Boston College Law Review

Volume 1 | Issue 2 Article 27

4-1-1960

# Chattel Mortgages—Bill of Sales to Secure Debt—Effect of Granting Borrower Permission to Sell the Secured Chattel.—Peoples Loan & Finance Corporation of Rome v. McBurnette.

John J. Desmond III

the problems surrounding the showing of such purpose by either the seller or his agent.

ANTHONY M. FREDELLA

**Chattel Mortgages—Bill of Sale to Secure Debt—Effect of Granting Borrower Permission to Sell the Secured Chattel.—*Peoples Loan & Finance Corporation of Rome v. McBurnette.*[1]**—An action of trover was brought in Georgia to recover possession of an automobile. The plaintiff granted a loan to an automobile dealer, taking a "bill of sale to secure the debt" to the car, such bill being duly recorded as required by statute.[2] The bill of sale stated that the dealer had the privilege of selling the car, the proceeds to be impressed in a trust for the benefit of the plaintiff, and to be used to retire the debt.[3] Subsequently, the dealer delivered the car to a third person in settlement of a personal gambling debt. Thereafter the car was sold to the defendant, a bona fide purchaser for value. The defendant's demurrer was sustained in the lower court. On the plaintiff's appeal to the Court of Appeals of Georgia, Division No. 2, affirmed. HELD: the bona fide purchaser took free of the lien of the security instrument.

Usually, one may not acquire title to a chattel from a person who himself has no title. However, in the present instance, the recorded bill of sale expressly granted the dealer-borrower the power to sell the chattel constituting the security with the proceeds to be held in trust for the lender. It is established in Georgia that one who lends money, receives and records a bill of sale to a chattel given as security, and by express provision or clear implication of the agreement authorizes the sale of the secured chattel, causes the borrower to become his agent for the sale and for the collection of the proceeds with the obligation to account for them. When the borrower disposes of the chattel in the due course of business, the lender's security title is extinguished and can not be asserted as against a bona fide purchaser for value.[4] By granting such permission to sell the lender places a strong reliance on the borrower's honesty in dealing with the chattel and in accounting

[1] 100 Ga. App. 4, 110 S.E.2d (2d Div. 1959).

[2] In Georgia, a bill of sale to secure a debt transfers title to the lender until the debt is paid. The instrument must be recorded. If it is not it remains valid only between the parties executing it, and as to others, is to be treated as an unrecorded deed of bargain and sale. See Manchester Motors Inc. v. Farmers & Merchants Bank, 91 Ga. App. 811, 87 S.E.2d 342 (2d Div. 1955); Commercial Credit Corp. v. Citizens & So. National Bank, 68 Ga. App. 393, 23 S.E.2d 198 (1st Div. 1942); Keel v. Attaway, 65 Ga. App. 172, 15 S.E.2d 562 (1st Div. 1941).

[3] The bill of sale recited: "Notwithstanding any other provision of this title, it is understood that the maker is a dealer in automobiles. He is hereby permitted to sell the above described property. In the event of such sale, the proceeds shall immediately become impressed in a trust for the use and benefit of the holder of this instrument. The said funds shall immediately be used to retire this instrument and for no other purpose."

[4] Automobile Financing Inc. v. Downing Motors Inc., 95 Ga. App. 711, 98 S.E.2d 643 (1st Div. 1957); Gernazian v. Harrison, 66 Ga. App. 689, 19 S.E.2d 165 (2d Div. 1942).

for the proceeds of the sale.[5] A similar result occurs in other jurisdictions which consider such financing transactions as chattel mortgages.[6] For it is widely accepted that a lender's consent to or authorization of a sale of the property given as security by the borrower when acted upon constitutes a release of the lender's interest irrespective of the borrower's subsequent failure to account for the proceeds.

In the present case, a sale by the borrower in the ordinary course of business would act to divest the plaintiff of his security title. However, here the borrower did not sell but instead transferred the chattel in settlement of a personal gambling debt. Such transfer in addition to being outside the express authorization given to the dealer, is void under the Georgia gambling statutes.[7] However, the court ruled that the third party transferee's subsequent sale to the defendant, a bona fide purchaser for value, served to divest the plaintiff of his security interest in the chattel. In arriving at this solution the court makes reference to "circumstances" which gave the dealer the apparent authority to transfer title to the third party.[8] In addition a Georgia Code provision is cited which recognizes that a purchaser without notice from a vendee with voidable title acquires a good title. Such approach, considering the transfer from the borrower to the third party as voidable and thus giving the third party the ability to transfer title to the bona fide purchaser, appears to be in direct conflict with the gambling statute[9] which declares that gambling contracts are void.[10] Yet, in so treating the bona fide

[5] National City Bank of Rome v. Adams, 30 Ga. App. 217, 117 S.E. 285 (2d Div. 1923).

[6] Quaker Oats Co. v. McKibben, 230 F.2d 652 (9th Cir. 1956); Schlafman v. O'Neil, 346 Ill. App. 577, 105 N.E.2d 775 (2d Dist. 1952); Fidelity Corp. v. Associates Discount Corp., 340 Mich. 610, 66 N.W.2d 235 (1954). See also, 10 Am. Jur., Chattel Mortgages, § 192.

[7] Ga. Code Ann. § 20-505.

"Gambling debts are void, and all evidences of debt, except negotiable instruments in the hands of holders in due course, or incumbrances or liens on property, executed upon a gambling consideration, are void in the hands of any person. Money paid or property delivered up upon such consideration may be recovered back from the winner within six months after the loss, and after the expiration of that time within four years for the joint use of himself and the educational fund of the country."

[8] Ga. Code Ann. § 96-207.

"Where an owner has given to another such evidence of the right of selling his goods as, according to the custom of the trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title."

However, such theory alone cannot satisfactorily explain how the plaintiff, who expressly limited the dealer's authority, can be deprived of his interest in the chattel. Since the present case is one of express authority to sell and the transfer not a purchase from a dealer in the normal course of business, the applicability of such is to demonstrate how the defendant in examining the title to the chattel would be reasonably without notice of the prior unauthorized transaction.

[9] Supra note 7.

[10] Statutes permitting the recovery of gambling losses have been enacted in a number of states. While they are based primarily on policy considerations of discouraging gambling, their provisions and interpretations often differ. Some are strictly

purchaser, the court reflects a desire to place the preservation of the commercial transaction, on which one relies without reasonably being put on notice of any irregularity, above the policy considerations voiding gambling contracts. Such protection of the bona fide purchaser could also be accomplished if a similar situation should arise in a jurisdiction in which the Uniform Sales Act or the Uniform Commercial Code has become law. Both statutes contain provisions permitting the acquisition of title by a bona fide purchaser from one having voidable title[11] or, in the proper circumstances, where the true owner is estopped from asserting the lack of authority in the possessor to transfer the chattel.[12] However, before this protection can be afforded the bona fide purchaser in this situation, the statute concerning the recovery of gambling losses must treat such gambling contracts as voidable, or be so construed as by the court as in the principal case.

If perhaps this result seems severe, it should be recalled that it was the lender who, desirous of facilitating a repayment of his loan, granted permission to the borrower to retain possession of the secured chattel and sell it. In so doing, a prudent lender should be completely satisfied with both the honesty and responsibility of his borrower. Otherwise, he runs the risk of not only losing the chattel when sold in the regular course of business, but also when such chattel is ultimately acquired by a bona fide purchaser, although there has been an intervening transfer made in violation of such permission and in settlement of a gambling debt.

JOHN J. DESMOND, III

**Conditional Sales—Construction of Insecurity Clause.**—***Jacksonville Tractor Co. v. Nasworthy.***[1]—A conditional sales contract for the sale of a farm rake contained an insecurity clause which provided that if the "seller deems himself insecure or the property in danger of misuse or confiscation (of which seller shall be the sole judge), . . . seller . . . may . . . retake possession of said property, with or without process of law . . ." After a retaking by the seller under the clause, the buyer brought this action for conversion and obtained a favorable jury verdict in the Civil Court of Duval County. Defendant appealed on the ground that the trial court's refusal to grant his motion for a directed verdict was error in the light of his uncontradicted testimony that he had deemed himself insecure. The Court of Appeals First District affirmed, holding that the party exercising

construed and declare all such transactions utterly void in the possession of anyone; Ill. Rev. Stat. ch. 38, §§ 329, 333; N.J. Rev. Stat. § 2:57-3; Va. Code Ann. 1950 § 11-4; while others make exceptions in the case of negotiable instruments in the hands of a holder in due course or bona fide purchasers; Conn. Gen. Stat. 52-553 (1948); Ga. Code of 1933 § 20-505.

11 USA § 24; UCC § 2-403(1).

12 USA § 23; UCC §§ 2-403(2) & (3).

1 114 So. 2d 463 (Fla. Ct. App. 1st D. 1959).