

OPINION NO. 90-061**Syllabus:**

1. Pursuant to R.C. 317.13, a county recorder may record only "deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded."
2. An instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument.
3. A "notice of common-law lien" is not recognized in Ohio by statute and is not among the "notices of liens" described in R.C. 317.08(E). As such, a "notice of common-law lien" is not an instrument of writing required or authorized to be recorded under R.C. 317.13.

To: Dean Holman, Medina County Prosecuting Attorney, Medina, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 7, 1990

I have before me your request for my opinion concerning the county recorder's duty to record instruments presented. Specifically, you wish to know whether an instrument captioned "Notice and Service of a Common-Law Lien" may be recorded. You have questioned whether R.C. 317.08, in providing authority for the recording of "notice of liens" requires a county recorder to record such an instrument.

A county recorder's duty to record¹ instruments is derived directly from R.C. 317.13, which states, in relevant part, that "[t]he county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing *required or authorized to be recorded*, presented to him for that purpose." (Emphasis added).

R.C. 317.08(E) is one statute that serves to identify, *inter alia*, the liens "authorized to be recorded," by stating in pertinent part:

The recorder may index, keep, and record in one volume unemployment compensation liens, federal tax liens, personal tax liens, mechanic's liens, agricultural product liens, *notices of liens*, certificates of satisfaction or partial release of estate tax liens, discharges of

¹ "Record" means "the copying of [an instrument] into the public records kept for that purpose, by or under the direction or authority of the proper public officer." *Green v. Garrington*, 16 Ohio St. 548, 550 (1866).

recognizances, excise and franchise tax liens on corporations, and liens provided for in sections 1513.33, 1513.37, 5111.021, and 5311.18 of the Revised Code. (Emphasis added).

See also R.C. 317.09 (recording and filing notices of federal liens); *Ramsey v. Riley*, 13 Ohio 157, 166 (1844) ("[i]t is the duty of the recorder to enter of record all deeds, mortgages, and other instruments of writing, required by law to be recorded, and which are presented to him for that purpose"). A county recorder, thus, has express authority to record those liens specified by R.C. 317.08 and R.C. 317.09.

Before determining whether a "Notice and Service of a Common-Law Lien" is within the definition of "notices of liens" as used in R.C. 317.08, it is necessary to analyze whether the county recorder has discretion to record an instrument not explicitly listed by statute. A county recorder is a ministerial officer, see *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 47 N.E. 551 (1897), who has only those powers expressly granted by statute, or necessarily implied therefrom. See *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961); 1986 Op. Att'y Gen. No. 86-006; 1940 Op. Att'y Gen. No. 2857. Moreover, the authority of a county recorder is further limited by the historical nature of the office of recorder. Inasmuch as the recording of instruments has no precedent in the common law, the authority to record an instrument must, therefore, be found in an express legislative provision. 1940 Op. 2857, at 913.

Without an express grant of authority to record a particular type of instrument, a county recorder may not record such instruments presented for recording. Op. No. 86-006. Thus, an instrument is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument. *Id.* A close examination of the duty to record instruments in R.C. 317.13 reveals that just four classes of instrument are enumerated: "deeds, mortgages, plats, and other instruments required or authorized to be recorded." Applying the rule of statutory construction of *expressio unius est exclusio alterius* (the naming of specific classes implies the exclusion of any class not named), see, e.g., *Craftsman Type v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983), a recorder's duty to record is limited to deeds, mortgages, plats and *only* those other instruments statutorily identified as being capable of being recorded.

No provision of the Revised Code authorizes, requires or even mentions the recording of a "common-law lien." R.C. 317.08 does, however, authorize the recording of "notices of liens." The question before me now focuses on whether a "notice of a common law lien" is reasonably contemplated by the "notices of liens" term used in R.C. 317.08. To make this determination, the classification of liens under Ohio law must be discussed.

The term "lien" means a charge upon real or personal property for the payment or discharge of a debt or duty. *Clapp v. Huron County Banking Co.*, 50 Ohio St. 528, 35 N.E. 308 (1893). Four types of liens are recognized by Ohio courts²: statutory, equitable, maritime and common-law. Because the "notice of

² Statutory liens are those either established by the General Assembly or codified from the common law. The terms of a statutory lien control its character, operation and extent. *Mahoning Park Co. v. Warren Home Development Co.*, 109 Ohio St. 358, 142 N.E. 883 (1924).

An equitable lien is a right not otherwise recognized at law to have a fund or specific property, or its proceeds, applied in whole or in part, to the payment of a particular debt or class of debts. *Clapp v. Huron County Banking Co.*, 50 Ohio St. 528, 35 N.E. 308, 310 (1893). Equitable liens generally arise from a contract, express or implied. See, e.g., *Cox Boulger*, 78 Ohio App. 527, 62 N.E.2d 913 (Franklin County 1945); *Dueber Watch-Case Mfg. Co. v. Daughtery*, 62 Ohio St. 589, 57 N.E. 455 (1900); *Syring v. Sartorious*, 28 Ohio App. 2d 308, 277 N.E.2d 457 (Athens

lien" that is the subject of this opinion was denominated a "common law lien," I will assume for the purposes of this opinion that the characterization is correct and confine my discussion accordingly. A "common law lien" is defined as:

One known to or granted by the common law, as distinguished from statutory, equitable, and maritime liens; also one arising by implication of law, as distinguished from one created by the agreement of the parties. It is a right extended to a person to retain that which is in his possession belonging to another, until the demand or charge of the person in possession is paid or satisfied.

Black's Law Dictionary 251 (5th ed. 1979). See also *Shearer v. Bill Garlic Motors, Inc.*, 59 Ohio App. 2d 320, 394 N.E.2d 1014 (Huron County 1977); *Cleveland Auto Top & Trimming Co. v. America Finance Co.*, 124 Ohio St. 169, 177 N.E. 217 (1931); *Justice v. Bussard*, 114 N.E.2d 305, 308 (Dayton Mun. Ct. 1953).

A common law lien arises from the retention of property of another by a person in possession, until some demand of the person in possession is satisfied. *Jordan, Ellis & Co. v. James*, 5 Ohio 88 (1831). For a common law lien to attach, the person asserting the lien must have independent and exclusive possession of the goods. *Ohio Finance Co. v. Middleton*, 14 Ohio App. 43 (Franklin County 1921). Notice of a common law lien is provided by the possession of the property. See *In re Beck Provision Co.*, 11 Ohio Fed. Dec. 449 (N.D. Ohio 1900). In the case of other liens where the claimant is not in possession of the property, notice of the lien must be recorded to place others on notice of its existence. See generally, M. Distelhorst & T. Marti, *Ohio Mechanics' and Materialmen's Liens* 31 (1986) (the "purpose of the second stage of the process, the public filing of a claim of lien, is...to provide any potential buyers or creditors with notice of the encumbrance...[which] limits the alienability of the property); W. Rockel & C. White, *Mechanics' and Sub-contractors' Liens* 62 (2d ed. 1892) ("object of statute in requiring the lien to be filed and recorded is to give general or public notice of its existence, so that all who may be affected thereby may protect themselves therefrom....The purpose of the statute in requiring the liens to be filed in the Recorder's office, is to give notice of its existence"); L. Jones, *The Law of Liens* 98 (3d ed. 1914) (the "protection afforded at common law by possession is, in case of statutory liens, afforded by notice to the owner"). Where possession of the property subject to the lien is retained by the one asserting the lien, the owner's lack of possession serves to place others on notice of the lien. Therefore, inasmuch as the notice of a common law lien arises from the retention or possession of the property upon which the lien is asserted, and the purpose of recording a lien is to make those with an interest or potential interest in the property aware of the lien, the filing of a formal "notice of common-law lien" is not necessary to place the owner of the property or one taking title from the owner on notice, since the retained possession of the property of the owner is itself the notice.

Not being statutory in nature, common law liens are not described or regulated by Ohio statutes. The lack of any statutory mention of the recording of a notice of a common-law lien is, therefore, in keeping with the liens' common law nature. Even without specific statutory authority to record a notice of common law lien, however, a county recorder could record such a notice if it were within the meaning of "notices of liens" as used in R.C. 317.08.

"Notices of liens," specifically denominated as such, are expressly authorized to be filed by numerous Revised Code sections. See, e.g., R.C. 317.09(A) ("[n]otices of liens for internal revenue taxes and of any other lien in favor of the

County 1971); *Westrick v. Unterbrink*, 90 Ohio App. 283, 105 N.E.2d 885 (Putnam County 1950).

Maritime liens are today largely statutory in nature under R.C. Chapter 4585. They apply to watercraft navigating the waters within or bordering upon Ohio. R.C. Chapter 4585 is, however, subject to limitation by United States Constitution, Art. III, sect. 2.

United States, as provided in the statutes of the United States or in any revision of the statutes); R.C. 1513.33 (the "statement [of the chief of the division of reclamation] shall constitute a notice of lien"); R.C. 2937.27 ("county recorder of the county in which the property of a surety on a recognizance is located, shall keep and file all notices of lien"); R.C. 5733.18 (the tax commissioner "may file...in the office of the county recorder...notice of such lien"). All of these examples are statutory liens; none are common law liens. In keeping with the general rule that only those instruments specifically designated by statute may be recorded, the General Assembly, in referring to specific types of "notices of liens," apparently intended "notices of liens" to mean those notices of liens specifically set forth in the Revised Code. Because no notice of common-law lien is authorized by any Revised Code provision, a county recorder is without authority to record a notice of common-law lien.

It is therefore my opinion and you are hereby advised that:

1. Pursuant to R.C. 317.13, a county recorder may record only "deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded."
2. An instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument.
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