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December 17, 2010

VIA HAND DELIVERY

Honorable Robert E. Gerber
United States Bankruptcy Judge
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

Re: ***Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation v. JPMorgan Chase Bank, N.A., et al. Adv. Pro. No. 09-00504 (REG)***

Dear Judge Gerber:

We write on behalf of plaintiff in the above-referenced adversary proceeding in response to JPMorgan Chase Bank N.A.'s December 9, 2010 letter enclosing additional authority referenced at oral argument. Enclosed please find copies of the following authorities that further support the plaintiff's position.

- *In re Lortz,* 344 B.R. 579 (Bankr. C.D. Ill. 2006) (mistaken release of security interest upheld despite unintended consequences);
- *People v. Baender,* 68 Cal.App. 49, 228 P. 536 (1924) (written escrow instructions signed by defendant authorized title company to record forged deed); and
- *Saunders v. Allstate Ins. Co.,* 168 Ohio St. 55, 151 N.E.2d 1 (1958) (principal bound by agent's mistake).

We note as well that we have not discovered any reported decision which relieves a principal of his agent's mistake on the theory that the principal did not authorize the agent to make a mistake.

Respectfully submitted,

Barry N. Seidel

Enclosures

cc: Kelley Drye & Warren LLP
John Callagy, Esq. (via e-mail PDF w/ enclosures)

344 B.R. 579, Bankr. L. Rep. P 80,633, 60 UCC Rep.Serv.2d 90
(Cite as: 344 B.R. 579)

United States Bankruptcy Court,
C.D. Illinois.
In re Charles W. LORTZ, Debtor.
No. 05-87542.

June 16, 2006.

Background: Creditor moved for relief from automatic stay, and Chapter 7 trustee objected.

Holdings: The Bankruptcy Court, Thomas L. Perkins, J., held that:
(1) creditor's mistaken release of its lien did not discharge debtor's liability for unpaid loan balance or terminate creditor's security interest in vehicle, but
(2) lien was avoidable by trustee through exercise of his strong-arm powers.

Motion for automatic stay relief denied.

West Headnotes

[1] Bankruptcy 51 2576

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2576 k. Perfection or Recordation Under State Law, in General. Most Cited Cases

Bankruptcy 51 2704

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases

Bankruptcy 51 2952

51 Bankruptcy
51VII Claims
51VII(F) Priorities
51k2952 k. Liens. Most Cited Cases

Although federal law invests bankruptcy trustee with the status of a hypothetical lien creditor, applicable state law governs the issues of perfection and priority. 11 U.S.C.A. § 544(a)(1).

[2] Secured Transactions 349A 7

349A Secured Transactions
349AI Nature, Requisites, and Validity
349AI(A) Nature and Essentials
349Ak3 What Law Governs
349Ak7 k. Certificate of Title, Property Covered By. Most Cited Cases
Under Illinois law, state vehicle code governs perfection of security interests in motor vehicles, while state's version of Uniform Commercial Code (UCC) governs the priority of those interests. S.H.A. 625 ILCS 5/1-100 et seq.; 810 ILCS 5/1-101 et seq.

[3] Bankruptcy 51 2704

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases

Secured Transactions 349A 140

349A Secured Transactions
349AIII Construction and Operation
349AIII(B) Rights as to Third Parties and Priorities
349Ak139 Unperfected Security Interests, Priority Over
349Ak140 k. Lien Creditors. Most Cited Cases
Under Illinois law, the interest of a judicial lien creditor takes priority over an unperfected security interest, and, therefore, bankruptcy trustee prevails over the holder of a security interest in a vehicle who fails to perfect its security interest in accordance with statute.

[4] Secured Transactions 349A 2

349A Secured Transactions
349AI Nature, Requisites, and Validity
349AI(A) Nature and Essentials
349Ak2 k. Security Interest. Most Cited Cases
Pledge of a vehicle to secure a debt is a "security interest."

[5] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases
Under Illinois law, state vehicle code provides the exclusive means for perfecting and giving notice of security interests in motor vehicles. S.H.A. 625 ILCS 5/3-207.

[6] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases
Creditor may hold a valid security interest that is not perfected.

[7] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases

Secured Transactions 349A 117

349A Secured Transactions
349AIII Construction and Operation
349AIII(A) In General
349Ak117 k. Title and Interests in Collateral. Most Cited Cases
Signed security agreement stands by itself and governs creditor's rights in collateral with respect to debtor, and is enforceable against debtor even if the security interest is not perfected.

[8] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases
Perfection of security interest is only significant with respect to the creditor's rights vis-a-vis third parties.

[9] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases

Secured Transactions 349A 87

349A Secured Transactions
349AII Perfection of Security Interest
349Ak87 k. Notation on Certificate of Title. Most Cited Cases
Perfection of security interest may not be achieved or maintained without a valid security interest granted by debtor, and if a security agreement is invalid or terminated, a lien noted on a title is worthless.

[10] Secured Transactions 349A 207

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak207 k. Effect of Release or Satisfaction. Most Cited Cases
Under Illinois law, creditor's mistaken release of its lien on debtor's automobile did not discharge debtor's liability for unpaid loan balance or terminate creditor's security interest in vehicle.

[11] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases
Under Illinois law, lack of perfection of security interest relates only to the issue of priority over other creditors' interests in the collateral and does not, by itself, terminate or impair the secured party's rights as against debtor.

[12] Secured Transactions 349A 205

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak205 k. Release of Collateral. Most Cited Cases
Under Illinois law, secured party has the power to

release its security interest or only its lien before full payment of the secured debt.

[13] Secured Transactions 349A 205

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak205 k. Release of Collateral. Most Cited Cases
Provision of Illinois's vehicle code requiring creditor to release its security interest in vehicle within 21 days after payment of secured loan is intended not to define the minimum conditions for when a lien could be released, with full payment as a prerequisite, but to delineate only when a secured creditor must release its lien. S.H.A. 625 ILCS 5/3-205.

[14] Secured Transactions 349A 87

349A Secured Transactions
349AII Perfection of Security Interest
349Ak87 k. Notation on Certificate of Title. Most Cited Cases

Secured Transactions 349A 131

349A Secured Transactions
349AIII Construction and Operation
349AIII(B) Rights as to Third Parties and Priorities
349Ak131 k. Effect as to Third Persons in General. Most Cited Cases
Under Illinois law, lien that is noted on title to motor vehicle, by the very fact of its presence there, gives conclusive notice so that any subsequent transferee or lender necessarily acquires their interest subject to the lien. S.H.A. 625 ILCS 5/3-207.

[15] Secured Transactions 349A 207

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak207 k. Effect of Release or Satisfaction. Most Cited Cases
Under Illinois law, lien that is released on vehicle's title is notice of its termination that may be relied upon by a transferee or lender so that they take free and clear of the released lien.

[16] Secured Transactions 349A 81

349A Secured Transactions
349AII Perfection of Security Interest
349Ak81 k. In General. Most Cited Cases
Intent of the secured party is not relevant to questions of perfection of security interest, and errors can be fatal.

[17] Bankruptcy 51 2578

51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2578 k. Mortgages and Pledges. Most Cited Cases
If bankruptcy intervenes during period of unperfection arising when mortgagee mistakenly records release of mortgage in county recorder's office, the mistakenly released mortgage is avoidable by trustee.

[18] Secured Transactions 349A 206

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak206 k. Filing Release. Most Cited Cases

Secured Transactions 349A 207

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak207 k. Effect of Release or Satisfaction. Most Cited Cases
Illinois's vehicle code did not require lienholder to submit vehicle title to Secretary of State for release of lien to be effective, and therefore fact that records of Secretary of State continued to reflect creditor's lien, despite creditor's mistaken release of lien on certificate of title and return of title to debtor, did not preclude determination that lien was unperfected when debtor filed Chapter 7 petition.

[19] Secured Transactions 349A 207

349A Secured Transactions
349AVI Discharge and Satisfaction
349Ak207 k. Effect of Release or Satisfaction. Most Cited Cases
Under Illinois law, effect of a release of lien on motor vehicle, as to third parties, is not dependent upon full payment or the intent of the secured party.

344 B.R. 579, Bankr. L. Rep. P 80,633, 60 UCC Rep.Serv.2d 90
(Cite as: 344 B.R. 579)

[20] Bankruptcy 51 2704

51 Bankruptcy
51V The Estate
51V(H) Avoidance Rights
51V(H)1 In General
51k2704 k. Trustee as Representative of Debtor or Creditors. Most Cited Cases

As a result of creditor's mistaken return of original certificate of title for motor vehicle, with its lien released, to debtor, creditor's security interest became so far unperfected that judicial lien creditor would gain priority interest in vehicle under Illinois law, and therefore creditor's lien was avoidable by Chapter 7 trustee through exercise of his strong-arm powers. 11 U.S.C.A. § 544(a)(1).

***581** Steven Nelson, Rock Island, IL, for Ford Motor Credit Company.

OPINION

THOMAS L. PERKINS, Bankruptcy Judge.

This matter is before the Court on the motion for relief from the stay filed by FORD MOTOR CREDIT COMPANY (FMCC) and the objection by RICHARD E. BARBER, the Chapter 7 Trustee (TRUSTEE). The issue is whether a creditor that mistakenly releases its lien on a certificate of title to a motor vehicle and returns the title to the owner causes its security interest to become unperfected so as to be avoidable by a trustee in bankruptcy. A hearing was held on January 26, 2006, at which time the parties agreed to submit the matter for decision on a stipulation of facts and written briefs.

The parties have stipulated to the facts as follows. On July 14, 2005, CHARLES W. LORTZ, the Debtor (DEBTOR), obtained financing from FMCC to purchase a 2005 Ford Ranger. The amount financed of $16,657.89 was payable over five years with interest at 15.25% in equal installments of $400.90 per month. The first payment was due August 28, 2005. FMCC perfected its security interest in the vehicle by having its lien noted on the certificate of title.

Between August 25, 2005, and November 14, 2005, FMCC'S records show that it posted twelve payments on the loan sufficient to pay it off in full. Its records also show that each of the twelve payments was returned for insufficient funds within days of receipt. FMCC concedes that it mistakenly failed to reverse the credits on the account when the payments were returned. As a result of its error, FMCC'S records reflected that the account had been paid in full as of November 14, 2005, despite the fact that no collectible funds had ever been received. After posting the November 14 payment, FMCC automatically generated a paid in full letter, executed the lien release on the title and mailed the letter and the title to the DEBTOR. Apparently realizing its mistake soon thereafter, FMCC repossessed the vehicle on November 22, 2005. FN1

> FN1. In its brief, FMCC states that when it realized that the title was released in error, it took action to secure the collateral. FMCC does not allege that it attempted to repossess or replevy the certificate of title.

***582** On December 2, 2005, the DEBTOR filed a Chapter 7 petition. In his Statement of Financial Affairs, the DEBTOR disclosed the repossession of the vehicle, noting that FMCC'S lien may have been released in error. The DEBTOR listed FMCC as an unsecured creditor holding a claim in an unknown amount. Based on the DEBTOR'S failure to make the required payments, FMCC filed a motion for relief from the automatic stay, alleging that the DEBTOR had neither reaffirmed the debt nor redeemed the vehicle. The TRUSTEE filed a response, objecting on the ground that FMCC may have released its lien. Thereafter, the DEBTOR voluntarily gave the TRUSTEE the certificate of title to the Ford Ranger. At the hearing, the parties consented to the Court treating the matter as a proceeding to determine whether the lien is avoidable by the TRUSTEE, even though no adversary proceeding has been filed.

The TRUSTEE contends that FMCC'S lien is vulnerable to avoidance in the exercise of his strong arm powers under Section 544(a) of the Bankruptcy Code. FMCC contends that its lien, having been released by mistake, remains valid. Characterizing the lien release as a “clerical error,” FMCC points to its prompt repossession of the vehicle, which occurred prior to the filing of the bankruptcy petition, as evidence of an intent not to release its security interest. Accordingly, the Court must determine whether, under Illinois law, the judicial lien granted to the TRUSTEE pursuant to

Section 544(a)(1) has priority over the lien of FMCC, which was released on the certificate of title by mistake.

[1][2] Section 544(a) of the Bankruptcy Code, known as the "strong arm" provision, confers upon the bankruptcy trustee the status of a hypothetical judicial lienholder allowing the trustee to take priority over liens and security interests against property of the debtor's bankruptcy estate which were not perfected or which were improperly perfected under state law. 11 U.S.C. § 544(a)(1); *Matter of Fullop*, 6 F.3d 422 (7th Cir.1993). Though federal law invests the trustee with the status of a hypothetical lien creditor, applicable state law governs the issues of perfection and priority. *U.S. v. Rotherham*, 836 F.2d 359 (7th Cir.1988); *Matter of Chaseley's Foods, Inc.*, 726 F.2d 303 (7th Cir.1983). The Illinois Vehicle Code governs perfection of security interests in motor vehicles while the Uniform Commercial Code (UCC) governs the priority of those interests. *Rotherham*, 836 F.2d at 365 (citing *Finance America Commercial Corp. v. Econo Coach, Inc.*, 95 Ill.App.3d 185, 50 Ill.Dec. 667, 419 N.E.2d 935 (Ill.App. 2 Dist.1981) and *Peterson v. Ziegler*, 39 Ill.App.3d 379, 350 N.E.2d 356 (Ill.App. 5 Dist.1976)).

[3] Under Illinois law, the interest of a judicial lien creditor takes priority over an unperfected security interest. *First Nat. Bank of Lacon v. Strong*, 278 Ill.App.3d 762, 215 Ill.Dec. 421, 663 N.E.2d 432 (Ill.App. 3 Dist.1996); *Marquette Nat. Bank v. B.J. Dodge Fiat, Inc.*, 131 Ill.App.3d 356, 86 Ill.Dec. 678, 475 N.E.2d 1057 (Ill.App. 2 Dist.1985); *In re Church*, 206 B.R. 180, 183 (Bankr.S.D.Ill.1997). Accordingly, a bankruptcy trustee prevails over the holder of a security interest in a vehicle who fails to perfect its security interest in accordance with the statute. *Matter of Keidel*, 613 F.2d 172 (7th Cir.1980).

[4][5] Although the pledge of a vehicle to secure a debt is an Article 9 security interest, the Illinois Vehicle Code provides the exclusive means for perfecting and giving***583** notice of security interests in motor vehicles. 625 ILCS 5/3-207; *Arena Auto Auction, Inc. v. Mecum's Countryside Motor Co., Inc.*, 251 Ill.App.3d 96, 190 Ill.Dec. 385, 621 N.E.2d 254 (Ill.App. 2 Dist.1993). A security interest in a vehicle is perfected "by the delivery to the Secretary of State of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the lienholder and the required fee." 625 ILCS 5/3-202(b). It is then the responsibility of the Secretary of State's office to issue the certificate of title with the secured party's lien properly noted thereon. It is not disputed that FMCC had, for a time, a perfected security interest in the DEBTOR'S 2005 Ford Ranger as a result of filing its application with the Secretary of State and the Secretary of State's issuance of a certificate of title showing FMCC as the lienholder. Rather, the issue is whether FMCC'S execution of the release on the certificate of title and return of the title to the DEBTOR rendered it unperfected as of the petition date when the TRUSTEE'S rights accrued.

[6][7][8][9] Initially, it is worth emphasizing the distinction between a security interest and perfection of that interest. It is entirely possible for a creditor to hold a valid security interest that is not perfected. A signed security agreement stands by itself and governs the creditor's rights in collateral with respect to the debtor. A security agreement is enforceable against a debtor even if the security interest is not perfected. Perfection is only significant, indeed critical, with respect to the creditor's rights vis-a-vis third parties. On the other hand, perfection may not be achieved or maintained without a valid security interest granted by the debtor. If a security agreement is invalid or is terminated, a lien noted on a title is worthless.

[10][11] With that background, the Court accepts FMCC'S argument that the mistaken release of lien did not discharge the DEBTOR'S liability for the unpaid loan balance or terminate FMCC'S security interest in the vehicle. The issue before the Court, however, turns on the question of perfection alone. Lack of perfection relates only to the issue of priority over other creditors' interests in the collateral and does not, by itself, terminate or impair the secured party's rights as against the debtor. *Matter of Yealick's Estate*, 69 Ill.App.3d 353, 25 Ill.Dec. 743, 387 N.E.2d 399 (Ill.App. 4 Dist.1979); *Application of County Treasurer of DuPage County*, 16 Ill.App.3d 385, 306 N.E.2d 743, (Ill.App. 2 Dist.1973).

The Illinois Vehicle Code addresses perfection and release but not in a comprehensive fashion. Perfection is defined as follows:

> A security interest is perfected by the delivery to the Secretary of State of the existing certificate of title, if any, an application for a certificate of title

> containing the name and address of the lienholder and the required fee. The security interest is perfected as of the time of its creation if the delivery to the Secretary of State is completed within 21 days after the creation of the security interest or receipt by the new lienholder of the existing certificate of title from a prior lienholder or licensed dealer, otherwise as of the time of the delivery.

625 ILCS 5/3-202(b). Notably, perfection is not defined as occurring when the secured party's lien is noted on the certificate of title. Instead, perfection occurs at that earlier point when the Secretary of State receives the necessary documents to enable it to identify and note the lienholder on the title. Thus, the possibility exists that a lien may be perfected even though it is not noted on the title where, for example,***584** the Secretary of State's office, having received the application and title, hasn't gotten around to completing the notation yet or fails to do so in error.

The case at bar, however, involves not a lien that was never noted on the title but one that was properly noted and then subsequently released. The release was effected by an FMCC employee executing the portion of the certificate of title specifically designated for the purpose of a lienholder to release its lien by execution or signature.[FN2] The Vehicle Code authorizes the Secretary of State to prescribe a form of certificate of title that includes the naming of a lienholder and the assignment or release of the security interest of a lienholder. 625 ILCS 5/3-107(b). It further provides that a certificate of title issued by the Secretary of State is *prima facie* evidence of the facts appearing on it. 625 ILCS 5/3-107(c). The purpose of this provision is to provide the public with a readily available means of identifying the owners and lienholders of the vehicle and parties dealing with the vehicle are entitled to rely upon the information that appears on the face of the certificate of title. *Spaulding v. Peoples State Bank of Bloomington*, 25 Ill.App.3d 118, 120, 323 N.E.2d 143, 144-145 (Ill.App. 4 Dist.1975); *In re German*, 285 F.2d 740, 742 (7th Cir.1961) (provision of Illinois Motor Vehicle Act dealing with perfection of security interests, like other Illinois recording statutes, should be construed as primarily a constructive notice statute).

> FN2. There is no allegation that the release was obtained by fraud or that the employee that signed the release was acting outside of the authorized scope of employment.

Although the Vehicle Code does not expressly define the effect of execution of the lien release portion on a certificate of title, it is not disputed that such execution is the accepted method by which liens are released and by which public notice is given of the release of motor vehicle liens. Section 3-205 describes the process by which a creditor releases a security interest as consisting of two steps:

> (1) executing a release, and
>
> (2) mailing or delivering the release and the certificate of title to the next lienholder or, if none, the owner.

625 ILCS 5/3-205.

[12][13] Although Section 3-205 requires a creditor to release its security interest within 21 days after payment of the secured loan, it is clear that this section does not make full payment a prerequisite to a valid release. There is no question that a secured party has the power to release the security interest or only the lien before full payment of the secured debt. [FN3] By imposing a 21-day time limit for a secured party to execute a release and return the certificate of title, and a monetary penalty for noncompliance, the section's purpose is to prevent a recalcitrant lender from holding the title indefinitely after the loan has been fully paid, thereby impeding the owner's ability to sell the vehicle or borrow new funds against it. Section 3-205 was intended not to define the minimum conditions for when a lien could be released, with full payment as a prerequisite, but to delineate only *when* a secured creditor *must* release its lien. Other than generally describing the steps by which a security interest is released,***585** Section 3-205 has no impact on the issue before the Court.

> FN3. For example, a security interest in collateral may be voluntarily terminated where it is deemed by the creditor to be worthless or where the debtor is substituting other collateral. A lien alone may be released, without termination of the security interest, pursuant to a subordination agreement. Section 3-205, not making that distinction, addresses only the narrow issue of a creditor's duty to release its security interest upon receipt of full

payment.

[14][15] Of greater significance is Section 3-207, which provides that the stated method for perfecting and "giving notice of security interests" in motor vehicles is exclusive of any recording or filing requirement. 625 ILCS 5/3-207. The method referred to for giving notice of security interests is the notation of the lien on the original certificate of title. The importance of the original title for the purpose of giving notice of liens is obvious when one considers that it is the title that is the necessary document both to transfer ownership of a motor vehicle and to perfect a security interest in a motor vehicle. *See*, 625 ILCS 5/3-112, 3-202(b) and 3-203. A lien that is noted on the title, by the very fact of its presence there, gives conclusive notice so that any subsequent transferee or lender necessarily acquires their interest subject to the lien. Just as well, a lien that is released on the title is notice of its termination which may be relied upon by a transferee or lender so that they take free and clear of the released lien. An unperfected security interest in a titled vehicle is not valid against subsequent transferees or lienholders.[FN4] 625 ILCS 5/3-202(a). Using the original certificate of title as the exclusive method of giving such notice allows transactions concerning motor vehicles to be conducted easily and with certainty. *See*, *Meeks v. Mercedes Benz Credit Corp.*, 257 F.3d 843, 845 (8th Cir.2001) (policy behind certificate of title laws is that potential purchasers or creditors may rely upon certificate of title for notice of encumbrances).

FN4. The UCC commentary also indicates that a security interest, once perfected, that becomes unperfected before a judicial lien arises, is subordinate to the judicial lien. UCC Comment, par. 4, to § 9-317 at 810 ILCS 5/9-317.

[16][17] The Court also accepts FMCC'S representation that it did not intend to release its security interest for anything less than full payment of the loan, which is simply another way of saying that the lien was released by mistake. As with all perfection laws, however, which focus on third party perceptions and clarity and certainty of notice, the intent of the secured party is not relevant to questions of perfection and errors can be fatal. [FN5]

FN5. The situation at bar is analogous to a mortgagee who mistakenly records a release of mortgage in the county recorder's office. When bankruptcy intervenes during such period of unperfection, the mistakenly released mortgage is avoidable by the trustee. *In re Johnson*, 2006 WL 1075417 (Bankr.N.D.Ill.2006); *In re Anderson*, 324 B.R. 609 (Bankr.W.D.Ky.2005); *In re Godwin*, 217 B.R. 540 (Bankr.S.D.Ohio 1997).

It is also critical, here, that FMCC returned possession of the original certificate of title to the DEBTOR. Had FMCC executed the lien release but then caught the error before mailing the title to the DEBTOR, its perfected status may well have been preserved. By giving up possession of the title, however, FMCC in effect placed it back into the stream of commerce where it became open to reliance by third party purchasers and lien creditors with no notice that the lien had been released in error.

In *In re Office Machines Exchange, Inc.*, 47 B.R. 644 (Bankr.S.D.Ill.1985), the court rejected a trustee's argument that he could avoid a bank's security interest in a vehicle where the bank, in anticipation of a payoff that never materialized, executed the release of lien on the title but retained possession of it. Reasoning that the Illinois statutory scheme for the perfection and release of liens was intended to protect third party transferees and prospective***586** lienholders, the court concluded as follows:

> If the Bank had relinquished possession of the certificate of title, thereby creating the possibility that third parties would take positions in reliance of the Bank's executed release form, the Bank would be estopped from claiming that it had a valid lien in the Corvette, even if its security interest was not satisfied. Under the facts of this case, however, the Bank has constantly maintained possession of the certificate of title, thereby effectively precluding any third party from obtaining knowledge of its erroneous release. The Trustee cannot assert his status as a hypothetical lien creditor because the Bank has a properly perfected security interest in the 1980 Chevrolet Corvette.

47 B.R. at 647.

FMCC'S reliance upon two previous bankruptcy court decisions out of this District, *In re Allen*, 1997 WL

33475068 (Bankr.C.D.Ill.1997) and *In re Granger*, No. 95-80898 (Bankr.C.D.Ill.1995), is unavailing. Those cases, both involving Chapter 13 proceedings, stand for the proposition that a Chapter 13 debtor cannot exercise a trustee's avoiding powers, so that an unperfected security interest cannot be avoided in a plan and the creditor must be treated as holding a secured claim. Likewise, *First Galesburg Nat. Bank & Trust Co. v. Martin*, 58 Ill.App.3d 113, 15 Ill.Dec. 603, 373 N.E.2d 1075 (Ill.App. 3 Dist.1978), also relied upon by FMCC, deals only with the effect between the bank and the borrower of the bank's error in marking a note paid and returning it to the borrower.

[18] FMCC also contends that even though its lien was released on the title, the records of the Secretary of State continued to reflect FMCC'S lien. Unlike the laws of other states, however, the Illinois Vehicle Code does not require the lienholder to submit the title to the Secretary of State in order for a release of lien to be effective.[FN6] While it may be viewed as unfair to deprive a secured creditor of its lien because of an honest mistake, Illinois law places a "strong emphasis" on the need to obtain and maintain perfection in accordance with the statutory method; the consequent gain in certainty and regularity outweighs any such perceived unfairness. *Keidel*, 613 F.2d at 175.

FN6. *See, In re Marshall*, 266 B.R. 554 (Bankr.M.D.Ga.2001)(Alabama statute requires, in addition to satisfaction of the lien, in order for a lien release to be effective, (1) execution of a release on the certificate; (2) delivery of the certificate to the next lienholder or owner; and (3) delivery of the certificate to the DOR by the next lienholder or owner).

[19][20] This Court concludes that the effect of a release of lien, as to third parties, is not dependent upon full payment or the intent of the secured party, questions of fact that are not reflected on the certificate of title and that are "outside the record" so to speak.[FN7] Because the certificate of title is the exclusive method of perfecting and giving notice of a lien, what appears on the face of the certificate of title must be determinative where third party interests are involved. The Court holds that by returning the original certificate of title, with its lien released, to the DEBTOR, FMCC became so far unperfected that a judicial lien creditor would gain a priority interest in the vehicle under Illinois law. Therefore, FMCC'S lien is avoidable by the TRUSTEE and its motion for relief from the automatic stay must be denied.

FN7. These questions are relevant with regard to the effect of a release as between the debtor and the creditor.

This Opinion constitutes this Court's findings of fact and conclusions of law in ***587** accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

ORDER

For the reasons stated in an Opinion entered this day, IT IS HEREBY ORDERED that the lien held by Ford Motor Credit Company on the 2005 Ford Ranger owned by the Debtor, determined to be unperfected, is avoided by the Trustee pursuant to 11 U.S.C. § 544(a)(1); IT IS FURTHER ORDERED that the motion for relief from automatic stay filed by Ford Motor Credit Company is DENIED.

Bkrtcy.C.D.Ill.,2006.
In re Lortz
344 B.R. 579, Bankr. L. Rep. P 80,633, 60 UCC Rep.Serv.2d 90

END OF DOCUMENT

District Court of Appeal, First District, Division 1, California.
PEOPLE
v.
BAENDER.
Cr. 1155.

July 1, 1924.
Hearing Denied by Supreme Court Aug. 28, 1924.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Charles L. Baender was convicted of offering for filing a false and forged deed, and he appeals from the judgment and order denying a new trial. Affirmed.

West Headnotes

[1] Deeds 120 73

120 Deeds
120I Requisites and Validity
120I(E) Validity
120k73 k. Illegality. Most Cited Cases

Forgery 181 15

181 Forgery
181k15 k. False entries or records, and alteration of entries or records. Most Cited Cases
Where defendant intended that property should be conveyed to his brother-in-law, and represented that title was in the brother-in-law, and though, as claimed, he intentionally had the brother-in-law's name misspelled, he was never known by the name as so misspelled, and never pretended it was his name, the title was not in him under a fictitious name, so as to permit him to execute a deed in that name, or have another do so without the deed being a forged deed, within Pen.Code, § 115.

[2] Forgery 181 15

181 Forgery
181k15 k. False entries or records, and alteration of entries or records. Most Cited Cases
Where grantor had land deeded to his brother-in-law, who knew nothing about it, a deed reconveying the property, signed and acknowledged by persons impersonating the grantees, the woman using a fictitious first name for the wife, constituted a forgery, within (West's Ann.) Pen.Code, § 115, making it a felony to offer for filing a false or forged deed, in view of 470, defining forgery.

[5] Forgery 181 14

181 Forgery
181k3 Elements of Offenses
181k14 k. Injury from forgery. Most Cited Cases
That grantee should be actually defrauded is unnecessary, if in fact a forged deed might possibly deceive another and was prepared with intent to deceive and defraud another.

[6] Divorce 134 889

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(D) Allocation of Property and Liabilities; Equitable Distribution
134V(D)9 Proceedings for Division or Assignment
134k882 Judgment or Decree
134k889 k. Operation and effect. Most Cited Cases
(Formerly 134k255, 134k254)
While entry of interlocutory decree of divorce awarding life estate in property to wife vests no present interest, the life estate being merely inchoate, such estate becomes operative, if the decree is not reversed or modified, on appeal.

[7] Forgery 181 15

181 Forgery
181k15 k. False entries or records, and alteration of entries or records. Most Cited Cases
Where escrow instructions signed by defendant au-

thorized title company to record forged deed placed by him in escrow when agreement for exchange was complied with, and he gave oral instructions to the same effect, he offered or procured the forged deed to be recorded, within (West's Ann.) Pen.Code, § 115.

[8] Forgery 181 44(1)

181 Forgery
181k44 Weight and Sufficiency of Evidence
181k44(1) k. Fraudulent intent and knowledge. Most Cited Cases
In prosecution under (West's Ann.) Pen.Code, § 115, for offering forged instrument for record, evidence held to show that defendant knew the deed in question was false or forged.

[9] Forgery 181 15

181 Forgery
181k15 k. False entries or records, and alteration of entries or records. Most Cited Cases
(West's Ann.) Pen.Code, § 115, making offering of forged instruments for filing a felony, when instrument, if genuine, might be filed or registered, held applicable to a deed properly acknowledged in form, expressing valuable consideration, regardless of defective form or certification.

[10] Forgery 181 37

181 Forgery
181k36 Admissibility of Evidence
181k37 k. In general. Most Cited Cases
In prosecution under (West's Ann.) Pen.Code, § 115, for offering forged deed for record, the deed, which was false and forged, and the subject of the prosecution, was admissible.

[11] Forgery 181 38

181 Forgery
181k36 Admissibility of Evidence
181k38 k. Intent and knowledge. Most Cited Cases
In prosecution for offering a forged deed for record, judgment and findings in divorce decree awarding wife a life estate in the property involved, and defendant's letter to her shortly after the crime, joking about trouble she would have over her life estate, held admissible to show intent to defraud the wife.

[11] Privileged Communications and Confidentiality 311H 70(2)

311H Privileged Communications and Confidentiality
311HII Family Privileges
311HII(B) Spousal Privilege
311Hk68 Mode or Form of Communications
311Hk70 Writings and Documents
311Hk70(2) k. Letters and correspondence. Most Cited Cases
(Formerly 410k191)
In prosecution for offering a forged deed for record, defendant's letter to wife, shortly after the crime, joking about trouble she would have over her life estate awarded her in divorce decree, held admissible to show intent to defraud the wife.

[12] Witnesses 410 52(1)

410 Witnesses
410II Competency
410II(A) Capacity and Qualifications in General
410k51 Husband and Wife
410k52 Incompetency for or Against Each Other in General
410k52(1) k. In general. Most Cited Cases
(West's Ann.) Code Civ.Proc. § 1881, relative to testimony by wife for or against husband, did not render inadmissible letter from husband to wife in connection with testimony of third person, where the wife did not testify concerning the letter.

[13] Forgery 181 15

181 Forgery
181k15 k. False entries or records, and alteration of entries or records. Most Cited Cases
In prosecution under (West's Ann.) Pen.Code, § 115, for offering a forged deed for record, whether the deed passed or vested title in the grantees held immaterial, and instructions on that question properly refused.

Forgery 181 12(1)

181 Forgery

181k3 Elements of Offenses
181k12 Apparent Legal Efficacy or Operation of Instrument
181k12(1) k. Compliance with statutory requirements and invalidity appearing from face of instrument. Most Cited Cases
An instrument void on its face cannot be the subject of forgery.

Forgery 181 12(3)

181 Forgery
181k3 Elements of Offenses
181k12 Apparent Legal Efficacy or Operation of Instrument
181k12(3) k. Legal capacity of apparent maker, and obligation as between apparent parties to instrument. Most Cited Cases
A deed valid on its face may be the subject of forgery, though it purports to convey property to which named grantor had no title.
****536 *52** Milton E. D'Askquith, of Oakland, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., and Ezra W. Decoto. Dist. Atty., and Chas. Wade Snook, Deputy Dist. Atty., both of Oakland, for the People.

KNIGHT, J.

The defendant, Charles L. Baender, was charged by indictment with having knowingly procured and offered for filing in the office of the county recorder of ****537** Alameda county a false and forged deed. Upon that charge he was tried and convicted, and from the judgment of conviction and the order denying his motion for a new trial he has appealed.

The indictment was drawn under, and the appellant was prosecuted for a violation of, section 115 of the Penal Code, which provides that:

"Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within the state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of a felony."

Section 470 of the Penal Code defining forgery, in so far as it applies to this case, provides that:

"Every person who, ***53** with intent to defraud, signs the name of another person, or of a fictitious person, knowing [at the time] he has no authority so to do, *** is guilty of forgery."

One of the main contentions of appellant on this appeal is that the deed in question was not a false and forged instrument within the meaning of said Code section defining forgery. The facts disclosed by the record are as follows:

The real property described in the deed in question had been the community property of Baender and his wife for a number of years. In 1919 the property was about to be sold under execution by the sheriff, and in order to save it Baender requested one Schyler, with whom he had been and was then associated in a business transaction, to bid in said property at the sheriff's sale. This was done, and when the business relation existing between Schyler and Baender was ended Baender requested Schyler to convey the property to his brother-in-law, G. F. Gillelen, of Los Angeles; the latter being married to Baender's sister, whose name was Matilda A. Gillelen. Schyler executed the deed accordingly, except that the surname of the grantee was misspelled at Baender's request, for reasons which will hereinafter appear. The Gillelens of Los Angeles paid no consideration for the property, and in fact knew nothing about this transaction; but Baender's wife had full knowledge thereof. The deed was delivered to Baender. Thereafter, on August 11, 1921, Mrs. Baender was granted an interlocutory decree of divorce, by the terms of which the property in question was declared to be community property, and upon stipulation Mrs. Baender was awarded a life estate therein. Subsequent to the date of the granting of said decree, Baender, without the knowledge of his wife, opened negotiations with a real estate firm, named Faustina & Pelton, for an exchange of properties. An agreement was eventually reached whereby Baender agreed to exchange the property in question for other real property and a cash bonus of $700. During the course of those dealings Baender represented several times to Faustina & Pelton that his property stood in the names of his brother-in-law and sister of Los Angeles, and that they would come from Los Angeles to sign the deed.

On the morning of November 22, 1921, Baender appeared before J. F. Holm, a notary public in Oakland, accompanied ***54** by a man and woman, whom he introduced to Holm as Mr. and Mrs. Gillelen from Los Angeles. He requested Holm to prepare for their execution a deed to said property. Holm declined to draw the deed, and the parties left with the understanding that they would have the deed drawn elsewhere and return to Holm's office that afternoon to execute the same before him as notary public. That afternoon Baender returned to Holm's office, accompanied by the man, but not by the woman. He explained to Holm that the woman whom he referred to as Mrs. Gillelen was ill, and requested that Holm take her acknowledgment over the phone; she having already signed the deed in the name of "Ada M. Gillelen." Holm did so, and thereupon the man signed the deed and acknowledged the same as "G. F. Gillellen." By that deed said property was at the request of Faustina & Pelton conveyed to one Charles Baumann. The deed was then delivered to Baender. Pursuant to the exchange agreement Baender on December 1, 1921, delivered said deed, together with the Schyler to Gillellen deed and with certain written escrow instructions to the Alameda County Title Company, who were acting also in the matter for the other parties to the exchange. When the transaction was ready to be concluded, the title company upon the strength of the representations made by Baender, supported by the recitals in the notarial certificate to the effect that the Gillelens of Los Angelos had signed the deed, issued title insurance upon the Baender property, and thereafter, pursuant to said escrow instructions, carried out the necessary legal requirements to consummate the exchange of the properties, including the filing for record on December 5, 1921, of the Gillellen to Baumann deed. The evidence further shows that on or about January 31, 1922, about seven weeks subsequent to the attempted disposal of the property in question, the appellant mailed Mrs. Baender the following letter:

"Lately.

"Mrs. Baender: I have this day deposited for you $30.00 in the State Savings Bank, 13th and Franklin streets, for the children.

"I hear that you and your lawyers are having a little fun all to yourselves over some property on 20th street. Am I right?

***55** "Well, enjoy yourself while you are still ****538** young. I really believe that life estate of yours can be made the source of a real and constant pleasure for you, Albert, and your lawyers. You will have entertainment for several years. Charlie."

Following the receipt of that letter it was discovered that the man who executed the deed to Baumann was not Gillelen, the brother-in-law of Baender, and that the woman who also signed said deed was not Baender's sister. They were strangers whose services were procured by Baender for the very purpose of impersonating his relatives in the matter of effecting a transfer of the title to said property. The Gillelens of Los Angeles, as a matter of fact, knew nothing about the transaction until some time after it had occurred. Baender's indictment and arrest followed.

We are of the opinion that the evidence above narrated, when considered along with the additional evdence which will be hereinafter set forth, establishes a violation of the Code section under which the appellant was charged and is sufficient in law to sustain the judgment of conviction. Section 115 of the Penal Code was obviously designed to prevent the recordation or registration of spurious documents, which were knowingly offered for record with intent to defraud. The evidence here briefly stated shows that, in order to avoid the demands of creditors the appellant, with full knowledge on the part of his wife, with whom he was then apparently on friendly terms, caused the title to their community property to be placed in the name of his brother-in-law, and thereafter, and after the wife had obtained an interlocutory judgment of divorce, and had on stipulation by that interlocutory judgment been awarded a life estate in said community property, he endeavored to defeat said life estate by disposing of the property, and in order to accomplish that purpose he procured strangers to impersonate his brother-in-law and his sister in the execution of the deed by which the disposal was made.

[1] Appellant's contention that said deed was not false and forged is based upon the assertion that Schyler conveyed the property to him, that at his request he took title under the fictitious name of "G. F. Gillellen," and that having thus taken title in such name he was vested with full authority to use that name in divesting himself of title, either ***56** by signing that name personally, or by procuring another to sign it for

him. In this respect appellant testified that in spelling the name of his brother-in-law it properly contained but three "Is"-G-i-l-l-e-l-e-n -but that he purposely caused the name of the grantee in said deed to be spelled with four "Is," so that such grantee would in fact be a fictitious person, thereby allowing him, the appellant, as the fictitious Gillellen, to reconvey the property in that name. In support of such contention appellant cites the cases of Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 955, and Wilson v. White, 84 Cal. 242, 24 Pac. 114, which he claims legally justified the course adopted by him in transferring the title to such property. Those cases hold to the doctrine that if a person is in existence and ascertained, a conveyance to or by him by a fictitious name passes title. But upon examination of those cases, and the cases cited by them, it will be seen that the doctrine there applied is founded upon the established fact that the particular person named as grantee was known and identified by such fictitious name, either by having voluntarily assumed the same or by having been generally known by such name. In other words, the doctrine contended for by appellant is applied where there is a concurrence of identity in person and in name. For instance, in Wilson v. White, supra, it is said:

"It is involved in the very conception of a deed that there must be a grantee, to whom delivery is made, and in whom the title can vest. If there be no grantee, and the deed is to a mere fictitious name, it is obvious that it is a nullity. But if there be a person in existence, and identified, and delivery is made to him, it makes no difference by what name he is called. He may assume a name for the occasion, and a conveyance to and by him under such name will pass the title."

And again, in Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666, 32 Am. St. Rep. 536, quoted approvingly in Emery v. Kipp, supra, the court says:

"The name is not the person, but only a means of designating a person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him."

That is not the situation here. The evidence in the case at bar proves beyond question, we think, that the grantee ***57** specified in said deed was intended to be and in fact was G. F. Gillelen of Los Angeles, the brother-in-law of appellant, and not the appellant, and it further shows that throughout this entire transaction appellant consistently so claimed and represented to all of those with whom he was dealing. According to the undisputed facts, appellant never was known as, nor did he pretend to be, G. F. Gillellen, the party named as the grantee in the Schyler deed. They were always known and treated as separate individuals. He was personally known to all of the parties to this transaction-Schyler, Holm, Faustina & Pelton, and the representatives of the title company-as Baender. Schyler testified that Baender instructed him to deed the property to "Mr. Gillelen, his brother-in-law in Los Angeles."****539** The deed was executed accordingly, describing the grantee as a resident "of the city and county of Los Angeles." During the negotiations for the exchange of the properties Baender represented to Faustina & Pelton that the property stood in the names of his brother-in-law and sister of Los Angeles. When Baender appeared in the office of Holm for the purpose of having him prepare and as notary acknowledge the deed to Baumann, he presented to Holm that the property stood in the names of his brother-in-law and sister of Los Angeles, and he introduced the strangers to Holm as his brother-in-law and sister of Los Angeles, and the deed to Baumann designated "G. F. Gillellen, and Ada M. Gillellen, his wife, of the city of Los Angeles, county of Los Angeles," as grantors. After the deed was executed Baender represented to Faustina & Pelton and to the title company that said deed had been signed by the Gillelens of Los Angeles.

[2] That it was the intention of the appellant to transfer the title to the name of his brother-in-law, Gillelen, of Los Angeles, and not to himself, is further supported by appellant's own testimony, wherein he stated that he deposited the Schyler deed in his desk and attached to it written instructions to the effect that in the event of his (appellant's) death, the deed should be delivered to his brother-in-law, G. F. Gillelen, for the purpose of making him trustee to handle the property as he might deem best, and he further explained that he believed that in that situation his brother-in-law, in divesting himself of title, might spell his name both ways, and thereby overcome the misspelling of the name in the ***58** Schyler deed. It will therefore be seen that because of the dissimilarity in facts, as above pointed out, between those cases relied upon by appellant and the facts of the instant case, the doctrine of those cases is not available to appellant. And it being manifest that the person named as grantee in the Schyler deed was intended to be and in fact was G. F. Gillelen, of Los

Angeles, the brother-in-law of appellant, the signing of the latter's name by another to the deed in question, and the impersonation of him in the acknowledgment thereof, constituted said deed a false and forged instrument, within the meaning of the Code section above quoted. Even were it possible to reach a conclusion different from the one stated, so far as the name of the grantor in the deed is concerned, we are still confronted with the situation that the appellant also procured a woman to impersonate the wife of G. F. Gillelen and had her sign and acknowledge said deed in the fictitious name of "Ada M. Gillellen." The name of appellant's sister was Matilda A. Gillelen. The conveyance was not made to Ada M. Gillelen, nor was there any one identified with the transaction known by that name. Therefore the signing of that fictitious name to said deed for a fraudulent purpose clearly constituted forgery. People v. Chretien, 137 Cal. 450, 70 Pac. 305.

Appellant endeavors to make the question of the investiture of title in Gillelen the pivotal point upon which the commission of the act of forgery turns, claiming that if title was not at any time vested in Gillelen, conceding him to be the person who was named as grantee in the Schyler deed, the crime of forgery was not committed. This contention is based upon the theory that no title was ever acquired by Gillelen, for the reason that the Schyler deed was never delivered to or accepted by him, and he paid no consideration for the property; that if Gillelen possessed no title he consequently had none to convey, and that therefore any deed which Gillelen might have made purporting to convey title would have been void. To this state of facts appellant attempts to apply the rule that there can be no forgery of a void instrument.

We are of the opinion that the question of the investiture of title in Gillelen is not material. The respondent***59** does not claim that Gillelen even acquired title, and we think it matters little whether or not he did. It is doubtless the law that there can be no forgery of an instrument which is void upon its face. People v. Tomlinson, 35 Cal. 506. But this was not such a deed. Upon its face this deed was valid. It purported to be the deed of Gillelen who by virtue of the Schyler conveyance had become the record owner of the property, and whose deed, if genuine, would have formed a material link in the chain of title from Schyler through Gillelen to Baumann. That being so, Gillelen's deed would be the subject of forgery, even though it may have conveyed no title, for the rule is well established that "a deed may be the subject of such a crime [forgery], and in that case it is immaterial that the deed purports to grant land to which the grantor named had no title." People v. Van Alstine, 57 Mich. 69, 23 N. W. 594; Abston v. State, 134 Tenn. 604, 185 S. W. 706. To the same effect are West v. State, 22 N. J. Law, 212; Henderson v. State, 14 Tex. 503, and authorities therein cited.

[5] Nor was it necessary, in order to establish forgery, to prove that Gillelen or any other person was actually defrauded, if in fact it be shown that said deed might possibly deceive another, and was prepared with the intent to deceive and defraud another. People v. Turner, 113 Cal. 278, 45 Pac. 331; Henderson v. State, supra. In Henderson v. State, supra, it was said:

"The intent to defraud, it is true, is of the essence of the crime. But it is not essential that any person be actually defrauded, or that any act be done towards the attainment of the ****540** fruits of the crime other than the making of the instrument. And the very fact of the forgery iself will be sufficient to imply an intention to defraud, or at least it will be sufficient if, from the circumstances of the case, the jury can fairly infer that it was the intention of the party to utter the forged instrument (3 Greenl. Ev. § 103; 3 Arch. Cr. Pl. 546; 2 Russ. on Cr. 361 [7th Am. from 3d London Ed.]), and a fortiori if, as in this case, there is proof that he did utter it. It is well settled, it is true, as held in a case cited by counsel (People v. Shall, 9 Cow. [N. Y.] 778), that the forging of an instrument which on its face is void is not indictable. But that is not this case. ***60** The deed on its face appears to be a valid, legal conveyance of land. And it is sufficient that it is such a character of instrument as that the consequences of the forgery would necessarily or possibly be to defraud some person. It is sufficient if it appear that by possibility either the state or some person might be defrauded. Act above cited; 3 Greenl. § 103; 2 Russ. on Cr. 361, note; 2 New Jer. 212."

That the spurious deed in question did actually deceive the title company, and that by its execution appellant intended to defraud his wife of her life estate, is obvious. Acting upon the belief that it was the genuine deed of the Gillelens, the said title company insured the title, and in view of the letter hereinabove set forth, written by appellant to his wife, less than two months after the transaction in question was concluded, there

can be but little doubt of his intention to defeat his wife's interest in the property which he had previously stipulated should be awarded to her by said judgment of divorce.

[6] While the entry of such interlocutory decree vested no present interest in the property in Mrs. Baender, the life estate thereby awarded being merely inchoate in character, nevertheless said decree would have become final if not reversed or modified on appeal. The said life estate would have then become operative. Remley v. Remley, 49 Cal. App. 489, 193 Pac. 604, and cases cited. For the reasons stated it must be held that said deed was a false and forged instrument within the meaning of said Code sections.

[7][8] Appellant further urges that the evidence fails to show that the appellant offered or procured the deed to be recorded or that appellant knew that the deed was false or forged at the time he procured it to be recorded. We find no merit in either point. The written escrow instructions signed by appellant authorized said title company to record said deed when the agreement for exchange was complied with by the other parties to the transaction. These escrow instructions were supplemented by oral instructions given by the appellant to the representatives of the title company to the effect that the representatives of the title company were at liberty to record the deed to the Oakland property when the appellant received from the other parties the money due and the deed to the property to be taken in exchange. ***61** The transaction was afterwards consummated accordingly and the Gillelen to Baumann deed was recorded. The evidence already narrated is sufficient answer, we think, to the other point made, that the appellant did not know that the deed in question was false or forged.

[9] The contention made by appellant that there is no proof that the "genuine" counterpart of the alleged forged deed might be recorded, is disposed of by the case of People v. Webber, 44 Cal. App. 120, 186 Pac. 406, where it is held that section 115 of the Penal Code, under which this indictment was brought, "simply seeks to cover as coming within its terms the various classes of instruments entitled under our law to be recorded, such as deed, mortgages, etc. without any regard whatever, whether the particular instrument is defective in form or certification. The instrument in question on its face was a deed properly acknowledged in form expressing a valuable consideration and therefore an instrument which if genuine was entitled to be recorded under the laws of this state."

[10][11][12] Appellant also complains of the rulings of the trial court in admitting in evidence the deed in question, the letter from Baender to his wife, and the judgment and findings in the Baender divorce proceeding. The deed, being false and forged and being the very subject of the prosecution, was clearly admissible in evidence, and the other exhibits referred to were properly admitted as evidence upon the subject of intent to defraud. The provisions of section 1881 of the Code of Civil Procedure do not operate to exclude said letter from evidence in connection with the testimony of A. T. McDonald, the attorney for Mrs. Baender. Mrs. Baender did not testify concerning said letter. People v. Swaile, 12 Cal. App. 195, 107 Pac. 134.

There was no error committed by the court in the impanelment of the jury, for the reason that the record does not show that any of the jurors who tried said cause had been discharged as such within a year.

[13] The final contention of the appellant is that the court's instructions to the jury were erroneous and that it erred in refusing to give certain instructions proposed by the appellant. Appellant's objections cover some 24 instructions, and for that reason it is impracticable in this opinion ***62** to discuss the rulings of the court on each separate instruction. We have examined the court's charge, and also the instructions offered by the appellant, which were by the court refused, and it is our opinion that the jury was fairly, fully, and clearly instructed on all legal matters involved. Many of the instructions proposed by the appellant, and ****541** which were by the court refused, related to the question of the passing and vesting title in connection with the delivery of deeds. As heretofore stated, that question was not material in determining the guilt of the defendant, and those instructions were therefore properly refused. The other instructions refused either misstated the law or assumed facts not in evidence. The indictment conforms to all requirements of the law and the demurrer was properly overruled.

Finding no error in the record, the judgment and order appealed from are affirmed.

I concur: TYLER, P. J.

Cal.App. 1 Dist. 1924.
People v. Baender
68 Cal.App. 49, 228 P. 536

END OF DOCUMENT

Supreme Court of Ohio.
SAUNDERS, Appellant,
v.
ALLSTATE INS. CO., Appellee.
No. 35320.

May 28, 1958.

Insured brought action against insurer on automobile liability and property damage policy. Insurer contended that policy was void because of allegedly false statements in applications that no automobile insurance of insured had ever been canceled by any insurer, and insured contended that he truthfully answered questions of agent, but that agent had filled in incorrect answers in applications, and that insured had signed applications without reading them. The insurer filed cross-petition seeking rescission of the policy because of allegedly false statements in applications. At the close of all evidence, the Cleveland Municipal Court withdrew the case from the jury and entered judgment for the insurer on its cross-petition, and the insured appealed to the Court of Appeals for Cuyahoga County, and the Court of Appeals affirmed the judgment. An appeal as of right and the allowance of a motion to require the Court of Appeals to certify the record placed the cause before the Supreme Court for disposition on its merits. The Supreme Court, Zimmerman, J., held that question whether insurer was estopped to rely on falsity of statements was for jury.

Judgment of Court of Appeals reversed, and cause remanded to Municipal Court for further proceedings.

Stewart and Taft, JJ., dissented.

West Headnotes

[1] Principal and Agent 308 131

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k130 Liabilities Incurred
308k131 k. Agent's Acts in General. Most Cited Cases

Acts of an agent within scope of what he is employed to do and with reference to matter over which his authority extends are binding on his principal.

[2] Insurance 217 1607

217 Insurance
217XI Agents and Agency
217XI(A) In General
217k1605 Agency for Insurer or Insured
217k1607 k. Effect of Statutes. Most Cited Cases
(Formerly 217k73.4, 217k73)
Statute making one who solicits insurance and procures application therefor the agent of insurer applies to an agent who solicits automobile liability and property damage insurance risks. R.C. § 3929.27.

[3] Insurance 217 3091

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3088 Knowledge or Notice of Facts in General
217k3091 k. Officers or Agents; Imputed Knowledge. Most Cited Cases
(Formerly 217k378(3), 217k378(1))
Information obtained by soliciting agent of insurer when making out application for insurance is imputable to insurer, and, in absence of proof that applicant knew or should have known that insurer was being deceived, insurer cannot escape liability on subsequently issued policy by showing that its agent failed or neglected to disclose such information to it. R.C. § 3929.27.

[4] Insurance 217 3096(1)

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3094 Fault, Collusion or Fraud of Agent
217k3096 Insertion of False Statements; Omissions
217k3096(1) k. In General. Most Cited Cases

(Formerly 217k379(5))
Where application for insurance is made out by insurer's agent, who fills in false or incorrect answers to questions contained therein, though questions have been truthfully answered by applicant, and there is no fraud, collusion, or knowledge, actual or constructive, on part of applicant in connection therewith, insurer is estopped to rely on falsity of such answers to avoid liability on policy issued pursuant to the application.

[5] Insurance 217 3096(1)

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3094 Fault, Collusion or Fraud of Agent
217k3096 Insertion of False Statements; Omissions
217k3096(1) k. In General. Most Cited Cases
(Formerly 217k379(5))
Where agent, acting for and on behalf of insurer principal in soliciting insurance risk, misleads applicant and, in filling out application, notes answers to questions therein different from truthful answers given by applicant, and applicant, in reliance on agent, acts in good faith and is otherwise blameless, and policy is issued on payment of premium, insurance is effective, and, if loss occurs within coverage of policy, insurer is obliged to respond. R.C. § 3929.27.

[6] Insurance 217 3132

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3132 k. Questions of Law or Fact. Most Cited Cases
(Formerly 217k401.2, 217k668(15))
In action by insured against insurer on automobile liability and property damage policy, wherein insurer contended that policy was void because of allegedly false statements in application that no automobile insurance of insured had ever been canceled by any insurer, and wherein insured contended that he had truthfully answered questions of agent, but that agent had filled in incorrect answers in applications and that insured had signed applications without reading them, question whether insurer was estopped to rely on falsity of statements in applications was for jury. R.C. § 3929.27.

[7] Insurance 217 3086

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3086 k. Estoppel or Implied Waiver in General. Most Cited Cases
(Formerly 217k371)
Provisions inserted in policy of automobile liability and property damage insurance for protection and benefit of insurer do not operate retroactively to bind insured as against an estoppel, which had its origin in conduct antecedent to issuance of policy.

****2** Syllabus by the Court.*

***55** 1. Section 3929.27, Revised Code, which makes one who solicits insurance and procures the application therefor the agent of the insurer applies to those who solicit automobile liability and property damage insurance risks.

2. Information obtained by a soliciting agent of an insurer when making out an application for insurance is imputable to the insurer, and, in the absence of proof that the applicant knew or should have known that the insurer was being deceived, the insurer can not escape liability on a subsequently issued policy by showing that its agent failed or neglected to disclose such information to it.

3. Where an application for insurance is made out by the insurer's agent who fills in false or incorrect answers to the questions contained therein, which have been truthfully answered by the applicant, and there is no fraud, collusion or knowledge, actual or constructive, on the part of the applicant in connection therewith, the insurer is estopped to rely upon the falsity of such answers to avoid liability on the policy issued pursuant to the application.

4. Where an agent, acting for and on behalf of the insurer principal in soliciting an insurance risk, misleads the applicant and in filling out the application notes answers to questions therein different from truthful answers given by the applicant, and, where the applicant, in reliance on the agent, acts in good faith, is otherwise blameless and is then issued a policy upon payment of a premium, the insurance is effective, and,

when a loss occurs within the coverage of the policy, the insurer is obligated to respond.

5. Provisions of a policy of automobile liability and property damage insurance inserted for the protection and benefit of the insurer do not operate retroactively to bind the insured as against an estoppel which had its origin in conduct antecedent to the issuance of the policy.

****3** Fay v. Swicker, 154 Ohio St. 341, 96 N.E.2d 196, overruled in part.

Luther Saunders brought an action in the Cleveland Municipal Court against the Allstate Insurance Company to recover ***56** under an automobile liability and property damage insurance policy, issued to him upon the payment of a premium to the insurer, for injury done to his automobile when he, while driving the automobile, collided with a culvert. The insurer resisted the action on the ground that the insurance policy was ineffective and void because of false material statements made by plaintiff in his applications for the policy and a supplement thereto and filed a cross-petition seeking rescission of the policy on the basis of such false statements.

The cause was tried to the court and a jury, and at the close of all the evidence, upon defendant's motion, the case was withdrawn from the jury and judgment entered for the insurer on its cross-petition.

Plaintiff appealed from that adverse judgment to the Court of Appeals on questions of law, and ultimately there was an affirmance thereof.

An appeal as of right and the allowance of a motion to require the Court of Appeals to certify the record place the cause before this court for disposition on its merits.
M. Morgenstern and B. B. Direnfeld, Cleveland, for appellant.

Hauxhurst, Inglis, Sharp & Cull and M. R. Gallagher, Cleveland, for appellee.

ZIMMERMAN, Judge.

On January 11, 1953, upon written application, the insurer issued plaintiff a policy of automobile insurance insuring plaintiff for one year for, among other things, damage to the automobile he then owned from collision or upset to the actual cash value thereof, less $50.

Some two months later, upon a further written application, such policy of insurance was supplemented by an endorsement making its coverage applicable to plaintiff's newly acquired automobile (the one which was damaged) and extending protection for a two-year period from that date.

Both applications are on printed forms furnished by the insurer and the answers to questions on both were filled in by pencil by an agent of the insurer ostensibly in accordance with information given by plaintiff. The printed forms of the applications are identical, and a question appearing on both is:

***57** 'Has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household? [ ] Yes No [ ]' On the first application the initials, 'L. S.,' in pencil appear over the 'yes,' but a check mark is shown in the square opposite the word, 'no.' In the second application, relating to plaintiff's newly acquired automobile, the check mark appears in the square opposite 'no' and the initials, 'L.S.S.,' are over the word, 'no.' On the face of each application, near the bottom and over plaintiff's pencilled signature, is the following printed language: 'I hereby declare the facts stated herein to be true and request the company to issue the insurance, and any renewals thereof, in reliance thereon.' Whether such declaration is considered as a representation or warranty appears to make no difference. 45 C.J.S. Insurance § 729, p. 738.

Prior to the issuance of the policy here involved, plaintiff held one of a similar type issued by the Grange Mutual Casualty Company. By letter dated September 15, 1952, and addressed to plaintiff, Grange, without explanation, cancelled its policy, effective September 25, 1952, and returned the unused portion of the premium. Plaintiff by letter attempted to discover the reason for the cancellation but Grange in its letter of reply refused any explanation.

****4** At the trial plaintiff and his wife testified positively that, when defendant's agent, engaged in filling out the initial application for the policy, asked the question concerning previous insurance, he was told in detail about the cancelled Grange policy to which he

replied, as stated by plaintiff: 'Never mind. As long as you did not have an accident it don't make any difference.' And plaintiff's wife testified as follows:

'Q. * * * And what took place when Mr. Gallagher [insurer's agent] came to your home? A. Well, then, he sat down at the end of the table there, and he started to explain about this insurance to us, and so then my husband and I decided that we would take it, and he started to fill out these papers, and then he-he said to us:

"Have you ever had insurance before?'

'We said:

***58** "Yes, we had.'

'Then, he said:

"Was it ever canceled?'

'Then my husband and I both answered about the same time, and we said:

"Yes, with the Grange.'

'Then, he looked up, and he said:

"Why was it canceled?'

'We said that we didn't know, and then I said to him that:

"The only reason that I would know was that I had sent a payment in a little late.'

'I said that was the only reason that I knew of.

'Q. Was there anything further discussed between you at the time? A. Then, my husband got up, and he was going to get this policy, and he was going to show it to Mr. Gallagher, and Mr. Gallagher then said:

"Never mind. Forget it."

One of plaintiff's sons substantiated the testimony of his parents with reference to the disclosure of the prior insurance and its cancellation. As might be expected, the insurer's agent denied that there was any disclosure on the part of plaintiff or his wife concerning cancellation of a previous policy, although on the back of the first application under the heading, 'Insurance Record,' and over the agent's signature, the Grange policy is noted with the expiration date given as 'Oct-52.' However, its actual expiration date was January 16, 1953.

Plaintiff, a laborer with a grade-school education, testified that he read neither of the applications before signing but answered the questions put to him by the agent fully and truthfully. Incidentally, it appears that the second application executed at the insurer's office was treated as little more than a formality.

Section 3929.27, Revised Code, reads as follows:

'A person who solicits insurance and procures the application therefor shall be considered as the agent of the party, company, or association thereafter issuing a policy upon such application or a renewal thereof, despite and contrary provisions in the application or policy.'

[1] This is remindful of the long-established rule that the acts ***59** of an agent within the scope of what he is employed to do and with reference to a matter over which his authority extends are binding on his principal.

On March 5, 1879, an act was passed by the General Assembly entitled 'An Act to Regulate Contracts of Insurance on Buildings and Structures.' The act, with some unimportant changes, was carried into the revision of 1880 and became Sections 3643 and 3644, Revised Statutes. See Insurance Co. v. Leslie, 47 Ohio St. 409, 413, 414, 24 N.E. 1072, 1073, 9 L.R.A. 45.

[2] Present Section 3929.27, Revised Code, which is very similar in wording to ****5** Section 3644, Revised Statutes, is now an independent statutory provision with its own number, appears in the chapter entitled 'Domestic And Foreign Insurance Companies Other Than Life,' is complete in itself and evidences to us a clear legislative intent to have it apply generally to all soliciting agents for insurers other than those representing life insurance companies. As indicative of a fixed legislative policy, see Section 3911.22, Revised Code, with respect to the solicitation of applications for life insurance. Reference is also made to

Section 3923.141, Revised Code, effective July 1, 1956, which makes one who solicits an application for sickness and health insurance the agent of the insurer. And see Section 3911.06, Revised Code, relating to the answers to questions made by an applicant in his application for a life insurance policy.

But aside from statute, a widely accepted rule applying to the solicitation of insurance risks generally is stated in 44 C.J.S. Insurance § 139, p. 798, as follows:

'An insurance agent in the sense of one who is employed to solicit risks and effect insurance is the agent of the company by which he is appointed or employed with regard to matters connected with the solicitation of the risk, the making of the application and the issuance of the policy, and cannot be considered in any sense as the agent of insured in any matter connected with the issuance of the policy. This rule applies to mutual as well as stock companies, and * * * also applies notwithstanding a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of insured.'

***60** [3] It naturally follows that information obtained by a soliciting agent of the insurer when writing the application for insurance is imputable to the insurer and it is bound thereby and cannot escape liability on a subsequently issued policy in such an instance by showing that its agent did not correctly disclose such information, in the absence of proof that the applicant knew or should have known that the insurer was being deceived. Notors Ins. Corp. v. Freeman, Okl., 304 P.2d 328. Compare Massachusetts Life Ins. Co. v. Eshelman, 30 Ohio St. 647; and Foster v. Scottish Union & National Ins. Co. of Edinburgh, 101 Ohio St. 180, 127 N.E. 865.

With respect to the instant controversy, a case decidedly in point in principle is that of Farmers' Insurance Co. v. Williams, 39 Ohio St. 584, 48 Am.Rep. 474, in which the syllabus reads:

'A soliciting agent, procuring for an insurance company risks and applications on which policies are issued, who fills up the application, is, in so doing, the agent of the company, and not of the insured; and if the agent makes a mistake in wrongly stating facts which were correctly given him by the insured in preparing the application the company is bound by and responsible for such mistake.'

In that case, the application for insurance was made through the soliciting agent of the insurer. Williams, the prospective insured, imparted to the agent a true description of the conditions and surroundings of the property to be insured. The agent by mistake and without Williams' knowledge gave a different and incorrect version in the application. In ignorance of the mistake and believing that the agent had written down what he, Williams, had told him, Williams signed the application in good faith without reading it or hearing it read. In the application Williams covenanted and agreed with the insurer that the statements and representations contained therein were a full and true exposition of the condition of the property. The policy was issued and the premium paid. A loss occurred and the insurer refused to respond because of the false answers in the application. The District Court and later this court held that the insurer was chargeable****6** with its agent's mistake and judgment was rendered for the insured. In the opinion this court said:

***61** 'The agent had power to solicit risks for the company, receive applications therefor, and forward the same to the company. It is a general rule that when a power is conferred upon an agent, he has by implication such incidental authority as is necessary to carry his power into effect; and a principal is liable for the wrongful acts of his agent acting within his employment. The principal cannot take the benefit of the agent's acts, and avoid their burdens.'

[4] The Williams case corresponds with the great weight of authority, which is that, where an application for insurance is made out by an agent of the insurer, who fills in false answers to the questions contained therein which have been truthfully answered by the applicant, and there is no fraud, collusion or knowledge, actual or constructive, on the part of the applicant in connection therewith, the insurer can not rely upon the falsity of such answers to avoid liability on the policy issued pursuant to the application. In making out the application, the agent acts for the insurer and consequently the insurer is estopped from relying on the mistake to avoid the obligations of the policy. 29 American Jurisprudence, 643, Section 846; Annotation, 148 A.L.R. 507, 508; 45 C.J.S. Insurance § 728 et seq., p. 733; 17 Appleman, Insurance Law and Practice, 1, Section 9401.

For recent cases applying the rule where automobile insurance was involved, see Heake v. Atlantic Casualty Ins. Co., 15 N.J. 475, 105 A.2d 526, and Motors Ins. Corp. v. Freeman, supra.

The policy before us provides:

'In reliance upon the declarations on the supplemental page and subject to the limits of liability, exclusions, conditions and other terms of this policy and for payment of the premium, Allstate agrees with the named insured: * * *.'

The declarations on the supplemental page embrace the statement that no insurer has cancelled or refused any automobile insurance to the insured or a member of his household; and the policy further contains the following provision, 'By acceptance of this policy the named insured agrees that the declarations on the supplemental page are his agreements and represenations, and that this policy embodies all agreements, ***62** relating to this insurance, existing between himself and Allstate or any of its agents.' The policy also contains the statement, 'Such terms [hereof] as are in conflict with statutes of the state in which this policy is issued are hereby amended to conform.'

[5] Notwithstanding these policy provisions, the insurance risk was solicited by an agent of the insurer authorized to make such solicitations on behalf of his principal as a part of its business, and the knowledge he obtained thereby became that of his principal. Plaintiff desired the protection of automobile insurance and paid a premium therefor. If the agent acting for and on behalf of his principal in soliciting the insurance risk misled plaintiff and in filling put the application noted answers to questions therein different from truthful answers given him by plaintiff, and if plaintiff, in reliance on the agent, acted in good faith, was otherwise blameless and was then issued the policy upon the payment of a premium, pursuant to the application submitted to the insurer by the agent, the insurance was effective regardless of the policy provisions designed to protect the insurer, and, when a loss occurred within the terms of the policy, the insurer was obligated to respond. Compare Union Ins. Co. of Dayton v. McGookey & Moore, 33 Ohio St. 555, 565; Foster v. Scottish Union & National Ins. Co. of Edinburgh, supra; and Hartford Fire Ins. Co. v. Glass, 117 Ohio St. 145, 158 N.E. 93. As we see it, the provisions****7** of the policy referred to above would not operate retroactively to bind plaintiff as against an estoppel which had its origin in conduct antecedent to the policy.

This action was instituted by the plaintiff to recover a money judgment from the insurer on the basis that the insurance was in force and that he sustained a loss within the coverage of the policy. The insurer disclaimed liability because of false answers by plaintiff in the applications which it claimed rendered the insurance policy and the supplement thereto ineffective.

[6] The controversy presented questions of fact involving the credibility of witnesses and the weight to be accorded their testimony. These matters were for the determination of a jury, and we think the insurer's cross-petition did not alter the ***63** situation. Therefore, we entertain the view that the Municipal Court was wrong in taking the case from the jury and in rendering judgment for the insurer, and that the Court of Appeals likewise erred in affirming that action.

[7] On its facts, the case of Fay v. Swicker, 154 Ohio St. 341, 96 N.E.2d 196, is stronger for the insurer than is the instant one. However, a rule adopted in that case is irreconcilable with the position taken in the instant case, and consequently the Fay case is overruled so far as it holds that a contractual provision in a policy of insurance, that no knowledge possessed by an agent shall be held to effect a waiver or change in any part of the policy, is conclusive against the insured in a situation where there is evidence from which it could be found that the insurer's soliciting agent in filling out the application for the policy was chargeable with conduct and knowledge which were imputable to his principal and which would operate as an estoppel against the insurer at the time of the issuance of the policy.

The judgment of the Court of Appeals is reversed and the cause remanded to the Municipal Court for further proceedings not inconsistent with this opinion.

Judgment reversed.

WEYGANDT, C. J., and MATTHIAS, BELL and HERBERT, JJ., concur.
STEWART and TAFT, JJ., dissent.
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