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# Mechanic's Liens on Mortgaged Automobiles

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# NOTES

## MECHANIC'S LIENS ON MORTGAGED AUTOMOBILES

The motor industry has brought many new and perplexing questions before our courts for determination, and on account of the comparative newness of this industry, there are many questions that are not well settled and the courts of the different jurisdictions are not in accord. The purpose of this article is to discuss some of the questions growing out of the recent enactment of a statute<sup>1</sup> which gives to those persons, firms or corporations engaged in the general repair of motor vehicles and in furnishing accessories for motor vehicles a lien on such vehicle for the amount of such services rendered or material furnished. Three questions immediately present themselves, in regard to the rights which a dealer may have under this statute as against a mortgagee with a mortgage of record prior to the attaching of the lien of such dealer. (1) If the mortgage is not recorded by the clerk in the mortgage book but in another book kept for that special purpose, can it be treated as a duly recorded mortgage of the motor vehicle? (2) If it can be so regarded, will the repair man of the mortgagee have the priority? (3) If the mortgagee should be deemed to have the priority, should the mechanic or materialman be given any rights to the extent that his labor or material may have enhanced the value of the car? We shall consider each problem in turn.

Many things are to be considered in the application of this statute in conjunction with the rights of mortgagees under the laws of this state. Owing to the peculiar form of most mortgages used by those persons who usually take mortgages on motor vehicles, few of our county clerks record those instruments in what is designated as "Mortgage Book No.....," but usually record them in some special book kept for this purpose. This special book bears some name or title other than the mortgage book; it has a separate index; and instruments recorded in this are not indexed in the general mortgage index. In view of the provisions of the Kentucky statute that requires a county clerk to record all mortgages in a book to be designated as a mortgage book and that this shall be cross-indexed and a general

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<sup>1</sup> Kentucky Statute, 2739H.

cross-index for mortgages be kept separate and apart from any other index records, does a mortgagee whose mortgage is recorded in a book other than the regular mortgage book and not indexed in the regular mortgage index record acquire a lien? In other words, will this recording in the special book be constructive notice to all parties of this mortgage so recorded?

It is well settled in this jurisdiction that where grantee, lessee or mortgagee has lodged the instrument with the county clerk of proper county and paid the filing fee, his duty has ended. His rights as such mortgagee or grantee cannot be affected by subsequent lienholders or purchasers by reason of any failure of the clerk to do his duty, and when so lodged for record, *it is constructive notice to all*, although it may not be properly indexed or indexed at all and although it may not be recorded in proper record book or recorded at all. The consequences of the clerk's dereliction will not be visited upon the one who has paid the clerk his fees and performed every duty required of him. The law does not require the mortgagee to stand by and see that the clerk performs his duty. If this third person suffers damages by reason of the clerk not performing his duty, the clerk will be required to answer to him in damages.<sup>2</sup>

Let us now assume that this mortgage on the motor vehicle is a valid mortgage and gives the holder all the rights of a recorded mortgage. The next question is whether that lien is superior to the lien given by section 2739h to the garage dealer who does repair work or furnishes accessories for a motor vehicle? This section of the statute does not expressly say whether the dealer will have a lien superior to or prior to a mortgage lien; or whether it will be inferior to or subject to a record mortgage lien. It merely provided that a lien shall attach, and in so far as we are able to ascertain the appellate court of this state has not decided this question definitely. It may be some time before we have this question put to this court for the reason that so few of these bills are large enough to give the Court of Appeals jurisdiction; but we find by careful reading of the cases of *aGrrard v. Hubbard*<sup>3</sup> and *Wilson v. Flanders*<sup>4</sup> that the tendency of this jur-

<sup>2</sup> *Great Western Petroleum Co. v. Sampson*, 234 S. W. 727, 192 Ky. 814; *Kentucky River Coal Corp. v. Sumner*, 241 S. W. 820.

<sup>3</sup> 152 Ky. 672.

<sup>4</sup> 114 Ky. 534.

isdiction is to give full weight and benefit to the mortgagee with a properly recorded mortgage. Under the rule laid down in these cases, it would seem that the appellate court of this state will most likely follow the rule as laid down by the appellate courts of other states and hold that a properly recorded gives to the mortgagee a lien superior to an after acquired lien under the above mentioned section of our statute.

The general rule is recognized in the recent West Virginia case of *Scott v. Mercer Garage & Auto Sales Co.*<sup>5</sup> to be that the lien of a person making repairs to a chattel at the instance of the buyer in possession thereof, is inferior to the rights of the seller under a contract of sale of which the person making repairs has actual or constructive notice. This same doctrine is laid down in *Hallis v. Isbell*.<sup>6</sup>

In the case of *Cache Auto Co. v. Central Garage*<sup>7</sup> and the *Atlas Security Co. v. Grove*<sup>8</sup> it was definitely decided that the mechanic's or materialman's lien was subject to the recorded mortgage lien. It is true that a court will occasionally find that the mortgagee has authorized the mortgagor to keep the car in a reasonable state of repair or to make such repairs as are necessary to keep the car in operation and under such circumstances the Maryland Court of Appeals in *Meyers v. Neely and Ensor Auto Co.*<sup>9</sup> held that the one making the repairs had a valid lien for his labor and materials against the conditional vendor or mortgagee. But in spite of this theory of implied authority it seems that the great majority of courts will hold to the simple rule that the owner is not liable for repairs to personal property unless authorized by him, and we can safely conclude that the general holding of our courts is in favor of the recorded mortgage and against the mechanic's lien.

We come now to the more complex question where the mechanic or materialman furnishes supplies or labor and improves a motor vehicle and enhances its value by reason thereof. To the extent that he has enhanced the value of his motor vehicle

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<sup>5</sup> 88 W. Va. 92, 106 S. E. 425 (1921) annotated in 20 A. L. R. 249.

<sup>6</sup> 24 Miss. 799, 87 So. 273 (1921).

<sup>7</sup> 221 Pac. Rep. 862.

<sup>8</sup> 137 N. E. 570.

<sup>9</sup> 143 Md. 107, 121 Atl. 916 (1923). The annotation to this case in 30 A. L. R. 1227 indicates this doctrine of implied authority to make repairs will not be extended.

on which there is a recorded mortgage lien, does he have a lien superior to the recorded mortgage lien? We may put this extreme case—let us suppose that an automobile is attached by a creditor of the purchaser thereof and sold under an order of sale from a court of competent jurisdiction. On this car there is a recorded mortgage, but the holder of the mortgage is not a party to the creditor's suit. The car is sold at a judicial sale and the purchaser at this judicial sale thereafter improves car, rebuilds it, and enhances its value. To the extent that he enhances its value does he have or acquire a lien superior to the recorded mortgage lien?

In the case of *American National Bank v. First National Bank of Clarksville*<sup>10</sup> we have this statement; "Where the mortgagee elects to follow the specific article upon which the lien exists and to have it subjected to the satisfaction of his claim, his security attaches to the article in its entirety and we know of no principle of law that will compel him to release any portion of the article because another has knowingly changed its form or added to its value."

The general principle of law is that a sale of property under attachment passes all of the attachment defendant's interest therein, but ordinarily, a purchaser at such a sale acquires only defendant's interest in the property, unless he can show himself entitled to the full protection afforded a bona fide purchaser for value without notice.<sup>11</sup> In the leading case of *State Banking & Trust Co. v. Taylor*,<sup>12</sup> the court stated the principle as follows:

"The right of a creditor to the property attached must be determined by the state of the title at the time when the attachment was made, and in the absence of fraud and statutory regulations, he only obtains the rights which the debtor had in the property at the time, for the creditor is not in the position of a bona fide purchaser". He is postponed therefore as to liens or claims of other persons upon or to this property which be-

<sup>10</sup> Tex. Civ. App., 114 S. W. P. 176. Approved in 2 C. J. 647, sec. 338.

<sup>11</sup> *Parks v. Worthington*, 104 S. W. 921 (Texas Civ. App.) affirmed in 101 Tex. 505; 109 S. W. 9091; *Chetham-Strode v. Blake*, N. Mex. —, 142 Pac. 1130, approved in 6 C. J. 365, sec. 807

<sup>12</sup> 25 S. D. 577; 127 N. W. 590, 29 L. R. A. (N. S.) 523 (1910), approved in 6 C. J. 286, sec. 547.

came effective prior to attachment, as the unrecorded chattel mortgage did in the case under discussion.

This doctrine that the mortgage must prevail over the attaching creditor or a purchaser at a judicial sale has been most clearly recognized by the Kentucky Court of Appeals in the cases of *R. C. Poag Milling Co. v. Economy Fuel Co.*,<sup>13</sup> *Kentucky Refining Co. v. Morilton Bank Etc.*<sup>14</sup> and *H. A. Theirman Co. v. Laupheimer*.<sup>15</sup>

In the Kentucky case of *Mulligan v. Neeter*<sup>16</sup> we have this language: "Where an attaching creditor places his attachment in the hands of the sheriff and has it levied, he acquires no legal rights or title to the property but it is an equity and he cannot sell more than his creditor's interest."

Under these authorities it seems that the third question, like the other two, must be answered in favor of the holder of the mortgage of record. By reason of the fact that all parties are charged with knowledge of what the record discloses, any mechanic or materialman that improves a motor vehicle does so with actual or implied knowledge of the recorded mortgage, and when he so improves it with this knowledge, he does so at his peril and for the benefit of the holder of the record mortgage. This rule of law is sound on the theory that the holder of a mortgage of record has no way to protect himself by preventing some one from doing labor or improving the mortgaged vehicle, while the one who furnishes the accessories or does labor on the mortgaged vehicle can protect himself. He knows or can learn of this lien debt and he can then refrain from doing the repair work and protect himself perfectly by so doing. Hence we invoke again that principle that where one must suffer a loss it should be the one responsible, i. e. the one that could have, by the exercise of proper precaution, kept himself from being placed in a position to suffer a loss, rather than the one who was so situated that he could not, even by the exercise of proper precaution, have kept himself from being placed in such a position to suffer loss.

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<sup>13</sup> 128 S. W. 311.

<sup>14</sup> 89 S. W. 492.

<sup>15</sup> 55 S. W. 925.

<sup>16</sup> 5 Ky. Opinions 103.