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Robert E. Lee

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LIENS ON PERSONAL PROPERTY NOT GOVERNED BY THE UNIFORM COMMERCIAL CODE

ROBERT E. LEE*

It is as important to know the legal rules applicable to liens on personal property not governed by the Uniform Commercial Code as it is to have a knowledge of the security interest in personal property which falls within the statutory provisions of the Uniform Commercial Code. The purpose of this article is to discuss the common law and statutes dealing with liens on personal property that have not been affected by the enactment of the Uniform Commercial Code.

Although various shades of meaning have been applied to the term "lien,"¹ in its broadest sense the term signifies the right that a creditor has to have the specific property of another sold or otherwise applied to the satisfaction of an obligation. The holder of a lien is a secured creditor, and the particular property is charged or encumbered to secure the payment or performance of the obligation. There may be liens upon either real or personal property. The historic common-law lien was a possessory lien on personal property; that is, the lienor merely had the privilege of retaining the possession of the debtor's property until the former's claim with respect to that particular property has been satisfied. The lienor's former inability to foreclose his lien or have the property applied to the satisfaction of the debt has been remedied by statute.²

The term "lien" is not defined in any of the definition sections of the Uniform Commercial Code. Instead, the term "security interest" is defined as follows:

* Professor of Law, Wake Forest College.

¹ RESTATEMENT, SECURITY § 59 (1941); BROWN, PERSONAL PROPERTY § 107 (2d ed. 1955) [hereinafter cited as BROWN]; ENCYCLOPEDIA BRITANNICA, *Lien* (1960); BOUVIER, LAW DICTIONARY, *Lien* (Baldwin's stud. ed. 1934); BLACK, LAW DICTIONARY, *Lien* (4th ed. 1951); 33 AM. JUR. *Liens* § 2 (1941); 53 C.J.S. *Liens* § 1 (1948). "What is the definition of a lien? It is simply the right to have a demand satisfied out of the property of another." *Thigpen v. Leigh*, 93 N.C. 47, 49 (1885). "A lien is a right by which a person is entitled to obtain satisfaction of a debt, by means of property belonging to the person indebted to him." *Frick & Co. v. Hilliard*, 95 N.C. 117, 122 (1886).

² See note 76 *infra*.

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to Article 9.³

The term "secured party" is defined in Article 9 as "a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been assigned."⁴ Accordingly, the term "security interest," as used in the Uniform Commercial Code, and the word "lien," as generally used, are closely akin.⁵

Article 9 of the Uniform Commercial Code, with specified exceptions in section 9-104, has set forth a comprehensive scheme for the regulation of security interest in personal property and fixtures. This article of the Code is by far the most important, most complex, and most far-reaching portion of the entire Uniform Commercial Code. It supersedes the pre-Code statutes and decisions dealing with such security transactions of personal property as pledges, assignments of accounts receivable, chattel mortgages, chattel trusts, trust deeds, factors' liens, equipment trusts, conditional sales, trust receipts, other liens or title retention contracts, and leases or consignments of personal property intended as security.⁶

The Uniform Commercial Code becomes effective in North Carolina on July 1, 1967.⁷ A security transaction governed in its inception by prior North Carolina law will continue to be governed by such law, even though new transactions entered into subsequent to midnight, June 30, 1967, will be subject to the appropriate provisions of the Code.⁸ Thus, for a period of time following July 1, 1967, there will be in force in this state two parallel systems of law governing certain personal property security transactions. During

³ UNIFORM COMMERCIAL CODE § 1-201(37) [hereinafter cited as UCC], N.C. GEN. STAT. § 25-1-201(37) (1965) [hereinafter cited as N.C. GEN. STAT.].

⁴ UCC § 9-105(i), N.C. GEN. STAT. § 25-9-105(i).

⁵ UCC § 7-209, however, has provisions for the acquiring of both a "lien" and a "security interest" by a warehouseman and draws a distinction between them.

⁶ UCC § 9-102, N.C. GEN. STAT. § 25-9-102.

⁷ N.C. GEN. STAT. § 25-10-101.

⁸ UCC § 10-102(2), N.C. GEN. STAT. § 25-10-102(2).

this period of time it would seem prudent for an attorney checking prior liens to check any pre-Code filing system that might be applicable.

There are several secured transactions expressly regulated by sections of the Uniform Commercial Code found in articles of the Code other than Article 9, which has been labeled "Secured Transactions." They are the liens of warehousemen,⁹ carriers,¹⁰ and bankers.¹¹

There are a number of liens or security interests involving property that are expressly excluded from Article 9 by the Uniform Commercial Code. Section 9-104 (N.C. Gen. Stat. § 25-9-104) provides:

This Article does not apply

- (a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or
- (b) to a landlord's lien; or
- (c) to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 on priority of such liens; or
- (d) to a transfer of a claim for wages, salary or other compensation of an employee; or
- (e) to an equipment trust covering railway rolling stock; or
- (f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract; or
- (g) to a transfer of an interest or claim in or under any policy of insurance; or
- (h) to a right represented by a judgment; or
- (i) to any right of set-off; or
- (j) except to the extent that provision is made for fixtures in Section 9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or
- (k) to a transfer in whole or in part of any of the following: any claim arising out of tort; any deposit, savings, pass-

⁹ UCC §§ 7-209, -210, N.C. GEN. STAT. §§ 25-7-209, -210.

¹⁰ UCC §§ 7-307, -308, N.C. GEN. STAT. §§ 25-7-307, -308.

¹¹ UCC § 4-208, N.C. GEN. STAT. § 25-4-208.

book or like account maintained with a bank, savings and loan association, credit union or like organization.

Except for fixtures, Article 9 of the Uniform Commercial Code applies only to security interests in personal property. Liens or security interests in real property are expressly excluded.¹² The statutes of North Carolina¹³ and other states giving to contractors, subcontractors, and laborers a lien for labor and materials for a house or other building are in no way affected by the Uniform Commercial Code.¹⁴

The excluded transactions dealing with personal property, which are discussed in this article, are the liens of artisans, agisters, storage keepers of motor vehicles, attorneys, innkeepers, landlords, and medical liens in personal injury suits. If a lawyer encounters a problem involving any of these liens, it becomes unnecessary for him to plow into the complex sections of the Uniform Commercial Code seeking an answer. It may save him hours of research if he keeps at his finger-tips the list of secured transactions not governed by the Code. Article 9 of the Code was not designed for easy bedtime reading.

I. ARTISAN'S LIEN

A. *Nature of the Lien*

The artisan's lien¹⁵ is by far the most numerous and most important of all liens on personal property. It existed at common law whenever the bailee did work upon or added materials to a chattel at the request of the bailor.¹⁶ The security of the lienor is the

¹² UCC § 9-104(j), N.C. GEN. STAT. § 25-9-104(j).

¹³ N.C. GEN. STAT. §§ 44-1 to -85 (1950). See generally Mangum, *Mechanics' Liens in North Carolina*, 41 N.C.L. REV. 173 (1963).

¹⁴ UCC § 9-104(c), (j), N.C. GEN. STAT. § 25-9-104(c), (j).

¹⁵ The so-called "mechanic's lien," which by statute in many states confers a lien upon contractors, subcontractors, and laborers for labor or materials for a house or building, differs from the lien of an artisan. The mechanic's lien is a lien on real property, whereas an artisan's lien is a lien on personal property. To avoid confusion in terminology an artisan's lien is defined herein as a possessory lien which a bailee has for work done upon or added to a chattel at the request of the bailor. See N.C. GEN. STAT. §§ 44-1 to -85 (1950); BROWN § 107; Mangum, *supra* note 13.

¹⁶ RESTATEMENT, SECURITY § 61(a) (1941); BROWN § 108; 8 AM. JUR. 2D *Bailments* § 229 (1963); 8 C.J.S. *Bailments* § 35(a) (1962); 37 MICH. L. REV. 273 (1938); 17 CORNELL L.Q. 279 (1932). See *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 149, 100 S.E.2d 381 (1957). There must, of course, be a contract, either expressed or implied, entitling the bailee to compensation. 8 AM. JUR. 2D *Bailments* §§ 226-27 (1963); 8 C.J.S. *Bailments* § 35(a) (1962).

possession of the property of the bailor, which possession the lienor is not required to relinquish until his claim for work and materials has been paid. The particular common-law possessory lien is predicated on the idea that the artisan has enhanced the value of the chattel proportionate to his charges for the repairs.¹⁷ But as expressed by the *Restatement of Security*, it is not necessary "that the chattel be actually improved or increased in value. The lien exists if the services are rendered or the materials are added in accordance with the bailor's request."¹⁸

The artisan's possessory lien arises by operation of law, out of a custom incorporated into and made a part of the common law, and no express agreement creating the lien is necessary.¹⁹

In a number of states there are statutes either declaratory of the artisan's common-law lien or in modification of the same.²⁰ The pertinent North Carolina statute is section 44-2 of the General Statutes. The North Carolina Supreme Court has said that this statute simply affirms "the common-law lien given to artisans who have altered or repaired articles of personal property and are in the possession of same, with the superadded right of foreclosure by sale in order to make the lien effective"²¹

The North Carolina statute provides:

Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, after first publishing a notice of the time and place of said sale once in each of two suc-

¹⁷ 8 AM. JUR. 2D *Bailments* § 230 (1963); 8 C.J.S. *Bailments* § 35 (1962). See *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 149, 100 S.E.2d 381 (1957).

¹⁸ RESTATEMENT, SECURITY § 61, comment *d* (1941).

¹⁹ *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957); 8 C.J.S. *Bailments* § 35(a) (1962).

²⁰ E.g., N.C. GEN. STAT. § 44-2 (1950). See 8 C.J.S. *Bailments* § 35(a) (1962); 8 AM. JUR. 2D *Bailments* § 228 (1963); 37 MICH. L. REV. 273 (1938).

²¹ *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 147, 100 S.E.2d 381, 384 (1957), quoting *Johnson v. Yates*, 183 N.C. 24, 27, 110 S.E. 603, 604 (1922).

cessive weeks in a newspaper published in the county in which the work may have been done; provided, however, the last publication shall be within seven days prior to the date of sale, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Provided, that in selling any motor vehicle under the provisions of this section, a twenty day notice in advance of such sale shall be given the Commissioner of Motor Vehicles.²²

It should be observed that the North Carolina statute expressly stipulates that the lien exists if the work is done and materials are furnished at the request of "the owner or legal possessor" of the property.²³ In the absence of statute, it has been generally held elsewhere that the artisan's lien does not arise where the work was done at the request of one not in privity with the owner.²⁴

The law of the place of possession of the property governs the extent and character of the artisan's lien.²⁵

Since the lien is dependent upon possession, the artisan does not have a lien if the services are rendered upon personal property in the possession of the owner.²⁶ Thus an artisan who comes to my home to repair my television set is not a bailee in possession and as a consequence has no lien for his services. It is otherwise if he takes the television set to his place of business for the repairs.

The possessory lien of an artisan is said to be specific inasmuch as it extends only to the specific property upon which the particular services were rendered.²⁷ It does not cover a debt for services on other property of the same owner or services on the specific prop-

²² N.C. GEN. STAT. § 44-2 (1950).

²³ *Johnson v. Yates*, 183 N.C. 24, 110 S.E. 603 (1922); *Carolina Sales Co. v. White & Wilder*, 183 N.C. 671, 110 S.E. 607 (1922); see *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 146, 100 S.E.2d 381, 383 (1957); cf. *Willis v. Taylor*, 201 N.C. 467, 160 S.E. 487 (1931); *Mangum*, *supra* note 13, at 203-04.

²⁴ RESTATEMENT, SECURITY § 75(2) (1941); BROWN § 111; 8 AM. JUR. 2D *Bailments* § 234 (1963); C.J.S. *Bailments* § 35(a) (1962).

²⁵ 8 AM. JUR. 2D *Bailments* § 227 (1963); 8 C.J.S. *Bailments* § 35(a) (1962).

²⁶ *Broadfoot Iron Works, Inc. v. Bugg*, 208 N.C. 284, 180 S.E. 62 (1935); RESTATEMENT, SECURITY § 61, comment *e* (1941); BROWN § 108; 8 AM. JUR. 2D *Bailments* § 232 (1963).

²⁷ RESTATEMENT, SECURITY § 61(a) (1941); 8 C.J.S. *Bailments* § 35(b) (1962).

erty previously rendered. Thus, if a repair job of two hundred dollars is done on an automobile in January and it is returned to the bailor, who redelivers it in February for additional minor repairs of ten dollars, the bailee may hold the automobile the second time only to secure the payment of the ten dollars. The bailee has a claim for two hundred and ten dollars, but a lien for only ten dollars. Upon tender of the ten dollars, the bailee becomes entitled to the possession of the automobile. The bailee must sue for the January repair bill of two hundred dollars as an unsecured creditor.

A bailee may by special contract create a general lien covering the balance of a general account between the parties.²⁸ The courts will enforce a contract, oral or written, that gives to an artisan a general lien for his entire bill on any chattel in his possession. For example, a garage, engaged in the repairing of motor vehicles, will sometimes request the automobile owner to sign a written statement authorizing designated repairs upon a particular vehicle and inserted in the printed form, above the signature, will appear a sentence in substance as follows: "It is hereby agreed that the above named garage shall have a general lien, not only for the above authorized repairs, but for the balance of any former account due."

On the other hand the parties may agree specifically that no possessory lien is to exist.²⁹ This would be implied if the bailee extends credit to the bailor beyond the time at which the property is to be delivered in a repaired condition by him to the bailor.³⁰ There is, of course, no lien if there is an agreement or manifested intention of the parties inconsistent with a lien.³¹

When a number of articles are delivered for repairs under a single contract, and several of these are returned to the bailor after the work thereon has been done, the articles remaining in the possession of the bailee are charged with the burden of the whole lien.³² A bailee's specific lien extends in its entirety to each and every article delivered under a single contract of bailment. A bailor can-

²⁸ RESTATEMENT, SECURITY § 65 (1941); 8 C.J.S. *Bailments* § 35(b) (1962).

²⁹ Note 28 *supra*.

³⁰ BROWN §§ 110, 126; 8 AM. JUR. 2D *Bailments* § 235 (1963); 8 C.J.S. *Bailments* §§ 25(b)-(c) (1962); 20 MICH. L. REV. 361 (1922).

³¹ BROWN § 110; 8 C.J.S. *Bailments* § 35(c) (1962).

³² RESTATEMENT, SECURITY §§ 61, comment f, 80(2) (1941); BROWN § 108; 51 MICH. L. REV. 315 (1963); AM. JUR. 2D *Bailments* § 236 (1963); 8 C.J.S. *Bailments* § 35(a) (1962); Annot., 25 A.L.R.2d 1037 (1952).

not, without the consent of the bailee, acquire possession of one of such articles merely by paying the bailee's charges on that article alone.³³ All of the articles held by the bailee in connection with a single contract may be retained until the whole bill thereon has been paid. The law is otherwise if articles have been delivered to the bailee under separate contracts.

Although the statute of limitations may bar the bailee's right of action on the debt owing to him for services rendered, the statute does not affect the bailee's right of lien on the property in his possession.³⁴ The statute of limitations simply bars his remedy of action on the debt, but it does not discharge the obligation. The bailee may continue to hold the property. The *Restatement of Security* provides: "A lien is not terminated by the running of the statute of limitations against the claim secured by the lien, nor by the discharge of the claim in bankruptcy."³⁵ Also, the death of the debtor and administration of his estate in a probate court does not affect the right of the lienor to his security.³⁶

B. Necessity of Possession

At common law,³⁷ and under statutes such as the one in North Carolina³⁸ that are declaratory of the common law, an artisan loses

³³ Note 32 *supra*.

³⁴ BROWN § 119; RESTATEMENT, SECURITY § 81 (1941).

³⁵ *Id.* § 81 (1941).

³⁶ BROWN § 119.

Furthermore, in receiverships and assignments for the benefit of creditors, a secured creditor may prove his claim for the whole amount before exhausting his collateral security (cited cases omitted). The foregoing decisions, however, do not apply generally to secured claims held at the time of the death of a debtor. When a debtor dies, the administration laws, G.S. § 28-105, step in and determine the settlement of his estate. In such case, the holder of a note executed or assumed by the deceased, and secured by a deed or trust or mortgage, must first exhaust the security and apply the same on the debt, and may file a claim against the estate for the balance due, if any. But the holder of such note may not file claim and receive *pro rata* dividend on the basis of the full claim.

Montsinger v. White, 240 N.C. 441, 443, 82 S.E.2d 362, 364 (1954). For a discussion of the rules dealing with rights against an insolvent estate of secured creditors, see 13 N.C.L. REV. 239 (1935).

³⁷ RESTATEMENT, SECURITY § 80(1) (1941); BROWN § 121; 8 AM. JUR. 2d *Bailments* §§ 231-33 (1963); 8 C.J.S. *Bailments* § 35(a) (1962); 53 C.J.S. *Liens* § 8 (1948).

³⁸ *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957); *Tedder v. Wilmington & W.R.R.*, 124 N.C. 342, 32 S.E. 714 (1899); *Block v. Dowd*, 120 N.C. 402, 27 S.E. 129 (1897); *McDougall v. Crapon*, 95 N.C. 292 (1886). See *Twin City Motor Co. v. Triplett*, 199 N.C. 678,

his possessory lien if he voluntarily surrenders possession of the chattel to the bailor. Continued possession is absolutely essential to the existence of a possessory lien. The moment that possession is voluntarily surrendered, the common-law possessory lien is lost. Nothing else appearing, even as between the artisan and the owner of the chattel, the lien is lost if and when the artisan voluntarily and unconditionally surrenders possession to the owner.³⁹ If the holder of a specific possessory lien, after an intentional and permanent surrender of the subject matter of the lien, subsequently regains possession thereof, his lien is not restored.⁴⁰

It is possible for the artisan to surrender the repaired property in his possession to the bailor with an agreement that the artisan's lien shall continue and be considered not waived. As between the immediate parties, such an agreement is valid and enforceable.⁴¹ If the property is subsequently returned to the bailee, all of his rights of a lien are preserved as between the parties to the agreement. The bailee may also be permitted to enforce his rights of a lien in such a case against the bailor even though the property is in the manual possession of the bailor. A delivery of possession to the bailor under an agreement for the preservation of the lien is not, however, a common-law possessory lien but rather a lien created by contract.⁴² A special agreement that allows the bailor to regain possession does not preserve the bailee's lien as against third persons.⁴³ If and when the artisan surrenders possession of the property, he loses his right of priority as against the holder of a prior chattel mortgage.⁴⁴ He also loses his lien if the owner in pos-

155 S.E. 573 (1930); *Twin City Motor Co. v. Rouzer Motor Co.*, 197 N.C. 371, 148 S.E. 461 (1929); *Maxton Auto Co. v. Rudd*, 176 N.C. 497, 97 S.E. 477 (1918); *Thomas v. Merrill*, 169 N.C. 623, 86 S.E. 593 (1915). "Sound reason supports the rule that the common-law lien referred to in G.S. 44-2 may be preserved only by retaining possession." *Barbre-Askew Fin., Inc. v. Thompson*, *supra* at 149, 100 S.E.2d at 385.

³⁹ See *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957).

⁴⁰ RESTATEMENT, SECURITY, Explanatory Notes § 80 (Tent. Draft No. 4, 1939); *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957); *McDougall v. Crapon*, 95 N.C. 292 (1886).

⁴¹ RESTATEMENT, SECURITY § 80(3) (1941); BROWN § 121. See *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957).

⁴² See *Barbre-Askew Fin., Inc. v. Thompson*, *supra* note 41.

⁴³ See note 35 *supra*.

⁴⁴ *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957). To the effect that the cases in other jurisdictions are in conflict where the artisan has reacquired possession, see 36 N.C.L. REV. 512 (1958).

session sells the property to a bona fide purchaser for value or if the property is attached or levied on at the instance of one who has become a creditor without notice of the artisan's interest.⁴⁵

In *Barbre-Askew Fin., Inc. v. Thompson*⁴⁶ there was a duly recorded chattel mortgage on an automobile pursuant to the then existing recordation statutes. Subsequently the automobile was damaged in a wreck, and the mortgagor delivered it to a mechanic for repairs. The repairs were to be completed for a contract price of 338 dollars. After the major portion of the repairs were made, the automobile was delivered to the mortgagor for his use under an agreement that it should be later returned for the completion of some minor repairs. Three weeks later the automobile was returned to the mechanic for the completion of the minor repairs, consisting of the alignment of the front end and some touch-up painting, which the jury found to be worth 30 dollars. The mortgagor defaulted in his payments on the mortgage, at a time when there was a balance due of 796 dollars. The repaired automobile had a market value of only 650 dollars. The mechanic had not been paid anything on his contract of 338 dollars, but he was at the time in possession of the automobile. The mortgagee instituted a claim and delivery proceeding against the mechanic for the possession of the automobile. The mechanic claimed that his mechanic's lien of 338 dollars had priority over the chattel mortgage by virtue of section 44-2 of the General Statutes. The court held that the mechanic's lien had a priority over the chattel mortgage only to the extent of 30 dollars, notwithstanding that all the repairs were made under an indivisible contract. The voluntary surrender of possession to the mortgagor effected a loss of the lien for all work completed as of that date. The moment that the possession was voluntarily surrendered, the possessory lien was gone. As against the mortgagee, the possessory lien was lost and could not be revived through a subsequently acquired possession by the mechanic.

An artisan does not lose his lien if he voluntarily surrenders possession through fraudulent representations, and he may recover the chattel unless in the meantime third persons in good faith have

⁴⁵ RESTATEMENT, SECURITY § 80(3) (1941); BROWN § 121; 8 C.J.S. *Bailments* § 35(d) (1962).

⁴⁶ 247 N.C. 143, 100 S.E.2d 381 (1957), 36 N.C.L. REV. 512 (1958).

acquired interests.⁴⁷ But where the possession is taken without the consent of the artisan, either by the bailor or a third person, the chattel may be recovered by the artisan from even a bona fide purchaser.⁴⁸ He may also hold the wrongful taker liable for a conversion.⁴⁹

It has been held in North Carolina that where an automobile has been repaired and the artisan is induced to part with possession upon false and fraudulent representations by the owner that his check is good, and the artisan relies thereon and surrenders possession of the car, he does not do so voluntarily and unconditionally and the artisan does not lose his lien upon the car.⁵⁰

C. Waiver or Loss of Lien

In addition to the instances previously mentioned, there may be other occasions where the artisan may waive or lose his possessory lien.

An artisan loses his lien if the bailor makes a valid tender of the lawful charges and the same is refused.⁵¹ The artisan's lien becomes discharged, and the artisan cannot thereafter recover from the bailor for work done or materials furnished other than as an unsecured creditor. Although the debt itself is not discharged, the bailor becomes entitled to the immediate possession of the property.⁵² He may in an action of replevin or a statutory equivalent (claim and delivery proceeding in North Carolina) recover the property without paying anything or recover its market value in an action of trover for conversion. The bailor is not required to keep the tender good in order to discharge the lien.⁵³ But in order to free the bailor-debtor of his responsibility for damages for a delayed performance of a now unsecured debt, the tender must be "kept

⁴⁷ Reich v. Triplett, 199 N.C. 678, 155 S.E. 573 (1930); Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918); RESTATEMENT, SECURITY § 80, comment c (1941); BROWN § 121. See Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957).

⁴⁸ RESTATEMENT, SECURITY § 80, comment c (1941).

⁴⁹ BROWN § 121.

⁵⁰ Reich v. Triplett, 199 N.C. 678, 155 S.E. 573 (1930); Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918). See Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957). As to the effect of a worthless check given in a sales transaction, see UCC § 2-403(1).

⁵¹ RESTATEMENT, SECURITY § 78 (1941); BROWN § 121; 8 AM. JUR. 2D *Bailments* § 240 (1963); 8 C.J.S. *Bailments* § 35(c) (1962).

⁵² BROWN § 121.

⁵³ *Ibid.*

good"—that is, he must continue to be ready and willing to pay the debt at any time.⁵⁴

If the artisan claims a lien in excess of his lawful charges of the lien (or if he includes with the lien other charges owing to him by the bailor for which the law does not give to him a lien on the particular property), the artisan does not thereby necessarily waive the amount of his lawful lien.⁵⁵ The *Restatement of Security* has said: "The mere claim of a larger amount than the one due is not of itself enough to constitute a waiver of tender. The words or conduct of the lienor must indicate that a proper tender will be refused."⁵⁶ The bailor is not required to make a valid tender if the artisan has by his conduct or words made it plain that he will accept nothing less than the entire amount which he demands. The law does not require a person to do a useless act. As expressed by a North Carolina decision, "A tender is not necessary when it is reasonably certain that it will be refused."⁵⁷

Where the artisan sets up in himself a claim to the property that is inconsistent with his right of lien, for example that he is the absolute owner of the property, he thereby waives his lien, and the bailor may recover in an action of trover for conversion or replevy the property.⁵⁸ An unauthorized use of the chattel by the artisan also constitutes an act of conversion.⁵⁹

Whether or not the acceptance of a note or other security constitutes a waiver of the bailee's possessory lien depends upon the intent of the parties.⁶⁰ The mere acceptance of a note or other security alone does not constitute a waiver. But if a note is accepted with a maturity date considerably in the future, the court has little difficulty in finding that the parties did not intend the bailee to retain the goods of his debtor through such an extended period of time.⁶¹

If the bailor sues the possessory lienor or his transferee for conversion, the measure of damages is the value of the property less

⁵⁴ *Ibid.*

⁵⁵ *Id.* §§ 123-24; RESTATEMENT, SECURITY § 78 (1941); *cf.* 8 C.J.S. *Bailments* § 35(c) (1962); 8 AM. JUR. 2d *Bailments* § 240 (1963); 24 MICH. L. REV. 199 (1925).

⁵⁶ RESTATEMENT, SECURITY § 78, comment *a* (1941).

⁵⁷ *Cunningham v. Long*, 186 N.C. 526, 532, 120 S.E. 81, 84 (1923).

⁵⁸ BROWN § 123.

⁵⁹ *Id.* § 127; RESTATEMENT, SECURITY § 70 (1941).

⁶⁰ BROWN § 126; 8 AM. JUR. 2d *Bailments* § 235 (1963); 8 C.J.S. *Bailments* §§ 35(b)-(c) (1962).

⁶¹ Note 60 *supra*.

the amount of the lien.⁶² To allow full recovery without deduction for the amount of the lien would more than compensate the injured party for the wrong done. The bailor is permitted to recover only to the extent of his interest that has been converted. Section 79(2) of the *Restatement of Security* provides: "Where the possessory lienor is liable to the bailor for harm to or conversion of the chattel upon which a lien exists, the lienor can set off the debt in an action by the bailor to enforce this liability."

The bailor can set off, in an action on the debt by the possessory lienor, any claim that he may have against the lienor arising out of the lienor's conduct in respect to the chattel.⁶³ The tort claims of the bailor against the possessory lienor do not reduce the lien, even if they relate to the bailed chattels, until they have been judicially determined.⁶⁴

D. Assignment or Transfer

Under the early common-law rule it was held that a possessory lien could not be assigned or transferred and that any attempt to do so resulted in a termination of the lien.⁶⁵ However, the weight of the modern authority is to the effect that a lienor may transfer to a third person not only the debt owing to him but also the lien that secures it.⁶⁶ The assignee of the debt is allowed to enjoy the advantages of the lien. A fundamental rule of the law of security is that a lien is inseparable from the debt that is secured. A lien cannot be effectively assigned apart from the debt, and any attempt to do so will result in a termination of the lien.⁶⁷ Since a lienor may by statute in North Carolina⁶⁸ and many other jurisdictions foreclose his lien, there would seem to be no objection to his assigning the lien along with the debt that it secures except in certain situations where the confidential relations of the parties (as in the case of papers and documents involved in the relation of attorney and client) or the terms of the particular bailment are inconsistent with the power to assign the lien.

⁶² BROWN § 127; RESTATEMENT, SECURITY §§ 71, 79 (1941).

⁶³ RESTATEMENT, SECURITY § 79(1) (1941).

⁶⁴ *Ibid.*

⁶⁵ *Id.* § 67; BROWN § 120; 8 AM. JUR. 2D *Bailments* § 237 (1963); 8 C.J.S. *Bailments* § 35(g) (1962); 15 HARV. L. REV. 70 (1901).

⁶⁶ Note 65 *supra*.

⁶⁷ RESTATEMENT, SECURITY § 67 (1941); BROWN § 120.

⁶⁸ N.C. GEN. STAT. § 44-2 (1950) (artisan).

An artisan cannot compel a bailor to search throughout the country for a chattel that has been repaired. The artisan or his transferee must keep the chattel conveniently accessible to the bailor after the service has been rendered.⁶⁹ For example, if a jeweler has shops in Asheville and Wilmington and he decides to consolidate the two stores into one in Wilmington, he does not have the privilege of removing to Wilmington from Asheville watches upon which he has a lien.⁷⁰ Similarly if the jeweler should sell both of his stores, including all outstanding accounts, to a jeweler in Raleigh, a watch in the Asheville or Wilmington jewelry shop may not be removed to Raleigh.⁷¹ In this latter situation, if the watch were removed, the Raleigh jeweler would acquire no interest in the watch as against the bailor, and both jewelers would be liable to the bailor for conversion.⁷²

An attempt of an artisan to transfer the bailed chattel as his sole and unconditional property constitutes a conversion and a forfeiture of his lien.⁷³ For example, *A* has a lien on *B*'s watch for repairs. *A* pledges *B*'s watch to *C* as security, *C* thinking the watch belongs to *A*. *A* and *C* are liable to *B* for conversion. *C* acquires no interest in the watch.⁷⁴ If *A* had sold the watch to *C*, the result would have been the same.⁷⁵

E. Enforcement

At common law an artisan has no right to sell a chattel upon which he has done work or added materials for the purpose of reimbursing himself unless a power of sale has been superadded by special agreement.⁷⁶ The common-law possessory lien of an artisan is thus in essence merely a device to coerce the bailor into paying by a retention of the property from him until he pays.

There are, however, in practically all jurisdictions at the present time statutes that confer upon the artisan a power to enforce his claim by a sale of the chattel.⁷⁷ There are considerable variances in

⁶⁹ RESTATEMENT, SECURITY § 67 (1941).

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Id.* § 68.

⁷³ BROWN § 120; RESTATEMENT, SECURITY § 68(1) (1941); 8 AM. JUR. 2D *Bailments* §§ 110, 237 (1963).

⁷⁴ RESTATEMENT, SECURITY § 68 (1941).

⁷⁵ *Ibid.*

⁷⁶ *Id.* § 72; BROWN § 119; 8 AM. JUR. 2D *Bailments* § 241 (1963); 8 C.J.S. *Bailments* § 35(e) (1962).

⁷⁷ Note 76 *supra*.

the procedural methods of these statutes, and the artisan must strictly comply with the requirements of his particular jurisdiction. The complete North Carolina statute has been set forth in the text of this article accompanying note 22.

F. Effect of Lienor's Obtaining Judgment

A has a possessory lien on B's chattel for work done and added materials. A obtains a judgment for the amount of his claim, and has the sheriff levy execution upon the chattel in his possession. Some courts have held that if B becomes insolvent, the execution may be set aside as an unlawful preference under section 67(a)(1) of the Bankruptcy Act if obtained within four months of the petition in bankruptcy, and the unfortunate lienor is left without a security for his debt.⁷⁸ It is said that upon execution or attachment there occurs a surrender of possession to the sheriff with a consequent loss of the artisan's right to his possessory lien. Professor Brown in his text on personal property⁷⁹ states that the great majority of courts have so held. Then, in these states, the proper remedy would be for the artisan to foreclose on his lien rather than to sue on his contract. Other courts say that in the illustration above, the lienor does not lose his lien and that he may compel the return of the chattel in such circumstances.⁸⁰ The *Restatement of Security*,⁸¹ the *Restatement of Judgments*,⁸² and the Uniform Commercial Code⁸³ in matters covered by it in respect to possessory liens are all contrary to the majority view as stated by Brown and are believed to be the more modern and sounder view. No North Carolina cases have been found.

Generally, it would seem to be to the advantage of the possessory lienor to enforce his claim for services and materials by a statutory foreclosure of his possessory lien rather than by the obtaining of a judgment on the debt.

⁷⁸ BROWN § 121; 8 AM. JUR. 2D *Bailments* § 238 (1963); 15 AM. JUR. 2D *Chattel Mortgages* § 200 (1964); 35 HARV. L. REV. 475 (1922).

⁷⁹ BROWN § 121.

⁸⁰ 8 AM. JUR. 2D *Bailments* § 238 (1963); 20 MICH. L. REV. 361 (1922).

⁸¹ RESTATEMENT, SECURITY § 77(2) (1941). But in § 77(2) thereof it is expressly provided: "Where a chattel in respect of which a possessory lien exists is subsequently mortgaged and the lienor then attaches or levies upon it in enforcement of a judgment, the interest of the mortgagee is prior to that of the judgment lien."

⁸² RESTATEMENT, JUDGMENTS § 77, comment d (1942).

⁸³ UCC § 9-501, comment 6; 2 ANDERSON, UNIFORM COMMERCIAL CODE § 9-501 (1961).

G. Priorities

The decisions of the various jurisdictions have in the past differed widely on the question of priority as between the lien of an artisan for repairs and the prior perfected security interest of another on the same chattel.⁸⁴ The diversity may be largely attributed to the fact that many of the decisions have taken into consideration the statutory provisions relating to artisans' liens. In the absence of statutes to the contrary, the general rule has been that a person in possession of a chattel already encumbered cannot, without authority, create a lien preferred over the claims of the prior encumbrancer.⁸⁵ Normally the priority of legal interests is determined by the order of their creation. Thus, the holder of a filed chattel mortgage or conditional sales contract would in most states at common law prevail over an artisan claiming a possessory lien for repairs created by the chattel mortgagor or conditional buyer.

Pursuant to the provisions of section 44-2 of the North Carolina General Statutes, in the text of this article accompanying note 22, it has been held by the North Carolina Supreme Court that an artisan acquires a lien for repairs superior to the existing lien of a conditional seller or chattel mortgagor if the repairs were authorized by the owner or legal possessor of the chattel.⁸⁶ This is because the North Carolina statute expressly stipulates that the possessory lien exists if the work is done or materials are furnished at the request of "the owner or legal possessor" of the personal property. A bailee, conditional buyer, chattel mortgagor, or other person in legal possession of an encumbered chattel is a "legal possessor" and has an implied statutory authority to request the repairs.

The North Carolina statute is applicable only so long as the possession of the chattel is retained by the mechanic or artisan. If he surrenders possession of the chattel, he loses his lien.⁸⁷

Section 9-310 of the Uniform Commercial Code, which is the

⁸⁴ For a summary and discussion of the law generally throughout the United States, see Lee, *Power of Possessor of Personal Property to Create Lien for Repairs and Storage Charges Superior to Existing Interests of Others*, 90 U. PA. L. REV. 910 (1942).

⁸⁵ *Ibid.*; RESTATEMENT, SECURITY § 76 (1941); BROWN § 112; 15 AM. JUR. 2d *Chattel Mortgages* § 169 (1964); Annot., 36 A.L.R.2d 198 (1954); Annot., 36 A.L.R.2d 229 (1954).

⁸⁶ See cases cited in note 23 *supra*.

⁸⁷ *Barbre-Askew Fin., Inc. v. Thompson*, 247 N.C. 143, 100 S.E.2d 381 (1957); *Broadfoot Iron Works, Inc. v. Bugg*, 208 N.C. 284, 108 S.E. 62 (1935); *McDougal v. Crapon*, 95 N.C. 292 (1886).

only section of the Code governing artisans' liens,⁸⁸ gives to the artisan's possessory lien a priority over earlier perfected security interests, unless the artisan's lien is created by a statute which expressly provides otherwise. This section provides:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.⁸⁹

The above section of the Uniform Commercial Code does not repeal or change the existing pre-Code law of North Carolina in respect to artisans' liens.⁹⁰ In North Carolina the statutory artisan's lien is not expressly otherwise than the general provision of the Code. In fact, as we have seen,⁹¹ the decisions in this state have for many years been giving the artisan's possessory lien a priority over the perfected security interest of others.

II. LIENS OF AGISTERS AND LIVERY STABLE KEEPERS

An agister is a person who receives and pastures horses, cattle, or similar animals on his land for an agreed compensation.⁹² An agistment is a species of bailment. At common law one who feeds or cares for the animals of another as an agister has no lien thereon for his services.⁹³

The parties to a contract for the care of animals may create a lien that the courts will enforce, and in many states there is legislation conferring upon agisters a statutory lien.⁹⁴ But in the absence of a contractual stipulation or an express statute, one who feeds and cares for an animal does not possess a lien thereon. There is much diversity in the language of the statutes in the several states, and

⁸⁸ UCC § 9-104(c).

⁸⁹ UCC § 9-310.

⁹⁰ See 2 ANDERSON, UNIFORM COMMERCIAL CODE §§ 9-310.1, -310.2 (1961); 2 HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 712 (1964).

⁹¹ See text accompanying note 86 *supra*.

⁹² 3 C.J.S. *Animals* § 15 (1936); 4 AM. JUR. 2D *Animals* § 72 (1962).

⁹³ *Mauney v. Ingram*, 78 N.C. 96 (1878); RESTATEMENT, SECURITY § 61 (1941) (special note at end thereof); BROWN § 108; AMES, *History of Assumpsit*, 2 HARV. L. REV. 53, 62 (1888); 26 MO. L. REV. 105 (1961); 4 AM. JUR. 2D *Animals* § 74 (1962); 3 C.J.S. *Animals* § 21 (1936); Annot., 107 A.L.R. 1072 (1937).

⁹⁴ 3 C.J.S. *Animals* § 21 (1936); 4 AM. JUR. 2D *Animals* § 74 (1962).

being in derogation of the common law, they have at times been strictly construed.⁹⁵

North Carolina has a statute that provides as follows:

Every keeper of livery, sale, or boarding stables has a lien upon and the right to retain the possession of every horse, mule, or other animal belonging to the owner or person contracting for the board and keep of any horse, mule, or other animal, for any and all unpaid amounts due for board of any horse, mule, or other animal. This lien shall not attach for amounts accruing for a longer period than ninety days from the reception of such property or from the last full settlement; nor does this lien apply if the property is removed from the possession of said keeper of said livery, sale, or boarding stable.⁹⁶

Other sections of the above statute set forth the method of enforcement of the lien by public sale.⁹⁷

A statute of a somewhat different nature in North Carolina gives to the owner of a studhorse, jack, bull, or boar a lien upon the colts, calves, or pigs until the price charged for the "season" of the female animal is paid.⁹⁸ The action to enforce the lien must be instituted within twelve months from the birth of the animals.⁹⁹

There have been no cases reaching the supreme court involving any of the above North Carolina statutes.

III. STORAGE LIENS OF MOTOR VEHICLES

Under the common law a garage owner has no lien for storage charges.¹⁰⁰ The reason frequently given is that no value has been added to the bailed motor vehicle as a consequence of its storage.¹⁰¹ A lien, however, has today in many states been expressly granted by statute.¹⁰² But it has generally been held that a statute granting

⁹⁵ *Ibid.*

⁹⁶ N.C. GEN. STAT. § 44-33 (1950).

⁹⁷ N.C. GEN. STAT. §§ 44-34, -35 (1950).

⁹⁸ N.C. GEN. STAT. §§ 44-36, -37 (1950).

⁹⁹ *Ibid.*

¹⁰⁰ BROWN § 108; 8 AM. JUR. 2D *Bailments* § 227 (1963); 24 AM. JUR. *Garages, Parking Stations, and Liveries* § 55 (1939); 8 C.J.S. *Bailments* § 35 (1962); Annot., 48 A.L.R.2d 894, at 901 (1956). It has generally been held that no lien exists for the services rendered in towing an automobile to a garage. Annot., 62 A.L.R. 1485, at 1493 (1929).

¹⁰¹ BROWN § 108.

¹⁰² There is considerable variance in the language of the statutes in the several states. In some states artisans and bailees generally are given a lien for storage. Accordingly, garage owners in these states possess liens for storage. In several of the states the lien vests even though the garage

a lien to repairmen for repairs made, or materials furnished, to a motor vehicle does not embrace charges for storage of a motor vehicle by a garage keeper.¹⁰³

A statute expressly conferring upon a garage keeper a lien for storage charges is said to be a specific lien on the vehicle stored and not a general lien.¹⁰⁴

If a motor vehicle is left with a public warehouseman strictly for storage, without any agreement that the automobile may be continuously or occasionally used by the owner during such period, it would seem that a warehouseman's lien would arise and that the transaction would be controlled by section 7-209 and 7-210 of the Uniform Commercial Code.¹⁰⁵ These facts would arise when automobiles are placed in so-called "dead storage." Section 7-102(1)(h) of the Uniform Commercial Code defines a warehouseman as "a person engaged in the business of storing goods for hire." The typical garage keeper, who is engaged in the repairing and servicing of automobiles, does not at the same time hold himself out as engaging in the business of storing motor vehicles for hire. It is standard practice for a warehouseman to issue warehouse receipts for stored property.¹⁰⁶

If "the owner of a garage, storage lot or other place of storage" under section 20-77(d) of the North Carolina General Statutes is a warehouseman, as that term is defined in section 7-102(1)(h) of the Uniform Commercial Code (section 25-7-102(1)(h) of the General Statutes), it would seem that he has a lien pursuant to section 7-209 of the Uniform Commercial Code for the storage of any motor vehicle covered by a warehouse receipt. The enforcement of the lien under these circumstances would be pursuant to section 7-210 of the Uniform Commercial Code (section 25-7-210 of the General Statutes).¹⁰⁷ On the other hand, if such person should

owner voluntarily surrenders possession. Statutory citations may be found in Lee, *supra* note 84, at 921. Cited cases dealing with the statutes may be found in Annot., 48 A.L.R.2d 894, at 898 (1956).

¹⁰³ Annot., 48 A.L.R.2d 894, at 900 (1956).

¹⁰⁴ *Id.* at 899-900.

¹⁰⁵ See 24 AM. JUR. *Garages, Parking Stations, and Liveries* § 55 (1939). Under § 7-209(4) of the Uniform Commercial Code "a warehouseman loses his lien on any goods which he voluntarily delivers."

¹⁰⁶ BRAUCHER, DOCUMENTS OF TITLE 2 (1958).

¹⁰⁷ The warehouseman's lien is not regarded as an artisan's lien for purpose of gaining the special priority given by § 9-310 of the Uniform Commercial Code to artisans. It is not good against the holder of a perfected security unless he has authorized the bailor to store the property. 1 HAWK-

not be deemed a warehouseman, as that term is defined in section 7-102(1)(h) of the Uniform Commercial Code, it would seem that he has a lien pursuant to General Statutes section 20-77(d), and the enforcement of this lien would be pursuant to section 20-77(d).¹⁰⁸

Section 20-77(d) provides: "The owner of a garage, storage lot or other place of storage shall have a lien for his lawful and reasonable storage charges on any motor vehicle deposited in his place of storage by the owner or any other person having lawful authority to make such storage, and may retain possession of the motor vehicle until such storage charges are paid." The statute sets forth the procedures to be followed by the storage keeper when he sells the motor vehicle to satisfy his lien.

Although there have been no decisions construing the North Carolina statute, it would seem that a garage keeper or parking lot operator thereunder could acquire a valid storage lien on a motor vehicle only where such storage has been requested by the owner or an agent of the owner authorized to place the motor vehicle in storage. A thief or a bailee of the automobile would not have an implied authority to create a storage lien that could be asserted against the owner;¹⁰⁹ and in most jurisdictions, in the absence of a lien statute expressly providing to the contrary, neither a conditional buyer nor a mortgagor may create a lien that can be asserted against the conditional seller or mortgagee.¹¹⁰ But pursuant to the provisions of section 9-310 of the Uniform Commercial Code (General

LAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 324 (1964); UCC § 7-209, comment 3.

¹⁰⁸ It would seem that the storage of a motor vehicle could be considered a service and that the same is expressly excluded from the application of Article 9 of the Uniform Commercial Code. See UCC § 9-104(c) and comment 4. Section 9-310 of the Uniform Commercial Code, however, would probably determine the priority between such lien and other consensual security interests covered by Article 9—giving to the storage lienor in North Carolina, who is not a warehouseman, a priority over a perfected security interest, since the North Carolina statute creating the lien does not expressly provide otherwise, if the storage service is furnished in the ordinary course of the lienor's business and the motor vehicle remains in his possession.

¹⁰⁹ Annot., 48 A.L.R.2d 894, at 911 (1956).

¹¹⁰ *Id.* at 909-11. The cases are in conflict where the automobile has been stored with a garage keeper at the request of a public officer, such as a police officer, sheriff or highway patrolman. 9 MERCER L. REV. 372 (1958); 48 A.L.R.2d 894, at 912-13 (1956); 24 AM. JUR. *Garages, Parking Stations, and Liveries* § 56 (1939).

Statutes section 25-9-310) a garage keeper in North Carolina, when the motor vehicle is "deposited in his place of storage by the owner or any other person having lawful authority to make such storage," probably acquires a lien for storage charges with a priority over even a perfected security interest.¹¹¹

It should be observed that the persons who may create an artisan's lien for repairs under General Statutes section 44-2¹¹² are different from those who may create a storage lien of a motor vehicle under section 20-77(d). The artisan's lien may be created by the "owner or legal possessor," whereas the storage lien for a motor vehicle must be created by the "owner or other person having lawful authority to make such storage." Thus, if *A* rents or loans the use of his automobile to *B*, and the automobile is wrecked in a collision, and *B* takes the automobile to the garage of *C* and requests that necessary repairs be made and that the repaired automobile be kept in storage until he returns, *C* may assert a lien against *A* for the repairs but not for the storage.

IV. ATTORNEY'S LIENS

An attorney at law has two kinds of liens: (1) the retaining lien and (2) the charging lien. The first type is a general lien, which gives to the attorney the right to retain possession of all papers, books, documents, securities, moneys, and property of his client until he has been paid the general balance due him for professional services.¹¹³ The second type is a specific lien, which entitles the attorney to receive from the judgment he has obtained for his client compensation for services performed and expenses incurred in connection with the particular case.¹¹⁴

Both the retaining lien and the charging lien are recognized by the common law.¹¹⁵ In many states there are statutes governing the

¹¹¹ See note 108 *supra*.

¹¹² This statute has been set forth in the text of this article accompanying note 22 *supra*.

¹¹³ BROWN § 115; RESTATEMENT, SECURITY § 62 (1941); RESTATEMENT (SECOND), AGENCY § 464 (1958); 7 AM. JUR. 2D *Attorney at Law* § 273 (1963); 7 C.J.S. *Attorney and Client* §§ 210, 225 (1937); Annot., 3 A.L.R.2d 148 (1949); 65 COLUM. L. REV. 296, at 300 (1965). An attorney has no attorney's lien, as such, on papers or securities of his client not received by him in his professional capacity. Annot., 2 A.L.R. 1488 (1919).

¹¹⁴ BROWN § 115; RESTATEMENT (SECOND), AGENCY § 464 (1958); 7 AM. JUR. 2D *Attorney at Law* § 281 (1963); 65 COLUM. L. REV. 296, at 300 (1965).

¹¹⁵ BROWN §§ 115-16; RESTATEMENT (SECOND), AGENCY § 464 (1958);

liens of attorneys. In most instances the legislation is merely declaratory of the common law, but at other times it has worked a change in the scope of the lien.¹¹⁶ Legislation dealing with the charging lien is more common than legislation dealing with the retaining lien.¹¹⁷ There are no statutes dealing with either lien in North Carolina.

A. Retaining Lien

An attorney's retaining lien is a possessory lien.¹¹⁸ It may be lost by a voluntary parting with the possession of the items to which it has become attached.¹¹⁹ Being a passive lien, it cannot ordinarily be actively enforced either at law or in equity.¹²⁰ A retaining lien is primarily only of "nuisance value" to the attorney, a leverage by which he may at times coerce his client to pay for services rendered.

The attorney's lien is not dependent upon the existence of an express agreement between the attorney and his client.¹²¹ No kind of notice is required to render it operative.¹²² It is valid against the creditors of the client, his assignees, his trustee in bankruptcy, and any receiver appointed for the client.¹²³

An attorney has the right to apply against the general balance of the account owed to him by his client all moneys collected by him for his client in the course of his employment.¹²⁴ Although generally referred to as a lien, this is a right that strictly is more in the nature of a setoff.¹²⁵

7 AM. JUR. 2D *Attorney at Law* §§ 272, 281 (1963); 7 C.J.S. *Attorney and Client* § 210 (1937); 65 COLUM. L. REV. 296, at 298 (1965); Annot., 120 A.L.R. 1243 (1939); 3 A.L.R.2d 148 (1949). As to the right of an attorney to assert a lien when employed by the personal representative of a decedent, see Annot., 50 A.L.R. 657 (1927).

¹¹⁶ 65 COLUM. L. REV. 296, at 301 (1965); 45 IOWA L. REV. 147 (1959); 7 AM. JUR. 2D *Attorney at Law* § 282 (1963); Annot., 120 A.L.R. 1243 (1939). As to the conflict of laws questions arising when there are two or more states involved, see Annot., 59 A.L.R.2d 564 (1958).

¹¹⁷ 65 COLUM. L. REV. 296, at 301 (1965); 45 IOWA L. REV. 147 (1959).

¹¹⁸ See note 113 *supra*.

¹¹⁹ 7 AM. JUR. 2D *Attorney at Law* § 279 (1963); 7 C.J.S. *Attorney and Client* § 224 (1937).

¹²⁰ 7 AM. JUR. 2D *Attorney at Law* § 280 (1963); Annot., 111 A.L.R. 487 (1937); 3 A.L.R.2d 148 (1949).

¹²¹ 7 AM. JUR. 2D *Attorney at Law* § 272 (1963).

¹²² *Id.* § 277.

¹²³ *Id.* §§ 277-78.

¹²⁴ BROWN § 115; 7 AM. JUR. 2D *Attorney at Law* 274 (1963); Annot., 173 A.L.R. 429 (1948).

¹²⁵ BROWN § 115.

The lien does not exist on money or property that has been delivered to an attorney for specific purposes inconsistent with a lien.¹²⁶ Thus, money delivered to an attorney for the express purpose of paying the same over to a third party in satisfaction of the latter's claim against the client is not subject to the attorney's lien.¹²⁷

An attorney loses his retaining lien if he withdraws from the case without just cause or if he is discharged by his client with just cause.¹²⁸ But an attorney does not lose his lien if he is discharged by his client without good cause.¹²⁹

An attorney ordinarily cannot be compelled to allow an inspection of the papers and documents on which he has a retaining lien or to produce them in evidence where his lien will thereby be impaired.¹³⁰ It has generally been held that he is not required to produce them in court on a subpoena duces tecum issued on behalf of

¹²⁶ *Ibid.*; RESTATEMENT, SECURITY § 62, comment *i* (1941); 7 AM. JUR. 2D *Attorney at Law* § 275 (1963); 7 C.J.S. *Attorney and Client* § 226 (1937).

¹²⁷ BROWN § 115.

¹²⁸ 65 COLUM. L. REV. 296, at 304 (1965); 7 AM. JUR. 2D *Attorney at Law* § 278 (1963); Annot., 3 A.L.R.2d 148, at 159 (1949). An attorney of record is not at liberty to abandon his client's case without (1) justifiable cause, (2) reasonable notice to his client, and (3) the permission of the court. *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965).

¹²⁹ 7 C.J.S. *Attorney and Client* § 219 (1937); Annot., 3 A.L.R.2d 148, at 150-54 (1949); cf. 65 COLUM. L. REV. 296, at 306-07 (1965). However, without making a distinction as to whether the attorney has been discharged by his client with or without just cause, the Ethics Opinions of the Council of the North Carolina State Bar have stated: "When client discharges attorney in the middle of litigation and requests that attorney return to client his papers, attorney cannot decline to return them until his fee is paid in full." Opinion No. 7 (April 11, 1943), appearing in 241 N.C. 756 (1955), and Opinion No. 473 (January 15, 1965), appearing in 12 THE NORTH CAROLINA BAR 13 (1965). Where an attorney is employed to represent a client in specific matters at a specified fee, and before the matters are concluded, the attorney is discharged by the client without just cause, and the attorney remains ready, able and willing to comply with the contract, it has been held in North Carolina that the attorney may recover of the client the full contract fee, and not merely the reasonable value of his services to the date of his discharge. *Higgins v. Beaty*, 242 N.C. 479, 88 S.E.2d 80 (1955), 54 A.L.R.2d 600, 34 TEXAS L. REV. 1082 (1956). The decisions elsewhere are in conflict. 34 TEXAS L. REV. 1082 (1956); 54 A.L.R.2d 600 (1955). The measure or basis of recovery by an attorney under a contingent fee contract who is discharged without fault on his part is found upon a variety of theories. No North Carolina cases have been found. 1960 WIS. L. REV. 156; Annot., A.L.R. 231 (1942). A critical analysis of the contingent fee appears in Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability*, 47 IOWA L. REV. 942 (1962).

¹³⁰ RESTATEMENT, SECURITY § 62, comment *i* (1941), Explanatory Notes, comment 2 at 155-57 (Tent. Draft No. 3, 1939). Annot., 3 A.L.R.2d 148, at 150-54 (1949).

a former client for use in a separate action against a third party.¹³¹ The courts, however, will usually require the attorney to deliver up the papers and documents on which he has a retaining lien if the former client furnishes adequate bond or other security for the payment of what may be due or subsequently found to be due to the attorney.¹³²

There are a few extreme situations where a court in its sound discretion will compel the attorney to waive his retaining lien on the basis of public policy¹³³—for example, where the attorney withholds from probate the will of a decedent or withholds from a former client papers and documents needed in his defense to a charge of murder or other serious crime.¹³⁴

B. Charging Lien

The basic reasoning warranting the imposition of the attorney's charging lien is that the client has received or benefited through the skill and services of the attorney. The charging lien attaches to the fruits of the attorney's skill and labor. It is not a possessory lien, but rather a lien that the law impresses upon the judgment which the attorney has obtained for his client. The lien does not extend to compensation or indemnity on account of other transactions conducted by the attorney for his client.

The charging lien may be created by an express agreement between the attorney and his client.¹³⁵ In fact, nearly all the cases before the North Carolina Supreme Court sustaining the lien have involved written agreements expressly so providing.¹³⁶ In *Dupree*

¹³¹ *Ibid.*; In *Ross v. Wells*, 6 Ill. App. 2d 304, 127 N.E.2d 519 (1955), the papers and documents were ordered to be produced where the action was brought by the attorney against his former client for services rendered.

¹³² 7 AM. JUR. 2d *Attorney at Law* § 279 (1963); Annot., 3 A.L.R.2d 148, at 155-59 (1949); 65 COLUM. L. REV. 296, at 307-08 (1965).

¹³³ 65 COLUM. L. REV. 296, at 305-07 (1965).

¹³⁴ *Ibid.*

¹³⁵ 7 AM. JUR. 2d *Attorney at Law* § 283 (1963); 7 C.J.S. *Attorney and Client* § 211 (1937). For the form of a provision creating an attorney's lien upon the subject matter of the action and the judgment entered therein, see 1 AM. JUR. LEGAL FORMS No. 1: 1912 (1953).

¹³⁶ *Armour Fertilizer Works v. Newbern*, 210 N.C. 9, 185 S.E. 471 (1936); *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921), 19 A.L.R. 391; *Dupree v. Bridgers*, 168 N.C. 424, 84 S.E. 696 (1915). See also *Crutchfield v. Foster*, 214 N.C. 551, 200 S.E. 395 (1938); *Roe v. Journigan*, 181 N.C. 180, 106 S.E. 680 (1921); *Mordecai v. Devereux*, 74 N.C. 673 (1876); *Patterson v. Miller*, 72 N.C. 516 (1875).

v. Bridgers,¹³⁷ the North Carolina Supreme Court said: "An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount."^{137a}

In North Carolina,¹³⁸ as well as a number of other states,¹³⁹ it has been held that an agreement with an attorney to the effect that he shall have a specific sum, or a stipulated percentage, to be paid out of the judgment will, on the recovery of the judgment, operate as an equitable assignment *pro tanto*.

In the absence of an express agreement or statute to the contrary, it has been held in North Carolina¹⁴⁰ and most other jurisdictions¹⁴¹ that an attorney does not acquire a charging lien on the specific real or personal property that he has recovered for his client or that he has successfully protected against adverse claims by third parties. This is because basically a charging lien is a lien only on the judgment obtained by the attorney on behalf of his client. In a large number of states, however, there are statutes that have given attorneys a lien on real and personal property recovered by them for their clients.¹⁴² There are no such statutes in North Carolina. But there are dicta in some of the North Carolina cases that seem to indicate this is permissible by an express agreement between the attorney and his client.¹⁴³

It has generally been held that a charging lien does not attach to a decree for alimony or support.¹⁴⁴ This does not mean, however,

¹³⁷ 168 N.C. 424, 84 S.E. 696 (1915). *Accord*, 7 C.J.S. *Attorney and Client* § 211 (1937). For forms, see 1 AM. JUR. LEGAL FORMS NOS. 1:1912-1918 (1953); 2 AM. JUR. PLEADING & PRACTICE FORMS NOS. 2:1241-1254 (1956).

^{137a} 168 N.C. at 428, 84 S.E. at 698.

¹³⁸ *Armour Fertilizer Works v. Newbern*, 210 N.C. 9, 185 S.E. 471 (1936); *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921), 19 A.L.R. 391; *Dupree v. Bridgers*, 168 N.C. 424, 84 S.E. 696 (1915). See *Crutchfield v. Foster*, 214 N.C. 551, 200 S.E. 395 (1938).

¹³⁹ BROWN § 116, n.39; 7 AM. JUR. 2d *Attorney at Law* § 283 (1963); Annot., 143 A.L.R. 204 (1943).

¹⁴⁰ *Crutchfield v. Foster*, 214 N.C. 551, 200 S.E. 395 (1938).

¹⁴¹ BROWN § 116; 4 U. FLA. L. REV. 58, at 61 (1951); Annot., 93 A.L.R. 667 (1934); Annot., 99 A.L.R.2d 451 (1965).

¹⁴² Annot., 93 A.L.R. 667 (1934).

¹⁴³ See *Crutchfield v. Foster*, 214 N.C. 551, 200 S.E. 395 (1938); *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921).

¹⁴⁴ 4 U. FLA. L. REV. 58, at 61 (1951); Annot., 55 A.L.R. 361, at 365 (1928). For a discussion of the few cases involving an attorney's right to a charging lien upon continuing payments, other than for alimony or support, to which his client becomes entitled as a result of successful litigation, see Annot., 99 A.L.R.2d 451 (1965).

that the court will not make a proper allowance for counsel fees in the action.¹⁴⁵

The authorities are in conflict whether at common law the attorney is required to give a notice of his charging lien to the judgment debtor.¹⁴⁶ It is a matter frequently governed by statute.¹⁴⁷ Even in the absence of a statute, it would seem prudent for the attorney to give a notice to the judgment debtor or his attorney of record.¹⁴⁸ If the judgment debtor, after notice of the attorney's charging lien, pays the entire amount of the judgment to his creditor, the satisfaction is invalid.¹⁴⁹ On the other hand, no notice is required to protect the attorney's charging lien against his client, execution creditors of his client who have levied on the judgment, and assignees of the judgment.¹⁵⁰ By virtue of a judgment's being non-negotiable in character, creditors and assignees of the judgment debtor acquire the judgment subject to the possibility of there being a lien, irrespective of whether they had notice of its existence.¹⁵¹

Since the charging lien of an attorney is equitable in nature, there exists a variety of means for its enforcement.¹⁵² An approved procedure is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined.¹⁵³ In *High Point Casket Co. v. Wheeler*¹⁵⁴ the attorneys agreed to represent the plaintiff on the basis of a contingent fee of one-third of the sum recovered. They were successful in obtaining a judgment on

¹⁴⁵ LEE, NORTH CAROLINA FAMILY LAW § 148 (3d ed. 1963).

¹⁴⁶ 7 AM. JUR. 2D *Attorney at Law* § 215 (1963); 7 C.J.S. *Attorney and Client* § 287 (1937).

¹⁴⁷ Annot., 85 A.L.R.2d 859 (1962).

¹⁴⁸ BROWN § 116; RESTATEMENT (SECOND), AGENCY § 464, comment n (1958). For notice forms, see 1 AM. JUR. LEGAL FORMS Nos. 1:1913-1916 (1953); 2 AM. JUR. PLEADING & PRACTICE FORMS No. 2:1241 (1956).

¹⁴⁹ BROWN § 116; RESTATEMENT (SECOND), AGENCY § 464, comment n (1958); 4 U. FLA. L. REV. 58, at 64 (1951). As to the right of the judgment debtor to avoid or postpone the enforcement of the attorney's lien by the setoff of a prior judgment or claim which he may hold against the attorney's client, see Annot., 34 A.L.R. 323 (1925); Annot., 51 A.L.R. 1268 (1927).

¹⁵⁰ BROWN § 116; 7 AM. JUR. 2D *Attorney at Law* § 215 (1963); 7 C.J.S. *Attorney and Client* § 287 (1937); 4 U. FLA. L. REV. 58, at 64 (1951). See *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921), 19 A.L.R. 391.

¹⁵¹ BROWN § 115; 4 U. FLA. L. REV. 58, at 64 (1951).

¹⁵² 7 AM. JUR. 2D *Attorney at Law* §§ 302-07 (1963); 7 C.J.S. *Attorney and Client* §§ 231-38 (1937).

¹⁵³ *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921), 19 A.L.R. 391.

¹⁵⁴ *Ibid.*

behalf of the plaintiff. Apparently thinking the plaintiff was going to avoid paying the contingent fee, the attorneys intervened by petition in the case, claiming an equitable assignment of one-third of the judgment against the defendant. The court ordered the defendant to pay one-third of the amount of the judgment to the plaintiff's attorneys.

V. INNKEEPER'S LIEN

An innkeeper at common law has a lien on all property brought on the premises by or for the guest.¹⁵⁵ The lien may extend to property of others brought to the hotel by or for the guest. It extends even to property that may have been stolen from a third person, unless the innkeeper knows that the guest is in wrongful possession.¹⁵⁶ Where the innkeeper learns of the guest's wrongful possession of any property after the guest's arrival, the innkeeper's lien on such property is limited to charges arising before the innkeeper acquires his knowledge.¹⁵⁷ It has been held that the innkeeper's lien at common law is superior to the rights of a conditional seller, chattel mortgagee, bailor, master, or principal, if the property has been brought to the hotel as the property of the guest and the innkeeper is without knowledge that another person has an interest in the property superior to the guest.¹⁵⁸

The reason for the extraordinary lien of the innkeeper at common law was based upon the principle that he should be compensated in some way for his common-law liability¹⁵⁹ of being practically an

¹⁵⁵ RESTATEMENT, SECURITY § 63 (1941); BROWN § 114; Hogan, *The Innkeepers Lien at Common Law*, 8 HASTINGS L. REV. 38 (1956); 29 AM. JUR. *Innkeepers* §§ 150-53 (1960); 43 C.J.S. *Innkeepers* § 26 (1945).

¹⁵⁶ Note 155 *supra*.

¹⁵⁷ RESTATEMENT, SECURITY § 63, comment *i* (1941).

¹⁵⁸ BROWN § 114; RESTATEMENT, SECURITY § 63 (1941); 29 AM. JUR. *Innkeepers* § 153 (1960). On the other hand, the person with an interest in the property superior to the guest may have impliedly authorized the guest to bring it to the hotel as if it were his own. In such case the innkeeper's lack of knowledge of the facts would be immaterial. This is particularly true in reference to the sample trunks of a traveling salesman. RESTATEMENT, *supra*; BROWN, *supra*. In North Carolina, as the consequence of an interpretation of a statute changing the innkeeper's common-law lien, it has been held that the statutory lien of the hotel keeper extends only to the property of the guest himself. See note 171 *infra*.

¹⁵⁹ At common law an innkeeper was an absolute insurer of the safety of the goods of a guest, except for (1) act of God, (2) act of public enemy, or (3) negligence of the guest or persons in his party. BROWN § 102; 29 AM. JUR. *Innkeepers* § 81 (1960); 43 C.J.S. *Innkeepers* § 13 (1945). See *Holstein v. Phillips*, 146 N.C. 366, 59 S.E. 1037 (1907); *Neal v. Wilcox*, 49 N.C. 146 (1856). Most states today have statutes limiting the strict

insurer of the property brought by the guest to the inn and for his duty to serve all transients who should apply at his inn to the limit of accommodations.¹⁶⁰

The word "hotel" has almost entirely replaced the older term "inn" with members of the traveling public. The two words are synonymous in meaning and are frequently employed interchangeably in statutes and decisions.¹⁶¹ Since the law is not concerned with the particular name that an establishment is called, it would seem that the modern motel could very well be included within the category of a hotel or inn.^{161a}

The innkeeper's lien does not extend to necessary wearing apparel and other personal effects while they are on the guest's person.¹⁶² "The personal indignity suffered and the possibility of serious disturbances of the peace, should the innkeeper attempt to take from the person of the guest his clothing, jewelry, or wallet, forbid the allowance of any such claim in behalf of even the favored

common-law liability of innkeepers. For North Carolina, see N.C. GEN. STAT. §§ 72-2 to -4 (1965). If a North Carolina innkeeper should fail to keep posted in every room occupied by guests, and in the office, a printed copy of the particular statute limiting liability and all regulations relating to the conduct of guests, the innkeeper is liable as at common law. *Holstein v. Phillips*, *supra*.

¹⁶⁰ BROWN § 114; RESTATEMENT, SECURITY § 63, comment c (1941).

¹⁶¹ As to what constitutes a hotel or an inn and as to who is a guest, see BROWN §§ 103-04; RESTATEMENT, SECURITY § 63, comments a & b (1941); 29 AM. JUR. *Innkeepers* §§ 2-15 (1960); 43 C.J.S. *Innkeepers* §§ 1-3 (1945).

A hotel is a house which is held out to the public as a place where transient persons who conduct themselves properly and are able and ready to pay for their entertainment will be supplied at a reasonable charge with lodging and food and such services as are necessarily incident to the use of the house as a temporary home.

RESTATEMENT, SECURITY § 63, comment a (1941). N.C. GEN. STAT. § 72-1 (1965) provides: "Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel." But for a definition of establishments having a lien, see N.C. GEN. STAT. § 44-30 (1950). In *Holstein v. Phillips*, 146 N.C. 366, 370, 59 S.E. 1037, 1039 (1907), the court states: "An inn or hotel has been properly defined as a public house of entertainment for all who choose to visit it. It is this publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is made the principal distinction between a hotel and a boarding-house"

^{161a} "In modern usage establishments which furnish lodging to transients, although designated motels, may be deemed hotels since by and large they are obliged to serve the public indiscriminately. One who maintains a motel for the purpose of furnishing lodging accommodations to travelers sustains the relation of innkeeper to the transient occupants of such buildings." 29 AM. JUR. *Innkeepers* § 11, at 14 (1960).

¹⁶² RESTATEMENT, SECURITY § 63 (1941); 29 AM. JUR. *Innkeepers* § 150 (1960).

innkeeper."¹⁰³ It has also been said that the lien does not extend to charges for harm the guest may have caused to the hotel or its furnishings.¹⁰⁴

Although there is a conflict of the few decisions on the subject, the better view seems to be that the lien of the innkeeper is specific and not general.¹⁰⁵ This, at least, is the view of the *Restatement*.¹⁰⁶ The consequence of its being a specific lien is that it does not cover charges for a prior period of entertainment.

Statutes dealing with the liens of keepers of inns and hotels have generally been enacted throughout the United States. Some, as has the one in North Carolina,¹⁰⁷ have extended the lien to keepers of boarding and lodging houses. The language of the particular statute is, of course, important in determining the kind of property that is subject to the lien.¹⁰⁸ Some statutes say that the lien is subject to property "brought upon the premises by the guest," "belonging to the guest," or "under the control of the guest." To determine the law of any one state, the statute and decisions of that state must be consulted.

The pertinent North Carolina statute provides:

Every hotel, boardinghouse keeper and lodginghouse keeper who furnishes board, bed or room to any person has the right to retain possession of and a lien upon all baggage or other property of such person that may have been brought to such hotel, boardinghouse or lodginghouse, until all reasonable charges for such room, bed and board are paid.¹⁰⁹

Other sections of the above statute, enacted in 1899, set forth a method of enforcement of the lien by public sale.¹⁷⁰

¹⁰³ BROWN § 114, at 549-50.

¹⁰⁴ RESTATEMENT, SECURITY § 63, comment f (1941).

¹⁰⁵ RESTATEMENT, SECURITY §§ 61-63 (1941), and especially the Explanatory Notes to § 63; Hogan, *supra* note 155. But see BROWN §§ 109, 114.

¹⁰⁶ See note 165 *supra*.

¹⁰⁷ N.C. GEN. STAT. § 44-30 (1950).

¹⁰⁸ BROWN § 114; 29 AM. JUR. *Innkeepers* § 154 (1960).

¹⁰⁹ N.C. GEN. STAT. § 44-30 (1950). As to who is included within the terms "boardinghouse keeper" and "lodginghouse keeper," see generally 43 C.J.S. *Innkeepers* § 26(b)(2) (1945); 29 AM. JUR. *Innkeepers* § 145 (1960). Although the proprietor of a lodginghouse is accorded a statutory lien under N.C. GEN. STAT. § 44-30 (1950), this does not make the proprietor a bailee of personal property left in a room by the owner of the personality, even though the proprietor has access to the room for janitorial and maid service. Moreover, the liability of the proprietor for the safety of the property is not that of an innkeeper. *Wells v. Wells*, 212 N.C. 656, 194 S.E. 313 (1937).

¹⁷⁰ N.C. GEN. STAT. § 44-31, -32 (1950).

In North Carolina the hotel keeper's lien is determined by statute, and not by common-law rule. The hotel keeper's lien apparently extends only to the property of the guest himself,¹⁷¹ and not, it seems, to the property of a third person, even though such property is brought into the hotel by the guest and the hotel keeper is ignorant of its true ownership.¹⁷²

In *Pate Hotel Co. v. Blair*¹⁷³ the defendant stopped as guest at the Greystone Hotel at Carolina Beach. He attempted to leave without paying a hotel bill of 93 dollars. The hotel attached his baggage and the automobile that he had parked on hotel property. Rose Investment Company and Wright (a third person) intervened and established title to the automobile. The court released the automobile from the lien of the hotel. In a two-sentence opinion, Chief Justice Stacy said:

It is provided by C.S., 2461 [now G.S. 44-30], that every hotel or innkeeper who furnishes hotel accommodations to any person shall have a lien upon "all baggage or other property of such person . . . brought to such hotel" or inn, until reasonable charges for such accommodations have been paid. The lien, however, would not attach to an automobile, the property of a third person, brought to the inn by the guest under the circumstances disclosed by the present record. *Covington v. Newberger*, 99 N.C., 523, 6 S.E., 205; *Cook v. Kane*, 13 Or., 482, 57 Am. Rep., 28, and annotation.^{173a}

VI. LANDLORD'S LIEN

At common law the landlord had, as a security for the payment of rent, the right of distress; that is, the right to seize personally the chattels of the tenant, and even of strangers, on the premises and to hold them until the rent that had become due was paid.¹⁷⁴

¹⁷¹ *Pate Hotel Co. v. Blair*, 207 N.C. 464, 177 S.E. 330 (1934). In *Covington v. Newberger*, 99 N.C. 523, 6 S.E. 205 (1888), the court recognized that an innkeeper had a lien even upon the property of a third person held by a guest and brought into the inn, with the qualification, however, that if he knew that they belonged to such third person he had no lien upon them. But this decision was rendered before the enactment of any statute on the subject.

¹⁷² *Ibid.*

¹⁷³ 207 N.C. 464, 177 S.E. 330 (1934). See generally Annot., 56 A.L.R. 1102 (1928).

^{173a} 207 N.C. at 465, 177 S.E. at 331.

¹⁷⁴ 3 TIFFANY, REAL PROPERTY §§ 918-21 (3d ed. 1939); 2 AMERICAN LAW OF PROPERTY § 9.47 (Casner ed. 1952); 32 AM. JUR. *Landlord and Tenant* §§ 613-47 (1941); Annot., 62 A.L.R. 1106 (1929); RESTATEMENT, SECURITY § 61, comment q (1941).

Later the landlord was given the power to sell the chattels so seized or distrained.¹⁷⁵ Although the landlord's remedy of distress, in either its common-law form or statutory modification, still exists in a few jurisdictions, it has generally been a form of self-help not favored in America.¹⁷⁶ The landlord's right of distress for rent has never existed in North Carolina.¹⁷⁷

Statutes in a considerable number of states confer on the landlord a statutory lien.¹⁷⁸ There is a great deal of variation in these statutes, and the legislation of a particular state must be consulted.¹⁷⁹ In referring to the statutory liens of a landlord, *American Law of Real Property* has stated:

Usually they create a lien for rent, although some include rent and advances, and restrict the lien to the property of the tenant. But the lien attaches to property exempt from execution unless the statute provides otherwise. Some statutes confer a lien only on crops raised on the premises, while others include both crops and other property. Frequently the lien extends for some period after the termination of the lease, and attachment is provided as a remedy for its enforcement. Many statutes also preserve the lien for some time after removal of the property from the premises, but in most cases it is held that the lien is lost upon sale of the goods to a bona fide purchaser.¹⁸⁰

Although the Uniform Commercial Code controls liens and other transactions in respect to agricultural crops,¹⁸¹ the landlord's lien has been expressly excluded from its provisions.¹⁸²

A landlord in North Carolina has a statutory lien on all crops raised on the leased land until rent and all advancements made toward making and saving the particular crops are paid.¹⁸³ The landlord's lien is superior to that of all other liens, and all crops raised by the

¹⁷⁵ Note 174 *supra*.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907); *Howland v. Forlaw*, 108 N.C. 567, 13 S.E. 173 (1891); *Dalgleish v. Grandy*, 1 N.C. 249 (1800). See *Hall v. Odom*, 240 N.C. 66, 68, 81 S.E.2d 129, 131 (1954).

¹⁷⁸ 1 AMERICAN LAW OF PROPERTY § 3.72 (Casner ed. 1952).

¹⁷⁹ N.C. GEN. STAT. § 42-15 (1950).

¹⁸⁰ 1 AMERICAN LAW OF PROPERTY § 3.72, at 332-33 (Casner ed. 1952).

¹⁸¹ Sections of the Uniform Commercial Code having references to crops are 2-105, 2-107, 9-102, 9-109(3), 9-204(2)(a), and 9-312(2). See generally 2 COOGAN, HAGAN & VAGTS, SECURED TRANSACTIONS UNDER U.C.C. § 16.02 (1964). Agricultural liens for advances, N.C. GEN. STAT. §§ 44-52 to -66, are expressly repealed. N.C. GEN. STAT. § 25-10-102.

¹⁸² UCC § 9-104(b).

¹⁸³ N.C. GEN. STAT. § 42-15 (1950); 20 N.C.L. REV. 216 (1942).

tenant or sharecropper are deemed to be in the possession of the landlord until the rents and advancements are paid.¹⁸⁴ The landlord's lien is acquired automatically by virtue of his status. No writing or recordation of the same is required. A person who deals with a tenant is charged with notice of the landlord's rights under General Statutes section 42-15.¹⁸⁵

The priority of the landlord's lien over other liens has apparently been preserved by the Uniform Commercial Code.¹⁸⁶ At least, a federal case arising out of Pennsylvania has so held.¹⁸⁷

The North Carolina law has been succinctly stated, as follows:

The Act of 1876-7 (G.S. 42-15) gives the landlord a preferred lien on the entire crop, regardless of whether the relationship is that of landlord-tenant or that of owner-cropper, *until the rent is paid*. The statute vests the possession of the crop in the landlord; and, under this right of possession, he has the right to use force, if necessary, to prevent unauthorized removal by the tenant. *S. v. Austin*, 123 N.C. 749, 31 S.E. 731. Moreover, if the tenant, without the consent of the landlord, willfully removes the crop without giving five days' notice of removal, before satisfying the landlord's lien, he is guilty of a misdemeanor. G.S. 42-22. In such case, the tenant is liable both civilly and criminal-ly; for the constructive possession of the crop is in the landlord. *Jordan v. Bryan*, 103 N.C. 59, 9 S.E. 135.

The landlord's lien exists by virtue of the statute. G.S. 42-15. No written instrument is required or contemplated. The registration acts, which apply only to written instruments capable of registration, have no significance relative to a landlord's lien. See *Spence v. Pottery Co.*, 185 N.C. 218, 117 S.E. 32. The statute itself gives notice to all the world of the law relative to a landlord's lien.

While not always expressly stated, it is implicit throughout the many decisions of this Court that the landlord's lien remains intact until the rent is paid and all who deal with a tenant with reference to the crop are charged with notice thereof. *Belcher v. Grimsley*, 88 N.C. 88; *Sugg v. Farrar*, 107 N.C. 123, 12 S.E.

¹⁸⁴ N.C. GEN. STAT. § 42-15 (1950); *Eason v. Dew*, 244 N.C. 571, 94 S.E.2d 603 (1956); *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954); *Rhodes v. Smith-Douglass Fertilizer Co.*, 220 N.C. 21, 16 S.E.2d 408 (1941).

¹⁸⁵ Note 184 *supra*.

¹⁸⁶ UCC § 9-104(b).

¹⁸⁷ Since before the UCC a landlord's lien in Pennsylvania for rent was given a superiority over other liens by Pennsylvania statute, the UCC does not apply to a landlord's lien and hence does not change the existing Pennsylvania law with respect thereto. *In re Matter of Einhorn Bros.*, 171 F. Supp. 655 (E.D. Pa. 1959), *aff'd sub nom.* *Einhorn Bros. v. Textile Banking Co.*, 272 F.2d 434 (3d Cir. 1959).

236; *White v. Boyd*, 124 N.C. 177, 32 S.E. 495; *Burwell v. Warehouse Co.*, 172 N.C. 79, 89 S.E. 1064; *Rhodes v. Fertilizer Co.*, 220 N.C. 21, 16 S.E. 2d 408; *Adams v. Warehouse*, 230 N.C. 704, 55 S.E. 2d 331. As stated by *Ruffin, J.*, in *Belcher v. Grimsley*, *supra*: "Nothing short of an actual payment or a complete satisfaction of the lessor's demands, meets the words of the statute or will serve to determine his lien, or title. Neither can the fact that the defendants had no notice of the plaintiff's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant can convey no better right to the property than he himself was possessed of. The principle of *caveat emptor* applies with full force to the case."

The result is that the tenant who owns the crop subject to the landlord's rights and lien, has the right to sell the crop but in the same plight in which he holds it, *i.e.*, the purchaser from the tenant takes subject to the landlord's lien and, where the crop remains on the land, the purchaser can remove the crop only by consent of the landlord until the rent is paid. A purchaser from the tenant, or an auction sales warehouse selling as his agent, is dealing with a crop with statutory notice of the lien outstanding thereon.¹⁸⁸

The landlord's lien in North Carolina exists only where the land is leased for agricultural purposes. It merely covers the crops raised on the leased premises.¹⁸⁹ Unlike the statutory lien in some of the other states, it does not extend to personal property other than crops.

Where a tenant procures crop insurance, in the absence of an agreement between the parties to the lease, the landlord's lien for rent and advances extends to all of the proceeds of the policy.¹⁹⁰

The North Carolina statute makes no distinction between the lien of the landlord for rent and "advancements made and expenses incurred in making and saving said crops," but place both upon a parity.¹⁹¹ The aggregate claim of both have a priority over all other claims on the crop. Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances for which the landlord has a lien on the

¹⁸⁸ *Hall v. Odom*, 240 N.C. 66, 69-70, 81 S.E.2d 129, 132 (1954).

¹⁸⁹ *Reynolds v. Taylor*, 144 N.C. 165, 56 S.E. 871 (1907); *Howland v. Forlaw*, 108 N.C. 567, 13 S.E. 173 (1891).

¹⁹⁰ N.C. GEN. STAT. § 42-15.1 (Supp. 1965) (enacted in 1959 and changing the rule announced in *Batts v. Sullivan*, 182 N.C. 129, 108 S.E. 511 (1921) and *People v. United States Fire Ins. Co.*, 248 N.C. 303, 103 S.E.2d 381 (1958)).

¹⁹¹ *Brooks v. Garrett*, 195 N.C. 452, 142 S.E. 486 (1928).

crops.¹⁹² "An advancement, in the sense of the statute, is anything of value pertinent for the purpose to be used directly or indirectly in making and saving the crops, supplied in good faith to the lessee by the landlord."¹⁹³ Thus, subsistence for the tenant and the members of his family and his laborers may be considered as advancements.¹⁹⁴

In *Adams v. Growers' Warehouse*¹⁹⁵ there is an excellent discussion of the manner in which marketing cards are used in the sales of tobacco under the AAA acreage allotment system. In this case the landlord had turned over to his tenant the marketing card for the farm and the tenant sold the tobacco without accounting to his landlord for any of the proceeds. The landlord was unable to recover in an action against the warehouse. By the delivery of the marketing card to the tenant, the landlord had consented to the sale of the tobacco by the tenant. The tenant's failure to account to his landlord would, undoubtedly, be a criminal offense under N.C. Gen. Stat. § 42-22.1.¹⁹⁶

A North Carolina statute, applicable only to tobacco, is as follows:

No chattel mortgage, agricultural lien, or other lien of any nature upon leaf tobacco shall be effective for any purpose for a longer period than six months after the sale of such tobacco at a regular sale in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This section shall not absolve any person from prosecution and punishment for crime.¹⁹⁷

A similar North Carolina statute, applicable only to peanuts, provides:

No chattel mortgage, agricultural lien or other lien of any nature upon peanuts shall be effective for any purpose for a longer period than six months from the date of sale by the lienor. This section shall not absolve any person from prosecution and punishment for crime.¹⁹⁸

¹⁹² *Ransom v. Eastern Cotton Oil Co.*, 203 N.C. 193, 165 S.E. 350 (1932); *Powell v. Perry*, 127 N.C. 22, 37 S.E. 71 (1900); *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891); 20 N.C.L. REV. 216, 218 (1942).

¹⁹³ *Brown v. Brown*, 109 N.C. 124, 13 S.E. 797 (1891).

¹⁹⁴ See note 192 *supra*.

¹⁹⁵ 230 N.C. 704, 55 S.E.2d 331 (1949).

¹⁹⁶ *Hall v. Odom*, 240 N.C. 66, 81 S.E.2d 129 (1954).

¹⁹⁷ N.C. GEN. STAT. § 44-69 (1950).

¹⁹⁸ N.C. GEN. STAT. § 44-69.1 (Supp. 1965).

VII. MEDICAL LIENS IN PERSONAL INJURY SUITS

A North Carolina statute permits any person or corporation furnishing drugs, hospitalization, medical supplies, and medical services to acquire a lien upon any sums recovered as damages for personal injury in any civil action in this state if the claim is filed with the clerk of the court in which the action is instituted within thirty days after the civil action is instituted.¹⁹⁹ The injured person is not required to give notice of the commencement of his civil action to those who have furnished him with drugs and medical services. As a consequence, these persons or corporations must be constantly checking the court dockets throughout the state to determine if the injured has started his action against the tort-feasor.

Such a lien as provided for above attaches also upon all funds paid in compensation for or in settlement of the injuries, whether in litigation or otherwise; and it is the duty of the person receiving the funds to pay the just and bona fide claims after having received and accepted notice thereof—provided, nothing is construed in the statute as interfering with amount due for attorney's fee and that the lien, exclusive of attorney's fees, does not exceed fifty per cent of damages recovered.²⁰⁰

¹⁹⁹ N.C. GEN. STAT. § 44-49 (1950); 25 N.C.L. REV. 450 (1947). See *LIGON, NORTH CAROLINA HOSPITAL LAW* 148-50 (1964). Cf. *Ellington v. Bradford*, 242 N.C. 159, 86 S.E.2d 925 (1955). A number of other jurisdictions have similar statutes. 58 MICH. L. REV. 1242 (1960).

²⁰⁰ N.C. GEN. STAT. § 44-50 (1950).