

December 2019

Creditors Rights under the Recording Statutes

E. George Rudolph

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

Recommended Citation

E. G. Rudolph, *Creditors Rights under the Recording Statutes*, 4 Wyo. L.J. 73 (1949)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol4/iss2/3>

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

CREDITORS RIGHTS UNDER THE RECORDING STATUTES

E. GEORGE RUDOLPH*

The Wyoming Statute on chattel mortgages provides in part that such a mortgage "shall be absolutely void as against the creditors of the mortgagor—unless said mortgage—shall be filed or recorded as hereinafter provided."¹ This language inevitably raises two questions. First, what is meant by the term "creditors"? And second, how does such a creditor proceed in asserting the invalidity of the mortgage?

No lawyer will have difficulty with the second question. The creditor must first reduce his claim to judgment. Then he may levy execution on the property and the issue can be tried with the mortgagee in a possessory action,² or perhaps by intervention in a foreclosure suit.³ Or the creditor could, after he obtained his judgment, bring a creditors bill to establish the invalidity of the mortgage.⁴ But the important thing is that the creditor must first reduce his claim to judgment because, until he does, he is in no position to assert any rights in his debtor's property.⁵

However, the answer to the first question is not so simple and it is with this that the discussion which follows will be concerned. The basic difficulty may be illustrated by a simple hypothetical situation. Suppose that D gives a mortgage on a certain chattel to M which is not immediately recorded, and that, while it is unrecorded, C extends credit to D. Thereafter, in chronological order, M records and C obtains judgment and has execution levied on the chattel. Under these facts some courts will allow C to prevail over M's mortgage, but others will not because he did not obtain a lien on the property before the mortgage was recorded. We will examine this difference of opinion in some detail later, but now it seems well to digress for a moment to note that problems concerning creditors are not confined to the chattel mortgage statutes.

* Assistant Professor of Law, University of Wyoming College of Law. Admitted to practice in Illinois, Michigan, and South Dakota.

1. Wyo. Comp. Stat. 145, sec. 59-105.
2. *Carroll v. Anderson*, 128 Ia. 124, 103 N. W. 104 (1905); *Ward v. Parker*, 128 Ia. 124, 103 N. W. 104 (1905).
3. *American Loan and Trust Co. v. Olympia Light and Power Co.*, 72 Fed. 620 (C. C. Wash. 1896).
4. *Forrester v. Kearney Nat'l. Bank*, 49 Neb. 655, 68 N. W. 1059 (1896).
5. *First National Bank of Sheridan v. Woodworth*, 7 Wyo. 11, 49 Pac. 406, (1897); *First National Bank v. Ludvigsen*, 8 Wyo. 230, 57 Pac. 934 (1898); *Union Bank of Oshkosh v. Oium*, 3 N. D. 193, 54 N. W. 1034 (1892); *Ransom and Randolph Co. v. Moore*, 272 Mich. 31, 261 N. W. 128 (1935).

The Wyoming statute on recording conveyances of realty affords creditors of the grantor no protection against an unrecorded conveyance. It provides only that an unrecorded conveyance of realty is void as against subsequent purchasers for value in good faith,⁶ and a creditor can't qualify as such, even after he has obtained a lien on the property by reducing his claim to judgment, because he gives no new value at the time he obtains this interest.⁷ Two words of caution are necessary with respect to this, however. First, even though the judgment, creditor, as such, is not a purchaser for value, the buyer at the execution sale probably will be, and this may be so even though the judgment creditor himself buys in the property in complete or partial satisfaction of his judgment.⁸ Second, under some circumstances the failure to record may be evidence of a fraudulent conveyance and then a creditor of the grantor may pursue the property in the hands of the grantee, but he does so on the basis of the law of fraudulent conveyances and not on the recording statutes.⁹ More will be said of this last idea in connection with chattel mortgages.

Before leaving the real estate recording statutes it should be noted that, while statutes similar to Wyoming's in this respect are fairly common, they are by no means universal. A considerable number of real estate recording statutes extend their protection to creditors of the grantor in one form or another. We will pause with these only long enough to observe what seems to be a decided reluctance to give such provisions their full effect. A probable reason for this reluctance was expressed by a New Jersey court in considering the provision of their statute making an unrecorded conveyance of realty void as to judgment creditors of the grantor. After noting that the judgment creditor gave no new value, as a purchaser must to be within the protection of the recording statute, the court commented, "This partiality to a judgment creditor does not commend itself to a court of equity."¹⁰ An interesting illustration of this tendency is found in a line of Nebraska decisions construing the statute of that state which provides that an unrecorded conveyance of realty is void as to creditors of the grantor.¹¹ This statute, like many of its kind, goes on

6. Wyo. Comp. Stat. 1945, sec. 66-119.

7. *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475 (1893), 3 Glenn on Mortgages 1943 sec. 368.1.

8. 3 Glenn on Mortgages, 1943, sec. 368.1. This was apparently recognized by the court in *Frank v. Hicks*, supra, note 7. The mortgage not being entitled to record and thus the mortgagee having no chance of protecting himself in that manner, the court enjoined the judgment creditor and the sheriff from proceeding with the execution sale.

9. *Farmers Sav. Bank of Williamsburg v. Pugh*, 204 Iowa 580, 215 N. W. 652 (1927). Compare *Talcott v. Levy*, 20 N. Y. S. 440 (1892), aff'd, 143 N. Y. 636, 37 N. E. 826.

10. *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823 (1893).

11. Rev. Stat. of Neb. 1943 sec. 76-238.

to say that the unrecorded conveyance is void only as to those subsequent purchasers and creditors who shall first record their "deeds, mortgages, or other instruments." Therefore, the Nebraska court reasons, the prior deed will be invalid as against the interest of the "creditor" only if the sheriff's deed issued on the execution sale is first recorded.¹² Thus in Nebraska, where creditors are expressly included in the statute, the creditor actually gets neither more nor less protection than he does in Wyoming where he is not mentioned at all.

It is hoped that the foregoing discussion of the real estate recording acts will be of value for purposes of comparison as we now return to the chattel mortgage statutes and the difference of opinion previously mentioned. Re-phrased, this split of authority may be stated as follows: some courts will hold a chattel mortgage void as to any person who occupies the position of a creditor, in the usual meaning of the term, at any time while the mortgage is unrecorded, even though it may be later recorded before the creditor has obtained a lien on the property through judicial proceedings while courts of the other persuasion hold for the creditor only if he obtains such a lien before the mortgage is finally recorded. Since the Wyoming court has never had occasion to pass on this question the writer feels justified in reviewing the merits of the two positions at length.

At the outset it must be admitted that the chief purpose of the recording acts is to supply a source of information for the protection of those persons who give value in reliance upon another's ownership of particular property. The most obvious illustrations of such persons are, of course, purchasers, mortgagees, and the like, because the form of the transaction leaves no doubt that they acted in reliance on the other parties ownership of the property in question. Since practically all chattel mortgage statutes provide for creditors as well as bona fide purchasers, the legislators have apparently decided that creditors likewise act in reliance upon the property which their debtors apparently own.¹³ While one may have considerable doubts as to this, the proposition will be accepted here for the time being. But once this is conceded a further propositions seems self-evident. If the creditor relies upon his debtor's apparent ownership of the chattels at all, he does so at the time he extends credit. If the mortgage is unrecorded at this time the harm has been done and a later recording will do

12. *Harrall and Uhl v. Gray*, 10 Neb. 186, 4 N. W. 1040 (1880); *Mansfield v. Gregory*, 11 Neb. 297, 9 N. W. 87 (1881); *Omaha Loan & Building Ass'n. v. Turk*, 146 Neb. 859, 21 N. W. (2d) 865 (1946).

13. *Jones, Chattel Mortgages and Conditional Sales*, Bowers Edition, sec. 247.

nothing to cure it. This idea is the basis for the view of New York¹⁴ and Michigan,¹⁵ among others,¹⁶ giving the creditor priority if the mortgage is originally unrecorded, even though it may later be recorded before the creditor gets a lien.

But from another point of view, and ignoring for the moment the idea of fraudulent conveyance, it seems logically indefensible to give the creditor a position of priority dating from a time at which he had no interest in the property at all. Suppose that the mortgagee, instead of recording his old mortgage after the creditor has appeared on the scene, rather tears it up and then prevails on the mortgagor to give him a new one which he promptly records. In these circumstances it is difficult to see how the creditor could attack the mortgage with any more success than he can attack any other transfer that the debtor may make of particular property before the creditor has improved his position by acquiring a lien on that property.¹⁷

The preceding paragraph began by mentioning the idea of fraudulent conveyance and it is to this we must look for an explanation of the seemingly illogical situation described above. As a general proposition the right of a creditor to realize out of property which his debtor has fraudulently conveyed does not depend on his having

-
14. *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073 (1893).
 15. *Anch v. Andres*, 289 Mich. 206, 286 N. W. 214 (1939); *Ransom and Randolph Co. v. Moore*, 272 Mich. 31, 261 N. W. 128 (1935); *Feary v. Cummings*, 41 Mich. 376, 1 N. W. 946 (1879).
 16. *Union Bank of Oshkosh v. Oium*, 3 N. D. 193, 64 N. W. 1034 (1892). *Hollenbeck v. Loudon*, 35 S. D. 320, 152 N. W. 116 (1915). The statutes under which these cases were decided and those of Michigan and New York are substantially the same as that of Wyoming in this respect. But it should be noted that different types of statutes in other states make this result more or less mandatory. See *Collateral Finance Co. v. Braud*, 298 Ill. App. 130, 18 N. E. (2d) 392 (1938) in which the court construed an amendment to the Illinois statute requiring that the mortgage be filed within ten days as having this effect and so changing the previous rule of *Springer v. Lipsis*, 209 Ill. 261, 70 N. E. 641 (1904) requiring the creditor to obtain a lien before recording if he was to prevail over the mortgage. To same effect see *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394 (1895). But see *Wilson v. Leslie*, 20 Ohio 161 (1851) and *Moore v. Chilson*, 26 Ariz. 244, 224 Pac. 818. (1924) both holding that the creditor must obtain a lien before filing to prevail even though the statute involved expressly required prompt recording and the mortgagee had not complied with this.

See also *Ruggles v. Cannedy*, 127 Ca. 290, 53 Pac. 911 (1898) and *Volker Lumber Co. v. Utah and Oregon Lumber Co.*, 45 Utah 603, 148 Pac. 365 (1915) discussed in note 19.

Probably the most serious legislative effort along these lines is the statute of the state of Washington which provides that an unrecorded chattel mortgage is void as to creditors of the mortgagor, "whether or not they have or claim a lien on the property." *Rem. Rev. Stat.*, 1932, sec. 3780.

17. This argument is well stated in *American Loan and Trust Co. v. Olympia Light and Power Co.*, 72 Fed. 602 (C. C. Wash., 1896). See also *Cameron, Hull and Co. v. Marvin*, 26 Kans. 612 (1881), *In Re Shirley*, 112 Fed. 301 (C. C. A. 6, 1901) and *Wilson v. Leslie*, 20 Ohio 161 (1851).

any lien on the property prior to the transfer.¹⁸ Indeed if he had such a lien he would not have to bother proving his case of fraud. But this again brings us back to the idea of reliance, because if failure to record is going to serve as a workable device for defrauding creditors it must be because the creditor relies on his debtor's apparent ownership of the mortgaged property which he has in his possession as mortgagor. ¹⁹

This idea of reliance has been pretty generally accepted ever since *Twynes* case,²⁰ but there have been a few cases which dissent and these seem to have the better of the argument. Thus in *Ward v. Parker*²¹ the levying creditor of the mortgagor urged that the mortgagee, who had neglected to file his mortgage for a considerable time, should be stopped from asserting the mortgage even though it was ultimately filed before the levy of execution. But the Iowa court refused to apply such an estoppel because there was no evidence that the creditor had relied on the particular mortgaged property in extending credit. On this issue it would seem the presumption should be against the creditor because, once he has decided to rely on particular property of his debtor, he will ordinarily take the next obvious step and demand a security interest of some type in that property. The creditor's later protestations of reliance should be discounted greatly. As illustrative consider the situation in *First Nat. Bank of Albuquerque v. Haverkamp*,²² a New Mexico case. Again the creditors, this time represented by the mortgagor's trustee in bankruptcy, were urging that the mortgagee should be estopped under facts almost the same as in *Ward v. Parker*. However, in this case the creditors testified that they would not have extended credit had they known of the mortgage. In spite of this, the court found against them on the issue of reliance because these same creditors also extended credit after the

18. Some question may be raised as to the validity of this premise in our situation. It has been suggested that the chattel mortgage statutes are an outgrowth of the doctrine of *Twynes* case 76 Eng. Rep. 809 (1601), holding that it may be fraudulent as to the creditors of a transferor of chattels for him to remain in possession after the transfer. See I Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 350. But for the creditor to successfully assert this fraud he must act before the transferee eventually takes possession. See Glenn, *op. cit.* sec. 501. It can be argued that, since the statute simply provides recording as a substitute for delivery of possession, the creditor could be required to obtain a lien before recording consistently with the idea of fraudulent conveyance. See *Moore v. Chilson*, 26 Ariz. 244, 224 Pac. 818 (1924).

But in California and Utah the chattel mortgage statutes are included as a part of the law of fraudulent conveyances and the courts have held that the creditor will prevail if the mortgage is unfiled when he extends credit even though it may later be filed before he gets a lien. *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911 (1898); *Volker Lumber Co. v. Utah*, and *Oregon Lumber Co.*, 45 Utah 603, 148 Pac. 365 (1915).

19. *Palo Savings Bank v. Cameron*, 184 Ia. 193, 168 N. W. 769 (1918).

20. 76 Eng. Rep. 809 (1601).

21. 128 Ia. 124, 103 N. W. 104 (1905).

22. 16 N. M. 497, 121 Pac. 31 (1911).

mortgage was recorded. This suggests a distinction between reliance merely on the mortgagor's possession and reliance on that possession with the failure to record. It is obvious that reliance upon possession will avail the creditor nothing if the mortgage is recorded at the time. For purposes of estoppel at least the reliance required should be on the failure to record and to establish this it is submitted that the creditor must at least prove that he examined the records before extending credit.²³ However, even though the creditor is able to prove this, the case of *In re Shirley*²⁴ suggests a further difficulty in permitting him to assert an estoppel. In that case, again with a fact situation substantially like that in *Ward v. Parker*, the court refused to find the estoppel because, even though the creditor may in fact have relied on the mortgaged property, he was not justified in doing so, or for that matter in relying on any particular property of the debtor, since, as we have previously observed, a debtor may effectively dispose of any of his property, as against a general creditor, until such creditor changes his status by acquiring a lien through judicial proceedings. This suggests a further thought. The chattels which a debtor possesses, may indicate something as to his gross wealth although the picture is apt to be pretty inadequate if the particular debtor happens to have considerable intangible assets. But the general creditors legitimate concern would seem to be more with the debtor's net position than his total assets since he is neither entitled to, nor restricted to, a particular asset out of which to realize his claim. From this point of view a chattel mortgage is of no more significance than an unsecured debt.²⁵

One further point must be considered with respect to the idea of fraudulent conveyance. In each of the cases discussed in the preceding paragraph the court actually decided three things. First, the creditor, not having obtained a lien before the mortgage was recorded, was not entitled to priority over the mortgage merely through an

23. This suggestion, of course, runs counter to the general interpretations of the recording statutes with respect to later bona fide purchasers, but such purchasers prevail over the unrecorded mortgage simply by the terms of the statute and not by any doctrine of estoppel such as the creditors were urging in these cases.

24. 112 Fed. 301 (C. C. A. 6, 1901) (Involving the Ohio chattel mortgage statute).

25. Any evidence concerning the extent to which creditors actually rely on particular property must of necessity be rather inconclusive. But some interesting information along these lines is contained in Professor Hanna's article, "Extension of Public Recordation" 31 Columbia L. R. 615. The following is particularly pertinent to the idea expressed above. ". . . in a questionnaire answered by 44 large banks, less than one third indicated that in extending financial credit they regarded either visible merchandise or other assets. The replies were practically unanimous that credit was extended on the basis of financial statements, supplemented by business references or personal acquaintance. In response to the specific question, approximately three-fourths stated that the major basis of credit was the financial statement." (p. 636)

application of the recording statute. On this the decisions are in direct conflict with those of New York, Michigan, and jurisdictions of like persuasion. Second, the failure of the mortgagee to record promptly does not furnish a ground for estoppel for the reason considered above. And third, the failure to record did not, under the particular circumstances, make the mortgage a fraudulent conveyance. It seems significant that the courts considered estoppel and fraudulent conveyance as two separate issues, and further that reliance by the creditor was apparently not considered necessary to invalidate the mortgage on the ground of fraudulent conveyance. This does not square with the statement previously made that the effectiveness of the unrecorded mortgage as an instrument of fraud depends on such reliance. And reliance has always been an important element of the doctrine of apparent ownership as a part of the law of fraudulent conveyances.²⁶ The explanation lies in the rule that when the failure to record is part of a fraudulent design the issue of reliance will be presumed in favor of the creditor, and probably the only evidence that will be competent to rebut this presumption is that which shows knowledge of the mortgage on the part of the creditor at the time he extends credit.²⁷ This presumption seems fair enough in view of the relative moral positions of the parties, if the mortgagee is in fact guilty of participation in a fraudulent scheme. But certainly the mere failure to record should not be even rebuttable evidence of such fraud. The three cases discussed previously on the estoppel question agree with this. Both *Ward v. Parker* and *In re Shirley*, in refusing to find fraud, emphasized the absence of any agreement between the mortgagor and mortgagee to withhold the mortgage from record. Some such agreement seems almost indispensable to the charge of fraud inasmuch as the election to record or not is ordinarily in the mortgagee whereas the mortgagor will be the only beneficiary if the fraud is successful.²⁸ Of course such an agreement may be implied from the facts, and this seems to be the proper basis for those cases holding unrecorded conveyances of real estate to be fraudulent when the grantor and grantee are husband and wife and the conveyance is voluntary in the sense of not being made for a full consideration.²⁹

The preceding discussion is intended to demonstrate the unsoundness of an interpretation of the chattel mortgage recording statute which will make a mortgage originally unfiled invalid as against a creditor of the mortgagor even though the mortgage is eventually filed before the creditor gains a specific interest in the property by execution. Such a rule cannot be justified on the principal of estoppel since a necessary element to estoppel, reliance, is absent in at least

26. 1 Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 348.

27. 1 Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 343.

28. See also *Palo Savings Bank v. Cameron*, 184 1a. 183, 168 N. W. 769 (1918).

29. See cases cited in note 9 supra.

a large percentage of cases. Nor can this rule be supported by considering the recording statute as a sort of addition to the law of fraudulent conveyances since the unrecorded mortgage is not particularly useful as a tool for fraud—at least for defrauding creditors—and furthermore the mere failure to record is susceptible of many other explanations besides a fraudulent intent. It must be admitted that the foregoing arguments apply with almost equal force against including any creditors, even those who obtain a lien before recording, within the protection of the recording statute. However, the legislative policy on this is too well established to permit serious argument. But the interpretation requiring a lien before recording at least has the advantage of being restrictive. And more important, it is much easier of application, not being subject to the difficulties that the courts have experienced in trying to give a logical and consistent application to the interpretation in favor of general creditors.

In the first place there is the problem of the prior creditor, that is, a creditor who became such before the execution of the mortgage. Now it may be true that the hopes and expectations of such a creditor are frustrated by the mortgaged property being removed from his reach, but it cannot be said that he was misled since at the time he extended credit the apparent situation was the true one, his debtor in fact owned the property.³⁰ New York holds in favor of the prior creditor on the ground that he may forego pressing his claim in reliance on his debtors apparent continued ownership of the mortgaged property.³¹ This seems to be an unjustified extension of the original error on the question of reliance. Michigan gives the prior creditor no protection at all and, while this is logical enough, there is nothing in the statute to indicate the legislature's intent to confine its operation to subsequent creditors.³² The South Dakota court has done an interesting piece of fence straddling on this problem. While it will follow the New York and Michigan rule with respect to subsequent creditors, it will hold for the prior creditor only if he obtains a lien before the mortgage is recorded.³³ These three states are enough to illustrate that courts which are of the same persuasion on our fundamental difference of opinion have literally taken every possible position with respect to the prior creditor.

A further logical difficulty arises from the New York rule giving a prior creditor the same protection against an unrecorded chattel mortgage that it accords a subsequent creditor. Obviously the execu-

30. *Palo Savings Bank v. Cameron*, 184 Ia. 183, 168 N. W. 709 (1918).

31. *Kart v. Gane*, 136 N. Y. 316, 32 N. E. 1073 (1893). See also *Noyes v. Bank of Italy*, 206 Cal. 266, 274 Pac. 68 (1929).

32. *Ransom and Randolph Co. v. Moore*, 272 Mich. 31, 261 N. W. 128 (1935). See also *Union Bank of Oshkosh v. Oium*, 3 N. D. 193, 54 N. W. 1034 (1892).

33. *Hollenbeck v. Loudon*, 35 S. D. 320, 152 N. W. 116 (1915). To same effect though under a different type of statute, see *Volker Lumber Co. v. Utah & Oregon Lumber Co.*, 45 Utah 603, 148 Pac. 365 (1915).

tion and recording of a mortgage cannot be simultaneous, and therefore, with reference to the prior creditor, the mortgage must always be unrecorded for some period of time. This difficulty is met in New York by the proposition that the mortgage is made void only by an unreasonable delay in recording.³⁴ No doubt this can be applied to sustain a mortgage as against one who extends credit after its execution and before recording in a case where the recording is reasonably prompt. But consistency in this idea breaks down at a further point, for the New York court has conceded that if a creditor actually acquires a lien during the interm between execution and recording he will prevail over the mortgagee regardless of the mortgagee's promptness in recording.³⁵ And a further inconsistency may be observed. The statutes of some states contain express requirements for recording within a certain period after execution, and in Illinois at least such a provision has been applied to make a mortgage not seasonably recorded void even as to creditors becoming such after a late recording.³⁶ The same result would seem to follow logically from the judge-made requirement of prompt recording in New York, but a federal court sitting in New York has refused to go this far, escaping the logical difficulty by saying that a person who extends credit after filing is not a "creditor" within the meaning of the statute.³⁷

Another difference of opinion arise among these jurisdictions when the mortgage later takes possession instead of recording. New York apparently will hold for the mortgagee if he takes possession before the creditor obtains a lien, even though recording at the same time might be too late to perfect the mortgagee's interest.³⁸ Michigan on the other hand, holds that a late taking of possession is just as ineffective as a late recording in perfecting the mortgage against

34. It cannot be demonstrated, of course, that this requirement of prompt recording was formulated solely because of the problem of the existing creditor. But it was first clearly stated in *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073, the leading case on the rights of existing creditors, and it apparently does not prevail under the Michigan statute which protects only subsequent creditors. See *General Motors Acceptance Corporation v. Collier*, 106 F. (2d) 534 (C. C. A. 6, 1939).

35. *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073 (1893).

36. *Collateral Finance Co. v. Braud*, 298 Ill. App. 130, 18 N. E. (2d) 392 (1938). See also *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394 (1895), in which the court said the New Jersey statute requiring "immediate" recording would have this effect except for a further provision that the mortgage shall be "valid as against creditors from the time of recording."

In this situation it seems clear that Wyoming will hold for the mortgagee. See *Carroll v. Anderson*, 30 Wyo. 217, 218 Pac. 1038 (1923), which however, involves a late taking of possession rather than recording.

37. *In re Meyers*, 19 F. (2d) 600 (D. C. N. D. N. Y. 1927), *aff'd*, 24 E. (2d) 349 (C. C. A. 2, 1928).

38. *Bowdish v. Page*, 153 N. Y. 104, 47 N. E. 44 (1897). See Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 502.

intervening creditors.³⁹ Logic again seems to favor the Michigan view unless some distinction can be made in this respect between taking possession and recording. It has been suggested that the two are not equivalents because the taking of possession requires a fresh consent of the mortgagor, and so in effect constitutes a new transaction which should be judged without reference to the original mortgage, whereas the late recording is simply the unilateral act of the mortgagee and the old transaction continues tainted with the original fraud.⁴⁰ This does not seem very persuasive, and indeed it might be argued that the later cooperation of the mortgagor is itself some evidence of a fraudulent design at the outset. At best this appears to be another purposeless distinction in a field that already abounds with them.

These diverse holdings among jurisdictions seeking to protect general creditors against unrecorded chattel mortgages seem to be the result of attempting to build logically on an illogical premise. The writer submits that the only satisfactory method of handling the recording statutes is simply to treat them as establishing an order of priority among conflicting claimants of the same property, and for this purpose it is of course necessary that the creditor have an interest in the particular property by execution or attachment. Even giving the word creditor this restricted meaning its inclusion in the statute has considerable significance. A reference back to the discussion of the Wyoming statute on recording conveyances of realty will recall to mind that in the absence of an express provision for creditors, even a creditor who has reduced his claim to a lien by judicial proceedings will take subject to any unrecorded conveyances or mortgages that his debtor may have previously executed.

It would seem that the above discussion should be equally applicable to other forms of chattel security, such as conditional sales, and with respect to policy the writer believes that it is. But unfortunately the statutes of a given state on chattel mortgages and conditional sales may vary considerably in this respect. Furthermore, the conditional sales statutes vary so greatly from state to state that there is little possibility of generalizing on them, although it can probably be said with some safety that there is much less tendency to hold conditional sales void if they are originally unrecorded but

39. *Ransom and Randolph Co. v. Moore*, 272 Mich. 31, 261 N. W. 128 (1935). See also *Rolando v. Everett*, 165 P. (2d) 33 (3rd Dist. Ct. of App. of Calif., 1946) and *Collateral Finance Co. v. Braud*, 298 Ill. App. 130, 18 N. E. (2d) 392 (1938).

40. *Cameron, Hull and Co. v. Marvin*, 26 Kans. 612 (1881); *Bowdish v. Page*, 153 N. Y. 104, 47 N. E. 44 (1897). See also *American Loan and Trust Co. v. Olympia Light and Power Co.*, 72 Fed. 620 (C. C. Wash. 1896), in which the mortgagors act of executing a new affidavit after the creditor extended credit was deemed sufficient to constitute a new transaction and to save the mortgage as against the creditor.

eventually recorded before the creditor reduces his claim to a lien.⁴¹ This difference from the chattel mortgage situation may be explained on the basis that the conditional sale, unlike the chattel mortgage, has not generally been considered as fraudulent to creditors.⁴² Apparently it is not the debtor's possession alone that misleads his creditors but his continued possession of chattels which he originally owned unencumbered.⁴³ Why then, include creditors at all in the conditional sales statutes? If the answer is to obtain uniformity with the chattel mortgage statutes that obviously has not been accomplished.

The Wyoming statute on conditional sales is almost unique. In substance it provides that the seller's reservation of title by an unrecorded conditional sales contract is invalid against a judgment creditor of the buyer.⁴⁴ On first consideration the provision for judgment creditors seems odd. If the statute was intended as a rule of fraudulent conveyance there is no point in restricting its benefits to judgment creditors. On the other hand if it is intended only to establish a rule of priority the term judgment creditor seems erroneous because ordinarily a judgment does not constitute a lien on the judgment debtor's chattels.⁴⁵ Perhaps the answer is to be found in another Wyoming statutory provision which gives a judgment creditor a lien on his debtors interest as a buyer under a conditional sales contract.⁴⁶

-
41. Jones, *Chattel Mortgages and Conditional Sales*, Bowers Edition, vol. 3 sec. 1111 and 1112. This situation is well illustrated by *New York*. There as previously seen the unrecorded chattel mortgage is void as to general creditors of the mortgagor. But the statute on conditional sales provides that the reservation of the title is void only as to those creditors of the buyer who get a lien by attachment or levy before filing. See *Baker v. Hull*, 250 N. Y. 484, 166 N. E. 175 (1929).
 42. *Cole v. Berry*, 42 N. J. L. 308 (1880). See 2 Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 512.
 43. If this is the proper basis for the distinction between chattel mortgages and conditional sales in this respect then it would seem that the same distinction should be made between purchase money chattel mortgages and those where the mortgagor owned the chattel prior to the mortgage.
 44. *Wyo. Comp. Stat.* 1945 sec. 41.801. The court in *Crumrine v. Reynolds*, 13 *Wyo.* 111, 78 *Pac.* 402 (1904) states that this statute was borrowed from Nebraska and the present Nebraska statute is much the same. *Rev. Stat. of Nebraska*, 1943, sec. 36-207. The statute of Alabama is similar in this respect, *Code of Alabama*, 1940, title 47 sec. 131. Under these statutes it is clear that the seller under the contract will prevail if he records before the intervening creditor reduces his claim to judgment. *Wilson v. Lewis*, 63 *Neb.* 617, 88 *N. W.* 690 (1902). But neither state has any decision on the situation where the contract is filed after judgment and before levy of execution. The problem is recognized by dictum in *General Motors Acceptance Corp. v. Eaton*, 24 *Ala. App.* 533, 137 *So.* 780 (1931).
 45. *Wyo. Comp. Stat.*, 1945, sec. 3-4202. See *Crumrine v. Reynolds*, 13 *Wyo.* 111, 78 *Pac.* 402 (1904); *Richardson v. Seybold*, 76 *Ind.* 58 (1888).
 46. *Wyo. Comp. Stat.*, 1945, sec. 3-4719. This section is found in the article on "Proceedings in Aid of Execution" which serves to emphasize that this type of interest cannot be reached by ordinary execution. But the principal is the same in that the judgment creditor is ordinarily required to actually institute such proceedings in order to obtain a lien on the property towards which they are directed. See Glenn, *Fraudulent Conveyances and Preferences*, 1940, sec. 23.

It would be interesting to learn the legislature's purpose in making a judgment lien on this type of interest when something in the nature of execution is necessary to give the judgment creditor a lien on any other personal property of the judgment debtor. Certainly no reason for this distinction comes readily to mind.

Mention should be made of another type of chattel security device, the trust receipt. The Wyoming legislature recently adopted the Uniform Trust Receipt Act which, so far as relevant to our subject, provides that the security interest created by such an instrument is invalid as against lien creditors who become such without notice and before filing.⁴⁷ As an unambiguous statement of the proposition contended for above, this provision is to be commended. But the statute goes on to date the creditor's status as a lien creditor from the time his writ of execution or attachment is issued. This, of course, is at variance with the Wyoming statute on executions which gives the creditor a lien only from the time of levy, and it is at variance, too with the rule in many states that dates the lien from the time the writ is delivered to the sheriff. In the interest of consistency it would seem that this question of when the creditor acquires a lien status could better be left to the general law of each state on execution. The Uniform Conditional Sales Statute is subject to the same criticism although it goes to the other extreme in dating the creditors lien from the time of levy.⁴⁸ In New York a decision of the highest court was necessary to reconcile this provision with the general statute of that state giving the creditor a lien from the delivery of the writ to the sheriff. The court held, and it was undoubtedly correct, that for purposes of the conditional sales statute the creditor should be deemed to have a sufficient lien only upon levy of execution.⁴⁹ But, even apart from the inconsistency, this result is not entirely satisfactory since it rests on the concept of a lien for which the law does not expressly provide at any point.

But this last criticism concerns a detail only and should not obscure the point that both these Uniform Acts treat the question of the creditor's protection simply as one of priority in perfecting conflicting claims to the same property, leaving no room for a construction in favor of general creditors on any theory. This idea seems to be well imbedded now in the people who prepare uniform statutes. The latest effort along these lines is the proposed Uniform Commercial Code.⁵⁰ The principal characteristic of that part of the code deal-

47. Wyo. Comp. Stat., 1945 sec. 39-1308 (Supp. 1947).

48. Uniform Laws Annotated, 1922, vol. 2 sec. 5.

49. *Baker v. Hull*, 250 N. Y. 484, 166 N. E. 175 (1929).

50. This is presently being prepared under the joint auspices of the American Law Institute and National Conference of Commissioners on Uniform State Laws. A tentative draft of the complete code has been published by the sponsoring bodies as the May 1949 Draft.

ing with secured transactions is the elimination of most of the legal distinctions presently existing among chattel mortgages, conditional sales and other security devices and the substitution therefor of a single concept of chattel security. As originally drafted this section provided that a security interest could be defeated by any creditor of the debtor who extended credit between the creation of the security and its perfection, regardless of any subsequent perfection.⁵¹ It need only be added that perfection in situations where the borrower remains in possession would generally be accomplished by recording, to make it obvious that this is substantially the same as the New York rule with respect to chattel mortgages. To the writer this looked like a step in reverse and he was pleased to observe that in the September revision this provision had been dropped and the above discussed provisions of the Uniform Trust Receipt Act substituted.⁵² A further improvement has been made in the October revision by omitting the provision defining the time at which the status of "lien creditor" shall attach thus leaving that question to the general state law on executions and attachments.⁵³

51. Uniform Commercial Code, May 1949 Draft, sec. 7-107.

52. Uniform Commercial Code, September 1949 Revisions, sec. 8-302.

53. Uniform Commercial Code, October 1949 Revision, sec. 8-301.