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Commercial Law—Materialmen's Liens in North Carolina: The Problem of the Overeager Purchaser

The overeager owner and the overeager purchaser are figures well known to construction lenders and title insurers.¹ They are problem children of the construction industry. The overeager owner jeopardizes the lender's efforts to obtain a first priority lien by permitting construction to commence before the lender can conduct the loan closing and record his mortgage or deed of trust.² The overeager purchaser is even more daring; he orders the commencement of construction before he ever acquires legal title to the property.³ The question whether the overeager purchaser's act may give rise to a materialman's statutory lien, which would take precedence over a construction lender's deed of trust filed simultaneously with the purchaser's deed, is a question not clearly answered in the General Statutes or resolved by North Carolina's appellate courts.⁴

1. See Urban & Miles, *Mechanics' Liens for the Development of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 WAKE FOREST L. REV. 283, 329 (1976) and examples cited *infra* notes 2-3. The terms "overeager owner" and "overeager purchaser" are not found within the cited opinions, but are inventions employed throughout the text for purposes of clarity and brevity.

2. N.C. GEN. STAT. § 44A-8 (1976) (emphasis added) provides:

Any person who performs or furnishes labor . . . or . . . materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done . . . or material furnished pursuant to such contract.

N.C. GEN. STAT. § 44A-10 (1976) provides: "Liens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien." It is settled law that when an "owner" contracts with a materialman and causes work to commence before the lender records his security instrument, the materialman has the prior lien. *E.g.*, Frank H. Connor Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Sides v. Tidwell, 216 N.C. 480, 5 S.E.2d 316 (1939); 2 G. GLENN, MORTGAGES, DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND § 352, at 1459 (1943). But if the security instrument is recorded prior to the first furnishing of labor or materials, the lender is presumed to have the prior lien. *E.g.*, McAdams v. Piedmont Trust Co., 167 N.C. 494, 83 S.E. 623 (1914). *Cf.* Frank H. Connor Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978) (claimant had commenced visible improvement of the site by clearing and staking the outline of the future construction before lender recorded deed of trust; materialman was awarded the priority lien; court's attention to the date of recordation of the deed of trust implies that, if the deed of trust had been recorded first, the statutory lien would have been subordinate).

3. *E.g.*, Sontag v. Abbott, 140 Colo. 351, 344 P.2d 961 (1959); Society Linnea v. Wilbois, 253 Iowa 953, 113 N.W.2d 603 (1962); Noll v. Graham, 138 Kan. 676, 27 P.2d 277 (1933); Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor, 576 S.W.2d 794 (Tex. 1978); Tomlinson v. Higginbotham Bros. & Co., 229 S.W.2d 920 (Tex. Civ. App. 1950).

4. See generally Annot., 52 A.L.R. 693 (1928). The courts have, however, ruled that an overeager purchaser could not cause a materialman's lien to take priority over a purchase money deed of trust when the purchase money security instrument was executed, delivered, and recorded with the deed as a part of the same transaction. *Smith Builders Supply v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949). When the same-transaction test was not met, the materialman's lien took priority. *Pegram-West, Inc. v. Hiatt Homes*, 12 N.C. App. 519, 184 S.E.2d 65 (1971).

Smith Builders and *Pegram-West* arose under the former materialman's lien statute, N.C. GEN. STAT. § 44-41 (repealed 1969), and may have little precedential value under the current statute. Furthermore, both suits involved purchase money deeds of trust rather than construction loans. Purchase money deeds of trust have received special treatment in priority contests by operation of the doctrine of transitory (or instantaneous) seisin, which has yet to be applied to a con-

The dilemma should not be left to the courts to resolve; a statutory amendment should be enacted to clarify the matter. By amending G.S. 44A-7(3)⁵ and 44A-10⁶ to provide that the term "owner" shall be deemed to include persons who acquire title to the improved premises after contracting for the improvements with the claimant, and that properly perfected materialmen's liens shall take priority over all security instruments other than purchase money instruments filed subsequent to the claimant's first visible commencement of work, the legislature could accomplish its dual goals of providing both certainty and equity⁷ to statutory lien claimants. Should the legislature fail to correct this deficiency, however, the North Carolina courts may eventually be faced with the task of sifting through opinions from other jurisdictions in search of guidance to reach an equitable end.

If a court is faced with the task of construing North Carolina's materialman's lien statute in a case involving an overeager purchaser, it will find that the language of the current statute is ambiguous⁸ and may be construed to permit any one of three mutually inconsistent results. First, the statute may cause a materialman's lien to attach to a purchaser's subsequently acquired title, and to take priority over a construction deed of trust filed simultaneously with the deed.⁹ Second, the statute may cause the materialman's lien to at-

struction mortgage in North Carolina. See G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW* § 9.1 (3d ed. 1979); Urban & Miles, *Mechanics' Lien for the Development of Real Property: Recent Developments in Perfection, Enforcement and Priority*, 12 WAKE FOREST L. REV. 283, 329-30 (1976); Annot., 72 A.L.R. 1516 (1931), supplemented by Annot., 73 A.L.R.2D 1407 (1960); see also 2 G. GLENN, *MORTGAGES, DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND* § 353 (1943); 1 L. JONES, *A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY* § 743, at 1110 (8th ed. 1928); 10 G. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 5224, at 420-21 (1957). But see Sontag v. Abbott, 140 Colo. 351, 344 P.2d 961 (1959) (if the legislature had intended the purchase money deed of trust to be exempt from operation of materialman's lien statute, it would have so provided).

In both *Smith Builders* and *Pegram-West* it was assumed that the materialman's lien should attach to the overeager purchaser's after-acquired title. The issue whether the lien should arise at all was not discussed in either opinion. Apparently the two courts and all parties agreed that an overeager purchaser had the power to cause the lien to attach, but were divided over whether it should take priority over a purchase money deed of trust.

Because the subject of priority contests between materialmen and purchase money lenders has already been extensively treated by other authors, see authorities cited *supra*, this note will focus primarily on the contest between construction lenders and materialmen.

5. See *infra* note 8; see also *infra* text accompanying note 99 for proposed amendment.

6. See *supra* note 2; see also *infra* text accompanying note 100 for proposed amendment.

7. See *infra* note 12.

8. N.C. GEN. STAT. § 44A-8 (1976) is ambiguous in that it is unclear whether a purchaser who orders the commencement of work before he acquires title is an "owner" within the meaning of the statute. N.C. GEN. STAT. § 44A-7(3) (1976) purports to define the term "owner," but still leaves the instant question unresolved:

Unless the context otherwise requires in this Article . . . (3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

N.C. GEN. STAT. § 44A-7(3) (1976) (emphasis added). It remains to be seen whether the North Carolina appellate courts will find an overeager purchaser to have an "interest" that will support the attachment of a materialman's lien.

9. See, e.g., Sontag v. Abbott, 140 Colo. 351, 344 P.2d 961 (1959); Service Lumber & Supply Co. v. Cox, 98 Fla. 405, 123 So. 820 (1929); Northwestern Nat'l Bank v. Metro Center, 303 N.W.2d 395 (Iowa 1981); Noll v. Graham, 138 Kan. 676, 27 P.2d 277 (1933); Chicago Lumber Co.

tach, but not to take priority over the lender's lien.¹⁰ Third, the materialman's lien may not arise at all if an overeager purchaser is not deemed to be an owner within the statutory definition of that term.¹¹ The first result is preferable since it comports with the purpose of the materialman's lien statute,¹² but it is a difficult one to reach because it requires both a finding that an overeager purchaser is an owner for purposes of G.S. 44A-8 and a holding that construction lenders are not entitled to the benefit of the doctrine of instantaneous seisin.¹³

To illustrate the problem, imagine that *A* has entered into an agreement to purchase from *O* a lot on which he intends to build a dwelling that he hopes to sell later. *A*, having only enough capital to pay the purchase price of the unimproved lot, arranges to receive from an institutional lender a construction

v. Fretz, 51 Kan. 134, 32 P. 908 (1893); Enlow v. Brown, 357 S.W.2d 608 (Tex. Civ. App. 1962); Tomlinson v. Higginbotham Bros. & Co., 229 S.W.2d 920 (Tex. Civ. App. 1950); Breckenridge City Club v. Hardin, 253 S.W. 873 (Tex. Civ. App. 1923); see also Anderson v. Berg, 174 Mass. 404, 54 N.E. 877 (1899) (materialman's lien attaches to the after-acquired title and relates back to the making of the contract if the overeager purchaser ratifies the contract after he acquires title and before the work is completed); Courtemanche v. Blackstone Valley St. Ry., 170 Mass. 50, 48 N.E. 937 (1898) (same); Callaway v. Evanson, 272 Wis. 251, 75 N.W.2d 456 (1956) (court's ruling allowing the materialman's lien to attach to the overeager purchaser's subsequently acquired interest in the improved premises was expressly mandated by the statute).

10. *E.g.*, Sebastian Bldg. & Loan Ass'n v. Minten, 181 Ark. 700, 705, 27 S.W.2d 1011, 1013 (1930); Society Linnea v. Wilbois, 253 Iowa 953, 113 N.W.2d 603 (1962); Rochford v. Rochford, 188 Mass. 108, 74 N.E. 299 (1905).

11. *E.g.*, Corbett v. Greenlaw, 117 Mass. 167 (1875); Hayes v. Fessenden, 106 Mass. 228 (1870); Howard v. Veazie, 69 Mass. (3 Gray) 233 (1855); De Ronde v. Olmsted, 47 How. Pr. 175 (N.Y.C.P. 1874); Mahan v. Biting, 103 W. Va. 449, 137 S.E. 889 (1927).

12. The purpose of the materialman's lien statute is to protect the laborer's interest in the product of his own toil: "the [materialman] should have the benefit of the labor and materials that go into the property and give it value, rather than the mortgagee, who has taken his mortgage during the progress of the work." 1 L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 603, at 834 (8th ed. 1928).

The sole purpose of the relation back feature of the lien, see *supra* note 2, seems to be to rank lien priority according to a logical, objective order. Certainty and specificity were the draftsmen's goals. As one of the draftsmen has commented, "It is conceivable that the presently existing statutory framework in some instances sacrifices equity for certainty, but it is submitted that uncertainty can produce greater inequities." Humphrey, *Position, Priorities and Protection of Parties & Statutory Liens*, in 1975 N.C. BAR ASS'N FOUND. INST. ON TROUBLED REAL ESTATE VENTURES AND NEW USE AND OWNERSHIP CONCEPTS IV-1, -6 to -7.

To implement the purposes of the materialman's lien statutes, the courts must construe the statutes in a manner that will further the legislature's intent and purposes. They are hampered in this pursuit by vague and contradictory common-law rules of statutory construction. Generally, statutes in derogation of the common law are construed strictly, but a remedial statute should receive a construction that will advance the remedy. *Wilmington Shipyard v. North Carolina State Highway Comm'n*, 6 N.C. App. 649, 171 S.E.2d 222 (1969); see *Greene v. Town of Valdese*, 306 N.C. 79, 291 S.E.2d 630 (1982) (intent of legislature controls interpretation of a statute); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979).

The cases cited in the preceding paragraph do not concern materialman's liens, and no North Carolina case addresses the issue whether a materialman's lien statute should be construed strictly or liberally. Most jurisdictions hold that materialman's lien acts are remedial in nature and should be construed liberally. *E.g.*, *Mid-State Contractors v. Halo Dev. Corp.*, 342 So. 2d 1078 (Fla. Dist. Ct. App. 1977); *Polivka Logan Designers v. Ende*, 312 Minn. 171, 251 N.W.2d 851 (1977); *Stone Fort Nat'l Bank v. Elliott Elec. Supply Co.*, 548 S.W.2d 411 (Tex. Civ. App. 1977). Some jurisdictions construe the statutes strictly when determining whether a lien attaches, and liberally once the lien is deemed to have attached. *E.g.*, *Eastern Constr. Co. v. Cole*, 52 Mich. App. 346, 217 N.W.2d 108 (1974); *Earp v. Vanderpool*, 232 S.E.2d 513 (W. Va. 1977).

13. See *infra* notes 73-96 and accompanying text.

loan to be secured by a first deed of trust on the property. *A* expects to repay the loan out of the proceeds of the sale of the completed structure and retain any excess for himself. Three weeks later the closing goes smoothly, but during the interval *A* has taken advantage of favorable weather conditions by hiring workers to lay the foundation and frame for the house. Eventually, cost overruns and mismanagement exhaust the construction fund and deplete *A*'s personal assets to the point that he files for bankruptcy. The lender institutes foreclosure proceedings. The unpaid materialmen perfect their claims, and *M*, who commenced work prior to the closing and recordation of the deed of trust, claims to have priority over the lien of the deed of trust.

The North Carolina materialman's lien statute, as it is currently phrased, provides for a lien on real property improved by the materialman if the labor or materials are furnished pursuant to a contract between the claimant and the owner of the improved premises.¹⁴ If *A* is found to be an owner within the meaning of the materialman's lien statute, *M* will have a priority lien at least to the extent of *A*'s interest at the time the materialman's contract was made or the work commenced,¹⁵ unless the doctrine of instantaneous seisin operates to subordinate it.¹⁶ If *A* is not an owner prior to acquisition of title, *M* may have either a subordinate lien¹⁷ that will be extinguished by the lender's foreclosure on its lien, or he may have no lien at all.¹⁸ The threshold problem of the overeager purchaser, then, is whether he is an owner for purposes of the statute creating such a lien.

To qualify as an owner, G.S. 44A-7 requires that *A* must have "an interest in the real property improved" and be a person "for whom the improvement [was] made and who ordered the improvement to be made,"¹⁹ or be one who is so situated that a fair reading of the statute would require that he be deemed an owner.²⁰ The portion of G.S. 44A-7 that purports to define the term "owner" has not been construed by North Carolina's appellate courts. Other jurisdictions, however, have reported opinions in similar circumstances, and the results run the gamut of all the available possibilities.

Most jurisdictions agree that an enforceable executory contract to purchase the real estate provides sufficient equitable "interest" to give the pur-

14. N.C. GEN. STAT. § 44A-8 (1976). See *supra* note 2 for pertinent portion.

15. See *supra* note 9 and accompanying text.

16. See *infra* notes 74-97 and accompanying text.

17. See *supra* note 10 and accompanying text; see also *Inman v. Orndorff*, 596 S.W.2d 236 (Tex. Civ. App. 1980).

18. See *supra* note 11 and accompanying text. The scope of this note is limited to an inquiry into the purchaser's possible status as an owner under N.C. GEN. STAT. § 44A-8 (1976) and the ensuing priority contest if he is held to be such an owner. This note does not discuss the theory that an overeager purchaser may be the functional equivalent of a general contractor, making those whom he employs merely subcontractors who have no right to a lien against the real property of the owner (except by subrogation). Consequently, the question whether an overeager purchaser may shield his own after-acquired title from the attachment of materialmen's liens by claiming to be his own general contractor is outside the scope of this note.

19. N.C. GEN. STAT. § 44A-7(3) (1976). See *supra* note 8 for text.

20. *A* must have an interest in the real property "[u]nless the context otherwise requires in this Article." N.C. GEN. STAT. § 44A-7 (1976). See *supra* note 8 for statutory definition of "owner."

chaser ownership status for the purposes of the statute.²¹ But the courts diverge sharply on the following questions: (1) whether the owner's interest must exist when the materialman's contract is made²² or when his work is commenced,²³ or whether it is sufficient that the interest exist when the lien is claimed;²⁴ (2) if an interest must exist when the contract is made or the work commenced, whether an unenforceable interest (e.g., an oral agreement to purchase the real estate) is sufficient to support the lien;²⁵ (3) whether the lien first attaches to the owner's interest when the contract is made, when the work is commenced, when the legal title is obtained, or when the claim of lien is perfected or enforced;²⁶ (4) if the lien attaches to the owner's interest when the contract is made or the work commenced, whether it also attaches to any enlargement of the owner's interest, such as the addition of legal title to an existing equitable estate.²⁷

The answers to such questions should be clearly discernable from the language of the statute, and in some states they are.²⁸ But in many jurisdictions

21. See *supra* note 9; *infra* note 43; see also *Stockwell v. Carpenter*, 27 Iowa 119 (1869). See generally Annot., 2 A.L.R. 778, 794-98 (1919), supplemented by Annot., 95 A.L.R. 1085, 1095-98 (1935); Annot., 52 A.L.R. 693 (1928); Annot., 58 A.L.R. 911, 912-22 (1929), supplemented by Annot., 102 A.L.R. 233, 234-37 (1936).

22. See *Howard v. Veazie*, 69 Mass. (3 Gray) 233 (1855) (the interest must exist at the moment the contract is made or the lien will not attach); *De Ronde v. Olmsted*, 47 How. Pr. 175 (N.Y.C.P. 1874) (same).

23. See *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978) (lien cannot antedate acquisition of ownership interest in the land); see also *infra* text accompanying notes 38-40.

24. See *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 P. 908 (1893) (no interest necessary at the time contract is made because a subsequently acquired interest will support the lien and permit it to relate back); *Lemire v. McCollum*, 246 Or. 418, 425 P.2d 755 (1967) (same); *Tomlinson v. Higginbotham Bros. & Co.*, 229 S.W.2d 920 (Tex. Civ. App. 1950) (same). But see *infra* text accompanying notes 38-41.

25. See *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 704-05, 27 S.W.2d 1011, 1013 (1930) (mere parol agreement to purchase, which does not reach the level of an enforceable executory contract, does not give materialman a lien that will relate back); *Service Lumber & Supply Co. v. Cox*, 98 Fla. 405, 407 123 So. 820, 821 (1929) (dictum that the test of a sufficient interest is its transferability; however, held that "[a] person in possession [of real estate] is presumed to have an interest chargeable with a lien until the contrary is made to appear"); see also *infra* notes 42-54 and accompanying text.

26. See notes 55-64 and accompanying text. See generally 2 L. JONES, A TREATISE ON THE LAW OF LIENS § 1259, at 455-57 (3d ed. 1914); 10 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 5197, at 309-11 (1957).

27. See *supra* note 26.

28. E.g., OHIO REV. CODE ANN. § 1311.01(A) (Page 1979); WIS. STAT. ANN. §§ 779.01(2)(d), .01(4), .10 (West 1981).

Ohio's statutory definition of an owner expressly includes "all the interests either legal or equitable, which such person may have in the real estate upon which the improvements contemplated under such sections are made, including the interests held by any person under contracts of purchase, whether in writing or otherwise." OHIO REV. CODE ANN. § 1311.01(A) (Page 1979) (emphasis added); see *Summer & Co. v. DCR Corp.*, 47 Ohio St. 2d 254, 351 N.E.2d 485 (1976).

Wisconsin's definition includes any interest in the improved property:

"Owner" means the owner of any interest in land who, personally or through an agent, enters into a contract, express or implied, for the improvement of the land. Agency will be presumed, in the absence of clear and convincing evidence to the contrary, between employer and employee, between spouses, between joint tenants and among tenants in common, but there shall be a similar presumption against agency in all other cases.

they remain unresolved until litigation forces the courts to speak to matters upon which the statutes are silent.²⁹ In North Carolina none of these questions is answered on the face of the applicable statutes, so courts must resort to decisions in other states to predict how these questions might be answered by the local judiciary.

Courts have disagreed on the issue of when a purchaser's interest must exist in order to create preferred materialmen's liens. An early West Virginia opinion stated that when work was performed and completed, and the claim of lien filed, before the purchaser acquired his "interest," the lien could not attach to the interest thereafter acquired.³⁰ In so holding, the court reasoned that the lien must attach on the date it is filed. Distinguishing a materialman's lien from a judgment lien, the court stated:

The lien could only attach to [the purchaser's] interest in the land when filed, and not against her personally, and thus be kept alive. It could not be wandering around in the air ready to descend upon land afterwards acquired. A [materialman's] lien must have something on which it may attach, else it is not a lien.³¹

Early decisions of the Massachusetts³² and New York³³ courts stated that

Wis. STAT. ANN. § 779.01(2)(d) (West 1981) (emphasis added). Wisconsin's statutory scheme expressly measures priority from the visible commencement of improvement, Wis. STAT. ANN. § 779.01(4) (West 1981), and declares that a judgment emanating from foreclosure of the lien shall extend to and include the interests that the owner may have acquired in the property *after* the visible commencement of construction, Wis. STAT. ANN. § 779.10 (West 1981).

Priority of construction lien. The lien provided in sub. (3) shall be *prior to any lien which originates subsequent to the visible commencement in place of the work of improvement . . .* [C]ommencement is deemed to occur no earlier than the beginning of substantial excavation for the foundations, footings or base of the new construction. . . . Lien claimants who perform work or procure its performance or furnish any labor or materials or plans or specifications for an improvement prior to the visible commencement of the work of improvement shall have lien rights, but shall have only the priority accorded to other lien claimants.

Wis. STAT. ANN. § 779.01(4) (West 1981) (emphasis added).

The judgement shall adjudge the amount due to each claimant who is a party to the action. It shall direct that the interest of the owner in the premises at the commencement of the work or furnishing the materials for which liens are given *and which the owner has since acquired*, or so much thereof as is necessary, be sold to satisfy the judgement, and that the proceeds be brought into court with the report of sale to abide the order of the court.

Wis. STAT. ANN. § 779.10 (West 1981) (emphasis added); *see* Callaway v. Evanson, 272 Wis. 251, 75 N.W.2d 456 (1956) (construing Wis. STAT. ANN. § 289.12 (now codified at § 779.10)).

29. *E.g.*, Society Linnea v. Wilbois, 253 Iowa 953, 113 N.W.2d 603 (1962) (construing Iowa CODE ANN. §§ 572.1(1), 572.2 (West 1950); § 572.1(1) fails to describe the interest necessary to qualify as an "owner," and § 572.2 fails to define the moment of attachment of the lien); Tomlinson v. Higginbotham Bros. & Co., 229 S.W.2d 920 (Tex. Civ. App. 1950) (construing TEX. CONST. art. 16, § 37 and TEX. CIV. CODE ANN. § 5452 (Vernon 1958 & Supp. 1982-83), which fails to define "owner" or identify the effective date of the materialman's lien); Mahan v. Bitting, 103 W. Va. 449, 137 S.E. 889 (1927) (construing chapter 75 of the 1923 Code of West Virginia, now codified at W. VA. CODE §§ 38-2-1 to -39 (1966), which fails to define "owner" and also fails to state whether a materialman's lien may attach to an interest acquired after commencement of construction).

30. Mahan v. Bitting, 103 W. Va. 449, 137 S.E. 889 (1927).

31. *Id.* at 455, 137 S.E. at 891.

32. Corbett v. Greenlaw, 117 Mass. 167 (1875); Hayes v. Fessenden, 106 Mass. 228 (1870); Howard v. Veazie, 69 Mass. (3 Gray) 233 (1855).

33. De Ronde v. Olmsted, 47 How. Pr. 175 (N.Y.C.P. 1874).

an interest sufficient to qualify one for ownership must exist at the moment the materialman's contract is made. Otherwise no lien can arise under the statute. The rationale depended upon the assumption that the lien attaches when the contract is made and cannot attach thereafter. This approach, however, ignores the versatility of the relation back doctrine, which may permit a lien to attach on one date and relate back to a previous date for purposes of discerning the priorities of the claimants.³⁴ Subsequent to those early cases, Massachusetts has used the relation back doctrine to the materialman's advantage by coupling it with the contract ratification theory. Thus, if the overeager purchaser ratifies his materialman's contract after acquiring a suitable interest in the property, the lien will attach and relate back to the date the contract was made.³⁵

The Florida Supreme Court has held that the materialman's lien "attaches to whatever interest the owner had when the work was begun and to another or greater interest whenever acquired before the lien is enforced."³⁶ Furthermore, the materialman is given the benefit of a presumption that the person who hired him had the requisite interest to qualify as an owner from the outset: "A person in possession is presumed to have an interest chargeable with a lien until the contrary is made to appear."³⁷

The courts of Kansas and Oregon have boldly held that no interest is necessary at the time the contract is made or the work commenced because any subsequently acquired interest will support the lien and permit it to relate

34. *E.g.*, *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 P. 908 (1893) (defendant's acquisition of title a few days before construction was completed caused materialman's lien to attach and relate back to the time of the making of the contract, even though defendant had no ownership interest when the contract was made). *But see* *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978) (materialman's lien cannot relate back to a time prior to the owner's acquisition of an interest).

In North Carolina, the relation back doctrine evolved as a creature of case law, and was later codified at G.S. § 44A-10. *Humphrey*, *supra* note 12, at IV-8. Judge Ervin's statement of the doctrine in *Equitable Life Assurance Soc'y v. Basnight*, 234 N.C. 347, 351, 67 S.E.2d 390, 394 (1951), served as the legislature's guide in drafting G.S. § 44A-10. *See* N.C. GEN. STAT. § 44A-10 (1976) (quoted *supra* note 2); *see also infra* note 70. In *Basnight*, Judge Ervin described the doctrine as follows:

The doctrine is inherent in the very statutes which give the contractor the lien upon the property improved by his labor or materials, and allow him six months after the completion of the labor or the final furnishing of the materials in which to claim it; for it is plain that *unless the contractor's lien when filed relates back to the time at which the contractor commenced the performance of the work or the furnishing of the materials, the object of the statutes can be defeated at the will of the owner of the property, by his selling or encumbering his estate*. To hold that the doctrine of relation back is not inherent in these statutes would be to "keep the word of promise to our ear, and break it to our hope."

Equitable Life Assurance Soc'y v. Basnight, 234 N.C. 347, 351, 67 S.E.2d 390, 394 (1951) (citations omitted) (emphasis added). For an example of the doctrine's application in the overeager purchaser's situation, see *Pegram-West, Inc. v. Hiatt Homes*, 12 N.C. App. 519, 184 S.E.2d 65 (1971) (decided prior to the enactment of G.S. § 44A-10). *See also supra* note 4.

35. *E.g.*, *Anderson v. Berg*, 174 Mass. 404, 54 N.E. 877 (1899); *Courtemanche v. Blackstone Valley St. Ry.*, 170 Mass. 50, 48 N.E. 937 (1898).

36. *Service Lumber & Supply Co. v. Cox*, 98 Fla. 405, 407, 123 So. 820, 821 (1929).

37. *Id.*

back to the earlier time.³⁸ The Texas judiciary once subscribed to this view,³⁹ but has since retreated from this stance.⁴⁰ Texas law now holds that the lien cannot relate back to a time prior to the owner's acquisition of an interest.⁴¹

Concerning the question of what minimum interest is necessary to support the lien, some early Massachusetts and New York cases held that nothing short of legal title would suffice to make one an owner for purposes of the statute.⁴² In most states, however, a purchaser in possession under an enforceable written contract of sale is regarded as having equitable title that is sufficient to qualify him as an owner within the provisions of the materialman's lien statutes.⁴³ In *Hessinger v. Sorenson*⁴⁴ the Supreme Court of North Dakota intimated that the holder of the equitable title, not the legal titleholder, should be the only person empowered to subject the property to a materialman's lien.⁴⁵ In *Service Lumber & Supply Co. v. Cox*⁴⁶ a Florida court held that the test for an interest sufficient to constitute ownership should be whether the person's interest is transferable.⁴⁷ A Colorado court in *Sontag v. Abbott*⁴⁸ held that an optionee had a sufficient interest in the property to create a lien superior to a deed of trust filed with the optionee's deed.⁴⁹ One who has only a "vague verbal understanding" with the titleholder for the purchase of real property, however, may lack even the equitable title necessary to qualify as an

38. *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 P. 908 (1893); *Lemire v. McCollum*, 246 Or. 418, 429-30, 425 P.2d 755, 760 (1967).

39. *Tomlinson v. Higginbotham Bros. & Co.*, 229 S.W.2d 920 (Tex. Civ. App. 1950) (the court ignored the problem of determining when the lien attached but simply declared that it did attach to the full extent of the purchaser's after-acquired title, and related back to the moment the work was commenced); see also *Irving Lumber Co. v. Alltex Mortgage Co.*, 468 S.W.2d 341, 344 (Tex. 1971) (McGee, J., dissenting).

40. *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978); *Irving Lumber Co. v. Alltex Mortgage Co.*, 468 S.W.2d 341 (Tex. 1971); *Inman v. Orndorff*, 596 S.W.2d 236 (Tex. Civ. App. 1980).

41. See *supra* note 40.

42. *Hayes v. Fessenden*, 106 Mass. 228 (1870); *Thaxter v. Williams*, 31 Mass. (14 Pick.) 49 (1833); *Miller v. Mead*, 127 N.Y. 544, 28 N.E. 387 (1891).

43. *E.g.*, *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 27 S.W.2d 1011 (1930); *Sullivan v. Thomas Org., P.C.*, 88 Mich. App. 77, 276 N.W.2d 522 (1979); *Summer & Co. v. DCR Corp.*, 47 Ohio St. 2d 254, 351 N.E.2d 485 (1976); *Lemire v. McCollum*, 246 Or. 418, 425 P.2d 755 (1967); *Westfair Corp. v. Kuelz*, 90 Wis. 2d 631, 280 N.W.2d 364 (Ct. App. 1979); see Annot., 95 A.L.R. 1085, 1095 (1935). But see *C.R. Stocks, Inc. v. Blakely's Matterhorn, Inc.*, 90 Wis. 2d 118, 279 N.W.2d 499 (Ct. App. 1979) (rights of a purchaser under an executory contract to purchase land do not constitute an "interest in land" to which a lien can attach).

44. 180 N.W.2d 910 (N.D. 1970).

45. *Id.* at 915: "Section 35-1201 of the North Dakota Revised Code of 1943 defines 'owner' for the purpose of the [materialman's] lien chapter as being someone other than the mere holder of legal title. The vendee under an executory contract of sale is the equitable owner of the land The vendee is defined as the owner . . . and the vendor is not the owner within the purview of this [materialman's] lien law."

46. 98 Fla. 405, 123 So. 820 (1929).

47. *Accord* *Geissinger v. Robins*, 274 Minn. 215, 218, 143 N.W.2d 50, 53 (1966) ("ownership . . . has been broadly interpreted to include any interest which the court may order sold").

48. 140 Colo. 351, 344 P.2d 961 (1959).

49. But see *Gentry Bros. v. Byron Dev. Corp.*, 16 N.C. App. 386, 192 S.E.2d 100 (1972) (if optionee never exercises option, or otherwise acquires any ownership in the land, materialman may not enforce his lien).

"owner" under the statute.⁵⁰

Some courts draw a distinction whereby they permit the lien to attach if the purchaser holds an equitable title under an enforceable executory contract,⁵¹ but deny the lien if the purchaser has only an unenforceable agreement to purchase that is later fully executed.⁵² This distinction can be criticized as overly technical since neither circumstance can be reasonably said to have influenced the parties' behavior. It should not be expected that, prior to contracting with a homebuilder, a laborer or supplier of materials who is unversed in legal theories of ownership will undertake a costly and time-consuming title examination, or demand from a prospective employer or customer proof that he has equitable title to the building site.⁵³ Instead, a more appropriate rule has been adopted by the courts of Oregon and Kansas: any subsequently acquired interest will support a materialman's lien even if no enforceable interest in the property existed when the contract was made or the work was commenced.⁵⁴

The other side of the owner's interest question concerns the moment of attachment of the lien. If a court holds that an ownership interest must exist at the instant the materialman's work commences, does that mean that the lien attaches at that moment to whatever interest the overeager purchaser may own? If it does attach at that instant, may it then grow in scope as the owner's interest grows? If the lien does not attach when the contract is made, does it attach when the claim of lien is filed or perfected?

In *Mahan v. Bitting*⁵⁵ the West Virginia Supreme Court held that the lien attached at the moment the claimant filed his lien, and if the purchaser had no interest at that time, the lien could not attach to any subsequently acquired interest. The facts of the case were unusual because construction was actually completed and the lien filed before the purchaser acquired any interest (legal or equitable) that the court was willing to recognize. The claimant in *Mahan* unsuccessfully argued that the lien should attach and inure to his benefit in much the same way that estoppel by deed vests title in a grantee who accepts and records a deed from a grantor who has no title at the time, but thereafter acquires it.⁵⁶ More recently, in *Lyon v. Dunn*⁵⁷ the Maine Supreme Court

50. 2 L. JONES, A TREATISE ON THE LAW OF LIENS § 1259, at 456 (3d ed. 1914); 10 G. THOMPSON, *supra* note 4, § 5197, at 309 (1957). See *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 27 S.W.2d 1011 (1930).

51. See *supra* note 43 and accompanying text.

52. See *supra* notes 47 & 50 and accompanying text.

53. But see *Lyon v. Dunn*, 402 A.2d 461, 463 (Me. 1979) ("It is . . . incumbent upon a materialman seeking to establish a lien, to determine the extent of the contracting party's interest in the land.").

54. See *supra* note 38 and accompanying text.

55. 103 W. Va. 449, 137 S.E. 889 (1927).

56. *Id.* at 454, 137 S.E. at 891:

Plaintiff contends that . . . his lien . . . immediately attached to the lot when the title thereto was afterwards transferred to Irene . . . under analogy to the principle applicable where a person not having title to land deeds it to another and afterwards obtains title thereto; the title afterwards so obtained passes by operation of law to his prior grantee

construed its materialman's lien statute to mean that the lien attaches to the contracting party's interest at the moment the work commences. In *Lyon* the court held that "'ownership' . . . refers to ownership at the time services are first provided," and if the contracting party "has no interest in the land or its improvements . . . the lien has nothing to attach to and becomes a nullity."⁵⁸ Consequently, no lien arose against an overeager purchaser's interest even though he acquired legal title within the statutory period provided for filing claims of lien.

Early Massachusetts and New York cases held that the lien attached to the owner's interest at the moment the contract was made and could not attach to any new interest acquired thereafter.⁵⁹ If an equitable title was the only ownership interest held by an overeager purchaser when his contract with the materialman was made, the materialman's lien could attach only to the equitable title, leaving the purchaser's subsequently acquired legal title free of the lien.⁶⁰ In later years the Massachusetts courts retreated from this strict approach and embraced theories that permit the materialman's lien to attach to the after-acquired legal title.⁶¹ Many courts have followed suit by holding that a materialman's lien which is attached to a purchaser's equitable estate also attaches to his subsequently acquired legal estate.⁶² Other courts have held that the lien attaches at the moment the purchaser acquires a judicially recognized interest,⁶³ but have split on the issue whether the lien may then, for purposes of priority, relate back to a time when the purchaser owned no interest.⁶⁴ Some courts do permit the lien to relate back,⁶⁵ but in jurisdictions

A clearer statement of the principle of estoppel by deed was penned by Judge Hedrick in *Meachem v. Boyce*, 35 N.C. App. 506, 508, 241 S.E.2d 880, 882 (1970): "a grantor who is unable to convey a valid title to the property at the time of conveyance is estopped from denying the validity of the deed when he subsequently acquires the right to convey it." Thus, if *A*, who owns no interest in Blackacre, gives to *B* a deed purporting to convey Blackacre to *B* in fee simple in exchange for valuable consideration, the deed is ineffective to convey an estate to *B*, but equity will treat the the purported deed as a valid contract to convey the land to *B*. If *A* later acquires an interest in Blackacre, equity will declare the contract effective as a deed under the maxim "equity regards as done that which ought to be done," *id.* at 511, 241 S.E.2d at 883, and *A* will be estopped from denying the passage of his after-acquired title to *B*, his prior grantee. In the end, *B* receives by operation of law any interest *A* obtains in Blackacre after delivery of the deed.

57. 402 A.2d 461 (Me. 1979).

58. *Id.* at 463-64. (emphasis deleted).

59. *Howard v. Veazie*, 69 Mass. (3 Gray) 233 (1855); *accord De Ronde v. Olmsted*, 47 How. Pr. 175 (N.Y.C.P. 1874).

60. *Hayes v. Fessenden*, 106 Mass. 228 (1870).

61. See *supra* note 35 and accompanying text (concerning the Massachusetts courts' use of the contract ratification theory). See also *Rochford v. Rochford*, 188 Mass. 108, 74 N.E. 299 (1905) (permitting materialman's lien to attach when title was acquired, but subordinating it to the lien of a mortgage attaching at the same time).

62. *E.g.*, *Service Lumber & Supply Co. v. Cox*, 98 Fla. 405, 123 So. 820 (1929); *Summer & Co. v. DCR Corp.*, 47 Ohio St. 2d 254, 351 N.E.2d 485 (1976); *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978); see *Mahan v. Bitting*, 103 W. Va. 449, 137 S.E. 889 (1927) (dictum); see also 2 L. JONES, *supra* note 50, § 1259, at 457; 10 G. THOMPSON, *supra* note 4, § 5197, at 310.

63. *E.g.*, *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 27 S.W.2d 1011 (1930); *Society Linnea v. Wilbois*, 253 Iowa 953, 113 N.W.2d 603 (1962); *Rochford v. Rochford*, 188 Mass. 108, 74 N.E. 299 (1905).

64. See, e.g., *Chicago Lumber Co. v. Fretz*, 51 Kan. 134, 32 P. 908 (1893) (relation back

where the lien is not permitted to relate back⁶⁶ most courts have held the materialman's lien subordinate to mortgages and deeds of trust that attached to the property at the same moment as the materialman's lien.⁶⁷

North Carolina's relation back doctrine has been codified at G.S. 44A-10,⁶⁸ but the applicable language does not identify the moment of attachment of the lien, nor does it indicate whether the legislature intended to permit the lien to relate back to a time prior to the "owner's" acquisition of legal title. It is arguable that the statutory language "*shall relate to and take effect from the time of the first furnishing of labor or materials*"⁶⁹ means that the lien *attaches* upon commencement of work, and only attaches to such interest as the "owner" had at that time. It seems more likely, however, that the draftsmen neither thought about after-acquired title problems nor attempted to mark the invisible moment of attachment. The words probably were intended to mandate only a simple scheme for ranking liens in a logical order of priority, regardless of when, or to what interest, the lien technically attached.⁷⁰

In North Carolina, if the materialman's lien is permitted to attach to an overeager purchaser's after-acquired title, but not permitted to relate back to the lien claimant's commencement of work in accordance with G.S. 44A-10,⁷¹ the liens of all materialmen who commence work prior to the owner's acquisition of title would attach to the property simultaneously at the moment the purchaser's deed is filed. In the same instant, any deeds of trust executed, delivered, and recorded contemporaneously with the deed would also attach,⁷² as would all previously docketed money judgments against the purchaser.⁷³

permitted); *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978) (relation back denied).

65. See *supra* notes 38-39 and accompanying text.

66. See *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978).

67. *Id.*

68. N.C. GEN. STAT. § 44A-10 (1976); see *supra* note 2 & 34; *infra* note 69.

69. N.C. GEN. STAT. § 44A-10 (1976) (emphasis added).

70. See *Humphrey, supra* note 12, at IV-8. Mr. Humphrey, one of the statute's draftsmen, made no reference to the moment of attachment in his comment on this provision, but focused exclusively on the importance of the relation back feature for purposes of determining priority among competing liens.

71. See *supra* note 2.

72. See, e.g., *Smith Builders Supply v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949) (lien of purchase money deed of trust attaches instantaneously to title when executed, delivered, and recorded with deed as part of same transaction).

73. E.g., *H. Weil & Bros. v. Casey*, 125 N.C. 356, 34 S.E. 506 (1899); see *Dula v. Parsons*, 243 N.C. 32, 35, 89 S.E.2d 797, 799 (1955) ("A docketed judgment, directing the payment of money, is a lien on the real property situated in the county in which the judgment is docketed and owned by the judgment debtor at the time the judgment is docketed, or on such land as is acquired by him at any time within ten years from the date of the rendition of the judgment.") (emphasis added); N.C. GEN. STAT. § 1-234 (Cum. Supp. 1981) (same).

It is arguable that, if both the materialman's lien and the lender's lien attach simultaneously, priority might be determined by applying the same rules that govern priority contests between simultaneously attaching judgment liens and lender's liens. Generally, judgment liens attaching to a debtor's after-acquired title are given priority over simultaneously attaching mortgages and deeds of trust unless the mortgages are given to secure the purchase price of the property. E.g., *Yarlott v. Brown*, 86 Ind. App. 479, 149 N.E. 921 (1925); *Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico*, 106 N.J. Eq. 559, 151 A. 499 (1930); *H. Weil & Bros. v. Casey*, 125 N.C.

The question then arises how the North Carolina courts would determine the priorities among the competing lien claimants. The answer depends largely upon the court's use of the doctrine of instantaneous (or transitory) seisin.⁷⁴ The doctrine, which will be discussed more fully in subsequent paragraphs,⁷⁵ provides that when a deed and purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the purchaser acquires title and constitutes a lien superior to all others incurred by the mortgagor.⁷⁶ Historically, the doctrine has been applied almost exclusively in favor of purchase money security instruments, and has seldom been extended to include construction deeds of trust or other nonpurchase money security interests.⁷⁷ By applying the doctrine of instantaneous seisin to sort out priorities among competing liens attaching at the same instant, the North Carolina courts probably would hold that a purchase money deed of trust satisfying the same-transaction test is superior to judgment liens⁷⁸ and materialmen's liens,⁷⁹ while judgment liens would probably reign over nonpurchase money deeds of trust.⁸⁰ Whether materialmen's liens would

356, 34 S.E. 506 (1899). One reason that may be advanced for treating judgment liens and materialmen's liens alike in such situations is that a lender can readily discover both types of liens prior to closing if he searches public docket books in the county where the land lies for outstanding judgments against the prospective mortgagor, *see* Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, 106 N.J. Eq. 559, 151 A. 499 (1930), and also inspects the property to determine whether any work that might give rise to a materialman's lien has commenced at the site, *see infra* note 95 and accompanying text. A nonpurchase money lender who foregoes his opportunity to discover potential liens against the property, and to demand the satisfaction of inchoate liens prior to closing, might equitably be held to have a subordinate lien to others attaching in the same instant, regardless of their character as judgment liens or materialmen's liens. *Cf.* Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, 106 N.J. Eq. 559, 151 A. 499 (1930) (future advances deed of trust held subordinate to judgment lien because lender had constructive notice of mortgagor's judgment debts, and also because the purpose of the judgment lien statute would be defeated if the lender were awarded priority).

74. *See supra* note 4. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 4, § 9.1 is especially informative on the theory of instantaneous (or transitory) seisin.

75. *See infra* notes 83-95 and accompanying text.

76. *E.g.*, Smith Builders Supply v. Rivenbark, 231 N.C. 213, 56 S.E.2d 431 (1949) (materialman's lien incurred by overreager purchaser is subordinate to lien of subsequent purchase money deed of trust when deed of trust is executed, delivered, and recorded with deed as part of same transaction); H. Weil & Bros. v. Casey, 125 N.C. 536, 34 S.E. 506 (1899) (purchase money deed of trust is entitled to priority over judgment lien, but nonpurchase money deed of trust is subordinate); Pegram-West, Inc. v. Hiatt Homes, 12 N.C. App. 519, 184 S.E.2d 65 (1971) (lapse of eleven days between recording of deed and purchase money deed of trust permitted materialman's lien to take priority over the deed of trust lien because the deed and deed of trust were not executed, delivered, and recorded as part of the same transaction); *see supra* note 4.

77. *E.g.*, Yarlott v. Brown, 86 Ind. App. 479, 149 N.E. 921 (1925) (nonpurchase money mortgage executed, delivered, and recorded simultaneously with deed held not entitled to the priority status that a purchase money mortgage would enjoy under otherwise identical circumstances); Fidelity Union Title & Mortgage Guaranty Co. v. Magnifico, 106 N.J. Eq. 559, 562, 151 A. 499, 500 (1930) (future advances mortgage filed simultaneously with deed is not entitled to priority over other liens attaching at the same moment, but purchase money deed of trust filed simultaneously with deed is entitled to priority); H. Weil & Bros. v. Casey, 125 N.C. 536, 34 S.E. 506 (1899) (nonpurchase money mortgage recorded simultaneously with deed held not entitled to priority over a judgment lien attaching to title in the same instant, but if mortgage had been given to secure purchase price, it would have been entitled to priority); *see also infra* notes 87-88 and accompanying text.

78. *E.g.*, H. Weil & Bros. v. Casey, 125 N.C. 536, 34 S.E. 506 (1899); *see also supra* note 76.

79. *See supra* note 73; *see also infra* notes 88-89 and accompanying text.

80. *See supra* note 77.

be superior to nonpurchase money deeds of trust depends upon the courts' willingness to extend the instantaneous seisin doctrine to apply to nonpurchase money security instruments.⁸¹ The decision, in turn, should depend upon the courts' assessment of the doctrine's policy foundation,⁸² and not simply its technical rationale.

The technical rationale for the doctrine of instantaneous seisin is that when a purchaser simultaneously accepts a deed and conveys a security interest in the property acquired, there is never a moment when the grantee named in the deed holds title unencumbered by the lender's lien.⁸³ Stated another way, the moment of vesting of title is too brief to permit the lien of the materialman to squeeze ahead of the lender's lien. Obviously, the technical rationale for the doctrine is somewhat unsatisfactory. Since vesting and attachment are both fictional legal processes, any race for priority between a materialman's lien and a deed of trust is likewise a purely fictional event. Certainly if the materialman's lien can be said to have attached to the purchaser's equitable title before receipt of the deed,⁸⁴ the concept of an attachment race occurring at the moment legal title vests becomes illogical.⁸⁵

The meritorious policy foundation for the doctrine of instantaneous seisin has, however, generally overridden the problems inherent in the technical rationale. The policy argument supporting the doctrine is historically associated only with instruments securing purchase money loans. It is generally deemed equitable and just that a vendor, who has parted with his property on the faith of having a first priority security interest in it until he receives the purchase price, should be protected from the possibility of losing both his land and his money in the transaction.⁸⁶ Without the assurance that he would be able to foreclose on the land if the money were not paid, the vendor would never have parted with his property in the first place. Even if the purchase money loan is made by a third party institutional lender, the reliance argument is equally

81. See *supra* notes 63 & 66 and accompanying text (materialman's lien junior to construction loan attaching in the same moment). But see *supra* note 77 and accompanying text; *Noll v. Graham*, 138 Kan. 676, 27 P.2d 277 (1933) (where deed of trust covered both purchase money and construction funds, the portion of principal that covered purchase money was superior to materialman's lien, but materialman's lien was superior to remainder); *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978).

82. See *infra* notes 86-93 and accompanying text.

83. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 4, § 9.1 at 575.

84. See *supra* notes 26, 36 & 43 and accompanying text.

85. Some courts have employed strained reasoning to harmonize the fiction with the results their opinions reach. Thus, when an enforceable contract of sale occurs prior to the accrual of the materialman's lien, the vendor is said to acquire an equitable right to have the contract enforced and to obtain the purchase money mortgage on taking title. The vendor's equitable right to the purchase money deed of trust supports the superiority of the actual deed of trust given at closing. A third party lender of purchase money funds is awarded the same priority status as a vendor lender on the theory that he stands in the position of an assignee of the vendor's equitable interest. But the technical foundation for the doctrine breaks down if a purchase money deed of trust is awarded priority even though there was no enforceable contract of sale and no equitable vendor's lien available in the jurisdiction's body of laws. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 4, § 9.1 at 577; see also *Rudasill v. Cabiniss*, 225 N.C. 87, 33 S.E.2d 475 (1945) (equitable vendor's lien does not exist in North Carolina).

86. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 4, § 9.1 at 577.

persuasive: the lender would never have loaned the money and the mortgagee would never have acquired title without the assurance that the lender would have first recourse to the land if the principal and interest were not paid.⁸⁷

The purchase money lender looks to the value of the property in existence at the time of the closing for his security. Construction lenders rely on a security interest in a structure to be built in the future. Perhaps for that reason the instantaneous seisin doctrine has generally been limited to instruments that secure purchase money funds, not construction loan funds.⁸⁸ When construction funds and purchase money funds are secured by the same deed of trust, at least one court has refused to elevate any part of the lender's lien to a position of priority over a previously existing materialman's lien.⁸⁹ Even when the deed of trust secures only purchase money funds, some courts have not permitted the judicial doctrine of instantaneous seisin to subordinate a statutory materialman's lien to a subsequently filed security instrument.⁹⁰

Clearly the technical rationale for the instantaneous seisin doctrine⁹¹ poses no greater obstacle for a construction deed of trust than for a purchase money deed of trust. If a purely mechanical test is applied,⁹² a construction deed of trust executed and recorded with the deed of conveyance as a part of the same transaction should be given the same priority available to a purchase money security instrument. But the purpose of the doctrine⁹³ and current judicial trends respecting construction lending militate against extending the instantaneous seisin rule to benefit construction lenders.

The trend in the law today is to protect the materialman's interest in the

87. *Id.* at 578.

88. *E.g.*, *Snodgrass v. Huff*, 218 Ark. 113, 234 S.W.2d 505 (1950) (contractor who drilled a well for an overeager purchaser did not even attempt to argue that his materialman's lien should take priority over a subsequently executed purchase money deed of trust); *Noll v. Graham*, 138 Kan. 676, 27 P.2d 277 (1933) (when deed of trust covered both purchase money and construction funds, the portion of principal that covered purchase money was superior to materialman's lien, but materialman's lien was superior to remainder); *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978). *Cf.* *Northwestern Nat'l Bank v. Metro Center*, 303 N.W.2d 395 (Iowa 1981) (even though mortgage secured purchase money funds together with construction funds, entire mortgage was held subordinate to the materialman's lien).

89. *Sontag v. Abbott*, 140 Colo. 351, 344 P.2d 961 (1959); *see also* *Northwestern Nat'l Bank v. Metro Center*, 303 N.W.2d 395 (Iowa 1981). *But see* *Noll v. Graham*, 136 Kan. 676, 27 P.2d 277 (1933); *Diversified Mortgage Investors v. Lloyd D. Blaylock Gen. Contractor*, 576 S.W.2d 794 (Tex. 1978).

90. *See* *Sontag v. Abbott*, 140 Colo. 351, 358, 344 P.2d 961, 965 (1959) (whether a deed of trust is a purchase money deed of trust, in whole or in part, does not alter result that materialman's lien on overeager purchaser's interest is superior to the subsequently filed security instrument; if the legislature had intended purchase money deed of trust to be exempt from operation of materialman's lien statute, it would have so provided); *see also* *Sheridan, Inc. v. Palchanis*, 172 So. 2d 872 (Fla. Dist. Ct. App. 1965) (implying that the materialman's lien would have been superior to the subsequent purchase money deed of trust if the work performed had been of a "visible" nature); *Braden Co. v. Lancaster Lumber Co.*, 170 Okla. 30, 38 P.2d 575 (1934) (materialman's lien will prevail over the subsequent deed of trust, but only to the extent of the value added by the work).

91. *See supra* text accompanying note 83.

92. The mechanical test that has developed in North Carolina requires that the deed and deed of trust be executed, delivered, and recorded as part of the same transaction. *See supra* note 4.

93. *See supra* note 86-87 and accompanying text.

fruit of his labor by viewing the construction loan as a fund for the benefit of the materialman. Thus, some courts now require the construction lender to protect the mortgagor against materialmen's liens by burdening the lender with an affirmative duty to see that the materialmen are compensated for their work.⁹⁴ To obtain priority in such a jurisdiction, the construction lender must be sure that work has not commenced prior to recordation of his deed of trust.⁹⁵ An extension of the instantaneous seisin doctrine would undercut this policy by permitting a lender to acquire and foreclose a superior lien, extinguishing the lien of a materialman whose valuable improvement of the property was visible at the time the deed of trust was recorded. Such a result is inequitable largely because of the relative positions, expectations, and areas of expertise of the materialman and construction lender. Generally speaking, the lender (particularly an institutional lender) may be expected to have the sophistication and resources to examine the title and inspect the construction site prior to investing in the venture. The lender also possesses the substantial ability to force an overeager purchaser to pay his materialmen and obtain lien waivers by refusing to close the loan in the event of noncompliance. The materialman may have none of these advantages. Furthermore, the proceeds from a lender's foreclosure sale may be greatly increased by the existence of the improvements constructed on the land by the materialman's labor. Consequently, awarding a priority lien to the lender in an overeager purchaser's case may amount to unjust enrichment of the lender and the purchaser at the materialman's expense. Presumably, it was considerations such as these that led some legislators and judges to promote the materialman's interest by refusing to give construction loans priority over materialmen's liens,⁹⁶ even when the deed of trust is recorded first.⁹⁷

The questions whether an overeager purchaser may qualify as an owner for purposes of attachment of a materialman's lien, and whether such a lien should be superior to a construction loan deed of trust filed contemporaneously with the deed are questions the North Carolina appellate courts have not yet addressed and should not be required to answer. Since the stated goals of the materialman's lien statute are to provide certainty and equity to statutory lien claimants,⁹⁸ the legislature should promulgate amendments to provide certainty on these points. Appropriate amendments should include the following:

1. The term "owner" shall also be deemed to include persons who

94. R. KRATOVIL, *MODERN MORTGAGE LAW & PRACTICE* § 214, at 138, 141 (1972).

95. *Id.* at 140-41 (advising preclosing inspection of property); G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 4, § 12.4, at 739 (advising lender to inspect and photograph the property for future proof that no visible commencement of work had taken place at the time of the security instrument's recordation); see also Allen & Lunsford, *Construction Lending, Future Advances and Statutory Liens*, in 1979 N.C. BAR ASS'N FOUND. INST. ON MODERN REAL PROPERTY PRACTICE XII-1, -3 (encouraging lender's preclosing inspection of the premises).

96. See *supra* note 89 and accompanying text.

97. See *Ward v. Yarnelle*, 173 Ind. 535, 91 N.E. 7 (1910) (materialmen's liens enjoy equal rank (parity) with the construction deed of trust); *H.B. Deal Constr. Co. v. Labor Discount Center*, 418 S.W.2d 940 (Mo. 1967) (lender's grant of construction loan creates presumption that he has subordinated his security interest to the materialmen's liens).

98. See *supra* note 12.

acquire an interest in the improved realty after contracting for the improvements with the lien claimant.⁹⁹

2. Liens granted by this Article shall relate to and take effect from, and their priority over competing liens shall be measured from, the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien. All other interests or encumbrances attaching to the improved realty after the effective date of a lien granted under this Article shall be subordinate to the lien, except that the lien shall be subordinate to any purchase money security interest in the premises if such security instruments and deed of conveyance are executed, delivered, and recorded as part of the same transaction. Nothing herein shall be construed to invalidate a lender's express, recorded subordination of his purchase money security interest in favor of another encumbrance.¹⁰⁰

Should the legislature fail to amend the materialman's lien statute, the North Carolina appellate courts should construe the existing statutes to advance the materialman's remedy.¹⁰¹ The materialman's lien should attach to an overreager purchaser's interest in the improved property at the moment his interest is acquired,¹⁰² and should relate back to the first visible commencement of work¹⁰³ for the purpose of determining its rank among other liens. The doctrine of instantaneous seisin should not be extended to subordinate previously accruing materialmen's liens to construction deeds of trust recorded together with an overreager purchaser's deed.¹⁰⁴

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99. Author's proposed amendment to N.C. GEN. STAT. § 44A-7(3) (1976).

100. Author's proposed amendment to N.C. GEN. STAT. § 44A-10 (1976).

101. *See supra* note 12.

102. *See supra* notes 38-41 & 63 and accompanying text.

103. *See* Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

104. *See supra* notes 92-97 and accompanying text.