



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 30 | Number 1

Article 18

12-1-1951

Liens -- Subcontractors -- Acquisition and Priorities

William H. Bobbitt Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

William H. Bobbitt Jr., *Liens -- Subcontractors -- Acquisition and Priorities*, 30 N.C. L. REV. 83 (1951).

Available at: <http://scholarship.law.unc.edu/nclr/vol30/iss1/18>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

measure of compensation, would have given the upper hand to management, the authority of the State then becoming a hobble upon the bargaining strength of labor.³² In the *Pewee* case (involving, of course, losses instead of profits) there was no discussion of bargaining powers, but Justice Black would have given the advantage to management: clearly, a company which is losing money as *Pewee* was³³ will have no incentive to settle its differences with the union so long as all its losses are borne by someone else; more than that, such a decision would be a strong incentive toward continuation of Government control, and might even induce some companies to seek such control. The concurring opinion (and the holding) does not offer asylum to the financially sick, but it, too, does seem to favor management, since the company, upon settlement, would accomplish nothing more than the assumption of whatever increase was finally agreed upon. In either of these two situations, whether or not the employees were satisfied with their temporary agreement would matter little or nothing to management, economically speaking; but if they were satisfied then they also would have at least no particular reason to strive for de-control, thus compounding the odds against good-faith bargaining. Under the dissent's view, however, the company would have had to pay everything, including the increase in wages, and, consequently, the question of advantage to one side or the other would seem to depend solely upon how satisfied each was with the temporary settlement. It is submitted that this view is preferable to either of the other two in respect of labor-management relations, inasmuch as Government's place in that respect should be "in the middle"—favoring, as nearly as possible, neither side.³⁴

L. K. FURGERSON, JR.

Liens—Subcontractors—Acquisition and Priorities

In 1874, the Supreme Court of North Carolina held, in *Wilkie v. Bray*,¹ that there was no right to a lien under the statute² providing for mechanic's, laborer's, or materialman's liens unless there was a contract

³² For a discussion of this problem (which, however, apparently leaves open the question of what is fair rental value under such circumstances) see Gerhart, *Strikes and Eminent Domain*, 30 J. AM. JUD. Soc'y 116 (1946).

³³ Net loss for the period of seizure (May 1 to October 12, 1943) was \$36,128.96.

³⁴ "The greatest danger in the establishment of government seizure policy is that the normal processes of collective bargaining will be disrupted. Crisis measures should be reserved for crisis problems, voluntary mediation for normal collective bargaining. This implies two requirements: first, that voluntary mediation machinery of the government should be perfected before emphasis is placed on supplementary procedures; second, that seizure should not be permitted to be used as an instrument of economic pressure by either management or labor." Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1054 (1947).

¹ 71 N. C. 205 (1874).

² N. C. Laws 1868-69, c. 206, §1, now, N. C. GEN. STAT. §44-1 (1950).

with the owner creating the relationship of debtor and creditor.³ Consequently, subcontractors were not able to enjoy the benefits of these liens. Their contracts were not with the owner, but rather with the principal contractor. In 1880,⁴ however, the General Assembly made provision for a lien for subcontractors.⁵

A subcontractor is one who has entered into a contract for the furnishing of labor or material, or both, with the person who has already contracted with the owner of the property for such labor or material.⁶ There is no privity of contract between the subcontractor and the property owner, nor does the relationship of debtor and creditor ever arise between them.

When the subcontractor has furnished labor or material to his principal contractor under the subcontract, the debtor-creditor relationship arises between the subcontractor and the principal contractor. At this point the subcontractor may be in a position to acquire his lien. Whether or not this lien may be acquired depends on two things. First, there must be a balance due on the contract between the owner and the principal contractor.⁷ Second, there must be notice given to the property owner of the amount the principal contractor owes to the subcontractor.⁸

The requirement that a balance must be owing the principal contractor by the owner is essential. The subcontractor cannot acquire a lien on the property of the owner in excess of "the amount due the original contractor at the time of notice given."⁹ As a direct consequence of this, where the owner has paid the principal contractor in full

³ *Accord*, *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); *Charlotte Pipe and Foundry Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916); *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 381 (1899); *Nicholson v. Nichols*, 115 N. C. 200, 20 S. E. 294 (1894).

⁴ N. C. Laws 1880, c. 44, §§1, 3.

⁵ N. C. GEN. STAT. §44-6 (1950) "All subcontractors and laborers who are employed to furnish or who do furnish labor or material for the building, repairing or altering any house or other improvement on real estate, have a lien on said house and real estate for the amount of such labor done or material furnished, . . ."

⁶ *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

⁷ N. C. GEN. STAT. §§44-6, 8, 9 (1950), *Schnepf v. Richardson*, 222 N. C. 228, 22 S. E. 2d 555 (1942); *Rose v. Davis*, 188 N. C. 355, 124 S. E. 576 (1942); *Charlotte Pipe and Foundry Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916); *Blue Pearl Granite Co. v. Merchants Bank*, 172 N. C. 354, 90 S. E. 312 (1916); *Orinoco Supply Co. v. Masonic Home*, 163 N. C. 513, 79 S. E. 964 (1913); *Decker Bros. v. Flack*, 152 N. C. 600, 68 S. E. 16 (1910).

⁸ N. C. GEN. STAT. §§44-8, 9 (1950). *Schnepf v. Richardson*, *supra* note 7; *Norfolk Bldg. Supplies Co. v. Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918); *Blue Pearl Granite Co. v. Merchants Bank*, *supra* note 7; *Borden Brick Co. v. Pulley*, 168 N. C. 371, 84 S. E. 513 (1915); *Morganton Mfg. Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914); *Morganton Hardware Co. v. Graded Schools*, 151 N. C. 507, 66 S. E. 583 (1909); *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896); *Lookout Lumber Co. v. Mansion Hotel*, 109 N. C. 658, 14 S. E. 35 (1891); *Pinkston v. Young*, 104 N. C. 102, 10 S. E. 133 (1889).

⁹ N. C. GEN. STAT. §44-6 (1950).

in advance, the subcontractor cannot acquire a lien.¹⁰ In connection with this, it is to be noticed that a subsequent promise by the owner to the subcontractor to pay the debt of the principal contractor is generally without consideration.¹¹ Also, it comes under the Statute of Frauds requiring such a guaranty promise to be in writing.¹² However, even though at the time the notice is given to the owner there is nothing owed by the owner to the principal contractor, any subsequent amount due the principal contractor by the owner under the same contract is subject to the lien of the subcontractor.¹³

In contrast with the liens for labor and materials as acquired by the principal contractor, the subcontractor's lien does not have to be filed publicly with the clerk of the superior court.¹⁴ However, a notice must be served on the owner of the property. This notice may be given by two methods. First, the principal contractor is required by law¹⁵ to furnish to the owner, before receiving any part of the contract price, an itemized statement of the amount owing to any subcontractor. When this notice is given the owner, a lien arises in favor of the subcontractor.¹⁶ Second, as a safeguard in the event the principal contractor fails to give the above notice, the subcontractor may give notice in the form of an itemized statement of the amount owed to him by the principal contractor.¹⁷ When this is done, the lien is perfected. Either of these notices, to be effectual in establishing the lien, must show the amount owed by the principal contractor to particular subcontractors and the specific work or materials for which the amount is due.¹⁸ A notice of a general indebtedness of the principal contractor is not sufficient.¹⁹ Also, the mere fact that the owner is aware that certain people have furnished labor or material is not sufficient.²⁰

¹⁰ Roberts & Johnson Lumber Co. v. Horton, 232 N. C. 419, 61 S. E. 2d 100 (1950); Dixon v. Ipock, 212 N. C. 363, 193 S. E. 392 (1937); Rose v. Davis, 188 N. C. 355, 124 S. E. 576 (1924); Orinoco Supply Co. v. Masonic Home, 163 N. C. 513, 79 S. E. 964 (1913); Decker Bros. v. Flack, 152 N. C. 600, 68 S. E. 16 (1910).

¹¹ Roberts & Johnson Lumber Co. v. Horton, *supra* note 10.

¹² N. C. GEN. STAT. §22-1 (1943); Roberts & Johnson Lumber Co. v. Horton, 232 N. C. 419, 61 S. E. 2d 100 (1950).

¹³ Norfolk Bldg. Supplies Co. v. Hospital Co., 176 N. C. 87, 97 S. E. 146 (1918); Blue Pearl Granite Co. v. Merchants Bank, 172 N. C. 354, 90 S. E. 312 (1916); Borden Brick Co. v. Pulley, 168 N. C. 371, 84 S. E. 513 (1915).

¹⁴ N. C. GEN. STAT. §44-10 (1950); Blue Pearl Granite Co. v. Merchants Bank, *supra* note 13; Morganton Mfg. Co. v. Andrews, 165 N. C. 285, 81 S. E. 418 (1914).

¹⁵ N. C. GEN. STAT. §§44-8, 12 (1950).

¹⁶ Economy Pumps, Inc. v. Woolworth Co., 220 N. C. 499, 17 S. E. 2d 639 (1941); Norfolk Bldg. Supplies Co. v. Hospital Co., 176 N. C. 87, 97 S. E. 146 (1918); Pinkston v. Young, 104 N. C. 102, 10 S. E. 133 (1889).

¹⁷ N. C. GEN. STAT. §44-9 (1950). See note 8 *supra*.

¹⁸ Norfolk Bldg. Supplies Co. v. Hospital Co., 176 N. C. 87, 97 S. E. 146 (1918).

¹⁹ *Ibid.*

²⁰ *Ibid.*; Clark v. Edwards, 119 N. C. 115, 25 S. E. 133 (1896).

Once the subcontractor has perfected his lien he is by substitution entitled to the rights which the principal contractor could have acquired.²¹ From this it follows that the relation back rule, applicable to liens of principal contractors,²² would apply, thereby making the lien of the subcontractor effective as of the date of the first furnishing of materials or performance of labor.²³ The lien acquired attaches to the full extent of the owner's property on which the work was done or for which materials were furnished.²⁴ However, the claim of the subcontractor against the owner is limited. It cannot exceed the amount owed the subcontractor by the principal contractor. Also it cannot, in any event, exceed the amount owed by the owner to the principal contractor at the time of the giving of the notice,²⁵ nor the amount which may subsequently be owing to the principal contractor for additional performance under the same contract.²⁶

The subcontractor's lien is preferred over any lien which the principal contractor²⁷ might have acquired upon the property under the same transaction²⁸ until the amount owed by the principal contractor to the subcontractor is paid.²⁹ Until the subcontractor's lien has been discharged, it enjoys the same position as to priority as against other creditors of the owner as does a lien acquired by a principal contractor.³⁰ As between a number of subcontractors, each having acquired a lien, working under the same principal contractor, there is no preference.

²¹ *Schnepf v. Richardson*, 222 N. C. 220, 22 S. E. 2d 555 (1942); *Borden Brick Co. v. Pulley*, 168 N. C. 371, 84 S. E. 513 (1915).

²² Note, 29 N. C. L. REV. 480 (1951).

²³ *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); *Warren v. Woodard*, 70 N. C. 382 (1874).

²⁴ N. C. GEN. STAT. §44-6 (1950). See also *Lanier v. Bell*, 81 N. C. 337 (1879).

²⁵ N. C. GEN. STAT. §44-6 (1950). "The claim of the subcontractor or materialman supplants that of the contractor and the duty of the owner to pay is an independent and primary obligation created by statute. The owner is liable to the subcontractor, however, only in the event he received notice of the claim prior to the settlement with the principal contractor and then only to the extent of the unexpended contract price still retained by him." *Schnepf v. Richardson*, 222 N. C. 228, 229, 22 S. E. 2d 555, 557 (1942); *Widenhouse v. Russ*, 234 N. C. 382, — S. E. 2d — (1951).

²⁶ *Norfolk Bldg. Supplies Co. v. Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918); *Blue Pearl Granite Co. v. Merchants Bank*, 172 N. C. 354, 90 S. E. 312 (1916); *Borden Brick Co. v. Pulley*, 168 N. C. 371, 84 S. E. 513 (1915).

²⁷ For a discussion of mechanic's, laborer's and materialman's liens as acquired by principal contractors see Note, 29 N. C. L. REV. 480 (1951).

²⁸ N. C. GEN. STAT. §44-6 (1950); *Lookout Lumber Co. v. Mansion Hotel*, 109 N. C. 658, 14 S. E. 35 (1891); *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

²⁹ *Lester v. Houston*, *supra* note 28.

³⁰ Note, 29 N. C. L. REV. 480 (1951).

Each is entitled to his pro rata share of the amount that the owner retained, or should have retained, of the contract price owed to the principal contractor at the time notice was given.³¹ Any payment made by the owner to the principal contractor after the notice of the amount due the subcontractor from the principal contractor is given does not in any way decrease the claim which the subcontractor may assert against the owner.³²

Should the owner refuse to retain the required amount of the contract price after notice or if he should refuse to pay the same over to the subcontractor, the subcontractor may proceed to enforce his lien.³³ An action to enforce this lien is essentially the same in an action to foreclose a mortgage on real property. Hence, the proper venue is in the county in which the property is located.³⁴ In suing to enforce the lien against the owner, or rather his property, the subcontractor must join as a party defendant the principal contractor as he is the primary debtor. Until the subcontractor has established his claim against the principal contractor he cannot maintain an action against the owner.³⁵

Suit to enforce a subcontractor's lien must be brought within six months from the time of the serving of notice on the owner.³⁶ Failure to bring suit within this period discharges the lien.³⁷ In this event, however, the subcontractor may nevertheless maintain a personal action against the owner.³⁸ This personal action is allowed on the theory that the amount which the owner should have retained after the notice given by the subcontractor is in the nature of a trust fund³⁹ for the benefit of the subcontractor.

Unfortunately, the decisions have left some of the aspects of lien law as it pertains to subcontractors somewhat in doubt. An application

³¹ N. C. GEN. STAT. §44-11 (1950); *Norfolk Bldg. Supplies Co. v. Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918); *Charlotte Pipe and Foundry Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916); *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936 (1914); *Morganton Mfg. Co. v. Andrews*, 165 N. C. 285, 81 S. E. 418 (1914); *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

³² N. C. GEN. STAT. §44-9 (1950); *Lookout Lumber Co. v. Mansion Hotel*, 109 N. C. 658, 14 S. E. 35 (1891).

³³ N. C. GEN. STAT. §44-9 (1950).

³⁴ *Penland v. Red Hill Methodist Church*, 226 N. C. 171, 37 S. E. 2d 177 (1946).

³⁵ *Lookout Lumber Co. v. Mansion Hotel*, 109 N. C. 658, 14 S. E. 35 (1891).

³⁶ N. C. GEN. STAT. §44-43 (1950); *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

³⁷ N. C. GEN. STAT. §44-48 (1950) *Hildebrand v. Vanderbilt*, *supra* note 36.

³⁸ *Porter v. Case*, 187 N. C. 629, 122 S. E. 483 (1924); *Campbell v. Hall*, 187 N. C. 464, 121 S. E. 761 (1924); *Charlotte Pipe and Foundry Co. v. Southern Aluminum Co.*, 172 N. C. 704, 90 S. E. 923 (1916); *Hildebrand v. Vanderbilt*, 147 N. C. 639, 61 S. E. 620 (1908).

³⁹ *Norfolk Bldg. Supplies Co. v. Hospital Co.*, 176 N. C. 87, 97 S. E. 146 (1918); *Charlotte Pipe and Foundry Co. v. Southern Aluminum Co.*, *supra* note 38. *Bond v. Pickett Cotton Mills*, 166 N. C. 20, 81 S. E. 936 (1914).

of the present lien law to certain facts can produce some anomalous situations. Suppose *O*, the owner of certain property, contracted with *C* for the building of a house. *C* commenced work on July 1. On August 1, a mortgage executed by *O* to *M* was properly recorded. On September 1, pursuant to a contract between *S* and *C*, *S* furnished certain materials that were used in the finishing of the house. On October 1, after the completion of the house, *C* filed notice of lien in the office of the clerk of the superior court. On November 1, *S*, having received no payment from *C* who in turn had received no payment from *O*, gave sufficient notice to *O* of the amount due *S* by *C*. Since *O* had become insolvent and his property was not of sufficient value to pay off the three⁴⁰ claims in full, the problem is which lien shall have priority.

As between *C* and *M*, by application of the rule of relation back to the date of the initial furnishing of labor or materials, the mechanic's lien of *C* is superior to the mortgage subsequently recorded.⁴¹ As between *C*'s mechanic's lien and *S*'s lien for material, *S*'s lien is superior being so preferred by the express words of the statute creating it.⁴² By elementary logic it would seem to follow that *S*'s lien would be superior to *M*'s mortgage. However, by close analysis and application of the previously discussed principles of law, this result need not necessarily follow.

The initial furnishing of materials by *S* was subsequent to the recordation of *M*'s mortgage. The Supreme Court of North Carolina has held that the relation back rule applies to liens of subcontractors.⁴³ Such application fixes the effectiveness of *S*'s lien at the time of the initial furnishing of material. Consequently, if this theory is followed, *S*'s lien is subsequent and hence inferior to *M*'s mortgage.

The Supreme Court of North Carolina has also held that when the subcontractor perfects his lien he is substituted to the rights of the original contractor.⁴⁴ If this is the case, *C*'s lien being superior to the mortgage, *S*'s lien would be superior to the mortgage by substitution.

Suppose, however, instead of the above situation, *M*'s mortgage, having been recorded before any work was done, was clearly superior to both *C*'s lien and *S*'s lien. Also, the value of the property had declined to such an extent that it was sufficient only to pay off the claims of *M*

⁴⁰ Though there are three claims against *O*'s property, the total amount of these claims is only the sum of *M*'s claim and *C*'s claim—*S*'s claim being in amount a part of *C*'s claim.

⁴¹ Note, 29 N. C. L. REV. 480 (1951).

⁴² N. C. GEN. STAT. §44-6 (1950); *Lester v. Houston*, 101 N. C. 605, 8 S. E. 366 (1888).

⁴³ *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794 (1896); *Lookout Lumber Co. v. Mansion Hotel*, 109 N. C. 658, 14 S. E. 35 (1891).

⁴⁴ Note 21 *supra*.

and *S*. The question arises as to whether or not *S*'s lien for furnishing materials can defeat *O*'s homestead exemption.

The North Carolina Constitution⁴⁵ provides that the mechanic's and laborer's liens can defeat the homestead exemption; whereas, the materialman's lien being purely statutory cannot.⁴⁶ *C*'s lien is a mechanic's lien and by express provision can defeat the homestead. *S*'s lien is a materialman's lien and being purely statutory cannot as such defeat the homestead exemption. If *S*'s lien is not allowed to defeat the homestead exemption and *C*'s lien is, *S* has lost his only security. This would seem contrary to the established policy of protecting the rights of the subcontractor as against the principal contractor. If, however, *S*'s materialman's lien is substituted to the rights of *C*'s mechanic's lien and thus allowed to defeat the homestead exemption, this would be promoting a materialman's lien to the elevated status of a mechanic's lien in law, though not in fact. Though this result may be desirable as protection for the subcontractor, it certainly should not be attained by giving liens purely statutory the power to defeat rights conferred by the Constitution.

A satisfactory solution of these problems under the existing lien law is not apparent.⁴⁷ However, in the light of the possible confusion that application of the existing lien law might produce, a constitutional amendment protecting the subcontractor followed by a revision of our lien law would seem desirable.

WILLIAM H. BOBBITT, JR.

Municipal Corporations—Tort Liability—Emergency Use of Fire Department Inhalators

Traffic laws frequently exempt from their operation certain vehicles engaged in public service emergencies¹ or give to such vehicles certain rights of way over other vehicles on the streets and highways.² Such

⁴⁵ N. C. CONST. Art. X, §4.

⁴⁶ *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).

⁴⁷ The subcontractor's lien for materials would likely be held to be inferior to the constitutionally created homestead rights. However, it is submitted that this would not solve the problem.

¹ *E.g.*, N. C. GEN. STAT. §20-145 (Supp. 1951): "The speed limitations set forth . . . shall not apply to vehicles . . . of the police in the chase or apprehension of violators of the law . . . nor to fire department or patrol vehicles when traveling in response to a fire alarm, nor to . . . ambulances when traveling in emergencies, nor to vehicles . . . [of the] Utilities Commission when . . . regulating and checking . . . traffic and speed. . . . This provision shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

² *E.g.*, N. C. GEN. STAT. §20-156 (b) (1943): "The driver of a vehicle . . . shall yield the right of way to police and fire department vehicles and public and