

PRIORITIES BETWEEN ARTICLE NINE SECURITY INTERESTS AND STATUTORY LIENS IN IOWA

I. INTRODUCTION

Article 9 of the *Uniform Commercial Code* can be described as the most important and far-reaching article in its effect upon pre-Code law. It presents a comprehensive scheme for the regulation of security interests in personal property and fixtures and eliminates many of the problems which existed with the numerous prior security devices which it replaced.¹ However, Article 9 is not comprehensive in every respect. Statutory liens are among the transactions to which Article 9 does not apply except as provided in Section 554.9310 of the *Iowa Uniform Commercial Code*, entitled *Priority of Certain Liens Arising by Operation of Law*.² The purpose of this Note is to discuss the relative priority between Article 9 security interests and statutory liens on personal property in Iowa.

II. NONCONSENSUAL LIENS AND CONSENSUAL SECURITY INTERESTS

In broad terms the word "lien" refers to a charge or security or encumbrance upon property for the payment or satisfaction of a debt or obligation.³ The lienor has a right to sell certain property held as security and apply the proceeds against the debtor's unsatisfied obligation, thus the lienor is a secured creditor. The lien may be upon real or personal property. However, only those relating to personal property are covered in this Note.⁴

The term "lien" is not defined in the *Code*. Rather, the term "security interest" is used to describe the interest created under the *Code*, defined as "an interest in personal property or fixtures which secures payment or performance of an obligation."⁵ This is closely related if not wedded to the word "lien." However, a major distinction between an Article 9 security interest and the particular type of lien dealt with here—a statutory lien—is to be made.

A statutory lien arises by operation of law, *i.e.*, the law itself, without the stipulation of the parties, creates a lien. The lien is created as a legal consequence of the relation of the parties or the circumstances of their dealings.⁶

1. See IOWA CODE § 554.9102 (1973). For a summary of financing with different types of collateral under Article 9 of the UNIFORM COMMERCIAL CODE see Hansell, *Financing Under Article 9 of the Iowa Uniform Commercial Code*, 17 DRAKE L. REV. 143 (1968).

2. IOWA CODE §§ 554.9102(2), 554.9104(c) (1973). [IOWA UNIFORM COMMERCIAL CODE hereinafter referred to in the text as the "Code."]

3. BLACK'S LAW DICTIONARY 1072-73 (rev. 4th ed. 1968).

4. For a complete discussion of liens on personal property, their nature, and their enforcement, transfer and loss, see generally R. BROWN, *THE LAW OF PERSONAL PROPERTY* §§ 107-27 (2d ed. 1955).

5. IOWA CODE § 554.1201(37) (1973).

6. See note 3 *supra*.

Statutory liens arose from common law liens, often expanded and amended to include new parties, property and situations, which gave an interest in the property of another to one who furnished services and/or materials to the property. This interest or lien secured payment for what had been furnished.

A security interest under Article 9 is consensual even though it is regulated by the statutory provisions of the Article. The Article applies "to any transaction . . . which is intended to create a security interest in personal property or fixtures. . . ."⁷ Section 554.9102(2) further states that the Article "applies to security interests created by contract" adding it "does not apply to statutory liens except as provided in section 554.9310."⁸ The non-applicability of the Article to statutory liens is reiterated in section 554.9104 on excluded transactions which states that the Article does not apply "to a lien given by statute or other rule of law for services or materials except as provided in Section 554.9310 on priority of such liens."⁹ Nor does it apply to landlords' liens.¹⁰

Thus, the basic distinction between the statutory lien and an Article 9 security interest is in the manner in which it is created—by operation of law or by consent.¹¹ With this distinction in mind a brief examination of the basis for allocating priority between them can be made.

III. THE CONCEPTUAL BASES FOR GIVING PRIORITY

There is one major conceptual basis for giving the security interest priority where it antedates the lien—first in time is first in right. This interest should not be diluted or cut off without the secured party's consent. Typically the security interest will be recorded by filing. Thus, the doctrine of constructive notice will be raised to argue that the lienor either knew or should have known of the existence of the security interest.¹²

The arguments for giving the lienor priority become more varied. There are two major bases for giving the lienor priority. First, it is argued that the lienor gives added value to the goods through the materials or services which he has provided. Therefore, he should have a prior lien for this added value in preference to a secured party. Otherwise, the secured party benefits from the lienor's work by now being secured by more valuable goods, with no corresponding increase in liability. Meanwhile, the lienor is left without security for his added value.

However, as a practical matter the charges for materials and services often exceed value added to the goods. Thus, where the lienor is given priority he is completely secured for his charges while the net value of the collateral available

7. IOWA CODE § 554.9102(1)(a) (1973).

8. *Id.* § 554.9102(2).

9. *Id.* § 554.9104(c).

10. *Id.* § 554.9104(b).

11. See 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.4 (1965).

12. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 33.3, at 876-77 (1965). See also R. BROWN, THE LAW OF PERSONAL PROPERTY §§ 108, 112 (2d. ed. 1955).

as security for the debt owed the secured party is reduced without his consent. The rule giving the lienor priority may be rephrased to mitigate such results. Under the rephrased rule the lienor will take priority only for the "reasonable value" of the work done. Whether "value" means the cost of the work or the increased market value is unclear.¹³ It seems the "cost value" definition may be required by a court in any case since the lien is not intended to shield an unscrupulous artisan. The "increased market value" definition may effect a better compromise between the respective positions of the secured party and the lienor.

The second argument for giving the lienor priority avoids the policy issue with an alternative approach. It is reasoned that the goods involved can reasonably be expected to require repairs and/or storage to maintain them in good condition. The lienor is given priority under a theory of implied consent to the making of repairs to, or the storage of, the goods. Under an agency theory the vendee—possessor of the goods—is deemed to be the agent of the secured party for the making of such repairs. In either case the secured party is said to have waived his priority.¹⁴

IV. THE ARTICLE 9 PRIORITY RULE

The only Section of Article 9 which deals with statutory liens is 554.9310 which provides:

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.¹⁵

The section adopts the policy of subordinating security interests to liens for service and materials. Its purpose is 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.¹⁶ Thus, section 554.9310 is applicable whether the security interest is perfected or not.¹⁷ However, the fact of filing to perfect a security interest will be determinative as to priority under certain Iowa statutory liens.

The priority of liens over secured interests is given whether the lien is based upon common law or upon a statute which is silent as to priorities or which gives the lien priority. The policy favoring priority for the lien yields to a security interest only where the lien is based upon a statute and the statute

13. *Id.* at 878.

14. *Id.* at 879-82.

15. IOWA CODE § 554.9310 (1973).

16. UNIFORM COMMERCIAL CODE § 9-310, Comment 1 (1972 ed.).

17. R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 9-310:3 (2d ed. 1971).

expressly declares the lien shall be subordinate to a security interest.¹⁸ Thus, the lien will prevail where the statute so provides or where it is silent even though pre-Code case law had held otherwise. The Comment to section 554.9310 so states:

Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions. If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this section provides a rule of interpretation that the lien should take priority over the security interest.¹⁹

It should be noted that two elements are required by section 554.9310 before a lienor will have priority under that section. First, the services or materials must be furnished in the ordinary course of the lienor's business. This should be read as requiring good faith on the part of the lienor. The *Code* provides: "Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement."²⁰ Section 554.9310 is designed to protect only the honest lienor. A court could use the "ordinary course of business" requirement not only in cases of actual fraud but to deny or reduce to a reasonable amount the priority of a lienor who is unduly rapacious.²¹

The second requirement is that the goods be "in the possession of" the lienor. Common law service and materials liens were possessory liens and many statutes merely codify these. However, there are some statutes which provide for giving priority to liens by means of filing rather than possession, including some in Iowa. It is these non-possessory liens which raise questions about the applicability of section 554.9310. Iowa statutory liens give priority to some and deny it to others. Whether this reflects a conscious adoption of a particular theory of priority in each case or whether it merely reflects the relative strength and influence of the interests involved in each upon the legislative process is not entirely clear.

In any event difficulty may occur in attempting to determine which statutes meet the "expressly provide otherwise" test. Professor Gilmore rather pessimistically says, "It is too much to hope that states which enact the Code will concurrently review and revise the local collection of lien statutes."²² Whether true or not, it is certain that Iowa is not alone in the confusion over priorities.

V. APPLICABILITY TO IOWA STATUTORY LIENS

The *Iowa Code Annotated* Comment to section 554.9310 states:

The following statutory liens will have priority over other security interests by operation of this section: Forwarding and Commission Merchant's Lien, I.C.A. ch. 576; Cold Storage Locker Lien, I.C.A.

18. This Note deals only with liens based upon Iowa statutory law.

19. 194 Iowa 1280, 191 N.W. 107 (1923).

20. IOWA CODE § 554.1203 (1973).

21. See 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 33.5, at 888-89 (1965).

22. *Id.* at 887.

ch. 578; Hotelkeeper's Lien, I.C.A. ch. 583. The Lien for Care of Stock and Storage of Boats and Motor Vehicles is expressly made subject to all prior liens of record. I.C.A. § 579.1.

The Artisan's Lien is expressly subject to all prior liens of record, but, as amended, will be prior to liens of record if notice is given to all record lien holders and their written consent obtained for the services performed. I.C.A. § 577.1.

The possessory liens of an unpaid seller, § 554.2705, and a carrier of goods, § 554.7307, will have priority under this section, but the lien of a warehouseman under § 554.7209 will not be affected.²³

These statutory liens are all possessory.

The following statutory liens relating to goods, including fixtures, are not mentioned in the Comment: Landlord's Lien, *Iowa Code* ch. 570; Thresherman's or Cornsheller's Lien, *Iowa Code* ch. 571; Mechanic's Lien, *Iowa Code* ch. 572; Miner's Lien, *Iowa Code* ch. 574; Lien for Services of Animals, *Iowa Code* ch. 580; Veterinarian's Lien, *Iowa Code* ch. 581. These statutory liens are all non-possessory. Does a negative reading of the Comment mean the operation of the section has no effect upon these liens? If so, how are conflicts between these liens and security interests in the same property to be resolved? The effect of section 554.9310 upon priorities depends upon how the court chooses to interpret and apply the section to non-possessory statutory liens.

As noted Iowa statutory liens can be categorized as possessory and non-possessory. The possessory liens can be further divided into three groups with respect to priority between the lien and security interests. The first group is silent about the problem. The second group provides that the lien shall be subordinate to certain existing security interests. The third group provides that the lien shall have priority over liens and encumbrances which would include security interests.

VI. IOWA STATUTORY LIENS WHICH ARE POSSESSORY

The Iowa statutory liens which are possessory present no conflict with section 554.9310. If the element of "ordinary course of business" is satisfied one need only look to the priority provided in the statute giving the lien to determine priority.

A. *Liens Which are Silent*

Most of the possessory statutory liens in Iowa are silent as to priority. Therefore, by operation of section 554.9310 these liens will take priority over all security interests, whether perfected or not.²⁴

The following liens take priority in this manner over all security interests:²⁵

23. IOWA UNIFORM COMMERCIAL CODE, *Iowa Code Comment*, IOWA CODE ANN. § 554.9310 (1967).

24. See text accompanying notes 15-16 *supra*.

25. See text accompanying note 19 *supra*.

Forwarding and Commission Merchant's lien;²⁶ Cold Storage Locker Lien;²⁷ and Hotelkeeper's Lien.²⁸ These liens provide that the respective lienor shall have a lien upon all property of any kind in his possession for the reasonable costs of services rendered thereon, and/or for the hotel guest's expenses, and for any costs of enforcement.

B. *Liens Which are Subordinate*

The rule of priority in section 554.9310 which gives a lien priority will yield to statutory liens which expressly provide otherwise. Two Iowa statutory liens expressly provide that they will be subordinate to all prior liens of record: the Lien for the Care of Stock and Storage of Boats and Motor Vehicles²⁹ and the Artisan's Lien.³⁰ Thus, these liens will be subject to all security interests which have been perfected by filing before the lienor furnishes services or material or, in the case of vehicles, by compliance with section 321.50 of the *Iowa Code* relating to the notation of security interests on the certificate of title.³¹ The lien will take priority if the security interest is unperfected, *i.e.*, has not been recorded, or if it has been recorded after the services or materials were furnished.

The artisan's lien is by far the most important of the statutory liens in Iowa because it is the one which relates to automobiles and appliances. It is of interest to note that with respect to the most important of the liens, Iowa gives the secured party who has recorded priority over the lienor. This approach to priority has its basis in a combination of the "first in time is first in right" and constructive notice theories. However, the lien statute also provides that if "notice is given to all lienholders of record and written consent is obtained from all lienholders of record to the making, repairing, improving, or enhancing the value of any inanimate personal property" the lien will be prior to liens of record.³² This provision recognizes the "added value" theory in favor of the lienor, but it protects the secured party against liens for an amount greater than the added value by requiring his consent. Presumably it will be given when it is to his benefit to allow the artisan to take priority.

There are no possessory statutory liens in Iowa which provide that they shall take priority.

VII. IOWA STATUTORY LIENS WHICH ARE NON-POSSESSORY

A. *Applicability of 9-310*

The Iowa statutory liens which are non-possessory present a problem as to priority, since it is uncertain in the absence of judicial construction how section

26. IOWA CODE § 576.1 (1973).

27. *Id.* § 578.1.

28. *Id.* § 583.1, .2.

29. *Id.* § 579.1.

30. *Id.* § 577.1.

31. See *Municipal Equip. Co. v. Butch & Son Deep Rock*, 185 N.W.2d 756 (Iowa 1971).

32. IOWA CODE § 577.1 (1973).

554.9310 applies to these non-possessory liens. There are three possible interpretations of the section. The first will result in all security interests taking priority over a non-possessory lien. The second will result in priority being determined by the express language of the statute creating the lien. The third leaves questions of priority to be determined by statute and case law alone, section 554.9310 having no applicability to non-possessory liens.

The first interpretation results from a very strict reading of the section. Under this interpretation the "unless" language is read as referring to the entire language of the section, including the means of obtaining priority as well as the actual provision for priority of the lien. Thus, while the general rule is that liens take priority, if the statute creating the lien says *anything* which expressly provides otherwise than the language of section 554.9310, the lien will be subordinate to a security interest. Applying this interpretation to non-possessory liens, they must be found to be subordinate since they expressly provide otherwise. Professor Gilmore states that this is the most obvious construction of the section.³³ Certainly it is the most literal construction. However, Gilmore goes on to say that inclusion of the possessory language in the 1956 draft is unexplained and does not necessarily lead to the conclusion that the draftsmen deliberately aimed at subordinating non-possessory liens, many of which already enjoyed statutory or judicial priority, and considers the question open.³⁴

The second interpretation focuses on the rule of priority only, without considering the means of obtaining the lien. This interpretation is based upon the policy of section 9-310 of allowing express statutory language in a state statute creating the lien and giving priority to prevail. Under this interpretation the section is deemed to lay down a general rule which the state may overturn by express language to the contrary. Thus, where a state desires to create a statutory lien by filing instead of by possession and also give it priority, it can do so by express language to that effect. This recognizes that some types of personal property are extremely difficult to take into the lienor's possession.³⁵ In effect this interpretation gives the states the option of changing both the rule of priority for any particular statutory lien and the means of obtaining the lien. Therefore, the states may choose to give a lien by filing instead of possession and to give priority to these non-possessory liens by explicit decision manifested in a statute creating the lien. In this situation the lienor would take priority or not by the express terms of the statute and not under section 554.9310. However, this interpretation has a rather weak basis of support since actual possession seems to be a specific requirement of applicability of the section.³⁶

33. See note 21 *supra*, at 887-88.

34. *Id.* at 888.

35. See, e.g., the Mechanic's Lien, the Miner's Lien, and the Veterinarian's Lien. IOWA CODE §§ 572.1, 574.1, 581.1 (1973).

36. See note 19 *supra*. But see Note, *Nonconsensual Liens Under Article 9*, 76 YALE L.J. 1649, 1656-61 (1967).

If there is a correct answer to the question of priority between security interests and non-possessory liens, the third interpretation is most likely it: the section is limited to possessory statutory liens, the non-possessory liens being outside its scope. Therefore, Article 9 has no applicability to non-possessory statutory liens since it applies to statutory liens only as provided in section 554.9310.³⁷ Thus, priority will be governed by prior statute and case law.

Prior to the 1956 addition of the requirement of possession by the lienor it was thought that section 9-310 would govern all conflicts between statutory liens and the holder of contractual security interests.³⁸ However, since the inclusion of the possessory language commentators have considered the section limited to possessory liens—non-possessory liens being outside its scope and governed by prior state law.³⁹ Most states, like Iowa, have not considered the question of applicability of the section to non-possessory liens in commenting on the section.⁴⁰ However, those states which have dealt with the section's applicability in their comments to the section are unanimous in stating that it does not apply to statutory non-possessory liens at least after possession, if had, is given up.⁴¹ The *Illinois Code Comment* is illustrative. It stresses the two requirements of furnishing services or materials in the ordinary course of business and of possession of the goods by the lienor and further states: "This section does not apply to statutory non-possessory liens, at least after the lienor has relinquished possession of the collateral."⁴² This language has been followed by the Appellate Court of Illinois which applied prior statutory law in giving priority to a perfected security interest over a filed lien.⁴³

This third interpretation is supported by the greater weight of authority.⁴⁴ Again, it holds the section inapplicable to non-possessory statutory liens, priority being determined by applying prior statutory and case law. Thus, the Iowa

37. See notes 7-9 *supra*.

38. G. GILMORE, 4 CONFERENCE ON PERSONAL FINANCE LAW QUARTERLY REPORT 13 (No. 3, 1950).

39. 1 P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 5.07(1)[b] (1972); Coogan and Mays, *Crop Financing and Article 9: A Dialogue with Particular Emphasis on the Problems of Florida Citrus Crop Financing*, 22 U. MIAMI L. REV. 13, 47 (1967). See Note, *Nonconsensual Liens Under Article 9*, 76 YALE L.J. 1649, 1656-61 (1967).

40. See note 23 *supra*.

41. See, e.g., DEL. UNIFORM COMMERCIAL CODE, Del. Study Comment, DEL. CODE ANN. tit. 5A, § 9-310 (1971); ILL. UNIFORM COMMERCIAL CODE, Ill. Code Comment, ILL. ANN. STAT. ch. 26, § 9-310 (Smith-Hurd 1963); IND. UNIFORM COMMERCIAL CODE, Ind. Comment, IND. ANN. STAT. § 19-9-310 (1964); ME. UNIFORM COMMERCIAL CODE, Me. Code Comment, ME. REV. STAT. ANN. tit. 11, § 9-310 (1964); MINN. UNIFORM COMMERCIAL CODE, Minn. Code Comment, MINN. STAT. ANN. § 336.9-310 (1966); N.H. UNIFORM COMMERCIAL CODE, N.H. Comments, N.H. REV. STAT. ANN. § 382-A:9-310 (1961); N.J. UNIFORM COMMERCIAL CODE, N.J. Study Comment, N.J. STAT. ANN. § 12A:9-310 (1962); N.Y. UNIFORM COMMERCIAL CODE, N.Y. Annotations, N.Y. UNIFORM COMMERCIAL CODE § 9-310 (McKinney 1964); N.C. UNIFORM COMMERCIAL CODE, N.C. Comment, N.C. GEN. STAT. § 25-9-310 (1965); WASH. UNIFORM COMMERCIAL CODE, Wash. Comments, WASH. REV. CODE ANN. § 62A.9-310 (1966).

42. ILL. UNIFORM COMMERCIAL CODE, Ill. Code Comment, ILL. ANN. STAT. ch. 26 § 9-310 (Smith-Hurd 1963).

43. See *Pennington v. Alexander*, 103 Ill. App. 2d 145, 242 N.E.2d 788 (1968). Cf. *In re Einhorn Bros., Inc.*, 272 F.2d 434, 440-41 (3d Cir. 1959).

44. See notes 38 and 40 *supra*.

statutes creating non-possessory liens, along with supporting case law, must be examined to determine priority.

B. *Priority of Non-Possessory Liens by Statute and Case Law*

1. *Landlord's Lien*

Article 9 expressly states that it does not apply to landlords' liens.⁴⁵ Therefore, it does not change existing statutory and case law which will govern priority where there is a conflict between a landlord's lien and a security interest.⁴⁶ The landlord's lien statute states no rule of priority to govern such conflicts.⁴⁷ Priority between the two competing interests must be determined by prior case law.⁴⁸ In general where the security interest is recorded before the tenant's property is brought on the leased premises, the security interest is prior to the landlord's lien. But where the security interest is executed and recorded after the property has been brought on to the leased premises the landlord's lien is superior.⁴⁹ Where the security interest is executed but unrecorded the landlord's lien will take priority as a subsequent purchaser as to property of the tenant brought on to the premises at the beginning of the tenancy. But unrecorded interests in personal property brought upon the leased premises after the execution of the lease are superior to the landlord's lien.⁵⁰ A landlord also has a prior lien upon crops grown on the leased premises and upon the tenant's livestock born upon the leased premises.⁵¹

2. *Thresherman's or Cornsheller's Lien*

The thresherman's or cornsheller's lien expressly provides that it shall be prior and superior to any landlord's lien or to any security interest upon grain, seed, or corn for the reasonable value of services rendered with respect to them.⁵² Thus, a security interest will always be subordinate to this lien regardless of whether the security interest was prior in time or perfected.

3. *Mechanic's Lien*

Conflicts may occur between creditors claiming priority under the mechanic's lien⁵³ and those claiming a security interest in fixtures. *Iowa Code* section 554.9313 states that "nothing in Article 9 governs priority between a security interest in goods which are or are to become fixtures and the claims

45. IOWA CODE § 554.9104(b) (1973).

46. *In re Einhorn Bros., Inc.*, 272 F.2d 434, 440-41 (3d Cir. 1959).

47. See IOWA CODE §§ 570.1-.10 (1973).

48. Case law in Iowa dealing with this question of priority is quite old and covers only the older forms of security interests. For a discussion of such case law see Note, *Relative Priority of the Landlord's Liens in Iowa*, 21 IOWA L. REV. 109 (1935).

49. *Id.* at 111.

50. *Id.* at 112-14.

51. *Id.* at 114-16.

52. IOWA CODE § 571.2 (1973).

53. *Id.* §§ 572.2, .18.

of any person who has an interest in the real estate."⁵⁴ This would, of course, include those claiming under a mechanic's lien.⁵⁵ Thus, priority between the mechanic's lien and other interests in the property are governed by the terms of the mechanic's lien statute.⁵⁶ However, this would seem to be true even if Iowa had not declined to adopt the uniform version of section 9-313 dealing with fixtures.⁵⁷ A person claiming under this section would not be able to claim priority over a mechanic's lien under the section since Article 9 states that it does not apply to statutory liens except as provided in section 554.9310.⁵⁸ This would logically include the rules of priority in section 9-313. And since section 554.9310 is not applicable, priority will be determined by the mechanic's lien statute.⁵⁹

The mechanic's lien statute provides that the mechanic's lien shall have priority over all other liens except liens of record prior to the time of the original commencement of the work.⁶⁰ Thus, a security interest will be subject to a filed mechanic's lien unless the security interest is perfected by filing prior to the start of the work or improvements by the contractors or subcontractors claiming under the mechanic's lien.⁶¹ The statute also provides that encumbrancers who acquire interests in good faith, and for a valuable consideration, and without notice, after the expiration of the time for filing claims for such liens shall be prior to the claims of contractors and subcontractors which have not been filed prior to the date that such interests were acquired.⁶² Thus, a secured party who takes a security interest in fixtures in good faith, for valuable consideration, and without notice of the interests of contractors or subcontractors, and after the time for filing claims for mechanic's lien, will take priority if the secured party acquires his interest before the contractors or subcontractors file their claims for mechanic's liens. However, any security interest acquired between the time the work or improvements are begun and the time for filing claims for mechanics' liens will be subject to any mechanics' liens filed during that time. And any mechanic's lien filed after that time but before the security interest.⁶³

4. *Miner's Lien*

The miner's lien statute provides that it shall be secured and enforced in

54. *Id.* § 554.9313.

55. *Id.* § 572.2.

56. *Id.* § 572.18.

57. UNIFORM COMMERCIAL CODE § 9-313 (1972 ed.).

58. IOWA CODE §§ 554.9102(2), 554.9104(c) (1973).

59. See 1 and 1A P. COOGAN, *supra* note 39, §§ 3.04[5] n.32, 5.07[1][b], 16.19.

60. IOWA CODE § 572.18 (1973).

61. Statements shall be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date the last material was furnished or the last of the labor performed. IOWA CODE § 572.9 (1973).

62. IOWA CODE § 572.18 (1973).

63. See also Note, *Mechanic's Liens—A Summary of Priority*, 6 DRAKE L. REV. 51 (1956); Note, *Priority of Mechanics' Liens in Iowa*, 45 IOWA L. REV. 813, 818-21 (1960).

the same manner as the mechanic's lien.⁶⁴ Thus, the miner's lien will take priority over security interests in the same goods except for certain prior recorded security interests and certain security interests taken as a bona fide purchaser as described *supra*.

5. *Lien for Services of Animals*

The lien for services of animals expressly provides that those who provide breeding service shall have a prior lien on the progeny which results from such services for the amount due for the services.⁶⁵ Thus, the lien will take priority over a security interest in the young of livestock which attaches when they are conceived.⁶⁶

6. *Veterinarian's Lien*

The veterinarian's lien provides that it shall have priority over all other liens and encumbrances upon livestock⁶⁷ to which professional services have been rendered for the value of any products used and service rendered if the lien is filed as provided.⁶⁸ The secured party will therefore always take subject to the lien if the veterinarian files an account as provided in the chapter.

VIII. CODE LIENS AND 9-310

In addition to the statutory liens discussed *supra* the *Code* itself establishes three possessory liens to which section 554.9310 applies. The possessory liens of an unpaid seller⁶⁹ and a carrier of goods⁷⁰ will take priority under the section while the lien of a warehouseman⁷¹ will be unaffected,⁷² since it provides otherwise within the meaning of section 554.9310.

A. *Lien of an Unpaid Seller*

A seller who stops delivery of goods under section 554.2705 is given a lien on the goods and the bailee must hold and deliver the goods to the seller subject to charges or damages incurred and payable to the bailee.⁷³ The lien is contingent on the constructive possession by the seller through the bailee and is terminated if the buyer receives the goods.⁷⁴ The rights of the seller's lien as a security interest will be governed by Article 2,⁷⁵ but priority will be

64. IOWA CODE § 574.1 (1973).

65. *Id.* § 580.1.

66. *Id.* § 554.9204(2)(a).

67. *Id.* § 581.2.

68. *Id.* § 581.1.

69. *Id.* § 554.2705.

70. *Id.* § 554.7307.

71. *Id.* § 554.7209.

72. See text at note 23 *supra*.

73. IOWA CODE § 554.2705(3) (1973).

74. *Id.* §§ 554.2705(2), 554.9113.

75. *Id.* § 554.9113.

determined by Article 9 provisions.⁷⁶ The seller's interest is non-consensual, possessory⁷⁷ and occurs with respect to services furnished in the seller's ordinary course of business. Being within the terms of 554.9310 and not expressly providing otherwise, the seller's interest will prevail over a conflicting security interest.

B. *Lien of a Carrier*

A carrier has a non-consensual, possessory lien on goods covered by a bill of lading for reasonable charges for storage, transportation, expenses necessary for the preservation of the goods or incurred in their sale pursuant to law.⁷⁸ Where the carrier was required by law to receive the goods for transportation, the lien is effective against the consignor or any person entitled to the goods unless the carrier had notice of lack of authority to subject the goods to such charges.⁷⁹ Any other lien under the section is effective against the consignor and any person who permitted the bailee to have control or possession of the goods, unless the carrier had notice of the bailor's lack of authority.⁸⁰ Under either formula a secured party who has taken a non-possessory security interest has by hypothesis allowed the debtor to have control or possession of the goods.⁸¹ The notice exception in both formulas requires actual, not constructive, notice.⁸² Thus, where the carrier had no actual notice, the carrier's lien will take priority over an existing, perfected security interest.

C. *Lien of a Warehouseman*

A warehouseman has a non-consensual, possessory lien against the bailor on goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage, transportation and other⁸³ specified expenses relating to the goods. However, the lien is ineffective against a secured party who has not delivered or entrusted the goods or any document of title to the bailor or acquiesced in the procurement by the bailor of any document of title.⁸⁴ Thus, the warehouseman's lien statute provides otherwise within the meaning of section 554.9310 and the special priority will not apply to the lien.⁸⁵ Thus, the warehouseman's lien under section 554.7209(1) as well as the security interest reserved under section 554.7209(2) is subordinate to existing, perfected security interests in the goods if the secured party has

76. J. WHITE & R. SOMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 22-10, at 781 (1972).

77. *Id.*

78. IOWA CODE § 554.7307(1) (1973).

79. *Id.* § 554.7307(2).

80. *Id.*

81. See note 21 *supra*, § 33.6, at 891.

82. *Id.*; UNIFORM COMMERCIAL CODE § 7-307, Comment (1972 ed.).

83. IOWA CODE § 554.7209(1) (1973).

84. *Id.* §§ 554.7209(3), 554.7503(1). And see UNIFORM COMMERCIAL CODE § 7-209, Comment 3 (1972 ed.); note 21 *supra*, § 33.6, at 889.

85. UNIFORM COMMERCIAL CODE § 7-209, Comment 3 (1972 ed.).

authorized or acquiesced in the bailment.⁸⁶

IX. CONCLUSION

The statutory liens are among the interests given by state statute which can prevail over security interests. Section 9-310 gives statutory, possessory liens priority but allows the states to provide otherwise if they so desire. With respect to possessory liens, the section provides a rule of priority which is relatively simple in its application. Such is not the case with non-possessory liens with respect to which priority is determined only by examining a maze of statutes and cases relating to each lien. There has been some discussion about whether section 9-310 need be limited to possessory liens.⁸⁷ In any event, the determination of priorities between security interests and non-possessory liens, and between the liens themselves where they may conflict, would be both simplified and clarified by a more concise expression of legislative intent in the lien statutes.

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86. See note 12 *supra*, § 33.6, at 890.

87. See Note, *Nonconsensual Liens under Article 9*, 76 YALE L.J. 1649, 1656-58 (1967).

Case Notes

ANTITRUST—REGULATION BY THE FEDERAL POWER ACT DOES NOT IMMUNIZE ELECTRIC UTILITY FROM SHERMAN ACT SANCTION AGAINST REFUSALS TO DEAL INTENDED TO CREATE OR MAINTAIN A MONOPOLY.—*Otter Tail Power Co. v. United States* (U.S. Sup. Ct. 1973).

The defendant-appellant is an investor-owned utility which provides electricity at retail to small towns in Minnesota, North Dakota, and South Dakota. Defendant is the exclusive supplier of electric power for most of these towns, operating under franchise agreements of ten to twenty years duration. A few of these towns, upon the expiration of their agreements, elected to establish their own municipal power systems. They sought to purchase wholesale power from defendant or the use of defendant's lines to transport, or "wheel," power from other wholesale sources to the municipal systems. Defendant refused to sell at wholesale and refused the use of its lines for the wheeling of other wholesale power. Defendant also instituted litigation against communities which had other access to wholesale supplies. This litigation was alleged by the government to be purely for the purpose of stalling efforts by those communities to set up their own municipal systems. The government charged that defendant's refusals to deal and its other conduct designed to protect its monopolistic position were violations of the Sherman Act. The United States District Court for the District of Minnesota granted injunctive relief requiring defendant to either sell power at wholesale or transfer power over its lines from other wholesale sources to its former retail customers.¹ *Otter Tail* appealed directly to the United States Supreme Court² asserting that it was not subject to antitrust laws because it was regulated under the Federal Power Act of 1935. *Held*, affirmed in part and vacated and remanded in part, three justices dissenting in part and concurring in part, two justices not sitting. *Otter Tail* is not insulated from antitrust regulation by reason of the Federal Power Act of 1935, and the district court's decree does not conflict with the regulatory responsibilities of the Federal Power Commission. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

1. *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971); *noted at* 1972 L. & Soc. ORD. 507; 2 MEM. ST. U.L. REV. 432 (1972); 50 TEX. L. REV. 1023 (1972).

2. 15 U.S.C. § 29 (1970). Referring to preceding antitrust sections, the section states: "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

This section is not applicable to civil penalty actions brought by the United States seeking money damages. *United States v. ITT Continental Baking Co.*, 462 F.2d 1104 (10th Cir. 1972).