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HORSE AND BUGGY LIEN LAW AND MIGRATORY AUTOMOBILES

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Considerable opportunity for successful fraud now exists in interstate sales of second hand automobiles. This is due to the lack of coordination between the motor vehicle registration statutes as presently administered and the law relating to liens on automobiles. The lack of coordination opens the door to the "skip-state" operator, so-called because he skips out of the state without paying more than the down payment on a car and sells it in another state for the full price. He then absconds with the cash and leaves the person who sold him the car and the one to whom he sold it ruefully struggling each to place the loss on the other.

The factual pattern of this swindle is not complicated. An automobile is acquired in New York, for example, with a minimum down payment, the balance to be paid in installments. The finance company retains a security interest in the vehicle under a conditional sale, or a chattel mortgage. The owner is a resident of New York, and the contract is duly recorded in the county of his residence. The contract usually expressly forbids removal of the car from the state without the finance company's permission. Despite this provision, and the criminal sanction it normally bears, the car is driven across the state line without

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the knowledge of the finance company, re-registered in the second state either by the "skip" himself or a used car dealer to whom the vehicle has been sold. Later the automobile in question is sold to a purchaser who has no knowledge of the finance company's interest in the car, or, for that matter, that the car was ever registered in another state. Thereafter the original owner disappears without making any more payments to the finance company. Later the finance company somehow discovers the new location of the car and seeks to assert its lien to collect the balance due. The local purchaser refuses to pay or give up the car, and a law suit follows. These resales and the resulting law suits are not concentrated in any area. Six cases and one statute dealt with this problem in 1947; two of the cases were in North Carolina and one each in Arizona, Florida, Pennsylvania and Wyoming;¹ the statute was enacted in New Mexico.²

What, then, are the general rules of law apparently governing this situation? What result would a literal application of the verbal formulae of the text books lead us to expect? The dogma is that the law governing the creation of title interests in a chattel is the law of the place where the chattel is when the interest is created; that is, in the case of a conditional sale where the chattel is delivered to the buyer and in the case of a chattel mortgage, where the chattel is located at the creation of the mortgage. If the security interest is validly created under the law of one state, say the books, and if the removal from that state is without the consent of the conditional vendor or chattel mortgagee, then the security interest will be recognized in another state to which the chattel is removed as against the buyer, his creditors or purchasers from him.³ A minority of states, however, refuse to follow this rule and prefer the interests of bona fide local purchasers or attaching creditors over the interest of the out-of-state conditional vendor or chattel mortgagee.⁴

On this state of "the law" the conditional vendor or chattel mortgagee, usually an out-of-state finance company, would be expected

1. *Ragner v. General Motors Acceptance Corp.*, 185 P. 2d 525 (Ariz. 1947); *Lee v. Bank of Georgia*, 32 So. 2d 7 (Fla. 1947); *Universal Finance Co. v. Clary*, 227 N. C. 247, 41 S. E. 2d 760 (1947); *General Finance & Thrift Corp. v. Guthrie*, 227 N. C. 431, 42 S. E. 2d 601 (1947); *First National Bank of Jamestown, N. Y. v. Sheldon*, 161 Pa. Super. 265, 54 A. 2d 61 (1947); *Mosko v. Smith*, 179 P. 2d 781 (Wyo. 1947).

After this article was in print an eighth case was reported. *Manning v. Miller*, 11,920 3 C. C. H. CONDITIONAL SALE & CHATTEL MORTGAGE SERVICE (Tex. Civ. App. 1947).

2. N. M. Laws 1947, c. 64. Apparently the statute was designed to overrule the decisions in *Hart v. Oliver Farm Equipment Sales Co.*, 37 N. Mex. 267, 21 P. 2d 96 (1933), and *Snyder v. McCain*, 43 N. Mex. 231, 89 P. 2d 613 (1939). See Memorandum of Hugh B. Woodward in support of House Bill No. 58.

3. See, e. g., 2 BEALE, *CONFLICT OF LAWS* (1935) §§ 268.1, 275.1; GOODRICH, *CONFLICT OF LAWS* (2d ed. 1938) §§ 153, 154; Lee, *Conflict of Laws Relating to Installment Sales*, 41 MICH. L. REV. 445, 448, 452 (1942).

4. See, e. g., GOODRICH, *loc. cit. supra* n. 3; Lee, *op. cit. supra* n. 3 at 457-61.

to win in situations similar to the basic factual pattern except in the so-called minority states. But this is not the case. All of the six 1947 cases involved that factual pattern, and only one was decided in a minority jurisdiction, yet four decisions protect the domestic purchaser and only two protect the out-of-state finance company. The statute also protects the domestic purchaser. It appears then, that a strict application of the verbal formula of the so-called conflicts rule does not produce results that satisfy the courts today and that we must look elsewhere for solution.

Much has been written on the power of a state to change by its law the title to a chattel brought into the state without the consent of the owner of a security interest therein.⁵ But confusion of thought may result from the use of the generic term "chattel," as the mind at once considers tangible personal property generally, and not just automobiles. Special facts in the case of an automobile warrant a special rule, and the rule will, in certain cases, require opposite results from the general conflict of laws rule. Those who argue for the minority rule, which protects the domestic purchaser in all cases, say "Would you compel the purchaser to search in forty-eight or more jurisdictions?" But the answer is "No, they need look in only one state—the state plainly indicated to them by the license plate and registration certificate of the car, and a check can be made by use of the telegraph very quickly."

For example, in *MacCabe v. Blymyre*, an early Pennsylvania case, still cited in decisions relating to automobiles, Doctor De Lacey, resident of Maryland and owner of a horse, executed a chattel mortgage thereon which was duly recorded in Maryland. Thereafter the doctor moved his residence to Bedford, Pennsylvania and opened an office for the practice of his profession. He then sold the horse to Blymyre for value. The Maryland chattel mortgagee's action for replevin was dismissed, the court saying "Would it be reasonable to require that [Blymyre] should have first ascertained where this migratory doctor came from, and then have had the records of all counties of Maryland searched for chattel mortgages?"⁶

But should horse and buggy precedent apply to automobiles? So far as the minority rule protecting local purchasers is concerned the

5. See, e. g., Beale, *Jurisdiction Over Title of Absent Owner in a Chattel*, 40 HARV. L. REV. 805 (1927); COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, 86 (1942); Carnahan, *Tangible Property and the Conflict of Laws*, 2 U. OF CHI. L. REV. 345 (1935); Leflar, *Constitutional Jurisdiction Over Tangible Chattels*, 2 MO. L. REV. 171 (1937); Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COL. L. REV. 767 (1947); Note, *Conflict of Laws, the Chattel Mortgage and Conditional Sale*, 18 N. Y. U. L. Q. REV. 553 (1941).

6. 9 Phila. 615, 616 (C. P. Bedf. Co. 1872). For a case involving two horses and a wagon and reaching the same result see *M'Kaig v. Jones*, 3 Pa. L. J. 365, 2 Clark 365 (C. P. Somerset Co. 1842).

universal requirement of a license plate and a registration card showing not only the state but also the county from which the car has come, seems a conclusive basis for a negative answer. Moreover, with modern communication facilities, it places no great burden on purchasers to require that they check for liens in the state from which the vehicle has come. But it does not follow that the out-of-state encumbrancer should prevail in every case. To determine what the proper basis of decision should be, however, we must consider in more detail the various ways in which liens⁷ on automobiles are recorded, the effect of changing registration of the car to another state and, in some detail, what common factors can be found in decisions protecting the local purchaser.

REGISTRATION SYSTEMS

Based upon the legislative provisions governing the recording of liens upon motor vehicles, the states can be grouped into four categories, a group of "non-title" states and three groups of "title" states, so called because the state issues with respect to each automobile registered in the state a document called a certificate of title, or of some similar designation. As to each category, those dealing with the car in a state other than the one in which it is registered can tell the state and county from which the car has come, but the procedure for determining whether any liens exist will vary. Serious defects, however, exist in each category and it is the purpose of this article to propose a system which may eliminate most of these defects.

Seventeen states are called "non-title" states.⁸ Liens in these states are recorded in the several counties, and inquiry must be made at the county clerk's office in the county of the owner's residence. The certificates of title issued in the other groups of states to a greater or lesser extent determine rights in and to the car. For example, failure to transfer the certificate of title with the car may in some states void the sale, subject the purported "seller" to liability for the torts

7. The word lien is loosely used in this article to include every non-possessory security interest.

8. The grouping by types of statute was suggested by Byse, *Automobiles, Recording of Encumbrances, Certificate of Title*, 12 Wis. L. REV. 92 (1936). Byse's first group of title states with certificates making no mention of liens seems to have disappeared. The following seventeen states do not issue certificates of title: Alabama, Arkansas, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Rhode Island, South Carolina, Tennessee and Vermont. In 1939, the Arkansas legislature passed a title act but has not yet made any appropriation to put the law into effect, consequently no certificates of title have been issued by Arkansas. Letter from Chief, Motor Vehicle Division, Arkansas, Oct. 28, 1947. The 1946 Report of Committee on Laws and Ordinances of the President's Highway Safety Conference lists 18 non-title states, including New Jersey, but evidently N. J. Laws 1946, c. 136 was not called to their attention.

of the "purchaser", or preclude the purported purchaser from claiming an insurable interest.⁹

The title certificate statutes fall into three categories, based upon their treatment of liens upon motor vehicles. One group enters on the certificate only those liens upon the car disclosed in the application for a certificate.¹⁰ Application need only be made when the car is sold to a new owner. This type of statute can have a very misleading effect. Liens created in course of acquisition of the car may show up thereon, but no provision is made for keeping the certificate up to date, should the owner borrow after he has acquired the vehicle, or finance his purchase otherwise than through the seller.^{10a} That is to say, there is no provision for noting on the certificate of title a lien created after the certificate has been issued by the state authorities. Thus a prospective purchaser, without actual notice of any liens, can only safeguard himself from the unexpected taint of "constructive notice" by making a local title search, just as in the states requiring liens to be recorded in the county clerk's office and issuing no certificate of title at all—the so-called "non-title" states.

A second group of states issue certificates of title which have the same defect, but these laws provide a partial solution by requiring all liens upon automobiles to be recorded centrally, usually in the office of a Commissioner of Motor Vehicles or some similar office.¹¹

There is a third group of thirteen jurisdictions which have gone further and made the certificate of title a positive recording device,

9. See, e. g., Comment, *A Comparison of Land and Motor Vehicle Registration*, 48 YALE L. J. 1238, 1246 *et seq.* (1939); Comment, *Automobiles—Registration of Title and Transfer—Effect on Ownership*, 37 MICH. L. REV. 758 (1939).

10. COLO. STAT. ANN., c. 16, § 2 (Supp. 1946); ILL. ANN. STAT., c. 95½, § 77 (Smith-Hurd, Cum. Supp. 1946); IND. LAWS 1945, c. 304, § 11; KAN. GEN. STAT. § 8-135(c) (1) (Supp. 1937), as amended by Laws 1941, H. B. 206; MD. ANN. CODE, art. 66½, § 22 (Flack, 1939), as amended by Laws 1947, c. 17; MICH. COMP. LAWS § 4659 (Mason, Supp. 1940), as amended by Acts 1945, No. 272; N. C. GEN. STAT. § 20-52a (1943); N. D. REV. CODE § 39-0505 (1943); OKLA. STAT., tit. 47, § 23.3 (1941); S. D. CODE § 44.0202 (1939); WASH. COMP. STAT. § 6312-4a (Remington, 1932), as amended by Laws 1947, H. B. 204; W. VA. OFF. CODE, c. 17, art. 7, § 1 (1931); WIS. STAT. § 85.01(3) (1943); WYO. REV. STAT. § 60-207 (1945), as amended by Laws 1947, S. B. 40.

10a. "Each state desires to accord full faith and credit to certificates of title issued in other States, but this will not be practicable, nor will innocent purchasers be protected, unless and until all of the states enact uniform requirements in regard to certificates of title, requiring in every instance that any chattel mortgage or other lien, except a lien dependent upon possession, shall be filed or that a copy of the instrument be filed with the [State Highway] department." PRESIDENT'S HIGHWAY SAFETY CONFERENCE, REPORT OF COMMITTEE ON LAWS AND ORDINANCES 42 (1946). But see *infra* note 14, for present administrative practice which indicates that the Certificates are being accepted in other states as evidence of an unencumbered title when such is not the fact. See also note 57 for the reason given by one state commissioner for his failure to make any investigation.

11. FLA. STAT. § 319.15 (1941); Nev. Laws 1931, c. 202, §§ 15(a), (c) added by Laws 1945, c. 240; N. J. REV. STAT. § 46:32-13 and § 39:10-11 (1937), as amended by Laws 1946, c. 136; N. M. STAT. ANN. § 68-115 (1941) as amended by Laws 1943, c. 73; ORE. COMP. LAWS ANN. § 68-203 (Supp. 1943).

denying protection to liens not entered on a certificate of title.¹² Some of this last group provide for local entry by the clerk of court, others for central filing and entry by a Commissioner of motor vehicles.

But almost all states have neglected the problem of the out-of-state lien when application is made to have license plates and registration or certificate of title issued with respect to an out-of-state car. As to such liens all but three states appear to rely upon the quaint theory that an applicant, under oath but not subject to cross examination, will tell the truth in a matter against his interests and involving a chattel so valuable that its acquisition has provided the motive for murder.¹³ Some of these states require a notarized bill of sale which would disclose any lien reserved to the seller, but no more.¹⁴ Thus when the car was originally registered in a non-title state, the "skip" operator can quite easily re-register it in another state by using a fake bill of sale and thus obtain a clean title to enable him more readily to dupe his prospective purchasers. Or, as is more commonly the case, a dealer-purchaser of an out-of-state car will re-register the car using the clean bill of sale given him by the "skip."¹⁵ A purchaser from the

12. *Local entry*: MO. REV. STAT. § 3488 (1939), as amended by Laws 1941, H. B. No. 321; NEB. REV. STAT. § 60-110 (1943); OHIO ANN. CODE § 6290-9 (Page, 1945). *Central filing*: ARIZ. CODE ANN. § 66-231 (1939); CAL. VEHICLE CODE §§ 195, 196 (Deering, 1937), as amended by Laws 1947, c. 697; DEL. REV. CODE, c. 165, art. 3, § 5574 (1935), as amended by Laws 1937, c. 220; D. C. CODE §§ 40-702, 7 (1940); IDAHO CODE § 48-402 (1932), as amended by Laws 1945, c. 99; MONT. REV. CODE, Vol. I, c. 152, § 1758.3 (1935), as amended by Laws 1945, c. 63; PA. STAT. ANN., tit. 75, § 33 (Purdon, Supp. 1947) and Acts 1945, No. 434, § 5; TEX. LAWS 1939, H. B. No. 407, § 44; UTAH CODE ANN. §§ 57-3a-80 to 57-3a-86 (1943); VA. CODE § 2154(64) (b) (1942).

There are some statutes not listed above which do provide for a notation of subsequent liens upon the certificate of title, but which do not specifically provide that such notation constitutes constructive notice. See, e. g., Wyo. Laws 1947, S. B. 40, 3 C. C. H. CONDITIONAL SALE & CHATTEL MORTGAGE SERVICE, 16,262. In view of the decision in *Kaufmann & Baer v. Monroe Motor Line Transportation, Inc.*, 124 Pa. Super. 27, 187 Atl. 296 (1936), under the former similar wording of the Pennsylvania statute, that the certificate of title was not constructive notice, such statutes are not classed as "positive recording" statutes.

13. See p. 465 *infra*. See *State v. Bradley*, 55 A. 2d 114 (Conn. 1947) for a case involving three separate homicides to obtain possession of three automobiles which were separately sold in the New York market.

14. In an effort to ascertain administrative practice, information was requested from all state motor vehicle authorities as to what supporting documents or other evidence was required when application was made for registration of and for a certificate of title with respect to a vehicle formerly registered in another state. Replies from some 39 jurisdictions were sufficiently full to permit comparison of their practices. The usual division between the so-called "proof of ownership" states and those relying exclusively upon the applicant's own statements was observed.

Two states stated that they required a bill of sale to the applicant, but twenty-six states reported that they required the applicant to produce either a certificate of title or the registration receipt and such bills of sale as might be necessary to complete the chain of title from the last title-holder or registered owner and the applicant. Four of these states reported that they also required the bill of sale by which the registered owner acquired title to the car, although one of these apparently required it solely for the purpose of assessing the *ad valorem* tax. Three states require a lien search in the state of origin. See note 58 *infra*.

15. Of the states requiring an applicant to file proof of ownership, the great bulk required bills of sale only from last registered owner to applicant. This practice can

dealer will, then, so far as he can tell, buy a locally registered car. Strict application of the conflicts dogma protecting the out-of-state lienor can work very real hardship in this situation, as there is no notice to the sub-purchaser indicating any necessity to inquire for liens in another state.¹⁶ Small wonder, then, that courts have strained to find exception to the general rule.

THE 1947 CASES

One such exception to the general rule is illustrated by *General Finance & Thrift Corporation v. Guthrie*, one of the two cases decided in 1947 by the North Carolina Supreme Court.¹⁷ The plaintiff, a Georgia finance company, financed the sale of an automobile to a man named York in Atlanta, Georgia on Thursday, May 30, 1946, just before the holiday and ensuing week end. Georgia is a non-title state with local recording of liens. Plaintiff did not record its security interest until the following Wednesday, June 5, 1946. York, a resident of Georgia at the time, although formerly a North Carolinian, drove the car into North Carolina and sold it to one Hodges, a used car dealer, on June 12, a week later. The car was thereafter registered in North Carolina and given North Carolina license plates. In this condition it was purchased by defendant Guthrie. Plaintiff sued to obtain possession of the vehicle. The lower court directed a verdict for the out-of-state finance company as the dogma of the text books would lead us to expect. But the evidence was not clear as to when York had driven the car out of Georgia. Guthrie's lawyer contended that the automobile had been removed from Georgia on June third, and there was evidence to support this contention. There was also contrary evidence. If the June third removal date was the correct one (the argument ran), the car had been removed prior to the recording of plaintiff's contract, so that when the lien was recorded there was nothing in the state to which the lien could attach. The appellate court held that the direction of a verdict for plaintiff was error, and the case was remanded for trial on the issue of the date of removal.

be especially misleading when the car was previously registered in a state where conditional sales retain their common law validity without recordation. Fortunately, after allowing for "title" laws, only five states remain in this category. They are Arkansas, Massachusetts, Mississippi, Rhode Island and Tennessee. For a case involving a fake bill of sale, see *Ragner v. General Motors Acceptance Corp.*, 185 P. 2d 525 (Ariz. 1947), discussed *supra*, p. 456.

16. Several states require dealers to register a vehicle locally before reselling it, but Florida has now apparently required that out-of-state origin be shown. See Fla. Laws 1947, c. 23658 (No. 44) S. B. No. 108, Sec. 4.

17. 227 N. C. 431, 42 S. E. 2d 601 (1947). The court distinguished *Mack International Truck Corp. v. Wilkins*, 219 N. C. 327, 13 S. E. 2d 529 (1941) on the ground that the property there involved was physically located in the other state when the lien was there recorded. Cf. *Universal Finance Co. v. Clary*, 227 N. C. 247, 41 S. E. 2d 760 (1947), also following the so-called majority rule. See Annotations 57 A. L. R. 702, 714, and 148 A. L. R. 375, 380.

The court's reasoning (or rather, the reasoning of the prior Wyoming decision relied upon by the court)¹⁸ was, as Guthrie contended, that the lien was not valid until recorded, and due to the removal of the car there was nothing to which the lien could attach when filed for record. This smacks of medieval scholasticism. The purpose of recording, a layman would say, is to give notoriety to an otherwise secret lien, to provide a method by which a prospective purchaser could check up on the truth of the statements of his seller as to liens on the car. When is the notoriety needed? When will the check-up be made? Not when York drove across the border into North Carolina, but when the sale was made—or at the earliest when negotiations started with Hodges, the dealer. Our hypothetical layman would argue that Hodges saw that the car had Georgia plates, and that the registration card gave York's address as Augusta, Georgia. Hodges could easily have telegraphed the county clerk in Georgia for a statement of liens. Had he done so, the reply would have disclosed the plaintiff's interest regardless of the time when the car was driven out of the state. However, if we regard the court's reasoning merely as a means of protecting Guthrie, the sub-purchaser, who had no notice of the Georgia origin of the car, our criticism boils down to this: did the court have to adopt a theory that would protect the dealer who knew about the Georgia origin in order to protect the sub-purchaser who did not? We think not, but of this more anon.

The Supreme Court of Florida, in *Lee v. Bank of Georgia*,¹⁹ another of the 1947 cases, also decided in favor of the local purchaser, notwithstanding the general rule. Again it was a Georgia car that was involved but the lien was recorded while the car was in Georgia. The facts were that one Willson, then a resident of Fulton county, Georgia, obtained a loan from the Bank of Georgia upon the security of a chattel mortgage on his Dodge automobile. That chattel mortgage was recorded. Thereafter the car was sold to Howard Marsh of Jacksonville, Florida, and Marsh was issued a Florida certificate of title showing no liens. There were, of course, no liens filed against the car in the office of the motor vehicle commissioner where liens on automobiles, under Florida law, are required to be filed.²⁰ The car was then sold to defendant Lee. The court applied the Florida certificate-of-title and central recording law to defeat the claim of the finance company, ruling that the statute excluded enforcement of any unfiled lien against a purchaser for value and without notice. The

18. *Yund v. First National Bank*, 14 Wyo. 81, 82 Pac. 6 (1905).

19. 32 So. 2d 7 (Fla. 1947).

20. Florida's general recording statute is Florida Statute, 1941, Sec. 698.01. The central recording provision of the "Title" law is Florida Statute, 1941, Sec. 319.15.

theory of this decision is interesting because it enables the court to protect the local purchaser of a locally registered car, but does not involve a theory that also protects one dealing with the vehicle when it still carries license plates indicating an out-of-state origin.

In *First National Bank of Jamestown v. Sheldon*, the Pennsylvania Superior Court was faced with almost the same problem.²¹ Sheldon, a resident of New York, a non-title state, gave plaintiff a chattel mortgage on his automobile purchased in New York. Plaintiff duly filed in New York. *Thereafter*, Sheldon drove into Pennsylvania and sold the car to one Mychauda doing business as Northampton Auto Exchange. Mychauda then obtained Pennsylvania plates and certificate of title and sold the car to defendant Mack. On discovering the facts, plaintiff attempted to replevy the car from Mack, joining Sheldon as defendant. Mychauda appeared as an intervening defendant.

Despite the fact that the car was in New York when plaintiff recorded, the Pennsylvania court reversed a judgment below for plaintiff and entered judgment for Mack and Mychauda, on the ground that chattel mortgages were unenforceable in Pennsylvania unless specifically authorized by statute. The Court ruled that the 1945 Chattel Mortgage Act gave no validity to New York chattel mortgages on automobiles, as liens on motor vehicles were exempted from the operation of that Act.²² During the course of his opinion, Dithrich J. characterized Mychauda as "an innocent purchaser for value (who) . . . had no notice of the lien recorded in favor of the plaintiff in the State of New York," thus protecting the dealer who purchased a New York car.

The Pennsylvania court apparently overlooked the exact wording of the exception in the statute. The exception only applies to a "motor vehicle for which a certificate of title is issuable" under the Pennsylvania Motor Vehicle Code,²³ and this clearly does not include a New York car owned by a resident of New York, which was the situation when defendant Mychauda, the dealer, purchased the car. As to the ultimate purchaser, the defendant Mack, it would be more valid to assert that he was protected by the certificate-of-title law, as the Florida court did in the *Bank of Georgia* case just discussed.

In *Mosko v. Smith*,²⁴ coming before the Wyoming Supreme Court in 1947, removal of the car from the state prior to recording was again

21. 161 Pa. Super. 265, 54 A. 2d 61 (1947).

22. Act of June 1, 1945, P. L. 1358, PA. STAT. ANN., tit. 21, § 940.1 (Purdon, Supp. 1947).

23. Act of May 1, 1929, P. L. 905, as amended, PA. STAT. ANN., tit. 75, § 33 (Purdon, Supp. 1947).

24. 179 P. 2d 781 (Wyo. 1947).

used as a ground for protecting the local purchaser. The facts were that one "Ed." Orr owned a car used primarily by his wife. They lived in Wyoming and the car bore Wyoming plates and was registered in Wyoming at all times. Orr separated from his wife and acquired a residence in Leadville, Colorado. His wife continued to use the car until shortly before October 25, 1944, when Orr obtained possession of the automobile and removed it to Leadville. Then on October 25, 1944, in Colorado, Orr mortgaged the car to plaintiff. The statement of facts laconically tells us that the estranged wife came to Leadville and took the car back to Wyoming before November 3, 1944. No details of the transaction between husband and wife at that time are divulged. On November 3, 1944, plaintiff recorded his mortgage in Colorado. On August 1, 1945, Orr assigned his certificate of title to Major, who in turn sold to defendant Nell Smith. A new certificate of title was issued to Nell Smith by Wyoming. Plaintiff then brought suit in Wyoming to assert his lien, but the court protected Nell Smith on the ground that the car had been removed from Colorado before plaintiff filed his lien.

Here again, but for the prompt and possibly irate action of the estranged wife strict application of conflicts dogmas would have worked injustice on poor Nell Smith. No method of search would have revealed the Colorado lien, and nothing would tell her to look to Colorado, for we may assume that Orr's certificate of title showed a Wyoming residence. But if we consider whether the plaintiff could have taken action to protect itself, we can justify the result on other grounds. Here the Colorado finance company was offered as security a car with Wyoming plates. True, the prospective borrower, a former resident of Wyoming, was the registered owner. He claimed to be now a resident of Colorado, and undoubtedly satisfied the company of his residence and employment. But in such a case, why wasn't the car re-documented in Colorado? On the other hand, filing could as easily have been accomplished in Wyoming, and the cost would not be excessive even if the Wyoming filing was in addition to the Colorado filing. Here, too, the court, in effect, protected a person dealing with an automobile, who examined only in the state in which the car was registered.

These are the four cases protecting the local purchaser. In all four cases the car bore license tags of the state in which it was located at the time of sale, and in all four cases the court protected the local purchaser.

Of the two cases protecting the out-of-state finance company, one was *Universal Finance Company v. Clary*, decided in 1947 by the

Supreme Court of North Carolina.²⁵ Here a car was purchased in Maryland and a chattel mortgage placed thereon, which was clearly recorded in Maryland. The car was driven to North Carolina and there sold. But at the time of sale the car was still registered in Maryland and carried Maryland plates. The trial court charged the jury that when defendant bought the car it bore a Maryland license plate and that no sufficient inquiry was made to ascertain what liens, if any, were recorded against it in Maryland. No objection was made to the charge, and, on appeal, since no objection was made at the trial, the holding was that error, if any, in the charge could not be raised for the first time in the appellate court. The charge of the trial judge has only the weight due a *nisi prius* ruling, but the ruling contains the seed of a possible solution to our problem, namely how to protect adequately the legitimate interests of both the local purchaser and the out-of-state finance company in these cases.

Our final case is *Ragner v. General Motors Acceptance Corporation*, the 1947 case from Arizona.²⁶ In this case the court did not protect the local purchaser buying a locally registered car. The facts were that one Bernace Lee Franklin, representing himself as H. G. Franklin of Kilgore, Gregg County, Texas, purchased a car in Louisiana, and gave a chattel mortgage to secure the payment of the installments due on the unpaid portion of the price. The car was registered and licensed in Louisiana, apparently in the name of H. G. Franklin, Kilgore, Texas.²⁷ The chattel mortgagee, the finance company, recorded its mortgage in Gregg County, Texas and in Caddo Parish, Louisiana, where the sale was made. Louisiana is a non-title state. Franklin drove to Arizona and exactly one week after his Louisiana purchase made application for an Arizona certificate of title, presenting his Louisiana registration card and a fake bill of sale from a Louisiana vendor who supposedly resided in Vernon Parish, Louisiana. Arizona issued a certificate of title on the same day that application was made. Four days later Franklin sold the car to a used car dealer in Arizona. The finance company by a curious coincidence found out where the car was on the same day that the dealer sold the car to defendant Helen Ragner and on that day attempted to file its mortgage with the Arizona Highway Department. The Department refused to accept the filing and issued a certificate to Miss Ragner showing a clear title. A lawsuit resulted. Arizona had previously

25. 227 N. C. 247, 41 S. E. 2d 760 (1947).

26. 185 P. 2d 525 (Ariz. 1947).

27. Telegram from counsel states "Do not have registration card, but original application for registry stamped 'Transferred to H. G. Franklin, Kilgore, Texas.'"

adopted the so-called majority rule of conflict of laws²⁸ and so Miss Ragner's lawyer contended that the 1937 certificate of title law had changed the result of the prior cases. This contention the court rejected, saying:—

"We are of the opinion that the statute [1937 Title Act] contains no implied abrogation of the rule set forth in the Forgan case. The statute was not intended to have extra-territorial effect other than would be accorded it through the rule of comity. This statute sets forth the *modus operandi* for registering motor vehicles, securing certificates of title, and establishing liens in the state by and for the citizens of this state. The statute specifically says that a lien can be acquired only in the manner set forth in the statute, and that the instrument creating the lien 'shall be executed in the manner required by the laws of this state. . . .'
It is inconceivable that the legislature contemplated that it had the authority or was attempting to set forth the manner in which other states might create the means for establishing liens. . . . Though the language of the statute is broad enough to authorize the interpretation contended for by appellants, certainly it is not compelling nor do we believe that it is warranted."²⁹ (Italics supplied).

Miss Ragner lost her car to the finance company, unless, of course, she was later able to make a deal with General Motors Acceptance Corporation to keep the car upon payment of what was due them under the Franklin contract.³⁰ She would, however, be able to recover from the dealer whatever out-of-pocket loss she might suffer as damages for his breach of warranty of title, at least in the normal case.³¹

What the Arizona court held to be inconceivable, the legislature in the adjoining state of New Mexico did expressly. In 1947 New Mexico passed a statute expressly providing that no security interest in an automobile created pursuant to the laws of another state would be given recognition in New Mexico unless the other state was a title state and used its certificate of title as a positive recording device, referring apparently to the third group of so-called title states men-

28. *Forgan v. Bainbridge*, 34 Ariz. 408, 274 Pac. 155 (1928); *Davis v. Standard Accident Ins. Co.*, 35 Ariz. 392, 278 Pac. 384 (1929).

29. 185 P. 2d 525, 528 (Ariz. 1947).

30. Ragner could here show a chain of assignment from the conditional vendor and claim to stand in his shoes. Indeed, if the local purchaser has not paid the full purchase price, courts wishing to protect him could still give some protection to the finance company by protecting the purchaser only to the extent of his payments, upon analogy to the *pro tanto* protection accorded an innocent purchaser of land under the recording system. See, e. g., *Durst v. Daugherty*, 81 Tex. 650, 17 S. W. 388 (1891); 2 POMEROY, EQUITY § 650 (5th ed. 1941).

31. UNIFORM SALES ACT § 13(3); 1 WILLISTON, SALES § 218 (2d ed. 1924). Of course, the terms of sale might expressly negative a warranty of title, but in such a rare case, the purchaser probably was taking his chances.

tioned before.³² The effect of the statute then is to protect all local purchasers of automobiles from non-title states, even though the license plates and registration card indicate its origin.

Looking back over our 1947 data, we find that the Florida court thought the certificate of title statute was sufficient to protect the local purchaser, while the Arizona court did not. The North Carolina and Colorado courts relied upon the fortuitous circumstance that the car in question might have been taken out of the other state before the security interest was recorded to protect the local purchaser. The Pennsylvania court relied upon its ancient animosity to chattel mortgages to protect the local purchaser. But the common factor that emerges is that in every situation in which local purchasers were protected, the case involved an individual who purchased a car bearing the license plate of his own state, and no search indicated to him by the available documents would have disclosed the security interest created in the other state, or for that matter, that the car came from another state. More will be said concerning this at a later point, in the discussion of sales to used car dealers.

In two of the cases, the *Guthrie* and *Sheldon* cases,³³ the decisions also protect the dealer who purchased the car when it carried the plates of another state. The next phase of the inquiry, then, is to determine whether this protection was either necessary or desirable. Apparently both courts felt compelled to go the whole way. Apparently they felt either that the security interest of the out-of-state finance agency is paramount, or that the interests of all domestic purchasers must prevail. Certainly, if examined exclusively as a conflict of laws problem, the issue would appear to be whether, as a matter of jurisdiction, or comity, or choice of law, the courts should recognize out-of-state liens. If, as now urged by those writing in the field, we recognize that "the choice of law to govern conflicting title interests in chattels is the expression of a choice between the relative merits of the interests that are at issue,"³⁴ we can adopt an intermediate position: we can give protection to the out-of-state finance company as long as the car carries out-of-state plates, but protect local purchasers buying auto-

32. See notes 2 and 12 *supra*. Apparently only the liens created in the states listed in note 12 could qualify for protection under the statute. While the statute was probably designed to relieve local purchasers, finance companies and dealers from danger, it is difficult to see why it will not have the effect of an invitation to a New York "skip-state" operator to try the New Mexico market, especially if the validity of a New Mexico purchaser's title is recognized elsewhere. See, e. g., *W. H. Applewhite Co. v. Etheridge*, 210 N. C. 433, 187 S. E. 588 (1936); *Fuller v. Webster*, 28 Del. 538, 95 Atl. 335 (Super. Ct. 1915), *aff'd. w/o op. by necessity*, 29 Del. 297, 99 Atl. 1069 (1916). *Contra*: *Forgan v. Bainbridge*, 34 Ariz. 408, 274 Pac. 155 (1928); *Meyer v. Equitable Credit Co.*, 174 Ark. 575, 297 S. W. 846 (1927).

33. *Supra* notes 17 and 21.

34. Note, 47 COL. L. REV. 767, 785-86 (1947).

mobiles that are locally registered without notice of an out-of-state security interest in the car.

The *Guthrie* and *Sheldon* decisions are correct under this intermediate view in protecting the sub-purchasers, at least on the facts that we have, because they had no notice that the car was an out-of-state one. Both are wrong in protecting the local dealer who bought the car when it had out-of-state plates. Let us forget for the moment about state lines and rules of conflict of laws. Consider the question as to the local dealers as if it were purely a matter of local law. On which party should we place the loss involved in dealing with the "skips," the finance company or the dealer?

THE FIRST PURCHASER

The Pennsylvania Superior Court in the *Sheldon* case concluded its argument protecting the dealer with:

"Furthermore, applying the universally accepted principle that when one of two innocent persons must suffer through the fraud of a third person, the one who made it possible for the fraud to be perpetrated must bear the loss, it readily appears that the loss in this case should be borne by the mortgagee who, by permitting the mortgagor to remain in possession of the automobile, placed him in a position to perpetrate a fraud upon innocent purchasers without notice of the mortgage which he did in fact perpetrate on appellants."³⁵

Application of this principle, however, requires that we first determine whether the foreign lender, or seller as the case may be, and the domestic used car dealer are *both* "innocent persons," or perhaps are two *equally* innocent persons, and that we next determine "the one who made it possible for the fraud to be perpetrated." But, in situations of the type we are discussing here, the fraud cannot be successful unless two people are victimized, the foreign finance agency who first dealt with the swindler and the local purchaser who was the second victim. The swindler must obtain a car on credit, so the one giving credit is the first victim. Then to be successful the swindler must sell the car to his second victim in order to obtain the cash which is the object of his scheme. Unless we are to make the maxim merely an automatic device for placing the loss in all cases upon the first person dealing with the swindler, we must consider with some care just what is meant by "making it possible for the fraud to be perpetrated," and equally what is meant by "innocent." If, for argument's sake, it be conceded that the second person dealing with the swindler can, in cases

35. 161 Pa. Super. 265, 270, 54 A. 2d 61, 63 (1947).

where the maxim is held applicable, so conduct himself as to be the one to bear the loss, we can see more clearly the true nature of our inquiry. In other words, we must consider the means available to each victim to enable him so to conduct himself in the transaction as to prevent the perpetration of a fraud; and whether each such person made use of the available means. Thus, the verbal formulae "the one who made it possible for the fraud to be perpetrated" needs further refinement.

If by that formula we mean the person who set in motion the chain of events resulting in the commission of a fraud, then the formula should be rephrased to read simply, "When one of two innocent persons must suffer through the fraud of a third person, the first of the two to deal with the defrauder must bear the loss." On the other hand, borrowing an analogy from tort law, we could argue that the second victim should bear the loss if he had the "Last Clear Chance" of avoiding fraud and failed to use methods readily and easily available to him. That is to say, if the second person dealing with the defrauder could, in the exercise of normal prudent business methods, have found out about the lien, and did not do so, the loss should fall on the second victim, not the first. To state the matter another way, it is an unusual situation if both persons dealing with the automobile "skip" have used the same degree of care and exercised the same amount of precaution in view of the means of protection available to each. In this light, our inquiry on the skip-state automobile cases becomes at the outset one of determining whether one of the two victims used all of the means available to him to eliminate the possible commission of a fraud.

In the *Guthrie* and *Sheldon* cases it seems to us that the dealers were not as innocent as the finance agencies. In the first place, consider the business situation. Automobile dealers are engaged in a well-organized business. Its annual volume is in the neighborhood of four billion dollars, and automobile installment sales may well be about half of the entire amount of consumer installment credit.³⁶ Credit bureaus are used in investigating the status of potential purchasers. There is evidence that these bureaus are also used to check on possible liens against used cars turned in by the purchaser. Services exist which supply dealers in used cars with charts showing state by state the methods used to record liens against automobiles.

36. The dollar volume of automobile installment sales is difficult to estimate. In 1939 and 1940 it has been estimated at 2.3 billion dollars and 2.8 billion dollars, respectively. COX, *THE ECONOMICS OF INSTALLMENT BUYING*, Table 11, c. 2 (to be published 1948). This compares with total installment sales of 3.7 billion dollars and 4.5 billion dollars, respectively. The estimates, of course, are rough. Assuming that the 2.3 and 2.8 figures represent 60% of total sales, we arrive at the four billion dollar figure used in the text for total sales.

BUSINESS PRACTICE

What is the general practice in this business with regard to inquiring as to possible liens? What do used car dealers generally do to protect themselves against liens when an out-of-state car is offered to them for cash or as a "trade-in" on a more expensive model? An informal inquiry was made of an admittedly inadequate selection of used car dealers in West Philadelphia.³⁷ Some smaller dealers stated that they did not bother with out-of-state cars. They felt that they could not afford to risk a potential loss if the out-of-state car were stolen or subject to valid liens. Others subscribed to one of various services which supplied them, at a cost as low as ten dollars a year, with up-to-date charts showing, state by state, the method by which liens on automobiles are recorded. When offered an out-of-state car deal, this second group telegraphed the appropriate authorities in the sister state with request for a C. O. D. reply as to liens. A third group referred to a credit bureau in the other state for information on liens. A fourth group reported that an occasional out-of-state car was purchased with post-dated checks. The title papers offered by the seller were forwarded to Harrisburg, and, if a clear title was issued, payment was not stopped on the check. Parenthetically, this reliance on Harrisburg is misplaced. If the car has been reported stolen to the state police, no title will issue, but no other check-up is made.³⁸ And, finally there were a few dealers who made no attempt to verify the statements of their vendors, but these appeared to be mostly in the "high pressure" class.³⁹

While our investigation leads us to believe that used car dealers as a class, do inquire as to liens or consciously assume the risk of not inquiring, our sample is so inadequate that general business practices cannot be determined, but the means for inquiring in the other state are available, the cost is not prohibitive and the delay not an obstacle to

37. Conversations were had with only fifteen used car dealers in West Philadelphia. Information was obtained also from personal contact with relatives of automobile dealers in two other states, which confirmed the information as to practices supplied by those dealers with whom we talked in West Philadelphia. This example is admittedly inadequate, but suggests that a careful study should prove illuminating.

38. The examination made at Harrisburg includes a check of the "Stolen Car" index, which contains the numbers of all automobiles reported as stolen, embezzled, etc. Thus, if the finance company knows of the "skip" before application is made for a Pennsylvania title, and the police in the former state have notified the Pennsylvania authorities, the procedure will give the dealer some protection. But no inquiry of the other state is made by the Pennsylvania authorities. Letter of Nov. 13, 1947, from Director of Motor Vehicles, Dept. of Revenue, Commonwealth of Pennsylvania.

39. New car dealers were the least aware of the problem, but since their sales are often on the installment plan, involving a credit investigation of the purchaser, "skips" are perhaps less likely to approach such dealers. Again the need for a careful investigation of business practice is indicated.

successful conduct of business.^{39a} We feel that these last mentioned facts are enough to enable a conclusion to be reached as to a proper rule of law.

Let us return to a consideration of the relative position of the out-of-state finance company—for example, a New York bank dealing with an ostensible resident of its state (New York in our supposed case) and a Pennsylvania dealer buying a car with New York plates. We believe that the New York finance company by recording its security interest in New York, has done all that it can do to avoid a possible fraudulent resale. But has the Pennsylvania dealer done all he could or should do when he buys a car with New York plates, if he only inquires as to liens from the person selling him the car? Would it be too great a burden to require all those purchasing out-of-state cars to make the same inquiry that many persons in that line of business already make as a matter of routine? Further support for imposing such a duty can be found in the statistics showing that, on an average, six out of ten automobile sales of both new and used cars are on the installment plan.⁴⁰ Common knowledge that a substantial portion of cars are sold under conditions in which a security interest is created might well be used to impose a duty to inquire or be subject to recorded liens. We are aware that one court has already ruled that common knowledge of a custom among finance companies not to put their security interest on record in half of their installment sales was not sufficient to constitute a dealer a purchaser with notice of an unrecorded lien.⁴¹ We do not believe that this case is precedent against our contention here. In the first place it does not appear that any testimony was given as to the percentage of total sales that were made on credit subject to a security interest; the unrecorded half of the installment sales could have been half of a small portion of total sales. Second, the issue was whether the purchaser should be charged with notice of a security interest in a particular car, not whether he should be under a duty to inquire in another state. Finally a decision that the purchaser in that case was not a purchaser in good faith would have created too much of a gap in the recording law. Our contention is merely that a court could find,

39a. The speed of telegraph and air mail indicate that any fear that delay in communications would clog transactions is unfounded. Less spectacular but important in view of its cheapness is the speed of ordinary mail today. In connection with this article the author communicated with numerous state authorities. Letters mailed November 3rd, 1947, in Boston, Mass., Providence, R. I., and Richmond, Va., were received at 9:30 A. M. November 4th, 1947. Letters mailed in Cheyenne, Wyo., and Nashville, Tenn., on November 1st, 1947, were received November 4th, 1947, at 9:30 A. M.

40. COX, *THE ECONOMICS OF INSTALLMENT BUYING*, Table 9, c. 2 (to be published 1948). Cf. HOLTHAUSEN, *et al.*, *THE VOLUME OF CONSUMER INSTALLMENT CREDIT, 1929-1938*, Table A-6 (1940).

41. *Commercial Credit Corp. v. Interstate Finance Corp.*, 236 Iowa 459, 18 N. W. 2d 178 (1945).

on the evidence of the way the automobile market works, that a Pennsylvania, or a North Carolina, dealer is under a duty to inquire in New York when buying a New York motor vehicle labelled as such by its registration and plates.

In the light, then, of these facts, it becomes increasingly difficult to understand why the court in the *Sheldon* case called the Pennsylvania dealer a bona fide purchaser when he had made no inquiry at all. In the *Guthrie* case, the plaintiff, the out-of-state vendor, urged arguments against the local dealer similar to those we have made here. His points were dismissed with the statement, "We are not inadvertent to plaintiff's arguments." The case was remanded however, to resolve a conflict in the evidence as to whether the car had been driven out of Georgia before, or after, plaintiff had recorded his conditional sales contract.

THE SECOND PURCHASER

Earlier in this discussion it has been stated that the *Guthrie* case was correct in protecting the person who purchased in good faith from a dealer, where the dealer had documented the car in his own state. Once we abandon the idea that we are dealing with "jurisdiction" or the "exercise of jurisdiction" to affect the interests of out-of-state holders of liens on "chattels" brought into a state without their consent, and concentrate on determining which of several persons involved in a transaction involving an automobile is to bear the loss, it is clear that the majority rule may go too far in permitting the out-of-state chattel mortgagee to recover from sub-purchasers because sub-purchasers may have no means to ascertain the facts. Consider for a moment the position of the sub-purchaser. He is offered a car by a local dealer and shown a certificate of title free of liens. Or, if we are in a "non-title" state, he may (usually he doesn't!) search the records in the county of his dealer's residence and place of business. Should he have to inquire as to the dealer's vendor—perhaps even of the vendor of that vendor—if the car has changed hands after its first sale to a resident of the same state? On the other hand, what can the out-of-state chattel mortgagee or conditional vendor do? He has done what was required of him, and he doesn't yet know, we will assume, that the car has been taken out of state. Here then, is a real case of two equally innocent parties—*i. e.* two people each of whom has exercised the same degree of care in the light of the means available to them.

Aside from this difference, there is another factor present. One of these two parties has dealt directly with the wrongdoer and the other has not, and we are really here allocating the incidence of loss caused

by the dishonesty of the wrongdoer. Should that loss be placed initially upon one who has not dealt with the wrongdoer or upon the one who extended credit to him after investigation of the credit risk? Which of the two should be subject to the honesty risk? Unhesitatingly we suggest the out-of-state finance dealer, and persuasive analogy exists for our selection, for the case is really similar to the "purchaser in ordinary course of business" protected by the Uniform Trust Receipts Act,⁴² or to the many situations in which the ultimate consumer buying from a dealer has been protected against recorded liens.⁴³ The concept that one cannot convey what he does not have, dies but slowly, however. In this situation one can urge that the policy against secret liens, the policy behind the recording provisions in all of our chattel security statutes, should be sufficient to prevail here and protect the sub-purchaser.⁴⁴ After all, the sub-purchaser dealing with a car locally registered or titled has no ground for inquiry, and the loss should fall on the out-of-state lienor in the first instance, but ultimately upon the first purchaser of the car in the state,⁴⁵ unless that person can prove he checked properly for liens as suggested above and was informed that no liens existed. There is no sound reason why all purchasers have to be protected. For example, the original Pennsylvania purchaser dealing with a New York car upon which there was a security interest validly created in New York, could be liable for conversion, while a sub-purchaser dealing in Pennsylvania with what appeared to be a Pennsylvania car could be protected.⁴⁶

42. See, e. g., UNIFORM TRUST RECEIPTS ACT § 9(2).

43. See Note, *Automobile Dealer Financing and the Bona Fide Purchaser*, 43 MICH. L. REV. 605 (1944).

44. Cf. The policy requiring the recording of conditional sale contracts, notwithstanding their common law validity generally. Glenn, *The Conditional Sale at Common Law and as a Statutory Security*, 25 VA. L. REV. 559, 579-80 (1939). Support may also be found in the so-called rule of "reputed ownership," which protects not only the innocent purchaser, but the creditor. See, e. g., 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 341-343c (rev. ed. 1940).

45. Where the local purchaser loses the automobile to the finance company, presumably he has an action against his vendor for breach of warranty of title, in which he can recover the money he has paid down and any installments paid. See note 31 *supra*.

46. This may not involve as radical a departure from the decided cases as may be supposed. An analysis of the cases indicates that the result of many of the decisions will not be changed by this theory. Many a decision under the so-called majority rule involves a suit against the local dealer-purchaser who dealt with a vehicle bearing out of state plates. A few decisions are contrary to the theory that the state of the registration and places should be controlling. Of sixteen cases examined, eleven in result are consistent with the theory that a purchaser is bound by liens recorded in the state indicated by the license tags and registration. See, e. g., *Mercantile Acceptance Corp. v. Frank*, 203 Cal. 483, 265 Pac. 190 (1928); *Metro-Plan, Inc. v. Kotcher-Turner, Inc.*, 296 Mich. 400, 296 N. W. 304 (1941); *Goetschius v. Brightman*, 245 N. Y. 186, 156 N. E. 660 (1927). *Contra*: see, e. g., *Gen'l Motors Acceptance Corp. v. Nuss*, 195 La. 209, 196 So. 323 (1940); *American Equitable Assurance Co. v. Hall Cadillac Co.*, 93 Colo. 186, 24 P. 2d 980 (1933); *Ragner v. General Motors Acceptance Corp.*, 185 P. 2d 525 (Ariz. 1947); and the *Guthrie* and *Sheldon* cases, discussed in the text insofar as they protected the dealer.

CONSENSUAL REMOVALS

So far we have been considering the typical fact situation involving out-of-state finance company, migratory automobile and local bona fide purchaser, on the supposition that the removal from the foreign state was against the wishes of the finance company and without their consent. Should their consent make any difference? Looked at purely as a question of jurisdiction, or comity, and as a problem of extra-territorial recognition of validly created interests in chattels, there is good reason for arguing that consent should be immaterial.⁴⁷ But if considered as a problem of automobiles, against a background of changed registrations and certificates of title, different considerations come to the fore.

Of course, if the owner of a title interest consents to a removal and refiles in the second state he will be protected as against purchasers or creditors of his debtor. If he doesn't refile, he should perhaps be debarred from recovery from local dealers because he failed to take available steps to protect himself. But should he always? Suppose the car is not "titled" or registered in the second state. How can the out-of-state holder of a security interest protect himself in a state having a "title recording" statute, such as Pennsylvania? Suppose in the *Sheldon* case the New York chattel mortgagee had been told of the removal to Pennsylvania. He might record under the Chattel Mortgage Act of 1945⁴⁸ in the county where the car was to be kept, for the exception in Section 5 of that act for motor vehicles applies by its terms only when the vehicle is one for which a certificate of title is issuable under the Pennsylvania Motor Vehicle Code. As such a certificate is not issuable for a New York car temporarily in Pennsylvania in the hands of the New York owner, this exception in the Chattel Mortgage Act does not apply. Section 10, however, is applicable for it expressly refers to property brought into the state subject to a lien and requires that the mortgage be filed in the county in which the chattel is to be kept. Such a filing would, in practice, be merely a trap, as we doubt whether county indices are ever checked in Pennsylvania by used-car dealers in making a purchase. A far simpler rule would require the dealer—or for that matter anyone else dealing with a car bearing out of state plates and registration—to check in the state indicated by the license until a certificate of title for the car is issued in Pennsylvania, and thereafter protect bona fide purchasers. In effect, this adopts the Florida court's solution and leaves open the conditional vendor's possible cause of action against the dealer

47. See, e. g., GOODRICH, *CONFLICT OF LAWS* §§ 153, 154 (2d ed. 1938).

48. PA. STAT. ANN., tit. 21, §§ 940.1, 940.5, 940.10 (Purdon, Supp. 1947).

who saw and knew of the New York origin of the car. Such a ruling would certainly be more consonant with the Uniform Conditional Sales Act which preserves the out-of-state conditional vendor's interest until ten days after the conditional vendor has notice of the new location.⁴⁹ And since that statute is in force in Pennsylvania, the rule that similar statutes should be similarly construed⁵⁰ could have been invoked as against the dealer.

PRESENT STATUTES

The foregoing discussion has dealt primarily with cases involving the general recording acts, which, as we have seen, are usually held not to apply to security interests validly created in other states when the vehicle was located in the other state and the removal is without the finance company's consent. There have been many legislative attacks upon the problem of the out-of-state lien. We have already referred to the 1947 enactment in New Mexico which, in effect, refuses recognition to security interests in automobiles except when noted on a certificate of title. Several states have statutes requiring out-of-state lienors to record within the state after a chattel in which they claim a security interest has been within the state for some specified period, or, perhaps, without a grace period.⁵¹

Since payments are generally due on a monthly basis, and since the "skip" very rarely keeps up his payments, in statutes allowing a three months' grace period, it may be fair to put the loss on the out-of-state finance company for not tracing promptly upon failure to receive payment. It should not be necessary to go to the lengths of the New Mexico Statute and invalidate all out-of-state liens not shown on a certificate of title. The Uniform Conditional Sales Act, as we have seen, provides that the out-of-state lien is cut off ten days after the seller has notice of the new location of the chattel.⁵² By negative implication, then, the lien is good until the conditional vendor receives such notice. This may, however, take quite some time. The solution offered in the Uniform Act, therefore, does not protect the local sub-purchaser, as sales usually take place quite soon after arrival in the

49. UNIFORM CONDITIONAL SALES ACT § 14; PA. STAT. ANN., tit. 69, § 432 (Purdon, 1931).

50. Cf. Landis, *Statutes and the Sources of Law* in HARVARD LEGAL ESSAYS 213 ff. (1934) *passim*, where the point is well taken that the policy of cognate statutes is a datum which should be of prime consideration in determining a rule of policy.

51. See, e. g., ALA. CODE, tit. 47, § 123 (1940) (three month grace period); GA. CODE ANN., tit. 67, § 108 (Park, *et al.*, 1935) (six month period); MISS. CODE ANN., tit. 7, § 870 (1942) (no grace period); OKLA. STAT. ANN., tit. 46, § 58 (1937) (120 day period); VA. CODE ANN., tit. 46, § 5197 (Michie, *et al.*, 1942) (no period); W. VA. CODE ANN., c. 40, § 3996 (Michie, *et al.*, 1943) (three month period).

52. UNIFORM CONDITIONAL SALES ACT § 14.

state, and before the out-of-state conditional vendor knows of the removal. Re-titling can be accomplished in a week or less. On the other hand, statutes absolutely cutting off the out-of-state lien are unduly harsh, and, as has been shown, unnecessary where the car still bears the registration of its home state.

DUPLICATE CERTIFICATES

But even dealing with an original certificate of title may not be complete protection in view of the Duplicate Title racket. Of course, a Certificate of Title may become lost or destroyed and so provision is made for issuance of a duplicate.⁵³ Certainly a person dealing with a duplicate, designated as such, should inquire of the issuing authorities to see if the original has turned up and whether any new liens are entered thereon. But the Duplicate Title racket works the other way and is really a neat little scheme. Carefully keeping his original title certificate, the cunning car owner applies for a duplicate, claiming destruction of the original. He is duly issued a duplicate. On this duplicate he applies for a loan from a finance company, surrendering the duplicate for recordation of the lien. Inquiry at the central recording office indicates no liens and no reappearance of the original, so the loan is made. After a short while, the car owner then sells the car, or borrows elsewhere, but now he trots out his original title certificate which is still free and clear of encumbrances. Lulled into security by the clear original title, the purchaser is tricked. While the police dragnet is out for the swindler, the two victims ruefully wonder which of them will prevail in the eventual lawsuit and resolve that hereafter they will make inquiry at the state capital even when dealing with original certificates.

A PROPOSED SOLUTION

In summary, neither the majority nor the minority rules of the text books appears to offer an adequate solution. The majority rule holding that validly created security interests are not cut off by a removal of the chattel to another state, is unfair to local purchasers who buy after the car has been registered in their state. The minority rule protecting all local purchasers is unfair to the finance companies in view of the ease with which local purchasers can find out about liens in other states. The solution of the Florida Court in *Lee v. The Bank of Georgia*,⁵⁴ protecting local purchasers dealing with an unencumbered Florida title, is fair to local purchasers but dangerous to finance com-

53. See, e. g., PA. STAT. ANN., tit. 75, § 36 (Purdon, 1939).

54. *Supra*, p. 462.

panies in view of the ease with which the Georgia owner can obtain a Florida certificate of title. The various statutory solutions are also objectionable, as we have seen, because they appear to embrace the same "all or nothing" solution that was found objectionable in discussing the *Sheldon* and *Guthrie* cases;⁵⁵ that is, they involve a blanket refusal of recognition to certain foreign created security interests, or to all such interests after a period of time.

It seems to us that the Florida court's solution points the way, if we can avoid the danger to finance companies mentioned above. We believe an administrative solution to this difficulty does exist. When application is made for a change of registration from one state to another, the authorities in the new state should make inquiry for liens in the state in which the car is presently registered. This does not require reciprocity or interstate compact to become operative. Any one state can do it for the protection of its own citizens. If the original state records liens either on a certificate of title or centrally in the state capital, then an inquiry to the proper state officer in the state capital would reveal any liens, and incidentally upset anyone attempting a Duplicate Title racket by borrowing in his home state on the duplicate title and selling in another state by showing the original unencumbered title. If the old state was one in which liens were recorded in the county in which the property is kept or the owner resides, the authorities of the new state could obtain necessary information as to outstanding security interests by mail or telegram from the appropriate county clerk's office. This could be done by requiring the applicant to furnish certificates from the other state on forms prescribed by the state in which application is being made, or by direct inquiry. Any lienor not filing his lien in the county of residence indicated by the registration card of the car, would, of course, not be protected by this system, but on balance of the equities he should not be protected. Dealing with a person claiming residence in one county with respect to an automobile, the registration of which indicates a different residence should put the prospective lienor on notice that the discrepancy needs reconciliation. Recall, too, the practice of filing in two places indicated by the statement of facts in the Arizona case where a resident of Texas registered his car in Louisiana.⁵⁶

Of course, in a state not requiring central recording, nothing prevents the intending "skip" from borrowing in one county, and then changing his residence and obtaining a new registration at the new residence. This possibility is one more argument against county

55. *Supra*, p. 467.

56. *Supra*, p. 465.

recording and in favor of central recording. In some states the owner merely notifies the authorities, and enters the change in ink on the certificate until the next yearly change. Such an alteration would give notice of two counties to a prospective purchaser, who could then protect himself.

In effect our proposal is nothing more than an elaboration of the provision in the present Pennsylvania statute requiring the authorities to "use reasonable diligence" to ascertain whether the facts stated in the application for a certificate of title are true.⁵⁷ In the event that the state in which the car was registered reported the existence of liens the new title would be issued subject to those liens. Arizona, Idaho and Utah have already adopted this practice.⁵⁸ Others could follow under existing legislation. For example, it could be done in states having the Uniform Motor Vehicle Administration, Registration, Certificate of Title and Anti-Theft Act, sponsored, among other organizations, by the National Conference on Street and Highway Safety.⁵⁹ Section 35 (a) 4 of said act provides that the state authorities may, in addition to the applicant's statement as to encumbrances, require:

"Such further information as may reasonably be required by the department to enable it to determine whether the vehicle is lawfully entitled to registration and the owner entitled to a certificate of title."

As we have shown, information from the authorities of the state in which the car was previously registered is necessary to enable the

57. See, e. g., PA. STAT. ANN., tit. 75, § 32 (Purdon, 1939). One other state, in replying to inquiry, pointed out that since the fee for issuance of a certificate of title was only fifty cents, obviously "reasonable diligence" was satisfied by reliance upon statements in the application. This raises a question whether the fee should not be increased to cover costs of reasonable investigation, and perhaps provide an insurance fund from which payment could be made to out of state lienors whose liens are not noted on a certificate of title through failure of the motor vehicle authorities to use due diligence. See *infra*, p. 480.

58. Arizona furnishes a form to the applicant whose automobile was previously registered in a non-title state requesting local authorities to certify to a lien search. Letter of Oct. 31, 1947, from Div. of Motor Veh., Ariz. Hwy. Dept. As pointed out, *supra*, p. 459, the same procedure should be adopted as to certain of the so-called "title" states.

Utah requires an abstract from the office that records any liens against motor vehicles, but again limits this to "non-title" states. Utah State Tax Comm., Letter of Nov. 3, 1947. Of course, if the abstract is obtained by direct inquiry from one governmental agency to another, there is less opportunity for fraudulent applications and forged abstracts.

Idaho requires a notarized affidavit from the county in which the automobile registration shows the car was located, in the case of non-title states. Letter February 3rd, 1948, from Department of Law Enforcement, Idaho.

59. The first National Conference on Street and Highway Safety resulted in the appointment of a committee on uniformity of laws which during the period 1925-26 prepared the original text of the UNIFORM VEHICLE CODE. The National Conference of Commissioners on Uniform State Laws participated. THE PRESIDENT'S HIGHWAY SAFETY CONFERENCE, REPORT OF COMMITTEE ON LAWS AND ORDINANCES, 15-16 (1946). Act I of the Code, referred to in the text, is the basis of the statutes of California, Delaware, Idaho, Maryland, Michigan, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Utah, Virginia, Washington, and West Virginia. *Id.* at 19.

registering authorities in the new state to determine whether the owner has an unencumbered title. This information should be considered necessary in states having the Uniform Act, since by Section 38 (3) of that statute, the local authorities are directed to refuse registration upon the ground that:

"The department has reasonable ground to believe that the vehicle is a stolen or embezzled vehicle or that the granting of registration or the issuance of a certificate of title would constitute a fraud against the rightful owner or other person having a valid lien upon such vehicle; . . ."

It would, however, be advisable to amend Section 39 of the Uniform Act, which presently requires a comparison of engine and serial numbers against the indices of registered motor vehicles and of stolen and recovered vehicles. The amendment should add a new subsection requiring the authorities to make appropriate inquiry as to encumbrances in the state in which the car was previously registered.⁶⁰

We must, however, coordinate the law relating to registration with the law relating to sales of automobiles. The statute should also provide that anyone dealing with a motor vehicle registered in another state would be subject to any encumbrances validly created by the law of such other state, or appearing of record there, unless he made application for and received an unencumbered title in his own state. The phrase "validly created . . . or appearing of record" is used advisedly to overrule decisions similar to the *Guthrie* case,⁶¹ refusing validity to an encumbrance appearing of record when a sale is made, but which may not have been placed on record before the automobile was driven across the state line. The statute should make it clear that any purchaser or encumbrancer dealing with an automobile as to which a certificate of title has been issued by the state authorities would, notwithstanding the general rule of the conflict of laws, be subject only to such liens as may be recorded in the state capital. Perhaps entry on the certificate of title should be prima-facie evidence thereof, although the Duplicate Title scheme mentioned above indicates that central recording goes as far as necessary since, under even the most modern title acts, inquiry at the state capital must be made for full protection.

60. Cf. § 2 of Proposed Statute, *infra*, p. 481. The index of stolen vehicles required to be maintained by the VEHICLE CODE, includes "embezzled" vehicles reported by persons having a lien or encumbrance thereon. Act I, § 76. But lienor's reports are to be accepted only if the lienor has procured the issuance of a warrant for the arrest of the person charged with embezzlement. *Id.* § 75. This limitation may be necessary, with respect to locally registered vehicles, to prevent use of the department as a collection agency. As to placing a "stop" on the registration of vehicles from other states, however, the usefulness of the limitation seems highly questionable.

61. See discussion *supra*, p. 462.

No administrative scheme can operate without allowance for human error. There may be slip-ups in the process of obtaining information from other states, and there may be failure to note on a certificate of title liens duly filed with the central office. Losses caused by such errors of administration should be paid by the State from a fund created by making a small additional charge for issuance of a certificate of title. This method of spreading losses is not new. The Torrens system of land registration provides for a fund to pay those whose legitimate claims are cut off by the issuance of a Torrens Title.⁶² Some recording acts provide for recovery against the official bond of the Recorder of Deeds where the loss occurs through his improper action.^{62a} And, apparently, a similar result would be effected under the Continental *droit administrative*.⁶³ Persuasive analogy could also be found in the policy of the new Federal Tort Claims Act.⁶⁴ This provision is not however an integral part of the proposed solution and could be omitted, in view of the Anglo-American feeling against imposing liability on the government. On the other hand since the out-of-state lien is to be cut off, a sense of fairness would suggest compensation to the lienor and a system of insurance, as suggested, seems the best method.

In addition to its function as a protection against foreign liens, our proposal requiring an inquiry if the authorities of a foreign state would disclose cases involving forged papers, unless the forger were clever enough to register the car in the foreign state, too. Of course, no absolute protection is offered by this scheme against a clever alteration of the county of residence on the registration card of a non-title state like New York. A telegram to the county indicated on the card would, of course, receive a "no-lien" reply. But this is again just one more argument for enactment of a central recording statute for automobiles in New York.

62. See, e. g., MASS. LAWS ANN., c. 185, § 97 (Michie, 1933). For a discussion, see Cushman, *Torrens Titles and Title Insurance*, 85 U. OF PA. L. REV. 589, 600 *et seq.* (1937).

62a. See, e. g., 1 LADNER, CONVEYANCING IN PENNSYLVANIA § 127(c) (2d ed. 1941). Action must be brought within seven years after the improper act. Judge Ladner feels that this is too short a time for real estate but for automobile financing the limit would present no problems. The highest average duration in months of installment indebtedness reported by dealers in new and used automobiles was 17.4 months in 1937, with a low of 9 months in 1945. COX, THE ECONOMICS OF INSTALLMENT BUYING, c. III Table 14. (To be published 1948.)

63. Apparently failure to record a lien would constitute a *faute de service* for which the administrative courts in France would allow the citizen compensation from the state. See, as to recovery for *faute de service*, Berthélemy, *The Conseil d'Etat in France*, 12 JOURNAL OF COMPARATIVE LEGISLATION 23, 30-32 (1930).

64. 60 STAT. 842, 28 U. S. C. § 921 (Supp. 1946). For discussion, see Gellhorn and Schenk, *Tort Actions Against the Federal Government*, 47 COL. L. REV. 722 (1947).

THE PROPOSED STATUTE

A statute embodying our proposed solution might read as follows, the word "department" being used to designate the appropriate state office charged with administration of the motor vehicle registration statutes:⁶⁵

(The title and enacting clause are omitted)

"Section 1. *Limitations on Issuance of Certificates of Title with Respect to Motor Vehicles Registered in Other States.* The department shall not issue a certificate of title hereunder with respect to a motor vehicle which has been registered in, or with respect to which a certificate of title has been issued by another state, territory or country until the department has received (a) from the applicant such notarized copies of bills of sale as may be necessary to show his title from, and any lien against, the last registered owner,^{65a} and (b) from the proper officials of such other state, territory or country a statement or statements setting forth the liens against such motor vehicle, appearing of record, in such other state, territory or country. Any liens shown by such bills of sale or statements shall be noted on the certificates of title issued in this state, until released in the manner provided for the release of liens created in this state.

"Section 2. *Inquiry of Other States.* The department upon receiving application for registration of any vehicle, or for the issuance of any certificate of title with respect to any vehicle, registered in another state, territory or country shall first obtain from the proper officials of such other state, territory or country a statement, in form satisfactory to the department, of all liens upon the said vehicles as may appear of record in such state, territory or country, and the names and addresses of all persons who may appear of record to be the holders of liens upon the said vehicle.

"Section 3. *Effect of Liens Valid in Other States.* If a certificate of title has been issued under this Act with respect to a vehicle, no lien upon such vehicle, other than a lien dependent upon possession, valid under the laws of or appearing of record in any other state, territory or country is effective against the owner named in the certificate of

65. Wherever possible phraseology is that of the Uniform Code. It has been suggested that provision should be made for inquiry of more than one state to preclude the possibility that an automobile registered in New York would be re-documented in New Jersey without disclosing liens, and then brought into a state having the proposed statute. In answer it is suggested that the car would be sold in New Jersey, if a clean title was obtained there, rather than driven into a third state and re-titled.

65a. Obviously the bill of sale to the last registered owner need be required only in the case of cars formerly registered in the states not requiring conditional sales to be recorded. See note 15 *supra*.

title unless a statement with respect to such lien has been entered upon the certificate of title issued by the department.

"Section 4. *Notice of Liens of Record in Other States.* Any person in this state purchasing or acquiring a lien upon any vehicle which is registered in or with respect to which an outstanding certificate of title has been issued by, another state, territory or country, shall be subject to any lien upon said vehicle validly created or appearing of record in such other state, territory or country unless application is made for an issuance of certificate of title and the department issues a certificate without entry of such lien thereon.

"Section 5. *Liability of State for Improper Certificate.* This state, to the extent hereinafter provided, hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability determined as hereinafter provided. The state shall be liable for civil damages to any person whose lien on any vehicle is invalidated by any act or omission of any employee of the department while acting in the scope of his employment under this act or the act of (here insert appropriate reference to act or acts relating to locally created liens upon motor vehicles). Any person having a claim against the state under this section may present same to the state in the same manner as other claims are presented and if such claim is not acted upon within thirty (30) days after said presentation or is, prior to the expiration of said time, rejected in whole or in part, then said person may sue the state in the (insert name of appropriate court) with service upon the Attorney General. Such suit shall thereafter proceed in the manner prescribed by law for the maintenance of a suit against a private individual.

"Section 5. *Definitions.* As used in this act, unless the context otherwise requires:

"(1) the term 'lien' means any interest of a conditional vendor, conditional or bailment lessor, chattel mortgagee, entruster under a trust receipt, or other person having a lien or encumbrance not dependent upon possession created by agreement or statute.

"(2) the term 'lienor' means any person holding a lien interest."

CONCLUSION

Unless some method, such as is here recommended, is adopted to secure co-ordination of the requirements for registration with automobile lien law, losses due to skip-state frauds will continue, and the courts will continue to struggle with difficult decisions allocating these

losses. It is possible, as has been suggested, to work out on common law principles a solution that seems more equitable in the light of present conditions than the "all or nothing" solutions of existing verbal formulae. Purchasers knowing of the out-of-state origin of the automobile should be bound by any liens valid or appearing of record in the state from which the car has come. Purchasers having no notice of out-of-state origin should not be. The cases seem to tend in this direction, but the ease with which a registered owner can change the state of registration presents possibilities of danger to finance companies. Voluntary co-ordination of state authorities seems difficult to obtain.⁶⁶ Nor will universal adoption of the positive recording type of title law give adequate protection due to the duplicate title racket. States can fairly give protection to their citizens only by compelling their motor vehicle registration authorities to make inquiry as to liens from the appropriate officials of the state in which the automobile was formerly registered.⁶⁷

66. This is not the only situation in which state authorities have failed to make a co-ordinated attack upon a problem. Even within a single state co-ordination would solve many problems. It has been said that the failure of the Michigan Departments of Revenue and of State to co-ordinate enforcement of the Sales Tax and Motor Vehicle Title Act was the cause of a considerable "black market" in new cars at substantially higher than list prices. MS. Report of Hon. W. McKay Skillman, Recorder's Court, Detroit, Michigan, acting as a One-Man Grand Jury, at p. 18. Judge Skillman also points out that many of the transactions involving illegal titling of automobiles were interstate transactions. *Id.* at 27. Voluntary co-ordination between state authorities would disclose the practices.

67. Of course, proof of freedom from liens should not be required, perhaps, where similar proof is not required when locally registered cars are re-registered. Section 482e(b) of CONN. GEN. STAT. (Supp. 1939) was declared unconstitutional in *Bober v. Connor*, 8 Conn. Supp. 152 (1940), but the statute there excepted cars turned in for the purchase of a new car and also contained no requirement that proof of ownership be supplied by sellers of cars registered in Connecticut. While the court invoked the commerce clause of the Federal Constitution, it was apparent that the statute was enacted to benefit new car dealers at the expense of those solely engaged in the second hand business and was, therefore, discriminatory.