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Mechanic's Liens on Mortgaged Automobiles

Richard C. Stoll
Fayette Circuit Court

NOTES

MECHANIC'S LIENS ON MORTGAGED AUTOMOBILES.

In connection with the article written by Mr. Vert C. Frazer of Providence, Kentucky, and published in the March number of the Kentucky Law Journal on the subject of "Mechanics' Liens on Mortgaged Automobiles" we are glad to reprint the opinion of Judge Richard C. Stoll, of the Fayette Circuit Court in the cases of *Midland Acceptance Corporation, Plaintiffs* v. *Eugene Lewis, Defendant;* and *Midland Acceptance Corportaion, Plaintiffs,* v. *Robert Brown, Defendant,* decided December 18, 1926. The opinion is as follows:

The demurrer in both of these cases raises the same questions, and so the conclusion that I may reach will apply to both cases, and this opinion will be made a part of the record in both of them.

In the Lewis case it is alleged that he executed his note to the Stewart-Cassell Motor Co. for $220.05. To secure the payment of the note Lewis executed a mortgage to the Motor Company. The plaintiff, Midland Acceptance Corporation, purchased the note in due course, and, of course, the lien retained in the mortgage followed the note.

In the Brown case he executed a note secured by a mortgage to the Fayette Motor Company, and the plaintiff purchased the Brown note from the Motor Company.

In the Lewis case it is alleged by the defendants Breeden that at the instance and request of Lewis they did certain work and made repairs on the automobile which had been purchased from Stewart-Cassell, amounting to $10.50, and they claim that they have a lien on the car superior to the plaintiff.

In the Brown case the defendants Breeden claim that the automobile purchased from the Fayette Motor Company had been wrecked; that they towed it into their garage, did certain work and furnished accessories and repairs to the amount of $89.26, and that there was a storage bill on the car amounting to $5.00; that this bill was not paid, the car was sold in accordance with the provisions of the statute, and the defendants

Breeden purchased it for $99.25, and he claims to be the owner of the car and asks that the court adjudge that the Midland Acceptance Corporation has no lien on it.

It will be seen then that the question to be determined in both cases is, whether a lien given by the Acts of 1918 (now Section 2739h-1 of the Statutes) to garage companies is superior to the lien retained in a prior mortgage, which was recorded before the work was done, for which a lien was granted, or whether the lien and the prior mortgage is superior? This question, so far as I can find, has not been decided by our Court of Appeals.

The statute in question gives to persons conducting garages a lien for work done, accessories or supplies furnished for or on machines; the lien provided for shall not be lost by the removal of the motor vehicle from the garage or shop provided a statement is filed in the office of the county clerk somewhat similar to the statement required in the case of mechanics' lien. The second section of the Act provides that the motor vehicle remaining in the possession of the garage may be sold after a certain time and by publication of certain notice. This statute was declared constitutional in the case of *Willis* v. *Lafayette-Phoenix Garage,* 202 Ky. 555, in which the judgment of this court was affirmed.

Upon an examination of the authorities I find that the courts of the various states are not in harmony upon the question here submitted, and sometimes the courts of the same states are not in harmony with each other, as, for instance, in Texas, where the statute is not quite the same as ours, there are several courts known as courts of civil appeal. In the case of *Commercial Credit Company* v. *Brown,* 281 S. W., 1101, and in *Bank* v. *Laughlin,* 210 S. W., 617, it is held that the lien of the garage is superior to the lien retained in a prior recorded mortgage. On the other hand, in *Holt* v. *Schwarz,* 225 S. W. 856, and in *Bank* v. *Chrisman,* 231 S. W., 857, and in other Texas cases, a different conclusion is reached, and it is held that the prior mortgage lien is superior. The decisions of the courts in the various states will be found in an annotation in 32 A. R. L., 1005, the note being entitled "Priority as between artisans' lien and chattel mortgage." Those who are interested may by examination of this

note read the various cases therein referred to, and will see that the courts of several states are not in accord as to their ruling.

It seems to me, however, that the better doctrine is laid down in the case of *Ehrlich* v. *Chapple,* 311 Ill., 467; 143 N. E., 61; 32 A. R. L., 929. The facts in that case are almost on all fours with the facts in the instant case. The mortgage had already been executed and recorded when the mortgagor placed the automobile with the garage-keeper for repairs. A controversy arose as to which lien was prior, and the court discusses the priority and reached the conclusion that the lien of the prior mortgage was superior to the lien of the garage-keeper. It was conceded in that case that the repairs were necessary to the operation of the truck. It was also shown that the mortgagee did not know of the repairs by the appellee until he announced that he would hold the car for the repair bill. The court said:

"It is urged that because these repairs were necessary it was to the interest of the mortgagee that they should be put upon the truck, and therefore he should be required to meet the expense thereof. The purpose of a chattel mortgage is to secure to the mortgagee his interest in the chattel mortgaged. If it be said that, because it would enhance the value of the truck to put the repairs upon it, a lien for putting on such repairs should be held prior to the lien of the mortgagee, it might well be that the repairs put upon the truck could reach a point where they would consume the entire selling price of the truck after such repairs were made, under which circumstances the mortgage lienor would have nothing on his lien. * * * To hold that the mortgagor may, without notice or consent of the mortgagee, cause an artisans' lien to be placed on a mortgaged chattel which would be a lien prior to the mortgage, would be to make it possible to entirely defeat the lien of the mortgage. Such a holding is repugnant to our whole law relating to the priority of liens. There is no implied authority to the mortgagor to cause a prior lien to be put upon a chattel, by the mere stipulation in the mortgage that the mortgagor is to keep the property in repair. . . . The contract was made between the artisan and mortgagor without knowledge of the mortagee. While the artisan has a lien against the mortgagor's interest in the mortgaged property, yet his lien is junior to the chattel mortgage, and if he would realize any benefit from his lien it is incumbent upon him, where the mortgagor becomes in default under the terms of the mortgage, to protect his own lien by satisfying the mortgage. Nor is this in any way a hardship upon the artisan. He can at all times know, before he puts his material and time upon the chattel, whether or not it is subject to a mortgage.

"It is urged in this case that commercial necessity requires that the artisans' lien be preserved, and that where the mortgaged chattel is retained by the mortgagor, to be used in the course of the mortgagor's business, an artisans' lien should, in the nature of things, be considered prior to the mortgage. What constitutes commercial necessity is by no means easy of determination. By reason of the facility with which chattels of the character involved here can be

moved, the chattel mortgage has become a very important feature of the automobile business, large sums of money are invested in the manufacture and sale of automobiles, and in the matter of loans upon them and in the automobile business. Banks and automobile industries depend upon the chattel mortgage as a security in the sale of automobiles. It would be difficult to say that the purpose for which a car is used is more of a commercial necessity than the means of its production or the protection of mortgage liens. We know of no doctrine in the law which will countenance a necessity, commercial or otherwise, that would destroy the vested interest of a prior lien. The purpose of a mortgage is to furnish security while the mortgaged property is to be left with the mortgagor for his convenience. It is the basis of a contract of this character that nothing should be done or permitted by the mortgagor to impair the security, other than that which arises out of ordinary wear and tear."

In the case of *Dennison* v. *Shuler,* 47 Mich., 598; 41 Amer. Rep., 734, it was held that a mechanics' lien for repairs on a chattel is subordinate to a prior duly recorded mortgage thereon for the purchase money, the court saying:

"The mortgage was on file and the defendants were therefore effected with notice. On general principles it would seem that the lien so carefully reserved by the vendor and the person furnishing the entire original machine ought to have priority over the subsequent repairs. The engine itself included all the labor and all the materials necessary for its production, and when the plaintiff sold it he virtually furnished to his vendees that labor and those materials and preserved an express lien. The repairers did less. Their expenditure was comparatively small and they acted in making it under circumstances which charged them with notice of the plaintiff's prior lien. Why then should their claim be preferred?"

In the case of *Metropolitan Securities Co.* v. *Orlow,* 108 Ohio St., 583; 140 N. E., 306; 32 A. R. L., 992, a silimar conclusion was reached by a divided court. It was stated before me in argument by a former judge of the Court of Appeals of Kentucky that decisions reached by a divided court were generally more sound than those reached where there was no dissent, for the reason that where the court is divided the matter is always fully threshed out and gone into. In the Ohio case it appeared that there was also a prior lien upon the property. The machine was damaged, probably in a wreck. The court, in discussing the case, said, among other things:

"It was urged that, the machine having been damaged, repairs would be beneficial, and that consent may be implied. This does not by any means follow. It may be conceived that the machine was in such condition that the repairs would not enhance the value thereof to the full amount of the cost of the repairs, or it may be further con-

ceived that the mortgagee would prefer to make the repairs himself and be the judge of the extent thereof. It is quite certain that, although repairs were made by McGuire at a charge of $355.20, the machine itself, after completion of the repairs, sold for only $280.00."

The court, after discussing many cases, further said:

"The underlying principles of all those cases is that the lien which is prior in time is prior in right, and that the record of the mortgage is notice to the whole world, including the repair man. It is apparent that a mortgagee without notice of the intended repairs has no opportunity to protect himself, and that he cannot be the judge of whether the repairs are needed, or to what extent such repairs would enhance the value of the property, or whether the contract for repairs is a reasonable one; while, on the other hand, the repair iman has every opportunity to fully protect himself before either expending labor or using materials in repairs. There is no obligation on his part to do anything, or to incur a penny of expense, until he has assurance that the property is free from encumbrance. If the person in possession of the machine, who requests that repairs be made, cannot give such assurance, the artisan is not bound to proceed."

It seems to me that the reasoning in the two cases above referred to is sound, and while the annotator in his note, *supra*, says that these cases appear to be against the weight of authority, they are to my mind certainly sound in principle. The manufacture and sale of automobiles has become one of our largest industries. It is a matter of common knowledge that automobiles are frequently sold and the salesman takes part payment in cash and a mortgage upon the car for the remainder of the purchase money. The notes secured by this mortgage are discounted at banks or with other financial institutions. No person should be permitted then to obtain a lien prior to the lien of the mortgage for work subsequently done without the consent of the mortgagee, because, if that were so, the mortgagor by his own act could easily place a lien ahead of the recorded mortgage lien upon his property. He might take his car to one garage, and not being satisfied with a composition or imitation leather trimmings, have them removed and have his whole car re-lined with expensive real leather, although the former trimmings were practically new. He might then go to another garage, have the wooden wheels removed and steel wheels put on. He might go to another garage and have a winter top put on his car. Each of these garage owners would have a lien for these accessories and supplies furnished and repairs made for six months after

they are made, and they do not have to regain possession of the car to assert their lien. The aggregate cost of all of these repairs and work done might easily amount to more than the saleable value of the car, and if this lien should be held to be superior to a prior recorded mortgage lien, then, of course, the holder of the note secured by the prior mortgage would have no security for his debts. I cannot believe that this can be the law. In the case of *Rankin* v. *Scott*, 12th Wheaton, 177, Chief Justice Marshall said:

"A prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective or displaced by some act of the party holding it, which shall postpone him in a court of lower equity to a subsequent claimant."

There is no greater authority than Mr. Chief Justice Marshall, and there is no doubt in my mind that his language states the law, and I believe sound law. I am of the opinion, therefore, that the lien of the garage company under the Acts of 1918 is inferior to the lien of a prior valid recorded mortgage.

RICHARD C. STOLL,
Judge of the Fayette Circuit Court.

Lexington, Kentucky.

THE KENTUCKY RULE AGAINST PERPETUITIES?

Apparently the principle of *stare decisis* does not apply to the interpretation of section 2360 of the Kentucky statutes. This section provided that "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter."

In commenting upon this section and also upon a similar section of the statutes of Iowa, Professor Gray asked the question: "Is the statute provision a substitute for the common-law rule, (as to perpetuities) or to be taken as an addition to it."[1] That question was asked a quarter of a century ago and we find that our courts are still troubled by the same question and that

[1] *The Rule Against Perpetuities* (3rd ed.), Sections 736, 737.