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Chattel Mortgages—Sale of Mortgaged Chattels on Default Without Notice to Mortgagor—Protection of Mortgagor's Equity.—Veterans Loan Authority v. Wilk

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whether the action of the sheriff involves damage to property or property rights of the bankrupt under state law.

Notwithstanding the Michigan survival statute,[9] it was held in *Cochran Timber Co. v. Fisher*,[10] cited and followed in the principal case, that an action for fraud is nonassignable, a distinction being drawn between a naked cause of action for fraud which is nonassignable and a fraud claim connected with the transfer of some property to which a right of action attaches, which claim is regarded as assignable.[11]

It has been a matter of some doubt as to whether causes of action involving statutory multiple damages pass to a trustee in bankruptcy, at least in respect to the multiple damages aspect. There are holdings both ways as to whether treble damage claims recoverable under antitrust laws pass to a trustee in bankruptcy.[12] It appears in Michigan that the multiple damage provision should not affect an otherwise assignable cause of action.[13]

The position taken by the dissenting judges reaches a more satisfactory result than that of the majority. The truck was tangible property, title to which would pass to the trustee upon his election to avoid the sale and replevy the vehicle. Consequently, the cause of action for fraud would pass to the trustee with the title to the truck. The fraud could then be considered as involving an injury to the bankrupt's property making § 70a(6) applicable.

However, even under § 70a(5) the purpose of the Bankruptcy Act would be better served if such rights of action are deemed to be transferable. Should the trustee be limited to an action to avoid the sale and recover the truck, its value to the estate may in the interim be materially decreased due to the lapse of time between the fraudulent sale and the trustee's appointment. At least depreciation of the value of the truck and possibly its total loss to the estate could be anticipated. Moreover, the primary purpose of the multiple damage statute which is to restrain public officials from conducting illegal execution sales would be better accomplished by allowing the trustee to sue on behalf of the estate.

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Chattel Mortgages—Sale of the Mortgaged Chattels on Default Without Notice to the Mortgagor—Protection of the Mortgagor's Equity.—***Veterans Loan Authority v. Wilk.***[1]—The defendant took a loan from a bank in 1946, in return for which he gave the bank a promissory note, secured by a chattel mortgage. The note and mortgage were given within the terms

[9] Mich. Comp. Laws § 612.32 (1948).

[10] 190 Mich. 478, 157 N.W. 282 (1916).

[11] Grand Trunk Western Railroad Co. v. H. W. Nelson Co., 116 F.2d 823 (6th Cir. 1941).

[12] Fazakerly v. E. Kahn's Sons Co., 75 F.2d 110 (5th Cir. 1935); contra, Bonvillain v. American Sugar Ref. Co., 250 Fed. 641 (D.C. La. 1918).

[13] Holmes v. Loud, 149 Mich. 410, 112 N.W. 1109 (1907).

[1] 160 A.2d 138 (N.J. Super. 1960).

of the Veterans Loan Act.[2] After defendant's default in 1947, the bank sold the mortgaged chattels without notice to the defendant. Subsequently the note was purchased from the bank by the plaintiff, Veterans Loan Authority, in accordance with the provisions of the Loan Act.[3] The trial court awarded the plaintiff a deficiency judgment, ruling that the sale, on default, of the mortgaged chattels without notice to the mortgagor did not operate to extinguish the total debt, but rather entitled the mortgagor only to a credit on his debt to the extent of the fair value of the goods at the time of the sale. The plaintiff was thus entitled to a deficiency judgment for the unpaid balance remaining on the note. On appeal to the Appellate Division of the Superior Court of New Jersey, the judgment was affirmed.

The result reached is in accord with the law relating to foreclosure of chattel mortgages in a majority of those jurisdictions which adhere, as does New Jersey, to the title-theory of mortgages.[4] In these jurisdictions, in the event of the irregular disposition of the chattels by the mortgagee, a credit on the debt equal to the fair value of the chattels is all that is allowed the mortgagor and in a few of the title-theory states the mortgagor is required to bear the burden of proof as to the fair value of the goods.[5] Many such jurisdictions have enacted statutes providing for foreclosure of chattel mortgages, either by judicial action or by sale on notice to the mortgagor.[6] However, while the New Jersey statute[7] makes no provision for foreclosure (except in instances where the chattels are household goods), the courts have held that the mortgagor's equity of redemption is a necessary concomitant of the mortgage transaction, giving him a right to notice of sale.[8]

In jurisdictions following the lien-theory of mortgages, the chattel mortgagor's equity of redemption is more than adequately protected. Under this theory, the mortgagee is considered to have only lien rights in respect to the security. Any attempted irregular disposition of the chattels by him results in a conversion and he is deemed to have extinguished the mortgage lien by his own illegal act. Because of this, the mortgagee forefeits his right to any deficiency claim.[9] The policy behind

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[2] N.J. Rev. Stat. § 38:23 B-1 et seq. (1937).

[3] Ibid.

[4] Franklin Nat. Bank v. Austin, 99 N.H. 59, 104 A.2d 742 (1954); Caraway v. Jean, 97 N.H. 506, 92 A.2d 660 (1952); Harrison v. Hall, 239 N.Y. 51, 145 N.E. 737 (1924).

[5] Waltner v. Smith, 274 S.W. 526 (Ct. of App., Mo. 1925); Boyd v. Beaudin, 54 Wis. 193, 11 N.W. 521 (1882).

[6] Me. Rev. Stat. Ann. ch. 178 §§ 3,4 (1954); Mo. Rev. Stat. ch. 433 §§ 443.190, 443.290, 443.520 (1949); Annot., 30 A.L.R.2d 539 (1953).

[7] N.J. Rev. Stat. § 46:28-1 et seq. (1937).

[8] Veterans Loan Authority v. Wilk, supra note 1; Geiger v. Metz, 11 N.J. Super. 134, 78 A.2d 152 (Law Div. 1950).

[9] Lessard v. Smith, 45 Wash. 2d 473, 275 P.2d 730 (1954); Sime v. Horton, 43 Wash. 2d 907, 264 P.2d 879 (1953); Carey v. Interstate Bond & Mortgage Co., 4 Wash. 2d 634, 104 P.2d 580 (1940); 2 Jones, Chattel Mortgages & Conditional Sales, §§ 547, 711, 774 (Bowers ed. 1933).

the law in such states is to prevent self-help and it is thought that the statutory procedure for foreclosure is sufficiently expedient and adequately safeguards the interests of the mortgagee.[10] Thus the mortgagee cannot obtain possession of the chattel security by way of self-help or judicial process.[11] He has no alternative but to foreclose in the prescribed manner if he wishes to preserve his right to a deficiency award.

It is questionable whether in the title-theory state the chattel mortgagor's equity of redemption is adequately protected from abuses by the mortgagee, such as an irregular sale, if in fact it be protected at all. Historically the mortgagor's equity of redemption has been considered as important as the security interest of the creditor.[12] In the modern title-theory state the mortgagee has a decided advantage as regards foreclosure proceedings[13] and attempts, both statutory and judicial, to safeguard the mortgagor's equity are at best unsatisfactory. The absence of any effective sanction for non-compliance with either statutory recommendations or judicial efforts to protect the mortgagor's right to notice, render such laws ineffectual. Certainly a credit to the extent of the fair value of the chattels sold cannot be considered a penalty. It merely prevents possible fraud and is the very least protection the mortgagor might expect. Fair value would be all that could be realized at any sale, even with notification to the mortgagor. Thus from the viewpoint of the mortgagee either mode of disposition achieves the same result, whereas on the sale without notice, the mortgagor's right to redeem his chattel is forever foreclosed[14] and he is in no way compensated for the loss of this right.

Quite to the contrary, under the lien theory, the balance appears to be weighted very much in favor of the mortgagor. The rather strict approach of the lien-theory system, though it more than adequately shields the mortgagor's equity, does so at the cost of flexibility in the methods of realization upon collateral security. In an economic system which thrives on credit, it is imperative that the creditor be afforded a great variety of means for realizing upon his security. Limitations upon such modes of realization tend to discourage the extension of credit, which factor in turn results only in an unnecessary obstruction in the current of our economy.

A possible solution to the many difficulties and seeming inequities attending the present-day law of chattel mortgages in respect to foreclosure and post-foreclosure proceedings might be found in the Uniform Com-

[10] Lessard v. Smith, supra note 9; Boomer v. Isley, 42 Idaho 547, 246 P. 966 (1926).

[11] Ibid.

[12] See, Wilson, A Discourse upon Usury (Tawney's ed. 1925); Gilmore and Axelrod, Chattel Security, 57 Yale L.J. 517, 531 (1948).

[13] See Comment, Mortgages-Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 260, 290 (1960).

[14] The mortgagor can, in theory, always resort to his remedy in equity to have the sale set aside, provided he can demonstrate sufficient grounds. This remedy is uncertain, expensive, and in many instances unfeasible. Consequently, after the unauthorized sale of the mortgaged chattels, the mortgagor's right of redemption is for all practical purposes "forever foreclosed."

mercial Code.[15] Generally, in § 9-504, the secured creditor, after default, is allowed to dispose of the collateral in any *"commercially reasonable"* manner. By virtue of § 9-504(3), the secured party is required to notify the debtor of the contemplated disposition of the collateral, unless "collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market." The test of *"commercially reasonable"* is thus conditioned on notice to the debtor and to other interested parties, who fulfill certain stated requirements.[16] Once having satisfied the requirement of notification, the secured creditor under the UCC, unlike the chattel mortgagee in a lien-theory state, can proceed with the disposition of the collateral in any number of ways deemed *"commercially reasonable,"* as generally defined in § 9-507(2). The UCC, not unlike title-theory jurisdictions, affords the chattel mortgagee and other secured creditors many available means for realizing on their security. However in the UCC, contrary to title-theory law, the debtor, or any other party entitled to notice or whose interest in the goods is known to the creditor prior to the disposition, is afforded a right to recover from the secured party any loss occasioned by failure to give notice or by non-compliance with any of the other rules respecting disposition of collateral.[17] Thus, in the event of an irregular sale, the secured party is made liable by statute to the debtor and/or others with interests in the chattel security. This statutory liability serves as a penalty for wrongful sale, a penalty not apparent in New Jersey and other title-theory jurisdictions.

The UCC appears to obviate the defects apparent in the two systems of chattel mortgages under consideration by providing adequate sanction for lack of notice, thus protecting the motgagor's equity, while at the same time supplying the mortgagee with a multiplicity of ways to realize upon his security, thereby encouraging the liberal extension of credit.

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Conditional Sales—Waiver of Defense—Public Policy.—***Walter J. Hieb Sand and Gravel Inc. v. Universal C.I.T. Credit Corp.***[1]—Appellant, Hieb, purchased 10 trucks under a conditional sales contract, appellee, Universal, being the seller's assignee. In addition to the standard contract provisions it was stipulated that the buyer would "settle all claims against the seller directly with seller, and not set up any such claim in any action brought by Universal. . . ." In a suit by Universal to repossess the trucks, payment not having been made, the buyer asserted the defense of the seller's breach of implied warranty claiming the waiver of defense

[15] See, Shattuck, A Comparison of the Law in Washington and the UCC, 29 Wash. L. Rev. 1, 272 (1954).

[16] UCC § 9-504(3).

[17] UCC § 9-507(1).

[1] 332 S.W.2d 619 (Ky. 1960).