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The Mechanic'S Lien In Virginia

There has long been a need for additional legislation to clear the highways of the menace of intoxicated drivers. The necessary convictions to deter effectively the large number of citizens who do drive after taking "a few" have not been forthcoming under present legislation because enforcement agencies are unable to prove beyond a reasonable doubt that the driver in a particular case was inebriated.[32] Thus, any law tending to aid the obtaining of definite evidence as to the state of intoxication would seem to be a step in the right direction. It is submitted that the proposed implied consent statute would be such a law.

This law could accomplish: the elimination of guesswork from the prosecution of driving while intoxicated cases; the protection of the temperate drinker, who may be competent to drive, but victimized by the circumstances of an accident in which he may be involved; the giving of immediate medical attention to persons who may be injured and at the time show physical manifestations of alcoholic intoxication; and, most significantly, the removal of the drunk driver from Virginia's streets and highways. Where blood tests are used the conviction rate is up around 90 per cent,[33] and the use of tests in Detroit during a period of less than ten years has resulted in a decrease in deaths due to alcohol from ninety to ten a year.[34] The 1962 General Assembly has the opportunity to achieve results just as significant in Virginia.

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THE MECHANIC'S LIEN IN VIRGINIA

The ownership of a home represents stability, security and the attainment of a coveted economic position, but, in an effort to achieve this status, the building of a house is often entered into imprudently. The inexperienced person may find himself put to the expense of mechanic's lien litigation before he can proceed with what should have been a reasonably simple and expeditious transaction—paying the cost of construction. Such litigation involves complexities that often choke and confuse, rather than enlighten.

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[32]See Fowlkes v. Commonwealth, 194 Va. 676, 74 S.E.2d 683 (1953).

[33]Use Of Chemical Tests For Alcoholic Intoxication—A Symposium, 14 Md. L. Rev. 111, 138 (1954).

[34]Ibid.

As early as 1792, Virginia recognized that the mechanic[1] was a person deserving special consideration, and provided a tax exemption[2] in order to encourage mechanics to take up residence in the Commonwealth. However, it was not until 1843 that Virginia gave the mechanic a preference as a creditor.[3] The purpose of the 1843 Act was to furnish a form of security for persons who by their labor, skill and materials increase the value of property—the property in turn becoming pledged by lien for their payment.[4]

The recent Virginia case of *Hadrup v. Sale*[5] involved the sometimes difficult and often confused issues of priority and attachment. Hadrup contracted with the owner of a residential subdivision to perform the plumbing and heating installations for houses to be constructed. The property in question, a lot and unfinished house, was conveyed to Sale and his wife, who duly recorded their deed. The conveyance and recordation were accomplished subsequent to the commencement and completion of Hadrup's work, but prior to the perfection of his lien. Two weeks prior to the completion of the house, but four months after the conveyance, Hadrup, who had no actual knowledge of the transfer in ownership, proceeded to perfect his claim. When Hadrup recorded his lien, the clerk notified him that there had been a change in ownership and, therefore, Hadrup named the purchasers in his memorandum to establish his mechanic's lien. Hadrup then brought suit for the amount due him under the con-

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[1]The word "mechanic" as used refers to those who qualify to avail themselves of a lien under a mechanic's lien statute, e.g., contractors, subcontractors, materialmen, laborers, furnishers, etc. As statutes vary from state to state, the exact statute concerned must be consulted. In Virginia see Va. Code Ann. § 43-1 (repl. vol. 1953) (giving liens to contractors, laborers, mechanics and materialmen).

[2]Va. Acts 1792, ch. 48, § 4.

[3]Va. Acts 1843, ch. 76, §§ 1-6.

[4]Bristol Iron Steel Co. v. Thomas, 93 Va. 396, 25 S.E. 110-12 (1896). The mechanic's lien is designed to give security to those adding value to property. Merchants & Mechanics Sav. Bank v. Dashiell, Va. 66 (25 Gratt.) 616, 621 (1874). The object of the law is to give those who have enhanced the value of a building or structure the security of a lien thereon to the extent that they have added to its value, but not to give a lien upon property not benefited. Gilman v. Ryan, 95 Va. 494, 28 S.E. 875 (1898). Consequently, it is generally held that no lien arises for tearing down or wrecking and removing a building or a part thereof. Goldberger-Raabin, Inc. v. 74 Second Ave. Corp., 252 N.Y. 336, 169 N.E. 405 (1929). However, the same case held that where improvements for which a lien can properly be obtained are made, and the work of tearing down old structures or parts thereof is a necessary part of making the improvements, such work may be included in the lien. 169 N.E. at 406.

[5]201 Va. 421, 111 S.E.2d 405 (1959).

tract with the original owner.[6] The lower court held that Hadrup's lien should have been filed within sixty days after the property was conveyed, whether or not the house was finished. The court said: "When there is a change of ownership, that is notice to contractors and workmen *who do no further work* on the house, that the statute has begun to run and the lien even on an unfinished house must be filed within the limitations period from the date of sale."[7] Hadrup's lien was therefore held invalid as the change in ownership had "otherwise terminated" the work within the meaning of the Virginia statute and made it necessary for Hadrup to file his claim within sixty days therefrom.

The Supreme Court of Appeals reversed, stating that "under the Virginia statute the new owner is chargeable with notice that a lien might attach to the property for the improvements," and further, "an inchoate lien attaches to the property when the work is done and materials furnished which may be perfected within the specified time... there is nothing in the statute to indicate that the work on the building is 'otherwise terminated' by a mere sale."[8] For these reasons Hadrup's lien was held valid against the good faith purchasers, the court feeling that any other construction of the statute would impose an undue hardship upon the mechanic and would not be in keeping with the language or spirit of the statute.

Although the priority and attachment problems were controlling in *Hadrup,* other issues had to be disposed of before the priority[9] and attachment questions were reached. In Virginia mechanic's lien litigation is brought on the equity side of the court.[10] However, this

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[6]The work was done and the lien was filed by Hadrup. However, Hadrup assigned in writing to third parties all sums of money due him under his contract with the original owner. The assignment had no bearing on the outcome of the case. For the assignability of mechanic's lien claims, see Va. Code Ann. § 43-19 (repl. vol. 1953). For cases construed under this section see Anderson v. White, 183 Va. 302, 32 S.E.2d 72 (1944) (subcontractor's lien is assignable); Coleman v. Peraman, 159 Va. 72, 165 S.E. 371 (1932) (assignment is valid against subcontractors who have no potential liens); Dewitt v. Coffey, 150 Va. 365, 143 S.E. 710 (1928) (priority of inchoate but potential liens is preserved); Electric Transmission Co. of Va. v. Pennington Gap Bank, Inc., 137 Va. 94, 119 S.E. 99 (1923) (contract of suretyship with option to complete).

[7]111 S.E.2d at 406.

[8]Id. at 407.

[9]Problems arising where there are more than one lien claimant were not encountered in the Hadrup case. For excellent discussions of this subject see Comment, 41 Yale L.J. 271 (1931), and Note, 29 Va. L. Rev. 121 (1942).

[10]Virginia's view is in accord with the principle that enforcement depends upon the essential nature of the substantive right which the statute creates. Since a lien is created, it must be foreclosed by the same equitable process that is used for

does not mean that the lien claimant is relieved of bringing himself within the statute.[11] While there is a tendency to liberalize the rules relating to the attachment of the lien,[12] Virginia's policy is to strictly construe them.[13] But once the Virginia courts find that the lien has attached, construction is liberal so that the purpose of the Act may be attained.[14] The rule of strict compliance with the letter of the law makes it essential that contractors, subcontractors, materialmen and laborers use extreme care in the initial steps taken to procure their liens, for any departure from the necessary requirements is fatal.[15]

Hadrup was qualified to avail himself of the mechanic's lien statute,[16] for he was not claiming a greater amount than that due him under his contract,[17] and his work resulted in a substantial improve-

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mortgages. As that process does not include a jury trial as a matter of right, it follows that a jury cannot be demanded in the foreclosure of a mechanic's lien. Behrens v. Kruse, 121 Minn. 28, 140 N.W. 118 (1913); DiMenna v. Cooper Co., 220 N.Y. 391, 115 N.E. 993 (1917).

In a minority of jurisdictions the lien is considered a statutory method of enforcing a debt, with the result that issues of fact are tried by a jury. Nolte v. Nannino, 107 N.J.L. 462, 154 Atl. 831 (1931).

[11]Monk v. Exposition Deepwater Pier Co., 111 Va. 121, 68 S.E. 280 (1910). See also Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950); Rison v. Moon, 91 Va. 384, 22 S.E. 165 (1895); Bailey Constr. Co. v. Purcell, 88 Va. 300, 13 S.E. 456 (1891).

[12]Caldwell v. Schmulbach, 175 Fed. 429 ,438 (C.C.N.D. W. Va. 1909); United States Blowpipe v. Spencer, 40 W. Va. 698, 21 S.E. 769 (1895).

[13]Clement v. Adam-Bros. Paynes Co., 113 Va. 547, 73 S.E. 294 (1912).

[14]"An examination of outside authorities shows that there is a hopeless diversity of opinion as to whether mechanic's liens statutes should receive a liberal or strict construction. We believe the correct rule deducible from the language and purposes of our statute, and the decisions of this court with respect to it, is that there must be a substantial compliance with the requirement of that portion of the statute which relates to the creation of the lien, but that the provisions with respect to its enforcement should be liberally construed." Francis v. Hotel Rueger, 125 Va. 106, 99 S.E. 690, 694 (1919). See also Mathews v. Myers, 151 Va. 426, 145 S.E. 352, 353 (1928) (lien for adherence of wages wherein the rule of Francis case was applied).

[15]Trustees v. Davis, 85 Va. 193, 7 S.E. 245 (1888).

[16]The Virginia mechanic's lien statute gives the lien only to general contractors and subcontractors and persons contracting with them. Va. Code Ann. § 43-1 (repl. vol. 1953). The courts have defined a subcontractor as one who furnishes material to a contractor under a continuing contract, Staples v. Adams, Payne & Gleaves, Inc., 215 Fed. 322 (4th Cir. 1914), and as one to whom the principal contractor sublets a portion or all of the contract itself, S. V. R. R. Co. v. Miller, 80 Va. 821, 7. S.E. 246 (1885). See also London Bros. v. National Exch. Bank, 121 Va. 460, 93 S.E. 699 (1917).

It is interesting to note that Hadrup was considered as a general contractor rather than a subcontractor. Hadrup contracted directly with the owner. The subsequent conveyance from the contracting owner to the defendant Sales had no effect upon Hadrup's status. Va. Code Ann. § 43-1 (repl. vol. 1953).

[17]A mechanic's lien can bind no greater interest in the property than the lien claimant has in the contract. Atlas Portland Cement Co. v. Main Line Reality Corp., 112 Va. 7, 70 S.E. 536 (1911).

ment.[18] Also, the property involved was capable of being subjected to Hadrup's claim. Therefore, since Hadrup had strictly complied with the statutory requirements for perfecting his claim,[19] the question confronting the Supreme Court of Appeals was whether a conveyance by the owner to a good faith purchaser of the lot and unfinished house "otherwise terminated" the work upon the house and made it necessary for the lien claimant to file his claim within sixty days from the date of conveyance. The answer depends on the language of the Virginia Code, which provides in part:

> "A general contractor in order to perfect the lien given by the preceding section shall file at any time after the work is done and the materials furnished by him and before the expiration of sixty days from the time such building, structure, or railroad is completed, or the work thereon *otherwise terminated.*"[20]

The general rule in all jurisdictions is that a mechanic's lien has priority if it has attached to the property before the conveyance is made.[21] The conflict lies in the *Hadrup* situation, where a conveyance is made subsequent to the contract and completion of the improvements, but before the lien has been perfected. Four theories are followed. Some jurisdictions hold that there is no lien until notice is filed, and priorities are determined by date of filing.[22] In other jurisdictions the lien attaches to all conveyances made subsequent to the delivery of materials and labor to the job.[23] Still other jurisdictions follow the rule that a properly perfected lien relates back to the date of the contract between the owner and the contractor.[24] In a few jurisdictions, a properly perfected lien relates back to the commence-

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[18]Va. Code Ann. §§ 43-4 (repl. vol. 1953).

[19]See Va. Code Ann. §§ 43-4, 43-5, 43-17, 43-19 (repl. vol. 1953).

[20]Va. Code Ann § 43-4 (repl. vol. 1953). (Emphasis added).

[21]Waterbury Lumber & Coal Co. v. Asterchinsky, 87 Conn. 316, 87 Atl. 739 (1913).

[22]Dwight v. Acme Lumber & Supply Co., 186 Ga. 805, 199 S.E. 178 (1938); Paris v. Lawyers' Title Ins. & Trust Co., 141 App. Div. 866, 126 N.Y. Supp. 753 (1910); Hinckley & Egery Iron Co. v. James, 51 Vt. 240, (1878). Here general registry may be had at any time after beginning to perform labor or furnish materials.

[23]Corwell v. Gilmore, 18 Cal. 370 (1861); Class v. Freeberg, 50 Minn. 386, 52 N.W. 900 (1892); H. F. Cady Lumber Co. v. Miles, 96 Neb. 107, 147 N.W. 210 (1914); Thorn v. Barringer, 73 W. Va. 618, 81 S.E. 846 (1914). This rule is based on the theory that mechanic's liens are an extraordinary remedy given to protect one who performs labor or furnishes materials in a specific res, and until he begins to perform the labor or furnish the material he has no claim.

[24]Paddock v. Stout, 121 Ill. 571, 13 N.E. 182 (1887); Shaughnessy v. Isenberg, 213 Mass. 159, 99 N.E. 975 (1912). It has been suggested that the absence of a requirement that the contract be recorded is prejudicial to the rights of innocent parties who have no knowledge of the owner's intention to build on his property. Comment, 36 Yale L.J. 131 (1926).

ment of work, so that subsequent conveyances are made subject to the possibility of the lien becoming effective upon recordation.[25] Under the Virginia statute it appears the last theory prevails, *i.e.*, the lien relates back to the time of the commencement of work.[26] In *Hadrup* the court followed that theory and further held that, if there was a transfer in ownership after commencement and completion of the work, the lien claimant may validly assert his claim against the new owner, as the new owner is charged with notice that liens might attach to the property for the improvements. In so holding, the court seems to be applying the dictum from the 1941 Virginia case of *Wallace v. Brumback*.[27] In that case the original owner of vacant land entered into a contract with a contractor to erect a building. While the building was in the course of construction there were two transfers of the property—the final transferee having contractually agreed to pay off all liens, perfected or inchoate. The contractor, however, upon completing his work named the original owner, with whom he made the contract, in his memorandum to effect his mechanic's lien. The court held the lien invalid in regards to the original owner, concluding that the word "owner" means the holder of the legal title at the time the lien is filed, not the owner at the time the contract was made. At the same time, in indicating that if the lien had been filed in proper form it would have prevailed against the new owner who purchased after the work had begun, the court said: "One who purchases a building pending construction takes it subject to the risk that a mechanic's lien may thereafter be perfected thereon."[28]

It seems that the Virginia court has reached a fair result in *Hadrup*. The rule it propounds is that an inchoate lien attaches and the statute starts running when the improvements are actually completed. A conveyance of the property during the course of the work is not controlling, but of course the lien must be perfected within the statutory period[29] from the date of completion or the mechanic will lose his

[25]Welch v. Porter & Co., 63 Ala. 225 (1879). Accord, H. C. Behrens Lumber Co. v. Lager, 26 S.D. 160, 128 N.W. 698 (1910); Peatman v. Centerville Light, Heat & Power Co., 105 Iowa 1, 74 N.W. 689 (1898); Nixon v. Knights of Pythias, 56 Kan. 298, 43 Pac. 236 (1896); Murray v. Swanson, 18 Mont. 533, 46 Pac. 441 (1896).

[26]Va. Code Ann §§ 43-1-3, 7-8, 20-23 (repl. vol. 1953).

[27]177 Va. 36, 12 S.E. 801. This case is in accord with Continental Supply Co. v. White, 92 Mont. 254, 12 P.2d 569 (1932).

[28]12 S.E.2d at 802.

[29]The statutory period differs in the various jurisdictions; Virginia allows sixty days. Va. Code Ann. § 43-4 (repl. vol. 1953). However, liens perfected by decrees in mechanic's lien proceedngs remain in full force without revival proceedings for a period of ten years as provided by statutes governing judgments in rem, unless fully discharged, and do not expire after a period of three years as do liens

right to the lien. In addition to subjecting the purchaser to a possible second liability for the cost of the lien claimant's work,[30] *Hadrup* will further inconvenience the purchaser by requiring him to call the original contracting owner into court to indemnify him if he is required to make the second payment. Hence it must be admitted that the rule of *Hadrup* is an obstacle in the good faith purchaser's path. It is not an insurmountable obstacle though, for the purchaser may protect himself either by contract, or by withholding part of the purchase price for the period of limitation.[31] Consequently, the result is not nearly as harsh as it appears at first impression, especially when the purpose of the Act and the requirement that the lien claimant strictly comply with the statutory procedure[32] are taken into consideration.

When the conveyance is made subsequent to both the contract and the completion of work, the question of attachment is adequately disposed of by *Hadrup*. When the conveyance is made subsequent to the contract but "prior to the commencement of work," Virginia should allow the inchoate mechanic's lien to attach at the date of contract. In this case the lien resembles a mortgage for future advances,[33] and the date of attachment should not be postponed until completion of the contract for then it would be of little use. It should be treated as inchoate when the contract is made, to ripen or fade with performance.[34] In subscribing to the rule that the lien relates back to the time of the commencement of work, the problem of determining what act constitutes commencement of work is often difficult to decide.[35] On the other hand, at least one noted writer prefers the rule

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under judgments in personam. Rosenzweig v. Ferguson, 348 Mo. 1144, 158 S.W.2d 124 (1941).

[30]This statement is made upon the premise that the Sales had already paid the owner for the lot and improvements.

[31]For an informative discussion of defenses to mechanic's lien actions, see Anderson, Defenses to Actions under Mechanics Lien Statute, 17 Tenn. L. Rev. 460 (1942).

[32] See notes 16, 17, 18, and 19 supra.

[33]2 Glenn, Mortgages § 351 (1943).

[34]Irrespective of statute, a mechanic's lien, though obtained through self-help and inchoate prior to perfection, has always been considered a true lien as distinguished from a mere right to priority of payment for debt. Glenn, Fraudulent Conveyances and Preferences § 447 (rev. ed. 1940).

[35]What constitutes a sufficient commencement of a building or any improvements is a point of much conjecture and difficulty. Merely piling lumber without any act of building is enough in some states, James v. Van Horn, 39 N.J.L. 353, 363 (1877), but is not in others, Kansas Mortg. Co. v. Weyerhaeuser, 48 Kan. 335, 29 Pac. 153 (1892). One state has gone so far as to hold that a contract with an architect is the inception of the building within the meaning of the statute. Wight, Mechanic's Liens on Non-Homestead Property from the Standpoint of the Loan Company, 2 Texas L. Rev. 77 (1923).

that there shall be no lien until notice is filed with priorities determined by date of filing.[36] While *Hadrup* retains this rule in part by requiring that notice be filed and recorded in strict compliance with the statute, it deviates by allowing the inchoate lien to attach when the work is finished and materials furnished.[37] Consequently, in the situation where a conveyance is made subsequent to the contract but prior to commencement of work, the question of the validity of the lien would be in a state of flux. The rule of *Hadrup,* on its face, does not secure to the mechanic his statutory remedy in this situation.

It is submitted that, in the *Hadrup* factual situation, any rule other than *Hadrup* or the "relation back to contract" rule would require the lien claimant to proceed with extreme care in seeking his statutory remedy. It would further require him to maintain a constant vigil at the contracting owner's doorstep so that he might ascertain any alienation of the property prior to the completion of the improvements and the perfection of his lien. Doubtless the "priority of time recording" rule is meritorious in many instances, but it would not help the lien claimant in the *Hadrup* situation. The Virginia court has, therefore, handed down a desirable rule, if only in that the result is the lesser of two evils.[38]

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[36]2 Glenn, Mortgages § 351 (1943).

[37]See note 7 supra. Some states hold that where an owner of real estate contracts to sell it to another and build a house on it for a single price, he continues as owner until the deed is given, so that he may charge the property with mechanic's liens without necessity of notice to the intending purchaser. Hannan v. Handy, 104 Conn. 653, 134 Atl. 71 (1926). Accord, Houston v. Long, 15 Ky. L. Rep. 721, 23 S.W. 586 (1893); Panhandle Tel. & Tel. Co. v. Kellogg Switchboard & Supply Co., 62 Tex. Civ. App. 402, 132 S.W. 963 (Civ. App. 1910); Evans-Lee Co. v.Knudtson, 190 Wis. 207, 208 N.W. 872 (1926). However, it is impossible to ascertain from the stated facts in Hardup whether or not the deed given was for the land and improvements or land only. From the language used it is implied tht the deed was for the land only. "[L]ot 67 had been purchased . . . by appellees. . . . Appellees deed was duly recorded...." 111 S.E.2d at 405.

[38]"If a sale of it [the property] by the owner operates to defeat the laborer's lien, then to file notice of it would be nugatory,—a mockery. It is said that such liens, until notice of them is filed, are snares to innocent buyers of the property to which they attach. This may be so in a measure, but the legislature had power to provide for and allow them as it has done. It, and not the court, must be the judge of the expediency and wisdom of such legislation." Burr v. Kerchner, 99 N.C. 263, 6 S.E. 108, 110 (1888).