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## Commercial Law Priorities under UCC 9-310 Relinquishing and Regaining Possession of Repaired Equipment - Thorp Commercial Corporation v. Mississippi Road Supply

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COMMERCIAL LAW  
PRIORITIES UNDER UCC 9-310  
RELINQUISHING AND REGAINING  
POSSESSION OF REPAIRED EQUIPMENT

*Thorp Commercial Corporation v. Mississippi Road Supply*, 348 So. 2d 1016 (Miss. 1977).

On June 9, 1972, Thorp Commercial Corporation purchased a new International Model 7D-15(C) Power-Shift Crawler Tractor from Mississippi Road Supply. Four days later Thorp entered into a lease agreement with James E. Herrin on the equipment. This agreement gave Thorp a security interest, which was duly recorded.<sup>1</sup> In April and May of 1974 Mississippi Road Supply made repairs on the tractor. Herrin failed to pay for the repairs, and Mississippi Road Supply subsequently relinquished the tractor to Herrin,<sup>2</sup> who shortly thereafter defaulted on his Thorp lease contract. The tractor was repossessed by Mississippi Road Supply, and Thorp brought a replevin action.

An equally divided Mississippi Supreme Court affirmed the judgment of the Circuit Court of Hinds County<sup>3</sup> by entering judgment on a replevin bond in favor of Mississippi Road Supply against Thorp Commercial Corporation and its surety. The court ruled that Mississippi Road Supply had made improvements which were necessary to maintain the equipment in operational condition and to prevent its depreciation.<sup>4</sup> Consequently, a lien was created in favor of Mississippi Road Supply within the meaning of section 75-9-310.<sup>5</sup> This lien, the court ruled, continued its priority over Thorp's security interest, even though Mississippi Road Supply voluntarily parted with the equipment and subsequently regained its possession.<sup>6</sup> *Thorp Commercial Corporation v. Mississippi Road Supply Company*, 348 So. 2d 1016 (Miss. 1977).

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<sup>1</sup>Thorp later assigned its security interest to ITT Industrial Credit Company. *Thorp Commercial Corporation v. Mississippi Road Supply*, 348 So. 2d 1010, 1017 (Miss. 1977).

<sup>2</sup>Prior to relinquishment Mississippi Road Supply attempted to secure payment by having Herrin execute a promissory note and security agreement. *Id.*

<sup>3</sup>*Id.* at 1018.

<sup>4</sup>*Id.* at 1017.

<sup>5</sup>MISS. CODE ANN. (1972). Section 75-9-310 recognizes the mechanic's common law lien and gives it priority over a previous security interest.

<sup>6</sup>Although appellee had maintained that its subsequent security agreement with Herrin, note 2, was valid, the court made no ruling on this issue. However, in *Smith & Vaile Co. v. Butts*, 72 Miss. 269, 270, 16 So. 242, 243 (1894), the court held a mechanic had not waived his lien by taking other security. An earlier ruling to the same effect had been laid down in *Parberry v. Johnson*, 51 Miss. 291, 297 (1875).

The supreme court reasoned that the repairs were necessary,<sup>7</sup> thus creating a lien in favor of Mississippi Road Supply as given by section 85-7-101.<sup>8</sup> The court further noted that under Mississippi Code section 85-7-105<sup>9</sup> Mississippi Road Supply retained its lien even after it had parted with possession. Noting that under pre-Uniform Commercial Code law the mechanic's lien had been given priority over a previously perfected security interest,<sup>10</sup> the court held that section 85-7-101 and new section 75-9-310, also creating a possessory lien with priority over a previously perfected security interest, were to be read and interpreted in *pari materia*,<sup>11</sup> and that Mississippi Road Supply, being restored to the possession of the equipment voluntarily, therefore had a lien superior to the security interest of Thorp Commercial Corporation as given by the above statutes.<sup>12</sup> In reaching this conclusion, the court stated that there had been no change in the status or the rights of the parties between the time Mississippi Road Supply relinquished and regained possession of the equipment.<sup>13</sup>

In the dissent, Justice Patterson maintained that the legislature's adoption of the Uniform Commercial Code manifested its intention to have priorities decided "in a uniform manner, by statute, and not by choice of debtor or by the result of a race between creditors for possession."<sup>14</sup> Section 85-7-105 is silent as to priorities,<sup>15</sup> and court decisions under it, Justice Patterson argued, were determined by pre-Code rationales.<sup>16</sup> In addition, section 75-9-310 requires the lienholder to retain possession of the property as "opposed to relinquishment and regained possession."<sup>17</sup> If this seemed inequitable, Justice Patterson argued that there were other remedies available to the mechanic.<sup>18</sup> Justices Sugg, Walker, and Broom joined in the dissent.<sup>19</sup>

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<sup>7</sup>348 So. 2d at 1017.

<sup>8</sup>MISS. CODE ANN. (1972).

<sup>9</sup>*Id.* Section 85-7-105 provides for a continued existence of the lien after the mechanic voluntarily parts with goods.

<sup>10</sup>348 So. 2d at 1017.

<sup>11</sup>*Id.* at 1018. For a case presenting a clear working definition of *pari materia*, see *Dupont v. Mills*, 39 Del. 42, 196 A. 168, 177 (1937) (Consistent statutes, though enacted at different dates, relating to the same subject matter, are treated prospectively and construed together as one act).

<sup>12</sup>348 So. 2d at 1018.

<sup>13</sup>*Id.*

<sup>14</sup>348 So. 2d 1016, 1018.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>The repairman, according to Justice Patterson, can retain possession as provided by statute. He can take a security interest in parts used in the repair and give notice to prior creditors. He can obtain the prior secured party's consent. Finally, upon relinquishment he can attain the priority of a judgment creditor. *Id.*

<sup>19</sup>*Id.*

The common law mechanic's or artisan's lien could be created only when the mechanic made repairs or finished services to the owner's property.<sup>20</sup> The lien arose while the property remained in the mechanic's possession and was said to denote a legal claim or charge on the property as security for payment of such services or repairs.<sup>21</sup> The common law decisions further required that the mechanic's improvements to the owner's property not only be necessary but also represent increased value to the owner.<sup>22</sup> A further requirement by many courts was that the owner have consented to the repairs.<sup>23</sup> However, many courts were of the inclination that the owner should not be given the value of improved property without some compensation to the mechanic; accordingly, numerous ways were found to reimburse the mechanic for his services.<sup>24</sup>

It was invariably recognized at common law that a mechanic's lien was in force only as long as the mechanic maintained physical possession of the repaired article.<sup>25</sup> Involuntary relinquishment, however, was ineffective to destroy the lien.<sup>26</sup> Only when the lienholder voluntarily parted with the materials was the lien said to have been lost.<sup>27</sup>

<sup>20</sup> See generally 2 G. GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY § 33 (1965).

<sup>21</sup> See generally 53 C.J.S. *Liens* § 1.

<sup>22</sup> See, e.g., *Funchess v. Pennington*, 205 Miss. 500, 513, 39 So. 2d 1, 2 (1949); *Devan Motor Co. v. Bailey*, 177 Miss. 441, 449, 171 So. 342, 344 (1936).

<sup>23</sup> See, e.g., *Huntley v. Drummond*, 226 Miss. 753, 759, 85 So. 2d 188, 190 (1956) (Owner's auto repaired by mistake); *Smith v. Gardner Hardware Co.*, 83 Miss. 654, 656 (1903).

<sup>24</sup> See, e.g., 177 Miss. at 449, 171 So. at 344. See generally 2 G. GILMORE, *supra* note 20, at § 33.3 According to Gilmore, the courts offered the following rationales for recognizing the mechanic's lien as well as for giving it priority over other existing debts:

1. The lienholder had increased the value of the property.
2. The holder of the security interest had consented more or less to the repairs.
3. The mortgagor or vendee in possession was held to be an agent of the mortgagee or vendor who, consequently, had authorized the repairs.
4. The vendee's promise to maintain the property in good condition was held inconsistent with his promise to keep the property free of liens.
5. The repaired property was found to be income-producing.
6. Repairs were held to be ordered by the owner who was construed as a beneficial owner.

<sup>25</sup> See, e.g., *Vane v. Newcombe*, 132 U.S. 220, 239 (1889); *accord*, *Gregory v. Morris*, 96 U.S. 619, 623 (1877) (Possession requirement of lien of vendor of personal property); *Patapsco Trailer Servs. & Sales, Inc. v. Eastern Frieghtways, Inc.*, 271 Md. 558, 318 A.2d 817, 821 (1974); *Johnson v. Wamble*, 205 So. 2d 921, 922 (Miss. 1968); *Stewart v. Flowers*, 44 Miss. 513, 518 (1870) (noting the possession requirement of attorney's lien by reason of "meritorious and valuable services").

<sup>26</sup> See, e.g., *General Motors Acceptance Corp. v. Colwell Diesel*, 302 A.2d 595, 597 (Mo. 1973) (loss of lien by replevin action). See generally 2 G. GILMORE, *supra* note 20 § 33.

<sup>27</sup> See, e.g., 132 U.S. at 239; *United States v. Crittendon*, 563 F.2d 678, 691 (5th Cir. 1977) (Mechanic voluntarily returned tractor after each repair); *Hendrickson & Sons*

Judicial holdings under the common law also invariably noted that the mechanic's repossession of the repaired materials after voluntary surrender did not revive the lien.<sup>28</sup>

The mechanic's lien exists in several guises among the states.<sup>29</sup> In some it may be found in its original common law form.<sup>30</sup> Others have adopted it virtually unchanged in statutory form.<sup>31</sup> Some states allow the mechanic to bring an action to enforce the common law as well as statutory lien.<sup>32</sup> Finally, there are states which have converted it into a non-possessory lien.<sup>33</sup>

Before the adoption of the Uniform Commercial Code, the courts in the various states were divided on the issue of whether a common law mechanic's lien, statutory or otherwise, was superior to a prior security interest, usually that of a conditional vendor.<sup>34</sup> Statutory law either did not mention priority, subordinated the lien, or declared the lien superior.<sup>35</sup> Where it was given priority, differing rationales were used to support and uphold the legislative enactment.<sup>36</sup>

The adoption of the Uniform Commercial Code by the states settled the issue of priority between the mechanic and the secured party. The Code in section 9-310 unequivocally gives the mechanic in possession of goods or equipment that he has repaired, priority over a prior security interest, even though the mechanic has knowledge of the security interest and even though the owner has not consented to the repairs, unless there is a statute that provides otherwise.<sup>37</sup> Where the

Motor Co. v. Osha, 331 N.E.2d 743, 757 (Ind. App. 1975) (Auto surrendered after several repairs).

<sup>28</sup> See, e.g., 318 A.2d at 820; Central Motor Exch. v. Thompson, 236 So. 2d 736, 737 (1970) (Replevin action could not revive lien); 205 So. 2d at 922; People v. Photo, 45 Cal. App. 2d 345, 354, 114 P.2d 71, 76, (1941).

<sup>29</sup> See generally 2 G. GILMORE, *supra* note 20 § 33.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Gables Lincoln-Mercury, Inc. v. First Bank & Trust Co., 219 So. 2d 90, 92 (Fla. App. 1969) (Security interest prior to Code enactment was superior to garageman's lien); Manufacturers Acceptance Corp. v. Gibson, 220 Tenn. 654, 656, 422 S.W.2d 435, 436 (1967) (Court noted priority of artisan's lien under pre-Code Tennessee law); Westlake Fin. Co. v. Spearman, 64 Ill. App. 2d 342, 345, 213 N.E.2d 80, 82 (1965) (Court acknowledged priority of holder of conditional sales contract prior to Code's adoption); 205 Miss. at 512, 39 So. 2d 1 (burden required for priority of mechanic claiming lien); Broom v. Dale, 109 Miss. 52, 64, 67 So. 659, 662 (1915) (lien held to be superior to prior security interest).

<sup>35</sup> See generally 2 G. GILMORE, *supra* note 20 § 33.

<sup>36</sup> *Id.* Gilmore points out that some courts drew analogy with Maritime law, holding that contract liens ranked in the inverse order of creation, the most recent having priority. Other courts gave the mechanic the status of a buyer in ordinary course who, consequently, was not charged with constructive notice. See also note 24, *supra*.

<sup>37</sup> U.C.C. § 9-310 and official comment (1972 version). Annot., 69 A.L.R.3d 1162 (1976).

statute is silent, the official comment to section 9-310 states that the lien takes priority over the security interest.<sup>38</sup> Section 9-310 designates this lien as one having been conferred either by statute or rule of law.<sup>39</sup> Consequently, decisions based on 9-310 have held the common law requirement of continuous possession essential to the mechanic's right to assert the lien.<sup>40</sup>

Mississippi, like many of its sister states, adopted the common law mechanic's lien in statutory form.<sup>41</sup> This section has been judicially construed as an adoption of the lien given at common law.<sup>42</sup> And, like some of its sister states, Mississippi, through its legislature and in an effort to put the mechanic on firmer footing, allowed this possessory lien, upon surrender by the repairman, to continue to the same extent it was allowed in cases of liens for purchase-money goods.<sup>43</sup> Court decisions under this statute held that the repairer was given priority over a party with a security interest in the same goods and upon voluntary surrender of possession had the procedural remedies of a purchase-money lienor.<sup>44</sup>

In 1966 the Mississippi Legislature enacted the Uniform Commercial Code, intending it as "an act to be known as the Uniform Commercial Code, relating to certain commercial transactions ... to make uniform the law with respect thereto; and repealing inconsistent legislation."<sup>45</sup> Section 9-310 was enacted verbatim, thus awaiting judicial interpretation in the Mississippi courts. Inexplicably, in 1968 the legislature amended Mississippi Code section 355 to give the lienholder the right to enforce his lien as provided in sections 85-7-31

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<sup>38</sup>*Id.* For a case discussing the weight to be given the official comments, see *In Re Yale Express, Inc.*, 370 F.2d 433, 437 (2nd Cir. 1966) (comments are "powerful dicta").

<sup>39</sup>U.C.C. (1972 version).

<sup>40</sup>*See, e.g.*, *Forest Cate Ford v. Fryar*, 62 Tenn. App. 572, 465 S.W.2d 882, 884 (1971); 302 A.2d at 601; *Pennington v. Alexander*, 103 Ill. App. 2d 145, 242 N.E.2d 788, 789 (1968).

<sup>41</sup>MISS. CODE ANN. § 1383 (1880) (current version at MISS. CODE ANN. § 85-7-101 (1972)).

<sup>42</sup>*See* 109 Miss. at 60, 67 So. at 660.

<sup>43</sup>MISS. CODE ANN. § 3075 (1906) (amended in 1968) (current version at MISS. CODE ANN. § 85-7-105). Section 85-7-105 presently gives the mechanic lienholder the remedies of 85-7-31 and 85-7-53. Section 85-7-31 calls for commencement of suit by filing affidavit before authorized officer. Section 85-7-53 is applicable where lienholder's interest is in a steamboat or watercraft. A buyer takes such equipment subject to the rights of such a lienholder.

<sup>44</sup>*See, e.g.*, 236 So. 2d at 737; *Commercial Secs. Co., Inc. v. Kriner*, 53 So. 2d 92 (Miss. 1951); 177 Miss. 441, 171 So. 342. *But cf.* *Turner v. Colonial Fin. Corp.*, 467 F.2d 202 (5th Cir. 1972) (holding Mississippi's replevin statute unconstitutional because it did not provide for notice and a hearing before seizure of debtor-possessor's property).

Apparently, the latter case accounts in part for appellee's failure to use 85-7-31 to recover the tractor. *See* Brief for Appellee at 7, n. 1.

<sup>45</sup>1966 Miss. Laws Ch. 316 at 431.

and 85-7-53,<sup>46</sup> although the continued conversion of the possessory lien (as recognized under common law and as given effect under the statutory scheme of the Uniform Commercial Code) into a non-possessory lien was in derogation of its historical treatment<sup>47</sup> and therefore in conflict with the type of lien recognized under section 75-9-310. Which way the Mississippi courts would go or what alternative interpretations could be devised did not come squarely before the supreme court until the instant case was presented for decision.<sup>48</sup>

An analysis of the opinion in the instant case reveals that the court found the necessary prerequisites for a valid mechanic's lien under section 85-7-101. That is, the court found that the repairs to the tractor "were necessary to maintain the tractor in operational condition and to prevent its depreciation."<sup>49</sup> The court noted the priority of Mississippi's mechanic's lien over a security interest under pre-Code law.<sup>50</sup> Parting with possession, the court held, did not mean loss of the lien.<sup>51</sup> The possession requirement for priority under 75-9-310 was met when Herrin restored the tractor to Mississippi Road Supply.<sup>52</sup> As such, 85-7-101, conferring the lien, and 75-9-310, requiring possession, the court concluded, must be read together as dealing with the same subject matter, manifesting a clear intent of the legislature to reverse "long-established principles of law and equity."<sup>53</sup>

In finding for the appellee, the court in the instant case makes only a cursory analysis of the common law lien. Indeed, if its analysis had been in more depth, the decision would have been rendered in the appellant's favor. The decision pays homage to the possession requirement of the lien but makes no attempt to explain the ramifications of

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<sup>46</sup>Note 43, *supra*.

<sup>47</sup>For a discussion of statutes in derogation of the common law, see 3 C. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTIONS 61 (4th ed. 1974). For Mississippi cases dealing with such statutes, see *Day v. Hamilton*, 237 Miss. 472, 115 So. 2d 300 (1959); *Houston v. Holmes*, 202 Miss. 300, 32 So. 2d 138 (1947).

<sup>48</sup>The status of the non-possessory lien in light of a states adoption of UCC 9-310 had been rendered ineffective in jurisdictions considering the question. See, e.g., *Balzer Machinery v. Kline Sand & Gravel*, 271 Or. 596, 533 P.2d 323, 324 (1975); 62 Tenn. App. 572, 465 S.W.2d at 883-884; 318 A.2d. at 820.

*Thorp v. Mississippi Road Supply*, however, is the first instance where a mechanic actually claimed restoration of the lien by subsequent repossession of the repaired equipment, although there are instances where courts have held repossession did not revise the lien where no claim was made that it did. See, e.g., 318 A.2d at 821; 114 P.2d at 76.

Since the *Thorp* decision, the court on similar facts has upheld its holding in favor of the mechanic lienholder. *ITT Indus. Credit Co. & Fireman's Ins. Co. v. Robinson & Jones*, 350 So. 2d 52 (Miss. 1977).

<sup>49</sup>348 So. 2d at 1017.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 1018.

<sup>53</sup>*Id.*

voluntarily surrendering possession.<sup>54</sup> The issue has never been squarely before the United States Supreme Court, but dictum in *Vane v. Newcombe*<sup>55</sup> was to the effect that the right to the common law lien was given up when the lienholder surrendered possession of the equipment.<sup>56</sup> In accord are numerous state appellate decisions where the question of possession was central.<sup>57</sup> In *Johnson v. Wamble*<sup>58</sup> the Mississippi Supreme Court held the mechanic had lost his lien when he did not retain possession.<sup>59</sup> There the appellee had made repairs on a bulldozer which was subsequently sold prior to seizure. Clearly, the mechanic's lien, as used at common law and as enacted under Mississippi law, held continuous possession essential.

The opinion of the court in the instant case omits the enforcement provision of 85-7-105.<sup>60</sup> Originally, enforcement called for the procedural remedies of a purchase-money lien<sup>61</sup> but was later amended to the remedial guideline of 85-7-31 and 85-7-53.<sup>62</sup> In short, 85-7-105 makes the common law lien of 85-7-101 a nonpossessory lien. Such a lien, of course, is in derogation of its common law ancestry.<sup>63</sup> For this reason, the judicial holdings in this state dealing with loss of possession maintained that the lien, when voluntarily surrendered, was only enforceable to the extent of a purchase-money lien.<sup>64</sup> Thus the lienholder followed the procedure outlined under the purchase-money section of the Mississippi Code. In no case, however, was it assumed that a purchase-money lienholder could physically repossess the goods. As recently as 1970, in *Central Motor Exchange of Mississippi v. Thompson*,<sup>65</sup> the supreme court held that even a replevin action by the mechanic lienholder was improper where 85-7-105 mandated the purchase-money procedures.<sup>66</sup> Logically, such a holding implies that any action as abrupt as a physical retaking or repossessing, circumven-

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<sup>54</sup> See, e.g., 331 N.E.2d at 755.

<sup>55</sup> 132 U.S. 220.

<sup>56</sup> *Id.* at 239.

<sup>57</sup> See, e.g., 318 A.2d at 821; 302 A.2d at 547; 331 N.E.2d at 755.

<sup>58</sup> 205 So. 2d 921.

<sup>59</sup> *Id.* at 922.

<sup>60</sup> "[T]he lienholder... may enforce the same in like manner as is provided in sections 85-7-31 and 85-7-53." MISS. CODE ANN. (1972).

<sup>61</sup> See note 43, *supra*.

<sup>62</sup> *Id.*

<sup>63</sup> The Mississippi Supreme Court has held that "statutes are not to be understood as effecting a change in the common law beyond that which is clearly indicated." 115 So. 2d at 303.

It is therefor somewhat disconcerting why a similar and more cautious line of reasoning was not followed in the instant case. The legislative intent here at best is confusing.

<sup>64</sup> See, e.g., 236 So. 2d at 737; 53 So. 2d at 92; 177 Miss. at 441, 171 So. at 342.

<sup>65</sup> 236 So. 2d 736.

<sup>66</sup> *Id.* at 738.



ting any type of judicial condonation, would be invalid. Thus the retaking of the tractor by Mississippi Road Supply was not a valid enforcement of its lien.

The court's reading of 9-310 assumes a naïveté that just is not present in the commercial world. Although there is definitely a need for language that is direct, concise, and unequivocal, selected and straightforward interpretations of the provisions of the Uniform Commercial Code are not always warranted. Obviously, the inclusion of official comments to illustrate and interpret the expansive sections of the Code attests to the truth of the preceding statements.<sup>67</sup> The court failed to note that 75-9-310<sup>68</sup> involves those liens given at common law or by statute.<sup>69</sup> In either case, the mechanic has made repairs and is in possession of the equipment. Therefore all of the rules or requirements for the existence of a valid lien at common law are still applicable. An essential ingredient of a lienholder's claim to a valid lien was that he have continuous possession of the equipment.<sup>70</sup> If possession was voluntarily surrendered, the lien was lost.<sup>71</sup> Mississippi Road Supply, after voluntarily releasing the equipment to Herrin, could not revive its lien by repossessing the goods. This is the thrust of modern decisions under the Code, although *Thorp Commercial Corporation v. Mississippi Road Supply* appears to be the first instance where a voluntarily surrendered item was later regained by a lienholder who also reasserted his lien.<sup>72</sup>

The court's dismissal of *Forest Cate Ford, Inc. v. Fryar*<sup>73</sup> on grounds that it involved a nonpossessory lien<sup>74</sup> leaves out several relevant similarities to the instant case. Both cases involve common law liens, although Mississippi's is in statutory form, as well as non-possessory statutory liens. In *Forest Cate Ford, Inc.* the Tennessee court, referring to the question of priority between a security interest and a non-possessory mechanic's lien, held the repairman under 9-310 of the Uniform Commercial Code must now retain possession.<sup>75</sup>

<sup>67</sup> See, e.g., 370 F.2d at 437.

<sup>68</sup> MISS. CODE ANN. (1972).

<sup>69</sup> *Id.*; see also note 39 and text *infra* at 70.

<sup>70</sup> See note 25, *supra*.

The purpose of the possession requirement, as one federal justice explained, may be an attempt to draw the line between the repairman's status as a mechanic entitled to superpriority and his status as a general creditor....The possession requirement allows the mechanic to be master of his own fate; he maintains superpriority as long as he retains possession of the collateral.

Thus the mechanic can retain possession or obtain "appropriate releases" from the secured party. 563 F.2d at 691-692, n. 23. (*Crittenden* deals with the priority of Federal Tax liens over a mechanic's lien; however, it applies the provisions of the common law possessory lien as codified in U.C.C. 9-310 in giving priority to the Federal Tax lien to the extent the mechanic had relinquished possession of the repaired goods).

<sup>71</sup> See note 27, *supra*.

<sup>72</sup> See note 48, *supra*.

<sup>73</sup> 62 Tenn. App. 572, 465 S.W.2d 882.

<sup>74</sup> 348 So. 2d at 1018.

<sup>75</sup> 62 Tenn. App. at 574, 465 S.W.2d at 884. "We conclude the plain import of

Thus it would not seem unnatural that section 85-7-105 must yield to 75-9-310, which requires continuous possession of the repaired material.

At this point, it is rather palpable that 85-7-105 and 75-9-310 are in conflict. And if, as the court seems to maintain, section 85-7-105 is a continuance of the lien in 85-7-101, which is an enactment of the lien at common law, then 85-7-101 is also in conflict.<sup>76</sup> Therefore, there can be no *pari materia* interpretation of 85-7-101 with 75-9-310 as the court ruled in the instant case.<sup>77</sup> The decision borders closely on a legislative enactment; it is not the court's function to make laws delineating what a legislature intended by certain statutes which are in conflict and can only be harmonized by a light reading of a Uniform Commercial Code provision.

Consequently the decision in the instant case places Mississippi law on priorities between the mechanic lienholder and a party with a security interest in the same collateral under the umbrella of pre-Code uncertainty. The legislative intent to have priorities decided in a uniform manner is thwarted.<sup>78</sup> This decision renders 75-9-310 ineffective where the mechanic regains property and the secured party is left without remedy.

The holding in this case poses many real and unwarranted problems for the secured party. A number of speculations arise. The debtor, theoretically, can choose who is to have priority, the mechanic or the secured party.<sup>79</sup> Competition may arise between them in obtaining the collateral.<sup>80</sup> Collusion may raise its diabolical head. Sales and leasing activities may be entered into with some hesitancy by parties accustomed to taking security interests. The mechanic may be tempted to go after the goods rather than pursue other, more time consuming avenues. It is possible that litigation in this area will become more frequent since the good faith compliance with the priority provisions of the Uniform Commercial Code will now be a guessing game.<sup>81</sup>

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Tenn. Code § 47-9-310 is the repairman must retain possession of the vehicle in order to maintain priority of his statutory lien...." *Id.*

<sup>76</sup>Section 85-7-101 conflicts mainly because the court has chosen to read 85-7-105 as an extension of the possessory lien. If 85-7-105 is read simply as creating a non-possessory lien, then there is no conflict with the common law lien delineated in 85-7-101. The conflict thus becomes one between 85-7-105 and 75-9-310. Its resolution would simply be to construe 85-7-101 and 75-9-310 according to their common law interpretations as set forth in U.C.C. 9-310 and its official comment, leaving it to the legislature to provide otherwise. See e.g., 533 P.2d 323.

<sup>77</sup>348 So. 2d at 1018.

<sup>78</sup>*Id.* (Patterson, J., dissenting).

<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup>Compare the similarities of Mississippi Road Supply's actions in a subsequent litigation, see 350 So. 2d 52.

In essence, the value of a uniform system of priorities is negated, while the legislature's enactment of the Uniform Commercial Code intends the opposite.<sup>12</sup>

*Jessie L. Evans*

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<sup>12</sup> 348 So. 2d 1016 (Patterson, J., dissenting).