U.C.C. SECTION 9-310, THE CERTIFICATE OF TITLE ACT, AND THE ARTISAN’S LIEN: THREE ACT PLAY OR THREE RING CIRCUS?

INTRODUCTION

A frequent transaction in the commercial world is the purchase of a motor vehicle under the terms of an agreement whereby the seller or financer retains a security interest in the motor vehicle. The Uniform Commercial Code provides that, unless otherwise agreed, a secured party has on default the right to take possession of property, or collateral, which is subject to a security interest. Should a repairman perform work on the vehicle during the period in which payments are still being made on it, the repairman will also have an interest in the vehicle. This is so because the Nebraska artisan’s lien statute gives the repairman the right to retain possession of the vehicle until he is paid for his services.

1. The Uniform Commercial Code defines a “security interest” as an “interest in personal property... which secures payment or performance of an obligation.” U.C.C. § 1-201(37) (Unless otherwise indicated, all citations to the U.C.C. will be to the 1972 official text. Where a Nebraska Uniform Commercial Code provision differs, the Nebraska statute will be cited also).

2. A “secured party” is a “lender, seller or other party in whose favor there is a security interest.” U.C.C. § 9-105(1)(m); Neb. Rev. Stat. (U.C.C.) § 9-105(1)(i) (Reissue 1974).


Any person who makes, alters, repairs or in any way enhances the value of any vehicle, automobile, machinery, farm implement or tool, or shoes a horse or horses, mule or mules, at the request of or with the consent of the owner, or owners thereof, shall have a lien on such vehicle, automobile, machinery, farm implement or tool, or horse or horses, mule or mules, while in his possession, for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain such property until such charges are paid.

The possessory artisan’s lien provided by the above statute should be distinguished from the nonpossessory mechanic’s lien which is given to those furnishing labor or materials which improves real estate. See Neb. Rev. Stat. § 52-101 (Reissue 1974). The artisan’s lien, in contrast, applies only to personal property. The potential confusion between the two liens arises because the automobile repairman who is entitled to an artisan’s lien is frequently referred to as a “mechanic.” The confusion is best avoided by referring to the lien of the automobile mechanic and others who improve personal property as an artisan’s lien. See R. Brown, The Law of Personal Property, § 13.1, at 393 (3d ed. 1975).

In Nebraska a further distinction exists between the artisan’s possessory, or retaining, lien and the artisan’s nonpossessory, or charging, lien. Under the
If the purchaser of a motor vehicle fails to pay both the secured party and the repairman with whom the vehicle has been left for repairs, the question arises as to who has the superior right to possession of the vehicle—the secured party or the repairman. Much conflict of authority existed at common law with respect to this issue. The U.C.C. addresses this conflict in section 9-310:

When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise. Since the Nebraska artisan's lien statute does not provide for any priorities, section 9-310 would appear to settle the issue. However, the current state of Nebraska law is complicated by the provisions of the Nebraska Certificate of Title Act which regulates interests held in motor vehicles. There is an indication that these provisions, rather than section 9-310, may control the issue of priority.

The purpose of this comment is to examine the various resolutions of this priority conflict in both pre-Code case law and decisions rendered after the enactment of the Code. Particular attention will be directed toward Nebraska law in which the priority issue is presented within the context of three statutes: the artisan's lien statute, the Certificate of Title Act, and section 9-310. If these three statutes interrelated in a consistent manner on the issue of priority, the resolution of the issue would former, the repairman asserts his lien by retaining possession of the property. NEB. REV. STAT. § 52-201 (Reissue 1974). Under the latter nonpossessory lien, the lien is asserted by filing a statement. Continued possession of the property is not necessary. NEB. REV. STAT. § 52-202 (Reissue 1974). See generally 2 G. Gilmore, Security Interests in Personal Property, § 33.2, at 873-75 (1965). Reference to an artisan's lien in this article is to the possessory artisan's lien of NEB. REV. STAT. § 52-201 (Reissue 1974).

5. R. Brown, supra note 4, § 13.6, at 410. See text at note 11 infra.
7. See § 52-201, note 4 supra.
9. In particular, NEB. REV. STAT. § 60-110 (Supp. 1977) provides that "any mortgage, conveyance intended to operate as a security agreement . . . , trust receipt, conditional sales contract or other similar instrument covering a motor vehicle" should be noted on the certificate of title in order to be valid "as against the creditors of the debtor, . . . subsequent purchasers, secured parties and other lien holders or claimants. . . ."
10. See text at notes 82-87 infra.
unfold as the denouement of a three act play. However, legislatures often enact laws without considering the interrelation among various statutes. This may be excusable because of the difficulty in determining the effect of a new law upon all existing statutes. Nevertheless, the resulting confusion may remind one of a three ring circus rather than a three act play.

PRE-CODE LAW

Pre-Code law, both legislative and judicial, has been varied and inconsistent on the issue of priorities. However, an examination of the rationale applied will provide a basis for understanding current decisions and may indicate a course to guide current decisionmaking.

The interest of the secured party generally arises at the time of purchase of the motor vehicle and, therefore, will typically antedate the artisan's lien. Thus, the secured party, on the basis of the maxim "first in time is first in right," could contend that the security interest was acquired first and ought not to be diverted or diluted by the subsequently asserted artisan's lien. This "first in time is first in right" rationale was further strengthened by the fact that secured parties were generally required to file their interest to make it effective against subsequent claims. Such filing gave the repairman constructive notice that a prior interest existed in the vehicle. Thus, the repairman would be taking the risk of having his lien subordinated to such prior interest when he furnished services or materials with respect to the vehicle.

A significant difficulty with the constructive notice argument in pre-Code law was that the various security devices employed had separate filing systems and a search for prior interests could require a substantial amount of time.

11. 2 G. Gilmore, supra note 4, § 33.3, at 875.
12. Id. at 876-77. For pre-Code cases following this rationale, see Universal Credit Co. v. Spinazzolo, 39 Del. 117, —, 197 A. 68, 72 (1938); Baribault v. Robertson & Bennett, 82 N.H. 297, —, 133 A. 21, 21 (1926); United Tire & Investment Co. v. Maxwell, 202 Okla. 476, —, 215 P.2d 541, 543 (1950).
13. The theory behind filing is to provide a system whereby subsequent creditors may discover if prior interests exist; thus a failure to file properly will not give such creditors constructive notice of prior interests. From this, it is argued that later creditors should not be subject to such prior unrecorded interests. For a general discussion of the development of filing systems and requirements, see 1 G. Gilmore, supra note 4, §§ 15.1-3, at 462-80.
14. Separate filing systems existed for chattel mortgages, for conditional sales, for trust receipts, for factor's liens, and for assignments of accounts.
ably, it was an unjust hardship to require a repairman to refuse to provide services pending an elaborate search of the records in all the counties where a valid filing might be found.\textsuperscript{15}

The asserted hardship imposed upon a repairman by the constructive notice rationale was to a large extent alleviated by the enactment of certificate of title laws.\textsuperscript{16} Certificate of title laws provided for the notation of security interests and other encumbrances upon the certificate of title of a motor vehicle so that there would be a record of interests which went with the vehicle rather than remaining in scattered and isolated county offices.\textsuperscript{17} The repairman's burden was significantly reduced because, rather than performing his own search for prior interests, he could simply demand production of the certificate of title before agreeing to service a vehicle.\textsuperscript{18} With notice provided by the certificate of title, a repairman arguably took the risk that any lien he might later assert would be subordinate to an interest noted upon the certificate of title.\textsuperscript{19}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{15} \textit{2 G. Gilmore, supra note 4, § 33.3, at 878; see, e.g., Jesse A. Smith Auto Co. v. Kaestner, 164 Wis. 205, —, 159 N.W. 738, 739 (1916) ("highly inequitable" to charge artisans with constructive notice "of mortgages filed perhaps long distances from where the repairs are made").}
\item \textsuperscript{16} Nebraska's Certificate of Title Act, Neb. Rev. Stat. §§ 60-101 to -117 (Reissue 1974), was first enacted in 1939. 1939 Neb. Laws, ch. 81.
\item \textsuperscript{17} Certificate of title acts were originally developed to impede the sale of stolen motor vehicles. But provisions relating to recording security interests in motor vehicles upon certificates of title were created in response to the inadequacy of ordinary chattel security recordation systems. Notes & Comments, \textit{Security Interests in Motor Vehicles Under the UCC: A New Chassis For Certificate of Title Legislation}, 70 Yale L.J. 995, 995-96 (1961) [hereinafter cited as \textit{Security Interests in Motor Vehicles}]. For recent developments in Nebraska regarding the effect of the certificate of title when a stolen motor vehicle is purchased, see Note, 10 \textit{Creighton L. Rev.} 777 (1977).
\item \textsuperscript{18} Securities Credit Corp. v. Pindell, 153 Neb. 298, 303, 44 N.W.2d 501, 505 (1950) (Certificate of Title Act enacted because it was "unpracticable" to require search of numerous records). \textit{See generally 2 G. Gilmore, supra note 4, § 33.3, at 882.}
\item \textsuperscript{19} For example, in Champa v. Consolidated Fin. Corp., 231 Ind. 580, 110 N.E.2d 289 (1953), the repairman failed to inspect the certificate of title, and the court invoked the rule that "[w]here one of two innocent persons must suffer a loss, it should fall upon him who, by reasonable diligence or care, could have protected himself, rather than on him who could not." \textit{Id. at —, 110 N.E.2d at 295. But cf. 2 G. Gilmore, supra note 4, § 33.3, at 882 (characterizing the whole notice rationale as a "makeweight" argument).}

It should be noted that the certificate of title acts of some states give express priority to artisan's liens over recorded security interests. \textit{See Security Interests in Motor Vehicles, supra note 17, 1013 n.109.}
\end{enumerate}
\end{footnotesize}
In opposition to the idea that the artisan's lien should be subordinated to a security interest noted upon the certificate of title, it has been observed:

This reasoning implies that a mechanic, knowing the vehicle to be subject to a security interest, can assure payment of his claim either by refusing to work on the vehicle without payment in advance, or by seeking a subordination agreement from the prior secured party. This inconvenient procedure seems undesirable; to the extent that repair is actually discouraged by this procedure, the priority system seems particularly onerous in the motor vehicles repair field, since the vehicles are so frequently needed for daily use.\(^{20}\)

It has also been argued that it would provide an unjustifiable windfall to give priority to the secured party who takes the value of the vehicle, as improved by the repairs, on a foreclosure sale and thus leaves nothing for the repairman who improved the vehicle.\(^{21}\)

Another rule espoused in pre-Code law was that, unless the secured party expressly or impliedly consented to having repairs made on the chattel, the artisan's lien was subordinate to the security interest.\(^{22}\) A routine argument on behalf of the repairman was that the secured party's consent to the repairs could be implied from the fact that the secured party had placed the motor vehicle in the purchaser's possession for the sole use of the purchaser and that it was only natural to expect that repairs would be necessary to enable continued use of the vehicle.\(^{23}\) Some courts accepted this argument with little qualifica-

\(^{20}\) Id. Security Interests in Motor Vehicles, supra note 17, at 1014. See also Comment, Priority Between Security Interests and Liens Arising By Operation of Law in Oregon, 12 WILLIAMETTE L.J. 172, 187 (1975) [hereinafter cited as Security Interests and Liens] wherein the court suggested that awarding priority to the artisan's lien may improve the ability to obtain repairs and may thereby prevent a farmer from losing his crop. Without such priority, the repairman may refuse to risk losing the cost of services and materials.

\(^{21}\) See 2 G. GILMORE, supra note 4, § 33.3, at 878; Miller, Liens Created By Operation of Law: A Look at Section 9-310 of the Uniform Commercial Code, 76 COM. L.J. 221, 231 n.66 (1971), who notes the probable validity of the argument suggested in the text as applied to automobiles, but doubts its application to more sophisticated transactions.

The unjustifiable windfall rationale would bring into question whether the repairman actually increased the value of the motor vehicle, and whether the measure of value should be the cost of repairs or the increase in market value. See 2 G. GILMORE, supra note 4, § 33.3, at 878.


\(^{23}\) See, e.g., Champa v. Consolidated Fin. Corp., 231 Ind. 580, —, 110
tion. Other courts found the requisite consent when some special benefit accrued to the secured party by having the motor vehicle repaired, such as when the purchaser needed to use the vehicle in order to earn enough money to discharge the security interest. Yet, some courts rejected this argument altogether. However, where the secured party had actual knowledge of the repairs, theories of implied consent and waiver could be successfully asserted.

A further complication arose in regard to interpretation of the written agreement of sale. For example, consent could be implied from a provision which required the vendee to keep the vehicle in good repair. On the other hand, a provision stipulating that the purchaser must keep the vehicle free from all liens and encumbrances could prevent consent from being implied.

A final development in pre-Code law concerned the interpretation of the term "owner" as it was used in the artisan's lien statutes. These statutes, following the common law pattern, often required the repairs to be made at the request of, or

N.E.2d 289, 297-98 (1953) (concurring opinion); see also cases cited notes 24-26 infra.


30. Under the general principles of the common law, a lien could be acquired only with the consent of the owner of the property in question. R. BROWN, supra note 4, § 13.5, at 407. For a discussion of the historical development of the lien, see id. § 13.1, at 390-96.
with the consent of the owner of the property.\textsuperscript{31} The significance of the term "owner" related to the type of security device that was used in the sale transaction. For example, if a conditional sales contract was used, the seller or financer retained title.\textsuperscript{32} On the other hand, if a chattel mortgage was used, the purchaser generally possessed the legal title.\textsuperscript{33} As a consequence, when a court construed the term "owner" in the artisan's lien statute to mean "legal title holder", the secured party was held to be the owner under a conditional sales contract,\textsuperscript{34} while the purchaser would be considered to be the owner under a chattel mortgage transaction.\textsuperscript{35}

Thus, the type of security device used not only determined whether the buyer or the seller had title, but also determined who had to consent to repairs under the lien statute. The failure of the repairman to acquire the consent of the secured party under a conditional sales contract resulted in a court finding that the repairman did not act with the consent of the "owner". The secured party would, therefore, prevail on the issue of right to possession.\textsuperscript{36} Under a chattel mortgage, however, the consent of the purchaser would suffice to fulfill the requirement of the

\begin{itemize}
  \item \textsuperscript{31} A model example is Neb. Rev. Stat. § 52-201 (Reissue 1974). See note 4 supra. See also National Bond & Inv. Co. v. Haas, 124 Neb. 631, 637, 247 N.W. 563, 566 (1933) (section 52-201 is enactment of common law lien).
  \item \textsuperscript{32} See 1 G. Gilmore, supra note 4, § 3.2, at 67; R. Brown, supra note 4, § 9.8, at 207. The conditional sale in its origin was not a security device. However, it was later employed in consumer financing as a security device although it did not have the filing requirements and cumbersome procedures of the chattel mortgage. As states began to treat the conditional sales contract more and more as a security device by subjecting it to filing and other procedures, it became practically indistinguishable in function from the chattel mortgage—both devices enabled prior creditors to protect their interests by filing. Often, the only distinction between the two devices was that title was retained by the seller under the conditional sales contract but not under the chattel mortgage. As the next note indicates, even title retention would not make a difference in some states. 1 G. Gilmore, supra note 4, § 3.2, at 67-68. For a thorough explanation of the conditional sales contract and the chattel mortgage as security devices, see id. §§ 2.1-3.8, at 24-85.
  \item \textsuperscript{33} See note 32 supra. There has been a variance of opinion as to whether a chattel mortgage passes title to the mortgagee or whether it merely creates a lien interest in the mortgagee. Compare Lowery v. Louisville & N.R.R., 228 Ala. 137, —, 153 So. 467, 467 (1934) (chattel mortgage passes title) with Drummond Carriage Co. v. Mills, 54 Neb. 417, 424-25, 74 N.W. 966, 969 (1898) (mortgagor has title and mortgagee has lien only).
  \item \textsuperscript{34} See, e.g., Neitzel v. Lawrence, 40 Idaho 26, 231 P. 423, 425 (1924); Cache Auto Co. v. Central Garage, 63 Utah 10, —, 221 P. 862, 865-66 (1923); Wilcox v. Moberly, 118 Wash. 118, —, 198 P. 728, 728 (1921).
  \item \textsuperscript{36} See note 34 supra.
\end{itemize}
artisan's lien statute. Hence, it has been stated that pre-Code law often made priority dependent upon the location of title. Such was the case in Nebraska before the enactment of the Code, as the next section will demonstrate.

NEBRASKA LAW BEFORE THE CODE

The first case in which the Nebraska Supreme Court addressed the issue of priority between an artisan's lien and a secured party was *Drummond Carriage Co. v. Mills.* There, a physician had purchased a carriage under a chattel mortgage, which was subsequently filed. The physician later delivered it to a repairman for servicing. When the unpaid mortgagee demanded possession of the carriage, the repairman refused to comply and asserted a right to retain the carriage until paid for his services. The court held the repairman's lien to be superior to the interest of the mortgagee.

Because the physician purchased under a chattel mortgage, he was held to have had legal title to the carriage. However, the issue of title was not determinative of the court's holding. Instead, the court based its decision on the theory that the secured party had impliedly consented to the repairs. One may infer from the court's holding that, had implied consent not been found, the secured party would have had priority over the repairman's lien. This would suggest that, rather than considering the issue of legal title as determinative, the court was proceed-

37. See note 35 supra.
39. 54 Neb. 417, 74 N.W. 966 (1898).
40. *Id.* at 421-24, 74 N.W. at 968.
41. At the time of the case there was no statutory artisan's lien. *Drummond* appears to be the first case in which Nebraska recognized the common law lien for repairs. *Id.* at 423-24, 74 N.W. at 968.
42. *Id.* at 427, 74 N.W. at 970.
43. *Id.* at 424-28, 74 N.W. at 969.
44. *Id.* at 427, 74 N.W. at 970. The court held: We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so. *Id.*

The finding of implied consent was based largely upon a clause in the mortgage contract under which the purchaser was required to prevent the property from depreciating and thereby allowed the inference that repairs were contemplated by both parties. *Id.* at 424, 74 N.W. at 969.
ing on a theory that secured parties should prevail on the "first in time is first in right" rationale unless they consented to the repairs and thereby to a subordination of their interest.

Nevertheless, the Nebraska Supreme Court found the location of title to be a significant factor in the later case of General Motors Acceptance Corp. v. Sutherland. In that case, the court was faced with the issue of priority between a statutory artisan's lien and a security interest under a conditional sales contract which had been filed before the purchaser requested that the motor vehicle be repaired.

After pointing out that title does not immediately pass to the purchaser under a conditional sales contract, the court stated:

It is to be noted that there is a marked difference between the position of a mortgagor and a conditional sale vendee. The former must own the property which he mortgages. He is commonly known as the owner. This is not true as to the conditional sale vendee. He holds possession under an executory contract to purchase. He may have acquired equitable rights in the property, but he is not the owner.

Thus, because the purchaser under a conditional sales contract did not have title, no valid artisan's lien was created since the "owner" did not consent to the services. There being no valid lien, no issue of priority existed. The court also refined the doctrine of implied consent recognized in Drummond Carriage Co. by requiring that the consent of the conditional vendor, when implied by conduct, must be based on more than merely placing the purchaser in possession and permitting him to use the vehicle.

The distinction drawn in Sutherland between a chattel mortgage and a conditional sale was reiterated in National Bond & Investment Co. v. Haas, in which the statutory artisan's lien was held superior to a chattel mortgage which had

47. Id. at 725, 241 N.W. at 283.
48. Id. at 727, 241 N.W. at 284.
49. Id. at 728, 241 N.W. at 284.
50. Id. The court found that a provision in the conditional sales contract which required the vendee to keep the property free of all taxes, liens, and encumbrances dispelled any theory of implied consent. Id. at 727, 241 N.W.2d at 284.
been recorded in Missouri.\textsuperscript{52} Thus, by the time of \textit{Haas}, it was clear that a chattel mortgagee could furnish the consent required to create a valid artisan's lien while the conditional sale vendee could not. However, priority in \textit{Haas} was apparently based on the repairman's lack of notice of the chattel mortgage which had not been recorded in the Nebraska county in which the repairs took place.\textsuperscript{53} This holding was probably the result of the court's construction of the statutes involved.\textsuperscript{54} However, it is possible that, had the chattel mortgage been filed in the repairman's county, the secured party would have prevailed on a first in time is first in right rationale regardless of the statutes.

The final pre-Code decision regarding the priority of an artisan's lien vis-a-vis a security interest was rendered in \textit{Allied Investment Co. v. Shaneyfelt}.\textsuperscript{55} The interest of the secured party was under a conditional sales contract, and the repairman asserted his lien under the artisan's lien statute.\textsuperscript{56} Following the decision in \textit{Sutherland}, the court held that there was no valid artisan's lien since the purchaser, rather than the conditional vendor, requested the repairs.\textsuperscript{57} As required under the \textit{Sutherland} decision, the repairman was charged with notice of the vendor's legal ownership.\textsuperscript{58} However, notice in \textit{Allied} was provided by notation of the conditional sales contract on the certificate of title rather than by filing in the county office as occurred in the \textit{Sutherland} case.\textsuperscript{59}

The only substantial difference between \textit{Sutherland} and \textit{Allied} was that, by the time of the \textit{Allied} decision, the Certificate of Title Act had altered the method of recording the conditional sales contract. In both cases, recordation of the condition-
al sales contract charged the repairman with notice of the legal owner. Thus, in repairing without the owner's consent, the repairman assumed any risk of loss since he would have no valid artisan's lien.60

In summary, pre-Code Nebraska law established that the secured party under a recorded conditional sales contract would prevail over the repairman asserting an artisan's lien if the secured party, as "owner", had not consented to repairs. From this rule it would seem that if the purchaser took under a chattel mortgage, the repairman's lien would prevail since only the purchaser, being the owner, need consent to the repairs to establish a lien. In this latter instance, one might conclude that a lien is created without the secured party's consent. However, it is not clear from the pre-Code Nebraska cases that such a lien is automatically superior to a recorded chattel mortgage. Indeed, it is possible that a "first in time is first in right" rationale might still be applied where the repairman had notice of a prior interest.61

Thus, pre-Code Nebraska law equipped the judiciary with two possible grounds on which to determine the issue of priority between an artisan's lien and a security interest noted upon the certificate of title:

(1) Where the security device used was a conditional sales contract, consent to repairs by the secured party was necessary to create a valid artisan's lien; and

(2) Where a valid lien was created under any security device, and the repairman had notice of a secured party's interest, consent of the secured party was required if the repairman's lien was to have priority.

60. See Allied Inv. Co. v. Shaneyfelt, 161 Neb. 840, 847, 74 N.W. 2d 723, 727 (1956); General Motors Acceptance Corp. v. Sutherland, 122 Neb. 720, 728, 241 N.W. 281, 284 (1932). The notation upon the certificate of title makes the constructive notice argument more palatable than when interests in motor vehicles were filed in various county offices. See text at note 14 supra.

61. See text at notes 43, 53 supra. That the first in time rule would not conflict with the legal title rule upon which the conditional sales contract cases were decided is indicated by the apparent approval by the Sutherland court of the rule as stated in Rankin v. Scott, 25 U.S. (12 Wheat.) 111, 113 (1827):

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

NEBRASKA UNDER THE UNIFORM COMMERCIAL CODE

The most direct statement by the Nebraska Supreme Court on the issue of priority between the artisan's lien of section 52-201 and a security interest perfected by notation on a certificate of title is found in White Motor Credit Corp. v. Sapp Brothers Truck Plaza, Inc. The trial court in White Motor held that the secured party had a superior right to possession of the motor vehicle involved. Despite the fact that this holding was not contested on appeal, the Nebraska Supreme Court explained:

Generally the rights of an artisan making repairs to a chattel at the request of the possessor is (sic) subordinate to the rights of those having liens of which the artisan has constructive or actual notice. We have heretofore held that plaintiff [secured party] had a superior interest under section 60-1.10, R.R.S. 1943. That section provides that a security agreement noted on the certificate of title "shall be valid as against the creditors of the debtor, whether armed with process or not . . . ."

In White Motor, the repairman suggested that section 9-310 of the Uniform Commercial Code provides the applicable rule of priority. Although the court's response must be regarded as dicta since the priority issue was not contested on appeal, it indicates that the court may give controlling status to the Certificate of Title Act. This precipitates three basic questions which will be examined in turn in the remaining sections of this comment:

(1) Whether priority under U.C.C. section 9-310 depends upon a notice theory;
(2) Whether section 9-310 defers to the Certificate of Title Act on the issue of priority; and
(3) Whether the decisions under pre-Code law are still of consequence on the issue of priority.

62. For text of the lien statute, see note 4 supra.
63. 197 Neb. 421, 249 N.W.2d 489 (1977).
64. Id. at 422, 249 N.W.2d 491.
65. Id. at 426-27, 249 N.W.2d 493. In support of its explanation, the court cited Allied Inv. Co. v. Shaneyfelt, 161 Neb. 840, 74 N.W.2d 723 (1956).
66. Although the issue was reported as not contested on appeal, counsel for the repairman had prepared arguments on this issue in the reply brief. Reply Brief for Appellant at 5-7, White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc., 197 Neb. 421, 249 N.W.2d 489 (1977).
67. This third question arises from the fact that the court cited Allied Inv. Co. v. Shaneyfelt, 161 Neb. 840, 74 N.W.2d 723 (1956) which was decided upon the ground that title was retained in the secured party so that no artisan's lien was
DOES SECTION 9-310 INCORPORATE A NOTICE THEORY?

Section 9-310 on its face appears to give the artisan's lien priority over a perfected security interest since the artisan's lien statute does not indicate otherwise.\(^{68}\) Perfecting a security interest in a motor vehicle consists of noting the security interest on the certificate of title.\(^{69}\) This notation was considered as giving constructive notice to the repairman in *Allied*,\(^{70}\) that is, perfection functions as notice. Thus, the fact that section 9-310 subordinates a perfected security interest to an artisan's lien indicates that notice of a prior interest is not relevant under section 9-310.\(^{71}\)

The most plausible interpretation of section 9-310 is that priority is based upon the repairman's enhancement of the value of the collateral.\(^{72}\) Therefore, the notice theory, based upon a "first in time is first in right" rationale, seems to have been rejected in favor of an enhancement theory, which might well have had its roots in the "unjustifiable windfall" theory of pre-Code law.\(^{73}\)

Nevertheless, a type of notice theory might be found in the requirement of section 9-310 that the person furnishing the services or materials must do so "in the ordinary course of his

---

68. See text at note 6 supra.

69. NEB. REV. STAT. (U.C.C.) § 9-302(3)(b) (Reissue 1971) states that the filing provisions of Article 9 do not apply to a security interest subject to a statute which requires notation on a certificate of title of such security interest. Id. § 9-302(4) further provides that a security interest covered by § 9-302(3) can be perfected only under the certificate of title statute. Finally, NEB. REV. STAT. § 60-110 (Supp. 1977) states that a security interest in motor vehicles must be indicated on a certificate of title.

70. See text at note 58 supra.


The elimination of knowledge [of the prior interest] as a factor is consistent with the purpose of [the] Code ..., as expressed in Comment 1 to Uniform Commercial Code § 9-301: "To provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected."


73. For the "unjustifiable windfall" rationale, see text at note 21 supra.
business". If that requirement is interpreted in a manner analogous to the definition which the Code provides for a "buyer in the ordinary course of business", the repairman might be obliged to act in good faith and without knowledge of any security interest that would be violated by his furnishing the services or materials. Under such an interpretation, the repairman may be held not to have been in the ordinary course of his business if a security interest was previously noted on the certificate of title.

However, if section 9-310 is based upon an enhancement theory, the provision that services or materials be furnished in the ordinary course of business may be a requirement that the work performed be reasonably intended to increase the value of the collateral and that it not be in the nature of running up a bill for needless services. The Nebraska Supreme Court seems to have taken this position in Mousel v. Daringer where it held that "[a] person who furnishes materials or service with respect to goods that are already subject to a perfected security interest is not engaged in the ordinary course of his business under § 9-310, U.C.C., with respect to any part of his charges that are unreasonable." Thus, although the lien may have priority, the ordinary course of business provision limits the benefit of priority to an amount not in excess of a reasonable charge.

The foregoing rationale may not conclusively establish the basis of the rule of priority under section 9-310. However, the

74. For the provisions of section 9-310, see text at note 6 supra.
75. U.C.C. § 1-201(9) defines a "buyer in the ordinary course of business" as:
   [A] person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker.
76. See Miller, supra note 21, at 228-29; Security Interests and Liens, supra note 20, at 174.
77. The difficulty with the analogy upon which this is based is that the buyer fails the ordinary course of business test under U.C.C. § 1-201 (9) if he has knowledge of the violation of a security interest. However, the Code defines knowledge as meaning actual knowledge, not mere notice. Id. § 1-201(25). The repairman would most likely have only notice by the certificate of title.
78. See 2 G. Gilmore, supra note 4, § 33.5, at 888-89; Security Interests and Liens, supra note 20, at 174.
79. 190 Neb. 77, 206 N.W.2d 579 (1973).
80. Id. at 82, 206 N.W.2d at 584.
81. The issue could still be raised whether or not a reasonable charge means that the repairs must have actually increased the market value of the motor vehicle. See note 21 supra. See also Manufacturers Acceptance Corp. v. Gibson, 220 Tenn. 654, —, 422 S.W.2d 435, 437 (1967) (intention to enhance is sufficient).
indication is that the more reasonable interpretation of section 9-310 is that it adopts an enhancement theory of priority rather than a notice theory. Had the trial court in *White Motor* followed the priority rule of section 9-310, the artisan's lien should have prevailed. However, one may conclude from the *White Motor* dicta that a rule of priority was found in the Certificate of Title Act.

**DOES SECTION 9-310 DEFER TO THE CERTIFICATE OF TITLE ACT ON THE RULE OF PRIORITY?**

The Nebraska Certificate of Title Act contains the following provision with respect to interests held in motor vehicles:

> Any mortgage, conveyance intended to operate as a security agreement as provided by article 9, Uniform Commercial Code, trust receipt, conditional sales contract or other similar instrument covering a motor vehicle, . . . in the case of a certificate of title, if a notation of same has been made by the county clerk on the face thereof, shall be valid as against the creditors of the debtor, whether armed with process or not, and subsequent purchasers, secured parties and other lienholders or claimants but otherwise shall not be valid against them, . . . [A]ll liens, security agreements and encumbrances, noted upon a certificate of title, shall take priority according to the order of time in which the same are noted thereon by the county clerk.\(^{82}\)

Almost identical language appears in the Certificate of Title Act of Ohio,\(^{83}\) which the Ohio Supreme Court construed in *Commonwealth Loan Co. v. Berry*\(^ {84}\) to provide the applicable rule of priority for an artisan's lien and a security interest noted on a certificate of title. The Ohio Supreme Court found a clear legislative intent that the enactment of the Uniform Commercial Code did not alter the well-established law of Ohio that such

---

82. *Neb. Rev. Stat.* § 60-110 (Supp. 1977). This section was amended to allow for the application of Article 9 filing provisions to security interests in motor vehicles held as inventory. Such security interests are executed by the dealer to the manufacturer rather than by the consumer as in our present discussion. Thus, the amendment would have no effect upon the priority issue under discussion since in other respects the statute remains as it existed at the time of *White Motor* in *Neb. Rev. Stat.* § 60-110 (Reissue 1974).

83. *Ohio Rev. Code Ann.* § 4505.13 (Baldwin 1971). Because the language of Ohio's certificate of title act is identical in the pertinent provisions to that of Nebraska, it affords the best comparison for analysis of the problems involved herein. Different wording in the certificate of title acts of other states makes it problematic to consider them in relation to the Nebraska Act.

84. *2 Ohio St. 2d 169, 207 N.E.2d 545 (1965).*
liens are not prior to a recorded security interest. This intent was manifested by the legislature's elimination of motor vehicles from the operation of the artisan's lien statute, its exception of motor vehicles from the Article 9 filing provisions, and its amendment of the Certificate of Title Act to provide for the recording of security interests in motor vehicles on the certificate of title.

It is not so clear that the actions of the Ohio legislature demonstrated an intent to retain pre-Code law. Without a finding of such legislative intent, there is little else in the provisions of the Ohio and Nebraska certificate of title acts from which one may detect a rule of priority that conflicts with the rule under section 9-310. However, assuming that the title act provides a rule of priority which would subordinate the artisan's lien, the issue of which rule to apply is presented. The Ohio Supreme Court applied the statutory rule of construction that a special statutory provision which relates to a specific subject matter controls over a general provision which might otherwise be applicable. Thus, it found the Certificate of Title Act, which deals specifically with motor vehicles, to be controlling over the generally applicable rules of section 9-310.

85. Id. at —, 207 N.E.2d at 546.
87. Id. at 143. Professor Murphey suggests, for example, that by excluding motor vehicles from the statutory lien, automobile repairmen had available a common law artisan's lien which ought to have been immune from subordination since there would be no statute creating the lien which could expressly subordinate it as required under § 9-310.
88. See text at note 100 infra.
89. The Ohio court apparently found the rule of priority in the language: "[A]ny security agreement . . . in the case of a certificate of title, if a notation of such instrument has been made . . . on the face of such certificate, shall be valid as against the creditors of the debtor, . . . and against subsequent purchasers, secured parties, and other lienholders or claimants." OHIO REV. CODE ANN. § 4505.13 (Baldwin 1971); 2 Ohio St. 2d at —, 207 N.E.2d at 546. The analogous language of the Nebraska Certificate of Title Act was cited by the Nebraska Supreme Court in White Motor. See text at note 65 supra.
90. 2 Ohio St. 2d at —, 207 N.E.2d at 546. This rule was also invoked in construing priority between a motor vehicle act and a lien statute in GMC Superior Trucks, Inc. v. Irving Bank & Trust Co., 463 S.W.2d 274, 276 (Tex. Civ. App. 1971). However, Texas subsequently amended its certificate of title act and the Texas Supreme Court, in Gulf Coast State Bank v. Nelms, 525 S.W.2d 866 (Tex. 1975), held that § 9-310 provides the rule of priority.
91. 2 Ohio St. 2d at —, 207 N.E.2d at 546. This decision has been criticized for having the practical effect of writing an exception into § 9-310. It is argued that such an exception is not justified by the language of § 9-310. See Manufacturers Acceptance Corp. v. Gibson, 220 Tenn. 654, —, 422 S.W.2d 435, 437 (1967); Editor's Note, 2 U.C.C. Rep. Serv. 750 (1965). Section 9-310 gives the lien priority
The conflict of priority rules might be resolved by giving a more liberal construction to the clause "unless the lien is statutory and the statute expressly provides otherwise." It has been suggested that when read literally, "these words seem to permit only the statute which creates a lien to subordinate it [the lien]" and that this limitation does not appear to have any particular meaning or value. This reasoning suggests that section 9-310 should defer to any statute which "expressly provides otherwise." However, perhaps the argument should be addressed to the legislature rather than to the judiciary since the language of section 9-310 is unambiguous on this point.

The Nebraska Supreme Court stated in *Mousel v. Danger*:

"If the statute creating a lien in favor of persons who furnish services or materials with respect to goods subject to a security interest is silent on seniority, the lien takes priority over the security interest, although judicial interpretation has subordinated the lien to the security interest." It is difficult to understand how the court could make this statement and still give controlling status to the Certificate of Title Act on the issue of priority as it apparently did in *White Motor*. The interpretation of section 9-310 as deferring to any statute other than the

---

Unless the *lien statute* expressly provides otherwise. In effect, *Commonwealth* added an exception to this rule by allowing a statute other than the lien statute to control the issue of priority.

92. U.C.C. § 9-310.
93. *Nonconsensual Liens*, supra note 38, at 1663.
94. *Id.* *Cf.* Miller, *supra* note 21, at 225:
Because of [the] practical problem of locating and interpreting statutes and court decisions creating [artisan’s] liens, because of their conceptual similarity to voluntary security interests created by agreement, and because of the underlying theme of Article 9 to protect the first creditor to properly perfect his interest and the concurrent encouragement of creditors to perfect by filing, Section 9-310 can and perhaps ought to read restrictively.

Perhaps one rationale for this limitation is to ensure that if the legislature intends to subordinate the lien, its intention will be clearer if expressed in the lien statute itself rather than in some generally applicable statute.

96. 190 Neb. 77, 206 N.W.2d 579 (1973).
97. *Id.* at 82, 206 N.W.2d at 583.
98. A possible reason for this apparent discrepancy is that the court in *Mousel* was only construing two statutes—a lien statute and § 9-310—while in *White Motor* the court was faced with a third statute—the Certificate of Title Act—which it may have felt conflicted with § 9-310. Another reason for the discrepancy would simply be that priority was not in issue at the appeals stage in *White Motor* and therefore the court did not consider the ramifications of the unfortunate language which it chose to use in the opinion.
lien statute on the issue of priority certainly introduces undue uncertainty into the Code and detracts from one of its alleged purposes—"to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." 99

Whether or not section 9-310 could be read as allowing some statute other than the lien statute to "expressly provide otherwise," it must be asked whether the Certificate of Title Act in fact provides another rule of priority. Section 9-302 of the Nebraska Uniform Commercial Code provides that a security interest in motor vehicles can be perfected only by notation on a certificate of title. 100 It has been held that this section excludes certain security interests from only the filing provisions of Article 9, and that Article 9 otherwise provides the controlling law for those security interests. 101 Given that section 9-302 applies only to the filing of security interests, the Nebraska Certificate of Title Act can be read as simply providing that a security interest in a motor vehicle may be perfected, not by filing under Article 9, but by notation upon the certificate of title. The interest is then valid against subsequent claimants, secured parties, and other lienholders as if it had been perfected under Article 9. Thus, such provisions seem to comprise a rule for perfecting interests, not a rule of priority.

It may be urged that the title act provides a rule of priority in the statement: "[A]ll liens, security agreements and encumbrances, noted upon a certificate of title, shall take priority according to the order of time in which the same are noted thereon by the county clerk." 102 However, this statement pro-

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute...
(b) of this state which provides for central filing of, or which requires... indication on a certificate of title of, such security interests in such property.
(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title...
vides a convenient rule of priority for interests recorded on the certificate and is not a rule which encompasses both the interests noted upon the certificate of title and the interests which need not be noted on the certificate in order to be valid. Since the artisan’s lien is an interest which is valid and enforceable without being recorded on a certificate of title, the Nebraska Certificate of Title Act does not provide a rule to determine the priority between an artisan’s lien and a security interest perfected by notation upon a certificate of title. Since there is no real conflict between the two statutes, section 9-310 should be considered controlling on this point in Nebraska.

If it be assumed that a conflict exists between section 9-310 and the Nebraska Certificate of Title Act, the Ohio Supreme Court’s argument that a special statute controls a general statute must be considered. The general rule, accepted in Nebraska, is when there are general and special statutes in pari materia, the statutes should first be harmonized if possible; but if there is any conflict, the special statute will prevail regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.

Although one may contend that the two statutes considered here cannot be harmonized, the Nebraska Legislature has ex-

103. Sun Fin. & Loan Co. v. Hadlock, 82 Ohio App. 27, —, 162 N.E.2d 131, 134 (1959). The Ohio court held that the Ohio Certificate of Title Act, which was essentially identical to the current Nebraska Act, was not intended to encompass the artisan’s lien.

Another factor demonstrating that the artisan’s lien of NEB. REV. STAT. § 52-201 (Reissue 1974) is not required to be noted upon the certificate of title is that the title act refers to the notation of “instruments” covering motor vehicles while the artisan’s lien does not require any type of instrument but only possession to be effective. Compare id. § 52-202 (artisan’s charging lien does require an instrument and would likely be encompassed by the certificate of title provisions).

It should be noted that some states specifically exclude liens for services and materials from the operation of their certificate of title acts. See, e.g., ALA. CODE § 32-8-60 (1975).

104. See text at note 90 supra.


106. Statutes are general when they deal with a subject in general terms, while special statutes deal with a part of the same subject in a more detailed manner. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 51-03, at 315 (4th ed. 1973).

107. Statutes are in pari materia when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object. Id. § 51-03, at 298.

108. Id. § 51-05, at 315.
pressed the intention in U.C.C. section 10-103\textsuperscript{109} that all parts of acts inconsistent with the provisions of the Uniform Commercial Code are to be considered repealed. Such a statement expresses an intention to make the provisions of section 9-310 controlling over any conflicting provisions of the Certificate of Title Act concerning priorities of interests.\textsuperscript{110} This contention is even more persuasive considering that Ohio did not enact section 10-103. Consequently, that provision was not a consideration when the Ohio Supreme Court applied the special versus general rule in Commonwealth Loan Co. v. Berry.\textsuperscript{111}

**Consequences of Pre-Code Law on the Priority Issue Under the Code**

A conditional sales contract, or any pre-Code security device, may still be used under the Code.\textsuperscript{112} However, the retention of title by the secured party, which occurs under a conditional sales contract, has no effect upon the application of the provisions of the Code itself.\textsuperscript{113} Nevertheless, when the applicability of some rule of law outside the provisions of the Code depends upon the location of title, the retention of title may well have an effect.\textsuperscript{114} Since the Nebraska artisan's lien statute is a non-Code provision, the location of title may still have the effect which occurred in pre-Code law in Nebraska: the repairman may not create a valid artisan's lien without acquiring the consent of the secured party to perform the repairs.\textsuperscript{115} This would occur de-

\textsuperscript{109} Neb. Rev. Stat. (U.C.C.) § 10-103 (Reissue 1971): “Except as provided in the following section, all acts and parts of acts inconsistent with this act are hereby repealed.”

\textsuperscript{110} Cf. Associates Discount Corp. v. Rattan Chevrolet, Inc., 462 S.W.2d 546, 548-49 (Tex. 1970) (using a similar analysis). There is a presumption in Nebraska that the legislature knows all related acts at the time it takes any action. See Bass v. Saline County, 171 Neb. 538, 540-41, 106 N.W.2d 860, 863 (1960).

\textsuperscript{111} 2 Ohio St. 2d 169, 207 N.E.2d 545 (1965). See text at note 84 supra; Editor's Note, 2 U.C.C. Rep. Serv. 750 (1965).

\textsuperscript{112} Official Comment 1, U.C.C. § 9-102.


\textsuperscript{114} Official Comment, U.C.C. § 9-202 states: “This Article in no way determines which line of interpretation (title theory v. lien theory or retained title v. conveyed title) should be followed in cases where the applicability of some other rule of law depends upon who has title.” See also Official Comment 1, U.C.C. § 2-401; Official Comment, U.C.C. § 9-101; Nonconsensual Liens, supra note 38, at 1651.

\textsuperscript{115} For the effect of title retention in Nebraska pre-Code law, see text at note 45 supra.
spite the replacement of the first in time is first in right rule by section 9-310.\textsuperscript{116}

The comments to section 9-310 state with regard to pre-Code law: "Under chattel mortgage or conditional sales law many decisions made the priority of such liens turn on whether the secured party did or did not have 'title'. This section changes such rules . . . ."\textsuperscript{117} Read literally, the rules which the comment indicates are changed are rules making priority of the lien turn on the location of title. Section 9-310 does not, however, change any rules which make the existence, as opposed to the priority of the lien, turn on the location of title.\textsuperscript{118}

Under pre-Code Nebraska law, interpretation of the term "owner" in the artisan's lien statute was determinative of the existence of a lien. Considering that the purposes of the Code are aimed at providing uniformity and making the law of commercial transactions more liberal and nontechnical,\textsuperscript{119} it is highly questionable whether the pre-Code technicalities of the artisan's lien statute should be retained. Two basic considerations will be examined in this regard.

First, it has been frankly conceded that the retention of title in conditional sales transactions is a technical and non-substantive consideration which should not be weighed in deciding issues under non-Code statutes.\textsuperscript{120} Ever since the conditional sale evolved into a security device, the retention of title has been noted as an illogical basis for distinguishing its effects from the effects of other security devices.\textsuperscript{121} With regard to the specific situation at hand, it has been stated:

It would subvert that apparent purpose [of section 9-310] to adopt the view of those pre-code cases that prefer the conditional sales vendor to the repairman and to hold for the [secured party] on the ground that he did not consent to the creation of the repairman's lien and, thus, no lien arose. . . . To so hold would be to emphasize, to the exclusion of all other considerations, the retention by the [secured party] of title and might re-

\textsuperscript{116} See text at note 72 supra.
\textsuperscript{117} Official Comment 2, U.C.C. § 9-310.
\textsuperscript{118} General Motors Acceptance Corp. v. Colewell Diesel Service & Garage, Inc., 302 A.2d 595, 598 (Me. 1975); Nonconsensual Liens, supra note 38, at 1651.
\textsuperscript{121} See, e.g., Note, 12 NEB. L. BULL. 196, 198 (1933).
vitalize formalisms eliminated by the code. This would be contrary to main threads of the code: the de-emphasis of title in favor of a functional approach and the elimination of distinctions in the law’s treatment of security interests based on their form.\textsuperscript{122}

Indeed, there is no practical reason to perpetuate the title retention aspect of pre-Code security devices in light of the Code’s goal of providing for the creation and enforcement of security interests without regard to location of title.

A second consideration for eliminating the technicality presented by the term “owner” in the artisan’s lien statute is provided by Professor Gilmore:

This ambiguous term [owner] is an invitation to courts to follow their own predilections. To the anti-lienor court, it is clear that the “owner” is the chattel mortgagee or conditional vendor. To the pro-lienor court it is equally clear that the “owner” is the “beneficial owner”, the owner of the equity, the mortgagor or vendee.\textsuperscript{123}

Under current Nebraska law, therefore, it would be desirable for the court to eliminate the pre-Code interpretation of the term “owner” in the lien statute. This is so because the term distinguishes the effects of using security devices which retain title and those which do not. If this were accomplished by the court, a valid lien could arise without the consent of the secured party under any circumstances not agreed upon in the security agreement. In such a case, section 9-310 would operate under the current statutes to award priority to the artisan’s lien despite the notation of any security interest on the certificate of title of a motor vehicle.

\textsuperscript{122} Nickell v. Lambrecht, 29 Mich. App. 191, -, 185 N.W.2d 155, 160 (1970). The court added with regard to awarding priority to the lien for repairs: “This result does not penalize the seller, it merely avoids rewarding him for retaining title.” Id.

\textsuperscript{123} 2 G. Gilmore, \textit{supra} note 4, § 33.3, at 881. Landis Machine Co. v. Omaha Merchants Transfer Co., 142 Neb. 389, 6 N.W.2d 380 (1942), offers a good illustration of Professor Gilmore’s concern. In that case, the Nebraska Supreme Court held that the vendee of personal property under a conditional sales contract may quite reasonably be considered as the owner under a statute requiring that property be assessed to its owner. The title retained by the seller was for security only and carried with it none of the ordinary incidents of ownership. Thus, “owner” meant “beneficial owner” instead of “legal title holder” as in the Sutherland and Allied cases. An unarticulated distinction appears to have been made as to when “owner” means “beneficial owner” or “legal title holder,” and it certainly appears as though the court was following its own predilection.

Gilmore suggests that the term “owner” might be reasonably construed to mean the same person who is considered the owner under the certificate of title act. 2 G. Gilmore, \textit{supra} note 4, § 33.3, at 881. See Champa v. Consolidated Fin. Corp., 231 Ind. 580, —, 110 N.E.2d 289, 297 (1953) (concurring opinion).
Assuming, however, there is some inherent virtue in the first in time is first in right rationale allowing a perfected security interest to prevail in the priority battle with an artisan’s lien, it would be desirable to prevent the perfected security interest from being subordinated to the subsequent lien under section 9-310. Such protection should not occur simply because of the type of security device chosen and the ownership concept attending that device. One alternative would be to amend the lien statute so as to allow any “lawful possessor” to consent to repairs in order to create a valid lien, but to expressly subordinate the lien created thereby to prior perfected security interests. With such changes, the lien statute would “expressly provide otherwise” within the meaning of section 9-310. Such changes would also alleviate the uncertainty and hazards long associated with the choice of security devices which differed in their effects depending upon the location of title and which are still a factor haunting the businessman under the current artisan’s lien statute.

CONCLUSION

Faced with the problem of deciding the priority between a security interest and an artisan’s lien within the context of the Nebraska Certificate of Title Act, the artisan’s lien statute, and section 9-310 of the U.C.C., one may well wonder if the three statutes interrelate with the coherence of a three act play or the confusion of a three ring circus. Whichever may be the case, it is

124. The White Motor rationale, based upon constructive notice under the Certificate of Title Act, suggests a preference for protecting the party who first records his interest. Indeed, one commentator suggests that the Code itself adopts this preference as an underlying theme. See Miller, supra note 21, at 225. However, such a legal principle ought not to be applied against statutes which are not ambiguous in their mandates; and where there is statutory ambiguity, the virtue of the principle ought to be weighed against the policies for favoring the artisan’s lien. As an example of such policies, it has been suggested that giving priority to artisan’s liens would improve the ability to obtain the repairman’s services. The denial of such services, for fear of losing out to secured parties, could result in, for example, a farmer losing his crop because the necessary vehicles were in a state of disrepair. Security Interests and Liens, supra note 20, at 187. Besides, if only possessory liens are given priority, there could be only one lien ahead of perfected security interests and it is likely such a lien, when discharged, would not consume a substantial portion of the value of the collateral. Id. See generally New Britain Real Estate & Title Co. v. Collington, 102 Conn. 652, —, 129 A. 780, 781 (1925); Earthmovers, Inc. v. Clarence L. Boyd Co., 554 P.2d 877, 879-80 (Okla. Ct. App. 1976).

125. See, e.g., ILL. STAT. ANN. ch. 82, § 40 (Smith-Hurd 1966).

126. Id. § 43.

certain that legislative re-drafting could improve upon the story being told, with the theme being more certainty and uniformity in commercial transactions. Nevertheless, certain conclusions about Nebraska law in this area may be drawn.

First, whatever rationale might have been used in the court's explanation of the rule as to priorities in *White Motor*, it was dicta and therefore is not controlling. In *Mousel*, the court had no difficulty in finding the rule of priority to be in section 9-310. The only distinction between the situation in *Mousel* and that in *White Motor* is the Certificate of Title Act, which should not change the effect of section 9-310. Upon close examination of Nebraska's Certificate of Title Act, read within the context of: (1) section 9-302, which defers to the title act only for purposes of filing requirements; (2) section 9-310 which provides a rule of priority between liens for services and materials furnished and security interests; and (3) section 10-103 which repeals all parts of acts in conflict with the provisions of the Code, it can be seen that section 9-310 should control on the issue of priority between the artisan's lien and a security interest noted upon the certificate of title.

Under the present statutes, it would be reasonable to expect that the artisan's lien would prevail in the priority battle under section 9-310. However, the pre-Code law of Nebraska still lies in wait for the unwary in the form of the artisan's lien requirement of the consent of the owner. The safest procedure for a secured party to follow as long as such provisions are maintained is to retain the title to the motor vehicle or other collateral that may become subject to an artisan's lien. As for the repairman or other artisan, unless he is willing to risk losing the value of the services and materials furnished, a search ought to be made for perfected security interests. One consolation for the repairman is that the Code and the title act have significantly eased the burden of the search required through uniform filing systems. Nevertheless, the apparent policy behind section 9-310 to award priority to the person enhancing the value of the motor vehicle, does not appear as though it will completely achieve fulfillment under the current law.

*Mark W. Major—'79*