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Chattel Mortgage - Security Clause as a Potestative Condition

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not affected by the imposition of a charge upon those able to pay.

From the Louisiana jurisprudence, it is apparent that, regardless of the precise ground of immunity,[18] a charity is not liable for the torts of qualified servants. There is no Louisiana decision dealing with the liability of a charitable institution for the negligence of its managers in selecting incompetent subordinate agents. In a number of cases there are sporadic statements to the effect that a charitable hospital is not liable for the torts of servants *selected with due care*.[19] The significance of such statements is not clear. One might infer that liability will be imposed where there is a lack of due care in the selection of servants.[20] On the other hand, it might be contended that such statements were merely precautionary and bounded the issue presented by the particular facts under consideration.[21]

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CHATTEL MORTGAGE—SECURITY CLAUSE AS A POTESTATIVE CONDITION—The vendee of an automobile executed notes secured by a chattel mortgage which the vendor transferred to the plaintiff. Acting under a clause of the mortgage which gave the mortgagee the right to declare the notes immediately due and payable if he deemed himself insecure, the plaintiff obtained an order of executory process against the vendee. *Held*, the clause in question is null as a potestative condition under Articles 2024 and 2034 of the Civil Code. *Motors Securities Co., Inc. v. Tullos*, 178 So. 634 (La. App. 1938).

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18. All of the various theories of immunity are discussed in the Louisiana cases; from the cases as a whole it is not clear upon which theory Louisiana courts base their decisions.

19. See Jordan v. Touro Infirmary, 123 So. 726, 730-731 (La. App. 1922); Thibodaux v. Sisters of Charity of the Incarnate Word, 11 La. App. 423, 428, 123 So. 466, 470 (1929).

20. In the following cases, where the servants were not selected with due care, the charity was held liable: St. Paul's Sanitarium v. Williamson, 178 Tex. Civ. App. 108, 164 S.W. 36 (1914); Roberts v. Ohio Valley General Hospital, 198 W.Va. 476, 127 S.E. 318 (1925). Cf. Lindler v. Columbia Hospital of Richland County, 98 S.C. 25, 81 S.E. 512 (1914). See also Rhodes v. Millsaps College, 179 Miss. 596, 618-620, 176 So. 253, 255 (1937).

21. As was said by the Massachusetts court of a similar statement in Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 70, 126 N.E. 392, 394 (1920): "It simply showed the extent of the decision. It does not purport to be a comprehensive or exclusive statement. The correlative assertion, to the effect that there is liability of the hospital in cases where there has been carelessness on the part of the managers in the selection of servants and agents, is neither expressed nor implied." For cases holding charitable agencies immune from liability for negligence in the selection of agents, see Ettlinger v. Trustees of Randolph-Macon College, 31 F. (2d) 869 (C.C.A. 4th,

The decision in this case is in conflict with the established jurisprudence of other states,[1] a fact not recognized in the opinion. While such security clauses are by no means devoid of legal problems, in none of the other states have they been found utterly unenforceable. Of course the potestative condition is peculiar to the civil law, but it would be a mistake to believe that whatever wisdom it enfolds is unknown to our sister system. The conflict in other jurisdictions manifests itself in three variant interpretations of these clauses.[2] One view is that such a clause vests absolute discretion in the mortgagee as to when there is *insecurity*.[3] Another is that the mortgagee may exercise this condition only if there is a *reasonable insecurity*.[4] Finally, it has been held that the mortgagee must act in *good faith* and upon facts rendering his debt insecure.[5]

There is nothing in our chattel mortgage statute[6] which would justify the rule of the present case. On the other hand, the code articles and cases dealing with potestative conditions, if correctly construed, would uphold the validity of such a clause, even if it were meant to give the mortgagee unlimited discretion as to when to foreclose. This follows from Article 2034[7] which de-

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1929); Bodenheimer v. Confederate Memorial Ass'n, 68 F. (2d) 507 (C.C.A. 4th, 1934); Vermillion v. Women's College of Due West, 104 S.C. 197, 88 S.E. 649 (1916). Cf. Fordyce & McKee v. Women's Christian Nat'l Library Ass'n, 79 Ark. 550, 96 S.W. 155, 7 L.R.A. (N.S.) 485 (1906).

1. Manufacturers' Finance Acceptance Corp. v. Woods, 222 Ala. 329, 132 So. 611 (1931), noted (1931) 17 Va. L. Rev. 826; Thorp v. Fleming, 78 Kan. 237, 96 Pac. 470, 19 L.R.A. (N.S.) 915, 130 Am. St. Rep. 366 (1908); Englund v. Souther, 22 N.D. 261, 133 N.W. 301, Ann. Cas. 1914B, 1095 (1911); Johnson v. Thayer, 53 Ohio App. 25, 4 N.E. (2d) 172 (1936), noted (1937) 11 U. of Cin. L. Rev. 291; 2 Jones, Chattel Mortgages and Conditional Sales (Bowers' 6th ed. 1933) 18, § 331.

2. For a discussion of this, see Englund v. Souther, 22 N.D. 261, 265, 133 N.W. 301, 303, Ann. Cas. 1914B, 1095, 1097 (1911).

3. Cline v. Libby, 46 Wis. 123, 49 N.W. 832, 32 Am. Rep. 700 (1879); Hill v. Meriman, 72 Wis. 483, 40 N.W. 399 (1888).

4. Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151 (1880); Deal v. D. M. Osborne and Co., 42 Minn. 102, 43 N.W. 835 (1889); 2 Jones, Chattel Mortgages and Conditional Sales (Bowers' 6th ed. 1933) 189, § 431(a).

5. Hawver v. Bell, 64 Hun. 636, 19 N.Y. Supp. 612 (1892); Oppenheimer v. Moore, 107 App. Div. 301, 95 N.Y. Supp. 138 (1905); 2 Jones, Chattel Mortgages and Conditional Sales (Bowers' 6th ed. 1933) 192, § 431(b). See also Englund v. Souther, 22 N.D. 261, 133 N.W. 301, Ann. Cas. 1914B, 1095 (1911) and authorities cited therein.

6. La. Act 65 of 1912, as amended by La. Act 155 of 1914; La. Act 18 of 1915 (E.S.); La. Act 151 of 1916; La. Act 198 of 1918; La. Act 81 of 1922; La. Act 232 of 1924; La. Act 189 of 1932; La. Act 178 of 1936 [Dart's Stats. (1939) §§ 5022-5033]. See also La. Act 119 of 1924 [Dart's Stats. (1939) § 5034] and La. Act 157 of 1918 [Dart's Stats. (1939) §§ 5035-5036].

7. Art. 2034, La. Civil Code of 1870: "Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself."

clares null only those obligations based on a potestative condition on the part of the obligor.[8] The mortgagee who is allowed the option is not the obligor, but the obligee. Furthermore, the opinion is innaccurate in declaring the *potestative condition* null, for Article 2034 provides only that the *obligation* contracted on a potestative condition is null. This provision confers no authority therefore, for annulling a potestative condition which makes part of an enforceable contract.[9]

The better reasoned cases at common law have required a reasonable insecurity before permitting the mortgagee to foreclose.[10] There is nothing in our Code requiring a different result, nor would public policy be offended by allowing to mortgagees the protection of such an option if it is relied on only when the circumstances warrant its use.

W. M. S

CONFLICT OF LAWS—FOREIGN CHATTEL MORTGAGE NOT RECORDED IN LOUISIANA—RIGHTS OF INNOCENT PURCHASER—Plaintiff, the assignee of a Missouri vendor, seeks to enforce a chattel mortgage given on an automobile which the Missouri vendee subsequently removed to Louisiana. The defendant purchased the car in Louisiana, and gave in payment therefor a note secured by a chattel mortgage. Both chattel mortgages were valid under the laws of their respective states. The present holder of the Louisiana mortgage intervened, contending that the Missouri mortgage had no effect in Louisiana because it had not been recorded here. *Held,* that in the absence of recordation in this state the Missouri mortgage has no effect against a third party purchaser in good faith. Judge Janvier dissented on the ground that a chattel mortgage valid against third parties in the state where it was given was also valid in Louisiana. *General Motors Acceptance Corp. v. Nuss,* 192 So. 248 (La. App. 1939).

In cases involving conditional sales contracted in another jurisdiction, recovery by the vendor is allowed if at the time of execution is was not contemplated that the property would be

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8. Conques v. Andrus, 162 La. 73, 110 So. 93 (1926); La Salle Extension University v. Thibodaux, 155 So. 53 (La. App. 1934); Gumbel Realty and Securities Co. v. Levy, 156 So. 70 (La. App. 1934).

9. Brown, Potestative Conditions and Illusory Promises (1931) 4 Tulane L. Rev. 396-439.

10. See note 4, supra.