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Attachment - Storage Lien - Sheriff's Power to Encumber

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Attachment — Storage Lien — Sheriff's Power To Encumber

The president of Midwest Livestock Commission Company (Midwest), a Nevada corporation, transferred title to a certain aircraft in California to a third party and left it with Pemberton Flying Service (Pemberton) for repairs. A suit was brought against Midwest in California and the aircraft was attached, the sheriff instructing Pemberton to hold it during pendency of the suit. Thereafter, Midwest was adjudged a bankrupt by the Nevada District Court. The levy of attachment and the purported transfer of title were held to be void, and the court ordered a sale of the aircraft with a lien for repairs and storage in favor of Pemberton to attach if found to exist. The referee in bankruptcy determined that Pemberton's lien should be allowed in the amount of $272.04 for repairs and $250.00 for storage, the latter limited by section 1208.62 of the California Code of Civil Procedure.[1] Pemberton petitioned for review of the referee's decision, contending that his lien should be adjudicated in the amount of $272.04 for repairs and $2,291.54 for storage, computed at the rate of $3.50 per day. *Held*: (1) When an aircraft is left for repairs, the aircraft is not impliedly left for storage; (2) A Sheriff cannot encumber the aircraft with a storage lien enforceable against the owner. *In re Midwest Livestock Commission Co.*, 295 F. Supp. 955 (D. Nev. 1967).

In general, there were two typical cases in which a bailee at common law could acquire a lien: (1) Where he had by labor contributed to the improvement of the thing bailed causing its value to increase, or (2) where he was engaged in a trade regarded as a public employment, in which the law left him no choice but to accept the bailment when offered.[2] The artisan's lien, representative of the first type, extended to tradesman who received personal property of his bailor under an express or implied contract to improve or repair it. The requirement necessary to establish the lien included: (1) Possession; (2) request being made by the proper party; (3) enhancement of value. Thus, if possession were lost through a voluntary surrender, the lien was lost.[3] Similarly, the request for repairs or alterations had to be at the instance of the owner or his agent, with certain exceptions.[4] Finally, it was necessary that the labor and materials

[1] WEST. CAL. CIV. P. CODE § 1208.62 (1955).

[2] Of this second type were the liens of common carriers, innkeepers, and warehousemen. 8 AM. JUR. 2d *Bailments* § 227 (1963).

[3] Clark Bros. & Co. v. Pou, 20 F.2d 74 (4th Cir. 1927); Jess H. Young & Son, Inc. v. Victory Tool & Die Co., 11 Cal. Rptr. 516 (1961); Solomon v. Bok, 49 Misc. 493, 98 N.Y.S. 859 (1906). The lien survived if wrongfully recovered by the Bailor. Bruley v. Rose, 57 Iowa 651, 11 N.W. 629 (1882). *See also* Horowitz v. Hurlburt Motor Truck Co., 176 N.Y.S. 514 (1919) (removed without bailee's consent).

[4] To this rule an early exception arose where it was possible to imply consent. Under admiralty law, it was early recognized that the master of a vessel could give the artisan making repairs, such as necessary for continuation of a voyage, a lien upon the ship superior to all existing interests. The J. E. Rumbell, 178 U.S. 1 (1892); The St. Jago de Cuba, 9 Wheat. 409 (U.S. 1824); The Scotia,

furnished actually added to the value of the chattel. Thus, bailees who did not hold themselves out as public warehousemen or common carriers could claim no lien for the storage or safekeeping of a chattel, even though economically the value of the goods was enhanced.[5] As a result of these deficiencies, there has been considerable statutory modification of the lien law in almost all jurisdictions. The trend has been to codify the common-law liens and to establish others which either expand those known at common law or provide for liens whose origins were unknown at common law.[6]

The statutory liens in California are representative, for the most part, of those of other jurisdictions. In the case of service or repairs of chattels, California law provides in section 3051 of the California Civil Code:

> Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor or skill, employed for . . . safekeeping, or carriage thereof, has a special lien thereof, dependent on possession, for the compensation . . . which is due to him from the owner for such service; a person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for this reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid; (Liens given in favor of livery stable proprietors, agisters, foundry proprietors, veterinarians, garage keepers, and trailer park keepers for balances due). . . .[7]

The provisions of this section are remarkably similar to the Aircraft Lien Provision, which provides:

> Subject to the limitations set forth in this chapter, every person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon and furnishing supplies or materials for, and for the storage, repair, or safekeeping of, any aircraft,

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35 F. 907 (D. N.Y. 1888). An analogous rule was adopted by the common law in cases of pledges. A pledgee has a lien upon pledged chattels for expenditures made in preserving the chattel. Bank of British Columbia v. Frese, 116 Cal. 9, 47 P. 783 (1897); Rowan v. State Bank, 45 Vt. 160 (1872). It seems to be settled that the possessor of a chattel may create a lien upon it whenever the consent of the legal owner can be implied. The doctrine was enunciated in Williams v. Allsup 10 C.B. (N.S.) 417 (1861). In this early case the mortgagor of a vessel delivered it to a shipwright for repairs and subsequently the shipwright refused to deliver the ship claiming a common law lien. The court sustained the common law lien, no doubt being heavily influenced by the rule in admiralty. Later cases went considerably further and allowed liens where repairs were only reasonably necessary. Welber Implement & Auto Co. v. Pearson, 132 Ark. 101, 200 S.W. 273 (1917); Case v. Allen, 21 Kan. 217 (1878); *see also* cases at note 13, *infra*. Naturally, the requirement of necessity, is subject to difficulty in construction. The admiralty rule is apparently the most reasonable, and it appears to have been most frequently alluded to, *e.g.* necessity is present if the services were rendered to preserve the chattel or to permit its continued use in the manner contemplated by the parties. See 27 COL. L. REV. 81 (1927).

[5] Johnson v. Brizendire, 141 Ore. 477, 18 P.2d 247 (1933); Mitchell v. Standard Repair Co., 275 Pa. 328, 119 A. 410 (1929); Guce v. Berkner, 148 Minn. 64, 180 N.E. 923 (1921).

[6] Typical liens at common law included, in addition to those at note 2, *supra*, the liens of artisans and hotelkeepers. By statute, liens are given to keepers of Boarding houses & lodginghouses, agisters, garage keepers, bankers, veterinarians, and foundry proprietors. See 53 C.J.S. *Liens* § 3, 5 (1948). Much variation is found in the lien law between the different jurisdictions, such being usually attributed to socio-economic differences. See Boynton, *Extent to Which Common-Law Artisans Lien has been Supplemented by Statute*, 37 MICH. L. REV. 273, for interesting discussion of statutory evolution.

[7] WEST. CAL. CIV. CODE § 3051 (1954).

also for reasonable charges for the use of any landing aid furnished such aircraft and reasonable landing fees.[8]

Both of these provisions require that the portion of the lien in excess of $250.00, in the case of an aircraft lien, or $300.00, in the case of personal property liens, is invalid unless prior to commencing the work, the lienor gives actual notice to the title holder and obtains his consent.[9] Both statutes give the artisan a lien for storage and safekeeping, as distinguished from the storage lien of warehousemen; thus, the requirement of enhancement of value is abrogated. However, the question of who may subject the property to a lien for services or repairs has left considerable room for conjecture. Under section 3051 the legal possessor may make requests for repairs, and an artisan's lien may arise. It has been held that a thief is *not* a legal possessor,[10] nor a tenant who leased a house and furniture.[11] On the other hand, a conditional vendee is in legal possession, and anyone *repairing* an automobile at the vendee's request has a valid lien for the value of his services.[12] The cases which have arisen under this statute may at first appear in derogation of the common law requirement of consent of the owner; however, these cases are consistent with many at common law which adopted the fiction of implied consent found in the repair or alteration cases.[13] What the common law did require, generally, was an authorized agent; and such would seem to be the general rule,[14] at least in the statutory interpretation of cases not involving repairs or alterations.

Beyond the cases of a conditional vendee, involving repairs, and a thief, there is a lack of case law. This deficiency is further compounded by an apparent contradiction in the California Supreme Court decisions regarding the provisions of section 3051. Under these provisions, there is a distinction made between the cases where alterations or improvements are made and those where only straight services, e.g., safekeeping or carriage, are rendered; in the former the rule would seem to require consent of the owner or legal possessor, while in the latter, *no* reference is made to a legal possessor. This distinction was emphasized in *Lowe v. Wood*[15] and in *Hackett v. California Laundry*[16] which seemed to state the rule that if any of the proprietors

[8] WEST. CAL. CIV. CODE § 3051a (1954); WEST. CAL. CIV. P. CODE § 1208.61 (1955).

[9] WEST. CAL. CIV. P. CODE § 1208.61 (1955).

[10] General Exchange Ins. Corp. v. Pellissier Square Garage, 24 Cal. App. 2d 768, 69 P.2d 236 (1937).

[11] Hackett v. California Laundry, 7 Cal. App. 2d 757, 45 P.2d 833 (1935).

[12] Goodman v. Anglo-Califronia Trust Co., 62 Cal. App. 702, 217 P. 1078 (1923). *See also* Pacific States Finance Corp. v. Freitas, 111 Cal. App. Supp. 757, 295 P. 804 (1931) (garage keeper's lien); Davenport v. Grundy Motor Sales Co., 28 Cal. App. 409, 152 P. 932 (1915).

[13] Kirtley v. Morriss, 43 Mo. App. 144 (1891). *See also* White v. Smith, 44 N.J.L. 105, 43 Am. Rep. 347 (1882); Williams v. Alsup, 10 C.B.(N.S.) 417 (1861). *Contra*: Wilson v. Donalson, 121 Cal. 8, 53 P. 404 (1895); Baughman Auto Co. v. Emanuel, 137 Ga. 354, 73 S.E. 511 (N.S.) (1912). *See also* Whiteside, *Priorities Between Chattel Mortgagee or Conditional Seller and Subsequent Lienors*, 10 CORN. L.Q. 331 (1925). See cases at note 4, *supra*.

[14] Thus, to the extent someone other than the owner could encumber property with a lien at common law, it may be accurately said that § 3051 is more a codification than a modification of this point. However, it is obvious that the term "legal possessor" is quite broad in its scope, thus evidencing an intention to broaden the implied consent cases under common law. *See, What is a Legal Possessor Under Civil Code 3051?*, 27 CALIF. L. REV. 220 (1939).

[15] 100 Cal. 408, 34 P. 959, 38 Am. St. Rep. 301 (1893) (*semble*).

[16] 7 Cal. App. 2d (Supp.) 757, 45 P.2d 833 (1935) (*semble*).

in these categories[17] can bring themselves within the provisions for altering or repairing a chattel, they may assert a lien on property turned over by a legal possessor. The *Lowe* case held that no lien arose in favor of an agister where the animal was placed with him by a conditional vendee without the consent of the vendor, the case being clearly one of services.[18] The same holding was made in Hackett; in the service case, here a laundry, the common law rule applies and services must be requested by the legal owner or his authorized agent. However, the propriety of these decisions is disturbed by the 1927 case of *First National Bank v. Silva*,[19] which held that an agister's lien created by a mortgagor in possession took priority over the claim of a prior chattel mortgagee, who had not consented to the lien. Thus, it would seem that if a mortgagor of cattle can create a lien binding on his mortgagee, a legal possessor could do likewise against the rightful owner,[20] as to liens arising out of services rendered. However, such a holding would seem inconsistent with apparent differences between repair of a chattel and safekeeping of the chattel, and the resulting statutory liens which are said to arise.

Summarizing, it would appear that section 3051 clears up some of the difficulties which might arise under common law principles; it allows a lien in favor of a repairman where a request for repairs is made by the legal possessor. It appears to retain the common law principle that in the case of straight services, no lien will arise unless such request was made by the owner or his authorized agent, though the *First National Bank* case,[21] may be authority for a contrary view. It is apparent that these sections were enacted to provide protections to a broader group of persons than at common law without changing the basic rules or circumstances under which a lienor's right may be asserted.[22] The principle obstacles encountered are in defining "legal possessor," in cases of repairs or altera-

[17] See categories set out in statute, page —, *supra*, which would appear to be the service activities in which, normally, no lien may arise unless such service was rendered at the owner's or authorized agent's request.

[18] *See also* Mctigue v. Artic Ice Cream Co., 20 Cal. App. 708, 130 P. 165 (1912).

[19] 200 Cal. 494, 254 P. 262 (1927).

[20] The relationship between the mortgagee and mortgagor in possession is more than analogous to that of bailor and bailee, so that it is reasonable that the same rule should apply in both cases. It should be pointed out, however, that the court was primarily concerned with the question of priority between the liens on the chattels, the one in favor of the agister and the one in favor of the mortgagee, and that its holding was consistent only with giving priorities to repairmen in similar situations and *not* that a legal possessor has the power to create agister's lien as against the owner. In the latter case, the question is not one of priorities but rather the question of whether the agister has any possessory rights at all. *See* 27 CALIF. L. REV. 220, note 14, *supra*.

[21] Note 19, *supra*.

[22] Quist v. Sandman, 154 Cal. 748, 99 P. 202 (1909). While the Code has extended the right to a lien in general to all persons performing the prescribed labor concerning an article of personal property at the request of the owner or legal possessor thereof, it is in other respects but declaratory of the common law rule and the right to a lien must be governed by the same rules which prevailed at common law. It can only be asserted under the same circumstances and conditions as it could be asserted at common law and the right to do so must be interpreted in accordance with common law principles. 99 P. at 207. It should be noted that these provisions stand alone and only to the extent they do not conflict with similar provisions of the Warehouse Receipts Act, or more recently, the Uniform Commercial Code. The former uniform law was said to revise the entire subject-matter relating to the general business of conducting a public warehouse. Any conflicting provision under §§ 3051, 3052 has been said to be repealed by later legislative act. *See* Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 18 P.2d 351 (1933).

tions,[23] and in ascertaining whether such definition is applicable in the straight service type case. It is submitted that in the absence of statutory modification, the common law rule will apply.[24]

The Aircraft Lien Act, section 1208.61, is a more modern lien statute. There is no reference to legal possessor in cases of repairs, and no distinction is drawn between the various types of services, e.g., storage and safekeeping, or repair or alteration. It is apparent from the few decisions, however, that the common law principles are not disturbed. In *Colonial Trust Co. v. Goggin*,[25] the Court of Appeals held that a lien acquired by the bankrupt's performance of repairs on the owner's aircraft at the request of lessee, without the owner's consent, was limited to the statutory $250.00 limit. The court refused to allow an equitable lien to be enforced because of the clear mandate of the California law, holding the basis for a mechanic's lien is entirely statutory.[26] It is obvious that the trial court relied on the broader common law rule which allows a lien against the owner, where the bailee orders repairs;[27] this reliance was not disturbed on appeal. With the exception of this case and several others,[28] not in point, the pertinent case law of section 3051 is the only source of reference for these points.

In the case, of *In re Midwest Livestock Commission*, the court held that when an aircraft is left with a flying service for repairs, it is not impliedly left for storage. This appears to be settled law as section 2892 of the California Civil Code provides:

> HOLDER OF LIEN NOT ENTITLED TO COMPENSATION. One who holds property by virtue of lien thereon, is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under Sections 1892 and 1893.[29]

The case law clearly reflects the applicability of this section to this case.[30]

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[23] To what extent the term "legal possessor" is a modification of the common law is conjectural. In Quist v. Sandman, note 22, *supra*, the court stated:

> . . . legal possessor of the property . . . is one who has the right by virtue of his possession to originally contract with reference to the manufacture, alteration, or repair thereof . . . . 99 P. at 209.

Since only a legal possessor can bind the property with a lien under the statute, the definition becomes circuitous by defining him in the same, conclusory sense. This follows from *Quist* unless a totally artificial meaning is given the term "originally." *See also* note 14, *supra*.

[24] It is beyond the scope of this note to explore all the difficulties of statutory construction. It should be noted that California does follow the rule of statutory construction requiring a strict interpretation of provisions contrary to the common law. *See* note 22, *supra*. However, under the Aircraft Lien Law, § 1208.61, *supra* note 8, and under § 3051, *supra* note 9, in the case of storage type services, there is no legislative change of the common law requirement as to the necessity of the owner or his agent to make the request for services; thus, to that extent, there appears no difficulty of construction.

[25] 230 F.2d 634 (9th Cir. 1955).

[26] It should be noted that the owner made apparent its willingness to pay at least $250.00. 230 F.2d at 637.

[27] See notes 4, 13, *supra*.

[28] Gordon H. Ball, Inc. v. Parreira, 214 Cal. App. 2d 697, 29 Cal. Rptr. 679 (1963); International Airports v. Finn, 132 Cal. App. 2d 293, 282 P.2d 102 (1955).

[29] WEST. CAL. CIV. CODE § 2892 (1954).

[30] Owens v. Pyeatt, 248 Cal. App. 2d 840, 57 Cal. Rptr. 100 (1967). A garageman who retains possession of an automobile repaired by him in the exercise of his right to claim a lien thereon is not entitled to the reasonable value of the storage thereof during the time he keeps it in his possession. 57 Cal. Rptr. at 105.

The court properly recognized that to hold otherwise would be to encourage "repairmen to sleep on their rights."[31] Also noted was another section which permits a sale to satisfy the lien if it remains unpaid 10 days after it becomes due.[32]

In passing on petitioner's second point, the claim of storage lien for safekeeping at the behest of the sheriff, the court held that no enforceable lien was acquired. The decision rested on the insufficient possessory right of the sheriff. First, it was noted that the relationships created by the sheriff's possession under attachment are manifold. He is an officer of the court but not its agent in serving a writ of attachment;[33] he is the agent of the attaching creditor and the attached propery is the constructive possession of the creditor, but not within the possession of the court.[34] Second, the court noted that though the sheriff has a possessory right to the goods and may bail them for safekeeping, if his bailee sells the property in enforcement of his presumed warehousemen's lien, the sheriff as principal will be liable for his agent's actions.[35] The court then held that such characterized possessory rights were insufficient to encumber attached property.[36] Moreover, the court noted that the sheriff is given a statutory lien, where he levies on personal property, and such cannot be enforced by a third party for his benefit. This distinguished the present case from those where the sheriff actually enforced his lien.[37]

While the court's reasoning was sufficient to dispose of the storage lien issue, it is submitted that it is not authority for the proposition that a sheriff acting under attachment powers is always precluded from subjecting property to a bailee's lien. First, the common law would seem to recognize that repairs characterized as a necessity may be sufficient to allow a lien to arise; the relationship between the owner and possessor would seem secondary to this necessity in determining the lien's existence.[38]

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[31] 92 F. Supp. at 957.

[32] WEST. CAL. CIV. P. CODE § 1208.65 (1955).

[33] *See* Spark v. Buckner, 14 Cal. App. 2d 213, 57 P.2d 1395 (1936) ("He is an officer of the court, and should render obedience to the mandates of court unless the process or order appears upon its face to be illegal . . . ."). *See also* United States Overseas Airlines v. County of Alameda, 235 Cal. App. 2d 348, 45 Cal. Reptr. 237 (1965) (a sheriff serving a writ of attachment is an officer of the court, not its agent).

[34] *See* United States Overseas Airlines v. County of Alameda, *supra* note 1; Hayward Lumber & Inv. Co. v. Biscaibiz, 40 Cal. 2d 716, 306 P.2d 6 (1957).

[35] Aigeltinger v. Whelan, 133 Cal. 110, 65 P. 125 (1901); Reynolds v. Lerman, 138 Cal. App. 2d 586, 292 P.2d 559 (1956).

[36] It occurs to us that a ruling that a sheriff is guilty of conversion of attached goods sold by his agent, the warehouseman, in enforcement of a statutory storage lien, is inconsistent with the thought that the limited possessory right acquired by a sheriff by levy of attachment gives him power to impose a lien on the property for the benefit of a third person. 292 F. Supp. at 960.

[37] *See* Bentinck v. Menotti, 97 Cal. App. 412, 275 P. 850 (1929); Newell v. McDonald, 60 Cal. App. 202, 212 P. 389 (1922). *Cf.* Perin v. McMann, 97 Cal. 52, 31 P. 837 (1892).

[38] As pointed out at note 4, *supra*, the admiralty rule of conferring an artisans lien for necessary expenditures has been extended to the case where a pledgee has incurred expenses necessary for chattel preservation. This desire to preserve chattels should likewise permit the possessor of a chattel to request repairs for which a lien may attach. The early decisions reflect the courts' trend to imply consent in proportion to necessity. Guarantee Security Corp. v. Brophy, 243 Mass. 597, 137 N.E. 751 (1923); Rupert v. Zang, 73 N.J.L. 216, 62 A. 998 (1906); Watts v. Sweeney, 127 Ind. 116, 26 N.E. 680 (1891). Where the services are not essential to preservation the lien was denied. Hill v. Burgess, 37 S.C. 604, 15 S.E. 963 (1892); Easter v. Goyne, 51 Ark. 222, 11 S.W. 212 (1889). *See* Note, 40 HARV. L. REV. 762 (1926).

The term legal possessor in section 3051, in the case of repairs, adds credence to the acceptability of this common law rule.[39] Second, the common law did recognize that even in storage cases agency was not required to create a lien. This, of course, was founded on commercial necessity; a public warehouseman could not refuse to store property.[40] However, this almost universal lien has been modified by uniform law provisions which define the possessor in more restrictive terms.[41]

In the present case, the implied consent argument could not be raised; this was a case of straight storage. However, it would seem that such argument would still be valid if the sheriff ordered repairs,[42] and to that extent the court's denunciation of the ability of a sheriff to encumber property held under attachment would appear inappropriate.[43]

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[39] Set out page 4, *supra.*

[40] In J.I. Case Plow Works v. Union Iron Works, 56 Mo. App. 1 (1894), recognized a warehousemen's lien for storage where goods were placed in his possession by a sheriff who seized them under a writ of attachment. The court followed Wycoff v. Southern Hotel Co., 240 Mo. App. 382 (1887) which held that "when personal property comes into the possession of a third person and he stores it, or otherwise cares for it and preserves it, he is entitled to a lien for his reasonable compensation." *See also* Note, 23 HARV. L. REV. 63 " . . . [A]n English court would probably give the carrier a lien, on the ground that he is obliged to carry goods offered for transportation. *See* York v. Grenaugh, 2 Ld. Raym. 866, 867. But in the United States it is recognized that this obligation does not extend to goods offered for shipment by a third party without the owners authority." *Accord* with Plow Works: Aliger v. Keeler, 8 Hun. (N.Y.) 125 (1876); Hamilton v. Kennedy, 3 Baxt. 476 (1874). *Contra*: Roehl Storage Co. v. Wilson, 268 Mich. 691, 256 N.W. 598 (1934); Genesee County Sav. Bank v. Ottawa Circuit Judge, 54 Mich. 305, 20 N.W.2d 53 (1884). *Cf.* Vette v. Leonori, 42 Mo. App. 217 (1890); Snead v. Wegman, 27 Mo. 176 (1858). Those cases upholding the lien are strict common law cases where a possessor without owner's consent could encumber the property by storage in a public warehouse.

[41] *See* Vol. 2 UNIFORM LAWS ANN. (1968). Section 7-209(3)(a) Uniform Commercial Code (WEST'S ANN. COMMERCIAL CODE § 1201 (1963)) provides: "A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7-503." The hypothetical test is similar to that under previous uniform law, *e.g.* 29-32 Uniform Warehouse Receipts Act. Thus, the Missouri cases cited in note 3 *supra*, would seem overruled by this test. *See* Smith v. K.M. & S. Co., 163 S.W.2d 128 (Mo. App. 1942) (citing Roehl Storage Co. v. Wilson, 268 Mich. 691, 256 N.W. 598 (1934)).

[42] This would seem apparent in considering "Legal Possessor" under § 3051 (artisan's lien) set out on pages , *supra.*

[43] Of course the limiting provisions ($250.00 aircraft; $300.00 personalty), note 9 *supra*, would still apply in an implied consent situation.