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Priorities Between Chattel Mortgagee or Conditional Seller and Subsequent Lienors

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It is the intention of the writer to discuss in this article the relative merits of the conflicting claims which arise between a chattel mortgagee, claiming under a duly recorded chattel mortgage, and an artisan, repairman, carrier, innkeeper, agister, or other lien claimant who is attempting to assert a lien upon the goods in question as against the interest of the prior mortgagee, the services of the lien claimant having been rendered at the instance of the mortgagor in possession. Substantially the same problem arises when the lienor has acted at the request of a conditional buyer in possession and then claims a lien against the title of the conditional seller. The effect of failure on the part of the mortgagee or conditional seller to record his encumbrance, as required by statute, will be considered at some length below, but in general the reader may assume that the encumbrance is duly recorded unless an express statement to the contrary appears.

The common law lien upon personal property arose by implication.[1] It was nothing more than a personal right of detainer; it conferred no right to use or sell the chattel in question, and the lienor must bear the expense of keeping it.[2] The common law lien was not assignable; it was lost if possession was given up by the lienor.[3] It will be worth while to mention briefly the common law liens with which this article is chiefly concerned, together with the principles upon which they were based and a suggested classification. (I) The lien in favor of a repairman or artisan was recognized at common law from comparatively early times and was apparently based upon the principle that a bailee who had by his services or labor increased the value of a chattel or materials at the request of the owner was in justice entitled to retain the improved article until his charges were

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[1]Steinman v. Wilkins, 7 Watts & S. (Pa.) 466 (1844); In re Leith's Estate, L. R. 1 P. C. (Eng.) 296 (1866).

[2]Ridgley v. Inglehart, 3 Bland (Md.) 540 (1832); Aldine Mfg. Co. v. Phillips, 118 Mich. 162 (1898); Burrough v. Ely, 54 W. Va. 118 (1903); Thames Iron Works Co. v. Patent Derrick Co., 1 John. & H. (Eng.) 93 (1860); Somes v. British Empire Shipping Co., 8 H. of L. (Eng.) 338 (1860).

[3]McFarland v. Wheeler, 26 Wend. (N. Y.) 467 (1841); Ruggles v. Walker, 34 Vt. 468 (1861).

paid.[4] It was not generally thought that this principle included carriers,[5] warehousemen,[6] wharfingers,[7] and agisters,[8] though it would now be conceded that at least the first three of these bailees do in fact add to the value of the chattel in the economic sense. (II) The innkeeper's lien was based upon the principle that he should be repaid by this privilege for the exceptional liability to which he was held and for the duty to serve all transients who should apply at his inn so far as his accomodations permitted.[9] The innkeeper was accorded a lien not only upon the goods of his guest, but also upon the goods of third parties brought to the inn by the guest and received by the innkeeper on the faith of the innkeeping relation.[10] There is some doubt whether the lien accorded to common carriers should be classed with the innkeeper's lien on the ground that the carrier is under the same exceptional liability and duty to serve, or with the artisan's lien mentioned above, or with the class of liens based upon mercantile custom. The same question arises in respect of the liens sometimes given by the common law to a wharfinger or warehouseman. (III) A third and rather well defined class of common law liens is that based upon mercantile custom. This class includes the *general* liens given to bankers, attorneys, factors, brokers, consignees, etc.[11] With this group we will not have occasion to deal at any great length. (IV) At common law the agister or livery stable keeper was not accorded a lien to secure his charges since he was not thought to increase the value of the

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[4]Green v. Farmer, 4 Burr. (Eng.) 2214 (1768), dyer; Franklin v. Hosier, 4 B. & Ald. (Eng.) 341 (1821), shipwright; Lord v. Jones, 24 Me. 439 (1844), farrier; Moulton v. Greene, 10 R. I. 330 (1872), repairman. See 1 Jones on Liens (3d ed.), sec. 731 and cases cited. Dean Ames's contention that the benefit of a lien was given where the repairman or other bailee had no remedy by express contract, and before the promise implied in fact was recognized, is no doubt true historically, but it is believed that the principle stated in the text is the one recognized by the courts in modern times; see Ames' History of Assumpsit, 2 Har. L. R. 53, 61.

[5]It has been suggested that the privilege of lien is accorded to a common carrier because of his obligation to receive and carry all goods offered and his exceptional liability for loss of the goods: Yorke v. Grenaugh, 2 Ld. Raymond (Eng.) 866 (1703); Rushforth v. Hatfield, 6 East (Eng.) 518 (1805). See 1 Jones on Liens (3d ed.), sec. 262–3.

[6]Steinman v. Wilkins, 7 Watts & S. (Pa.) 466 (1844).

[7]In England this lien was regarded as a general lien based upon mercantile custom: Naylor v. Mangles, 1 Esp. (Eng.) 109 (1794); Rex v. Humphrey, 1 McClel. & Y. (Eng.) 173 (1825).

[8]Chapman v. Allen, Cro. Car. (Eng.) 271 (1632); Jackson v. Cummings, 5 Mees. & W. (Eng.) 342 (1839). See Ames' History of Assumpsit, 2 Har. L. R. 53, 61.

[9]Beale, The Law of Innkeepers and Hotels, secs. 251–252.

[10]Robbins & Co. v. Gray, 2 Q. B. Div. 501 (1895); Cook v. Kane, 13 Ore. 482 (1886); Beale, *op. cit.*, secs. 256, 261, 262.

[11]See, generally, 1 Jones on Liens (3d ed.) under the title of the liens named.

animals fed and cared for by him,[12] and he was under no special duty to serve, but this lien has been quite generally given by statute.[13] Liens have also been given by statute to laborers, to landlords, to lumbermen and many others,[14] but the statutes conferring these last named liens do not in many instances require that the lien claimant be in possession, and many of them contain *express* provisions upon the question of priority between the lien given and other liens. The language of these statutes is exceedingly varied in the several jurisdictions, and it is not thought that any extensive reference to them can have any other result than to complicate the present discussion by adding a mass of unrelated detail. For these reasons the treatment of our problem in respect of statutory liens which were not recognized at common law will be confined largely to the liens of the agister and livery stable keeper, where the statutes are more uniform.

In many jurisdictions the common law liens mentioned above have been re-enacted in the statute law, and methods of enforcement by sale have been provided, and in some instances the nature of these liens has been materially changed, but in the main these statutes have resulted in mere codifications of the common law and have not effected any considerable change except that they have given the lien claimant a more satisfactory remedy by sale. It will be necessary, however, to consider, as we proceed, the language of statutes codifying or altering the common law liens mentioned in the last preceding paragraph.

I. In Respect of the Liens of Artisans and Repairmen

In the leading English case of *Williams v. Allsup*,[15] the court had occasion to consider whether a shipwright who had repaired a vessel at the request of the mortgagor in possession could enforce an artisan's lien as against the mortgagee. It appeared that the mortgagor had been left in possession of the vessel for the purpose of operating it to earn money with which to pay off the mortgage. It appeared further that the repairs were necessary and that the charges of the shipwright were reasonable. In holding that the defendant's claim of lien was well founded, Erle, C. J., used this language,[16] "I put my decision on the ground suggested by Mr. Mellish, viz., that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning the where-

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[12] *Supra*, n. 8.
[13] 1 Jones on Liens (3d ed.), ch. XIII.
[14] See, generally, 1 Jones on Liens (3rd ed.), under the appropriate titles.
[15] 10 C. B. N. S. (Eng.) 417 (1861).
[16] At pp. 426–7.

withal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested: he put her into the hands of the defendant to be repaired, and according to all ordinary usage, the defendant ought to have a right of lien on the ship, so that those who are interested in the ship, and who will be benefitted by the repairs, should not be allowed to take her out of his hands without paying for them. * * * It is to be observed that the money expended in repairs adds to the value of the ship; and, looking to the rights and interests of the parties generally, it cannot be doubted that it is much to the advantage of the mortgagee that the mortgagor should be held to have power to confer a right of lien on the ship for repairs necessary to keep her seaworthy." It is to be observed that the decision is expressly put upon the following grounds: (1) that the repairs were necessary to preserve the property and increased the value for the benefit of the mortgagee, (2) that without the repairs it had become impossible for the mortgagor to use the vessel and earn money wherewith to pay the debt to the mortgagee as was contemplated under the terms of the mortgage, and (3) that the mortgagee might be deemed to have consented impliedly that the mortgagor might subject the vessel to a lien. As thus limited and explained, it would seem that *Williams v. Allsup* announces a perfectly sound principle, but one which it may be difficult to apply to the facts of a particular case. This principle was correctly applied in the Indiana case of *Watts v. Sweeney*,[17] where it was held that a mortgagee of a railway locomitive and tender was not entitled to foreclose his mortgage so as to deprive a mechanic who had repaired the locomotive of his lien. It appeared that it was within the contemplation of the parties to the mortgage that the locomotive should remain in the possession and use of the mortgagor to enable the latter to operate the railway and earn money with which to pay off the mortgage debt, that the repairs were necessary and reasonable for this purpose and that the locomotive in question was the only one the mortgagor possessed and therefore absolutely essential to the operation of the business. In deciding that the lien of the mortgagee was

[17]127 Ind. 116 (1890). The repairman's lien was statutory, but the statute only codified the common law, and did not affect the question of priority.

postponed to the lien of the repairman, the court used this language,[18] "When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and the mortgagor was, in the case of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee as well as the mortgagor."

The principles announced in *Williams v. Allsup* and *Watts v. Sweeney* have been the basis of decisions in many other cases in this country where the question of priority has arisen between a mortgagee or conditional seller of a chattel and an artisan or repairman attempting to assert a lien on the chattel for repairs made at the instance of the mortgagor or conditional buyer in possession.[19] Where the elements may reasonably be found to be present which were present in the cases named, it would seem that these decisions may be supported. But in many instances the courts have followed blindly the language and result of these cases when the facts and situation of the parties did not warrant the conclusion that the mortgagee or conditional seller consented expressly or impliedly to have the mortgagor or conditional buyer in possession subject the article in question to a lien which should be prior to the duly recorded mortgage or conditional sale.[20] In a number of these cases the artisan's lien was declared to be superior where there was no other evidence of consent than the fact that the mortgagor or conditional buyer was in possession of the chattel and entitled to use it for his own benefit with the probable result that repairs might be needed, but where it did not appear that he was expected to earn money by using the chattel for the purpose of paying the mortgage debt. The result of these decisions would seem to be

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[18]At p. 123.

[19]Weber Implement & Auto Co. v. Pearson, 132 Ark. 101 (1917); Hammond v. Danielson, 126 Mass. 294 (1879); Kirtley v. Morris, 43 Mo. App. 144 (1890), but see Hampton v. Seible, 58 Mo. App. 181 (1894); Drummond Carriage Co. v. Mills, 54 Nebr. 417 (1898); White v. Smith, 44 N. J. L. 105 (1882); Scott v. Delahunt, 5 Lans. (N. Y.) 372 (1872), Affd. 65 N. Y. 128; Reeves & Co. v. Russell, 28 N. D. 265 (1914); Keene v. Thomas, (1905) 1 K. B. (Eng.) 136; Gurevitch v. Melchoir, 29 B. C. (Can.) 294 (1921).

[20]Rehm v. Viall, 185 Ill. App. 425 (1914); Etchens v. Dennis, 104 Kan. 241 (1919); Meyers v. Neeley, 143 Md. 107 (1923); Broom v. Dale, 109 Miss. 52 (1915); Guaranty Security Corp. v. Brophy, 137 N. E. (Mass.) 751 (1923), noted in 7 CORNELL LAW QUARTERLY 259; Ruppert v. Zaug, 73 N. J. L. 216 (1905); Terminal & Town Taxi Corp. v. O'Rourke, 117 Misc. (N. Y.) 761 (1922), *semble*; Garr v. Clements, 4 N. Dak. 559 (1895), *semble*.

that a mortgagor or conditional buyer in possession could always destroy the security of his mortgagee or seller except where forbidden to use the article in question. In some cases the fact that the mortgagee or conditional seller knew that the repairs were being made has been considered sufficient to show implied consent that the mortgagor might subject the chattel to a paramount lien.[21] The fact that the repairs increase the value of the chattel and inure to the benefit of the mortgagee has been given by the courts as a reason for preferring the lien of the repairman,[22] but it would seem that this factor is of no importance if the person in possession had no right or authority to subject the interest of the owner to a lien, and it might be suggested that the owner should have some voice in the matter.

In many cases, however, where there was no evidence that the mortgagee or conditional seller authorized the mortgagor or conditional buyer to subject the chattel to an artisan's lien, or where such conduct was expressly forbidden, the courts have squarely faced the question whether there is anything in the nature of the artisan's lien, or in principle, which demands that the claim of the artisan or repairman shall take precedence over the lien or title of the prior recorded encumbrance. The majority of the courts have reached the conclusion that the lien or interest which is prior in time is prior in right, and that there is nothing in the nature of the subsequent lien, or in the relation of the parties, from which the mortgagor or conditional buyer is authorized or entitled in law to defeat the prior interest.[23] In a Georgia case[24] the court held that equity would not enjoin the conditional seller of an automobile from recovering his property by an appropriate action at law from a repairman who was seeking to fore-

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[21]Etchen v. Dennis, 104 Kan. 241 (1919); Broom v. Dale, 109 Miss. 52 (1915). See Hollis v. Isbell, 124 Miss. 799 (1921), *contra*, on the ground that the conditional seller did not know that the repairs were being made.

[22]See cases cited *supra*, n. 19, 20. It should be observed that mere increase in value is no ground for depriving the owner of his property where the repairs are made at the instance of a wrongdoer: Hiscox v. Greenwood, 4 Esp. (Eng.) 174 (1802), repairs ordered by servant; Clark v. Hale, 34 Conn. 398 (1867), purchaser from converter had repairs made; Hollingsworth v. Dow, 19 Pick. (Mass.) 228 (1837), no lien in favor of subcontractor; Globe Works v. Wright, 106 Mass. 207 (1870), no lien in favor repairman where mortgagor agreed to make repairs himself; Meyers v. Bratespiece, 174 Pa. 119 (1896), no lien in favor subcontractor.

[23]Wilson v. Donaldson, 121 Cal. 8 (1898); Atlas Securities Co. v. Grove, 137 N. E. (Ind. App.) 570 (1922); Madison, etc., Ass'n v. Wells, 137 N. E. (Ind. App.) 769 (1923); Small v. Robinson, 69 Me. 425 (1879); Bath Motor Mart v. Miller, 122 Me. 29 (1922); Globe Works v. Wright, 106 Mass. 207 (1870); Denison v. Shuler, 47 Mich. 598 (1882); Hollis v. Isbell, 124 Miss. 799 (1921); Hampton v. Seible, 58 Mo. App. 181 (1894); Cache Auto. Co. v. Central Garage, 221 Pac. (Utah) 862 (1923); Beecher v. Thompson, 120 Wash. 520 (1922); Scott v. Mercer, 88 W. Va. 92 (1921).

[24]Baughmann Auto. Co. v. Emanuel, 137 Ga. 354 (1911).

close an artisan's lien for repairs and materials furnished at the instance of the conditional buyer. It was suggested that the remedy of the repairman was to pay off the conditional seller and then subject the automobile to a lien as against the buyer. To the criticism that this suggested remedy works an undue hardship on the repairman, and that the chattel may not be of sufficient value to afford him protection, the answer is made that he acts voluntarily with actual or constructive notice of the prior rights of the seller, and consequently is not entitled to a preference. And in *Shaw v. Webb*[25] the court reached the same conclusion, distinguishing cases like *Watts v. Sweeney*[26] where there was sufficient evidence that the conditional seller or mortgagee had impliedly consented that his interest should be postponed to the subsequent lien of a repairman and cases like *Keene v. Thomas*[27] where the superiority of the repariman's lien was sustained by reason of an express provision in the contract of mortgage or sale. Referring to the last named case, the Tennessee court said,[28] "Doubtless a court, in order to sustain a claim of lien, would not hesitate to seize upon any provision in a contract retaining title or in a mortgage which may be construed to look to the making of repairs or improvements at the instance of the vendee or mortgagor in possession."

The cases announcing the majority rule have pointed out that in general liens take priority according to the time when they attached to the property, that it is not the policy of the law to take the property of one man to pay the debts of another, and that any other holding would seriously impair the security of the mortgagee or conditional seller and render these forms of doing business too precarious for practical use. Furthermore, it is true that the repairman acts voluntarily, wherein he differs from the innkeeper discussed hereafter, and if the prior encumbrance is duly recorded as required by statute, the repairman has actual or constructive notice. If the mortgage or conditional sale is not recorded, it will depend upon the language of the recording statute whether or not the person subsequently repairing or rendering services is intended to be protected. This matter is discussed below.

In some jurisdictions the lien of the artisan or repairman takes precedence over a prior recorded chattel mortgage or conditional sale by

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[25]Shaw v. Webb. 131 Tenn. 173 (1914).
[26]*Supra*, n. 17.
[27](1905) 1 K. B. 136, where the hire-purchase agreement provided that the prospective buyer should keep the dogcart in repair.
[28]At p. 182.

virtue of express statute.[29] Occasionally these statutes provide that the artisan or repairman shall have a lien on the property when the services were rendered at the request of "the owner or legal possessor of the property," or some similar phrase.[30] Obviously, under statutes of this character there can be no doubt that the repairman's lien will be given priority unless such statutes are unconstitutional. It has been held that a statute is unconstitutional which purports to subordinate a valid existing right to a subsequently acquired lien, the right of the mortgagee or conditional seller having been vested before the statute in question was enacted.[31] This would not be true in a jurisdiction which held that at common law the lien or title of the chattel mortgagee was postponed to the subsequently acquired lien of the repairman, since there the statute would merely be declaratory of the common law rule as it existed before the adoption of the constitution. It would seem that a statute would not be unconstitutional, as interfering with the freedom or obligation of contracts or as taking property without due process, where the statute provides that the lien of a repairman or artisan should be preferred to the prior interest of a mortgagee or conditional seller, provided the statute was enacted before the rights of the mortgagee or conditional seller attached, since in that case they would enter into the mortgage or conditional sale with full knowledge of the statute and subject to its provisions.[32] It will not be implied, however, that the legislature intended a statutory lien to take priority over the right or interest of a conditional seller or mortgagee when the statute in question does not expressly or by clear implication declare such superiority.[33] It has been repeatedly stated that in general statutory liens will attach subject to all prior liens and claims against the property. Conversely,

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[29]1 Jones on Liens, secs. 731–786c.

[30]See, for example, Davenport v. Grundy Motor Sales Co., 28 Cal. App. 409 (1915); Reeves & Co. v. Russell, 28 N. D. 265 (1914); Crosier v. Cudihee, 85 Wash. 237 (1915), statute repealed before decision in Wilcox v. Mobley, 116 Wash. 118 (1921); Smith Auto. Co. v. Kaestner, 164 Wis. 205 (1916). Sometimes the statutory lien is expressly postponed, as in Burrow v. Fowler, 68 Ark. 178 (1900). See also secs. 183–184 of the N. Y. Lien Law (L. 1909, c. 38).

[31]National Bank v. Jones, 18 Okla. 555 (1907); Betts v. Ratliff, 50 Miss. 561 (1874).

Obviously it would not be unconstitutional to subordinate the prior interest to a subsequent lien if the prior encumbrancer gave his consent, expressly or by implication.

[32]See Howard v. Burke, 176 Ia. 123 (1916); Terminal, etc., Corp. v. O'Rourke, 117 Misc. (N. Y.) 761 (1922); Crosier v. Cudihee, 85 Wash. 237 (1915). But see Jensen v. Wilcox Lumber Co., 295 Ill. 294 (1920), statute making lien for storage superior to chattel mortgage held unconstitutional.

[33]Easter v. Goyne, 51 Ark. 222 (1889), lien in favor of keeper of stallion; Wilson v. Donaldson, 121 Cal. 8 (1898), laborer's lien; Peter Barrett Mfg. Co. v. Wheeler, 212 N. Y. 90 (1914).

there are some *dicta* that common law liens attach to the chattel regardless of ownership,[34] but it is not believed that these *dicta* state a true doctrine except in respect of the common law lien of the innkeeper.

EFFECT OF FAILURE TO RECORD CHATTEL MORTGAGE OR CONDITIONAL SALE

At common law a chattel mortgage was deemed fradulent as to creditors of the mortgagor unless the possession of the property was delivered to and retained by the mortgagee.[35] So, obviously, an artisan or repairman would prevail over the mortgagee, where the mortgagor was left in possession, but for the recording statutes. Leaving out of consideration local peculiarities in these statutes, their effect is to do away with the requirement that the mortgagee take possession of the property, provided he duly acknowledges and records the chattel mortgage as required by the particular statute.[36] As between the parties to the mortgage the agreement is valid without either delivery of possession or recording, but under the statutes a chattel mortgage is void as to creditors of the mortgagor unless it is accompanied by delivery of possession, or recorded or filed in the manner prescribed. It follows that the mortgagee can never prevail over a repairman who contracts with the mortgagor in possession unless the mortgage is duly recorded. This statement is subject to the qualification that in many jurisdictions the creditor is not protected by the recording statute if he had actual notice of the prior unrecorded chattel mortgage.[37]

In the field of conditional sales the history of recording statutes is somewhat different. At common law the great majority of the courts reached the conclusion that the title of the conditional seller should be protected as against purchasers from and creditors of the conditional buyer even though the buyer had been given possession and use of the property by the seller, and the seller was accordingly permitted to recover the property from such purchasers and creditors.[38] Likewise, the courts declined to hold that the conditional sale was subject to statutes providing for the recording of filing of chattel mortgages.[39]

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[34]Ruppert v. Zaug, 73 N. J. L. 216 (1905); Peter Barrett Mfg. Co. v. Wheeler, *supra*, n. 33.

[35]Russell v. Fillmore, 15 Vt. 130 (1843). See Williston on Sales (2d ed.), sec. 352 *et seq.*

[36]Jones on Chattel Mortgages (5th ed.), ch. VI, VII.

[37]Jones on Chattel Mortgages (5th ed.), secs. 313–318.

[38]Harkness v. Russell, 118 U. S. 663 (1886). For a complete collection of the authorities, see Bogert's Commentaries on Conditional Sales, secs. 47–48.

[39]Bogert, op. cit., sec. 54.

But in a majority of the states, statutes have been enacted which provide for the recording or filing of conditional sale contracts.[40] These statutes vary materially as to the classes of persons who will be entitled to prevail over the seller if the contract is unrecorded. Some protect only purchasers for value from the mortgagee and his judgment or attaching creditors without notice of the conditional sale. Other statutes protect all "third parties" without notice, or even make the contract void as to all persons except the seller and buyer unless it be duly recorded. Section 5 of the Uniform Conditional Sales Act provides, "Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale." It would seem that in those jurisdictions which have adopted the uniform act[41] it is not required that the conditional seller shall record his contract so far as artisans or repairmen who act at the instance of the buyer are concerned, since they are not purchasers nor have they acquired a lien by attachment or levy.[42] The same is true in those jurisdictions where there is no statute requiring the recording of conditional sales, and in those states where the recording statutes are not broad enough to protect the creditors of the buyer generally.[43] But where the recording statutes are broad enough to protect the creditors of the buyer generally, or all "third parties,[44] the seller must record his contract if he expects or hopes to prevail over the artisan or repairman or other lien claimant who acts at the instance of the buyer.[45]

RULE AS TO CARRIERS, WAREHOUSEMEN, ETC.

The priority which is generally accorded to a chattel mortgagee or conditional seller of goods against an artisan or repairman who sub-

[40]Bogert, op. cit., sec. 53. The substance of the various statutes is given, together with full citations to authorities. See also 2 Uniform Laws Ann. 42 *et seq.*

[41]Alaska (L. 1919, c. 13); Arizona (L. 1919, c. 40); Delaware (L. 1919, c. 192); New Jersey (L. 1919, c. 210); New York (L. 1922, c. 642); South Dakota (L. 1919, c. 137); West Virginia (L. 1921, c. 75); Wisconsin (L. 1919, c. 672).

[42]Commercial Credit Co. v. Vineis, 120 Atl. (N. J.) 417 (1923), landlord not protected.

[43]Reischmann v. Masker, 69 N. J. L. 353 (1903), before adoption of Uniform Cond. Sales Act; Beebe v. Fouse, 27 N. M. 194 (1924); Bath Motor Mart v. Miller, 122 Me. 29 (1922).

[44]See Winton Co. v. Meister, 133 Ind. 318 (1918).

[45]In Massachusetts the conditional seller cannot prevail over the repairman unless the latter has *actual* notice of the rights of the conditional seller. Dunbar-Laporte Motor Co. v. Desrocher, 142 N. E. (Mass.) 57 (1924).

sequently attempts to assert a lien for repairs or services rendered at the request of the mortgagor or conditional buyer in possession is likewise accorded as against a common carrier who carries the goods at the instance of the mortgagor or conditional buyer.[46] Thus, in the case of *Owen v. Burlington, etc., Co.*,[47] it was held that the lien of the carrier for transporting a merry-go-round at the request of a chattel mortgagor was inferior to the right of the chattel mortgagee, though the latter had permitted the mortgagor to remain in possession and use of the article, and to move it around within the state, and inferentially the mortgagor was using the article for the purpose of earning money with which to pay off the mortgage. It appeared that the carrier had actual notice of the rights of the mortgagee. It would seem that in this case the court might have implied the consent on the part of the mortgagee which was implied in *Watts v. Sweeney*[48] or *Keene v. Thomas*.[49] A like result was reached in a Mississippi case[50] in which the court made the added suggestion that the railway company might have demanded the freight in advance. It seems to be well settled that a carrier can claim no lien against the owner, mortgagee, or conditional seller when the goods have been delivered to the carrier by a wrongdoer, or by one rightfully in possession but without any authority to have the goods carried for the owner.[50a]. The same principles which have been applied to the liens of the artisan and carrier would seem to apply to the lien of a warehouseman or wharfinger,[51] or to any other similar lien recognized under the common law. It would seem to make no difference that in many jurisdictions these liens are now given by statute. The statutes were generally enacted for the purpose of providing a remedy for the enforcement of the lien,

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[46]Savannah, etc., R. Co. v. Talbot, 123 Ga. 378 (1905), goods delivered to carrier by wrongdoer; Robinson v. Baker, 5 Cush. (Mass.) 137 (1849), goods delivered to carrier by wrongdoer; Gilson v. Gwinn, 107 Mass. 126 (1871), goods delivered to carrier by bailee; Corinth Engine & Boiler Works v. Miss. Cent. R. Co., 95 Miss. 817 (1909); Singer Mfg. Co. v. London, etc., R. Co. (1894) 1 Q. B. 833, *semble contra*.

[47]11 S. D. 153 (1898).

[48]*Supra*, n. 17.

[49]*Supra*, n. 19.

[50]Corinth Engine & Boiler Works v. R. Co., *supra*, n. 46.

[50a]Swinson v. The Atchison, etc., R. Co., 230 Pac. (Kans.) 1046 (1924).

[51]Graben Motor Co. v. Brown Garage Co., 195 N. W. (Ia.) 752 (1923), storage; Storms v. Smith, 137 Mass. 201 (1884), storage; Vette v. Leonori, 42 Mo. App. 217 (1890), storage; Baumann v. Post, 16 Daly (N. Y.) 385 (1890), at time when N. Y. statute did not give warchouseman prior lien for storage; Peter Barrett Mfg. Co. v. Wheeler, 212 N. Y. 90 (1914), not within statute giving priority; Leitch v. Sanford Motor Tr. Co., 123 Atl. (Pa.) 658 (1924); Adler v. Godfrey, 153 Wis. 186 (1913), although the mortgagee knew that the goods were being stored. *Contra*, Singer Mfg. Co. v. London, etc., R. Co., *supra*, n. 46.

or for the purpose of extending its scope, or for the simple purpose of codification. In the absence of a change accomplished expressly or by implication in the language of the statute,[52] the same principles will be applied to these liens under the statutes as were applied at common law.

II. The Lien in Favor of an Innkeeper or Lodging-house Keeper

The principles applied to the lien of the innkeeper at common law were somewhat different from those applied to the liens previously discussed. The lien of the innkeeper was based upon the fact that he was held liable for the loss of the goods of his guest practically as an insurer, and he was under a duty to receive as guests all transients who applied at his inn together with their baggage up to the limit of his accommodations, and possibly the keeping of the goods by the innkeeper was a benefit to the goods.[53] In view of the exceptional burdens imposed upon the innkeeper, it was thought just that he be given a lien on the goods of his guest to secure his charges for the entertainment of the guest and for the keeping and care of the goods. The lien extended to all the goods brought by the guest to the inn, and received by the innkeeper on the faith of the relation, whether or not the goods belonged to the guest, provided only that the innkeeper did not know that the guest was wrongfully in possession of the goods in question.[54] The courts have continued to apply these principles

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[52]See the following illustrative cases where the language of the statutes was important: Monthly Installment Loan Co. v. Skellet Co., 124 Minn. 144 (1913); statute gave warehouseman a lien where goods deposited "at the request of the owner or legal possessor of any personal property;" Willis-Overland Co. v. Prudman Auto. Co., 196 N. Y. S. 487 (1922). In Lloyd v. Kilpatrick, 71 Misc. (N. Y.) 19 (1911), the statute provided for a lien in favor of the warehouseman where goods deposited with the consent of the owner "whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise," but it was held that the consent of the conditional vendee would not be implied. In Doody v. Collins, 223 Mass. 332 (1916), the owner was estopped to deny the authority of the bailee. portant: Monthly Installment Loan Co. v. Skellet Co., 124 Minn. (1913); statute gave warehouseman a lien where goods deposited "at the request of the owner or legal possessor of any personal property;" Willis-Overland Co. v. Prudman Auto. Co., 196 N. Y. S. 487 (1922). In Lloyd v. Kilpatrick, 71 Misc. (N.Y.) 19 (1911), the statute provided for a lien in favor of the warehouseman where goods deposited with the consent of the owner "whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise," but it was held that the consent of the conditional vendee would not be implied. In Doody v. Collins, 223 Mass. 332 (1916), the owner was estopped to deny the authority of the bailee.

[53]Cook v. Kane, 13 Ore. 482 (1886); Beale on Innkeepers and Hotels, secs. 251–253.

[54]Threfall v. Borwick, L. R. 7 Q. B. 711 (1872); Robbins & Co. v. Gray, (1895) 2 Q. B. 501; Gordon v. Silber, L. R. 25 Q. B. 491 (1890); Jones v. Morrill, 42 Barb. (N. Y.) 623 (1864); R. L. Polk & Co. v. Melenbacker, 136 Mich. 611 (1904); Cook v. Kane, 13 Ore. 482 (1886). See Beals, *op. cit.* secs. 261–2.

where the lien of the innkeeper has been given by statute, on the ground that the statutes are merely declaratory of common law principles,[55] unless this interpretation is precluded by the language of the statute. It is interesting to note that the privilege accorded to the innkeeper of holding a lien upon the goods of third parties has never been given to the common carrier,[56] though it is admitted that the latter is under an equal duty to serve all applicants, and is under an insurer's liability which is equal to that imposed on the innkeeper. It is said that the carrier might demand the freight in advance, but is not the same true of the innkeeper, at least in modern practice? Suffice it to say that the lien of the innkeeper has been considered broader than the other common law liens, and attaches to any goods brought by the guest to the inn and received by the innkeeper on the faith of the relation.

So the innkeeper is generally permitted to assert his lien as against the conditional seller and chattel mortgagee. In *Horace Waters Co. v. Gerard*[57] the plaintiff sold a piano by conditional sale to one Carlisle and delivered it to her while she was a guest at the defendant's hotel. At that time she was a technical guest and indebted to the defendant, and she subsequently became indebted to a greater extent. Still later she took an apartment at the hotel upon a year's lease, by the lease expressly giving the defendant a lien upon all property brought into the hotel by the said Carlisle. She occupied under the lease for about three months and incurred further indebtedness. Defendant had no notice of the rights of the plaintiff until after the guest left the hotel. It was held that the lien of the defendant was good against the plaintiff under a statute giving the keeper of a hotel or inn a lien on the baggage or other personal property brought upon the premises by the guest, although owned by a third party, unless the proprietor knew that it was not the property of the guest, or not legally in his possession. It was held further that the statute was constitutional since it did not give the innkeeper any greater rights than at common law, and that it was not against public policy; that the common law lien of the innkeeper was not repugnant to the constitution of New York, by the adoption of which the common law of England was declared to be the law of the state, and the statutory lien was a mere codification. In another case[58] construing the same

[55]R. L. Polk & Co. v. Melenbacker, *supra*, n. 54; Horace Waters & Co. v. Gerard, 189 N. Y. 302 (1907). But see Wyckoff v. Southern Hotel Co., 24 Mo. App. 382 (1887).

[56]*Supra*, n. 46, 47, 50.

[57]*Supra*, n. 55.

[58]Matthews v. Victor Hotel Co., 74 Misc. (N. Y.) 426 (1911), Affd. 150 App. Div. (N. Y.) 928.

statute the Supreme Court of New York has held that the lien of the hotel keeper is superior to a prior duly recorded chattel mortgage on the property brought to the hotel by the guest, that the hotel keeper did not have notice that the property was not the property of the guest from the record of the chattel mortgage, since by the recording statute the record was notice to "creditors, purchasers, and subsequent mortgagees" only. These two cases illustrate the almost universal holding that the lien of the inn or hotel keeper is preferred to the claims of third parties who have entrusted their goods to the person who later becomes a guest at the inn or hotel.[59] Knowledge on the part of the innkeeper or hotelkeeper that the guest is not the owner of the goods should not defeat the lien unless the guest is known to be wrongfully in possession.[60]

At common law the keeper of a boarding house or lodging house was not given a lien on the goods of his guest, since the boarding house keeper or lodging house keeper was not under the duty to serve all who applied, nor was he subjected to the same extraordinary liability as the innkeeper.[61] In many jurisdictions, however, the lien of the innkeeper has been extended by statute to boarding house keepers and lodging house keepers.[62] Where the statutes give the same lien which was accorded to the innkeeper at common law, the same principles will govern the statutory lien,[63] but in many jurisdictions the statutory lien of the boarding house keeper or lodging house keeper is not so broad as the common law lien of the innkeeper. A rather common form of statute is one which provides that the lien shall attach to the "goods of the guest," or where the property is brought by the "owner or legal possessor," or other like restriction.[64]

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[59]See Brown Shoe Co. v. Hunt, 103 Ia. 586 (1897); R. L. Polk & Co. v. Melenbacker, *supra*, n. 54; Singer Mfg. Co. v. Miller, 52 Minn. 516 (1893); Leonard v. Harris, 147 App. Div. (N. Y.) 458 (1911), Affd. 211 N. Y. 511; Cook v. Kane, *supra*, n. 53; Robbins & Co. v. Gray, *supra*, n. 54. *Contra*, because of the language of the statutes: Wyckoff v. Southern Hotel Co., *supra*, n. 55; Mercer v. Lowery, 193 Mo. App. 106 (1916); McClain v. Williams, 11 S. D. 227 (1898); Chickering-Chase Bros. Co. v. L. J. White & Co., 127 Wis. 83 (1906).

[60]Robbins & Co. v. Gray, *supra*, n. 59. There are some decisions and dicta *contra*, for which see Beale, *op. cit.*, sec. 262.

[61]Beale, *op. cit.*, sec. 252 and cases cited.

[62]1 Jones on Liens (3d ed.), sec. 515; Beale, *op. cit.*, sec. 298.

[63]Leonard v. Harris, *supra*, n. 59; Nance v. O. K. Houck Piano Co., 128 Tenn. 1 (1913). But see n. 31, 32, *supra*.

[64]See, for example, Wyckoff v. Southern Hotel Co., *supra*, n. 55; McClain v. Williams, *supra*, n. 59; Wertheimer-Swarts Shoe Co. v. Hotel Stevens Co., 38 Wash. 409 (1905); Chickering-Chase Bros. Co. v. L. J. White & Co., 127 Wis. 83 (1906).

III. General Liens Based upon Mercantile Custom

Questions of priority between a chattel mortgagee or conditional seller and a subsequent lien claimant do not seem to have arisen in respect of the general liens of brokers, attorneys, factors, consignees, etc. This is no doubt due to the fact that these liens are usually applied to negotiable securities, or the relations of the parties are such that it would involve a criminal act for the mortgagor or conditional buyer to attempt to transfer the goods to a factor or consignee. It is not believed that the principles to be applied when the question of priority arises are materially different from those applied to the lien of the artisan or carrier discussed above.

IV. The Statutory Lien of the Agister or Livery Stable Keeper

The common law did not grant a lien to the agister or livery stable keeper to secure to him his charges for feeding or pasturage or care of animals.[65] It was not thought that the agister added any value to the animals so kept or fed unless in the exceptional case where the animal was fattened for the slaughter or trained for some special purpose. By statute, however, in almost all jurisdictions a lien has been given to agisters and livery stable keepers, as well as to their modern successor, the garage keeper.[66] The fact that these statutes follow rather closely the model of the previously known common law liens, and are fairly uniform in the various jurisdictions, makes it possible to select this class for a brief discussion of the problem of this article as applied to statutory liens which were wholly unknown at common law. It is generally held that the interest of the conditional seller or chattel mortgagee is superior to the lien of an agister or livery stable keeper subsequently acquired, even though the agister or livery stable keeper had no knowledge of the prior encumbrance,[67] unless the owner

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[65]Lewis v. Tyler, 23 Cal. 364 (1863); Goodrich v. Willard, 7 Gray (Mass.) 183 (1856); Chapman v. Allen, Cro. Car. (Eng.) 271 (1632); Jackson v. Cummins, 5 Mees. & W. (Eng.) 342 (1839). See 1 Jones on Liens (3d ed.), secs. 641–5. Cf. Ames, History of Assumpsit, 2 Har. L. R. 53, 61.

[66]1 Jones on Liens, ch. XIII, and cases cited *infra*.

[67]Chapman v. Bank, 98 Ala. 528 (1893); Rohrer v. Ross, 53 Colo. 328 (1912); Haunch v. Ripley, 127 Ind. 151 (1890); Beh v. Moore, 124 Ia. 564 (1904), language of statute; Lee v. Vanmeter, 98 Ky. 1 (1895), language of statute; Bowden v. Dugan, 91 Me. 141 (1898); Howes v. Newcomb, 146 Mass. 76 (1888); Erickson v. Lampi, 150 Mich. 92 (1907); Pickett v. McCord, 62 Mo. App. 467 (1895); Cable v. Duke, 132 Mo. App. 334 (1908); Bank v. Lowe, 22 Nebr. 68 (1887); Sargent v. Usher, 55 N. H. 287 (1875); Sullivan v. Clifton, 55 N. J. L. 324 (1893); Nat. Bank of Commerce v. Jones, 18 Okla. 555 (1907); Wright v. Sherman, 3 S. *D.* 290 (1892);

consented to the creation of a paramount lien[68] or the language of the statute indicated the intention of the legislature to prefer the lien claimant.[69] It has been suggested that in general statutory liens are intended to be given subject to prior encumbrances, a principle which has been sometimes erroneously denied as to common law liens.[70] Thus in *McGhee v. Edwards*[71] it was held that the lien of a duly recorded chattel mortgage on a horse was entitled to priority over a subsequently acquired livery stable keeper's lien under the Tennessee statute, and that the filing of the chattel mortgage was notice to the livery stable keeper, and this result was reached in spite of the fact that the Tennessee statute gave the livery stable keeper a lien by reference to another statute which in effect made it the same as the common law lien of the innkeeper. So the courts generally hold that the filing of the chattel mortgage is constructive notice to the agister or livery stable keeper unless the language of the recording statute precludes such a holding,[72] and since the agister has notice of the prior encumbrance, and since he acts voluntarily at the request of the mortgagor,[73] he is entitled to no special protection and will not be permitted to claim priority over the mortgagee. Likewise, it is generally held that the mortgagor's possession and use of the animals with the consent of the mortgagee does not show that the mortgagee authorized the mortgagor to subject the property to a paramount lien.[74]

In some cases it is held that the lien of the mortgagee will be postponed to the lien of the subsequent livery stable keeper if the mort-

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McGhee v. Edwards, 87 Tenn. 506 (1889); Masterson v. Pelz, 86 S. W. (Tex. C. A.) 56 (1905); Grubb v. Lashus, 42 Utah 254 (1913); Ingalls v. Vance, 61 Vt. 582 (1889).

[68]Woodward v. Myers, 15 Ind. App. 42 (1895); Bowden v. Dugan, 91 Me. 141 (1898); Howes v. Newcomb, 146 Mass. 76 (1888), *semble*; Lynde v. Parker 155 Mass. 481 (1892); Miller v. Crabbe, 66 Mo. App. 660 (1896); Ingalls v. Vance, 61 Vt. 582 (1889), *semble*.

[69]Colquitt v. Kirkman, 47 Ga. 555 (1873); Smith v. Stevens, 36 Minn. 303 (1886), but the Minn. statute was changed in 1891; see Petzenka v. Dallimore, 64 Minn. 472 (1896); Corning v. Ashley, 51 Hun (N. Y.) 483 (1889), Affd. 121 N. Y. 700; Peter Barrett Mfg. Co. v. Van Ronk, 212 N. Y. 90 (1914), but cf. Bissell v. Pearce, 28 N. Y. 252 (1863). See also Nat. Bank of Commerce v. Jones, *supra*, n. 67, where it was held that a statute adopted after the rights of the chattel mortgagee vested was unconstitutional in providing that the agister's lien should be preferred to such mortgage.

[70]Sullivan v. Clifton, 55 N. J. L. 324 (1893); Stone v. Kelley, 59 Mo. App. 214 (1894).

[71]87 Tenn. 506 (1889).

[72]Chapman v. Bank, *supra*, n. 67; Haunch v. Ripley, *supra*, n. 67; Wright v. Sherman, *supra*, n. 67; McGhee v. Edwards, *supra*, n. 71.

[73]Pickett v. McCord, 62 Mo. App. 467 (1895); Wright v. Sherman, 3 S. D. 290 (1892); McGhee v. Edwards, *supra*, n. 71.

[74]See cases cited *supra*, n. 67.

gagor knew or had reason to know that the animals were being fed or cared for by the livery stable keeper,[75] but it would seem that such consent should not be implied against the mortgagee upon such slender evidence. In one or two jurisdictions it is held that the agister's lien is entitled to priority over a duly recorded chattel mortgage on the animals, these decisions being based on the reasoning that the keeping of the animals is for the benefit of the mortgagee, and that the cost of the keeping for which the lien is given is usually small in comparison with the value of the animals. So, in *Case v. Allen*[76] the Supreme Court of Kansas said, " * * * the principle seems to be, that where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged. Such indebtedness really inures to his benefit. The entire value of his mortgage may rest upon the creation of such indebtedness and lien, as in the case at bar, where the thing mortgaged is live stock, and the lien for food. * * * The amount due under such liens is usually small—a mere trifle compared with the value of the thing upon which the lien is claimed. * * * It is probable that the amount of the agister's lien, as against the mortgagee, would be fixed, not by the contract with the mortgagor, but by the reasonable value of the services." The Kansas court relied upon cases involving the liens of innkeepers and admiralty liens, and upon *Williams v. Allsup*[77] and similar cases. The decision of *Case v. Allen* has not met with favor except in jurisdictions where the language of the statutes expressly or by clear implication indicates the intention of the legislatures that the lien of the agister should be preferred. The question as to the constitutionality of such statutes depends upon the same principles which were discussed with reference to similar statutes in the field of artisans' liens.[78] In the absence of a preference based upon statute, it would seem that the agister is sufficiently protected by the personal liability of the mortgagor or conditional seller, and by the privilege he has of paying off the prior encumbrance for the purpose of subjecting the chattel to his lien.[79]

The principles which apply to the statutory lien of the agister

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[75]See cases cited *supra*, n. 67, 68.

[76]21 Kan. 217 (1878). See also Colquitt v. Kirkman, 47 Ga. 555 (1873), and Vose v. Whitney, 7 Mont. 385 (1888).

[77]*Supra*, n. 15.

[78]Nat. Bank of Commerce v. Jones, *supra*, n. 69.

[79]See Ingalls v. Green, 62 Vt. 436 (1890).

apply with equal force to the lien in favor of the keeper of a stallion or jack,[80] to the statutory lien of a warehouseman,[81] and to many other statutory liens too numerous to be covered in this article. And in respect of many of these statutory liens it may be added that they depend so largely upon the peculiar language of the local statutes, and differ so widely, as to be impossible of treatment in the limited space allotted to this article.

The following conclusions may be stated: (a) The general rule is that the lien or title of a duly recorded chattel mortgage or conditional sale is preferred to the lien of an artisan or repairman, who works upon the chattel at the request of the mortgagor or conditional seller, unless there is evidence that the mortgagee or conditional seller has consented expressly or impliedly to the imposition of a paramount lien. The same result is reached whether the artisan's lien is claimed under common law principles or under the statutes codifying the common law lien, unless the language of the statute expressly or by implication indicates that it was the intention of the legislature to give the artisan a paramount lien. (b) The same principles apply to the purely statutory liens which have been given to agisters, livery stable keepers and others. (c) Unless modified by statute, the lien of the innkeeper and hotel keeper is entitled to priority over a duly recorded chattel mortgage or conditional sale, previously given, where the goods were brought to the inn or hotel by the mortgagor or conditional buyer in possession, and the innkeeper did not know that the possession of the guest was wrongful. Where the innkeeper's lien is extended by statute to boarding house keepers and lodging house keepers, the same principles will apply, but a statute may not impair the obligation of contracts made before its enactment.

Proposed Legislation

The second tentative draft of the proposed Uniform Chattel Mortgage Act, discussed by the Committee on a Uniform Chattel Mortgage Act of the National Conference of Commissioners on Uniform State Laws at Chicago, February 26 and 27, 1925, provides in Section 34: "Liens given by any statute or rule of law against an owner of goods, so far as they arise out of acts of the mortgagor incidental to the production, maintenance, preservation, repair, storage, transportation

[80]Mayfield v. Spiva, 100 Ala, 223 (1893); Easter v. Goyne, 51 Ark. 222 (1889). But see Sims v. Bradford, 80 Tenn. 434 (1883).

[81]See cases cited *supra*, n. 51.

or use of the goods in the ordinary course of business and not otherwise, shall attach against the interest of the mortgagee as well as against the interest of the mortgagor, although the mortgage be filed as required by statute."

This proposed rule has been called to the writer's attention since the main body of this article was written. It may be suggested that this rule would be desirable in that it would bring about a settled rule in respect of chattel mortgages, unless the words "ordinary course of business" should prove a stumbling block.