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Mortgages -- Conditional Sales -- Recordation -- Conflict of Laws

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where his immediate grantor held a deed conveying only the surface rights, be precluded from denying the title of the remote grantor of the surface rights, to the mineral rights. It is not impossible that the immediate grantor had title to both surface and mineral rights, acquiring title to each from a different source.

The North Carolina court has indicated that the common source rule is not strictly based upon an estoppel in this state, as it is said to be in other jurisdictions.²⁰ In *Ryan v. Martin*,²¹ Merrimon, J., speaking for the court, said: "The conclusion thus established between the parties is not strictly and technically an estoppel, but it is in the nature of and has the practical effect of an estoppel. This rule of law is founded in justice and convenience. . . ." The dissenting opinion makes much of this supposed distinction. It is submitted that if under a given set of facts the courts of other states apply what they term an estoppel and reach a certain result, and the North Carolina court with the same set of facts goes through the identical process to reach the same result but calls its rule one of justice and convenience, there is no real distinction, certainly no distinction such as would call for a different result in the principal case.

The court's decision seems correct, being merely an application of the age-old North Carolina rule that in an action of ejectment, the plaintiff must win on the strength of his own title, and not on the defendant's weakness.²² The apparent hardship of the present decision may yet be remedied provided that on the new trial which the court granted, *P* changes his line of attack and establishes his title in another way. *D* should not be allowed to plead *res adjudicata*,²³ because the supreme court did not finally pass upon the issue involved, but merely granted a new trial because of an error of substantive law in the trial judge's charge to the jury.

LAFAYETTE WILLIAMS.

Mortgages—Conditional Sales—Recordation— Conflict of Laws.

Intervener's assignor sold an automobile in South Carolina under a duly recorded conditional sale contract. The purchaser, having collided with plaintiff in Virginia while en route to Baltimore, had judgment rendered against him by a Virginia court, and the sale of the automobile was ordered in satisfaction thereof. Intervener then inter-

²⁰ *Jennings v. Marston*, 121 Va. 79, 92 S. E. 821 (1917), 7 A. L. R. 860 (1920), 91 N. C. 464, 469 (1884).

²¹ *Carson v. Jenkins*, 206 N. C. 475, 174 S. E. 271 (1934); see *Sinclair v. Huntley*, 131 N. C. 243, 245, 42 S. E. 605 (1902); *Bettis v. Avery*, 140 N. C. 184, 192, 52 S. E. 584, 586 (1905); *Virginia-Carolina Power Co. v. Taylor*, 194 N. C. 231, 233, 139 S. E. 381, 383 (1927).

²² 2 BLACK, THE LAW OF JUDGMENTS (1891) §§650, 654, 683, 684.

vened claiming by reason of the conditional sale contract a prior lien on the proceeds from the sale of the automobile. The court held for the intervener. The Virginia statute making recordation of foreign chattel mortgages essential to their validity does not apply to contracts of conditional sale, and, moreover, the car had never been "removed" to Virginia within the meaning of the statute. Valid foreign conditional sale contracts will be recognized even though they are not registered in Virginia.¹

The effect that should be given a foreign chattel mortgage or conditional sale contract as against third parties in a state to which the property has been removed has been a subject of much discussion.² The decision in the principal case is in accord with the rule that statutes providing for recordation of chattel mortgages are not applicable to conditional sale contracts.³ However, in the situation presented here, most states have statutes applying to both or to neither, so that in this respect, the practice in Virginia is not in accord with that in most states. As the effect of chattel mortgages and conditional sales is substantially the same in this situation, it would seem advisable to include both in the statute.

When the contract, whether a chattel mortgage or conditional sale, is made in one state, but delivery of the property pursuant to the contract is to take place in another state, the older rule held that the law of the state where the contract was made would govern its validity, so that recordation in that state alone would be sufficient to protect the mortgagee or vendor.⁴ This rule is probably still the weight of authority, but more recent cases show a marked tendency toward the view that the law of the state to which the property is to be removed should govern, thus making recordation in the state to which the property is removed necessary for the protection of the security holder.⁵ Although it is true that the law of the place where a contract is made usually governs its validity,⁶ in this particular situation, as the situs of the property will be in the state to which it is to be taken, and as sub-

¹ *C. I. T. Corporation v. Guy*, 195 S. E. 659 (Va. 1938).

² (1928) 28 COL. L. REV. 111; (1933) 41 HARV. L. REV. 779; (1929) 13 MINN. L. REV. 724; (1926) 74 U. OF PA. L. REV. 749.

³ *The Marina*, 19 Fed. 760 (D. N. J. 1884); *McComb v. Donald's Adm'r*, 82 Va. 903, 5 S. E. 558 (1888).

⁴ *G. A. Gray Co. v. Taylor Bros. Iron-Works Co., Ltd.*, 66 Fed. 686 (C. C. A. 5th, 1894); *Cleveland Machine Works v. Land*, 67 N. H. 348, 31 Atl. 20 (1893); *Barrett v. Kelley*, 66 Vt. 515, 29 Atl. 809 (1894).

⁵ *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003 (1876); *Smith's Transfer and Storage Co. v. Reliable Stores Corp.*, 58 F. (2d) 511 (App. D. C. 1932). Accord: *United States Fidelity and Guaranty Co. v. Northwestern Engineering Co.*, 146 Miss. 476, 112 So. 580 (1927); *Eli Bridge Co. v. Lachman*, 124 Ore. 592, 265 Pac. 435 (1928).

⁶ *Harrison v. Sterry*, 5 Cranch 289, 3 L. ed. 104 (U. S. 1809); *Green v. Van Buskirk*, 7 Wall. 139, 19 L. ed. 109 (U. S. 1868).

sequent transactions in relation to it will probably take place in that state, the application of the latter rule would be more convenient to all parties concerned and would greatly simplify any future litigation with regard to the chattel.

A more difficult problem presents itself when the contract does not contemplate removal or expressly forbids it, and the property is, nevertheless, removed to another state. A few jurisdictions refuse to give effect to foreign chattel mortgages and conditional sale contracts, not locally recorded, under any circumstances.⁷ Experience has shown that this position is not advisable, as demonstrated by a frequent practice of unscrupulous persons in the Southwest, who remove automobiles which have been mortgaged or conditionally sold elsewhere, to Texas, one of the states which supports this rule, and there sell them. Under this rule, purchasers are not encouraged to be careful as to the titles of their vendors, and the original vendor or mortgagee in the first state, even though innocent of the fraud practiced by his vendee or mortgagor, cannot recover the property, and is practically unable to protect himself. The courts of other states have recognized the weakness of this rule, and in one case even refused to give effect to a title obtained by sale in Texas where the property at the time of the sale was encumbered by a mortgage, validly executed and recorded in another state.⁸

The great weight of authority supports the proposition that a chattel mortgage or conditional sale contract, if enforceable in the state where it was made, will be upheld in a state to which the property is removed, if such removal is without the consent of the mortgagee or conditional vendor, and if no positive law of the forum is thereby contravened.⁹

⁷ *Corbett v. Littlefield*, 84 Mich. 30, 47 N. W. 581 (1890) (on the ground that recordation in a foreign state is not constructive notice to citizens of Michigan); *Sherman State Bank v. Carr*, 15 Pa. Super. 346 (1900); *Chambers v. Consolidated Garage Co.*, 231 Tex. 1072, 210 S. W. 565 (1919) (on the ground that recognition of unrecorded incumbrances is contrary to policy and prejudices Texas citizens); *cf. Turnbull v. Cole*, 70 Colo. 364, 201 Pac. 887 (1921) and *Universal Credit Co. v. Marks*, 164 Md. 130, 163 Atl. 810 (1932). As Louisiana does not permit chattel mortgages at all, it is impossible to record a foreign mortgage there, and such mortgage will not be effective in that state. *Delop v. Windsor*, 26 La. Ann. 185 (1874).

⁸ *Forgan v. Bainbridge*, 34 Ariz. 408, 274 Pac. 155 (1928).

⁹ *Shapard v. Hynes*, 104 Fed. 449 (C. C. A. 8th, 1900); *Flora v. Julesburg Motor Co.*, 69 Colo. 238, 193 Pac. 545 (1920); *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721 (1891); *Rodecker v. Jannah*, 125 Wash. 137, 215 Pac. 364 (1923); 1 WILLISTON, SALES (2d ed. 1924) §339; RESTATEMENT, CONFLICT OF LAWS (1934) §§266, 273. Logically, the converse situation, occurring when the contract is unenforceable in the state where it was made, calls for a refusal to uphold the contract in the second state, even though it may conform to the laws of that state. *Fry Bros. v. Theobald*, 205 Ky. 146, 265 S. W. 498 (1924); *Davis v. Osgood*, 69 N. H. 427, 44 Atl. 432 (1899); RESTATEMENT, CONFLICT OF LAWS (1934) §§267, 274. *Contra: Weinstein v. Freyer*, 93 Ala. 257, 9 So. 285 (1891); *Public Parks Amusement Co. v. Embree-McLean Carriage Co.*, 64 Ark. 29, 40 S. W. 582 (1897). It has also been held that when requirements for enforceability in the state where the contract was made are not met until after

It will be noted that there are two restrictions on this rule: (1) the removal must have been without the consent of the mortgagee or conditional vendor, and (2) application of the rule must not contravene a positive law of the forum.

As to the first of these, it has generally been held that consent of the mortgagee or conditional vendor to removal of the property will deprive the contract of recognition unless it conforms to the law of the state to which the property is removed¹⁰ on the theory that any loss sustained by the mortgagee or vendor in such a case is due in part to his own negligence.¹¹ There is, however, a growing minority holding that consent is immaterial and will not vary the rule that the contract should be recognized.¹² The theory of this position is that the rights of the mortgagee or conditional vendor arise from the contract itself and not from any care in keeping track of the property. It is conceded by advocates of this position that, in some circumstances, the mortgagee or conditional vendor might act in such a way that he would be estopped to enforce the contract against third parties in the state to which the property is removed, but it is also said that consent to removal will not work such an estoppel.¹³ This latter view has much to commend it from the standpoint of logic, but a balancing of the equities would seem to indicate that the loss should fall on the party whose negligence is partly responsible for the situation rather than on an innocent purchaser or creditor of the mortgagor or conditional vendee. On the other hand, it is at least arguable that, in view of the strictness of title requirements in regard to automobiles, a greater duty should rest upon third parties in a case where an automobile is involved than in a case involving other chattels, for in most cases a rather cursory examination into the title to an automobile would reveal defects sufficient to put third parties on guard, if such defects existed. The situation with regard to consent should not be confused with that where immediate removal is provided or contemplated by the contract.

removal of the property to another state, the contract will not be given effect in the other state. *Cunningham v. Donelson*, 110 W. Va. 331, 158 S. E. 705 (1931); *Yund v. First Nat. Bank of Shawnee*, 14 Wyo. 81, 82 Pac. 6 (1905).

¹⁰ *Globe Grain Milling Co. v. Northwestern and Pacific Hypotheekbank*, 69 F. (2d) 418 (C. C. A. 9th, 1934); *Moore v. Keystone Driller Co.*, 30 Idaho 230, 163 Pac. 1114 (1917); *Farmers' and Merchants' State Bank v. Sutherland*, 93 Neb. 707, 141 N. W. 827 (1913); *Goetschius v. Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927); *Newsum v. Hoffman*, 124 Tenn. 369, 137 S. W. 490 (1911); *Jones v. North Pacific Fish and Oil Co.*, 42 Wash. 332, 84 Pac. 1122 (1906).

¹¹ See *Newsum v. Hoffman*, 124 Tenn. 369, 373, 137 S. W. 490, 491 (1911).

¹² *Davis v. Standard Accident Ins. Co.*, 35 Ariz. 392, 278 Pac. 384 (1929); *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353, 60 Pac. 249 (1900); see *Shapard v. Hynes*, 104 Fed. 449, 452 (C. C. A. 8th, 1900).

¹³ See *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 9 Okla. 353, 367, 60 Pac. 249, 253 (1900).

The rule in the latter case refers only to situations in which delivery of the property pursuant to the contract is to take place in a state other than that in which the contract was made, and although in some instances the distinction might be difficult to draw, the courts have indicated that the two situations are quite separate.¹⁴

A positive law of the forum is held to be contravened when the forum state has a statute expressly providing that foreign chattel mortgages and conditional sale contracts on chattels removed to the forum must be registered in accordance therewith to be valid as against third parties. In such a state, if the time prescribed in the statute within which the contract must be recorded has passed and the contract has not been so recorded, it will no longer be upheld as against third parties.¹⁵ Such states, however, will recognize unrecorded foreign chattel mortgages and conditional sale contracts until the statutory period has elapsed.¹⁶ These statutes are designed for the protection of citizens of the state¹⁷ against foreign liens, the existence of which might be difficult to discover, and for this purpose they are quite effective, but they tend to operate to the detriment of innocent parties outside the state. However, they are not to be greatly condemned if the time within which the contract must be recorded is sufficiently long to enable the diligent security holder to protect himself. A number of states have statutes prescribing penalties for the mortgagor or conditional vendee if he removes the property from the state without the consent of the mortgagee or conditional vendor.¹⁸ Although statutes such as these in some measure act as a deterrent to unauthorized removal of the property, a more satisfactory solution to the whole problem would be the adoption of uniform legislation on the subject such as the Uniform Conditional Sales Act and the Uniform Chattel Mortgage Act.¹⁹ These

¹⁴ Johnson v. Sauerman, 243 Ky. 587, 49 S. W. (2d) 331 (1932); Eli Bridge Co. v. Lachman, 124 Ore. 592, 265 Pac. 435 (1928).

¹⁵ Pulaski Mule Co. v. Haley and Koonce, 187 Ala. 533, 65 So. 783 (1914); Hubbard v. Andrews, 76 Ga. 177 (1886), with which compare Olmstead v. Carolina Portland Cement Co., 30 Ga. App. 126, 117 S. E. 255 (1923), *aff'd*, 157 Ga. 669, 121 S. E. 687 (1924); Southern Finance Co. v. Zegar, 198 S. E. 875 (W. Va. 1938).

¹⁶ Hubbard v. Andrews, 76 Ga. 177 (1886).

¹⁷ ALA. CODE ANN. (Michie, 1928) §6868; GA. CODE (1933) §§67-108, 67-1403; N. Y. PERS. PROP. LAW §76; VA. CODE ANN. (Michie, 1936) §5197. Such statutes usually state that they are for the benefit of purchasers and creditors. It has sometimes been held that such a "creditor" must be a judgment creditor. Great Western Stage Equipment Co. v. Iles, 70 F. (2d) 197 (C. C. A. 10th, 1934); Goodrich Silvertown Stores v. A. & A. Credit System, 200 Minn. 265, 274 N. W. 172 (1937). At least one case holds that tort claimants are not in the category of purchasers and creditors at all. Universal Credit Co. v. Knights, 145 Misc. 876, 261 N. Y. Supp. 252 (N. Y. City Cts. 1932).

¹⁸ GA. CODE (1933) §67-9908; N. C. CODE ANN. (Michie, 1935) §4288; TENN. CODE ANN. (Williams, 1934) §7295; W. VA. CODE ANN. (Michie, 1937) §§4019, 5973.

¹⁹ Section 14 of the Uniform Conditional Sales Act provides that the buyer may remove the property without the consent of the seller, provided he gives

acts lay down complete and relatively simple requirements for refiling of the contract upon removal of the property, which give adequate protection to all parties concerned. This protection will be effective, however, only when the acts are adopted in substantially the same form²⁰ by all the states.

Under statutes providing for refiling of the contract on removal of the property, it frequently becomes necessary, as in the principal case, to determine whether the property has been "removed" to the state so as to bring it within the purview of the statute. It has usually been held that to accomplish this removal, the property must gain a situs in the state.²¹ The situs of property is usually the domicile of the mortgagor or vendee as stated in the mortgage or conditional sale agreement.²² To change the situs it has been held that the mortgagor or vendee must form an intent to remove the property to another state, and then actually take it to some place in such other state and habitually keep it there.²³ In other words, the removal must be "permanent and continuous"; therefore, the bringing of automobiles and trucks through or into a state on business or pleasure trips does not constitute "removal."²⁴

Even among majority opinions, some diversity is found as to the basis for the rule giving effect to foreign chattel mortgages and conditional sale contracts which have not been locally recorded. It is generally stated to be founded on comity,²⁵ which in itself is a rather ambiguous term. The generally accepted definition is that comity is

the seller notice thereof before the actual removal takes place, and if he fails to give such notice, the seller may retake the goods as in the case of default in payment of the purchase price. Section 14 provides that when removal of the property takes place, the seller must refile the contract in the filing district to which the property is taken within ten days after receiving notice of the filing district to which the goods have been removed, or the reservation of title in him will not be effective as against third parties. Section 37 of the Uniform Chattel Mortgage Act provides that when the chattel is removed to another state or filing district, the mortgagee's interest will be defeasible unless he has the instrument filed there within ten days after receiving notice of the filing district to which the goods are removed, and if the instrument is not filed within six months, the mortgagee's interest will no longer be effective as against third parties, even though he did not consent to removal and did not have notice of the destination of the property.

²⁰ Some states purporting to adopt the Acts have made changes which apply only to the particular state. For example, the Indiana statute entirely omits §14 of the Uniform Conditional Sales Act.

²¹ *W. H. Applewhite Co. v. Etheridge*, 210 N. C. 433, 187 S. E. 588 (1936).

²² *Hare & Chase v. Tomkinson*, 129 Atl. 396 (Sup. Ct. N. J. 1925).

²³ *In re Bowman*, 28 F. (2d) 620 (N. D. N. Y. 1928).

²⁴ *Peterson v. Kaigler*, 78 Ga. 464, 3 S. E. 655 (1887); *C. I. T. Corp. v. Coleman*, 54 Ga. App. 576, 188 S. E. 585 (1936); *Forgan v. Smedal*, 203 Wis. 564, 234 N. W. 896 (1931).

²⁵ See *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, 671, 23 L. ed. 1003, 1004 (1876); *Shapard v. Hynes*, 104 Fed. 449, 453 (C. C. A. 8th, 1900).

the principle on which one state will give effect to the law of another, not because it is obligated to do so, but because it is more courteous and convenient.²⁶ As no state is bound to give effect to the law of another, many states extend this courtesy only to states which grant them similar privileges. This has been called the theory of reciprocity, and, although it is frequently applied,²⁷ it has been condemned by courts holding that comity is not a mere courtesy, but a legal right which should not be denied for any reason so flimsy as that of reciprocity.²⁸ Another approach to the problem, advocated by scholars and gaining ground with the courts, is that, in an accurate sense, the forum does not apply any theory such as that of comity, but rather its own set of rules applicable in cases involving a foreign element, or in other words, its own law of conflict of laws.²⁹

ELIZABETH SHEWMAKE.

Taxation—Constitutional Law—Exemption of Governmental Instrumentalities.

The Port of New York Authority is a municipal corporate instrumentality organized under a compact between the states of New York and New Jersey for the purpose of improving the port of New York and facilitating its use by the construction and operation of bridges, tunnels, terminals and other facilities. In pursuance of its purpose it has constructed the Outerbridge Crossing, the Bayonne, Goethals, and George Washington bridges, the Holland and Lincoln tunnels, and the Port Authority Commerce Building of New York City, and operates an interstate bus line over one of the bridges. The Authority has been financed by funds advanced by the two states, revenue from the sale of its own bonds, and income from bridge and tunnel tolls and from bus fares. This action was brought by the United States Commissioner of Internal Revenue to collect federal income taxes assessed against a construction engineer and two assistant general managers employed by the Port Authority. *Held*, employees of the Authority are not exempt from the federal income tax because no burden is imposed there-

²⁶ See *Franklin Sugar Refining Co. v. William D. Mullen Co.*, 7 F. (2d) 470, 473 (D. Del. 1925); *Herron v. Passailaigue*, 92 Fla. 818, 823, 110 So. 539, 542 (1926).

²⁷ *Mosko v. Matthews*, 87 Colo. 55, 284 Pac. 1021 (1930); *Farmers' and Merchants' State Bank v. Sutherlin*, 93 Neb. 707, 141 N. W. 827 (1913); *Hart v. Oliver Farm Equipment Sales Co.*, 37 N. M. 267, 21 P. (2d) 96 (1933).

²⁸ *Fuller v. Webster*, 5 Boyce 539, 95 Atl. 335 (Super. Ct. Del. 1915), *aff'd*, 6 Boyce 297, 99 Atl. 1069 (Sup. Ct. Del. 1916); *Hughes v. Winkleman*, 243 Mo. 81, 247 S. W. 994 (1912); *RESTATEMENT, CONFLICT OF LAWS* (1934) §6, comment *a*.

²⁹ *Cook, The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.