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MECHANICS' LIENS IN NORTH CAROLINA

CHARLES S. MANGUM, JR.*

In this article the North Carolina statutes concerning what are commonly referred to as mechanics' liens will be summarized and an analysis attempted of the interpretive decisions of state and federal courts. The classification of these liens, including those of contractors, subcontractors, mechanics and other laborers, skilled or unskilled, materialmen, artisans, and loggers will be discussed with a view to delineation and clarification. Jurisdictional matters, and issues with respect to practice, procedure, and the admissibility of evidence, will merit attention only when they have arisen in some case concerning rights derived from or connected with the liens conferred by these statutes.

I. BASIC MECHANIC'S LIEN ON REAL AND PERSONAL PROPERTY

The North Carolina statute¹ providing for the generally applicable mechanic's lien states that any property, whether real or personal, and specifically including vessels, farms, buildings, and the land upon which the structures are situated, is subject to liens for all debts which may be incurred for work performed or material furnished for the purpose of building, rebuilding, repairing, or improving such property.

A. Who is Entitled to the Lien?

Issues often arise concerning the right of some person or class of persons to claim a lien under this statute. Basically, the question of who is entitled to the lien is determined by considerations of (1) the type of services undertaken (2) the type materials furnished and (3) the contractual relationship between the lienor and lienee. A discussion of definitions and the court's interpretive analysis of these three considerations will prove enlightening.

1. *Services undertaken.* One who furnishes labor or materials directly to the owner in erecting or repairing a building can enforce such a lien upon the edifice.² The same is true of a contractor who

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¹ N.C. GEN. STAT. § 44-1 (1950).

² *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680 (1932); *Isler v. Dixon*, 140 N.C. 529, 53 S.E. 348 (1906).

makes an agreement to erect a building and obtains labor and materials from others at his own expense.³ Mechanics would similarly be clearly within the scope of the statute. The term "mechanic" is given a broad meaning and has been defined as being applicable to laborers who work with their hands and are skilled in the utilization of tools of common use.⁴

Outside the scope of the statute was the bookkeeper who made a commitment to be "generally useful" under which he performed certain manual duties.⁵ There was also held to be no lien in favor of one employed to superintend the erection of a building,⁶ or one hired to assist in purchasing mill machinery as well as to perform other duties in connection with the erection and operation of a factory.⁷ Furthermore, the court denied a lien under this statute to one who hauled crossties from a swamp to railway operators who afterwards purchased them from the owner.⁸

To authorize a lien under the general lien statute, it would seem to be necessary that there be some betterment to the property upon which the labor is bestowed or the materials expended.^{8a}

2. *Materials furnished.* Vendors of certain types of articles and other persons seeking to assert materialmen's liens have been denied the right to do so. The courts, for example, have refused to classify as "materials" such articles as an engine for a gas boat,⁹ an architect's plans and specifications,¹⁰ and electrical appliances furnished to a power company where none of the appliances ever became a part of the plant and the wires and transformers supplied were merely strung on electric light poles.¹¹ The tribunal in this latter example used language which would seem to indicate that

³ Lester v. Houston, 101 N.C. 605, 8 S.E. 366 (1888).

⁴ Stephens v. Hicks, 156 N.C. 239, 72 S.E. 313 (1911).

⁵ Nash v. Southwick, 120 N.C. 459, 27 S.E. 127 (1897).

⁶ Stephens v. Hicks, 156 N.C. 239, 72 S.E. 313 (1911).

⁷ Cook v. Ross, 117 N.C. 193, 23 S.E. 252 (1895).

⁸ Tedder v. Wilmington & Weldon R.R., 124 N.C. 342, 32 S.E. 714 (1899).

^{8a} Thomas v. Merrill, 169 N.C. 623, 627, 86 S.E. 593, 595 (1915); Glazener v. Gloucester Lumber Co., 167 N.C. 676, 83 S.E. 696 (1914); Tedder v. Wilmington & Weldon R.R., *supra* note 8. In the Tedder case the court stated: "It seems, so far, that the Legislature has provided a lien only when the service or labor is for the betterment of the property on which the labor is bestowed. . . ." *Id.* at 345, 32 S.E. at 714.

⁹ The Pearl, 189 Fed. 540 (E.D.N.C. 1911).

¹⁰ Stephens v. Hicks, 156 N.C. 239, 72 S.E. 312 (1911).

¹¹ Fulp & Linville v. Kernersville Light & Power Co., 157 N.C. 154, 72 S.E. 869 (1911).

articles perfect in themselves and not placed in a building in such a manner as to lose their identity would not be considered as being within the meaning of the term as employed in the statute.

3. *Relationship between lienor and lienee.* It is a generally accepted rule of law that the assignment of a debt carries with it the security provided to guarantee its payment. Hence the assignment of a valid claim for labor or materials will give the assignee the right to file, perfect, and enforce a mechanic's lien.¹²

Although the statute does not so specify, the party seeking to create a lien against a specific piece of property, in order to perfect his lien, must have contracted with the owner or some other person who has an interest in the property. If an alleged contract has been entered into with a person other than the owner, there can be no lien unless this party can be shown to have had some special interest in the land,¹³ or to have been properly authorized to make the agreement upon which the encumbrance is based.¹⁴

A valid debt is necessary for the creation of a mechanic's lien, and consequently one will not exist in favor of a person who, without contract or authority, erects a building upon land belonging to another.¹⁵ The North Carolina Supreme Court has held that this general rule is not changed simply because there has been a mistake in ownership caused by an abortive attempt to exchange two lots which has fallen through for the reason that one of them was encumbered by a mortgage.¹⁶ Furthermore, the court has declared

¹² *Horne-Wilson, Inc. v. Wiggins Bros.*, 203 N.C. 85, 161 S.E. 726 (1932); *Blue Pearl Granite Co. v. Merchants Bank*, 172 N.C. 354, 90 S.E. 312 (1916). The court in *Horne-Wilson* disagreed with what had been said in *Zachary v. Perry*, 130 N.C. 289, 41 S.E. 533 (1902) to the effect that only the assignor, the original party to the contract, could enforce the lien. In *Horne-Wilson* the court stated that the *Zachary* decision was irrelevant because it involved a charge upon the estate of a married woman. The court's statement in the *Zachary* case denying the assignee's right to enforce the lien is unqualified, and it is difficult to perceive any reason why the involvement of a married woman's estate should have had any bearing upon the right of the assignee to enforce the lien. A more reasonable explanation would seem to be that the court did not wish to admit that one of its former members had made such an unsupportable assertion.

¹³ *Baker v. Robbins*, 119 N.C. 289, 25 S.E. 876 (1896) (contracting party had an equity of redemption).

¹⁴ See *Nicholson v. Nichols*, 115 N.C. 200, 20 S.E. 294 (1894).

¹⁵ *Thompson v. Taylor*, 110 N.C. 70, 14 S.E. 513 (1892); *Wilkie v. Bray*, 71 N.C. 205 (1874).

¹⁶ *Honeycutt v. Kenilworth Dev. Co.*, 199 N.C. 373, 154 S.E. 628 (1930).

that there can be no lien where the materials furnished were not used in erecting the building upon which the lien was claimed.¹⁷

A somewhat similar situation develops where a husband and wife hold an estate by the entirety. To entitle a laborer or materialman to a lien upon real estate thus owned, it must appear that both spouses have lawfully contracted the indebtedness out of which the claim arose.¹⁸ Mere knowledge that the contracting spouse is making improvements on the property cannot make the other spouse or the property liable.¹⁹ However, where the wife or husband has lawfully contracted to become jointly responsible for the indebtedness for which the lien is claimed, the property is subject to a lien.²⁰ In *Ranlo Supply Co. v. Clark*²¹ the contract for the purchase of materials was negotiated by a son who was building a house on land held by his parents as an estate by the entirety. The materialman was held not

¹⁷ *Lanier v. Bell*, 81 N.C. 337 (1879). The question as to whether there would be an enforceable lien where such use was intended but not carried out was raised but left unanswered.

¹⁸ *General Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E.2d 828 (1954).

¹⁹ *Healey Ice Mach. Co. v. Grene*, 191 Fed. 1004 (4th Cir. 1910).

²⁰ *Finch v. Cecil*, 170 N.C. 72, 86 S.E. 992 (1915). It is thought that the following historical material would be of interest here. By N.C. Pub. Laws 1911, ch. 109 married women were given full rights to contract. Another statute, N.C. Pub. Laws 1901, ch. 617, had made a married woman's separate property subject to mechanics' liens. See Revisal § 2016 (1905). For the general situation between 1901 and 1911 see *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905); *Finger v. Hunter*, 130 N.C. 529, 41 S.E. 890 (1902); *Zachary v. Perry*, 130 N.C. 289, 41 S.E. 533 (1902). No formal contract of employment or sale was necessary. The lien was enforceable if the married woman procured the material or gave her consent to its purchase. *Payne & Decker Bros. v. Flack*, 152 N.C. 600, 68 S.E. 16 (1910). Revisal § 2107 (1905) provided that no contract between husband and wife affecting her real estate would be valid unless it was in writing and formalized as required for conveyances of land, and unless it appeared to the official taking the wife's private examination that the transaction was reasonable and not to her disadvantage. There was a common-law presumption that a husband's improvements on his wife's land constituted a gift to her. In an instance where a husband supplied labor and materials to erect a house on his wife's land and then died, his administrator attempted to establish a mechanic's lien on the property. The wife had executed a note about four years after work had begun on the house, built by the husband over a period of several years, but the court declared that the note and the circumstances surrounding its issuance would not rebut the aforesaid presumption, since there was no evidence to overcome a second presumption that the note had been executed under the influence of the husband. *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911). For the law before 1901, see *Weir v. Page*, 109 N.C. 220, 13 S.E. 773 (1891) where a lien was denied despite evidence that the wife was aware of the husband's contract, and had supported and approved the contract.

²¹ 247 N.C. 762, 102 S.E.2d 257 (1958).

to be entitled to enforce a lien upon such land unless an express or implied obligation on the part of the parents could be shown. As evidence of such an express or implied obligation it was shown that a building and loan association, which had made the loan to finance the project for the son, issued one of its vouchers and made it payable to the father, the contractor, and the materialman. The voucher was endorsed by the father and the contractor and delivered to the materialman. The court ruled that the signing of the voucher did not create the contractual relationship between the father and the materialman necessary to give rise to a lien.²² In another instance a mortgage executed by both spouses upon property held as an estate by the entirety contained a provision stating that any sum which was paid by the mortgagee to satisfy prior liens would be added to the indebtedness secured. A federal court held that this provision would not be taken as an acknowledgment by the wife of a previously claimed lien on the property and that the recital would not estop the wife to contest its validity.²³

Unless some agency agreement authorizing a lessee's improvements can be established, the reversionary interest of the lessor cannot be subjected to the liens of laborers and materialmen hired by a contractor to erect a building for the lessee,²⁴ and this is especially true where the lessor's rights are reinforced by contract provisions.²⁵ This principle was applied in *Baker v. Robbins*,²⁶ where the owner of an equity of redemption in a mortgaged steam sawmill had repairs made on a boiler without the consent or knowledge of the mortgagee. Since no agency could be proven, it was held that the mechanic would have an enforceable lien only upon the mortgagor's equity. In *Asheville Woodworking Co. v. Southwick*²⁷ bar paraphernalia and a counter did not become part of a rented building by being installed

²² Of course there could have been no lien upon the property unless both husband and wife were responsible.

²³ *Henley Ice Mach. Co. v. Green*, 191 Fed. 1004 (4th Cir. 1910). In *McGee v. Ledford*, 238 N.C. 269, 77 S.E.2d 638 (1953), the owners of an estate by the entirety repaired a jointly held dwelling. They were then divorced, the husband conveying his interest in the real estate to his ex-wife. A repairman who had properly filed a lien for labor and materials was held to have an enforceable claim upon the property in the hands of the defaulting woman.

²⁴ *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942).

²⁵ *Weathers & Perry v. Cox*, 159 N.C. 575, 76 S.E. 7 (1912); *Boone v. Chatfield*, 118 N.C. 916, 24 S.E. 745 (1896).

²⁶ 119 N.C. 289, 25 S.E. 876 (1896).

²⁷ 119 N.C. 611, 26 S.E. 253 (1896).

therein by the lessee. The fixtures did not pass to the lessor upon the expiration of the lease but rather remained the property of the lessee and hence subject to the claimant woodworking company's mechanic's lien.

With respect to crops grown upon land which may be subjected to enforcement proceedings under mechanics' liens, claimants who have not perfected their liens before the crops are sold will lose any claim they may have had thereto.²⁸

B. Enforcement of Lien

Contractors and those who supply labor or material directly to the owner of an edifice being built or repaired may file their liens, according to jurisdictional requirements to be discussed later, with a justice of the peace or in the office of the clerk of the superior court in the county where the property involved is situated.²⁹ The notice of the lien must be filed with the proper official within a period of six months after the completion of the work or the final furnishing of the material.³⁰ There is a rule of law that the time for filing such a lien will not be extended because some trivial portion of a contract has not been performed. However, where an important item in a construction job remains to be done the contractor will have the statutory period, in this instance six months from the date of completion of the additional task, to file his lien. In one case the court ruled it was a jury question whether a wire screen covering a skylight on top of a hotel built under contract was an important item

²⁸ *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593 (1925).

²⁹ N.C. GEN. STAT. § 44-38 (1950). A former statute, N.C. Pub. Law 1868-69, ch. 206, required that the lien be filed with the register of deeds, and it was held that a claim filed in accordance with this former statute was effective despite the change where the filing was otherwise in accordance with the law. *Chadbourne v. Williams*, 71 N.C. 444 (1874). For practical application of the present statute, see *In re Fleetwood of Hendersonville Hotel Corp.*, 1 F. Supp. 125 (W.D.N.C. 1932); *Boykin v. Logan*, 203 N.C. 196, 165 S.E. 680 (1932); *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914).

³⁰ N.C. GEN. STAT. § 44-39 (1950). A twelve month period was formerly provided. Revisal § 2028 (1905). With respect to purchasers with no notice of the encumbrance the period was reduced to six months by N.C. Pub. Laws 1909, ch. 32. This amendment left the twelve month period still in effect for purchasers with notice, and it was held that anyone claiming to be without notice had the burden of proving the point. *Raeferd Lumber Co. v. Rockfish Trading Co.*, 163 N.C. 314, 79 S.E. 627 (1913). An unqualified six month period was adopted in 1913. N.C. Pub. Laws 1913, ch. 150.

in a construction agreement and that a lien might be filed at any time within six months of its delayed installation.³¹

1. *Jurisdiction.* All claims against personal property exceeding two hundred dollars, and all claims of whatever amount against real property, are to be filed in the superior court. Claims against personal property of two hundred dollars and under are within the jurisdiction of the justice of the peace.³² Difficult jurisdictional problems may arise with respect to claims for the enforcement of mechanic's lien based upon an indebtedness within the jurisdiction of the justice of the peace.

Where a creditor's account consists of several items, either for labor performed or material furnished on different occasions, the value of each item amounting to less than two hundred dollars, a justice of the peace may assume jurisdiction of any number of these items not exceeding two hundred dollars, even though the total sum of all the claims exceeds the jurisdictional limit of the justice. If, however, the debt is an entire one, consisting of just one item, and the sum exceeds the jurisdictional limitation for justices, the amount cannot be divided or split-up in order that a justice may be allowed to take the claim under consideration. Furthermore, consolidation may be ordered where there has been a wanton or malicious effort to bring multiple suits.³³

However, in some cases where the amount involved is less than two hundred dollars and thus within the jurisdiction of the justice of the peace, the superior court may nevertheless exercise its jurisdiction over the case. Thus the superior court, in taking charge of the entire estate of a debtor by means of a creditor's bill under its general equity jurisdiction, has power to collect and dispose of all the debtor's assets; to determine the validity of liens and all priorities which may exist; to apply the collected funds accordingly, irrespective of the

³¹ *Beaman v. Elizabeth City Hotel Corp.*, 202 N.C. 418, 163 S.E. 117 (1932). In *Atlas Supply Co. v. McCurry*, 199 N.C. 799, 156 S.E. 91 (1930) the court held that the time of the final furnishing of materials might be shown by introducing corporate records stating the dates on which materials were sent forth to their destination.

³² N.C. GEN. STAT. § 44-38 (1950). In an early case involving the estate of a married woman who was indebted to a person who had furnished labor and material to erect a house upon her property, it was decided that the action to enforce a mechanic's lien for an amount less than two hundred dollars must be brought before a justice of the peace. *Smaw v. Cohen*, 95 N.C. 85 (1886).

³³ *Boyle v. Robbins*, 71 N.C. 130 (1874).

amount of any one claim; and to enforce mechanics' liens even though the amount of the claim is less than two hundred dollars.³⁴ In an early case, moreover, where the proceeding was one to compel payment out of the estate of a married woman—an equitable remedy—it was held that the superior court had jurisdiction even though the amount of the asserted claim was less than the maximum jurisdictional amount for a justice's court. The tribunal declared that a justice of the peace has no equity jurisdiction.³⁵ It has also been declared that the notice of a claim of a mechanic's lien for a sum within the jurisdiction of a justice's court may be filed with the clerk of the superior court and still be effective. It is only necessary that the particular justice asked to enforce the lien have a copy of the notice.³⁶

In one opinion the court stated that an action to foreclose a mechanic's lien, being a proceeding *in rem*, is one in which jurisdiction does not have to be acquired by actual attachment or seizure of the property since the mere bringing of the suit in which relief is sought is the equivalent of seizure.³⁷ A few years later, however, the court declared that a materialman's action to enforce a lien is not an *in rem* proceeding, the indebtedness for which the lien is security being a personal liability founded on contract.³⁸ The statements in the opinions seem incompatible. The better view would appear to be that the proceeding would be *in rem*. There is a statement to this effect in a federal case³⁹ involving a boat and a mechanic's lien for supplies; however it is of little value as a precedent, since the common form of proceeding in an admiralty court is *in rem*.

There is no legal requirement that an action to enforce a mechanic's lien must be brought in the county where the encumbered property is located.⁴⁰ However, in some situations the court has allowed, as a matter of right, removal from the county of the plaintiff's residence to the county where the property involved is situated. Thus where a claimant wishing to recover the balance due on a contract for the construction of a church sought an order directing

³⁴ *Fulp & Linville v. Kernersville Light & Power Co.*, 157 N.C. 157, 72 S.E. 867 (1911).

³⁵ *Daugherty v. Sprinkle*, 88 N.C. 300 (1883).

³⁶ *Boyle v. Robbins*, 71 N.C. 130 (1874).

³⁷ *Bernhardt v. Brown*, 118 N.C. 701, 24 S.E. 527 (1896).

³⁸ *Rutherford v. Ray*, 147 N.C. 253, 61 S.E. 57 (1908).

³⁹ *The Pearl*, 189 Fed. 540 (E.D.N.C. 1911).

⁴⁰ *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922).

the sale of church property under a properly perfected lien for labor and materials, the church officials, after timely motion, were held to be entitled as a matter of right to have the cause removed to county in which the land was located and the lien first filed.⁴¹

2. *Procedure.* The filing of a mechanic's lien for labor or materials entails more than mere delivery of notice to the office of the proper official. The transcription of the written notice of the claim to the lien docket and its proper indexing are essential. However, in *Saunders v. Woodhouse*⁴² the filing of a mechanic's lien in a lien docket established for old age assistance liens was said not to be ineffective, for it was shown that all types of liens had for years been filed in this docket rather than in the proper lien docket, the use of which had been continuously neglected.

The statute specifically states that "all claims shall be filed in detail, specifying the material furnished or labor performed and the time thereof."⁴³ However, while the statute demands more than a mere summary statement, it does not require a listing of all material item by item, or the labor performed hour by hour.⁴⁴ The notice filed must be sufficient in detail to put interested parties on notice as to the labor performed and materials furnished, the time when the labor was performed and the materials furnished, the amount due therefor, and the property to which the lien might attach.⁴⁵ In *Fulp & Linville v. Kernersville Light & Power Co.*⁴⁶ a notice of lien was deemed sufficient where the entry on the docket stated the names of the lienor

⁴¹ *Penland v. Red Hill Methodist Church*, 226 N.C. 171, 37 S.E.2d 177 (1946).

⁴² 243 N.C. 608, 91 S.E.2d 701 (1956).

⁴³ N.C. GEN. STAT. § 44-38 (1950). The requirement of filing a detailed statement of the claim is statutory. If the statement filed is defective due to lack of detail, no lien arises. This defective statement cannot be cured by an amendment in the superior court. In *G. W. Jefferson & Bros. v. Bryant*, 161 N.C. 404, 407, 77 S.E. 341, 342 (1913), the court stated: "If defective [notice] when filed, it is no lien, and to permit an amendment, curing a fatal defect, would be to confer upon the court the power to make a lien, and thus destroy the provisions of the statute."

⁴⁴ *Cameron v. Consolidated Lumber Co.*, 118 N.C. 266, 24 S.E. 7 (1896). In *King v. Elliott*, 197 N.C. 93, 147 S.E. 701 (1929), the court stated the following rule: "A distinction runs through the authorities in regard to the particularity required in specifying the amount and character of the work done or materials furnished, and the prices charged therefor, where the claim rests upon open account and where the work done or materials furnished were contracted for as an entirety. More particularity of statement is required in the former than in the latter instance." *Id.* at 98, 147 S.E. at 704.

⁴⁵ *Lowery v. Haitcock*, 239 N.C. 67, 79 S.E.2d 204 (1953).

⁴⁶ 157 N.C. 157, 72 S.E. 867 (1911).

and lienee, the amount claimed, an accurate description of the property to which the lien would attach, and the dates upon which or between which materials were furnished, and further referred to a schedule of prices and materials attached to the notice asking that it be taken as a part of the notice of lien. It has also been deemed proper to attach a bill of particulars to the notice filed reciting the various items of labor and materials furnished, the price of each item and the date furnished.⁴⁷ Inconsistencies in the recitals recorded would not necessarily be fatal, since the act of recording itself would usually put anyone concerned upon further inquiry.⁴⁸ Thus the lien cannot be avoided because the notice of the claim states the claimant's intention to apply it to two distinct lots separated by a street.⁴⁹ In determining the sufficiency of a claim as filed all portions of the recorded notice must be construed together.⁵⁰

With respect to liens filed under this general lien statute priorities are determined according to the time of filing.⁵¹ Thus an advantage will accrue to those who file their liens without any excessive delay.

After the claim has been filed, an action to enforce the lien created must be commenced in the proper court within six months from the date of the filing of the claim. However, if the debt which has given rise to the lien is not due within a period of six months, but will become collectible within twelve months, proceedings to enforce the lien may be initiated at any time within thirty days after maturity.⁵²

3. *Parties to enforcement proceedings.* The various statutes dealing with enforcement of mechanics' liens do not undertake to specify who shall be made parties to the action to enforce the lien. The nature and object of the action to enforce the lien must therefore be

⁴⁷ King v. Elliott, 197 N.C. 93, 147 S.E. 701 (1929).

⁴⁸ Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

⁴⁹ Chadbourn v. Williams, 71 N.C. 444 (1874).

⁵⁰ King v. Elliott, 197 N.C. 93, 147 S.E. 701 (1929).

⁵¹ N.C. GEN. STAT. § 44-40 (1950).

⁵² N.C. GEN. STAT. § 44-43 (Supp. 1961). While this and other statutes of limitations applicable to mechanics' liens do not bind a federal court attempting to enforce maritime liens, such statutes may be considered along with other matters in determining whether a particular claimant, opposing a bona fide purchaser of the vessel, has been guilty of laches. Davis v. The Nola Dare, 157 F. Supp. 420 (E.D.N.C. 1957); Phelps v. The Cecelia Ann, 199 F.2d 627 (4th Cir. 1952). Whether there has been such laches is a matter to be decided in each particular case after thorough consideration of all the circumstances involved, including the lapse of time. Laches has been said to exist in situations where no action was taken for a period of more than two years. Phelps v. The Cecelia Ann, *supra*.

considered. An owner of property upon which a contractor has filed a mechanic's lien is a necessary party in an action to enforce rights arising from the encumbrance.⁵³ Since a judgment in the enforcement action directly affects the owner's interest in the real property involved, in that the property may be sold to satisfy the encumbrance, such owner must be made a party to the action. The holders of other encumbrances, such as mortgages and deeds of trust, are not necessary parties but proper parties who, under ordinary circumstances, may be permitted to intervene and have their rights adjudicated in the lien proceeding. This procedure permits the court to consider and decide all issues pertaining to the property in one action, thus saving effort, time, and money.⁵⁴ However, where no justiciable issue is involved because a judgment by default has been rendered against the property owner, there would be no privilege of intervention and holders of other encumbrances would have to initiate an entirely new proceeding to have their rights adjudicated.⁵⁵ Any such claimant who is not a party to the action cannot be said to be bound by any decree which the court may render.⁵⁶

4. Sale of the Property. A judgment resulting from a contractor's successful effort to perfect his inchoate lien engenders a special lien upon the building constructed and the lot whereon it stands, and a general lien upon the owner's other property located in the county where the judgment is docketed. But the building must be sold to satisfy the judgment before resort may be had to the other property.⁵⁷ When a judgment has been recovered in a county other than the one where the property is situated, it is necessary that it be transferred to the county wherein the property is situated in order to enable the claimant to obtain a proper levy. In one instance, where the judgment had been transferred, the entry on the judgment docket in the county of the situs failed to mention the type of lien involved, though the judgment as filed had done so. The court ruled that

⁵³ Equitable Life Assur. Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951).

⁵⁴ Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Equitable Life Assur. Soc'y v. Basnight, *supra* note 53.

⁵⁵ Childers v. Powell, *supra* note 54.

⁵⁶ Equitable Life Assur. Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951).

⁵⁷ National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

the omission was immaterial and that it could not be used to defeat a recovery.⁵⁸

Sometimes a situation may arise where the amount of the indebtedness for which a mechanic's lien is claimed does not exhaust the property being sold under judgment. In one instance a contractor built a house on an undivided tract of land in a rural neighborhood. The house was placed within the confines of a fence enclosing approximately three acres of an eighty-acre tract. The holder of a properly established mechanic's lien started proceedings against the entire tract. It appeared that the house alone, apart from the land, was of comparatively little value. The court decided that there had been no segregation of the house from the land when the fence was constructed. The lien was therefore on the entire tract. But the court further stated that if it was both practicable and desired by the owner, the land should be divided and the parts sold separately in such order as the owner might elect, thus doing as little damage to his interest as possible.⁵⁹

C. Homestead Provisions

A state constitutional provision⁶⁰ makes the homestead exemption-proof against every form of claim except taxes, purchase money indebtedness, and the liens of mechanics and laborers.⁶¹ Under this provision there can be no doubt that the homestead exemption will not prevent real estate from being levied upon by officials acting under properly perfected liens of mechanics or laborers.⁶² Such is not the case with the materialman's lien, however, and the constitutional exemption protects the property against such a claim.⁶³ Where the type of transaction involved makes a claim for labor and materials indivisible, the exemption will not prevent the execution of a judgment for the whole amount.⁶⁴ An attempt by the legislature to make the lien for materials superior to the exemption was ruled unconstitutional.⁶⁵

⁵⁸ *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922).

⁵⁹ *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

⁶⁰ N.C. CONST. art. X, § 4.

⁶¹ See *Cumming v. Bloodworth*, 87 N.C. 83 (1882).

⁶² *Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924); *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922).

⁶³ *Cameron v. McDonald*, 216 N.C. 712, 6 S.E.2d 497 (1940).

⁶⁴ *Sugg v. Pollard*, 184 N.C. 494, 115 S.E. 153 (1922); *Isler v. Dixon*, 140 N.C. 529, 53 S.E. 348 (1906); *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

⁶⁵ *Cumming v. Bloodworth*, 87 N.C. 83 (1882).

D. Priorities

The liens created and established under the general mechanic's lien statute are to be paid and settled according to the priority of notice filed with the justice or the clerk.⁶⁶ However, in determining priority of claims when statutory mechanics' liens as well as other types of encumbrances are involved, priority is not actually determined by the date of filing. The lien in favor of contractors, laborers, and materialmen, created under the general mechanic's lien statute, when properly filed, relates back to the moment when the initial labor was performed or the first material furnished, and takes precedent over subsequent encumbrances. Thus if an encumbrance attaches to the property prior to the notice of the mechanic's lien, but subsequent to the time when work was commenced or the materials furnished, the contractor's, laborer's and materialman's lien, under the theory of relation back, will have priority.⁶⁷ An assignment of the property subject to a materialmen's claim will not prevent the operation of this rule, even though no lien has been perfected nor notice given before the transfer.⁶⁸ A mortgage or deed of trust registered prior to the initial furnishing of labor or material is superior to a mechanic's lien⁶⁹ and no lien will attach during the instantaneous passage through the hands of the borrower in a purchase-money mortgage transaction, even though subsequent to the initial furnishing.⁷⁰ However, a mechanic's lien will take precedence over a deed of trust⁷¹ or a conveyance⁷² made subsequent to the furnishing but prior to the filing of the lien. Hence there can be no doubt that the time of registration of a conveyance, mortgage, or deed of trust is important in determining the priorities involved in any particular situation. A mechanic's lien for labor and material completely furnished after registration of a deed of trust has been held to be inferior, even though the trustee acquired information leading him

⁶⁶ N.C. GEN. STAT. § 44-40 (1950).

⁶⁷ *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951); *Sides v. Tidewell*, 216 N.C. 480, 5 S.E.2d 316 (1939); *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593 (1925); *Burr v. Maulsby*, 99 N.C. 263, 6 S.E. 108 (1888).

⁶⁸ *McNeal Pipe & Foundry Co. v. Howland*, 111 N.C. 615, 16 S.E. 857 (1892).

⁶⁹ *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593 (1925).

⁷⁰ *Smith Builders Supply, Inc. v. Rivenbark*, 231 N.C. 213, 56 S.E.2d 431 (1949).

⁷¹ *Equitable Life Assur. Soc'y v. Basnight*, 234 N.C. 347, 67 S.E.2d 390 (1951).

⁷² *Burr v. Maulsby*, 99 N.C. 263, 6 S.E. 108 (1888).

to believe that the owner had a contract with the lien claimant for the construction of a building upon the property involved.⁷³

If there are two sources or funds from which a mortgage indebtedness may be paid, such as the building and land upon which labor and materials have been employed and personal property upon which there is no mechanic's lien, the doctrine of marshaling is applicable, and the mortgagee can be forced to proceed against the personalty in its entirety before the real estate can be seized, thus leaving as much of the realty as possible to satisfy the holder of the mechanic's lien.⁷⁴

II. SUBCONTRACTORS' LIENS—LIENS BY VIRTUE OF NOTICE TO OWNER

North Carolina has a statute⁷⁵ authorizing liens in favor of subcontractors, laborers, and materialmen who are hired by a contractor and perform work upon, or furnish materials for, any improvement on real estate, when proper notification is given to the property owner. This statute makes the lien conferred by its provisions superior to the ordinary mechanic's lien. It requires every building contractor to present to the owner of the edifice, before receiving any portion of the agreed price as it may become due by the terms of the contract, a list of every claim by laborers, artisans, or materialmen. This statement must be itemized, and upon delivery to the owner requires him to retain from sums due the contractor an amount not exceeding the remaining portion of the price named by the contract and which will be sufficient to pay the aggregate sum of the claims of the laborers, artisans, and materialmen. The statute also authorizes the owner to retain a sum agreed upon between himself and the contractor as a guaranty for faithful performance, and this fund shall be liable for any debts due to subcontractors, laborers, artisans, me-

⁷³ *McAdams v. Piedmont Trust Co.*, 167 N.C. 494, 83 S.E. 623 (1914). However, such liens are superior to an unregistered prior mortgage. *Dunavant v. Caldwell & No. R.R.*, 122 N.C. 999, 29 S.E. 837 (1898).

⁷⁴ *Harris v. Cheshire*, 189 N.C. 219, 126 S.E. 593 (1925).

⁷⁵ N.C. GEN. STAT. §§ 44-6 to -12. Soon after the enactment of the general lien statute, it was held, in *Wilkie v. Bray*, 71 N.C. 205 (1874), that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner thereby creating the relation of creditor and debtor. As a result of this decision, subcontractors were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the mere use of the materials since they were furnished to the contractor. To remedy this situation, the subcontractor's lien statute was passed.

chanics, or materialmen.⁷⁶ Provision is also made for the subcontractors and others covered by the statute to make the initial move and give notice of their claims to the owner;⁷⁷ thereafter the latter is required to withhold enough of the remaining sum due the contractor to satisfy the claims of those who have given notice. If the owner after proper notification neglects to retain such funds, no payment of any sum to the contractor will operate as a discharge in whole or in part of the indebtedness protected by the liens, and the owner will be liable for the unpaid claims. The filing of the contractor's statement operates in such a manner as to perfect the liens.⁷⁸ The failure of the contractor to file the required statement, or the contractor's refusal or neglect to apply funds paid to him by the owner to the satisfaction of claims for labor or material, is made a misdemeanor.⁷⁹ If at the time of notice the sum due the contractor is insufficient to pay all the claimants in full, it is provided that the distribution of the available funds shall be pro rata among those claiming a subcontractor's lien.⁸⁰

Claims for work on railroads and vessels are specifically mentioned in this statute, and it is clear that persons supplying labor or material for such construction projects would be entitled to liens under its provisions. Furthermore, another statute⁸¹ gives laborers and materialmen employed by a railway construction contractor, who is delinquent in meeting his obligations for thirty days, a right to notify the railroad company and thereafter hold it liable for the indebtedness. Such notice must be in writing and in detailed form. It is required to be served on the railroad company within a period of thirty days where labor is involved.⁸²

Where such a materialman supplying a subcontractor fails to avail himself of the opportunity to give the owner the statutory notice, he must develop any claim which he may have to funds due from the owner or contractor through the subcontractor without any aid

⁷⁶ N.C. GEN. STAT. § 44-8 (1950).

⁷⁷ N.C. GEN. STAT. § 44-9 (1950).

⁷⁸ N.C. GEN. STAT. § 44-10 (1950).

⁷⁹ N.C. GEN. STAT. § 44-12 (1950).

⁸⁰ N.C. GEN. STAT. § 44-11 (1950).

⁸¹ N.C. GEN. STAT. § 44-13 (1950).

⁸² A logging railroad of standard gauge whose tracks were moved about according to operational convenience was held to be within the scope of this enactment. *Carter v. Coharie Lumber Co.*, 160 N.C. 8, 75 S.E. 1074 (1912). The court declared that it would make no difference that at the time the statute was enacted there were no logging railroads in the state.

from or dependence upon the statute. In the case enunciating this principle,^{82a} a contractor who by a construction agreement was entitled only to partial payments as the work progressed, employed a subcontractor who consented to be solely responsible for all indebtedness incurred by himself. There was an agreement for installment financing of the subcontractor's operation. The subcontractor had been furnished with needed articles by two materialmen, neither of whom had given the statutory notice to the owner. The subcontractor had given one of these materialmen an order upon the contractor for a specified sum of money, and the order had been accepted and the money paid. The other materialman claimed a share of this payment and all other funds as payments were made under the construction contract, contending that there should be a pro rata distribution. After declaring that there could be no statutory rights established in the absence of notice, the court said that it was not unlawful for the contractor to accept the subcontractor's order upon the funds in his hands for the purpose of satisfying the subcontractor's legitimate debts. It was stated that there was no basis for a trust fund or pro rata distribution here.

One does not have to possess an entire and undivided interest in material used in a construction job in order to be able to make a valid claim under the statute. In one instance a shipment of lumber was sent to contractors who used it in constructing a building. A portion of the price for the lumber remained unpaid. A delivery to the contractors was made by the holder of a carrier's bill of lading who claimed to have paid a draft drawn by the shippers of the lumber. This person asserted a claim against the building under construction. The court held that the claimant had a sufficient interest and was entitled to enforce his rights under the statute.⁸³

In one subcontractor's action to enforce claims against an owner's property for labor performed, a trial judge instructed the jury that if the owner had the benefit of the work and there were no unusual circumstances demanding special treatment, the subcontractor should then be permitted to recover the value of his services on a *quantum meruit* basis. On appeal the court ruled that this instruction was erroneous, since the usual quasi contractual rule would not apply in proceedings of this sort because of the lack of contractual privity.⁸⁴

^{82a} Hall v. Jones, 151 N.C. 419, 66 S.E. 350 (1909).

⁸³ Lindsey v. Mitchell & McCauley, 174 N.C. 458, 93 S.E. 955 (1917).

⁸⁴ Price v. Asheville Gas Co., 207 N.C. 796, 178 S.E. 567 (1935).

A. Notice

The lien of a subcontractor, laborer, or materialman dealing with a contractor is a creature of the statute and the right thereto is based upon the required notice to the property owner.⁸⁵ The notice which will confer the lien must contain a written itemized statement specifying in detail, the labor or materials furnished, the time such was furnished, and the amount due and unpaid so as to put the owner on notice that such an amount is demanded.⁸⁶ Mere knowledge of the existence of the debt is not sufficient to charge the owner, and the fact that a subcontractor is working on a building in the process of construction, with the owner's knowledge, cannot be considered notice imposing upon the owner any obligation.⁸⁷ Thus where the contractor, under the terms of his contract with the owner, furnished statements and invoices showing the cost of labor and materials used, it was held that there was not sufficient notice to the owner to give rise to a lien in favor of the materialmen.⁸⁸ However, an itemized statement of a building supplier's account for materials used by a contractor in constructing a hospital, furnished the hospital officials by the contractor on behalf of the claimant materialman, was held to be sufficient notice of the claim to establish the materialman's lien.⁸⁹

The claimant has the burden of proving that notice has been given by himself or the contractor.⁹⁰

The requirement that a subcontractor, laborer, or materialman must file a proper notice with an owner in order to perfect a lien may be waived.⁹¹ Thus the requirement that the notice to the owner

⁸⁵ *Huske Hardware House v. Percival*, 203 N.C. 6, 164 S.E. 334 (1932).

⁸⁶ *Grier-Lowrance Constr. Co. v. Winston-Salem Journal Co.*, 198 N.C. 273, 151 S.E. 631 (1930).

⁸⁷ *Clark v. Edwards*, 119 N.C. 115, 25 S.E. 794 (1896).

⁸⁸ *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

⁸⁹ *Norfolk Bldg. Supplies Co. v. Jones*, 174 N.C. 57, 93 S.E. 440 (1917). The notice must observe certain formalities, and a materialman's letter notifying the owner that the writer was furnishing goods to the contractor has been held to be insufficient, no itemized statement having been delivered therewith. *Huske Hardware House v. Percival*, 203 N.C. 6, 164 S.E. 334 (1932). However a notice was held sufficient where it described the property upon which the lien was being claimed, but referred to it as the property of a company rather than as that of an individual, it having been shown that he was an individual operating a business and naming it a company. *Porter v. Case*, 187 N.C. 629, 122 S.E. 483 (1924).

⁹⁰ *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

⁹¹ *Goldston v. Randolph Mach. Tool Co.*, 245 N.C. 226, 95 S.E.2d 455 (1956).

should go into particulars regarding the varied transactions included in a claim was deemed to have been waived where a female owner, who had been given a cursory notice, wrote a letter to the claimant stating that in her opinion at the completion of the construction project there would be approximately the amount of the claimant's bill still due the contractor, that this was true despite the fact that several other bills had been received, and that she would reserve the claimant's bill for settlement.⁹² Moreover, an owner was held to have waived any objection to the sufficiency of such a statement by accepting it and making a payment thereon.⁹³ It has also been held that where an owner, after notice, wrote a claimant that funds sufficient to pay the indebtedness would be retained, it would be deemed that there had been a waiver of the owner's right to deny that materials furnished by the claimant had been used in the building operation.⁹⁴ In the absence of waiver it is clear there can be no lien where there is a complete failure to give any notice to the owner.⁹⁵

In actions pursuant to proper filing with an owner by subcontractors, laborers, or materialmen there is no necessity for filing claims with the clerk of the superior court or a justice of the peace within a period of six months as is required by the general lien statute covering claims by contractors and others dealing directly with owners.⁹⁶

The giving of proper notification to the owner is without question a prerequisite to the establishment of the lien. There is a further requirement that the lien will be lost if an action is not begun within six months of acquisition of the lien.⁹⁷ However, while the lien may be lost by failure to initiate the action within the six month period, the subcontractor may still maintain an action against the owner personally.⁹⁸

⁹² *Bain v. Lamb*, 167 N.C. 304, 83 S.E. 466 (1914).

⁹³ *Norfolk Bldg. Supplies Co. v. Jones*, 174 N.C. 57, 93 S.E. 440 (1917).

⁹⁴ *Bain v. Lamb*, 167 N.C. 304, 83 S.E. 466 (1914).

⁹⁵ *Pinkston v. Young*, 104 N.C. 102, 10 S.E. 133 (1889).

⁹⁶ *Porter v. Case*, 187 N.C. 629, 122 S.E. 483 (1924); *Campbell v. Hall*, 187 N.C. 464, 121 S.E. 761 (1924).

⁹⁷ N.C. GEN. STAT. § 44-43 (Supp. 1961).

⁹⁸ *Campbell v. Hall*, 187 N.C. 464, 121 S.E. 761 (1924); *Grier-Lowrance Constr. Co. v. Winston-Salem Journal Co.*, 198 N.C. 273, 151 S.E. 631 (1930). In *Porter v. Case*, 187 N.C. 629, 122 S.E. 483 (1924), the court stated: "The *lien* is lost by an action not being commenced within six months after notice by the subcontractor to the owner, but the statutory *right to sue* the *owner* is not barred. The owner under the statute is bound to account

In one instance where neither the contractor nor the subcontractor had given the required notice to the owner, it was declared that the contractor would be allowed to maintain an action on the contract in his own name and recover, as an element of damages, the cost of the labor and materials supplied by the subcontractor.⁹⁹ This case must be contrasted with an earlier decision¹⁰⁰ to the effect that a contractor may not sue in his own name, to the use of materialmen, in an attempt to set himself up as the trustee of an express trust within the purview of the real party in interest statute¹⁰¹ which authorizes such a trustee to sue without joining the persons for whose benefit the action is initiated. The court declared that the basis for such a proceeding could not be established by mere proof of authority on the part of the contractor to collect the claims of the materialmen, nor by proof that he furnished the owner written statements with respect to the amounts due. It was said that no action of this type was authorized and that a judgment of non-suit had been properly rendered.

B. Priorities

It is provided by statute that those having filed proper notice with the owner, and thereby establishing a lien, shall share pro rata in the distribution of the funds.¹⁰² This method of pro rata distribution differs greatly from the priority method set up by the general lien statute.¹⁰³ It should be noted that the doctrine of relation back is applicable, to a limited degree, to a subcontractor's lien. The lien arises as soon as notice is filed. As among themselves, subcontractors share pro rata, without regard to the date when the notice was first filed or the material furnished. But the lien will relate back to the date when the material or labor was first performed, in so far as

to the subcontractor for what he may owe the original contractor if notice is given before payment to the contractor." *Id.* at 639, 122 S.E. at 488. This rule thus avoids the problem of privity of contract and allows the subcontractor to sue the owner in a personal action without the joinder of the contractor.

⁹⁹ Grier-Lowrance Constr. Co. v. Winston-Salem Journal Co., *supra* note 98.

¹⁰⁰ Perry v. Swanner, 150 N.C. 141, 63 S.E. 611 (1909).

¹⁰¹ N.C. GEN. STAT. § 1-63 (1953).

¹⁰² N.C. GEN. STAT. § 44-11 (1950). In Morganton Mfg. & Trading Co. v. Andrews, 165 N.C. 285, 81 S.E. 418 (1914), the court held that there was no conflict with the provision of G.S. § 44-40 which provides for priority based upon filing date in the case of a general mechanic's lien.

¹⁰³ See note 66 *supra* and accompanying text.

other encumbrances (*e.g.* mortgages) are concerned.¹⁰⁴ The subcontractor's lien statute also provides that the lien shall be "preferred to the mechanic's lien now provided by law" thus eliminating any priority problems which might arise as to liens created under the general lien statute.

When proper notice has been given an owner, either by the required statement of the contractor or through the action of the claimants themselves, all sums which may be due the contractor from the owner under the construction contract become a trust fund for the joint benefit of every subcontractor, laborer, and materialman of whom the owner has been made cognizant.¹⁰⁵ Where this trust fund is not sufficient to satisfy all the claimants, each of them is entitled only to a pro rata share.¹⁰⁶ The rule is that only those claimants who have given notice to the owner are entitled to share in the distribution. However this may be changed by agreement of the parties. Thus in *West v. Laughinghouse*¹⁰⁷ there was by agreement pro rata distribution of the funds even though some of the claimants had not properly perfected their rights by giving notice to the owner. Sometimes a materialman or other claimant, in addition to filing a notice with the owner and thereby establishing a lien, will also file a lien with the clerk of the superior court or a justice of the peace, pursuant to G.S. § 44-1 in an attempt to obtain a priority. In one such case,¹⁰⁸ the claimant, a materialman furnishing a subcontractor, sought to establish a preference in this manner over the other claimants who had also given the required notice to the owner. The Supreme Court of North Carolina upheld a decision that a pro rata distribution was proper. It was declared that the statute giving an advantage to early filers was part of an enactment concerning contractors, laborers, and materialmen dealing directly with owners. The rights of subcontractors and other laborers and materialmen transacting business with contractors were said to be

¹⁰⁴ *Lookout Lumber Co. v. Mansion Hotel & Belt Ry.*, 109 N.C. 658, 14 S.E. 35 (1891).

¹⁰⁵ *Thomas H. Briggs & Sons, Inc. v. Allen*, 207 N.C. 10, 175 S.E. 838 (1934); *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, 172 N.C. 704, 90 S.E. 923 (1916).

¹⁰⁶ *Hildebrand v. Vanderbilt*, 147 N.C. 639, 61 S.E. 620 (1908). *Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.*, *supra* note 105.

¹⁰⁷ 174 N.C. 214, 93 S.E. 719 (1917).

¹⁰⁸ *Morganton Mfg. & Trading Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418 (1914).

governed by G.S. § 44-8, specifically delineating their rights and duties and providing for pro rata distribution.

C. Independent Contractor or Agent Problem

In some cases a claimant may honestly be in doubt as to whether he occupies the position of a subcontractor or a contractor. If a materialman furnishes building materials to an independent contractor, then the materialman is a subcontractor and is entitled to assert his lien only under G.S. § 44-6 by giving notice to the owner. However, if the materials are supplied to one who turns out to be an agent or employee of the owner, then the materialman will be, in effect, dealing directly with the owner and hence entitled to establish his lien under the general lien statute. Thus the type of lien the materialman may be entitled to will depend upon the status of the person to whom he furnishes the material. Thus it would be wise for all claimants to consider carefully the true relationship between the owner and the person with whom they are dealing.

In one instance¹⁰⁹ an action was brought by a claimant against both the owner and the person with whom the latter had direct dealings. The owner claimed that this person was an independent contractor and not an agent as asserted by the claimant. The lower court rendered a default judgment against the alleged agent and ordered that the case against the owner be tried on the issues raised by the pleadings. On appeal, the court held that this action was not determinative of the status of the parties and could not be looked upon as an election to hold the alleged agent exclusively responsible. It was said that, in this instance, there could be no election until the issues involving the identity of the relationship between the parties, raised by the owner, had been established. The court also noted that the materialman need not know, at the time of the furnishing of the materials, that the person to whom he furnishes the materials is in fact an agent of the owner, in order to claim a lien against the owner. The owner was in effect an undisclosed principal, and hence the materialman may hold the owner liable under the doctrine that an undisclosed principal may be bound by the simple executory contracts of the agent, made for his benefit, when he is afterwards discovered to be such.¹¹⁰

¹⁰⁹ North Carolina Lumber Co. v. Spear Motor Co., 192 N.C. 377, 135 S.E. 115 (1926).

¹¹⁰ See also, Carolina Hardware Co. v. Raleigh Banking & Trust Co., 169 N.C. 744, 86 S.E. 706 (1915).

Where a claimant elects to file notice with the owner upon the theory that the material sold has been furnished to an independent contractor, he is deemed to have elected the theory upon which he wishes to proceed and he cannot afterwards assert that the material has been sold directly to the owner.¹¹¹ Thus in *Doggett Lumber Co. v. Perry*,¹¹² the plaintiff furnished materials for the construction of a house. He elected to call himself a subcontractor and gave notice to the owner of his claim against the contractor for lumber furnished. Thus a lien was created by virtue of G.S. § 44-6. The plaintiff then learned that the amount still due from the owner to the contractor—the limit on the value of his lien—was not enough to cover his claim. The plaintiff sought to establish a lien under the general lien statute, as a materialman furnishing directly to the owner. The court held that having elected to file notice of a lien as a subcontractor, the plaintiff was estopped from asserting a lien under the general lien statute.

D. State of Account Between Owner and Contractor

By statute, it is expressly provided that the total of all liens due subcontractors and materialmen shall not exceed the amount still due the original contractor from the owner at the time of the filing of notice.¹¹³ Thus there is clearly no liability under the statute providing for notice to the owner, where there has been a failure on the part of the claimant to file notice at a time prior to full payment by the owner to the contractor.¹¹⁴ The true amount which can be collected is determined by the state of the account between the owner and the contractor and not that between the contractor and the subcontractor or materialman.¹¹⁵ Further, failure on the part of the claimant to allege that a balance on the agreed contract price between the owner and the contractor is due makes a complaint demurrable.¹¹⁶

¹¹¹ *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

¹¹² 212 N.C. 713, 194 S.E. 475 (1930), *petition for rehearing denied*, 213 N.C. 533, 196 S.E. 831 (1938).

¹¹³ N.C. GEN. STAT. § 44-6 (1950).

¹¹⁴ *Dixon v. Ipock*, 212 N.C. 363, 193 S.E. 392 (1937); *Brown v. Burlington Hotel Corp.*, 202 N.C. 82, 161 S.E. 735 (1932); *Pearce-Young-Angel Co. v. Sternberg*, 199 N.C. 21, 153 S.E. 629 (1930); *Orinoco Supply Co. v. Masonic & E. Star Home*, 163 N.C. 513, 79 S.E. 964 (1913); *Wood v. Atlantic & N.C.R.R.*, 131 N.C. 48, 42 S.E. 462 (1902).

¹¹⁵ *Atlas Powder Co. v. Denton*, 176 N.C. 426, 97 S.E. 372 (1918); *Powell & Powell v. King Lumber Co.*, 168 N.C. 632, 84 S.E. 1032 (1915).

¹¹⁶ *Dixon v. Ipock*, 212 N.C. 363, 193 S.E. 392 (1937).

Of course there can be no valid claim against the owner in any situation where the contractor is paid in advance.¹¹⁷

After notice, the owner cannot avoid liability by showing that the contractor has been paid for all work done prior to the filing of the claim, since if the contractor continues the work and receives additional sums under the agreement, the claim can be enforced against the property to an amount equal to the sums subsequently earned.¹¹⁸

The owner who seeks to avoid liability by showing that nothing is due the contractor for work done prior to the filing of the notice of the lien, has the burden of proving payment. In one instance, however, this burden was not sustained by proof of the delivery of a cashier's check which the drawee bank refused to accept for payment.¹¹⁹ The court, referring to an analogous decision,¹²⁰ declared that the claim would not have been enforceable if there had been an agreement to accept the check in full payment.

An effort to establish a claim is doomed to failure where there has been an abandonment of the project by the contractor before notice is given to the owner and it is established that there is no further sum due on the contract price.¹²¹ For instance, in *Parsley v. David*,¹²² there was evidence that after the owner and the contractor cancelled the contract the owner paid claims by others for labor and materials which had been furnished in furtherance of the project. These payments were made directly to other claimants and not through the contractor. The court ruled that they were made on the owner's sole responsibility, and that after the cancellation there remained no liability to the contractor and hence no basis for a valid materialmen's claim. A similar result was intimated where the contractor erected a building of such defective material and in such an unworkman-like manner as to render it unfit for use by the owner. The owner successfully claimed that she was damaged to such an

¹¹⁷ *Rose v. Davis*, 188 N.C. 355, 124 S.E. 576 (1924).

¹¹⁸ *Blue Pearl Granite Co. v. Merchants Bank*, 172 N.C. 354, 90 S.E. 312 (1916).

¹¹⁹ *Andrews-Cooper Lumber Co. v. Hayworth*, 205 N.C. 585, 172 S.E. 194 (1934).

¹²⁰ *South v. Sisk*, 205 N.C. 655, 172 S.E. 193 (1934).

¹²¹ *Roberts & Johnson Lumber Co. v. Horton*, 232 N.C. 419, 61 S.E.2d 100 (1950); *Piedmont Elec. Co. v. Vance Plumbing & Elec. Co.*, 197 N.C. 495, 149 S.E. 858 (1929).

¹²² 106 N.C. 225, 10 S.E. 1028 (1890).

extent that no liability to the contractor existed. The court declared that the owner might set up as a defense any actual damages caused by the contractor and show that there was no liability on her part, thus avoiding the claim.¹²³

Hence it may be said that it is clear that in any situation where uncontroverted testimony demonstrates that, at the time a claimant gives the required notice, the contractor has been paid everything that is due him according to the terms of the agreement, the claim is not enforceable against the owner's property.¹²⁴

As was previously discussed,¹²⁵ when the debt for which the claim of the complaining laborer or materialman is being pressed has been contracted for by an agent of the owner, the owner is primarily liable. In this situation the rule that the owner would not be liable unless something was due the contractor would not be applicable.¹²⁶ But a different result would follow where the materialman's agreement is with an independent contractor employed by the owner. Here the liability of the owner, after notice, extends only to the unpaid balance due the contractor.¹²⁷

The claim of a materialman contracting with a subcontractor has been said to be enforceable against any sum which may be due from the owner of a building under construction to the general contractor at the time notice was filed, or which may be subsequently earned under the agreement, and there can be no doubt that the claim is valid, regardless of the state of the account between the contractor and the subcontractor. However, there is no personal liability on the part of the contractor to the materialman unless it is established that he has been guilty of some breach of duty, under the statute, working to the claimant's prejudice, or an agency of purchase rendering him personally responsible has been established.¹²⁸

¹²³ *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E.2d 287 (1951).

¹²⁴ In one such instance involving the claim of a subcontractor it was held to be error for a trial judge to refuse to charge that, if the jury believed the evidence of total payment, there would then be no liability to the subcontractor on the part of the owner. *Wood v. Atlantic & N.C.R.R.*, 131 N.C. 48, 42 S.E. 462 (1902).

¹²⁵ See text, *C. Independent Contractor or Agent Problem*, *supra*.

¹²⁶ *Love v. Snellings*, 246 N.C. 674, 100 S.E.2d 65 (1957); *North Carolina Lumber Co. v. Spear Motor Co.*, 192 N.C. 377, 135 S.E. 115 (1926).

¹²⁷ *Economy Pumps, Inc. v. F. W. Woolworth Co.*, 220 N.C. 499, 17 S.E.2d 639 (1941).

¹²⁸ *Borden Brick & Tile Co. v. Pulley*, 168 N.C. 371, 84 S.E. 513 (1915).

E. Waiver of Lien

Sometimes there may arise an issue as to whether the claim of some laborer or materialman has been waived. In one such case¹²⁹ a lot owner who was an officer of a corporation to which a contractor owed a pre-existing debt entered into an agreement with the contractor to have a house built upon the land. The contract contained a provision obligating the contractor to pay the pre-existing indebtedness out of the agreed price. The contractor obtained a waiver of the claim of a materialman, who asserted that the waiver had been obtained by fraud, an allegation which was not denied by the contractor and which therefore, for the purposes of this action, must be taken as uncontroverted. Among issues tendered at the trial was one involving the alleged fraud in inducing the waiver. The refusal of the trial judge to submit this and other issues to the jury was held to necessitate an order for a new trial. In discussing the case the court stated that the materialman would not be permitted to recover against either the owner or the corporation unless there was an allegation and competent evidence that these defendants had participated in the fraud or had ratified the contractor's conduct. It was declared that under the circumstances here presented the effect of a valid waiver of an established claim would be to remit the materialman to a right to participate in the distribution of any funds which might remain in the hands of the owner after notice.

F. Federal Tax Liens and the Subcontractor's Lien

It is clear that a federal tax lien has priority over a statutory mechanic's lien which has not been reduced to judgment, even though the lien was perfected by giving the proper notice prior to the time the federal tax claim arose.¹³⁰ The mechanic's lien is not one of those preferred interests to which the Congress has extended priority over the federal tax lien.¹³¹ Further, if the owner rather than the general contractor has been a delinquent taxpayer, the federal tax lien reaching all of the owner's property would prevail over the claims of subcontractors, even though the subcontractor's claims are protected with perfected mechanic's liens.

However, the rights of subcontractors and other claimants, con-

¹²⁹ Home Bldg., Inc. v. Nash, 200 N.C. 430, 157 S.E. 134 (1931).

¹³⁰ United States v. White Bear Brewing Co., 350 U.S. 1010 (1956).

¹³¹ See INT. REV. CODE OF 1954, § 6323.

ferred by the statute delineating their rights against an owner, are not to be extinguished by the seizure, under a government tax lien upon the property of the contractor employing them, of funds still in the hands of the owner and payable to the contract or under the construction agreement. Subcontractors in a situation of this kind are said to be entitled to full payment of their claims. Thus in *United States v. Durham Lumber Co.*¹³² in a bankruptcy proceeding, the United States sought to enforce a tax lien on certain accounts owed the bankrupt contractor by the owner of the property, for work done on the owner's realty pursuant to a contract. A subcontractor, who had not been paid, notified the owner of his claim, thereby establishing his lien. The notification by the subcontractor was subsequent to the filing of the petition in bankruptcy. The Court held that the subcontractor's claim was superior to that of the federal tax lien. The rationale of the holding was that the federal tax lien could attach only to funds which belonged to the bankrupt contractor, and the contractor was entitled only to that which remained after the subcontractor's claims had been paid. The contractor was entitled to that part of the unpaid contract price which remains after the subcontractors have had their claims paid. Thus the United States was not entitled to that which did not belong to the contractor but rather belonged to the subcontractor.¹³³

G. Liens Against Public Property

At one time no property publicly owned was subject to the liens of laborers, materialmen, contractors, or subcontractors, whether the claims were made under the general mechanic's lien law¹³⁴ or under the statute making the claim enforceable upon notice to the owner.¹³⁵ Into the category of publicly owned facilities, not subject to mechanics' liens, were put public schoolhouses,¹³⁶ county homes,¹³⁷ sewer systems, power plants, and waterworks,¹³⁸ and no doubt

¹³² 257 F.2d 570 (4th Cir. 1958).

¹³³ It should be noted that this problem has not yet been adjudicated by the Supreme Court of the United States.

¹³⁴ See *Morganton Hardware Co. v. Morganton Graded School*, 151 N.C. 507, 66 S.E. 583 (1909).

¹³⁵ *Hutchinson v. Board of Comm'rs*, 172 N.C. 844, 90 S.E. 892 (1916).

¹³⁶ *Morganton Hardware Co. v. Morganton Grade School*, 150 N.C. 680, 64 S.E. 764 (1909).

¹³⁷ *Hutchinson v. Board of Comm'rs*, 172 N.C. 741, 90 S.E. 892 (1916).

¹³⁸ *J. S. Schofield's Sons Co. v. Bacon*, 191 N.C. 253, 131 S.E. 659 (1926).

edifices like courthouses and jails as well.¹³⁹ However, the lien was held to be applicable to property transferred to and owned by a corporation chartered for the purpose of supplying water to a city.¹⁴⁰

The non-application of these statutes to publicly owned property often made it difficult for laborers and materialmen making agreements with contractors constructing or repairing state or municipally owned edifices to protect themselves. In 1913 a statute¹⁴¹ was enacted commanding municipal corporations negotiating contracts in excess of five hundred dollars to require a contractor's bond conditioned upon faithful payment of all claims for labor and materials, the bond to have one or more sureties and its amount to be calculated on the basis of a stated percentage varying with the sum to be paid the contractor for the entire job. A laborer or materialman is authorized to sue on the bond whether his contract be with the contractor or a subcontractor. Only one action may be brought on the bond, the creditor who initiates the proceeding being required to notify all persons concerned of the pendency of the action and to make publication as outlined in the statute. Anyone having a claim is given the right to intervene at any time within a period of six months from the day the proceeding is begun. A pro rata distribution is decreed for all claimants. A failure on the part of municipal officials to require a contractor to furnish a proper bond constitutes a misdemeanor. Under this legislation there can be no doubt that all interested claimants, whether they be subcontractors, laborers, or materialmen, may sue the surety on the bond if the contractor has failed to meet his obligations.¹⁴²

This statute concerning municipal responsibility has been held to confer upon subcontractors, laborers, or materialmen no right to have funds withheld from the contractor to satisfy their unpaid claims, their proper remedy being an action on the bond. In *Robinson Mfg. Co. v. Blaylock*¹⁴³ it was the opinion of the court that the rights of these people, or those of the surety who has become re-

¹³⁹ See *Morganton Hardware Co. v. Morganton Graded School*, 151 N.C. 507, 66 S.E. 583 (1909).

¹⁴⁰ *McNeal Pipe & Foundry Co. v. Howland*, 111 N.C. 615, 16 S.E. 857 (1892).

¹⁴¹ N.C. GEN. STAT. § 44-14 (1950).

¹⁴² *Schefflow v. Pierce*, 176 N.C. 91, 97 S.E. 167 (1918). See also *Town of Gastonia v. McEntee-Peterson Eng'r Co.*, 131 N.C. 363, 42 S.E. 858 (1902).

¹⁴³ 192 N.C. 407, 135 S.E. 136 (1926).

sponsible for paying their claims, to any percentage of the contract price retained by the municipality as agreed upon must rest on the particular contract involved in each case. In the instant controversy a surety company, after default by the contractor, paid the entire sum required by an inadequate bond, and the money was used to pay some of the claims of subcontractors and merchants supplying labor and material to the contractor. Unsatisfied claimants brought an action against municipal officials, attempting to have the reserved percentage applied to the satisfaction of the contractor's indebtedness to them. The surety company, a party to the action, also claimed that it was entitled to this reserved percentage. The court declared that the surety would have no right of subrogation here, there having been only a partial satisfaction of the contractor's indebtedness and equitable principles demanding total payment to justify the invocation of the doctrine. However, under circumstances like those presented in this case the surety was said to have a right growing out of the contractual relationship of the parties to have the reserved percentage applied in exoneration of its loss sustained because of the failure of the contractor to meet his obligations. The court deplored the inadequacy of the bond but evidently believed it could do nothing to alleviate the plight of the unpaid claimants.

H. Contractor's Bond

It is standard procedure for property owners undertaking important building projects to require of the contractor making the lowest bid a bond with proper sureties. The usual bond is conditioned upon a faithful performance on the part of the contractor and commonly makes provision for the payment of debts which the contractor either cannot or will not pay.¹⁴⁴ These bonds are usually executed by surety companies and frequently can be said to be expressly or impliedly applicable to the satisfaction of the claims of subcontractors, laborers, or materialmen. Such claimants are classified as beneficiaries and will be permitted to recover on the bond.¹⁴⁵

¹⁴⁴ Even if the surety bond is a "performance" bond (rather than a "payment" bond) if the contract between the owner and the prime contractor requires the contractor to pay laborers and materialmen, the performance bond is deemed to cover the liability of the surety to the materialmen or subcontractors by reading the bond and the contract together. See *North Carolina Natural Gas Corp. v. Seaboard Sur. Corp.*, 284 F.2d 164 (4th Cir. 1960).

¹⁴⁵ *Dixon v. Horne*, 180 N.C. 585, 105 S.E. 270 (1920); *Guilford Lumber Mfg. Co. v. Johnson*, 177 N.C. 44, 97 S.E. 732 (1919); *Orinoco Supply Co. v. Shaw Bros. Lumber Co.*, 160 N.C. 428, 76 S.E. 273 (1912).

It would not matter that the claimants were not generally or specifically named in the bond.¹⁴⁶ Neither would it matter that at the time suit was brought there has been no pecuniary damage to the owner, the rule which requires such a loss being inoperative where the bond, in addition to guaranteeing faithful performance and agreeing to save the owner harmless, provides for the discharge of some obligation, in this case the payment of laborers and materialmen.¹⁴⁷ Furthermore, a materialman will not be prevented from recovery on the bond because he is neither a party to the agreement nor privy to the consideration.¹⁴⁸ It is clearly incumbent upon a claimant who has furnished material to allege and prove the indebtedness due from the contractor, as the surety's liability on the bond grows out of and is dependent upon the contract executed by the principal, who must be guilty of some default before the secondary responsibility will arise.¹⁴⁹ A materialman suing as a beneficiary of a bonding contract between a contractor and his surety is subject to all legal and equitable defenses, and hence fraud in the treaty with respect to the surety contract can be used to avoid liability thereon.¹⁵⁰ In *Morganton Mfg. & Trading Co. v. Andrews*¹⁵¹ a contract for the construction of a building provided that the contractor would perform the work and furnish all materials. The bonding agreement with a surety company provided that it would be responsible to the owner alone, and that he, in estimating the damages resulting from some breach of the building contract, might include the claims of mechanics and materialmen arising out of the performance of the contract, and to be paid for by the owner, only when the claims were valid liens against the property by virtue of state legislation. Unpaid furnishers of material who had not perfected liens brought suit, claiming that the surety bond covered this indebtedness incurred by the contractor. The contention of these creditors was that the construction agreement was a contract to build and furnish labor

¹⁴⁶ *Dixon v. Horne*, *supra* note 145.

¹⁴⁷ *Orinoco Supply Co. v. Shaw Bros. Lumber Co.*, 160 N.C. 428, 76 S.E. 273 (1912).

¹⁴⁸ *Pittsburgh Plate Glass Co. v. Fidelity & Deposit Co.*, 193 N.C. 769, 138 S.E. 143 (1927).

¹⁴⁹ *Carolina Builders Corp. v. New Amsterdam Cas. Co.*, 236 N.C. 513, 73 S.E.2d 155 (1952).

¹⁵⁰ *Pittsburgh Plate Glass Co. v. Fidelity & Deposit Co.*, 193 N.C. 769, 138 S.E. 143 (1927).

¹⁵¹ 165 N.C. 285, 81 S.E. 418 (1914).

and material for a house and impliedly to pay for them, and since the surety bond was executed to secure the performance of the building contract, it would then follow that the surety would be bound to pay the unpaid claims for materials. The court declared that if this interpretation of the contracts had been a proper one, and if there had been no restrictive provisions in the bond, there would then have been no doubt of the surety's liability. However, it was said that this was not a proper interpretation of the instruments. The stipulation binding the contractor to furnish labor and materials and requiring him to pay therefor was said to add no additional liability, since a reasonable interpretation of general terms in the agreement would require the contractor to pay such indebtedness without any dependence upon this provision. Since the construction agreement and surety contract must be construed together, there could then be no basis for the extension of the surety's liability to the payment of laborers and materialmen who had not perfected their claims. The bond provision limiting the surety's liability to perfected claims was said to clinch the matter. The plaintiffs, unpaid claimants who had not perfected their liens, were not permitted to recover on the bond.

In *Guilford Lumber Mfg. Co. v. Holladay*¹⁵² a sectarian college which made a contract for work upon a building on its campus was held not to be entitled to compel the surety on the contractor's bond to make good to the college the sum which the institution had been required to pay materialmen because of its failure to retain sufficient funds, after proper notification, to satisfy their claims. The liability here sought to be invoked was clearly outside the intended scope of the bond. To permit a recovery in such a situation would be to predicate the college's right of action upon its own failure to perform a statutory duty.

The rules of good pleading require a materialman claiming under such a surety bond to allege and prove the terms of the agreement between the owner and the contractor, that this agreement was the one upon which the surety bond was conditioned, that the material furnished the contractor was used in furtherance of the particular project involved, and that the contractor's indebtedness for this material was due and unpaid. A complaint which failed to plead a con-

¹⁵² 178 N.C. 417, 100 S.E. 597 (1919).

struction contract or to describe the cogent provisions of such an agreement was said to fail to state a cause of action.¹⁵³

III. THE LIEN ON PERSONAL PROPERTY IN FAVOR OF MECHANICS OR ARTISANS

In addition to the lien on personal property specifically mentioned in the general mechanic's lien law,¹⁵⁴ with regard to which there has been very little litigation or judicial comment, there is a more frequently employed statute which authorizes a lien in favor of "any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property."¹⁵⁵ The procedure for creating and enforcing this lien is different from that of the general mechanic's lien. Under the statute, G.S. § 44-2, the mechanic or artisan may retain possession of the property in question until just and reasonable charges for his services are paid. In the event such charges are not paid within thirty days if the charges are under fifty dollars, or if not paid within ninety days when the charges are over fifty dollars, the mechanic or artisan may upon proper statutory notification, sell the property in his possession.

To be entitled to this lien it is clear that anyone constructing some article of personal property for another or having possession of someone else's chattel for the purpose of alteration or repair would be required to retain possession of the property, since there can be no lien after the chattel has been *voluntarily* and *unconditionally* returned to the owner or other authorized person before a settlement of the indebtedness.¹⁵⁶

A somewhat different situation arises where the person making the repairs regains possession of the chattel after having once relinquished it to the owner or lawful possessor who had ordered the job done. Where the act of repossession was carried out without

¹⁵³ Carolina Builders Corp. v. New Amsterdam Cas. Co., 236 N.C. 513, 73 S.E.2d 155 (1952).

¹⁵⁴ See I. BASIC MECHANIC'S LIEN ON REAL AND PERSONAL PROPERTY, *supra*.

¹⁵⁵ N.C. GEN. STAT. § 44-2 (1950).

¹⁵⁶ Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957); Glazener v. Gloucester Lumber Co., 167 N.C. 676, 83 S.E. 696 (1914); Block v. Dowd, 120 N.C. 402, 27 S.E. 129 (1897). It is made clear in these cases that if the surrender is not completely voluntary, and unconditional, then the mechanic or artisan may regain possession by appropriate legal action and enforce his lien.

this person's consent, it is clear that the lien should not be revitalized.¹⁵⁷ Furthermore, the same would be true where the chattel was redelivered to the claimant for additional repairs, his lien then being limited to the amount charged for the latest work.¹⁵⁸

This statute concerning the claims of artisans has been interpreted to authorize a lien in favor of a mechanic who made repairs on an automobile at the request of a chattel mortgagor in lawful possession, the mechanic having retained possession of the vehicle. This claim was given priority over the pre-existing mortgage. The court said that by leaving the mortgagor in possession the mortgagee had given an implied authorization to the mortgagor to have the repairs made.¹⁵⁹ One commentator has suggested that the mortgagee would be in a more advantageous position, since the automobile would be worth more with the repairs than without them.¹⁶⁰ In another case,¹⁶¹ however, the rights of a conditional vendor in a car-purchase transaction prevailed over a repairman's claim where repairs were ordered by a second mortgagee who had never used or had possession of the car. The court declared that the second mortgagee was neither an "owner" nor a "legal possessor" within the scope of the statute. The language employed in the statute was said to cover only owners and those persons who are in possession with their knowledge and consent and under circumstances tending to show an express or implied authority to make such repairs as may be consistent with the contemplated use of the chattel involved.

There would appear to be no doubt that with respect to a car or other chattel sold under a conditional sale agreement, duly recorded, the rights of the holder of a mechanic's lien thereafter acquired would be inferior to the claim of conditional vendor.¹⁶² However, where the conditional sale agreements were not recorded until after commercial firms had become entitled to general mechanics' liens for labor and material furnished in connection with the construction of an edifice into which the appliances and equip-

¹⁵⁷ Block v. Dowd, *supra* note 156.

¹⁵⁸ Barbre-Askew Fin. Co. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957). The court in this case declared that there could be no lien for the first work done after possession was lost, and that the only rights the claimant had were those growing out of contract.

¹⁵⁹ Johnson v. Yates, 183 N.C. 24, 110 S.E. 603 (1922).

¹⁶⁰ Note, 1 N.C.L. REV. 127 (1922).

¹⁶¹ Willis v. Taylor, 201 N.C. 467, 160 S.E. 487 (1931).

¹⁶² Willis v. Taylor, *supra* note 161; *cf.* Fulp & Linville v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911).

ment subject to the agreements were built, thus acquiring the status of real estate, the liens of the commercial firms were held to be superior.¹⁶³

The artisan's lien statute can be used to protect the possession of one who holds timber after he has cut it in accordance with an agreement with a lumber company owning the land; but he is liable to the owner or its legal representative where he has failed to conserve the property and in such case may be required to return it.¹⁶⁴ However, a different situation is presented where an owner of standing timber sold it to a lumber company which employed a person trained in logging operations to cut the timber and float it by raft to the company's mill. The vendor, after the company's default, seized the severed timber from the logger. Although the logs were later lost accidentally and no lien existed here, it was declared that the logger had had a lien before the seizure and that the vendor had converted the property and was liable therefor.¹⁶⁵ Of course the timber became personal property after it was severed and cut into logs.

Just in passing it might be well to mention the statute¹⁶⁶ which describes the circumstances and conditions under which the holder of a mortgage, deed of trust, or conditional sale contract, executed in some other state, on a chattel afterwards brought into North Carolina, may insure the priority of his claim. Observance of the registration provisions of this statute has made it possible for such secured creditors to protect themselves more fully against the claims of future lienholders, including those of mechanics, laborers, and materialmen. This enactment is particularly important with respect to the assertion of claims upon automobiles and other vehicles.

IV. LABORER'S LIEN ON LOGS AND LUMBER

Another statute¹⁶⁷ authorizes a lien in favor of all persons engaged in cutting logs, sawing lumber, or preparing wood pulp, acid wood, or tan bark. This lien is given priority over all other liens or claims upon the logs or lumber with the exception of the claim of a bona fide purchaser for full value. Specific provisions chart the

¹⁶³ *Fulp & Linville v. Kernersville Light & Power Co.*, *supra* note 162.

¹⁶⁴ *Huntsman Bros. & Co. v. Linville River Lumber Co.*, 122 N.C. 583, 29 S.E. 838 (1898).

¹⁶⁵ *Thomas v. Merrill*, 169 N.C. 623, 86 S.E. 593 (1915).

¹⁶⁶ N.C. GEN. STAT. § 44-38.1 (Supp. 1961).

¹⁶⁷ N.C. GEN. STAT. § 44-3 (1950).

procedure to be followed in perfecting and enforcing this lien, including a requirement of notice to the owner.

A rather interesting case¹⁸⁸ arose concerning the interpretation to be placed upon this statute. A lumber company employed a contractor to manage a sawmill in connection with the operation of a logging railroad. Among the workers hired were three persons; one a laborer who took boards from the saw and placed them upon a truck, another a mechanic who was hired to repair railway cars and mill machinery, and the third who performed incidental repairs upon tracks, bridges, and a trestle. All three of these employees claimed that the statute authorized liens in their favor. The court ruled in favor of the sawmill worker but denied the claims of the other two. It is evident that a majority of the court believed that the logging lien statute was not designed to cover services like those performed by either of these other two employes. However the dissenting judge's opinion that the statute should cover all essential workers in the entire logging operation is very persuasive.

In an instance where the claimant seeking to establish this lien was employed by a contractor in charge of a logging operation, the court declared that he would be permitted to enforce his claim only if the owner of the timber could be shown to be indebted to the contractor, and then only to the extent of that indebtedness.¹⁸⁹

V. MISCELLANY

A. *Misrepresentations as to Existence of Liens*

Sometimes a case may arise where there has been fraudulent conduct by persons making erroneous representations concerning indebtedness which may form the basis of claims by laborers and materialmen asserting mechanics' liens. Such conduct will often make the culprits criminally as well as civilly responsible. In one such case¹⁷⁰ a criminal indictment alleged that the managers of a theatre in the process of being repaired had falsely and feloniously represented that all bills for labor and materials had been fully paid, and that the prosecuting bank, acting upon the representations, loaned the defendant managers a sum of money and took a mortgage which was pretended to be a first lien upon the theatre building and the land

¹⁸⁸ *Glazener v. Gloucester Lumber Co.*, 167 N.C. 676, 83 S.E. 696 (1914).

¹⁸⁹ *Bryson v. Gennett Lumber Co.*, 171 N.C. 700, 89 S.E. 26 (1916).

¹⁷⁰ *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941).

on which it was situated. It was stated that through the use of this ruse the theatre managers had obtained the loan with intent to defraud the bank and that they had thereby violated the statutes¹⁷¹ which decry conduct of this sort and make it punishable as the crime of false pretense. The court was of the opinion that the indictment had sufficiently charged the crime and upheld the conviction.

B. Lien Claimant's Interest Not Insurable

The materialman's inchoate right to a lien has been held to be insufficient to give him an insurable interest for the purpose of protecting himself from loss by fire, even though the loss occurred after the lien was actually filed.¹⁷² Furthermore, the holder of a properly established mechanic's lien has been held to have no claim upon the proceeds of an insurance policy taken out by a property owner and made payable to himself or a mortgagee.¹⁷³

C. Interest

In one instance the question arose as to whether the claims of subcontractors and materialmen against the amount due a contractor from an owner were within the purview of a statute¹⁷⁴ providing that money due by contract shall bear interest. The court, treating the aggregate sum due to various claimants after notice as a trust fund to be distributed pro rata as provided by statute among the claimants, decided that this enactment authorizing the payment of interest was not applicable in the situation presented here. The court stated that the owner, who had been ready and willing to pay over to the claimants the remaining sum still in his hands and required by agreement to be paid to the contractor, could not be held responsible for any interest payments. It was said that in situations not within the statute providing for such charges, no interest is to be allowed unless there has been some adequate default by the debtor in withholding the principal sum or any part of it. The court also declared that in such cases the payment of costs is at the discretion of the trial judge and that it may be adjudged that costs are payable out of the amount due.¹⁷⁵

¹⁷¹ N.C. GEN. STAT. §§ 14-100, 15-153 (1953).

¹⁷² *Roper v. National Fire Ins. Co.*, 161 N.C. 151, 76 S.E. 869 (1912).

¹⁷³ *Henley Ice Mach. Co. v. Green*, 181 Fed. 890 (4th Cir. 1910); *cf.* N.C. GEN. STAT. § 42-15.1 (Supp. 1961), where the agricultural landlord's lien is protected in a similar situation.

¹⁷⁴ N.C. GEN. STAT. § 24-5 (1953).

¹⁷⁵ *Bond v. Pickett Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914).

CONCLUSION

It may be said that the North Carolina law with respect to mechanics' liens is fairly clear. Most of the important issues have been raised and decided. The rights of holders of mechanics' liens as against bona fide purchasers of property subject thereto need to be pin-pointed and more directly stated. The profession would welcome a little more clarity both in the statutes and judicial opinions concerning the two types of these liens. Collateral rights also need to be spelled out more fully. Yet a careful analyst may obtain an accurate picture of the true state of the law.