

1965

Liens and Security Interests--Construction and Operation--Priority between Chattel Mortgage and Repairman's Lien--New Statement of Ohio Law (*Commonwealth Loan Co. v. Berry*, 2 Ohio St. 2d 169, 207 N.E. 2d 545 (1965))

Larry S. Turner

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Larry S. Turner, *Liens and Security Interests--Construction and Operation--Priority between Chattel Mortgage and Repairman's Lien--New Statement of Ohio Law (Commonwealth Loan Co. v. Berry, 2 Ohio St. 2d 169, 207 N.E. 2d 545 (1965))*, 16 W. Res. L. Rev. 995 (1965)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol16/iss4/11>

This Recent Decisions is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Recent Decisions

LIENS AND SECURITY INTERESTS — CONSTRUCTION AND OPERATION — PRIORITY BETWEEN CHATTEL MORTGAGE AND REPAIRMAN'S LIEN — NEW STATEMENT OF OHIO LAW

Commonwealth Loan Co. v. Berry, 2 Ohio St. 2d 169, 207
N.E.2d 545 (1965)

At common law, one to whom an automobile is delivered for repairs and who makes the desired repairs has a lien on the vehicle for the labor and materials furnished and not paid for, so long as he retains possession of the automobile.¹ The Ohio Supreme Court was recently called upon to settle a conflict as to the priorities between such a lien and a chattel mortgage in *Commonwealth Loan Co. v. Berry*.² In that case, the plaintiff held a chattel mortgage on a motor vehicle owned by the defendant. The co-defendant, an automobile repair company, had repaired the mortgaged vehicle at the request of the owner, subsequent to the chattel mortgage. The defendant failed to pay the repair bill and the repair company retained possession, claiming a common law lien. Thereafter, when the defendant also defaulted on the mortgage payment, the plaintiff brought an action to replevy the vehicle, claiming that the chattel mortgage was superior to the repairman's lien.

Until the adoption of the Uniform Commercial Code in Ohio in 1962,³ it was settled law that a chattel mortgage, duly noted on the face of a certificate of title, was superior to claims of the "creditors of the debtor and other lienholders or claimants."⁴ However, with the adoption of section 9-310 of the Uniform Commercial Code,⁵ repairmans' liens were made superior to chattel mortgages, provided they were not specifically subordinated by other legislation. Hence, the question in the instant case was whether this provision of the code affected prior decisions giving priority to the chattel mortgage. Basing its opinion on statutory interpretation, the court held that since section 1309.29 of the Ohio Revised Code

1. 7A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 5092 (1950); BROWN, PERSONAL PROPERTY § 107 (2d ed. 1955); 2 KENT'S COMMENTARIES 635 (13th ed. 1884).

2. 2 Ohio St. 2d 169, 207 N.E.2d 545 (1965); *Snyder v. Ryan*, 2 Ohio St. 2d 171, 207 N.E.2d 547 (1965) (companion case.)

3. OHIO REV. CODE §§ 1301.01-1309.50 [hereinafter cited as CODE §].

4. CODE § 4505.13.

5. CODE § 1309.29.

(U.C.C. § 9-310) is of general applicability whereas the certificate of title law is of special applicability, the latter must prevail since under accepted rules of statutory interpretation statutes of special application control over statutes of general application.⁶ Therefore, it is now the law in Ohio that the provisions of the certificate of title law control over the provisions of section 1309.29 relating to priority of liens arising by operation of law.

The precise origin of the repairman's lien is in doubt, although some authorities believe the lien was first given to afford relief to repairmen and skilled craftsmen before development of the writ of *assumpsit*. It provided relief for a repairman who had rendered services without first having expressly contracted to do the work. Even with the subsequent establishment of the theories of implied contract, the recognition of such liens continued to grow until now it has become firmly entrenched as an important part of modern security law.⁷

The two conflicting policy considerations involved in determining priority as between a chattel mortgagee and a repairman are: (1) claims first in time should be first in right; and (2) preference should be given to tradesmen who must hold themselves out to the public and who have little opportunity to determine the financial responsibility of their customers.⁸ In an attempt to resolve this conflict, the courts have generally recognized that liens first in time are first in right; however, a caveat is then added that a mortgagee may subordinate his claim to the claims of others, either expressly or by his conduct. Relating this to a situation where the mortgaged property has been repaired subsequent to the mortgage, some courts have held that the mortgagee impliedly consented to the mortgagor's contract for repairs, thereby subordinating his claim to the claim of the repairman.⁹ The courts have also used such theories as agency, waiver, and estoppel to accomplish the same goal.¹⁰ While the application of such theories has been confusingly inconsistent, the result reached is that the mortgagee is estopped from asserting his priority.

6. *Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 549 (1951).

7. See Ames, *The History of Assumpsit*, 2 HARV. L. REV. 53, 61 (1888).

8. Annot., 36 A.L.R.2d 229, 231 (1954).

9. Lee, *Power of Possessor of Personal Property to Create Lien for Repairs and Storage Charges Superior to Existing Interests of Others*, 90 U. PA. L. REV. 910, 912 (1942); Note, 15 IND. L.J. 573 (1940).

10. Annot., 36 A.L.R.2d 229, 231 n.5 (1954).

The landmark case in this area is *Williams v. Allsup*.¹¹ Here, a shipwright performed services on a ship encumbered by a chattel mortgage. In resolving the issue of priorities in favor of the repairman, the court held that by leaving the mortgagor in possession of the ship, the mortgagee had clothed the mortgagor with apparent ownership. Hence, the mortgagee was held to have impliedly consented to the creation of the repair lien making the resulting lien superior to his claim. In a concurring opinion, Judge Byles stated:

Now, as it is obvious that every ship will from time to time require repairs, it seems but reasonable under circumstances like these to infer that the mortgagor had authority from the mortgagees to cause such repairs as should become necessary to be done upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labour he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs.¹²

The law in this country is in much conflict on this subject, the courts holding either for the chattel mortgagee by rejecting or distinguishing the *Williams* decision, or for the repairman by finding some way to overcome the "first in time, first in right" doctrine. To bring order to inconsistent judicial decisions, many state legislatures have arbitrarily established priorities by statute.¹³ The Ohio legislature passed a bailee's lien statute; however, liens on motor vehicles were expressly excluded from its operation.¹⁴ Therefore, the first case to come before the Ohio Supreme Court was resolved in favor of the chattel mortgagee on common law principles.¹⁵ The court distinguished *Williams v. Allsup*, holding that since the vehicle in question was used for pleasure and in no way affected the mortgagor's business and ability to repay the debt, the mortgagee could not be deemed to have implied consent for the repairs. However, the repairman argued that since the mortgage expressly provided that the vehicle was to be kept in good repair, the mortgagee had thereby expressly consented to the repairs. The court rejected

11. 10 C.B. (N.S.) 417, 142 Eng. Rep. 514 (C.P. 1861).

12. *Id.* at 422, 142 Eng. Rep. at 518.

13. ARK. STAT. ANN. § 51-404 (1963); CAL. VEHICLE CODE § 6301; KAN. GEN. STAT. ANN. § 58-201 (Supp. 1961); N.Y. LIEN LAW § 184; N.C. GEN. STAT. § 44-2 (Supp. 1963); N.D. CENT. CODE § 35-13-04 (1960); WIS. STAT. ANN. § 289.41 (1958) (priority is given for lien up to \$200 on automobiles).

14. CODE § 1333.41.

15. Metropolitan Sec. Co. v. Orlow, 107 Ohio St. 583, 140 N.E. 306 (1923).

this contention by stating that upon no reasonable theory could this clause in the mortgage be held to constitute consent for the repairs. In so holding, the court found that the "underlying principle . . . 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."¹⁶ However, the dissenting judge was of the opinion that the "obligation imposed by the mortgagee upon the mortgagor carries with it the law applicable to such contract, to-wit, the law giving to any repairer, rebuilder or mechanic the right to the fair and reasonable value of his work and material in doing such repairing or rebuilding."¹⁷ The dissent then went on to question the logic of the majority opinion which held that while destruction of the chattel would ordinarily destroy the lien, the lien is resurrected to its original high standing by the efforts and at the expense of the laborer who may not even be able to recover the fair value of his services. The dissenting judge would therefore have applied the equitable principle that when one of two innocent parties must suffer a loss, the one that creates the conditions ought to be made to bear it. In other words, since the chattel mortgagee had permitted the mortgagor to retain possession not only authorizing but imposing upon such mortgagor the duty of keeping the vehicle in repair, the claim of the mortgagee ought to be subordinated.

It may be laid down as a legal truism that, when claims are equal in law and equity, in reason and good conscience, those prior in time are prior in right. Necessarily, however, this applies only to claims of the same class, the same nature, essentially alike or analogous in origin and kind. But upon what principle can it be claimed, as to the claims of the money lender, who makes his loan at his own risk, basing his interest and commission charges, etc., upon his estimate of the hazard involved, permitting the chattel upon which he holds his lien to be possessed and used by others upon the much-traveled highways of the state, where there is constant danger of collision, that such a lien, under such circumstances, is of the same class as the mechanic's or workman's, who in the ordinary course of business is called upon to rebuild and repair such automobile when wrecked and entirely unfit and incapable of use?¹⁸

The holding in the *Metropolitan*¹⁹ case was followed in *Cleve-*

16. *Id.* at 594, 140 N.E. at 309.

17. *Id.* at 601-02, 140 N.E. at 311.

18. *Id.* at 610-11, 140 N.E. at 314.

19. 107 Ohio St. 583, 140 N.E. 306 (1923).

*land Auto Top & Trimming Co. v. American Fin. Co.*²⁰ In the latter case, the court held that the "mortgagor could not contract a debt giving rise to a lien upon the mortgagee's property without the mortgagee's authority."²¹ And in this case, no authority, express or implied, could be found. The holdings in *Metropolitan* and *Cleveland Auto Top & Trimming Co.* formed the foundation for all subsequent decisions in Ohio on the point. Furthermore, the adoption of the Ohio Certificate of Title Act²² in 1938 afforded even greater support for this position by giving the chattel mortgagee what many considered to be an unassailable priority over the claims of repairmen and other lienholders.

In light of the foregoing principles, the *Berry* case must be examined in terms of the two basic questions presented: (1) what is the effect of the conflict between section 1309.29 of the Ohio Revised Code which makes repairman's liens superior to chattel mortgages and the decisions in Ohio adopting the "first in time, first in right" theory; and (2) what policy considerations come to bear upon any resolution of this conflict. First, it must be noted that section 1309.29 provides that if a repairman's lien is recognized, either by statute or by rule of law, then the lien is to be given priority over other security interests, unless it is statutory and that statute provides otherwise. Since repairman's liens have always been recognized in Ohio by judicial decision, section 1309.29 would give it priority over chattel mortgages. To resolve the conflict between this provision and the provisions in the Ohio Certificate of Title Act giving priority to the chattel mortgagee, the court in the *Berry* decision applied the principle of statutory construction known as *specialia generalibus derogant* — special language controls over general.²³ From this the court concluded that the chattel mortgage had priority. At first blush, this conclusion seems correct; however, further consideration raises some doubt. Since the Certificate of Title Act controls as to all interests in a motor vehicle, while section

20. 124 Ohio St. 169, 177 N.E. 217 (1931).

21. *Id.* at 172, 177 N.E. at 218.

22. CODE ch. 4505. CODE § 4505.13 provides, *inter alia*: "Any security agreement covering a security interest in a motor vehicle . . . if a notation of such instrument has been made by the clerk of the court of common pleas on the face of such certificate [of title], shall be valid as against the creditors of the debtor, whether armed with process or not, and against subsequent purchasers, secured parties, and other lienholders or claimants."

23. *Kintore v. Inverury*, II Scot. App. 1179, 4 Macq. App. 520 (1863); See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5204 (3d. ed. 1943) and cases cited therein.

1309.29 deals only with repairman's liens, it would seem reasonable to conclude that the latter provision is in reality the special provision. Furthermore, it is important to note that rules of statutory construction are to be used only when the legislature's intent is unclear or otherwise unavailable.²⁴ Here, however, the legislature's intent is apparent. In considering the Uniform Commercial Code, the legislature had before it two reports interpreting the code's provisions: the official comments explaining the purpose and scope of each section of the code; and the Legislative Service Commission Report dealing with the effect the code would have on existing Ohio law.²⁵ The official comments following the repairman's lien section clearly indicate that the purpose of the sections is "to provide that liens securing claims arising from work intended to enhance or preserve the value of a chattel take priority over earlier security interests even though perfected."²⁶ The Legislative Service Commission Report determined that adoption of section 9-310 would "reverse the usual rule as to chattel mortgages, that filing constitutes notice to all, including repairmen."²⁷ The report then indicated that the *Metropolitan*²⁸ case and the *Cleveland Auto Top & Trimming Co.*²⁹ case would be reversed. Thus, it seems clear that since the legislature was cognizant of the change that would be brought about in this area by adoption of the code and did nothing to limit its effect that it thereby intended to reverse the existing decisions by adopting the Uniform Commercial Code.

Aside from the question of statutory interpretation, the wisdom of the court's policy decision in the *Berry* case is questionable. The underlying policy of the Uniform Commercial Code is that legal concepts ought to be brought into line with modern commercial practices, thereby giving uniformity to business practices throughout the nation.³⁰ If this was also the paramount intention of the Ohio legislature, it would follow that only by giving full effect to each of the Code's provisions could this goal be realized. In con-

24. 2 SUTHERLAND, *op. cit. supra* note 23, § 5204.

25. Ohio Legislative Service Comm., *Ohio Annotations to Uniform Commercial Code*, INFORMATION BULL. NO. 1958-1 (1958). The sections of the report are printed verbatim following the appropriate sections of the Uniform Commercial Code in the Ohio Revised Code (*Baldwin*).

26. U.C.C. § 9-310 (comment 1).

27. Ohio Legislative Service Comm., *op. cit. supra* note 25, at IX-12, -13.

28. *Metropolitan Sec. Co. v. Orlow*, 107 Ohio St. 583, 140 N.E. 306 (1923).

29. *Cleveland Auto Top & Trimming Co. v. American Fin. Co.*, 124 Ohio St. 169, 177 N.E. 217 (1931).

30. U.C.C. § 1-102; CODE § 1301.02.

sidering the priorities established by section 9-310, a Kentucky Court of Appeals took occasion to extol the virtues of the code in this respect:

The Code represents an entirely new approach in several areas of commercial law, and especially as to security transactions. Its adoption in this state signifies a legislative policy to join with other states in achieving uniformity. . . . The realization of this purpose demands that so far as possible the meaning of the law be gathered from the instrument itself, unfeathered by anachronisms indigenous to the respective jurisdictions in which it is enforced.³¹

While the motor vehicle registration act of Kentucky³² does not have the same force and sanctity as the Ohio act, the logic and appeal of this decision ought to represent the attitudes of other states that have adopted the Code.

Thus far it has been assumed that the court in *Berry* was correct in applying the certificate of title act to the facts in that case. However, upon closer analysis it would appear that application and interpretation of that statute were not required to dispose of the case. The paramount consideration in *Berry* was whether the mortgagee had subordinated his claim to that of the repairman by his conduct with respect to the mortgaged vehicle. In this regard, it may be noted that a mortgagee may always subordinate his claim either by express or implied acts.³³ Likewise, a mortgagee will be estopped from claiming his priority if a third person justifiably relies on his conduct.³⁴ Thus, if a mortgagee allows a mortgagor to retain possession and use the mortgaged vehicle knowing full-well that in the ordinary course of events repairs will likely be needed, then he should be deemed to have impliedly given the mortgagor consent to contract for such repairs. If a lien is thereby created by operation of law, then the mortgagee's interest ought to be subordinated to the

31. *Corbin Deposit Bank v. King*, 384 S.W.2d 302, 304 (Ky. Ct. App. 1964); see also 82 BANKING L.J. 408 (1965); Note, 14 CATHOLIC U.L. REV. 285 (1965).

32. KY. REV. STAT. ANN. §§ 186.005-640 (1963).

33. *Williams v. Allsup*, 10 C.B. (N.S.) 417, 142 Eng. Rep. 514 (C.P. 1861); *Ohio Fin. Co. v. Middleton*, 14 Ohio App. 43 (1921); 7A BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 5163 (1950); BROWN, *op. cit. supra* note 1, § 112; Lee, *supra* note 9, at 912.

34. See *Cherry's Inc. v. Sharpsteen*, 33 Ariz. 342, 265 Pac. 90 (1928); *New Britain Real Estate & Title Co. v. Collington*, 102 Conn. 652, 129 Atl. 780 (1925); *Yellow Mfg. Acceptance Corp. v. Linsky*, 99 Ind. App. 691, 192 N.E. 715 (1934); *Etchen v. Dennis & Son Garage*, 104 Kan. 241, 178 Pac. 408 (1919); *Meyers v. Neeley & Ensor Auto. Co.*, 143 Md. 107, 121 Atl. 916 (1923); *Guaranty Sec. Corp. v. Brophy*, 243 Mass. 597, 137 N.E. 751 (1923); *Terminal & Town Taxi Corp. v. O'Rourke*, 117 Misc. 761, 193 N.Y.S. 238 (New York City Ct. 1922).

lien of the repairman.³⁵ Other courts have resolved this problem by applying the doctrine of equitable estoppel. In such cases, the statutory priority of a chattel mortgage is subordinated by determining that the repairman is the most innocent of the two lienholders. The principle is that where one of two innocent parties must suffer a loss for the wrongs of a third party, the party that trusted the wrongdoer first and placed in his hands the means by which he committed the wrong must suffer the loss.³⁶ Thus, in the *Berry* case, the mortgagee provided the mortgagor with possession and clothed him with apparent ownership. As between these two equally innocent lienholders, the chattel mortgagee should be made to bear the loss.³⁷

The Ohio courts have recognized both of these methods of subordinating the interest of a chattel mortgagee, notwithstanding the fact that the mortgagee's interest was clearly indorsed on the certificate of title. For example, where a mortgagee allows the mortgagor to exhibit encumbered motor vehicles for sale, and the mortgagor thereafter breaches the mortgage agreement by selling the vehicles to innocent purchasers, the courts have held that the innocent purchasers have good title and that the mortgagee is estopped from claiming any interest, notwithstanding the fact that his claim was duly noted on the certificate of title and the purchasers were deemed to be cognizant of such claims.³⁸ Thus, it would seem

35. See, e.g., *Guaranty Sec. Corp. v. Brophy*, 243 Mass. 597, 137 N.E. 751 (1923); *Hammond v. Danielson*, 126 Mass. 294 (1879); *Terminal & Town Taxi Corp. v. O'Rourke*, 117 Misc. 761, 193 N.Y.S. 238 (New York City Ct. 1922); *Ohio Fin. Co. v. Middleton*, 14 Ohio App. 43 (1921); *Bankers Commercial Sec. Co. v. Coffman*, 22 Ohio N.P. (n.s.) 193 (C.P. 1919); *Stern v. Sica*, 66 Pa. Super. 84 (1917); *Jesse A. Smith Auto Co. v. Kaestner*, 164 Wis. 205, 159 N.W. 738 (1916).

36. *Metropolitan Sec. Co. v. Orlow*, 107 Ohio St. 583, 610, 140 N.E. 306, 314 (1923) (dissenting opinion).

37. Some courts have granted relief to the repairman on the principle that when a chattel encumbered by a lien is destroyed, the lien is destroyed as well, or at least reduced to the value of what remains of the chattel. *New Britain Real Estate & Title Co. v. Collington*, 102 Conn. 652, 129 Atl. 780 (1925); *Etchen v. Dennis & Son Garage*, 104 Kan. 241, 178 Pac. 408 (1919); *Terminal & Town Taxi Corp. v. O'Rourke*, 117 Misc. 761, 193 N.Y.S. 238 (New York City Ct. 1922). See also *Metropolitan Sec. Co. v. Orlow*, 107 Ohio St. 583, 595, 140 N.E. 306, 310 (1923) (dissenting opinion). The rationale is that the mortgagee is unjustly enriched at the expense of the repairman if allowed to retain priority after his interest has been substantially impaired and then reinstated by the efforts of a repairman. To allow the chattel mortgagee to have his interest enhanced at the expense of the repairman would be a windfall to the mortgagee, and he should be precluded from claiming priority. Since the common law lien is only to the extent of the value added to the chattel, the mortgagee is not prejudiced by subordination. *BROWN, op. cit. supra* note 1, § 108. He will have a lien on the vehicle to the extent of its value prior to the repairs.

38. *Mutual Fin. Co. v. Municipal Employees Union*, 110 Ohio App. 341, 165 N.E.2d 435 (1960) (estoppel); *Mutual Fin. Co. v. Kozoil*, 111 Ohio App. 501, 165 N.E.2d

that if a chattel mortgagee is estopped from asserting his priority under the certificate of title laws in such a case, he should likewise be estopped where an innocent repairman has undertaken to repair the mortgaged vehicle and the mortgagor has defaulted on payment.³⁹ In contradiction to this approach, it has been argued that a repairman is bound by constructive notice of the information on the certificate of title.⁴⁰ But since the courts do not impose any duty upon purchasers to inspect the title when buying a new car, it cannot be reasonably expected that repairmen will do it before undertaking to make any necessary repairs.

In conclusion, it is appropriate to emphasize that the granting of priority to a repairman, whether accomplished by statute or rule of law, is basically an equitable allocation of loss between two innocent parties. It would be inequitable to permit a mortgagee to retain superiority after the encumbered chattel had depreciated and then been restored through the expense and labor of a repairman. To so hold would be to give the mortgagee a windfall at the expense of the repairman. Furthermore, it would seem that due consideration ought to be given to the fact that a financial institution is in the business of taking capital risks and therefore scale their interest rates accordingly. The repairman usually operates a small establishment and has no effective means of adjusting his service charges to cover such losses. It is by recognition of this fact that the courts can give effective relief.

LARRY S. TURNER

444 (1960), *aff'd*, 172 Ohio St. 265, 175 N.E.2d 88 (1961) (implied authority); 22 OHIO ST. L.J. 746 (1961). For a discussion of the effect of these cases on the Ohio Certificate of Title Law, see Note, *The Near-Absolute Rights of the Holder of an Ohio Motor Vehicle Certificate of Title*, 15 W. RES. L. REV. 785, 794 (1964).

39. In affirming *Mutual Fin. Co. v. Kozoil*, *supra* note 38, the Ohio Supreme Court held that the provisions of the certificate of title law were not applicable to the factual situation and that the principles of equity should be applied. The wisdom and logic used in this case could have been equally applied in the *Berry* case. At issue is really whether the mortgagee, by his conduct, has subordinated his claim to that of the repairman. This is the identical issue considered in *Metropolitan Sec. Co. v. Orlow*, 107 Ohio St. 583, 140 N.E. 306 (1923). While the court in *Berry* decided the same as it did in *Metropolitan*, by clear and careful reconsideration of all policies and equities involved an opposite decision should have been reached.

40. *Lazerick v. Associate Inv. Co.*, 30 Ohio L. Abs. 112 (Ct. App. 1939).