the lien either to the reasonable value of the labor done or materials furnished, or the price agreed upon for the same as between the claimant and

the person by whom he was employed, except in the case of a general contractor, i.e., one who has dealt directly with the owner, and may have contracted otherwise. Further, such direct lien is limited to labor or materials embraced in the owner's original contract, or any change in it made with his consent.

6. Effective January 1, 1970. § 43-3.2 is new and provides the second major departure from existing law by permitting an owner to limit his liability for mechanics' liens by requiring the general contractor to furnish a payment bond, with surety licensed to transact business in Virginia, in the amount of at least 50% of the contract price for the work to be done, conditioned upon payment in full of all laborers and suppliers. Such persons have a direct right to sue the obligors and sureties on their bond, provided they give written notice of intent to file such claim within 90 days of completion of the structure, or other termination of work, and provided suit be brought within one year from completion or other termination (defined in § 43-2.1).

To effect public notice, the owner must have the bond filed and indexed in the clerk's office where mechanics' liens may be filed, for a fee of \$1.

If an owner requires such a payment bond, his liability is limited to the amount which he owes the general contractor when he receives a lien notice or thereafter becomes indebted to him. The 50% bond requirement affords reasonable protection to lienors.

7. Effective July 1, 1968. § 43-4, relating to perfection of his lien by a general contractor, is unchanged except for substitution of specific reference to § 43-3 in lieu of reference to the "preceding section".

8. § 43-4.1, relating to recordation and indexing of mechanics' liens, is unchanged.

9. Effective July 1, 1968. § 43-5 is amended to provide a simplified form of a lien memorandum which a general contractor may file, being modeled after the form used in the Uniform Commercial Code (§ 8.9-402 et seq., of the Code of Virginia).

10. Effective July 1, 1968. § 43-6 is repealed as obsolete; it relates to validation of mechanics' liens recorded prior to April 18, 1927.

11. Effective January 1, 1970. The amended § 43-7 retains the present first sentence, adding thereto requirement for written notice to the general contractor as well as the owner, but, consistent with the direct lien, does away with limiting a subcontractor's lien to the amount which the owner owes the general contractor when written notice is given or the amount for which the owner thereafter becomes indebted to the general contractor.

12. Effective July 1, 1968. § 43-8 is amended to provide a simplified form of a lien memorandum to be used by a subcontractor as now defined. It is patterned after the Uniform Commercial Code. § 43-8 is also amended effective January 1, 1970 to adapt the notice form therein to the January 1, 1970 amendment of § 43-7 to require that written notice be given the general contractor also.

13. Effective July 1, 1968. § 43-10 is amended to provide a simplified form of a lien memorandum to be used by a sub-subcontractor.

14. Effective January 1, 1970. §§ 43-9 and § 43-10 (amended as above set forth), prescribing the manner and form for a sub-subcontractor to perfect his lien, are repealed, since § 43-1, as amended effective January

1, 1970, includes sub-subcontractors in the term "subcontractor", i.e., all who do not contract directly with the owner; thus all such persons would then be covered by § 43-7 and § 43-8.

15. Effective July 1, 1968. § 43-11 is amended to combine and alter existing §§ 43-11 and 43-12, and § 43-12 is repealed. Amended § 43-11 continues the separate and distinct remedy under existing law by which a subcontractor, laborer or materialman can make an owner or general contractor personally liable to him. Notice of such claim may be served by a sheriff or other appropriate officer, as under existing law, but consistent with § 43-14.1 may be given by certified or registered mail.

16. Effective July 1, 1968. § 43-13 is amended to put additional penalties on a contractor or subcontractor who knowingly obtains or uses construction funds for any purpose other than to pay laborers or materialmen, and facilitates prosecutions under the Section. It raises the penalties from a fine of \$100-\$250 and jail sentence of 30 days-6 months, to a fine of \$500-\$2,000 and a jail sentence of 30 days-12 months, or both. The amendment deletes the requirement of proving intent to defraud by the contractor or subcontractor, and substitutes the test of "knowingly" retaining or using such funds. His use of monies other than for the purposes of the act is prima facie evidence of knowingly appropriating funds to his own use; and in any prosecution under the Section the burden is on the defendant of going forward with the evidence to establish that all funds received from the owner or his agent, the contractor or lender, were in fact used to make proper payment.

It is our feeling that, considering the practices which brought about this study, prosecutions should be facilitated and the burden of showing a proper use of the funds placed on the one who diverted them.

17. Effective July 1, 1968. § 43-13.1 is new and is designed to stop present fraudulent practices relating to improper use of lien waiver forms. It provides that a contractor or subcontractor who presents such a waiver to obtain funds or title insurance and who knowingly omits from the waiver or who signs without authority the name of any person who has not been fully paid and who has furnished labor or materials of \$100 or more shall be guilty of a misdemeanor. Conviction carries a punishment of a \$500-\$2,000 fine, or 30 days-12 months in jail, or both.

18. Effective July 1, 1968. § 43-14 is repealed and replaced by new § 43-14.1 providing for service of notices under this chapter either by certain officers or by certified or registered mail. It also eliminates the \$20 forfeiture for failure to make a return.

19. Effective January 1, 1970. § 43-15 relating to inaccuracies in lien memoranda is unchanged until January 1, 1970, at which time the reference to § 43-10 is deleted since § 43-10, as amended, is repealed on January 1, 1970.

20. Effective January 1, 1970. § 43-16 of the present law granting priority to an owner who has to complete a structure, due to the general contractor's failure to do so, is continued, plus a new provision that if the owner requires a payment bond, the obligors and sureties remain liable thereunder. If the sureties pay, they are to that extent subrogated to the owner's rights, in addition to their existing rights.

21. Effective January 1, 1970. § 43-17 is unchanged until January 1, 1970, at which time references to §§ 43-9 and 43-10 are deleted since §§ 43-9 and 43-10 are repealed effective January 1, 1970.

22. Effective January 1, 1970. § 43-18 is unchanged until January 1, 1970, at which time references to laborers and materialmen are deleted since at that time laborers and materialmen are defined as subcontractors by the amendment of § 43-1 effective January 1, 1970.

23. § 43-19 is unchanged.

24. Effective July 1, 1968. § 43-20 is amended to incorporate by reference § 43-3 to accord with existing case law.

25. Effective July 1, 1968. § 43-21, relating to priorities, is unchanged as it stands except for a paragraph added to clarify present law that a purchase money mortgagee who subordinates to a construction lender does not also subordinate to mechanics' liens as to the value of the land, but important modifications are made in §§ 43-21.1, 43-21.2 and 43-21.3, effective January 1, 1970.

26. Effective January 1, 1970. § 43-21.1 is new; it is designed to give full first lien priority to a construction lender to the extent of funds actually advanced under a recorded deed of trust prior to the recording of a lien or a warning notice, provided (1) the deed of trust so states and refers to this Section, and (2) it contains the name and address of the noteholder secured. Such a note may be sold, assigned, or a participation therein sold without affecting the lender's priority (Subparagraph (a) of § 43-21.1).

Because most losses resulting from diversion of construction loan funds occur toward the end of the construction, a new approach has been taken in Subparagraph (b) of § 43-21.1: to perfect its priority as to any amount advanced beyond 75% of the total construction loan, the lender must, prior to disbursing beyond 75% of the loan, obtain an affidavit from the general contractor, or if none, the borrower, listing all persons and firms having contracts with him for performance of labor or furnishing materials, for \$100 or more, and who have not been fully paid. All persons so listed are deemed to have filed a warning notice (see § 43-21.2 below) and, assuming their liens are perfected, are entitled to priority to the extent of 25% of the construction loan. To protect lenders against secret liens, the potential lien of any person not listed is subordinated to the lien of the construction lender (Subparagraph (c) of § 43-21.1).

Further, prior to disbursing the last 25% of the construction loan, the lender must require the contractor or borrower to furnish releases or evidences of payment in full from all persons listed in the affidavit; if such be not obtained within fifteen days from the date of obtaining the affidavit, the lender may, after verifying the amounts due, pay such persons. If the balance due the contractor or borrower is insufficient to make full payment, the lender may withhold funds; and if thirty days go by without the affidavit being obtained, the lender may then, upon verifying the amounts due, disburse the balance of the loan to the persons listed on a pro-rata basis (Subparagraph (d) of § 43-21.1).

In instances where the lender is to lend less than the amount shown on the recorded trust, the lender must withhold the final 25% of its actual loan until the affidavit is obtained in order to protect this priority (Subparagraph (e) of § 43-21.1).

Where a lien is recorded, or a warning notice given, the claim thereunder is entitled to priority over any subsequent loan advances, provided the lien is properly perfected (Subparagraph (f) of § 43-21.1).

Subparagraph (g) of § 43-21.1 is designed to protect lenders further by leaving the lender's priority unaffected by any correction or supplemental

deed of trust or mortgage, other than by a release. However, changes to increase the loan or the security must comply with the Section.

27. Effective January 1, 1970. § 43-21.2 is new and provides that a warning notice by a contractor or subcontractor may be filed in the clerk's office, stating the estimated cost of labor or materials to be furnished for which a lien will be filed if payment is not made. The notice is to be separately indexed in the name of the record owner, costs \$1.00 to file, and need not be acknowledged nor given in affidavit form, in order to simplify filing it. A simplified form of warning notice is given; inaccuracy in the amount of the contract or estimated cost of work does not invalidate the warning notice or limit the right to file a lien for a greater amount, unless the inaccuracy is wilful. Provision is also made for the clerk to destroy such notices after five years from filing.

28. Effective January 1, 1970. § 43-21.3 is new and prescribes punishment for a contractor or borrower who knowingly furnishes a false or incomplete affidavit under § 43-21.1 by making it a misdemeanor and subject to a fine of \$500-\$2,000, or jail sentence of 30 days-12 months, or both.

29. § 43-22 is unchanged.

30. § 43-23 is unchanged.

31. Effective July 1, 1968. § 43-23.1 is new and provides for forfeiture of his lien by any person who knowingly includes in a lien memorandum work not performed or materials not furnished.

32. Effective July 1, 1968. § 43-23.2 is new and clarifies the fact that the remedies afforded in Chapter 1, of Title 43 are cumulative and not in lieu of other remedies.

COMPOSITE VERSION OF
CHAPTER 1 OF TITLE 43 OF THE CODE OF VIRGINIA
(after January 1, 1970
if the two bills are enacted)

CHAPTER 1.

Mechanics' and Materialmen's Liens.

Effective January 1, 1970

§ 43-1. Terms "general contractor" and "subcontractor" defined.—As used in this chapter, the term "general contractor" shall include contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" shall include all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor or a subcontractor.

Effective July 1, 1968

§ 43-2. Structures, materials, etc., deemed permanently annexed to freehold.—For the purpose of this chapter, a well, excavation, sidewalk, driveway, pavement, parking lot, retaining wall, curb and/or gutter, breakwater (either salt or fresh water), water system, drainage structure, filtering system (including septic or waste disposal systems) or *swimming pool* shall be deemed a structure permanently annexed to the freehold, and all shrubbery, earth, sod, sand, gravel, brick, stone, tile, pipe or other materials, together with *the reasonable rental or use value of equipment and any grading, clearing or earth moving required for the improvement of the grounds upon which such building or structure is situated shall be deemed to be materials furnished for the improvement of such building or structure and permanently annexed to the freehold.*

Effective July 1, 1968

§ 43-2.1. *Equivalents of "completed" or "the work thereon otherwise terminated."*—For the purposes of this chapter, any of the following shall be deemed equivalent to "completed" or "the work thereon otherwise terminated":

(a) *The acceptance by the owner, or his agent, of the work or improvement, and the cessation of labor thereon;*

(b) *The occupation or use of a work or improvement by the owner, or his agent, accompanied by a cessation of labor thereon; or*

(c) *After the commencement of a work or improvement, a cessation of labor thereon for a continuous period of sixty days.*

Effective July 1, 1968

§ 43-3. Lien for work done and materials furnished.—All persons performing labor or furnishing materials or *architectural services*, of the value of * *one hundred* dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if

perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchises for the work done and materials furnished. But when the claim is for repairs or improvements to existing structures only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered or authorized by the owner, or his agent.

Effective January 1, 1970

§ 43-3.1. *Direct Liens: Extent and scope.*—Subject to the limitation hereinafter set forth, the liens provided by this chapter shall be direct liens and shall not in the case of any claimant other than the general contractor be limited as to amount by any contract price agreed upon between the general contractor and the owner except as hereinafter provided. Such liens shall not in any case exceed in amount either the reasonable value of the labor done or the materials furnished, or both, for which the lien is claimed, or the price agreed upon for the same between the claimant and the person by whom he was employed. Such liens shall not, in any case where the claimant was employed by a general contractor or subcontractor, extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which contract or modification the claimant shall have had actual notice before the performance of such labor or the furnishing of such materials.

With respect to repair or improvement of an existing building or structure, the liability of an owner to subcontractors shall be limited to the amount owed by the owner to the general contractor at the time the memorandum of lien is filed unless such subcontractor gives written notice, within ten days of the time such subcontractor commences to furnish material or labor, of his intention to claim a direct lien.

Effective January 1, 1970

§ 43-3.2. *Limitation of owner's liability by requiring bond.*—Any owner may, at his option, require a general contractor to furnish a payment bond with good and sufficient surety thereon licensed to transact business in Virginia as a surety in the amount of at least fifty percent of the contract price, which bond shall be conditioned upon the payment in full of the claims of all persons performing labor or furnishing materials, as defined in § 43-3, in the prosecution of the work provided for in the contract. All such persons performing labor or furnishing materials shall have a direct right of action against the obligors and sureties on said bonds for the full amount shown to be due them for labor performed or materials furnished, provided such person gives written notice to the general contractor and his surety of his intention to file a claim under the bond within ninety days of the date the building or structure was completed or the work thereon otherwise terminated.

Every such bond shall be construed regardless of its language as incorporating within its provisions the obligation to pay those persons who furnish labor or materials as aforesaid.

No action on any bond given pursuant to the provisions of this section shall be brought unless within one year after the work covered by said contract is completed or the work thereon is otherwise terminated.

The owner shall cause the bond or a copy thereof to be filed in the clerk's office where liens may be filed under this chapter. The clerk shall

file such bond or copy thereof for a fee of one dollar, and he shall index the same in the general index of deeds both in the name of the owner of the property and in the name of the general contractor.

The liability of any owner who requires a bond in the manner and upon the terms and conditions herein provided shall be limited to the amount by which the owner is indebted to the general contractor at the time of the service of the notice of lien upon the owner or his agent or the amount by which the owner may thereafter become indebted to the contractor upon his contract.

Effective July 1, 1968

§ 43-4. Perfection of lien by general contractor; recordation and notice.—A general contractor, in order to perfect the lien given by * § 43-3, shall file at any time after the work is done and the material furnished by him and before the expiration of sixty days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated, in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is, or in the clerk's office of the Chancery Court of the city of Richmond, if such building, structure or railroad, or any part thereof, is within the corporate limits of the city lying north of James River and including the islands in such river, or in the clerk's office of the Hustings Court, Part Two, of the city of Richmond, if the building, structure or railroad, or any part thereof, is within the corporate limits of the city lying south of James River, a memorandum showing the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien. It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinbefore provided to record the same in the miscellaneous lien book, and to index the same not only in the miscellaneous lien book, but also in the general index of deeds, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

No Change

§ 43-4.1. Liens to be recorded in miscellaneous lien books or deed books and indexed in general index of deeds.—Notwithstanding the provisions of § 43-4, or any other section of this title, or any other provision of law requiring documents to be recorded in the miscellaneous lien book or the deed books in the clerk's office of any court, on and after July one, nineteen hundred sixty-four all memoranda or notices of liens, in the discretion of the clerk, shall be recorded in the miscellaneous lien books or the deed books in such clerk's office, and shall be indexed in the general index of deeds, and such general index shall show the type of such lien.

Effective July 1, 1968

§ 43-5. Sufficiency of memorandum and affidavit required by § 43-4.—The memorandum and affidavit required by * § 43-4 shall be sufficient if substantially in form and effect as follows:

Memorandum for Mechanic's Lien Claimed by General Contractor.

*Name of Owner:

Address of Owner:
Name of Claimant:
Address of Claimant:
 1. *Type of materials or services furnished:*

 2. *Amount claimed:* \$.....
 3. *Type of structure on which work done or materials furnished:*

 4. *Brief description and location of real property:*

 5. *Date from which interest on the above amount is claimed:*
Date:
(Name of Claimant).

Affidavit.

State of Virginia,

County (or city) of, to-wit:

I, (notary or other officer) for the county (or city) aforesaid, do certify that* *claimant*, or, agent for * *claimant*, this day made oath before me in my county (or city) aforesaid that (the owner) is justly indebted to * *claimant* in the sum of dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this day of 19.....
(Notary Public or Justice of Peace, et cetera.)

§ 43-6. Repealed, effective July 1, 1968.

Effective January 1, 1970

§ 43-7. Perfection of lien by subcontractor; extent of lien.—Any subcontractor, in order to perfect the lien given him by § 43-3, shall comply with § 43-4, and in addition give notice in writing to the owner of the property, or his agent, and to the general contractor, or his agent, of the amount and character of his claim. *

Amended, effective July 1, 1968, as to memorandum and affidavit forms; amended, effective January 1, 1970, as to notice form on account of amendment of § 43-1 and repeal of §§ 43-9 and 43-10, effective January 1, 1970.

§ 43-8. Sufficiency of memorandum, affidavit and notice required by § 43-7.—The memorandum, affidavit and notice required by * § 43-7 shall be sufficient if substantially in form and effect as follows:

Memorandum * for Mechanic's Lien Claimed by Subcontractor.

*Name of Owner:
Address of Owner:
Name of General Contractor (if any):
Name of Claimant:
Address of Claimant:
1. Type of materials or services furnished:
2. Amount claimed: \$.....
3. Type of structure on which work done or materials furnished:
4. Brief description and location of real property:
5. Date from which interest on above amount is claimed:
Date:
.....(Name of Claimant).

Affidavit.

State of Virginia,

County (or city) of, to-wit:

I, (notary or other officer) for the county (or city) aforesaid, do certify that * claimant, or, * agent * for claimant, this day made oath before me in my county (or city) aforesaid that * is justly indebted to * claimant in the sum of dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the day of, 19.....
..... (Notary Public or Justice of Peace, et cetera.)

Notice.

To (owner) and (general contractor):

You are hereby notified that (general contractor) (or a subcontractor under, said general contractor) is indebted to me in the sum of dollars (\$.....) with interest thereon from the day of, 19....., for work done (or materials furnished, as the case may be,) in and

about the construction (or removal, etc.,) of a
(describe structure, whether dwelling, store, or etc.,) which *
....., *said general contractor*, has contracted to construct (or
remove, etc.,) for *, *said owner*, in the county (or
city) of, and that I have duly recorded a mechanic's
lien for the same.

Given under my hand this the day of, 19.....
.....(Subcontractor).

§ 43-9. Repealed, effective January 1, 1970.

§ 43-10. Repealed, effective January 1, 1970.

Effective July 1, 1968

§ 43-11. How owner or general contractor made personally liable to subcontractor, laborer or materialman.—Any subcontractor or person furnishing labor or material to the general contractor or subcontractor, may give notice in writing to the owner or his agent or the general contractor, stating the nature and character of his contract and the probable amount of his claim, and if such subcontractor, or person furnishing labor or material shall at any time after the work is done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor, or the general contractor alone in case he is the only one notified, with a correct account, verified by affidavit, of his claim against the general contractor or subcontractor, for work done or materials furnished and of the amount due, the owner, or the general contractor, if he alone was notified, shall be personally liable to the claimant for the amount due to the subcontractor or persons furnishing labor or material by the general contractor or subcontractor, provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in case the general contractor alone is notified the sum in which he is indebted to the subcontractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor. But the amount which a person supplying labor or material to a subcontractor can claim shall not exceed the amount for which such subcontractor could file his claim.

Any bona fide agreement for deductions by the owner because of the failure or refusal of the general contractor to comply with his contract shall be binding upon such subcontractor, laborer or materialman.

The provisions of this section are subject to the qualification that before any such personal liability of the owner or general contractor as therein provided for shall be binding the notice therein required shall be either served with such return thereon as is sufficient under § 8-52 or said notice shall be mailed by registered or certified mail to the owner or general contractor upon whom personal liability is sought to be imposed.

§ 43-12. Repealed, effective July 1, 1968.

Effective July 1, 1968

§ 43-13. Funds paid to general contractor or subcontractor must be used to pay persons performing labor or furnishing material.—Any contractor or subcontractor who * shall *knowingly* retain or use the funds, or any part thereof, paid by the owner or *his agent, the contractor or lender* to such contractor or by the owner or *his agent, the contractor or lender* to a subcontractor under any contract for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, for any other purpose than to pay persons performing labor upon or furnishing material for such construction, repair, removal or improvement, shall be guilty of a misdemeanor in appropriating such funds to his own use while any amount for which he may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons * *who have not been fully paid*, and upon conviction shall be punished by a fine of not less than * *five hundred* nor more than two * *thousand* dollars, or by confinement in jail not less than thirty days nor more than * *twelve* months, or by both such fine and imprisonment in the discretion of the *jury or the court trying the case without a jury*.

The use by any such contractor or subcontractor of any moneys paid to him under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be *prima facie* evidence of * *knowingly appropriating such funds to his own use*.

In any prosecution under this section the burden of going forward with the evidence shall be on the defendant to establish that all funds received by the defendant from the owner or his agent, the contractor or lender were used to pay persons performing labor upon or furnishing materials for such construction, repair, removal or improvement.

Effective July 1, 1968

§ 43-13.1. *Use of lien waiver form; omission or failure to disclose; signing without authority.*—Any contractor or subcontractor who *knowingly* presents a waiver of lien form to an owner, his agent, contractor, lender, or title company for the purpose of obtaining funds or title insurance and *knowingly* omits from or fails to disclose within said waiver of lien form, or without authority signs, the name of any person who has not received payment in full for materials furnished or labor performed having a value of one hundred dollars or more shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by confinement in jail for not less than thirty days nor more than twelve months, or by both such fine and imprisonment in the discretion of the jury or the court trying the case without a jury.

§ 43-14. Repealed, effective July 1, 1968.

Effective July 1, 1968

§ 43-14.1. *Service of Notices.*—Any notice authorized or required by this chapter may be served by any sheriff, constable or sergeant who shall make return of the time and manner of service; or any such notice may be served by certified or registered mail.

Effective January 1, 1970

§ 43-15. Inaccuracies in memorandum or description not affecting lien.—No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5 and 43-8 * , respectively, and is not wilfully false. (This section will contain a reference to § 43-10, as amended, until January 1, 1970, when § 43-10 is repealed.)

Effective January 1, 1970

§ 43-16. What owner may do when contractor fails or refuses to complete buildings, etc.—If the owner is compelled to complete his building, structure, or railroad, or any part thereof undertaken by a general contractor in consequence of the failure or refusal of the general contractor to do so, the amount expended by the owner for such completion shall have priority over all mechanics' liens which have been or may be placed on such building, structure, or railroad by such general contractor, a subcontractor under him, or any person furnishing labor or materials to either of them.

In the event a bond is required by the owner as provided in § 43-3.2, nothing herein contained shall be construed to release the obligors and sureties on such bond from their obligations thereunder. If payment is made by the surety, it shall be subrogated to the extent of payment so made to the rights of the owner against the general contractor or others liable under the bond, in addition to any other rights it may have against the obligors and sureties on such bond.

Effective January 1, 1970

§ 43-17. Limitation on suit to enforce lien.—No suit to enforce any lien perfected under §§ 43-4, 43-5, 43-7 and * 43-8 shall be brought after six months from the time when the memorandum of lien was recorded or after sixty days from the time the building, structure or railroad was completed or the work thereon otherwise terminated, whichever time shall last occur; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and, provided further, that nothing herein shall extend the time within which such lien may be perfected. (This section will contain a reference to §§ 43-9, and 43-10 as amended, until January 1, 1970 when §§ 43-9 and 43-10 are repealed.)

Effective January 1, 1970

§ 43-18. Lien of general contractor to inure to benefit of subcontractor.—The perfected lien of a general contractor on any building or structure shall inure to the benefit of any subcontractor * who has not perfected a lien on such building or structure, provided such subcontractor * shall give written notice of his claim against the general contractor, or subcontractor, as the case may be, to the owner or his agent before the amount of such lien is actually paid off or discharged. (This section will contain references to "any person performing labor or furnishing materials to a subcontractor" until January 1, 1970 when § 43-1 is amended so as to include such persons within the definition of "subcontractor.")

No change

§ 43-19. Validity and priority of lien not affected by assignments.—Every assignment or transfer by a general contractor, in whole or in part, of his contract with the owner or of any money or consideration coming to him under such contract, or by a subcontractor of his contract with the general contractor, in whole or in part, or of any money or consideration coming to him under his contract with the general contractor, and every writ of fieri facias, attachment or other process against the general contractor or subcontractor to subject or encumber his interest arising under such contract, shall be subject to the liens given by this chapter to laborers, mechanics, and materialmen. No such assignment or transfer shall in any way affect the validity or the priority of satisfaction of liens given by this chapter.

Effective July 1, 1968

§ 43-20. Extent of lien where owner has less than fee in land.—*Subject to the provisions of § 43-3*, if the persons who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter.

Effective July 1, 1968

§ 43-21. Priorities between mechanics' and other liens.—No lien or encumbrance upon the land created before the work was commenced or materials furnished shall operate upon the building or structure erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; nor shall any lien or encumbrance upon the land created after the work was commenced or materials furnished operate on the land, or such building or structure, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied.

Unless otherwise provided in the subordination agreement, if the holder of the prior recorded lien of a purchase money deed of trust subordinates to the lien of a construction money deed of trust, such subordination shall be limited to the construction money deed of trust and said prior lien shall not be subordinate to mechanics' and materialmen's liens to the extent of the value of the land by virtue of such agreement.

In the enforcement of the liens acquired under the previous sections of this chapter, any lien or encumbrance created on the land before the work was commenced or materials furnished shall be preferred in the distribution of the proceeds of sale only to the extent of the value of the land estimated, exclusive of the buildings or structures, at the time of sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens provided for in the previous sections of this chapter. Provided that liens filed for performing labor or furnishing materials for the repair or improvement of any building or structure shall be subject to any encumbrance against such land and building or structure of record prior to the commencement of the improvements or repairs or the furnishing of materials or supplies therefor. Nothing contained in the foregoing proviso shall apply to liens that may be filed for the construction or removal of any building or structure.

Effective January 1, 1970

§ 43-21.1. Priority between mechanics' liens and liens of mortgagees advancing construction funds.—(a) Section 43-21 shall be subject to the proviso that the lien of a mortgage or deed of trust, securing a creditor lending funds for the construction, removal, repair or improvement of any building, structure, or railroad, recorded in the clerk's office in the county or city in which the building, structure or railroad (or any part thereof) is located, shall have priority of lien as to the land and the building, structure or railroad erected thereon over liens perfected pursuant to §§ 43-4 and 43-7 to the extent that such funds shall be advanced by such creditor under the mortgage or deed of trust prior to the recordation in the clerk's office of the memorandum of lien as required by §§ 43-4 and 43-7, or of the warning notice as provided in § 43-21.2, provided:

(1) The mortgage or deed of trust recites that it is given and executed pursuant to the provisions of this section; and

(2) The mortgage or deed of trust contains the name and mailing address of the noteholder (or his designee) secured by the mortgage or deed of trust. Such note may thereafter be sold or assigned or a participation or participations sold therein without affecting the priority herein conferred.

(b) In order to perfect such lender's priority as to any amount advanced in excess of seventy-five percent of the total amount of the construction loan, the lender must, prior to disbursement of any such amount in excess of seventy-five percent of the loan, obtain from the general contractor or, if none, the borrower, an affidavit in form substantially as follows:

Affidavit to Induce the Payment of Construction Funds.

The undersigned,, general contractor (if none, borrower), in order to induce to advance, in whole or in part, the final twenty-five percent, being \$....., of the construction loan in the total amount of \$....., in and about the construction, removal, repair or improvement of property briefly described as

....., hereby makes oath that the following is a true, accurate and complete list of all persons and firms with whom he has contracted, who have performed or will perform any labor, or have furnished or will furnish any materials or architectural services of the value of one hundred dollars or more, and who have not received payment in full:

(List those who have not received payment in full.)

.....
(Name of contractor or borrower)

State of Virginia,

County (or city) of, to-wit:

This day personally appeared before me,, (notary or other officer) for the county (or city) aforesaid,

....., who made oath that the foregoing is a true, accurate, and complete list of all persons or firms with whom he contracted for performing labor or furnishing materials, of a value of one hundred dollars or more, and who have not been fully paid.

Given under my hand this day of, 19.....

.....(Notary Public or
Justice of Peace, et cetera.)

(c) All persons or firms who are reasonably identified by such affidavit shall be deemed to have filed a warning notice, pursuant to the provisions of § 43-21.2, immediately subsequent to the disbursement of the first seventy-five percent of the construction loan, and upon perfection of their liens pursuant to this chapter shall be entitled to priority over any advances by the construction lender in excess of seventy-five percent of the amount of the construction loan. The lien of any person or firm who is not reasonably identified by such affidavit shall be inferior to the lien of the construction lender except to the extent construction funds are advanced subsequent to the filing of a memorandum of lien or a warning notice by such person or firm.

(d) Prior to the disbursement of all or any portion of the final twenty-five percent of the construction loan, the lender shall require the contractor or borrower to furnish releases or evidence of payment in full from all persons and firms listed in the affidavit set forth hereinabove. If the contractor or borrower fails to secure releases or furnish such evidence of payment in full within a period of fifteen days from the date of obtaining the affidavit, the lender may, upon verification of amounts due, pay such persons or firms in full. If the balance due the contractor or borrower is not sufficient to pay all such persons or firms in full, the lender shall pay no money to any of such persons or firms until such time as releases from all of such persons or firms have been furnished to it. In the event such releases are not furnished to the lender within thirty days of the date the affidavit is obtained, the lender may, upon verification of the amounts due, disburse the balance of the construction loan to such persons or firms named in the affidavit on a pro rata basis.

(e) In the event the loan to be made by a construction lender is less than the amount shown in the recorded deed of trust, the construction lender shall withhold the final twenty-five percent of its loan until the affidavit required by this section is obtained.

(f) In the event a memorandum of lien is recorded, or warning notice is filed, such claim for mechanic's lien shall be entitled to priority over any subsequent construction advances, provided such lien is subsequently perfected in accordance with the provisions of this chapter, but the lien of the construction deed of trust or mortgage shall continue to enjoy priority as to all mechanics' liens as to which no memorandum has been recorded or warning notice filed.

(g) The priority herein conferred shall not be affected or limited by any correction deed of trust or mortgage, supplemental deed of trust or mortgage, or other modification of record of the construction deed of trust or mortgage, other than a release deed or marginal release; provided, however, that if such correction deed of trust or supplemental deed of trust, or other modification contains either an increase in the amount of money secured or in the amount of land conveyed to secure the debt, the priority herein conferred shall not extend to the additional land or the additional sums to be secured, unless such correction deed of trust or

supplemental deed of trust or other modification complies with the provisions of this section.

Effective January 1, 1970

§ 43-21.2 *Warning notice.*—(a) Any contractor or subcontractor may cause to be filed in the clerk’s office a warning notice in the form hereinafter set forth. Such notice shall be indexed in a separate Index of Warning Notices in the name of the record owner of the real estate. The clerk of the court shall be entitled to a fee of one dollar for filing and indexing such notice. No affidavit or acknowledgment shall be required as a condition or filing such notice.

(b) The warning notice shall be sufficient if substantially in form and effect as follows:

Warning Notice of Right to Lien.

To:, as record owner, either at the date of the filing of the construction deed of trust or as of this date, of property briefly described as

Take notice that the undersigned has or will perform work or furnish materials or construction equipment in the construction of improvements on said land and if not paid therefor will perfect a lien as provided by law.

The amount of the contract or estimated cost of work to be performed or materials to be furnished is \$.....

Date:.....

Name:

Address:

(c) No inaccuracy in the amount of the contract or estimated cost of work to be performed or materials shall invalidate the warning notice or limit the right to file a lien for a greater amount unless such inaccuracy is willful.

(d) Five years after filing, the clerk of court may remove a warning notice from the files and destroy it, unless the warning notice of a lien, filed pursuant thereto, shall then, to the knowledge of the clerk, be the subject of litigation.

Effective January 1, 1970

§ 43-21.3. *Furnishing false or incomplete affidavit.*—Any contractor or borrower who knowingly furnishes a false or incomplete affidavit pursuant to the provisions of subparagraph (b) of § 43-21.1 shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars or more than two thousand dollars, or by confinement in jail for a period of not less than thirty days or more than twelve months, or by both such fine and imprisonment in the discretion of the jury or the court trying the case without a jury.

No Change

§ 43-22. How liens enforced.—The liens created and perfected under this chapter may be enforced in a court of equity by a bill filed in the county or city wherein the building, structure, or railroad, or some part thereof is situated, or wherein the owner, or if there be more than one, any of them, resides. The plaintiff shall file with his bill an itemized statement of his account, showing the amount and character of the work done or materials furnished, the prices charged therefor, the payments made, if any, the balance due, and the time from which interest is claimed thereon; the correctness of which account shall be verified by the affidavit of himself, or his agent. When suit is brought for the enforcement of any such lien against the property bound thereby, all parties entitled to such liens upon the property or any portion thereof may file petitions in such suit asking for the enforcement of their respective liens to have the same effect as if an independent suit were brought by each claimant.

No Change

§ 43-23. Priority among liens perfected under this chapter.—There shall be no priority among the liens created and perfected under this chapter, except that the lien of a subcontractor shall be preferred to that of his general contractor; the lien of persons performing labor or furnishing materials for a subcontractor, shall be preferred to that of such subcontractor; and liens filed by persons performing manual labor shall have priority over materialmen to the extent of the labor performed during the thirty days immediately preceding the date of the performance of the last labor.

Effective July 1, 1968

§ 43-23.1. *Forfeiture of lien.*—Any person who shall knowingly include in his memorandum of lien work not performed upon or materials not furnished for the property described in his memorandum shall thereby forfeit any right to a lien under this chapter.

Effective July 1, 1968

§ 43-23.2. *Cumulative remedy.*—The remedies afforded by this chapter shall be deemed cumulative in nature and not be construed to be in lieu of any other legal or equitable remedies.

OUTLINE OF CHANGES WHICH WOULD BE MADE
 BY THE TWO BILLS IN CHAPTER 1, TITLE 43
 (§§ 43-1 THROUGH 43-23) OF THE
 CODE OF VIRGINIA

<i>Present Law</i>	<i>Proposed Bills</i>	Section Effective (July 1, 1968 or January 1, 1970)
1. § 43-1: Defines "general contractor" to include all who contract with owner; "Subcontractor" all who contract with general contractor.	1. § 43.1: "General Contractor"—same; "Subcontractor" includes all who contract with general contractor <i>and</i> with a subcontractor.	January 1, 1970
2. § 43-2: Defines structures and materials which become subject to Mechanics' Lien Law when affixed to real estate.	2. § 43-2: Adds swimming pools to list of structures, and "reasonable rental or use value of equipment" to list of materials.	July 1, 1968
3. § 43-2.1: No provision.	3. § 43-2.1: <i>New.</i> Defines terms "completed" and "the work thereon otherwise terminated" to include cessation of work plus (1) acceptance of work by owner, or (2) occupation or use of work by owner, or (3) continuance of work cessation for at least 60 days.	July 1, 1968
4. § 43-3: Grants lien for work done or materials furnished of \$10 or more on land and buildings if ordered by owner and lien is properly perfected.	4. § 43-3: Grants lien only if work or materials is \$100 or more; includes architectural services as work. To protect landlords, lien attaches to existing structures only if <i>authorized or</i> ordered by owner. (See § 43-20 below.)	July 1, 1968
5. § 43-3.1: No provision. § 43-7 of present law embodies basic concept of "indirect" or "derivative" lien which would be changed by proposed § 43-3.1; § 43-7 limits a subcontractor's lien to what the owner owes general contractor when notice to owner is given and lien is filed.	5. § 43-3.1: <i>New.</i> Makes mechanics' liens direct liens on real estate, limited to lesser of contract price or reasonable value of labor or materials. Owner bound only to extent of his contract. In case of repairs or improvements to existing structures, owner's liability is limited to amount he owes general contractor when memorandum is filed unless subcontractor gives him written notice within 10 days from time he commences work of intention to claim direct lien against owner.	January 1, 1970
6. § 43-3.2: No provision.	6. § 43-3.2: <i>New.</i> Owner may limit liability by requiring general contractor to furnish payment bond, with surety, for at least 50% of contract price, for payment	January 1, 1970

Present Law

Proposed Bills

of all laborers and materialmen; latter can sue obligors and sureties on claims if written notice given general contractor and surety within 90 days of completion or other termination.

Suit must be brought within 1 year after work done, or other termination.

Bond must be filed and indexed in proper clerk's office; fee \$1.00.

If owner requires bond, his liability is limited to amount he owes, or may thereafter owe, general contractor when he receives lien notice.

- | | | |
|--|---|-----------------|
| 7. § 43-4: General contractor perfects lien by filing memorandum in proper clerk's office within 60 days from date of building completion, or other termination. | 7. § 43-4: Substitutes specific reference to § 43-3 for general reference to "preceding section". | July 1, 1968 |
| 8. § 43-4.1: Liens to be recorded in deed book or miscellaneous lien book, in <i>discretion</i> of clerk. | 8. § 43-4.1: No change. | |
| 9. § 43-5: Forms for general contractor's lien memorandum and affidavit. | 9. § 43-5: Memorandum form revised and simplified--follows Uniform Commercial Code. | July 1, 1968 |
| 10. § 43-6: Validation of liens recorded before April 18, 1927, etc. | 10. § 43-6: Repealed as obsolete. | July 1, 1968 |
| 11. § 43-7: Subcontractor perfects lien by filing memorandum as in § 43-4 above, and giving written notice to owner of his claim; claim limited to amount owner owes general contractor. | 11. § 43-7: Same, except to remove limit on claim to amount owner owes general contractor, thus eliminating the indirect or derivative lien. Adds requirement that written notice be given general contractor, also. | January 1, 1970 |
| 12. § 43-8: Forms for subcontractor's lien memorandum, affidavit and notice. | 12. § 43-8: Memorandum form revised and simplified; follows Uniform Commercial Code. Will be further amended, effective January 1, 1970, to revise notice form so as to include notice to general contractor, also. (See § 43-7 above.) | July 1, 1968 |
| 13. § 43-9: Sub-subcontractor perfects lien in manner similar to subcontractor and in addition gives written notice to general contractor, also. (See § 43-7 above.) | 13. § 43-9: No change in 1968; to be repealed, effective, January 1, 1970, since its provisions will then be covered by revised § 43-7 (revised § 43-1 will then include sub-subcontractor with subcontractors by definition). | January 1, 1970 |

<i>Present Law</i>	<i>Proposed Bills</i>	Section Effective (July 1, 1968 or January 1, 1970)
14. § 43-10: Forms for sub-subcontractor's lien memorandum, affidavit and notice.	14. § 43-10: Memorandum form revised to conform to Uniform Commercial Code. Will be repealed, effective January 1, 1970. (See §§ 43-7, 43-8 and 43-9 above.)	July 1, 1968
15. § 43-11: Subcontractor, laborer or materialman may make owner or general contractor <i>personally</i> liable by giving them written notice of expected claim, verified by affidavit within 30 days of completion or other termination; liability limited to sum owner owes general contractor when notice given.	15. § 43-11: Amended to permit notice to be given owner or general contractor by registered or certified mail. (Combines present §§ 43-11 and 43-12.)	July 1, 1968
16. § 43-12: Notice under § 43-11 recorded with officer's return in miscellaneous lien book of proper clerk's office.	16. § 43-12: Repealed, since covered under amended § 43-11 above.	July 1, 1968
17. § 43-13: Fine of \$100-\$250, jail sentence of 30 days-6 months, or both, on conviction of diverting construction funds from laborers or materialmen, with <i>intent to defraud</i> . Use by contractor or subcontractor of funds except to pay persons owed is <i>prima facie</i> evidence of intent to defraud.	17. § 43-13: Increases penalty to \$500-\$2,000 fine, 30 days to 12 months in jail, or both; reduces requirement from proving intent to defraud to <i>knowingly retaining or using</i> funds received from owner, <i>his agent</i> , the <i>contractor</i> , or a <i>lender</i> . Complaint made by anyone not fully paid. Improper use of funds is <i>prima facie</i> evidence of knowingly misappropriating funds to contractor's own use. In any prosecution burden of going forward with evidence is on defendant to show that funds he received were used to pay laborers and materialmen.	July 1, 1968
18. § 43-13.1: No provision.	18. § 43-13.1: <i>New</i> . Prescribes punishment, for omitting from lien waiver or signing without authority name of any person furnishing labor or materials of \$100 or more and not paid in full, as fine of \$500-\$2,000, or 30 days-12 months in jail, or both.	July 1, 1968
19. § 43-14: Notices served by officers; \$20 forfeiture for failure to make return.	19. § 43-14.1: <i>New</i> . Same as § 43-14 except forfeiture removed; notices also can be served by certified or registered mail, to reduce cost and time. § 43-14 repealed.	July 1, 1968
20. § 43-15: Inaccurate lien memorandum does not invalidate, unless wilful.	20. § 43-15: No change until January 1, 1970 when reference to § 43-10 will be deleted. (See § 43-10 above.)	January 1, 1970

<i>Present Law</i>	<i>Proposed Bills</i>	Section Effective (July 1, 1968 or January 1, 1970)
21. § 43-16: Owner can complete building if general contractor doesn't; cost of completion has priority over mechanics' liens resulting from such general contractor's work, or those claiming under him.	21. § 43-16: No change in 1968; amendment effective January 1, 1970 to provide that, if owner requires payment bond (proposed § 43-3.2), obligors and sureties remain liable where owner completes structure; and for subrogation in event sureties make payment, in addition to existing rights.	January 1, 1970
22. § 43-17: Suit to enforce lien to be brought within 6 months from date of recording or 60 days of completion or other determination, whichever is later.	22. § 43-17: No change until January 1, 1970 when reference to §§ 43-9 and 43-10 will be deleted. (See §§ 43-9 and 43-10 above.)	January 1, 1970
23. § 43-18: Perfected lien of a general contractor also inures to benefit of any subcontractor, laborer or materialman who gives written notice of claim to owner before lien is paid.	23. § 43-18: No change until January 1, 1970 when references to laborers and materialmen will be deleted as they will then be defined as subcontractors. (See § 43-1 above.)	January 1, 1970
24. § 43-19: Assignments by general contractors or subcontractors of amounts due them, attachments, etc. do not affect mechanics' liens.	24. § 43-19: No change.	
25. § 43-20: If person who causes structure to be erected or repaired has less than fee simple interest in land, only his interest is subject to mechanics' liens.	25. § 43-20: Amended to include cross reference to § 43-3 which has been amended to protect landlord where tenant makes improvements. (See § 43-3 above.)	July 1, 1968
26. § 43-21: Mechanics' liens have priority over prior liens as to improvements erected on the land; liens on land, created after work is started, rank behind mechanics' liens. In enforcement suits, liens created before work was started are preferred to extent of the estimated value of land and preexisting improvements; rest goes to satisfy mechanics' liens.	26. § 43-21: Paragraph added to clarify present law that purchase money mortgagee who subordinates to construction lender does not also subordinate to mechanics' liens as to value of land, unless otherwise agreed.	July 1, 1968
27. § 43-21.1: No provision.	27. § 43-21.1: <i>New.</i> (a) Grants priority to a construction lender's recorded deed of trust to the extent of funds advanced thereunder prior to recording of a mechanic's lien, or of a warning notice (See § 43-21.2 below) provided (1) the trust states it is executed under this Section, and (2) it contains the secured lender's name and address (or that of his designee).	January 1, 1970

Such note (or participation in it) can be sold without affecting such priority.

(b) To perfect its lien as to last 25% of total loan the lender must, before disbursing such 25%, obtain from general contractor (if none, the borrower) an affidavit in form prescribed listing all persons with whom he has contracted for supplying labor or materials of \$100 or more and not fully paid.

(c) Such persons are then deemed to have filed a warning notice to the owner (see § 43-21.2 below); if their liens are perfected they have priority on such last 25% of loan. If not so listed they come behind the lender's first lien unless they file lien before last 25% is fully disbursed.

(d) Prior to advancing such last 25% lender must require of a contractor a release or evidence of payment in full of all persons listed; if not received in 15 days lender may, on verifying amounts, pay such persons. If loan balance is inadequate, lender may hold disbursing for 30 days; on verifying amounts due, he may then disburse pro rata to claimants listed.

(e) If loan is less than recorded trust, lender withholds last 25% of its actual loan until above affidavit is obtained.

(f) Recorded lien or warning notice, if fully perfected, gives claimant priority over later construction advances.

(g) Lender's priority not affected by correction or supplemental trust (other than a release); but priority does not extend to an increase in loan or security unless change complies with this Section.

28. § 48-21.2: No provision.

28. § 43-21.2: *New.* Authorizes a contractor, laborer or materialman to file in proper clerk's office, for \$1, a simple warning notice (without affidavit or acknowledgment), in form prescribed, addressed to owner, that work or material will be supplied and if

January 1, 1970

<i>Present Law</i>	<i>Proposed Bills</i>	Section Effective (July 1, 1968 or January 1, 1970)
	not paid for, lien will be filed. Inaccuracy of estimate does not invalidate notice unless wilful. Five years after filing clerk may destroy warning notice, unless litigation is pending.	
29. § 43-21.3: No provision.	29. § 43-21.3: <i>New.</i> Imposes penalty of \$500-\$2,000 fine, 30 days-12 months in jail, or both, on contractor or borrower for knowingly furnishing false or incomplete affidavit as to unpaid contractors, laborers or materialmen.	January 1, 1970
30. § 43-22: Suits to enforce liens—procedure.	30. § 43-22: No change.	
31. § 43-23: No priority among mechanics' liens except: (1) subcontractor comes ahead of general contractor, (2) sub-subcontractor ranks subcontractor, and (3) manual laborers' claims for last 30 days' labor come ahead of materialmen.	31. § 43-23: No change.	
32. § 43-23.1: No provision.	32. § 43-23.1: <i>New.</i> Person who knowingly includes in lien memorandum work not done or materials not furnished forfeits right to lien.	July 1, 1968
33. § 43-23.2: No provision.	33. § 43-23.2: <i>New.</i> Remedies of Chapter 1, Title 43 are cumulative and not in lieu of other legal or equitable remedies.	July 1, 1968

A BILL to amend and reenact §§ 43-2 as amended, 43-3, 43-4, 43-5, 43-8, 43-10, 43-11, 43-13, 43-20 and 43-21 of the Code of Virginia, relating to mechanics' liens, structures, etc. subject thereto, creation and perfection thereof, sufficiency of forms for affidavits, etc., personal liability of owner and general contractor, misuse of funds and punishment therefor, extent of lien when owner has less than fee simple, and priorities between such liens and other liens; to amend the Code of Virginia by adding, in Chapter 1 of Title 43 thereof, sections numbered 43-2.1, 43-13.1, 43-14.1, 43-23.1 and 43-23.2, to prescribe circumstances under which work deemed completed or otherwise terminated, punishment for wrongful use and execution of lien waiver form, methods for service of notice and acts effecting forfeiture of lien, and to deem certain remedies cumulative; and to repeal §§ 43-6, 43-12 and 43-14 of the Code of Virginia, relating to validation of certain prior recordations, and certain requirements for recordation and service of notice.

Be it enacted by the General Assembly of Virginia :

1. That §§ 43-2 as amended, 43-3, 43-4, 43-5, 43-8, 43-10, 43-11, 43-13, 43-20 and 43-21 of the Code of Virginia be amended and reenacted, and that the Code of Virginia be amended by adding, in Chapter 1 of Title 43 thereof, sections numbered 43-2.1, 43-13.1, 43-14.1, 43-23.1 and 43-23.2, as follows:

§ 43-2. Structures, materials, etc., deemed permanently annexed to freehold.—For the purpose of this chapter, a well, excavation, sidewalk, driveway, pavement, parking lot, retaining wall, curb and/or gutter, breakwater (either salt or fresh water), water system, drainage structure, filtering system (including septic or waste disposal systems) or *swimming pool* shall be deemed a structure permanently annexed to the freehold, and all shrubbery, earth, sod, sand, gravel, brick, stone, tile, pipe or other materials, together with *the reasonable rental or use value of equipment* and any grading, clearing or earth moving required for the improvement of the grounds upon which such building or structure is situated shall be deemed to be materials furnished for the improvement of such building or structure and permanently annexed to the freehold.

§ 43-2.1. *Equivalents of "completed" or "the work thereon otherwise terminated."*—For the purposes of this chapter, any of the following shall be deemed equivalent to "completed" or "the work thereon otherwise terminated":

(a) *The acceptance by the owner, or his agent, of the work or improvement, and the cessation of labor thereon;*

(b) *The occupation or use of a work or improvement by the owner, or his agent, accompanied by a cessation of labor thereon; or*

(c) *After the commencement of a work or improvement, a cessation of labor thereon for a continuous period of sixty days.*

§ 43-3. Lien for work done and materials furnished.—All persons performing labor or furnishing materials or *architectural services*, of the value of * *one hundred* dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchises for the work

done and materials furnished. But when the claim is for repairs or improvements to existing structures only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered or authorized by the owner, or his agent.

§ 43-4. Perfection of lien by general contractor; recordation and notice.—A general contractor, in order to perfect the lien given by * § 43-3, shall file at any time after the work is done and the material furnished by him and before the expiration of sixty days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated, in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is, or in the clerk's office of the Chancery Court of the city of Richmond, if such building, structure or railroad, or any part thereof, is within the corporate limits of the city lying north of James River and including the islands in such river, or in the clerk's office of the Hustings Court, Part Two, of the city of Richmond, if the building, structure or railroad, or any part thereof, is within the corporate limits of the city lying south of James River, a memorandum showing the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien. It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinbefore provided to record the same in the miscellaneous lien book, and to index the same not only in the miscellaneous lien book, but also in the general index of deeds, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

§ 43-5. Sufficiency of memorandum and affidavit required by § 43-4.—The memorandum and affidavit required by * § 43-4 shall be sufficient if substantially in form and effect as follows:

Memorandum for Mechanic's Lien Claimed by General Contractor.

*Name of Owner:

Address of Owner:

Name of Claimant:

Address of Claimant:

1. Type of materials or services furnished:

.....

2. Amount claimed: \$.....

3. Type of structure on which work done or materials furnished:

.....

4. Brief description and location of real property:

.....

5. Date from which interest on the above amount is claimed:

Date:

.....(Name of Claimant).

Affidavit.

State of Virginia,

County (or city) of, to-wit:

I, (notary or other officer) for the county (or city) aforesaid, do certify that * claimant, or, agent for * claimant, this day made oath before me in my county (or city) aforesaid that (the owner) is justly indebted to * claimant in the sum of dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the day of, 19....

(Notary Public or Justice of Peace, et cetera.)

§ 43-8. Sufficiency of memorandum, affidavit and notice required by § 43-7.—The memorandum, affidavit and notice required by * § 43-7 shall be sufficient if substantially in form and effect as follows:

Memorandum * for Mechanic's Lien Claimed by Subcontractor.

*Name of Owner:

Address of Owner:

Name of General Contractor (if any):

Name of Claimant:

Address of Claimant:

1. Type of materials or services furnished:

.....

2. Amount claimed: \$.....

3. Type of structure on which work done or materials furnished:

.....

4. Brief description and location of real property:

.....

5. Date from which interest on above amount is claimed:

Date:

..... (Name of Claimant).

Affidavit.

State of Virginia,

County (or city) of, to-wit:

I, (notary or other officer) for the county (or city) aforesaid, do certify that * claimant, or, * agent * for claimant, this day made oath before

me in my county (or city) aforesaid that * is justly indebted to * *claimant* in the sum of dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the day of, 19.....
..... (Notary Public or Justice of Peace, et cetera.)

Notice.

To (owner).

You are hereby notified that (general contractor) is indebted to me in the sum of dollars (\$.....) with interest thereon from the day of, 19....., for work done (or materials furnished, as the case may be,) in and about the construction (or removal, etc.,) of a (describe structure, whether dwelling, store, or etc.,) which he has contracted to construct (or remove, etc.,) for you, in the county (or city) of, and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the day of, 19.....
..... (Subcontractor).

§ 43-10. Sufficiency of memorandum, affidavit and notice required by § 43-9.—The memorandum, affidavit and notice required by * § 43-9 shall be sufficient if substantially in form and effect as follows:

Memorandum * for Mechanic's Lien Claimed by Sub-subcontractor.

*Name of Owner:

Address of Owner:

Name of General Contractor (if any) and Subcontractor:

.....

Name of Claimant:

Address of Claimant:

1. Type of materials or services furnished:

.....

.....

2. Amount claimed: \$.....

3. Type of structure on which work done or materials furnished:

.....

.....

4. *Brief description and location of real property:*

.....
.....

5. *Date from which interest on above amount is claimed:*

Date:

..... (*Name of Claimant*).

Affidavit.

State of Virginia,

County (or city) of, to-wit:

I, (notary or other officer) for the county (or city) aforesaid do certify that * *claimant*, or, * *agent* * *for claimant*, this day made oath before me in my county (or city) aforesaid that * is justly indebted to * *claimant* in the sum of dollars for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the day of, 19.....

.....(**Notary Public or Justice of Peace, et cetera.*)

Notice.

To (owner) and (general contractor):

You are hereby notified that, a subcontractor under you, said (general contractor) for the construction (or removal, etc.,) of a (describe structure) for you, said (owner) is indebted to me in the sum of dollars (\$.....) with interest thereon from the day of, 19....., for work done (or materials furnished) in and about the construction (or removal, etc.,) of said (naming structure), situate in the county (or city) of, Virginia, and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the day of, 19.....

..... (Sub-subcontractor).

§ 43-11. How owner or general contractor made personally liable to subcontractor, laborer or materialman.—Any subcontractor or person furnishing labor or material to the general contractor or subcontractor, may give notice in writing to the owner or his agent or the general contractor, stating the nature and character of his contract and the probable amount of his claim, and if such subcontractor, or person furnishing labor

or material shall at any time after the work is done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed or the work thereon otherwise terminated furnish the owner thereof or his agent and also the general contractor, or the general contractor alone in case he is the only one notified, with a correct account, verified by affidavit, of his claim against the general contractor or subcontractor, for work done or materials furnished and of the amount due, the owner, or the general contractor, if he alone was notified, shall be personally liable to the claimant for the amount due to the subcontractor of persons furnishing labor or material by the general contractor or subcontractor, provided the same does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor, or in case the general contractor alone is notified the sum in which he is indebted to the subcontractor at the time the notice is given or may thereafter become indebted by virtue of his contract with the general contractor. But the amount which a person supplying labor or material to a subcontractor can claim shall not exceed the amount for which such subcontractor could file his claim.

Any bona fide agreement for deductions by the owner because of the failure or refusal of the general contractor to comply with his contract shall be binding upon such subcontractor, laborer or materialman.

The provisions of this section are subject to the qualification that before any such personal liability of the owner or general contractor as therein provided for shall be binding the notice therein required shall be either served with such return thereon as is sufficient under § 8-52 or said notice shall be mailed by registered or certified mail to the owner or general contractor upon whom personal liability is sought to be imposed.

§ 43-13. Funds paid to general contractor or subcontractor must be used to pay persons performing labor or furnishing material.—Any contractor or subcontractor who * shall *knowingly* retain or use the funds, or any part thereof, paid by the owner or *his agent, the contractor or lender* to such contractor or by the owner or *his agent, the contractor or lender* to a subcontractor under any contract for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, for any other purpose than to pay persons performing labor upon or furnishing material for such construction, repair, removal or improvement, shall be guilty of a misdemeanor in appropriating such funds to his own use while any amount for which he may be liable or become liable under his contract for such labor or materials remains unpaid, and may be prosecuted upon complaint of any person or persons * *who have not been fully paid*, and upon conviction shall be punished by a fine of not less than * *five hundred* nor more than two * *thousand* dollars, or by confinement in jail not less than thirty days nor more than * *twelve* months, or by both such fine and imprisonment in the discretion of the *jury or the court trying the case without a jury*.

The use by any such contractor or subcontractor of any moneys paid to him under the contract, before paying all amounts due or to become due for labor performed or material furnished for such building or structure, for any other purpose than paying such amounts, shall be prima facie evidence of * *knowingly appropriating such funds to his own use*.

In any prosecution under this section the burden of going forward with the evidence shall be on the defendant to establish that all funds received by the defendant from the owner or his agent, the contractor or

lender were used to pay persons performing labor upon or furnishing materials for such construction, repair, removal or improvement.

§ 43-13.1. *Use of lien waiver form; omission or failure to disclose; signing without authority.—Any contractor or subcontractor who knowingly presents a waiver of lien form to an owner, his agent, contractor, lender, or title company for the purpose of obtaining funds or title insurance and knowingly omits from or fails to disclose within said waiver of lien form, or without authority signs, the name of any person who has not received payment in full for materials furnished or labor performed having a value of one hundred dollars or more shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by confinement in jail for not less than thirty days nor more than twelve months, or by both such fine and imprisonment in the discretion of the jury or the court trying the case without a jury.*

§ 43-14.1. *Service of Notices.—Any notice authorized or required by this chapter may be served by any sheriff, constable or sergeant who shall make return of the time and manner of service; or any such notice may be served by certified or registered mail.*

§ 43-20. *Extent of lien where owner has less than fee in land.—Subject to the provisions of § 43-3, if the persons who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter.*

§ 43-21. *Priorities between mechanics' and other liens.—No lien or encumbrance upon the land created before the work was commenced or materials furnished shall operate upon the building or structure erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; nor shall any lien or encumbrance upon the land created after the work was commenced or materials furnished operate on the land, or such building or structure, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied.*

Unless otherwise provided in the subordination agreement, if the holder of the prior recorded lien of a purchase money deed of trust subordinates to the lien of a construction money deed of trust, such subordination shall be limited to the construction money deed of trust and said prior lien shall not be subordinate to mechanics' and materialmen's liens to the extent of the value of the land by virtue of such agreement.

In the enforcement of the liens acquired under the previous sections of this chapter, any lien or encumbrance created on the land before the work was commenced or materials furnished shall be preferred in the distribution of the proceeds of sale only to the extent of the value of the land estimated, exclusive of the buildings or structures, at the time of sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens provided for in the previous sections of this chapter. Provided that liens filed for performing labor or furnishing materials for the repair or improvement of any building or structure shall be subject to any encumbrance against such land and building or structure of record prior to the commencement of the improvements or repairs or the furnishing of materials or supplies therefor. Nothing contained in the foregoing proviso shall apply to liens that may be filed for the construction or removal of any building or structure.

§ 43-23.1. *Forfeiture of lien.*—Any person who shall knowingly include in his memorandum of lien work not performed upon or materials not furnished for the property described in his memorandum shall thereby forfeit any right to a lien under this chapter.

§ 43-23.2. *Cumulative remedy.*—The remedies afforded by this chapter shall be deemed cumulative in nature and not be construed to be in lieu of any other legal or equitable remedies.

2. §§ 43-6, 43-12 and 43-14 are repealed.

3. This act shall be in force on and after July one, nineteen hundred sixty-eight.

APPENDIX A

A BILL to amend and reenact §§ 43-1, 43-7, 43-8, 43-15, 43-16, 43-17 as amended, and 43-18 of the Code of Virginia, relating to mechanics' liens, definition of general contractor and subcontractor, perfection of lien by subcontractor, sufficiency of forms for affidavits, etc., certain inaccuracies not affecting lien, owners' remedies when building not completed, limitation on suit to enforce lien and benefits to subcontractor from general contractor's perfected lien; to amend the Code of Virginia by adding, in Chapter 1 of Title 43 thereof, sections numbered 43-3.1, 43-3.2, 43-21.1, 43-21.2 and 43-21.3, to provide for limited direct lien, owner's option to require payment bond of general contractor and priority of lien of construction lender under certain circumstances, and to prescribe punishment for furnishing certain false affidavits; and to repeal §§ 43-9 and 43-10 of the Code of Virginia, relating to perfection of lien by sub-subcontractor and sufficiency of forms therefor.

Be it enacted by the General Assembly of Virginia:

1. That §§ 43-1, 43-7, 43-8, 43-15, 43-16, 43-17 as amended, and 43-18 of the Code of Virginia be amended, and reenacted, and that the Code of Virginia be amended by adding, in Chapter 1 of Title 43 thereof, sections numbered 43-3.1, 43-3.2, 43-21.1, 43-21.2 and 43-21.3, as follows:

§ 43-1. Terms "general contractor" and "subcontractor" defined.—As used in this chapter, the term "general contractor" shall include contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner, and the term "subcontractor" shall include all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor or a subcontractor.

§ 43-3.1. *Direct Liens: Extent and scope.*—Subject to the limitation hereinafter set forth, the liens provided by this chapter shall be direct liens and shall not in the case of any claimant other than the general contractor be limited as to amount by any contract price agreed upon between the general contractor and the owner except as hereinafter provided. Such liens shall not in any case exceed in amount either the reasonable value of the labor done or the materials furnished, or both, for which the lien is claimed, or the price agreed upon for the same between the claimant and the person by whom he was employed. Such liens shall not, in any case where the claimant was employed by a general contractor or subcontractor, extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which contract or modification the claimant shall have had actual notice before the performance of such labor or the furnishing of such materials.

With respect to repair or improvement of an existing building or structure, the liability of an owner to subcontractors shall be limited to the amount owed by the owner to the general contractor at the time the memorandum of lien is filed unless such subcontractor gives written notice, within ten days of the time such subcontractor commences to furnish material or labor, of his intention to claim a direct lien.

§ 43-3.2. *Limitation of owner's liability by requiring bond.*—Any owner may, at his option, require a general contractor to furnish a payment bond with good and sufficient surety thereon licensed to transact

business in Virginia as a surety in the amount of at least fifty percent of the contract price, which bond shall be conditioned upon the payment in full of the claims of all persons performing labor or furnishing materials, as defined in § 43-3, in the prosecution of the work provided for in the contract. All such persons performing labor or furnishing materials shall have a direct right of action against the obligors and sureties on said bonds for the full amount shown to be due them for labor performed or materials furnished, provided such person gives written notice to the general contractor and his surety of his intention to file a claim under the bond within ninety days of the date the building or structure was completed or the work thereon otherwise terminated.

Every such bond shall be construed regardless of its language as incorporating within its provisions the obligation to pay those persons who furnish labor or materials as aforesaid.

No action on any bond given pursuant to the provisions of this section shall be brought unless within one year after the work covered by said contract is completed or the work thereon is otherwise terminated.

The owner shall cause the bond or a copy thereof to be filed in the clerk's office where liens may be filed under this chapter. The clerk shall file such bond or copy thereof for a fee of one dollar, and he shall index the same in the general index of deeds both in the name of the owner of the property and in the name of the general contractor.

The liability of any owner who requires a bond in the manner and upon the terms and conditions herein provided shall be limited to the amount by which the owner is indebted to the general contractor at the time of the service of the notice of lien upon the owner or his agent or the amount by which the owner may thereafter become indebted to the contractor upon his contract.

§ 43-7. Perfection of lien by subcontractor; extent of lien.—Any subcontractor, in order to perfect the lien given him by § 43-3, shall comply with § 43-4, and in addition give notice in writing to the owner of the property, or his agent, and to the general contractor, or his agent, of the amount and character of his claim. *

§ 43-8. Sufficiency of memorandum, affidavit and notice required by § 43-7.—The memorandum, affidavit and notice required by * § 43-7 shall be sufficient if substantially in form and effect as follows:

Memorandum * for Mechanic's Lien Claimed by Subcontractor.

- *Name of Owner:
- Address of Owner:
- Name of General Contractor (if any):
- Name of Claimant:
- Address of Claimant:
- 1. Type of materials or services furnished:
-
- 2. Amount claimed: \$.....
- 3. Type of structure on which work done or materials furnished:
-

4. *Brief description and location of real property:*

5. *Date from which interest on above amount is claimed:*

Date:

..... (*Name of Claimant*).

Affidavit.

State of Virginia,

County (or city) of....., to-wit:

I, (notary or other officer) for the county (or city) aforesaid, do certify that * *claimant*, or * *agent for claimant*, this day made oath before me in my county (or city) aforesaid that * is justly indebted to * *claimant* in the sum of dollars, for the consideration stated in the foregoing memorandum, and that the same is payable as therein stated.

Given under my hand this the day of, 19.....

..... (Notary Public or Justice of Peace, et cetera.)

Notice.

To (owner) and (*general contractor*):

You are hereby notified that (general contractor) (or a subcontractor under , *said general contractor*) is indebted to me in the sum of dollars (\$.....) with interest thereon from the day of, 19....., for work done (or materials furnished, as the case may be,) in and about the construction (or removal, etc.,) of a (describe structure, whether dwelling, store, or etc.,) which * , *said general contractor*, has contracted to construct (or remove, etc.,) for * , *said owner*, in the county (or city) of, and that I have duly recorded a mechanic's lien for the same.

Given under my hand this the day of, 19.....

..... (Subcontractor).

§ 43-15. Inaccuracies in memorandum or description not affecting lien.—No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5 and 43-8 *, respectively, and is not wilfully false.

§ 43-16. What owner may do when contractor fails or refuses to complete buildings, etc.—If the owner is compelled to complete his building, structure, or railroad, or any part thereof undertaken by a general contractor in consequence of the failure or refusal of the general contractor to do so, the amount expended by the owner for such completion shall have priority over all mechanics' liens which have been or may be placed on such building, structure, or railroad by such general contractor, a subcontractor under him, or any person furnishing labor or materials to either of them.

In the event a bond is required by the owner as provided in § 43-3.2, nothing herein contained shall be construed to release the obligors and sureties on such bond from their obligations thereunder. If payment is made by the surety, it shall be subrogated to the extent of payment so made to the rights of the owner against the general contractor or others liable under the bond, in addition to any other rights it may have against the obligors and sureties on such bond.

§ 43-17. Limitation on suit to enforce lien.—No suit to enforce any lien perfected under §§ 43-4, 43-5, 43-7 and * 43-8 shall be brought after six months from the time when the memorandum of lien was recorded or after sixty days from the time the building, structure or railroad was completed or the work thereon otherwise terminated, whichever time shall last occur; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and, provided further, that nothing herein shall extend the time within which such lien may be perfected.

§ 43-18. Lien of general contractor to inure to benefit of subcontractor.—The perfected lien of a general contractor on any building or structure shall inure to the benefit of any subcontractor * who has not perfected a lien on such building or structure, provided such subcontractor * shall give written notice of his claim against the general contractor, or subcontractor, as the case may be, to the owner or his agent before the amount of such lien is actually paid off or discharged.

§ 43-21.1. *Priority between mechanics' liens and liens of mortgagees advancing construction funds.—(a) Section 43-21 shall be subject to the proviso that the lien of a mortgage or deed of trust, securing a creditor lending funds for the construction, removal, repair or improvement of any building, structure, or railroad, recorded in the clerk's office in the county or city in which the building, structure or railroad (or any part thereof) is located, shall have priority of lien as to the land and the building, structure or railroad erected thereon over liens perfected pursuant to §§ 43-4 and 43-7 to the extent that such funds shall be advanced by such creditor under the mortgage or deed of trust prior to the recordation in the clerk's office of the memorandum of lien as required by §§ 43-4 and 43-7, or of the warning notice as provided in § 43-21.2, provided:*

(1) *The mortgage or deed of trust recites that it is given and executed pursuant to the provisions of this section; and*

(2) *The mortgage or deed of trust contains the name and mailing address of the noteholder (or his designee) secured by the mortgage or deed of trust. Such note may thereafter be sold or assigned or a participation or participations sold therein without affecting the priority herein conferred.*

(b) *In order to perfect such lender's priority as to any amount advanced in excess of seventy-five percent of the total amount of the*

construction loan, the lender must, prior to disbursement of any such amount in excess of seventy-five percent of the loan, obtain from the general contractor or, if none, the borrower, an affidavit in form substantially as follows:

*Affidavit to Induce the Payment of
Construction Funds.*

The undersigned,, general contractor (if none, borrower), in order to induce to advance, in whole or in part, the final twenty-five percent, being \$....., of the construction loan in the total amount of \$....., in and about the construction, removal, repair or improvement of property briefly described as

.....
hereby makes oath that the following is a true, accurate and complete list of all persons and firms with whom he has contracted, who have performed or will perform any labor, or have furnished or will furnish any materials or architectural services of the value of one hundred dollars or more, and who have not received payment in full:

(List those who have not received payment in full.)

.....
(Name of contractor or borrower)

State of Virginia,

County (or city) of, to-wit:

This day personally appeared before me,, (notary or other officer) for the county (or city) aforesaid,, who made oath that the foregoing is a true, accurate, and complete list of all persons or firms with whom he contracted for performing labor or furnishing materials, of a value of one hundred dollars or more, and who have not been fully paid.

Given under my hand this day of, 19.....
..... (Notary Public or
Justice of Peace, et cetera.)

(c) All persons or firms who are reasonably identified by such affidavit shall be deemed to have filed a warning notice, pursuant to the provisions of § 43-21.2, immediately subsequent to the disbursement of the first seventy-five percent of the construction loan, and upon perfection of their liens pursuant to this chapter shall be entitled to priority over any advances by the construction lender in excess of seventy-five percent of the amount of the construction loan. The lien of any person or firm who is not reasonably identified by such affidavit shall be inferior to the lien of the construction lender except to the extent construction funds are advanced subsequent to the filing of a memorandum of lien or a warning notice by such person or firm.

(d) Prior to the disbursement of all or any portion of the final twenty-five percent of the construction loan, the lender shall require the contractor or borrower to furnish releases or evidence of payment in full

from all persons and firms listed in the affidavit set forth hereinabove. If the contractor or borrower fails to secure releases or furnish such evidence of payment in full within a period of fifteen days from the date of obtaining the affidavit, the lender may, upon verification of amounts due, pay such persons or firms in full. If the balance due the contractor or borrower is not sufficient to pay all such persons or firms in full, the lender shall pay no money to any of such persons or firms until such time as releases from all of such persons or firms have been furnished to it. In the event such releases are not furnished to the lender within thirty days of the date the affidavit is obtained, the lender may, upon verification of the amounts due, disburse the balance of the construction loan to such persons or firms named in the affidavit on a pro rata basis.

(e) In the event the loan to be made by a construction lender is less than the amount shown in the recorded deed of trust, the construction lender shall withhold the final twenty-five percent of its loan until the affidavit required by this section is obtained.

(f) In the event a memorandum of lien is recorded, or warning notice is filed, such claim for mechanic's lien shall be entitled to priority over any subsequent construction advances, provided such lien is subsequently perfected in accordance with the provisions of this chapter, but the lien of the construction deed of trust or mortgage shall continue to enjoy priority as to all mechanics' liens as to which no memorandum has been recorded or warning notice filed.

(g) The priority herein conferred shall not be affected or limited by any correction deed of trust or mortgage, supplemental deed of trust or mortgage, or other modification of record of the construction deed of trust or mortgage, other than a release deed or marginal release; provided, however, that if such correction deed of trust or supplemental deed of trust, or other modification contains either an increase in the amount of money secured or in the amount of land conveyed to secure the debt, the priority herein conferred shall not extend to the additional land or the additional sums to be secured, unless such correction deed of trust or supplemental deed of trust or other modification complies with the provisions of this section.

§ 43-21.2. Warning notice.—(a) Any contractor or subcontractor may cause to be filed in the clerk's office a warning notice in the form hereinafter set forth. Such notice shall be indexed in a separate Index of Warning Notices in the name of the record owner of the real estate. The clerk of the court shall be entitled to a fee of one dollar for filing and indexing such notice. No affidavit or acknowledgment shall be required as a condition of filing such notice.

(b) The warning notice shall be sufficient if substantially in form and effect as follows:

Warning Notice of Right to Lien.

To:, as record owner, either at the date of the filing of the construction deed of trust or as of this date, of property briefly described as

.....

.....

Take notice that the undersigned has or will perform work or furnish materials or construction equipment in the construction of improvements on said land and if not paid therefor will perfect a lien as provided by law.

The amount of the contract or estimated cost of work to be performed or materials to be furnished is \$

Date:

Name:

Address:

.....

(c) No inaccuracy in the amount of the contract or estimated cost of work to be performed or materials shall invalidate the warning notice or limit the right to file a lien for a greater amount unless such inaccuracy is willful.

(d) Five years after filing, the clerk of court may remove a warning notice from the files and destroy it, unless the warning notice of a lien, filed pursuant thereto, shall then, to the knowledge of the clerk, be the subject of litigation.

§ 43-21.3. Furnishing false or incomplete affidavit.—Any contractor or borrower who knowingly furnishes a false or incomplete affidavit pursuant to the provisions of subparagraph (b) of § 43-21.1 shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars or more than two thousand dollars, or by confinement in jail for a period of not less than thirty days or more than twelve months, or by both such fine and imprisonment in the discretion of the jury or the court trying the case without a jury.

- 2. §§ 43-9 and 43-10 of the Code of Virginia are repealed.**
- 3. This act shall be in force on and after January one, nineteen hundred seventy.**

