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Priority of Common Law Liens

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EDITORIAL NOTES

PRIORITY OF COMMON LAW LIENS.—A question that often comes up is, what will displace a common law lien when other creditors and lienors claim rights in the same property. Several cases of this kind have been passed upon by the Supreme Court of Appeals of West Virginia.

In *Justice* v. *Moore*,[1] Justice sold to Browning & Company certain trees which Browning & Company were to manufacture into lumber. After cutting the trees and manufacturing some of the lumber, Browning & Company became financially embarrassed and re-sold their rights and interests to Justice in payment of what they owed him. Before the re-sale, Browning & Company had incurred other indebtedness, to secure which they executed a deed of trust on the timber, in which Moore was made trustee. Justice, after the re-sale, sold some of the timber and lumber to Newman & Spanner, and thereupon Moore, the trustee, came and took possession of the timber and lumber so sold to Newman & Spanner and advertised them for sale under the deed of trust. Justice then brought his action of detinue and regained possession of the timber and lumber, which he maintained by verdict and judgment. The question thereby presented was whether Justice's right, as the original vendor of the lumber, and owner of a lien for purchase money, was superior to the right of the owner of the lien created by the deed of trust. The contention was made that because Justice had let Browning & Company sell and dispose of part of the lumber, and had also taken a note of Browning & Company for part, Justice had waived his right to retain possession of the lumber and also lost his lien. As to this contention, however, the court said that release of part of the lumber did not necessarily imply intent to release the residue and that the vendor had a right of retaining the lumber until paid for, as long as it remained upon his land, such right being a lien given by the common law. In holding the common law lien of Justice

[1] 69 W. Va. 51, 71 S. E. 204 (1911).

superior to Moore's deed of trust lien, the court said:

> "As this timber was all on the premises of the plaintiff at the date of the execution of the deed of trust, the right created by that instrument, as to possession, was necessarily subordinate to that of Justice. By it the trustee secured only such right as the vendees of the timber had under their contract. They may have had title; but, if so, they had no right to possession, and therefore could not confer it upon the trustee, otherwise than subject to the precedent condition—that of payment of the purchase money before removal. * * * * Though he took the timber back from the Brownings in satisfaction of his claim for purchase money, he could fall back on his original lien and right of retention, if his right as purchaser from the Brownings failed, and pass that right to Newman & Spanner. As to this we have no doubt. His purchase was subject to the trust deed lien, but his own lien prior, and his right to possession superior, unless lost by the sale to Newman & Spanner."

In the case of *Acadian Coal & Lumber Company* v. *Brooks Run Lumber Company*,[2] rights under a mortgage and a levy by execution were asserted against certain lumber, but the court held that the common law lien of the vendor of the lumber was entitled to precedence over the mortgage and over the execution.

It will be observed in both the foregoing cases, that the common law lien was in existence and the property still in the possession, constructive or actual, of the vendor at the time of the creation of the mortgage and execution liens. Some situations that have been presented in rather recent cases present a question of the right of priority of common law liens over chattel mortgages and conditional sales contracts on property in the possession of the vendee who has left the same with a workman for repairs. The first of such cases is *Scott* v. *Mercer Garage & Auto Sales Company*.[3] That case was an action of detinue by Scott, the holder of a conditional sale contract, against the Mercer Garage & Auto Sales Company, whch had made certain repairs on an automobile and which was detaining possession of the automobile until paid for the repairs, and was contending that its common law lien to secure payment for the repairs, was superior to the lien of Scott, holder of the conditional sales

[2] 88 W. Va. 595, 107 S. E. 422 (1921).
[3] 88 W. Va. 92, 106 S. E. 425 (1921).

contract. The sale contract had been recorded in the county clerk's office prior to the delivery of the car to the purchaser. The purchaser left the automobile with the defendant to be repaired, and payment of the balance of the purchase money having been refused by the purchaser, Scott sought possession of the automobile and found it in the possession of the defendant, who refused to give it up unless paid for the repairs. In deciding that the holder of the sales contract was entitled to the superior lien, the court said:

> "We recognize the fact that we are presented a clear case of common-law lien of a repairman in possession of the chattel, holding it as security for labor and material expended upon it. But we also emphasize the fact that plaintiff is the vendor thereof with recorded reservation of title, held as security for the purchase money, giving notice to creditors of and purchasers from the vendee, the mortgagor * * * * . There is nothing in the equities of the case now before us which should allow the subsequent lien to supplant the prior lien of the vendor. The defendant no doubt acquired a common-law lien on the chattel for the amount of the repairs, but was it not subordinate to that of plaintiff for purchase money? Plaintiff furnished the automobile, practically new, with all the material and labor bestowed upon it to make it a valuable machine, and there is nothing in the provisions of the contract of sale implying authority in the purchaser to incumber the property, voluntarily or involuntarily, in such a way as to supersede the prior lien for purchase money. The instrument so reserving title of a chattel partakes of the nature of a mortgage, the vendor being mortgagee, the vendee the mortgagor. As a general rule, say all the authorities, a mortgagor cannot create a lien upon the property to take precedence over his recorded mortgage."

The court then cites some authorities from other states which hold that a workman's lien for repairs is subordinate to the lien of the holder of a chattel mortgage or sales contract, and then continues as follows:

> "An examination of the cases apparently in conflict with those cited and others that might be referred to, unless it be those of New Jersey constituting an exception, will show that wherever such common-law lien has been allowed to supersede a lien reserved by the vendor of the chattel, the courts have attempted at least to refer

their conclusions to some actual or implied authority of the vendor or mortgagee to have the chattel kept in repair. An illustration is the case of *Hammond* v. *Danielson,* 126 Mass. 294, involving a mortgage of a hack described as 'let for hire' and 'now in use,' from which authority was implied in the mortgagor to keep the vehicle in repair. And in accordance with this class of cases, it was sought in the present case to imply authority in the vendee to cause the automobile to be repaired, because of the fact that plaintiff knew that the purchaser intended to use the machine on some occasions to carry passengers for hire. No such authority was given in the recorded contract. May he not stand on that, if he has done nothing in the meantime to deprive him of his rights? The facts agreed show nothing justifying any such implied authority.

"For the reasons aforesaid, we are of opinion that plaintiff is entitled to recover possession of the property sued for * * * * *."

Another case involving the same question was *Commercial Credit Company* v. *Oakley.*[4] This was an action of detinue by Commercial Credit Company, the assignee of a conditional sale contract, against Oakley, a repairman, with whom the purchaser's assignee had left an automobile for repairs. The purchaser had defaulted in the payment of the balance of the purchase money and the car being found in the possession of Oakley, demand was made upon him for the car, and he refused to deliver possession thereof unless paid his bill for the repairs that he had made upon it. The repairman in this case, did not try to get around the decision in *Scott* v. *Mercer Garage & Auto Sales Company,* referred to above, but contended for a certain construction of the Uniform Conditional Sales Law that he thought would give priority to his common law lien over the lien of the holder of the sales contract. The court, however, did not view such contention with favor and adhered to its former holding in *Scott* v. *Mercer Garage & Auto Sales Company.*

It seems to be the general rule, in other states as well as West Virginia, that the lien of a person making repairs to a chattel at the instance of the buyer in possession thereof, is subordinate to the rights of a seller under a contract of conditional sale or mortgagee in a chattel mortgage, of

[4] 103 W. Va. 270, 137 S. E. 13 (1927).

which the person making the repairs has actual or constructive notice.[5]

The West Virginia Supreme Court of Appeals in writing the Syllabus to the case of *Scott* v. *Mercer Garage & Auto Sales Company*, qualified its holding by adding this phrase:

> "Unless by the terms of the contract, or by the subsequent conduct of the seller, he has given express or implied authority to the vendee to keep the property in repair."

No case has been found where the West Virginia court has held this exception to apply. However, in some other states the courts have followed the principle set forth in this exception. Thus, in the case of *Hammond* v. *Danielson*,[6] the lien of a mortgage upon a hack described as "let for hire" and "now in use," was held subordinate to the lien of a repairman, because the court said there could be implied, from the description of the hack given in the mortgage, authority to keep the hack in repair, and therefore the lien of the repairman should be preferred.

Also, in *Weber Implement & Automobile Company* v. *Pearson*,[7] it appeared that a conditional sale was made of three automobiles, with the understanding that they were to be used in a livery service, and were to be paid for from the earnings of the business. In holding that the purchaser, in having repairs made, was acting as an agent for the seller, the court said:

> "Necessary repairs are for the betterment of the property, and under circumstances like the present case, it will be presumed to have been the intention of the parties that the property should be kept in repair, and the purchaser in possession will be deemed the agent of the conditional vendor to procure the repairs to be made. * * * * One corporation sold the three cars to the Avens. They knew that they were to be used in the livery business, and that it would be necessary to make repairs on them from time to time, to keep them in running order."

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[5] Baughman Automobile Co. *v.* Emanuel, 137 Ga. 354, 73 S. E. 511, 38 L. R. A. N. S. 97 (1912); Small *v.* Robinson, 69 Me. 425, 31 Am. Rep. 299 (1879); Hollis & Ray *v.* Isbell, 124 Miss. 799, 87 So. 273, 20 A. L. R. 244 (1921); Shaw *v.* Webb, 131 Tenn. 173, 174 S. W. 273, L. R. A. 1915D, 1141, Ann. Cas. 1916A, 626 (1914); Denison *v.* Shuler, 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734 (1882); Atlas Securities Co. *v.* Grove, 79 Ind. App. 144, 137 N. E. 570 (1922); Madison R. L. Assn. *v.* Wells, 79 Ind. App. 266, 137 N. E. 769 (1923).

[6] 126 Mass. 294 (1879).

[7] 132 Ark. 101, 200 S. W. 273, L. R. A. 1918D, 327 (1917).

The case of *Small* v. *Robinson*,[8] reaches an opposite conclusion on substantially similar facts.

In *Keene* v. *Thomas*,[9] under a "hire-purchase agreement" which provided that the prospective purchaser of a dogcart should keep and preserve it from injury, it has been held that he had the authority to have necessary repairs made on the cart, and that the lien therefore was enforceable against the owner.

In *Broom* v. *Dale*,[10] it appeared that the buyer of an automobile under a conditional contract of sale had repairs made on it with the knowledge of the sellers. In holding that the lien for the repairs was superior to the rights of the sellers, the court said:

> "In the case at bar the automobile was in the possession of Mr. Polk, and being used by him with the knowledge and consent of appellees, which use continued for a long period of time. Appellees not only knew and consented to the general use of the automobile by Mr. Polk, but also had knowledge that, in the course of his use of the property, he was having it repaired. Appellees, with this knowledge, made no objection to the repairs being made. From the sole possession, control, and the use of the automobile by Mr. Polk, by agreement with appellees, from the manner of its use and the necessity of repairing to preserve it and keep it in running order and prevent its deterioration, and from the making of such repairs with the knowledge of appellees, we conclude that there was an implied authority and permission from appellees, as mortgagees, to Mr. Polk as mortgagor, to have such repairs made, and that appellants have a paramount and superior lien to that of appellees on the property, for the payment of the labor they performed and materials furnished in repairing it."

In *Meyers* v. *Neely & Ensor Auto Company*,[11] the court held that merely permitting an automobile to go into possession of a conditional vendee, authorizes him to contract for the repairs necessary to keep the car in operation, and therefore the one making the repairs has a valid lien for his labor and materials against the conditional vendor, although, by the filing of the conditional sales contract, he

[8] 69 Me. 425, 31 Am. Rep. 299 (1879).
[9] 1 K. B. (Eng.) 136 (1905).
[10] 109 Miss. 52, 67 So. 659, L. R. A. 1915D, 1146 (1915).
[11] 143 Md. 107, 121 Atl. 916, 30 A. L. R. 1224 (1923).

was charged with notice of the rights of the vendor. The court said:

> "The occasional need of repairs was an inevitable incident of the use for which the car was purchased. It may be fairly implied, therefore, that the delivery of possession to the purchaser involved also an authorization to proceed, in case of reasonable necessity, to have the car repaired. The recognition of such an agency by implication is supported by considerations of justice to the appellee, whose work and materials were bestowed upon the car, and it does no injury to the interests of the appellant, who is subject to no personal liability, but is simply required to recognize a lawful lien for repairs which conserve the value of his own property."

In *Dunbar Laporte Motor Company* v. *Desrocher*,[12] there was involved the right of the conditional vendor of an automobile, on which repairs had been made, to possession by virtue of a writ of replevin. It was held that the burden of proof was on the vendor to show that he was entitled to immediate possession; or, as the court expressed it, the plaintiff, to be entitled to possession of the automobile, was required to prove that the defendant had actual notice of the conditional sale or lease when the car was delivered to him, or that such delivery was made after the breach of a condition of the sale or lease. The court said:

> "In these circumstances the plaintiff is not entitled to possession as against the defendant, on the ground that the car was not properly cared for. As the plaintiff did not prove that the defendant had actual notice of the conditional sale, or that there was default in the payment of any of the notes when the car was delivered to the defendant, it is plain that the plaintiff failed to sustain the burden of proof."

In *Shaw* v. *Webb*, the Tennessee case cited above, the court, even though there was a very broad workman's lien statute in effect in that state, said:

> "We are of opinion * * * * that something more is required than the fact that a vehicle, which may need repair in order to continue personal use by the vendee, is placed in the possession of the conditional vendee. The vendor in such case should not be considered as consenting in advance to the subordination to that which both

[12] 247 Mass. 292, 142 N. E. 57 (1924).

parties patently intended to make superior—the title retained for the security of the payment of the purchase money. The intent of the vendor to permit repairs to be made, and a consequent lien to attach to his interest, should have been manifested in the note contract, since, upon a transfer of the note, the transferee is vested with the rights of the conditional vendor. To announce a doctrine such as is contended for by the mechanic in this case would be to deprive a note which contains a reservation of title to personalty, of a no inconsiderable element of marketability. The transferee of such paper should not, we believe, take it subject to the risk of having his right embarrassed or lessened by such act of the vendee-maker, when the note contains nothing to put him on notice."

This is one of the cases strongly relied on by the West Virginia Supreme Court of Appeals in *Scott* v. *Mercer Garage & Auto Sales Company* and, it will be noted, is a directly opposite holding to the Maryland case of *Meyers* v. *Neely & Ensor Auto Company* referred to above.

It is believed that the West Virginia Supreme Court of Appeals would require something like almost actual participation on the part of the conditional vendor or chattel mortgagee in the making of a contract with the repairman for repairs, before the court would allow priority to the repairman's common law lien over the lien of the conditional sales contract or chattel mortgage. —JOSEPH R. CURL.

THE NEED FOR AN INTRODUCTORY COURSE IN LAW.—In spite of the almost general acceptance of the requirements of the Association of American Law Schools, and of the American Bar Association as to two years of pre-legal work, it is submitted that the average beginning law student is not as well prepared as he might be for the undertaking of his professional studies. It is not proposed to go into the question of the advisability of requiring more than two years of pre-legal work, but rather to consider one opportunity for getting more out of the two years of pre-legal preparation at present generally required, than has been obtained heretofore.