OPINION NO. 79-097

Syllabus:

Pursuant to R.C. 4505.13, the clerk of a court of common pleas is required, upon presentation of any security agreement covering a security interest in a motor vehicle, the certificate of title for such motor vehicle, and the prescribed fee, to make a notation of the lien on the face of the certificate of title; the clerk's duty to make such a notation is not affected by inclusion in the security agreement of an after-acquired property clause that does not identify the nature of the after-acquired property.

To: Dean L. Dollison, Registrar, Bureau of Motor Vehicles, Columbus, Ohio
By: William J. Brown, Attorney General, December 18, 1979

I have before me your request for my opinion concerning the duty of the clerk of a court of common pleas to accept security agreements pursuant to R.C. 4505.13. Your request was precipitated by the refusal of some clerks to accept security agreements which contain an after-acquired property clause on the grounds that these agreements could create a security interest in chattels other than motor vehicles. An after-acquired property clause is a provision in a security agreement which purports to create a security interest in property acquired by the debtor subsequent to the time of making the security agreement; thus, the purpose of an after-acquired property clause is to further secure the initial indebtedness of the debtor. Sussen Rubber Co. v. Hertz, 19 Ohio App. 2d 1 (1969). Your specific question is as follows:

> Should this type of security agreement be presented to the clerks of court for a lien notation on motor vehicle titles?

In considering your question, I am not addressing the question whether any particular security agreement or after-acquired property clause is valid, but am concerned only with the duties of the clerk of a court of common pleas to make lien notations upon motor vehicle certificates of title.

R.C. 4505.13, set forth in pertinent part below, authorizes the clerk of a court of common pleas to make a notation of a lien on the certificate of title of a motor vehicle upon presentation of the security agreement, the certificate of title, and the prescribed fee by the lienholder:

> Sections 1309.01 to 1309.50, inclusive, and section 1701.66 of the Revised Code, do not permit or require the deposit, filing, or other record of a security interest covering a motor vehicle. Any security agreement covering a security interest in a motor vehicle, if such instrument is accompanied by delivery of a manufacturer's or importer's certificate and followed by actual and continued possession of such certificate by the holder of said instrument, or, in the case of a certificate of title, if a notation of such instrument has been made by the clerk of the court of common pleas on the face of such certificate, shall be valid as against the creditors of the debtor,

> whether armed with process or not, and against subsequent purchasers, secured parties, and other lienholders or claimants. . . .
>
> The secured party, upon presentation of the security agreement to the clerk of the county in which the certificate of title was issued, together with such certificate of title and the fee prescribed by section 4505.09 of the Revised Code, may have a notation of such lien made on the face of such certificate of title. The clerk shall enter said notation and the date thereof over his signature and seal of office, and he shall also note such lien and the date thereof on the duplicate of same in his files and on that day shall notify the registrar of motor vehicles, who shall do likewise. The clerk shall also indicate by appropriate notation on such agreement itself the fact that such lien has been noted on the certificate of title. (Emphasis added.)

The use of "shall" in setting forth the duties of the clerk makes performance mandatory, especially where the rights of the public are dependent on that performance. Heid v. Hartline, 79 Ohio App. 323 (1946). Thus, unless there is a legal bar to acceptance of the security agreements containing after-acquired property clauses, the clerk must accept the agreements and note the interests evidenced thereby.

The general provisions governing the creation, enforcement, and priority of security interests in personal property are found in R.C. Chapter 1309. As is clear from the portions of R.C. 4505.13 set forth above, the General Assembly has removed the creation of interests in motor vehicles from the operation of R.C. Chapter 1309 due to the special problems encountered with motor vehicles. See Kelley Kar Co. v. Finkler, 155 Ohio St. 541 (1951). Due to the consequent formulation of two separate procedures--one for creating interests in personal property generally, and one for creating interests specifically in motor vehicles--my predecessors have encountered problems with lenders who seek to encumber both types of property by recording only one instrument.

Initially, it was concluded in 1939 Op. Att'y Gen. No. 802, p. 1025, that chattel mortgages covering a motor vehicle and other personal property could not be accepted by the clerk of the court of common pleas due to the clerk's lack of authority to accept chattel mortgages covering any chattel other than a motor vehicle. My predecessor also concluded therein that such a mortgage could not be recorded by the county recorder since the recorder lacked authority to file mortgages covering motor vehicles. Thus, that opinion provides:

> [E]ncumbrances on motor vehicles joined with encumbrances on other chattel property in one chattel mortgage may not be filed with either the clerk of courts . . . or with the county recorder . . . .

The question of where these "combination mortgages" should be filed was later addressed in 1964 Op. Att'y Gen. No. 64-930, p. 2-115. There, a problem arose as to where a chattel mortgage covering both watercraft and boat trailers should be filed. Provision for lien notation on certificates of title of watercraft is made in R.C. 1548.20, which is substantially identical to R.C. 4505.13. Boat trailers, however, are not included in R.C. 1548.20 and are classified as motor vehicles only if they exceed a specified weight. Regarding trailers weighing less than the specified amount, my predecessor followed the 1939 Opinion. supra, and concluded that if the trailers were not motor vehicles, and were covered by a chattel mortgage which also covered watercraft, the clerk of the court of common pleas could not accept the mortgage. This conclusion, however, was stated with reluctance:

> Were this a problem of first impression, the same conclusion might not be reached today; but there now exists twenty-five years of established procedure grounded on my predecessor's conclusion. In addition, there has been ample opportunity for the Legislature to correct that interpretation of the law if it considered such to be in

> error. The authority of Clerks of Courts to make notation of security interests has now been extended to cases involving watercraft and outboard motors; but, with that exception, I find no subsequent changes in the law, including those made by the adoption of the Uniform Commercial Code (see Section 1309.38, Revised Code), which would warrant a departure from the rule layed [sic] down in Opinion No. 802, supra. I must therefore conclude that, unless a boat trailer is of sufficient weight to qualify as a motor vehicle under Section 4505.01, supra, the security agreement referred to in Sections 1548.20 and 4505.13, supra, may not be a combination agreement including such a boat trailer.

I am inclined to agree with my predecessor that, if this question were presented as a problem of first impression, a different conclusion might be reached, which would allow notation of the lien by the clerk on the certificate of title regardless of what type of other property was specified in the security agreement. A determination of this question is not essential, however, to answer the question presented by your request.

Your question pertains to a security agreement which makes reference to after-acquired property without specifying whether the property consists of motor vehicles or other chattels. This differs from the situation presented in the earlier opinions where the security agreement covered a motor vehicle and other chattels which were identified in the agreement. Thus, the rule in the 1939 and 1964 Opinions, supra, does not govern the present situation and does not prevent the clerk from accepting a security agreement which covers a motor vehicle and includes an after-acquired property clause, which clause does not specify that the after-acquired property will consist of anything other than motor vehicles.

Accordingly, it is my opinion, and you are advised, that pursuant to R.C. 4505.13, the clerk of a court of common pleas is required, upon presentation of any security agreement covering a security interest in a motor vehicle, the certificate of title for such motor vehicle, and the prescribed fee, to make a notation of the lien on the face of the certificate of title; the clerk's duty to make such a notation is not affected by inclusion in the security agreement of an after-acquired property clause that does not identify the nature of the after-acquired property.