The Relationship between California Code of Civil Procedure Sections 1193 and 1183.1(b) in Light of Halspar, Inc. v. La Barthe

James A. Rundel
THE RELATIONSHIP BETWEEN CALIFORNIA CODE OF
CIVIL PROCEDURE SECTIONS 1193 AND 1183.1(b)
IN LIGHT OF HALSPAR, INC. V. LA BARTHE

California Code of Civil Procedure section 1183.1(b) requires that if a property owner intends to prevent a mechanics' lien from being levied against his property interest for work performed on that property at the instance of some third person, he must post a notice of nonresponsibility within 10 days after he receives knowledge that such work is being performed. On the other hand, Code of Civil Procedure section 1193 requires all lien claimants, except those under direct contract with the property owner or those performing labor for wages on the premises, to serve a preliminary notice on the property owner within 20 days after commencement of work on or furnishing of materials to such property. This article will examine the interrelation between these two code sections in light of the decision rendered in Halspar, Inc. v. La Barthe where both the lien claimant and the property owner failed to comply with the above-mentioned statutory provisions.

History of California Code of Civil Procedure Section 1193

Code of Civil Procedure section 1193 was added to the California mechanics' lien laws in 1959. Marsh, in his work on the California mechanics' lien laws, describes the situation which led up to its enactment as follows:

For many years prior to the enactment of C.C.P. 1193 in 1959, there was agitation for some statute to protect property owners from sudden recordation of mechanics' liens without prior notice; and of course, the need for and the purpose of such provision is understandable.

In many instances, the owner has held back from the contractor sufficient funds to satisfy the claims of subcontractors and materialmen; or he might be perfectly willing and able to assume the responsibility for payment of claims in excess of his contract, in preference to suffering the lien. Again, and it happens frequently, the owner has provided his contractor with specific funds for payment of subcontractors, but the contractor has failed to keep his word and has used the owner's money elsewhere. The owner

1. The term "preliminary notice" will be used to describe the notice required by section 1193 after its amendment in 1967. Prior to that time the notice requirement will be referred to as a "prelien notice."
innocently believes that all just claims have been paid; nevertheless his property is subjected to valid liens which he had no opportunity to anticipate or prevent, and he has to pay twice. Without express notice, the owner might find himself charged with constructive notice for months as to liens of which he could have had no knowledge, filed by claimants whose names he had never seen or heard.  

For the purposes of this paper the pertinent portions of section 1193 as enacted in 1959 are as follows:

a) Except one under direct contract with the owner or one performing actual labor for wages, every person who furnishes labor, service, equipment or material for which a lien otherwise can be claimed under this chapter, must, as a necessary prerequisite to the validity of any claim of lien subsequently filed, cause to be given not later than 15 days prior to the filing of a claim of lien a written notice as prescribed by this section, to the owner or reputed owner and to the original contractor. The notice shall contain a general description of the labor, service, equipment or materials furnished, the name and address of such persons furnishing such labor, services, equipment or materials . . . . If an invoice for such materials contains this information, a copy of such invoice, transmitted in the manner prescribed by this section, shall be sufficient notice. The notice may be sent at any time after any labor, services, equipment or materials are furnished, but in no event later than fifteen (15) days prior to the expiration of the time within which to file a claim of lien.  

In 1965 changes were made, but they dealt solely with the method of serving a prelien notice, and are not relevant here.  

In 1967, section 1193 was completely rewritten; the material changes follow.

(1) It requires that a preliminary notice be given 20 days after commencement of construction in place of the old rule which allowed such notice to be given 15 or more days prior to filing the actual claim of lien.  

(2) In conjunction with the above change, the new section provides that a preliminary notice may be served and a lien perfected at any time after commencement of construction, but the lien claimant will not be entitled to a lien for any work performed or materials supplied prior to the 20 days immediately preceding the service of such notice.  

7. Cal. Stats. 1967, ch. 789, § 2, at 2183. It should also be noted that similar revisions were made with respect to CAL. GOV'T CODE § 4210, the public works equivalent of CAL. CODE CIV. PROC. § 1193.  
9. See text accompanying note 4 supra.  
(3) The new section requires additional information to be included in the preliminary notice. The old prelien notice was required to contain the following information:

(a) A general description of the labor or material supplied;
(b) The name and address of the person supplying the above;
(c) The name of the person who contracted for such labor or materials.11

In addition to the above, the 1967 amendment requires the following information:

(a) A description of the job site sufficient for identification;12
(b) a statement that if bills are not paid in full for labor, materials, etc., furnished or to be furnished, the improved property may be subject to a lien.13

Legislative Purpose Behind the Current Section 1193

Before examining what was intended by the 1967 amendment to section 1193, one should look at the basic scheme upon which California's mechanics' lien laws are based.

In Diamond Match Co. v. Sanitary Fruit Co.,14 the court noted:

[I]t is no less the duty of the legislature in adopting means for the enforcement of the liens referred to in the constitutional provision, to consider and protect the rights of owners of property which may be affected by such liens than it is to consider and protect the rights of those claiming the benefit of the lien laws.15

To the same effect the court stated in Alta Building Material Co. v. Cameron:16

While the essential purpose of the mechanics' lien statutes is to protect those who have performed labor or furnished material

13. Id. Additional amendments were made to section 1193 in 1968, but are not relevant to this article. See Cal. Stats. 1968, ch. 460, § 4, at 1090. It should be noted at this time that Senate Bill 316 (1969) has been passed by both houses of the state legislature and has been signed by the Governor of California. Under the terms of the bill, effective January 1, 1971, the entire body of California mechanics' lien laws will be removed from the Code of Civil Procedure and restated in the Civil Code. In regard to the provisions of the current Code of Civil Procedure section 1193, see pending Civil Code sections 3097 and 3114. In regard to the current provisions of Code of Civil Procedure section 1183.1(b), see pending Civil Code sections 3094 and 3129.

The legislative purpose of Senate Bill 316 (1969) is not to alter, but merely to restate and clarify. SB 316, § 10 (1969).
15. Id. at 701, 234 P. at 325. This language is quoted with approval in Borchers Bros. v. Buckeye Incubator Co., 59 Cal. 2d 234, 239, 379 P.2d 1, 4, 28 Cal. Rptr. 697, 699 (1963).
towards the improvement of the property of another, inherent in this concept is a recognition also of the rights of the owner of the benefited property.\textsuperscript{17}

The court went on to say that section 1193 should be viewed within the framework of those principles.\textsuperscript{18}

There are no cases that have specifically dealt with section 1193 since it was rewritten in 1967. Therefore, in order to properly ascertain the intent behind that section, it will be necessary to examine the cases dealing with the statute as it was originally drafted in 1959, and then by analogy, to extend those decisions to the section as it currently reads.\textsuperscript{19}

It has been said that the primary purpose of section 1193 is to provide notice to a property owner\textsuperscript{20} that his property may be subjected to a lien arising out of a contract to which he was not a party and to give him sufficient time to prevent the filing of such lien.\textsuperscript{21} Collaterally, the statute protects a property owner against double payment of material and construction costs,\textsuperscript{22} provides him an opportunity to determine the validity of the pending lien claim,\textsuperscript{23} enables him to avoid costly work stoppages, mechanics' lien foreclosure sales, and in general gives increased financial security to the building industry.\textsuperscript{24} The clearest statement of purpose is that contained in \textit{Alta Building Material Co. v. Cameron}:\textsuperscript{25}

The section does not require a pre-lien notice by those under direct contract with the owner or those who perform actual labor for

\textsuperscript{17} Id. at 303-04, 20 Cal. Rptr. at 716 (citations omitted).
\textsuperscript{18} Id. at 304, 20 Cal. Rptr. at 716.
\textsuperscript{19} There exist analogous provisions to section 1193 in both the California Public Works Law, \textit{Cal. Gov't Code} § 4200 \textit{et seq.}, and the Federal Miller Act, \textit{40 U.S.C. § 270(a)-(d)} (1964), but the cases construing those laws unfortunately shed little, if any, light on the purpose behind the section with which we are dealing. \textit{See also} the proceedings of the Senate Judiciary Committee found in \textit{Fifth Progress Report to the Legislature by the Senate Judiciary Committee, 1957-59, Mechanics' Lien}, 1960 \textit{APPENDIX TO THE JOURNAL OF THE CALIFORNIA SENATE at 17}.
\textsuperscript{20} Notice is also required to be given the general contractor and the construction lender. \textit{Cal. Code Civ. Proc. § 1193(a)}.
wages on the property. The logical reason for this distinction is that the owner would in the usual situation be apprised of potential claims by way of lien in connection with those with whom he contracts directly, as well as those who perform actual labor for wages upon the property.

However, as to materials furnished or labor supplied by persons not under direct contract with the owner, it may be difficult, if not impossible, for the owner to be so apprised and the clear purpose of section 1193 is to give the owner 15 days' notice in such a situation that his property is to be "embarrassed with a charge which will operate as a cloud upon the title thereof so long as the lien remains undischarged and that the property may be sold under foreclosure proceedings unless the debt to secure which the lien was filed is otherwise sooner satisfied."26

As mentioned above,27 the most substantial change to section 1193 in the 1967 amendment was that which changed the required deadline for serving a prelien notice from 15 days prior to filing a claim of lien to 20 days after commencement of the work for which a lien is to be claimed. Possibly it would have been better had the legislature required such notice to be given prior to the commencement of work or delivery of materials. Such a requirement would give the property owner an opportunity to prevent unauthorized work from being performed, and in addition, would allow a lien claimant to learn before he expends his effort on the property that he will have to look to the lessee or vendee, etc. (in cases where work was authorized by someone other than the property owner) as his sole source of payment. Requiring notice to be given prior to commencement of work or delivery of materials, however, could cause undue delays in the construction process. As written, section 1193 allows the lien claimant 20 days to determine who the property owner, construction lender, and general contractor are, and to serve the required notices without delaying construction. An analysis of section 1193, as now written, shows that the code section is designed to give notice as early as reasonably possible to those persons whose property interests may be adversely affected by a mechanics' lien, and who would not ordinarily be apprised that labor or materials from which such lien arises are being furnished. It would thus seem that the changes made in 1967 did not substantially affect the basic purposes behind the original section, but rather, were designed to implement the original legislative intentions.28

Extent of the "Except For" Provision in Section 1193

In 1959, when section 1193 was enacted, it specifically exempted two classes of lien claimants from the requirements of serving a prelien

26. Id. at 304, 20 Cal. Rptr. at 716 (citations omitted).
27. See text accompanying notes 6-7 supra.
notice—those under direct contract with the property owner, and those performing actual labor for wages upon the property. The rationale behind these exceptions is that in the normal situation the property owner, if he were a direct party to the contract, would be apprised of potential lien claims arising out of the contract. That reasoning, however, would not necessarily follow when applied to one performing labor for wages upon the property, especially where the lessee contracts for the work to be done. The rationale behind exempting those laboring for wages upon the property, while not clear, seems based, in part, on the idea that an "uninformed laborer would not, as a practical matter, have the same opportunity to comply with a notice requirement as a material supplier would." The legislature's concern for the poorly educated laborer may be well intentioned; nevertheless, it would superficially appear to be in conflict with California Constitution article 20, section 15 which provides that:

Mechanics, materialmen, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.

When first presented with a case under section 1193, a California court declared that these exceptions were unconstitutional because they unfairly discriminated between various classes of lien claimants in violation of article 20, section 15 of the California Constitution. In 1962, however, the California Court of Appeal reviewed those earlier opinions and, in effect, reversed them. The court held that section

29. Cal. Stats. 1965, ch. 1258, § 1, at 3132. "For the limited purpose of the notice requirement contained therein, section 1193 creates two classes of lien claimants, (1) those who are either 'under direct contract with the owner' or 'performing actual labor for wages' and (2) all others." Alta Bldg. Material Co. v. Cameron, 202 Cal. App. 2d 299, 303, 20 Cal. Rptr. 713, 715 (1962).
30. Id. at 304, 20 Cal. Rptr. at 716.
1193 affected "only the manner in which the right is to be enforced. The right itself is not denied or impaired." The decision was reinforced by another case in 1963 and apparently the issue has been permanently settled. The legislative classifications set out in section 1193 have been judicially determined to be neither arbitrary nor unreasonable, and hence, the notice requirement is constitutional.

We are still faced, however, with the question of what lien claimants are encompassed by the exceptions contained in subdivision (a) of section 1193.

"One Under Direct Contract with the Owner"

The courts have apparently interpreted this provision literally, holding that it encompasses only those persons who have a direct contractual relationship with the property owner or his agent. The reason given for such an interpretation is that if the owner has been a party to the contract he would, in the usual situation, be aware of the information otherwise required to be given by a prelien notice. It would seem clear, therefore, that a contractor who performs a work of improvement at the request of a lessee does not have "a direct contract with the owner," as that phrase is used in section 1193(a). This conclusion is buttressed by decisions in at least two cases where the court has found it necessary to apply the doctrine of estoppel in order to bring within the scope of the "direct contract" exception in section 1193 a lien claimant who had contracted with a property owner's lessee. Discussions of those cases will be postponed until a later section of this article.

"One Performing Actual Labor for Wages"

The rationale applied to the "direct contract" exception has been likewise applied here, even though performance of labor on the prop-

36. Id. at 303, 20 Cal. Rptr. at 715.
38. Id. at 240, 379 P.2d at 4, 28 Cal. Rptr. at 700.
42. See text accompanying notes 56-57 infra.
property would not necessarily give a property owner notice of potential lien claims—especially where the actual labor is being performed on leased property. An additional reason for this exception was indicated in *Borchers Brothers v. Buckeye Incubator Co.* where the court seemed to say that a common laborer would not have the same opportunity, or requisite knowledge, as possessed by other types of lien claimants, to comply with the notice requirements of section 1193.

The only case specifically dealing with the scope of the phrase "actual labor for wages" within the meaning of section 1193 is *Borello v. Eichler Homes, Inc.* In its decision, the court applied the same tests applied to cases dealing with the question whether one is a contractor or an employee within the meaning of the contractors' licensing law. The two standards set down in the *Borello* case require: 1) that sole compensation be in the form of hourly wages; and 2) that there is a lack of discretion in how such labor is to be performed.

The facts in the *Borello* case showed that plaintiffs were hired to perform certain excavating and grading work in return for an hourly rate of compensation that included both the rental cost of the necessary equipment and the wages of the operators. Plaintiffs were under the supervision of the employing contractor's foreman and had no discretion in the performance of their work. On the basis of those facts the court determined that plaintiffs were within the exception to section 1193(a) and hence not required to file the then 15 day prelien notice.

In the opinion of this writer, it is a mistake for a court to endeavor to lay down a firm set of rules for determining who is performing "actual labor for wages." Each case should be examined individually, with an eye toward the underlying purpose behind section 1193. The rules laid down in *Borello* should be viewed only as guidelines, and should not be applied as rigid standards.

**Interplay Between Section 1183.1 and Section 1193**

For orientation purposes, a brief introduction to the "notice of responsibility" section of Code of Civil Procedure section 1183.1(b)

---

44. 59 Cal. 2d 234, 379 P.2d 1, 28 Cal. Rptr. 697 (1963).
45. 59 Cal. 2d 234, 379 P.2d at 4, 28 Cal. Rptr. at 700.
47. 221 Cal. App. 2d at 498, 34 Cal. Rptr. at 655-66. The code sections in question are CAL. BUS. & PROF. CODE §§ 7000-7145. See particularly sections 7026, 7031, and 7053.
is necessary before proceeding with an analysis of those cases which involved section 1183.1(b) and section 1193. The pertinent part of section 1183.1(b) reads as follows:

(b) Every building or other improvement or work mentioned in this chapter . . . constructed, altered or repaired upon any land with the knowledge of the owner . . . , shall be held to have been constructed, performed or furnished at the instance of such owner, . . . and such interest owned . . . shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner . . . shall, within 10 days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, . . . file for record a verified copy of said notice in the office of the county recorder of the said county in which said property . . . is situated. Said notice shall contain a description of the property affected thereby sufficient for identification, with the name and the nature of the title or interest of the person giving the same, name of purchaser under contract, if any, or lessee if known . . . .

This section is intended to cover situations where someone holding less than a fee title to property, such as a lessee or conditional purchaser, enters into a contract for the improvement thereof without the knowledge of the owner. The purpose behind the section is two-fold: (1) to give such a property owner an opportunity to prevent a mechanics' lien from attaching to his property interest once he obtains knowledge that such work is being performed, and (2) to bring notice home to those who are expending labor or materials upon such property that the owner's interest in that property will not be liable for such labor or materials. As stated above, it is primarily the purpose of this paper to determine the relationship of this section to section 1193, as amended in 1967.

It has been held that the basis of section 1183.1(b) is the doctrine of estoppel. The owner of real property having knowingly procured, by the act of another, the improvement of such property, and received the benefit of another's labor and/or materials thereby, is deemed to have created an equitable lien upon the premises to secure payment of the value of such labor and materials.

51. CAL. CODE CIV. PROC. § 1183.1(b) (emphasis added).
Halspar and Subsequent Cases

Beginning in 1965, three cases with similar factual situations were decided by the California courts. In each case there was a noncontracting property owner, with knowledge of the work being performed on his property, who failed to post a notice of nonresponsibility as allowed by California Code of Civil Procedure section 1183.1(b), and a contractor lien-claimant who failed to serve the property owner with the 15 day prelien notice as required by Code of Civil Procedure section 1193 (as it read prior to November, 1967).

In the first of these cases, Halspar, Inc. v. La Barthe, the plaintiff lien claimant, a general contractor, had contracted with the lessee of property owned by the defendants to construct certain improvements on the property. The total cost of the improvements was approximately $30,000, of which only half had been paid by the lessee before an involuntary petition in bankruptcy was filed against the lessee. The work in question was completed on January 22, 1962, and a lien for the unpaid amount of the contract price was filed by plaintiff, Halspar, on April 6, 1962, well within the required time limitation for the filing of mechanics' lien claims. At no time, however, had Halspar given the defendants a prelien notice as required by section 1193. The facts did show, though, that the defendants were aware of the work being performed, and had failed to post the notice of nonresponsibility as allowed by Code of Civil Procedure section 1183.1(b).

The court held that defendants were, in effect, under a "direct contract" with the lien claimant because of their failure to post a notice of nonresponsibility, and therefore, Halspar, the lien claimant, was within one of the express exceptions to section 1193 and consequently under no duty to serve a 15 day prelien notice on the defendants. The court spoke in terms of applying a "conclusive presumption" that the work was done at the instance and request of the property owners. This phrase "conclusive presumption" was borrowed from the early case of Krenwinkel v. Henne, where it was stated:

---


57. See CAL. CODE CIV. PROC. § 1193.1(c).


60. Id. at 899, 48 Cal. Rptr. at 294.

Section 1192 [which has since been repealed, but which served substantially as the basis for the current section 1183.1(b)] places the noncontracting owner in the position of a party to the contract, in that it creates a conclusive presumption that the work was done at his instance and request [if he fails to file a notice of nonresponsibility once he has knowledge that work is being performed].

The facts in Krenwinkel were substantially similar to Halspar, with the material exception, however, that there was no legal requirement that a lien claimant serve a prelien notice on a noncontracting property owner. The Krenwinkel court stated that "one who stands by and sees another improve his property, without putting him on notice [that he does not intend to be responsible for the cost of such improvements], must be held responsible for the value of such improvements." What the Halspar court failed to recognize was that, with the passage of section 1193 in 1959, a corollary axiom of law should have arisen; one who improves the property of another, without putting him on proper notice of such improvements, cannot expect to hold such party's property interest responsible for the cost of such improvements. What the Halspar court did state, however, was that [t]his result is entirely logical as the statutory presumption of section 1183.1, subdivision (b), applies only if the owner has knowledge of the work being done and takes no action to exempt himself from it. Thus the owner is already in possession of the type of information otherwise provided by the prelien notice of section 1193.

Thus, in effect, the court said that a property owner who possesses of his own account the knowledge required to be given to him by section 1193, no longer has need of, nor a right to, such notice. Within the limited facts of the case, then, the court felt that the defendants had adequate information, without a notice of nonresponsibility. The court's reasoning was that such actual knowledge would, in the absence of a notice of nonresponsibility, bring the lien claimant under the "direct contract" exception of section 1193(a). Yet the effect of the Halspar decision, boiled down to a single sentence, was that actual knowledge by the property owner of work being performed on his property at the instance and request of a lessee is the equivalent of, and takes the place of, a 15 day written prelien notice. If this is the case, then the lien claimant, by giving the equivalent of a written prelien notice, would have fulfilled his section 1193 duties, rather than exempted himself from them. Why the court pursued the circuitous path it did to arrive at its decision is not clear; but it is possible that they did not wish to directly

62. See text accompanying note 50 & note 50 supra.
63. 42 Cal. App. at 584-85, 183 P. at 959 (emphasis added).
64. Section 1193 was not enacted until 1959.
65. 42 Cal. App. at 585, 183 P. at 959.
66. 238 Cal. App. 2d at 900, 48 Cal. Rptr. at 294 (emphasis added).
destroy the legislative requirement that a section 1193 prelien notice be written. Under either rationale the posting of a notice of nonresponsibility would cut off the lien claimant's rights.

Although the holding in *Halspar* in effect destroyed the written requirement of serving a prelien notice, the decision appears to be in harmony with the general spirit and intended result of the mechanics' lien laws. The decision, however, does violence to the express language of section 1193 and the question should be asked whether the courts should be at liberty to circumvent procedural requirements set out by the legislature as prerequisites to the perfection of any lien.

In *Benson Electric Co. v. Hale Brothers Associates, Inc.*, the second of the three cases mentioned above, the court summarily disposed of the same problem by quoting from *Halspar*.

In the last of the cases which presented this problem, *Scott, Blake and Wynne v. Summit Ridge Estates, Inc.*, the factual situation was somewhat different, although the issues presented were nearly identical with those in *Halspar*. A novel argument was made by defendants in the *Scott* case, however, that merits discussion here. Defendants urged that the reasoning in *Halspar* was not logical in light of section 1193(b), which declared void any agreement that purported to waive the provisions of section 1193. They argued that an owner entering into an agreement contemplated by that subdivision would necessarily have actual knowledge of the work being done and such knowledge in effect would be, under the reasoning in *Halspar*, a waiver of the 15 day prelien notice requirement of section 1193, despite the

67. It should be noted that under a distinguishable fact situation one court expressly held that section 1193 contemplates a written notification, and verbal notice by telephone was not adequate. *Windsor Mills v. Richard B. Smith, Inc.*, 272 A.C.A. 390, 77 Cal. Rptr. 300 (1969). See text accompanying note 81 & note 81 *infra*.

68. That is the essential purpose of California mechanics' lien laws is to protect those who have performed labor or furnished materials. *E.g.*, *Nolte v. Smith*, 189 Cal. App. 2d 140, 144, 11 Cal. Rptr. 261, 263 (1961).

69. See text accompanying notes 14-17 *supra*.


71. *Id.* at 693, 55 Cal. Rptr. at 78.

72. 251 Cal. App. 2d 347, 59 Cal. Rptr. 587 (1967). It should be noted that the case was decided prior to the 1967 amendment.

73. Facts indicated that plaintiffs contracted to perform surveying work with defendant tract developer, who did not own all of the land in question at the time the contract was entered into. There was a clear showing, however, that the noncontracting property owners were aware of the work being performed from the outset. *Id.* at 351-52, 59 Cal. Rptr. at 589-90.

74. Section 1193, subdiv. (b) read at that time as follows: "Any agreement made or entered into by an owner whereby the owner agrees to waive the rights or privileges conferred upon him by this section shall be void and of no effect." Cal. Stats. 1965, ch. 1258, § 1, at 3132.
provision making such agreements of no effect. In answer the court pointed out that the defendant had ignored the difference between estoppel and waiver, and then went on to say:

The knowledge of the owner referred to in section 1183.1, subdivision (b), is knowledge of actual construction, not intended construction. The basis of section 1183.1, subdivision (b), is estoppel. Section 1193, subdivision (b), invalidates a waiver of the right to prelien notice by agreement before construction of the work covered by the agreement commences. Section 1183.1, subdivision (b), estops an owner from disclaiming responsibility for work performed on his land with his actual knowledge unless he files a notice of nonresponsibility.

The above holding of the court either fails to consider the possibility that a waiver agreement could be entered into at any time between the date construction commences and the final date for filing the prelien notice, or else it makes an unfounded assumption that section 1193(b), as it then existed, contemplated only waiver agreements entered into prior to the commencement of construction. The court also fails to recognize that while it is true that section 1183.1(b) contemplates actual construction rather than intended construction, it is also true that the knowledge that will subject a property owner to the burden of filing a notice of nonresponsibility is not only actual knowledge, but can be constructive knowledge as well—that is to say, notice of circumstances that would put a prudent man upon inquiry as to the facts of possible construction. It would be hard to conceive of a situation in which an agreement entered into between a contractor and a property owner purporting to waive the latter's rights to receive a section 1193 prelien notice, would not be such as to put a prudent property owner on constructive notice that work was in progress, or at least put him on a duty of inquiry to determine if work was to be performed in

75. 251 Cal. App. 2d at 354, 59 Cal. Rptr. at 591.
76. Id. "Estoppel" is defined to mean a bar or impediment raised by the law, which precludes a man from alleging (or from denying) a certain fact or state of facts in consequence of his previous allegation or denial or conduct or admission. On the other hand "waiver" is defined as the intentional or voluntary relinquishment of a known right. BLACK'S LAW DICTIONARY 648, 1751 (4th ed. 1951).
77. 251 Cal. App. 2d at 354, 59 Cal. Rptr. at 591 (citations omitted) (emphasis added).
the future on his property at the instance and request of some lessee, vendee, etc.

Whether intended or not, the line of cases beginning with *Halspar* did much to do away with the effectiveness of the 15 day prelien notice requirement. While the decisions in those cases could hardly be called inequitable, neither could one say that they effectively fulfilled the legislative intent behind section 1193. Any further consideration of the relationship between section 1183.1(b) and section 1193, however, must be made in the light of the changes in the code discussed above. Attention, therefore, will now be given to the problem of interpreting the effect of the code changes on those cases.

**Relationship Between Halspar and the Code as Amended**

As discussed above, the code was significantly changed in 1967. In spirit one would think that the changes made to section 1193 would not affect the rule of *Halspar*; but a closer examination reveals serious conflicts. The rationale, as stated there, was that the "owner is already in possession of the type of information otherwise provided by the prelien notice of section 1193." By amendment, however, section 1193 now requires, in addition to the information previously required, a description of the property on which work is being performed, and most important, a statement to the effect that if bills are not paid for this work the property may be subject to a mechanics' lien. Thus in order to apply *Halspar* under the current law, the contractor would not only have to show that the property owner was aware of the nature of the work being performed, by whom it was being performed, and at whose request it was being performed, but in addition that he knew where the work was being performed and that there was a possibility that a mechanics' lien would be filed against his property if the bills for such work were not paid. It would seem that the latter requirement would, in most cases, be difficult to establish in a court of law, unless the property owner could be shown to have had previous experience in the field of mechanics' liens.

**Knowledge Contemplated by Section 1183.1(b)**

The questions presented here thus become: (1) What is the "knowledge" contemplated by section 1183.1(b); and (2) does the *Halspar* decision contemplate a stricter standard of knowledge than

---

81. See text accompanying note 68 *supra*.
82. See text accompanying notes 7-13 *supra*.
83. *Id.*
85. See text accompanying notes 12-13 *supra*. 
normally applied to that section. The cases construing the "knowledge" requirement of section 1183.1(b), apart from section 1193, while seeming to state unequivocally that the knowledge required may be actual or constructive, do not specifically state how much knowledge is required. For instance, mere knowledge that some construction is being performed, without knowledge of who is performing it, has been held adequate to impose the burden of filing a notice of nonresponsibility. It is not clear, however, exactly what the grounds for such reasoning are. It could well be that such knowledge merely puts one on a duty of inquiry to determine the remainder of the information required under section 1193, and the failure to pursue that duty, rather than the knowledge actually possessed, starts the running of the 10 day period within which one must file his notice of nonresponsibility.

In response to the second question, Halspar definitely contemplates actual knowledge of the facts required to be made known under section 1193. Whether Halspar (and Benson and Scott) would have followed the "duty of inquiry" theory of knowledge as it has been applied by the courts to section 1183.1(b) is unclear, for in those cases the property owners all appeared to be in actual possession of the information required to be given by section 1193, and as will be important in the discussion below, were aware of these facts from the beginning of the work.

It would seem that the legislature intended some sort of general scheme in respect to section 1183.1(b), and section 1193 when the latter was passed in 1959. Both sections involve similar problems, and appear to impose correlative duties designed to alleviate the inequities of the mechanics' lien laws in cases where the property is being improved at the instance of one other than the property owner or his agent. The most logical conclusion to be drawn out of this "scheme" is that the "knowledge" contemplated in section 1183.1(b), is the same "knowledge" required to be given by the contractor in section 1193, but there is no authority on this point one way or the other.

Under the Halspar rule, once a property owner obtained the information ordinarily required to be given in a section 1193 prelien notice and failed to file a notice of nonresponsibility, he was estopped to deny that the work was done at his instance; and hence the contractor fell within the "direct contract" exception in subdivision (a) of section 1193. Because of the serious consequences such a determination

86. See cases cited note 78 supra.
89. See 238 Cal. App. 2d at 899, 48 Cal. Rptr. at 294.
90. For discussion of this holding see text accompanying notes 54-80 supra.
would have on a property owner, it is likely that the *Halspar* estoppel argument was never intended to be applied in cases of mere constructive knowledge. It would seem proper under *Halspar* that a property owner would have a right to receive written preliminary notice, unless and until he had *actual* knowledge of the information which, under normal circumstances, he would receive in the preliminary notice. It must be concluded, therefore, that while case law has not decided the question, it is likely that *Halspar* will be limited to those cases in which it can be clearly shown that the property owner had actual, rather than constructive, knowledge of all the information (including knowledge that his property would be subject to a lien if bills for the work are not paid) required to be contained in the 20 day preliminary notice.

**Projected Effect of Section 1193(d)**

In addition to the changes in the information required to be given in the new section 1193 preliminary notice, the amended section also requires that notice be given within 20 days after commencement of construction. In *Halspar*, *Benson*, and *Scott*, decided under the old section 1193, the property owners had knowledge of the construction from the outset. Those cases, therefore, did not find it necessary to deal with the situation where the property owner obtained knowledge at some time between the date construction was commenced and the final date for filing the prelien notice.

It would appear, by projecting the reasoning in those cases, that as long as the property owner received actual knowledge 10 days or more before the last date upon which the lien claimant could serve his 15 day prelien notice, and failed to post a notice of nonresponsibility, the estoppel argument would apply and the lien claimant would be relieved of his section 1193 duty. Conversely then, if the knowledge was received within 9 days or less of that date, the *Halspar* rule should not apply since the property owner would not have had the statutory 10 days in which to post his notice of nonresponsibility. Hence, the lien claimant would have forfeited his lien rights against the property owner for failure to comply with the section 1193 notice requirement (i.e., the *Halspar* "conclusive presumption" must arise before the expiration of the time for giving the section 1193 notice).

The next question logically is: What is the effect of the new 20 day preliminary notice requirement? There can be little doubt that the reasoning of *Halspar* would still apply, in the absence of a judicial reversal, in those cases where the property owner, at the commencement of construction, was apprised of the information contemplated by sec-

---

91. Subject, however, to the provisions of subdivision (d) of CAL. CODE CIV. PROC. § 1193.
tion 1193 and failed to post a notice of nonresponsibility. The same reasoning should likewise apply if knowledge is obtained in the first 10 days after commencement of construction, because the period for the property owner to post a notice of nonresponsibility would expire with the expiration of the 20 days allowed the lien claimant to serve his preliminary notice. Thus, in the above cases, if the property owner failed to post a notice of nonresponsibility, he would be estopped by the rule in *Halspar* from denying that he had a direct contract with the contractor-lien claimant. Hence, under the "direct contract" exception in section 1193(a), the property owner's interest would be subject to a lien for the entire amount of the improvement.

Now, hypothetically, suppose that the property owner obtained actual knowledge of the information required to be given under section 1193 on the fifteenth day after commencement of construction; 10 days elapse and the owner has failed to file a notice of nonresponsibility; the contractor-lien claimant has likewise failed to serve a 20 day preliminary notice. While section 1193(c) requires lien claimants to serve a preliminary notice within twenty days, section 1193(d) allows such notice to be given subsequent to the original 20 day period, but provides that the lien is not effective for any work performed prior to the 20 days immediately preceding the service of such notice. It could be argued that a property owner's failure to post a notice of nonresponsibility would be effective *ab initio* on a relation-back theory—that is, the property owner could be deemed to be under "direct contract" with the lien claimant from the original date of commencement of construction. The wording in *Halspar*, however, seems to rebut such an argument:

On application of the conclusive presumption here, the contract of plaintiff with defendants' lessee became the contract of defendants *after* their admitted knowledge of the improvements and failure to give the notice of nonresponsibility required by section 1183.1, subdivision (b).\(^2\)

Applying this language to section 1193, as amended, would suggest a "first in time" waiver theory. Under such a theory the lien claimant would conclusively waive his lien rights to any work performed prior to the 20 days immediately preceding the service of the 20 day notice.\(^3\) Application of this "first in time" waiver theory to the above hypothetical situation indicates that the property owner's failure to post a notice of nonresponsibility would estop him from asserting his right to receive the 20 day preliminary notice. The lien claimant, how-

---

92. 238 Cal. App. 2d at 899, 48 Cal. Rptr. at 294 (emphasis added).

93. An exception is made with respect to work performed by architects who perform their tasks frequently years in advance of the time construction commences. Under section 1193(c), as amended in 1968, an architect has 20 days from date of commencement of physical construction despite the fact that his work was performed prior thereto.
ever, would have a right of lien only for the work performed after the twentieth day immediately preceding the effective date of the property owner’s failure to file his notice of nonresponsibility. That date, it would seem, would be 10 days after actual receipt of the knowledge otherwise required to be given to the property owner in the 20 day preliminary notice.

Thus under the new provisions of section 1193 the points in time of the respective failures to comply with the statutory requirements for posting a notice of nonresponsibility on the one hand, and serving a preliminary notice on the other, become important. If a lien claimant never serves the property owner with a preliminary notice, section 1193(c) will operate to entirely destroy the former’s lien rights (as it would have under the provisions of the former section 1193(a)). If, however, the property owner acquires actual knowledge of the lien claimant’s expenditure and thereafter fails to post a notice of nonresponsibility, the lien claimant’s lien is revived by the “direct contract” exception in section 1193(a). However, the effect of the savings clause in section 1193(d), which permits the service of notice after the expiration of the initial 20 day time limit, is to restrict nonetheless the amount of the revived lien to that work performed after the twentieth day immediately preceding the lien claimant’s coming within the “direct contract” exception to section 1193. The “first in time” waiver theory suggested above appears to be the only practical method of reconciling the time provisions of section 1193(c) and (d) with those in section 1183.1(b), and it is likely that the courts will adopt such a theory when faced with the problem.

Conclusion

While Halspar and the subsequent cases can be reconciled with the changes made to the code in 1967, the effect of such a reconciliation is to create new legal problems, rather than to clear up old ones. As stated above, the Halspar cases tend to destroy the purpose behind the written notice requirement of section 1193, in spite of the explicit code requirement that there be written notice. Thus Halspar, in effect, permits a contractor to give an oral preliminary notice to the property owner and then rely on estoppel to relieve him of the normal requirement of serving a 20 day preliminary notice.

In a recent California case, the court under a different factual situation involving the giving of notice by a subcontractor, expressly said that an oral notification by telephone would not replace the written notice required by section 1193.94 In theory, however, it does not

---

94. Windsor Mills v. Richard B. Smith, Inc., 272 A.C.A. 390, 77 Cal. Rptr. 300 (1969). The facts in that case show that property owners had contracted with a carpet contracting house to supply carpet to a tract development. Plaintiffs had supplied the
seem proper that an oral notice given by a subcontractor under a general contractor-property owner construction contract would be of no effect, whereas the same oral notice given by a contractor under a contractor-lessee construction contract would in effect satisfy the section 1193 requirement of written preliminary notice.

The answer to the above problem, and the others presented in attempting to reconcile Halspar with section 1183.1(b) and section 1193, lies in making the 20 day preliminary notice an absolute condition precedent to the validity of any claim of lien falling within the bounds of subdivision (a) of section 1193. The effect of such a procedure would be to eliminate the difficulties encountered by Halspar; bring the duties required by that section within the understanding of the lay mind; eliminate the inequalities in the treatment of the various lien claimants; and most important, once such a procedure was established, it would tend to eliminate a great deal of the litigation brought under the current section 1193. Such a rule would not in any way defeat the purpose of section 1183.1(b) which, as stated above,95 is twofold: (1) to give a property owner an opportunity to relieve himself from possible pecuniary loss as a result of mechanics' liens being filed against his property for work contracted at the instance and request of one other than himself; and (2) to serve notice on such lien claimants that the property owner will not be responsible for the work performed or materials supplied. In addition it would give a degree of independence and finality to both section 1193 and section 1183.1(b), a status which they definitely do not possess under the law as it currently exists.

James A. Rundel* 

carpet to the carpet contracting house, which subsequently became defunct. Plaintiffs had given an oral 20 day preliminary notice, but had failed to confirm in writing. In addition to arguing that oral notification was the equivalent of written notification, the appellants argued that oral notification should serve to estop the defendants from asserting section 1193 as a bar to its action. The court refused that contention, and another similar one based on a theory of unjust enrichment. Id. at 394-96.

95. See text accompanying notes 49-52 supra.

* Member, Third Year Class.