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Liens -- Mechanics, Laborers, Materialmen -- Acquisition and Priorities

William H. Bobbitt Jr.

Liens—Mechanics, Laborers, Materialmen—Acquisition and Priorities

The North Carolina Constitution of 1868 states that: "The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject matter of their labor."[1] To comply with the constitutional mandate and to serve its purpose, the General Assembly enacted what is now N. C. GEN. STAT. §44-1 (1950).[2] In addition to the constitutionally prescribed mechanic's and laborer's liens, this statute also provides that there shall be a lien[3] for material furnished.[4]

The fundamental principle in lien law is that in order to have a lien there must be between the parties an existent debt on a contract either express or implied.[5] This debt must have arisen by the furnishing of labor or material, or both,[6] for the improvement of the property on which the lien is to be acquired.[7] In the case of each of these liens, it is to be noted that the lien attaches to the property as improved and not, as might be suspected in the case of the mechanic's and materialman's liens, to the materials used in the improvement of the property.[8] Thus the perfecting of a lien by a contractor, laborer or materialman will ordinarily give him security well over the amount of his individual claim.

In view of the fact that the lien attaches to the property, it is apparent that the fundamental debt must exist between the prospective

[1] N. C. CONST. Art. XIV §4.

[2] This note will contain a discussion of mechanic's, laborer's and materialman's liens as acquired by independent contractors on real property. The rights of subcontractors are not discussed in this note nor are the various other types of liens provided for in the other sections of N. C. GEN. STAT. c. 44 (1943).

[3] When used in this note, the unmodified word lien shall mean lien as created by N. C. GEN. STAT. §44-1 (1943).

[4] The lien for material furnished as distinguished from the mechanic's and laborer's liens is statutory only and is not provided for in the constitution. The importance of this appears in the fact that N. C. CONST. Art. X §4 provides that the mechanic's and laborer's liens can defeat the homestead exemption; whereas, the materialman's lien being purely statutory cannot. Cameron v. McDonald, 216 N. C. 712, 6 S. E. 2d 497 (1939); Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31 (1896); Cumming v. Bloodworth, 87 N. C. 83 (1882); Aycock, *Homestead Exemptions in North Carolina,* 29 N. C. L. REV. 143, 153 (1950); Boyd, *Some Phases of Title Examination and Real Estate Practice,* 20 N. C. L. REV. 169, 173 (1942).

[5] Brown v. Ward, 221 N. C. 344, 20 S. E. 2d 324 (1942); Boykin v. Logan, 203 N. C. 196, 165 S. E. 680 (1932); Nicholson v. Nichols, 115 N. C. 200, 20 S. E. 294 (1894).

[6] The mechanic's lien is broader than a lien for labor or material alone. The mechanic's lien is for work done including both labor and material. Broyhill v. Gaither, 119 N. C. 443, 26 S. E. 31 (1896).

[7] Pocahontas Coal Co. v. Henderson Light Co., 118 N. C. 232, 24 S. E. 22 (1896).

[8] Lanier v. Bell, 81 N. C . 337 (1879).

lienor and the owner of the property against which the lien is sought.[9] Therefore a person performing labor for, or furnishing material to, a lessee or a tenant may be unable to secure a lien against the property unless he can show that the lessee or tenant had authority to contract for the owner.[10] Thus from the rule that one may not be made a debtor without his consent, it follows that a man's property may not be made subject to a lien without his consent, express or implied.

When the laborer has rendered services for, or the materialman has furnished material to, the owner of the premises under a contract express or implied, the debtor-creditor relationship arises; and, the laborer or materialman is now in a position to perfect his lien. In order to perfect his lien, the laborer or materialman must file a claim of lien "in the office of the superior court clerk in any county where the labor has been performed or the materials furnished."[11] This notice of lien in order to be effective must be filed "within six months after the completion of the labor or the final furnishing of materials."[12] Failure to file within this specified time constitutes a fatal forfeiture of the right to the lien.[13]

When does the filing period of six months begin to run? By N. C. GEN. STAT. §44-39 (1950),[14] the filing period runs from the completion of the labor or the final furnishing of material. In this respect it becomes important to determine if the contract is "entire and indivisible."[15]

Suppose *O* in building a house orders a certain quantity of brick from *B*. It is delivered on April 1. On April 7, *O* orders other brick from *B*. This is delivered on April 10. Then on May 1, pursuant to another such order, *B* delivers certain other brick. *B* on October 15 files notice of lien with the clerk of the court claiming a lien for the whole amount due for the three orders of brick. In an action to enforce this lien, the lienor, *B* will find that he has no lien at all on the orders of brick delivered April 1 and April 10; whereas, he will find that the lien is effective as to the amount due on the May 1 delivery. The reason is that *B* delivered brick to *O* under three separate order and delivery contracts, and not under an entire and indivisible contract.

[9] Brown v. Ward, 221 N. C. 344, 20 S. E. 2d 324 (1942); Boykin v. Logan, 203 N. C. 196, 165 S. E. 680 (1932); Nicholson v. Nichols, 115 N. C. 200, 20 S. E. 294 (1894).

[10] Brown v. Ward, 221 N. C. 344, 20 S. E. 2d 324 (1942).

[11] N. C. GEN. STAT. §44-38 (1943).

[12] N. C. GEN. STAT. §44-39 (1943).

[13] Atlas Supply Co. v. McCurry, 199 N. C. 799, 156 S. E. 91 (1930).

[14] N. C. GEN. STAT. §44-39 (1943): "Notice of lien shall be filed as hereinbefore provided . . . at any time within six months after the completion of the labor or the final furnishing of the materials. . . ."

[15] Sides v. Tidwell, 216 N. C. 480, 5 S. E. 2d 316 (1939); King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929).

Hence, since the filing period of six months runs from the delivery of each separate order and since here it has run as to the first two orders, no lien for the amount of the first two orders was acquired by the subsequent filing.

Instead of the above situation, suppose *B* and *O* had entered a contract whereby *B* was to furnish a fixed quantity of brick for the construction of the house with deliveries to be on April 1, April 10, and May 1; and subsequently *B* filed his notice of lien on October 15. In this case B perfected his lien for the entire amount due on all three deliveries as he filed notice within six months of the final furnishing of material under an entire and indivisible contract.[16]

With performance complete under a contract, a debt arises. For each such debt there is a corresponding right to a lien. Accordingly, the filing period as to each particular debt and its corresponding lien runs from the moment the prospective lienor completes performance under each particular contract.

With the filing of sufficient notice[17] the mechanic, laborer, or materialman has perfected his lien.[18] Once a lienor has perfected his lien, the lien relates back and becomes effective as of the time of the initial furnishing of material or the initial performance of labor under the contract on which the lien is founded.[19]

In *Burr v. Maultsby*[20] the plaintiff furnished material and performed labor in repair of property of defendant *A*. Subsequent to the completion of this labor and the final furnishing of material, defendant *A* conveyed the property to defendant *B* who took for value and without notice of the plaintiff's claim. The deed from defendant *A* to defendant *B* was duly recorded. Subsequent to these transactions and within the statutory time allowed, plaintiff filed notice of lien. The court held that the lien related back to the first furnishing of materials or performance of labor; and, therefore, the conveyance from defendant *A* to defendant *B* was subject to and inferior to the plaintiff's lien.

[16] King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929).

[17] The problem of sufficiency of notice will not be discussed in this note. On this point see N. C. GEN STAT. §44-38 (1943); King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929); Fulp v. Kernersville Light Co., 157 N. C. 157, 72 S. E. 867 (1911); Cook v. Cobb, 101 N. C. 68, 7 S. E. 700 (1888).

[18] Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108 (1888).

[19] King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929); Harris v. Cheshire, 189 N. C. 219, 126 S. E. 593 (1925); McAdams v. Piedmont Trust Co., 167 N. C. 494, 83 S. E. 623 (1914); Clark v. Edwards, 119 N. C. 115, 25 S. E. 794 (1896); McNeal Pipe and Foundry Co. v. Howland, 111 N. C. 615, 16 S. E. 857 (1892); Lookout Lumber Co. v. Mansion Hotel, 109 N. C. 658, 14 S. E. 35 (1891); Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108 (1888); Chadbourn v. Williams, 71 N. C. 444 (1874).

[20] 99 N. C. 263, 6 S. E. 108 (1888).

In *King v. Elliott*[21] plaintiff furnished material under an entire and indivisible contract on the dates of July 2, July 15, August 1, and August 22. Defendant Elliott executed a deed of trust on the property to the defendant bank as trustee and it was recorded August 1. The plaintiff lienor filed notice of lien on December 31. Here again the court held that since the lien related back to the initial furnishing of material, the materialman's lien was superior to the deed of trust recorded subsequent to the initial furnishing of materials, yet recorded prior to the filing of notice of the materialman's lien. Thus it appears that one taking a mortgage or deed of trust, or purchasing property cannot rely on the registrations in the lien docket[22] but rather has the burden of making inquiry as to the existence of potential liens yet unrecorded but for which there is still time for the lienor to file notice as required by the statute.[23]

In *McAdams v. Piedmont Trust Co.*[24] plaintiff and defendant *A* entered a construction contract on June 14. On July 20 a deed of trust executed by defendant *A* to defendant *B* as trustee was properly recorded. Labor and materials were first furnished by the plaintiff on August 7. The court consistent, with other decisions, held that the lien related back to the initial furnishing of labor and materials and did not relate back to the date of the contract. Further, the proper and prior registration of the deed of trust was notice to the plaintiff contractor, and therefore his lien was subject to and inferior to the deed of trust.

In *Smith Builders Supply, Inc. v. Riverbark*,[25] plaintiff furnished material to a lessee who had an option to buy. Subsequently, the lessee took up the option giving a deed of trust to the seller to secure the purchase price. It was held that the sale with the purchase money deed of trust back was as a single transaction; the title passed too quickly for the lien to attach. It may also be reasoned that no lien had been established. There must be a debt between the lienor and the owner for a lien to be established. North Carolina being a "title" jurisdiction the mortgagee is formally the owner, holding the legal title. Since the sale with the purchase money deed of trust given back is an instantaneous transaction, the seller-owner after such a transaction becomes the mortgagee-owner. Since there is no debt as between the material furnisher and the seller-mortgagee-owner, there can be no lien. As to subsequent encumbrances on the property, the materialman's lien would be in full force and effect.

[21] 197 N. C. 93, 147 S. E. 701 (1929).
[22] For further discussion in respect to title examination see Boyd, *Some Phases of Title Examination and Real Estate Practice*, 20 N. C. L. Rev. 169, 173 (1942).
[23] N. C. Gen. Stat. §44-39 (1943).
[24] 167 N. C. 494, 83 S. E. 623 (1914).
[25] 231 N. C. 213, 56 S. E. 2d 431 (1949).

In reaching the solution as to priority between two or more mechanic's, laborer's or materialman's liens, the North Carolina General Assembly has provided a statute[26] directly covering the problem. This statute explicitly provides that "liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with . . . the clerk."[27] In *Boykin v. Logan*[28] it was held that as between parties furnishing labor or materials and acquiring liens, each of which is properly filed, that lien is superior which is first filed notwithstanding the fact that the debt giving rise to this superior lien was not incurred until after the furnishing of labor or materials giving rise to the later filed liens.[29]

Thus as long as the contest is between a single statutory lien and one or more contract encumbrances, or between two or more statutory liens, absent any contract encumbrances, the law is explicit. To make a generalization from the above, the law is clear in any case involving the priority as between statutory liens and contract liens in any numbers provided that all of the statutory liens considered individually bear the same priority relationship to the various contract liens. In a situation where all of the statutory liens do not bear the same relationship to the contract liens, i.e., one in which a contract lien intervenes between two or more statutory liens, the application of the existent North Carolina law produces an anomalous situation.[30]

Suppose pursuant to a contract between *A* and *O*, *A* furnished building materials on April 1. On April 15, a deed of trust executed by *O* to *B* as trustee was recorded. On May 1, *C* performed labor for *O* pursuant to an independent contract. On May 15, *C* filed notice of his lien; and on June 1, *A* filed notice of his lien. Since *O* had become insolvent, and his property was not sufficient to pay off the three claims, the problem before the court is which claim shall be superior.

As between *A* and *B*, by application of the rule of relation back to the date of the initial furnishing of materials, the materialman's lien of *A* is superior to the deed of trust subsequently recorded.[31] As between *B's* deed of trust and *C's* laborer's lien, the deed of trust is superior, having been properly recorded before the performance of labor by *C*;[32] and, thereby, *C's* lien is subject to the deed of trust. If

[26] N. C. GEN STAT. §44-40 (1943).
[27] N. C. GEN STAT. §44-40 (1943).
[28] 203 N. C. 196, 165 S. E. 680 (1932).
[29] For example, *A* furnishes materials on April 1, and *B* furnishes materials on May 1. *B* files notice of lien on June 1, and then *A* files notice of his lien on July 1. Having been recorded first, *B's* lien is superior to that of *A's*.
[30] OSBORNE, MORTGAGES 567 (1951).
[31] King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929); Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108 (1888).
[32] McAdams v. Piedmont Trust Co., 167 N. C. 494, 83 S. E. 623 (1914).

this were the whole story, the liens of *A, B,* and *C* would rank in this order of preference. But by applying the statute[33] and its interpretation in the *Boykin* case, notice of *C's* lien having been filed prior to the filing of notice of *A's* lien, *C's* lien is superior. Thus there is a vicious circle with each claim at the same time being both superior and inferior to the other two claims.

This problem, or problems closely related hereto, has been passed on in several jurisdictions having lien laws similar to those of North Carolina.[34] The decisions of these jurisdictions that have passed on the problem fall into two categories. One group of decisions[35] by a strict and literal construction of the lien statutes holds that all of the statutory lien claimants should be preferred over the intervening contract lien claimants. The other group of decisions[36] holds that an intervening contract encumbrance creates by its intervention different classes of statutory liens. By applying the relation back rule, it is determined which liens are superior to the contract lien and which are inferior.[37] Then, as between these statutory lienors in each class, the priorities will be determined by applying the usual rule[38] as between lien claimants generally, to each class separately. The reasoning behind these decisions grouping the liens into classes is that the lien which is subsequent to and inferior to the contract lien can attach only to the interest of the owner as of the time the lien is acquired. And, likewise, the lien superior to the contract lien attaches to the property unencumbered by the subsequent contract lien.

Though this anomalous situation has never been presented directly to the Supreme Court of North Carolina, one of the following solutions may be proper, should such a case arise. First, the court might invoke the class theory. To reach the solution, the court should first apply the relation back rule to the various liens and thereby establish the

[33] N. C. GEN. STAT. §44-40 (1943).

[34] Pacific States Saving, Loan & Bldg. Co. v. Dubois, 11 Idaho 319, 83 P. 513 (1905); Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 7 (1910); Gardner v. Leck, 52 Minn. 522, 54 N. W. 746 (1893); Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398 (1891); Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643 (1893); Meister v. J. Meister, Inc., 103 N. J. Eq. 78, 142 A. 312 (Ch. 1928).

[35] Gardner v. Leck, 52 Minn. 522, 54 N. W. 746 (1893); Finlayson v. Crooks, 47 Minn. 74, 49 N. W. 398 (1891).

[36] Pacific States Saving, Loan & Bldg. Co. v. Dubois, 11 Idaho 319, 83 P. 513 (1905); Ward v. Yarnelle, 173 Ind. 535, 91 N. E. 7 (1910); Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643 (1893); Meister v. J. Meister Inc., 103 N. J. Eq. 78, 142 A. 312 (Ch. 1928).

[37] Meister v. J. Meister, Inc., 103 N. J. Eq. 78, 142 A. 312 (Ch. 1928). "Some lien claims therefore may be prior to the mortgage, and some subsequent, as here. This divides the lien claims into two classes."

[38] In some jurisdictions, the statutory lien claimants share pro rata in the distribution of the debtor's assets; whereas, in other jurisdictions as in North Carolina, the lien claimants take priority in the order in which they file their notices of lien.

classes of liens which are superior or inferior to the intervening contract lien. After the liens have been grouped into classes, the court should construe N. C. GEN. STAT. §44-40 (1943) to the effect that the word liens as used in this priority statute means liens of the same class, and apply it to determine the priority of the various liens within the individual classes.[39]

Second, the court might dispense with its long established doctrine of relation back.[40] It is true that this rule has time and again been sanctioned,[41] and there would probably be great hesitancy on the part of the court to overturn its past ruling. There are some good reasons, however, that stand in favor of such a reversal by the court. It it true that *Burr v. Maultsby*[42] takes the position that the filing of notice of lien is not an essential element to the establishing of a lien effective during the 6 months' filing period, nor is this necessary in order for the lien to take precedence over a contract lien recorded subsequently to the first furnishing of material or performance of labor. By interpreting the language of the court in the light of the decision it appears that the court is of the opinion that the purpose of the filing of the notice of lien is to give the lien life and efficacy after the expiration of the period of filing. This places the filing of notice of lien in the position of a condition precedent to the survival of the lien after the passage of the statutory time for filing.

But in *Cook v. Cobb*,[43] where the labor was performed and notice of lien filed and subsequently the property was attached and sold for another indebtedness, the court, in passing upon the sufficiency of the notice as filed, held that the purpose of the notice of lien is to put the public on notice of the lien established.[44] If indeed the purpose of the

[39] A statutory amendment could quite simply accomplish the same result. An amendment would not, however, be necessary.

[40] This doctrine of relation back applying to liens was first propounded in 1874. Warren v. Woodard, 70 N. C. 382 (1874); Chadburn v. Williams, 71 N. C. 444 (1874).

[41] Cases cited note 19 *supra*.

[42] 99 N. C. 263, 6 S. E. 108 (1888).

[43] 101 N. C. 68, 7 S. E. 700 (1888).

[44] "The obvious purpose of this requirement is to give public notice, in the offices designated, of the plaintiff's 'claim'—his debt—the amount of it, the materials supplied or the labor done, when done, on what property, on what farm or crop, and when, specified in such detail and certainty as will give reasonable notice to all persons of the character of the 'claim,' and the property to which the lien, on account of the same, attaches, and of the lien thereby established.

"Otherwise, such filing of the claim and notice thereof and the lien, would serve no useful purpose, and it would be practically nugatory." Cook v. Cobb, 101 N. C. 68, 70, 7 S. E. 700, 701 (1888).

Speaking of the lienor's advantage, this court said: "If he is to have such advantage other creditors should know the fact, and the extent of it, to the end they may have just opportunity the better to determine what extent of credit the employer should have, and what property of his they might expect to subject to the payment of their debt against him."

filing of notice of lien is to give notice to creditors of any prior encumbrances upon the property of the debtor, how can this view be reconciled with the fact that if a lienor has furnished labor or material before the recording of a subsequent contract lien and who files after the recording of the contract lien and within the time for filing, the lien is superior to the contract lien even though the contract lienor had no notice actual or constructive of the existence of the lien?

The relation back doctrine when first applied, was predicated on N. C. CODE (1883) §1782[45] in 1874.[46] The doctrine was again applied by referring to the same statute in 1888.[47] This statute was general applying to work on crops, farms, and for materials furnished;[48] and by direct implication it required the relation back rule. In the REVISAL OF 1905, the statute was modified so as to restrict its application to liens for work done on crops.[49] Notwithstanding this change, the court has continued to apply the relation back rule to mechanic's, laborer's, or materialman's liens on subject matter other than work done on crops.[50] Thus the rule still stands even though its statutory foundation has been removed.

N. C. GEN. STAT. §44-38 (1943) is a further argument for abandoning the relation back doctrine. Its emphasis is upon the time of filing rather than on the time of the initial furnishing, on the detail with which notice is to be filed. The degree of detail required would seem to be indicative of the legislature's intent that this notice should be directed to subsequent creditors of any class seeking security in the property of the owner-debtor. N. C. GEN. STAT. §44-39 (1943) expressly provides that as between lien claimants the date of the filing of their notices of lien determines the priority. N. C. GEN. STAT. §44-42 (1943)[51] also indicates the emphasis that the statutes place on the filing of the notice of the lien.

Thus it seems that there are good grounds on which a repudiation

[45] N. C. Laws 1869-70, c. 206, §2.

[46] Warren v. Woodard, 70 N. C. 382 (1874); Chadbourn v. Williams, 71 N. C. 444 (1874).

[47] Burr v. Maultsby, 99 N. C. 263, 6 S. E. 108 (1888).

[48] N. C. CODE (1883) §1782: "The lien for work on crops or farms or materials given by this chapter shall be preferred to every other lien or incumbrance, which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished."

[49] N. C. REVISAL OF 1905 §2034: "The lien for work on crops given by this chapter shall be preferred to every other lien or incumbrance which attached to the crops subsequent to the time at which the work was commenced."

[50] King v. Elliott, 197 N. C. 93, 147 S. E. 701 (1929); Harris v. Cheshire, 189 N. C. 219, 126 S. E. 593 (1925); McAdams v. Piedmont Trust Co., 167 N. C. 494, 83 S. E. 623 (1914).

[51] N. C. GEN. STAT. §44-42 (1943): "Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer."

of the relation back rule may be based. With such a repudiation of the relation back rule, priority, as between liens and contract liens or any combination thereof, would simply depend on the times of the filing of notices of lien or recording of the contract liens.

Furthermore, in *Penland v. Red Hill Methodist Church*,[52] the court held, in deciding a venue question, that as far as an interest in real property is concerned there is no essential difference between a statutory lien and a contract lien.[53] Hence, there is little reason why the recordation of statutory liens and the recordation of contract liens should not be given the same effect. This would make the rules easy of application and produce uniformity in lien law generally.

WILLIAM H. BOBBITT, JR.

Pleading—Unnecessary Allegations in Answer—Motion to Strike

Plaintiff instituted an action against defendant administrator to compel defendant to pay plaintiff, as sole distributee, assets of the estate of one Arsemus Chandler. Plaintiff alleged that he was born of the marriage between Arsemus Chandler and Della Fender Hensley and is the son and only heir of Arsemus Chandler. The defendant specifically denied this allegation and for further answer and defense set out matter to the effect that plaintiff was born to Della Fender more than two years after she and Arsemus Chandler separated and that plaintiff was not the son of Arsemus Chandler. In apt time plaintiff moved to strike this further answer and defense. The motion was overruled. In an opinion by Justice Winborne the North Carolina Supreme Court reversed saying;

"The plea of denial controverts and raises an issue of fact between the parties as to each material allegation denied, and forces the plaintiff to prove them. . . . averments of evidence which defendant contends sustain his denial of the controverted facts are irrelevant as pleading and have no place in the answer. . . .[1]

This decision seems inconsistent with an earlier case where the allegation sought to be stricken was but an elaboration of the denial previously made. The trial judge refused to strike the unnecessary allegation. The Supreme Court affirmed, saying that since under the denial the evidence would be competent with or without the explanatory

[52] 226 N. C. 171, 37 S. E. 2d 177 (1946).

[53] "And we see no essential difference in so far as an interest in real property is involved, in an action to foreclose a mortgage, a lien created by contract, and in one to foreclose a specific statutory lien on real property." Penland v. Red Hill Methodist Church, 226 N. C. 171, 173, 37 S. E. 2d 177 (1946).

[1] Chandler v. Mashburn, 233 N. C. 277, 63 S. E. 2d 553 (1951).