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EXTRA TERRITORIAL EFFECT OF RECORDING STATUTES

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To "look a gift horse in the mouth" has ever been deemed the acme of ingratitude and it is quite possible that the action of a successful litigant in questioning the ratio *decidendi* of an illustrious court in giving judgment in his favor may seem equally worthy of censure. Since, however, the question of the effect to be given to chattel-mortgage and conditional bill of sale recording acts, where the property affected is removed beyond the jurisdiction, is one upon which learned courts have radically differed, it may not be amiss to call attention to the difference and attempt to reach a correct solution upon pure legal theory.

The decision which brings this interesting point of Conflict of Laws actively to our attention is contained in the case of *Mergenthaler Linotype Company vs. Hull*, recently decided by the Federal Circuit Court of Appeals for the First Circuit (239 Fed. Rep. 26). The Mergenthaler Company conveyed to the Porto Rico Progress Publishing Company two linotype machines under what, for the present purposes, we may consider conditional bills of sale. The contracts provided that the machines should be delivered to a carrier in New York for transportation to the vendee in Porto Rico, should be considered as received by the vendee upon such delivery and should, upon arrival in Porto Rico, be installed in a certain place and not removed therefrom. The deferred payments were to be made in Porto Rico and in fact everything affecting the transaction was performed or contemplated to be performed in Porto Rico except the formal execution of the contracts and the delivery to the carrier. The contracts were not recorded anywhere. The machines duly arrived in Porto Rico and were there set up and used for about four years. Finally the vendee became bankrupt before the purchase price had been completely paid and its trustee claimed ownership of the machines released from the condition.

The question as to whether New York or Porto Rican law governed the transaction was fully discussed by the court which determines that New York law must control and which awarded the machines to the Mergenthaler Company on that theory. A convenient avenue of escape from decision of the point was open in view of the fact that under either law the Mergenthaler Company would be entitled to prevail but the court declined to avail itself of this way out.

For the sake of discussion let us assume the erroneous position of the court below to the effect that the New York conditional bill of sale and chattel mortgage recording Acts are identical and that failure to record in the former as well as in the latter case renders the condition invalid as to creditors without notice. On this supposition, which would place the New York Statute on a par with those of most other States the Mergenthaler Company would have been entitled to recover if Porto Rican law governed, but not if New York law controlled.

A recording act of this variety is merely a statute declaratory of public policy. The very fact that there is no uniformity in such enactments conclusively demonstrates that the policy of various jurisdictions differs on this as on other points. Where such laws exist, the policy may be stated to the effect that the State feels that one dealing with another, should be entitled to rely upon ocular evidence of ownership in the absence of some public record to the contrary. (*Vreeland v. Pratt*, 42 N. Y. St. Rep. 582, 17 N. Y. Supp. 307.) The requirements regarding place of filing are practically the only points of general uniformity in such statutes in the various States. They usually require the record to be made in the place most easy of access to those who might be expected to deal with the possessor or to be influenced by the possession.

The New York Chattel Mortgage Act is typical on this point and requires record at the place of the mortgagor's residence, or, if he be a non-resident, at the place of the location of the property in question (*Lien Law* § 232). This tells the whole story of the purpose of the Act. If A. applies to B. for credit, the most natural place for B. to inform himself as to A.'s responsibility is at the latter's residence. If A. has property located elsewhere, the place would also be one of interest since in case credit were extended and A. defrauded, B. would look first to his debtor and then to his debtor's property for satisfaction. A public record in either place to the effect that property which A. appeared to own really belonged to another would therefore be helpful to the prospective

creditor in determining whether or not his customer was worthy, but any other record would be a nugatory act. (See *Dillingham v. Bolt*, 37 N. Y. 198.) To put a case which is readily conceivable, suppose the seller to be a company with a dozen or more different factories, located in as many localities. The filing of the chattel mortgage or conditional bill of sale other than at the residence of the debtor or the place where the property was located would, so far as assistance to a later prospective creditor is concerned, be a nugatory act since as a matter of practical business, in order to make sure that his customer owned the property in question he would be obliged to search the records in a dozen different localities. Or suppose the case of a second hand machine sold by one other than the manufacturer: the one dealing with the apparent owner might be obliged for safety to inspect every record in every town and county in the entire country. As was appropriately said in reply to a similar contention by Judge Platt in *Re Greene* (134 Fed. 137, 139):

“To sustain the contention of the objecting creditors in the case before me would be unfortunate from any point of view. It might be subversive of a bedrock principle of commercial life, and, at best, it would lead to the necessity for adopting complicated and useless details in order that validity might attach to a very simple transaction.”

To sum up this phase of the question, it is an axiom that the law will not require a vain thing and it is submitted that to make the rights of creditors depend on whether or not a conditional vendor did or did not file a copy of its contracts with the vendee in some County Clerk's office possibly a thousand or more miles across the sea on some date several years before, amounts to little short of a vain thing.

But let us view the matter from a somewhat different standpoint. All rights must be acquired as a result of law. Theoretically at least, the operation of law in the acquisition and divesting of rights is a thing with which every man is familiar, but one of the points most firmly grounded in the rules of evidence is that a foreign statute must be proved like any other fact. How, then can subsequent creditors in different States or jurisdictions be expected to take cognizance of the statutory enactments of the distant locality where the sale takes place? When any such transaction occurs in the usual case there are two and only two parties interested therein. If the sale takes place in the State of New York, New York law should properly be looked to for the purpose of deciding what legal

effects flowed from the acts which made up the transactions as between the only actors therein. New York and every other law says that as between the parties thereto, the condition in a conditional bill of sale is valid irrespective of filing. (*Frank v. Batten*, 49 Hun, 91, 94, 1 N. Y. Supp. 705, 706; *Rodney Hunt Machine Co. v. Stewart*, 57 Hun, 545, 11 N. Y. Supp. 448, 451; *Re Carcewich*, 115 Fed. 87, 8 Am. Bcy. Rep. 149, 151.) With the status of the property thus determined, it leaves the jurisdiction where the transaction of sale has occurred and, on our supposition, is removed to another locality and becomes subject to the laws of another sovereign. The status of the property at the moment of its departure from the first jurisdiction is simply that the vendee has possession while the vendor has title. There is nothing illegal or monstrous in such an arrangement, and it was almost universally held valid at common law. (*Bierce Ltd. v. Hutchings*, 205 U. S. 340, 347; *Empire State Type Foundry Co. v. Grant*, 114 N. Y. 40, 44-45, 21 N. E. Rep. 49; *Harkness v. Russell*, 118 U. S. 663, 666, 670; *Hewett v. Berlin Machine Works*, 194 U. S. 296, 301-303, 11 Am. Bcy. Rep. 709; *Ballard v. Burgett*, 40 N. Y. 314, 316; *Austin v. Dye*, 46 N. Y. 500, 502.) This legal relation would have continued even in the original jurisdiction had the property remained there if a third individual in the form of a creditor had not subsequently acquired a potential interest in the article. The recording act is of importance only to creditors and on our supposition there are no such individuals so long as the property is in a position to be subject to the courts and laws of the place of sale. Whether the status of the property given it by the laws of the jurisdiction where the sale takes place will continue in the new locality to which it is removed depends solely on the public policy of the latter as evidenced by its laws. Such public policy might decree that the mere presence of the article within its jurisdiction was invalid as in the case of liquor in certain prohibition States or it might do any one of many conceivable things. The only point of interest, however, is that whatever the laws of the locality to which the property is removed determines, that is the thing of importance. The legal effect of any act must be determined by the law of the place where the act occurs and likewise the legal results of any status or relation must be decided by the laws which give rise thereto. If after the removal of the property to the new jurisdiction an injury were done to it, its law must determine the right to compensation and the measure of damages. Likewise if by the performance of certain acts the possessor of the property creates new

business and legal relationships with certain individuals commonly called creditors, the law which creates the relationship must determine the results of the relationship both as regards the individual himself and any property or rights which may be his or in his possession (*Title Guaranty & Surety Co. v. Whitmire*, 195 Fed. 41, 43, 45, 47, 28 Am. Bcy. Rep. 235, 237, 241, 242; *Matter of Edward Hess*, 14 Am. Bcy. Rep. 635, 643; *Altman & Taylor Machinery Co. v. Kennedy*, 114 Iowa 444, 447, 87 S. W. Rep. 435; *Fiske v. Peebles* 13 N. Y. State Rep. 743, 745; *Hall v. Cordell*, 142 U. S. 116, 120; *Re Greene*, 134 Fed. 137, 139, 13 Am. Bcy. *Re* 504; *Dyke v. Erie R. R. Co.*, 45 N. Y. 113, 116; *Beggs & Co. v. Bartels*, 73 Conn. 132, 133, 135, 46 Atl. Rep. 874). Instances where differences of policy give rise to differing rights of creditors are readily found in the exemption statutes in various States.

To make the *lex situs* in such cases the criterion of the rights of the parties not only makes for convenience of creditors but also works for justice to the vendor in the vast majority of cases, since as a practical matter the intended use of the article sold and its expected destination are almost always known to conditional vendors. Where that destination is within another jurisdiction in which the final acts of the conditional sale are to take place, such law properly becomes a part of the contract and its application is just to all concerned. As was said by Lord Escher in *Chatenay v. Brazilian Submarine Teleg. Co.* (1891-1 Q. B. 79, 82):

“the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country.”

This principle of law is so well established that almost numberless sustaining citations could be given (*Cox v. United States*, 6 Pet. (U. S.) 172, 201; *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 845; 34 Am. Bcy. R. 75, 76; *Union Trust Co. v. Bulkeley* 150 Fed. 510, 517, 18 Am. Bcy. R. 35, 43; *Altman & Taylor Machinery Co. v. Kennedy*, 114 Iowa, 444, 447, 87 N. W. Rep. 435, *Chillingworth v. Eastern Tin Ware Co.*, 66 Conn. 306, 33 Atl. Rep. 1011; *Hyde v. Goodnow*, 3 N. Y. 266, 269; *Curtis v. Leavitt*, 15 N. Y. 9, 227; *Hall v. Cordell*, 142 U. S. 116, 120; *Re Legg*, 96 Fed. 326, 327; *Bell v. Bruen*, 1 How. (U. S.) 169, 181; *Andrews v. Pond*, 13 Pet. (U. S.) 65, 78).

Fortunately the result here advocated and, in part, the principles enunciated are not without judicial approval. In the case of *Southern Hardware & Supply Co. v. Clark* (201 Fed. 1), the Circuit Court of Appeals for the Fifth Circuit passed upon a somewhat similar state of facts. The claimants, in Alabama, sold an automobile on conditional sale to a resident of Florida. Alabama had a statute requiring filing of such contracts to make them valid against creditors. Florida had no such statute. The contract was not filed. In ruling that the creditors of the vendee had no rights in the property the court says at page 3:

"The Alabama statute, of course, has no extra territorial force to require registration of instruments in Florida and is not applicable to this case."

In *Marvin Safe Company vs. Norton* (48 N. J. 410, 7 Atl. Rep. 418), the Supreme Court of New Jersey presents a very ably argued exposition of the same doctrine. There plaintiff sold a safe to one Schwartz in Pennsylvania, the laws of which required record of a conditional bill of sale to cut off subsequent *bona fide* purchasers. The contract of sale contemplated delivery of the safe to a carrier for shipment to the vendee in New Jersey. The vendee subsequently sold to the defendant in New Jersey and the court held that in spite of failure to file the contract as provided by the Pennsylvania statute, the vendor's title was not cut off.

A similar result was reached under somewhat similar facts by the Supreme Court of Arkansas in the case of *Public Parks Amusement Co. v. Embree-McLean Carriage Co.* (64 Ark. 29, 40 S. W. Rep. 582), where carriages were purchased in Missouri, the statutes of which required filing, and removed to Arkansas, where no such requirement existed.

It is therefore believed, both on principle and authority that chattel mortgages or conditional sale contracts are not within the contemplation of recording acts in cases where the mortgagor or vendee is not a resident of the jurisdiction where the transaction takes place, when there is merely a transient possession in such jurisdiction, and that the adoption of a contrary view, far from lending that additional assistance to the business world which is the basic reason for such enactments would, in a majority of cases, introduce hardship and uncertainty into otherwise simple business transactions.