

OPINION NO. 65-154

Syllabus:

1. Section 4505.13, Revised Code, as amended effective July 7, 1965, does not authorize the filing of a mortgage instrument by a Clerk of Court of Common Pleas, which mortgage covers a motor vehicle owned by a public utility.

2. Section 4505.10, Revised Code, expressly states the only requirements in making application to the clerk of courts for repossession certificate of title to a motor vehicle, including those owned by a public utility corporation. The listing of the

mortgage on the existing certificate of title is not included in such requirements. Therefore, a repossession certificate of title may be applied for and issued by the Clerk of Courts even though the existing certificate of title does not list such mortgage.

To: Lou Wilsch, Registrar, Bureau of Motor Vehicles, Columbus, Ohio
By: William B. Saxbe, Attorney General, August 23, 1965

You request my opinion on the following questions relative to Senate Bill No. 22, effective July 7, 1965, involving Section 4505.13, Revised Code:

"1. Does the addition of Section 1701.66, Revised Code of Ohio to Section 4505.13, prohibit the filing of a mortgage instrument by a Clerk of Courts if a certificate of title in Public Utility's name and mortgage instrument, is presented to him in accordance with Ohio Motor Vehicle Laws?

"2. If a mortgage instrument is filed by a Public Utility Corporation with Secretary of State according to Section 1701.66, Revised Code of Ohio, and not with Clerk of Courts on certificate of title, can a repossession certificate of title be applied for under Section 4505.10, in regular manner even though the title does not list mortgage?"

The relevant part of Section 1701.66, Revised Code, is as follows:

"(A) A mortgage of property of any description, or any interest therein, made (1) by a corporation which is a railroad or a public utility as defined by sections 4907.02, 4905.02 and 4905.03 of the Revised Code; or (2) by a corporation, domestic or foreign, organized for the purpose of constructing, acquiring, owning or operating a railroad or public utility, as so defined * * * shall be recorded in the office of the county recorder of each county in this state in which any of said property is situated or employed; but a mortgage by such mortgagor which includes rolling stock or moveable equipment such as cars, locomotives, or trolley buses, motor buses, or other vehicles, or machines for aerial transportation, may be filed in the office of the secretary of state, and when so filed shall have the same effect as to the lien created thereby on such rolling stock, movable equipment, or machines, as though filed in the office of the recorder of each such county in which such rolling stock, movable equipment, or machines are situated or employed.

* * * * *

"(F) Nothing contained in this section shall make inapplicable the provisions of Chapters 4505. to 4519., inclusive, of the revised code, relating to motor vehicles."

It is obvious from the above quotation that there is no provision in such Section 1701.66 for the filing by the Clerk of Courts of a mortgage on a motor vehicle owned by a public

utility, and also that by such subsection (F) thereof, Sections 4505.10 and 4505.13, Revised Code, are applicable to your questions.

Senate Bill No. 22, which went into effect on July 7, 1965, is as follows:

"To amend section 4505.13 of the Revised Code, relative to security interests in motor vehicles of a public utility or common carrier.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

"Section 1. That section 4505.13 of the Revised Code be amended to read as follows:

"Section 4505.13. Sections 1309.01 to 1309.50, inclusive, and section 1701.66 of the Revised Code, do not permit or require the deposit, filing or other record of a security interest covering a motor vehicle. Any security agreement covering a security interest in a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's or importer's certificate and followed by actual and continued possession of such certificate by the holder of said instrument, or, in the case of a certificate of title, if a notation of such instrument has been made by the clerk of the court of common pleas on the face of such certificate, 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. All liens, mortgages, 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 clerk. Exposure for sale of any motor vehicle by the owner thereof, with the knowledge and consent of the holder of any lien, mortgage, or encumbrance thereon, shall not render such lien, mortgage, or encumbrance ineffective as against the creditors of such owner, or against holders of subsequent liens, mortgages, or encumbrances upon such motor vehicle,

"The secured party, upon presentation to the clerk of the county in which the certificate of title was issued, together with such certificate of title and the fee prescribed by section 4505.09 of the Revised Code, may have a notation of such lien made on the face of such certificate of title. The clerk shall enter said notation and the date thereof over his signature and seal of office, and he shall also note such lien and the date thereof on the duplicate of same in his files and on that day shall notify the registrar of motor vehicles, who shall do likewise. The clerk shall also indicate by appropriate notation on such agreement

itself the fact that such lien has been noted on the certificate of title.

"When such lien is discharged, the holder thereof shall note a discharge of same on the face of the certificate of title over his signature. Prior to delivery such certificate to the owner, the holder shall present to the clerk for the purpose of having the clerk note the cancellation of said lien on the face of said certificate of title and upon the records of the clerk. The clerk, if such cancellation appears to be genuine, shall note such cancellation on the certificate of title, and he shall also note said cancellation on his records and notify the registrar, who shall note such cancellation.

"Section 2. That existing section 4505.13 of the Revised Code is hereby repealed."

As the only amendment to Section 4505.13, Revised Code, was the addition of the words "and section 1701.66" and as the purpose of such amendment as stated in the preliminary paragraph "relative to security interests in motor vehicles of a public utility or common carrier" disclose, the obvious purpose of such amendment was to make such section applicable to mortgaged motor vehicles of a public utility and thereby specifically to prohibit the filing of such a mortgage by the Clerk of Courts because of entire lack of statutory authority for him to do so.

In Opinion No. 6125, Opinions of the Attorney General for 1956, page 1, which involved mortgaged motor vehicles of a public utility corporation, it was held that Section 4505.13, Revised Code, as then worded, was applicable. After quotation of such section the following is quoted from pages 6 and 7 of such opinion:

"There is nothing in the statute which requires the filing with the clerk of the instrument, such as a mortgage, which undertakes to create a lien on a motor vehicle. The statute does contemplate that the instrument is to be 'presented' to him and that a notation of the lien created by such instrument shall be made by him on the face of the certificate of title. * * * * *

"As already stated, there is no provision in the law for filing a mortgage or other instrument of lien. Furthermore the statute, Section 4505.13, supra, distinctly specifies that the notation is to be made 'on such instrument itself' which language certainly excludes a copy."

Thus the legal opinion years before the amendment effective July 7, 1965, was that the clerk of courts had no

authority and, therefore, was prohibited from filing a mortgage instrument on a motor vehicle of a public utility. The recent amendment made it binding as a statute.

As to your second question the relevant part of Section 4505.10, Revised Code, is as follows:

"In the event of the transfer of ownership of a motor vehicle by operation of law, * * * or repossession is had upon default in performance of the terms of a security agreement as provided in sections 1309.01 to 1309.50, inclusive of the Revised Code, the clerk of the court of common pleas of the county in which the last certificate of title to the said motor vehicle was issued, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof to the clerk of ownership and rights of possession to such motor vehicle, and upon payment of the fee prescribed in section 4505.09 of the Revised Code, and presentation of an application for certificate of title, may issue to the applicant a certificate of title to such motor vehicle. Only an affidavit by the person or agent of the person to whom possession of such motor vehicle has passed, setting forth the facts entitling him to such possession and ownership, together with a copy of * * * instrument upon which such claim of possession and ownership is founded, is satisfactory proof of ownership and right of possession. If the applicant cannot produce such proof of ownership, he may apply directly to the registrar of motor vehicles and submit such evidence as such applicant has, and the registrar may thereupon, if he finds the evidence sufficient, authorize the clerk to issue a certificate of title. If, from the records of the office of said clerk, there appears to be any lien on said motor vehicle, such certificate of title shall contain a statement of said lien unless such application is accompanied by proper evidence of its extinction."

(Emphasis added)

I concur in the logic expressed in the first paragraph of the syllabus of Opinion No. 3595, Opinions of the Attorney General for 1954, page 91, which reads as follows:

"1. Where the assignee of a chattel mortgage on a motor vehicle has acquired the ownership and right to possession of such vehicle upon a default in performance

of the terms of such mortgage, such assignee may be issued a new certificate of title upon application therefor, as provided in Section 4505.10, Revised Code, upon presentation of satisfactory proof to the clerk of courts of such ownership and right of possession, and such proof may be had upon (a) an affidavit of such assignee or his agent, together with (b) a copy of the instrument of assignment involved."

In Section 4505.10, *supra*, there is no provision that the listing of such mortgage on the certificate of title is a prerequisite to the granting of the repossession certificate of title and as is specifically stated the "only" (as emphasized in the above quotation of such section) requirements for the applicant to obtain from the clerk a repossession certificate of title, such repossession certificate of title may be obtained by the applicant even though the certificate of title of the mortgagor does not list such mortgage.

Accordingly, in response to your request my opinion is as follows:

1. Section 4505.13, Revised Code, as amended effective July 7, 1965, does not authorize the filing of a mortgage instrument by a Clerk of Court of Common Pleas, which mortgage covers a motor vehicle owned by a public utility.

2. Section 4505.10, Revised Code, expressly states the only requirements in making application to the clerk of courts for repossession certificate of title to a motor vehicle, including those owned by a public utility corporation. The listing of the mortgage on the existing certificate of title is not included in such requirements. Therefore, a repossession certificate of title may be applied for and issued by the Clerk of Courts even though the existing certificate of title does not list such mortgage.