

Security Devices - Personal Liability of Third Party Purchasers Under Revised Statutes 9:5362

C. Alan Lasseigne

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property has been transferred into the hands of a good faith third party purchaser who has relied on the public records.

Helen M. Wimmer

SECURITY DEVICES—PERSONAL LIABILITY OF THIRD PARTY
PURCHASERS UNDER REVISED STATUTES 9:5362

The Harris Finance Company brought action against Fridge to recover the balance of the purchase price of an automobile which was secured by a chattel mortgage. Fridge purchased the car from the mortgagor and was being sued under the provisions of Title 9, Section 5362, of the Louisiana Revised Statutes. This statute states: "It shall be unlawful for a resident of any parish to purchase the movable property described in R.S. 9:5351 from any non-resident of such parish, without first obtaining an affidavit from the non-resident that there is no mortgage on the property, nor any money due on the purchase price thereof, and the purchaser who shall buy the movable property without having obtained the affidavit, shall be personally liable to the creditor for the debt secured by the property." Defendant Fridge failed to get the affidavit required by the statute. Harris Finance Company had failed to record the mortgage. Because of this fact Fridge was a purchaser without notice, and the question was whether the provisions of the statute applied to him. *Held*, Fridge was personally liable to the Harris Finance Company on the basis of the statute. *Harris Finance Company v. Fridge*, 55 So. 2d 707 (La. 1951).

The particular section in question was originally enacted as Section 5 of Act 151 of 1916. It was included as Section 5 of Act 198 of 1918 and Section 8 of Act 172 of 1944. It was then written verbatim into the Revised Statutes of 1950. The court of appeal said in *Finance Security Company v. Williams*¹ that although the mortgage in that case could not affect third persons because it was invalid, "the liability herein sought to be imposed on them does not arise out of the act of mortgage itself. Their liability, if any, is purely statutory and came into existence by virtue of the provisions of Section 8 of Act 172 of 1944."² In the *Harris*

1. 42 So. 2d 310 (La. App. 1949), rehearing refused 42 So. 2d 901 (La. App. 1949).

2. 42 So. 2d 310, 313.

case the supreme court held that the liability of a third party under Revised Statutes 9:5362 came into existence even though the holder of the chattel mortgage had not recorded the mortgage.³ The court agreed with the *Williams* case, stating "we prefer to rest our decision squarely on the ground that the defendant, having failed to secure the necessary affidavit, became personally liable for the debt irrespective of whether the mortgage was filed for recordation or not. . . . If the legislature had intended that this provision of the Act should only apply when a mortgage was timely filed for recordation, it would have so stated."⁴

Four possible fact situations might arise under the statute. The first is that involved in the *Harris* case where there was no recordation of the mortgage and the third party did not obtain an affidavit that there was no mortgage on the property. As seen, the court held in favor of the holder of the mortgage because Revised Statutes 9:5362 imposes personal liability on the third party in this situation. A second situation is one where the third party secures the affidavit although the mortgage is unrecorded. In this situation the chattel mortgage would be ineffective since, due to lack of recordation, the third party would be without notice. Nor would there be any personal liability since he obtained the affidavit in compliance with 9:5362.

The third situation would arise where the holder of the mortgage had it properly recorded and where the third party did not secure the required affidavit. In this case the third party not only would take the movable subject to the mortgage, but he would be liable for the entire debt owed on it, because of the personal liability imposed by the statute in the absence of an

3. In a case under the 1918 act the court of appeal held that the mortgage must be recorded for the act to give a right of action. *Booth Motor Co. v. Gamburg*, 9 La. App. 60, 118 So. 854 (1928).

In another court of appeal case, *Cullen Thompson Motor Co. v. Sullivan and Phillips*, 12 La. App. 486, 126 So. 456 (1930), the court held that Act 198 of 1918 did not apply to foreign mortgages. The opinion said, "It is apparent . . . that the Act was intended to apply only to mortgages . . . embraced in the Act [i.e., mortgages executed in Louisiana] . . . the mortgage [in this case a foreign mortgage] . . . is, therefore, not covered by that provision which imposed liability . . . without first requiring an affidavit."

Other cases under the 1918 act are *Southland Securities Co. v. Thieme*, 142 So. 375 (La. App. 1932), where the court held that the fact that the mortgagor was a nonresident of the parish was sufficient and a contrary belief on the part of the third party did not excuse him for not getting the affidavit; *Gulf Finance Securities Co. v. Taylor*, 2 La. App. 473 (1925), where the court held that the purchase by a third party made at a judicial sale in good faith gave the third party a good title.

4. 55 So. 2d 707, 709 (La. 1951).

affidavit. The last situation is that where the mortgage is recorded and the third party secures the affidavit. In this case also the third party would take the movable subject to the mortgage because the mortgage was recorded. However, he would incur no personal liability since he obtained the affidavit.

The purpose of this legislation was to provide for the mortgaging of movable property and to protect the rights of the mortgagee. One of the means for achieving the latter purpose is the requirement of an affidavit and the imposition of personal liability on those who fail to obtain it. It is questionable whether this is necessary to achieve the purpose of the statute and whether the statute is not too harsh in imposing personal liability on a third party.

First, are the means used by the statute necessary to achievement of its purpose? There are two parties who can be defrauded, the mortgagee and the third party. Whether the mortgagee has recorded the mortgage or not, the statute does not seem to prevent effectively the fraudulent disposition of the property to his detriment. The lack of recordation of the mortgage makes the fraudulent disposition of the property depend solely upon whether the mortgagor wants to sell without mentioning the unrecorded mortgage to the third party. He can give the third party a negative affidavit, and certainly the third party cannot be blamed if he takes the property. Also the third party is not protected since there is no way for him conveniently to check the validity of the affidavit; besides, he is without notice and the mortgage is not effective against the property in his hands. When the mortgage is recorded, the affidavit still does not prevent fraud. The mortgagor can transfer the property to the third party in any event. In this case the mortgagee does not need the protection of the affidavit. He can pursue the property under the mortgage since the third party has notice. Neither does the third party need the affidavit to protect himself, since he can do this by checking the records. It would therefore appear that where the only wrongdoer is the mortgagor, the statute does not deter him by punishing the third party with imposition of personal liability.

Second, even if the affidavit does seem justified or necessary to achieve the purpose of the statute, is the penalty on the third party too harsh? If the mortgage is recorded it is easy enough for the mortgagee to follow the property. He can then go against the mortgagor for any balance due him. This gives him the same

protection, in effect, as if the mortgagor never sold the property to the third party. If the mortgage is unrecorded, the rights of the mortgagee against the mortgagor are still the same as if the mortgage was recorded, but the mortgagee has no right of seizure against the third party; the third party is liable, however, if he has no affidavit. This personal liability can, in some cases, impose a very harsh penalty on the third party. For example, if the property involved were an automobile that had been wrecked since the original purchase, the third party might be held for possibly a \$2000 debt because he purchased a car for \$900 without getting the affidavit.

Under the present law the *Harris* case was certainly correctly decided. It would seem, however, that the statute which is the basis for the decision does not achieve its purpose by imposing personal liability on third parties who fail to obtain the affidavit. Also the penalty for this failure seems to be harsher than it need be. This purpose of the statute might be achieved as effectively by having a statute which would merely make unrecorded mortgages effective against third parties who fail to obtain the affidavit.

C. Alan Lasseigne

TORTS—PRENATAL INJURIES—LOUISIANA LAW

Defendant sold bottled gas in a defective container and an explosion resulting from this defective condition injured the plaintiff's unborn child, which was in the eighth month of gestation. The child was born dead and action was brought under Nebraska's wrongful death statute.¹ That act provides that where the decedent could have maintained an action for injuries had death not ensued, the wrongful death action permits recovery by the appropriate members of the family or next of kin.² The Supreme Court of Nebraska denied recovery, adhering to the majority common law rule that for actions in tort for personal injuries, an unborn child is not recognized as a separate being. *Drabbels v. Skelly Oil Company*, 50 N.W. 2d 229 (Neb. 1951).

1. Neb. Rev. Stat. 30:809 (1943).

2. The act is based on the English wrongful death statute, Lord Campbell's Act. Practically every state has adopted similar acts and it follows that there is no reason to segregate physical injury actions from wrongful death actions in treating the problem.