

2225.

MORTGAGE, CHATTEL — MOTOR VEHICLE — CLERK OF COURTS, COUNTY WHERE CERTIFICATE ISSUED, WILL RECORD LIEN UPON PRESENTATION OF MORTGAGE, CERTIFICATE OF TITLE AND FEE — LIENHOLDER MAY BE COMPELLED TO SURRENDER CERTIFICATE OF TITLE TO CLERK — PURPOSE — TO NOTE SUBSEQUENT LIENS — REDELIVER CERTIFICATE.

SYLLABUS:

1. *Under the provisions of Section 6290-9, General Code, the holder of a chattel mortgage on a motor vehicle, upon presentation of such instrument, together with the certificate of title and the proper fee, to the clerk of courts of the county where such certificate was issued, may have his lien noted of record.*

2. *A lienholder having possession of a certificate of title may be compelled to surrender such certificate to such clerk of courts for the purpose of noting subsequent liens thereon, the certificate to be then redelivered to the lienholder surrendering the same.*

Columbus, Ohio, April 25, 1940.

Hon. H. Lloyd Jones, Prosecuting Attorney,
Delaware, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion as follows:

“Is there any method whereby a person may place a second chattel mortgage upon a motor vehicle where the first lien holder refuses to surrender the original certificate for such notation?”

Our Clerk of Courts has been advised by the Bureau of Motor Vehicles that it is impossible to have a second mortgage in such case but it is my thought that the language of Section 6290-9, General Code, contemplates that there may be such a second mortgage. Your opinion on this matter and the procedure to be followed will be greatly appreciated.”

The manner of noting liens on certificates of title is set out in Section 6290-9, General Code, which provides in part:

“ * * * Any mortgage, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or other similar instrument made hereafter and covering a motor vehicle, if such instrument is accompanied by delivery of said manufacturer's or importer's certificate and followed by actual and continued possession of same by the holder of said instrument, or in the case of a certificate of title if a notation of same has been made by the clerk of courts on the face thereof, shall be valid as against the creditors of the mortgagor whether armed with process or not, and subsequent purchasers, mortgagees and other lien holders or claimants but otherwise shall not be valid against them. 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 of courts. Exposure for sale of any motor vehicle by the owner thereof, with the knowledge or with the knowledge and consent of the holder of any lien, mortgage or encumbrance thereon, shall not render the same void or ineffective as against the creditors of such owner, or holders of subsequent liens, mortgages or encumbrances upon such motor vehicle.

The holder of a chattel mortgage, trust receipt, conditional sales contract or similar instrument, upon presentation of said instrument to the clerk of courts of the county where such certificate of title was issued, together with the certificate of title and the fee prescribed by this chapter, may have a notation of such lien made on the face of such certificate of title. The clerk of courts 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 thereon on the duplicate of same in his files and on that day shall notify the registrar who shall do likewise. The clerk of courts shall also indicate by appropriate notation on such instrument 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 cancellation of same on the face of the certificate of title over his signature and shall deliver it to the owner. Said owner may, upon presentation of said certificate of title to the clerk of courts, have the clerk of courts note the cancellation of said lien on the face of said certificate of title. The clerk of courts, if such cancellation appears to be genuine, shall note said cancellation on said certificate of title and he shall also note said cancellation on his records and notify the registrar who shall do likewise."

It will be noted that the holder of a chattel mortgage, upon presentation of the same to the clerk of courts of the county where the certificate of title was issued, together with the certificate of title and the proper fee, may have a notation of such lien made on the face of such certificate of title. Obviously, the "certificate of title" referred to in Section 6290-6, supra, is the original certificate since it is also provided that the clerk shall note the lien on the duplicate in his files.

In addition to the above, it is also provided that the clerk of courts shall indicate by appropriate notation on the chattel mortgage that such lien has been noted on the certificate of title. It is obvious that Section 6290-9, supra, contemplates the presentation of the original certificate of title in order to have the notation of a chattel mortgage made thereon.

In setting out the method of issuing certificates of title, Section 6290-6, General Code, provides in part:

"The clerk of courts shall issue the certificate of title in triplicate. One copy shall be retained and filed by him in his office and the other copy shall be transmitted on that day to the registrar of motor vehicles at Columbus. The clerk of courts shall sign and affix his seal to the original certificate of title and, if there are no liens on said motor vehicle, shall deliver said certificate to the applicant. If there are one or more liens on said motor vehicle said certificate of title shall be delivered to the holder of the first lien."

By virtue of the preceding section, the clerk of courts is required to deliver the original certificate of title to the first lienholder. Section 6290-9, supra, provides that when such lien is satisfied, the holder thereof shall note a cancellation of the same on the certificate of title and deliver it to the owner of the vehicle.

It is elementary that property may be mortgaged or conveyed according to the will of the owner. From time to time the Legislature has changed the manner of mortgaging and conveying property, but it has never attempted to prohibit the exercise of the power to mortgage or convey. The power to acquire and own property generally includes the additional powers of mortgaging and conveying same. This rule is set out in 50 C. J. at page 779, as follows:

“The chief incidents of ownership of property are the rights to its possession, use, and enjoyment, and to sell or otherwise dispose of it according to the will of the owner, * * *.”

Obviously, in providing the procedure set out in Section 6290-9, *supra*, it was contemplated that the first lienholder would surrender the certificate of title temporarily for the purpose of subsequent notations. Such temporary surrender would be necessary so that the inherent property right resting with the owner of the motor vehicle might be exercised freely and unimpeded. It would be extremely difficult, if not impossible, for the owner of a motor vehicle to borrow money on the same, if the individual lending the money could not have his lien noted so that his priority might be preserved.

Because property rights are involved, it appears that the first lienholder could be compelled by appropriate legal action to temporarily surrender the certificate of title. In view of such fundamental rights, it could not have been intended that the retention by the lienholder of the certificate of title was to be an unconditional retention. Such possession is subject to the exercise, by the owner of the motor vehicle, of his property rights.

Therefore, in specific answer to your inquiry, I am of the opinion that: (1) under the provisions of Section 6290-9, General Code, the holder of a chattel mortgage on a motor vehicle, upon presentation of such instrument, together with the certificate of title and the proper fee, to the clerk of courts of the county where such certificate was issued, may have his lien noted of record; (2) a lienholder having possession of a certificate of title may be compelled to surrender such certificate to such clerk of courts for the purpose of noting subsequent liens thereon, the certificate to be then redelivered to the lienholder surrendering the same.

Respectfully,

THOMAS J. HERBERT,
Attorney General.