Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1983

First National Bank Of Commerce v. Jeoffrey Meacham : Brief of Appellant

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Lester A. Perry; Attorney for Appellant

Recommended Citation
Brief of Appellant, *First National Bank of Commerce v. Meacham*, No. 19287 (1983).
https://digitalcommons.law.byu.edu/uofu_sc2/4731

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

OF THE STATE OF UTAH

FIRST NATIONAL BANK OF COMMERCE,

Plaintiff-Respondent,

vs.

JEOFFREY MEACHAM,

Defendant-Appellant.

Case No. 19287

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PHILIP R. FISHLER, JUDGE

Lester A. Perry
GREGORY S. BELL & ASSOCIATES
376 East 400 South, Suite 210
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

James L. Christensen
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

FILED

SEP 2 - 1983

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

OF THE STATE OF UTAH

[illegible] NATIONAL BANK OF COMMERCE,

Plaintiff-Respondent,

vs.

Case No. 19287

JEOFFREY MEACHAM,

Defendant-Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF
THE THIRD JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PHILIP R. FISHLER, JUDGE

Lester A. Perry
GREGORY S. BELL & ASSOCIATES
376 East 400 South, Suite 210
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

James L. Christensen
NIELSEN & SENIOR
1100 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Secondary Authorities

STATEMENTS OF POINTS

I. DEFENDANT'S INTEREST IN THE SUBJECT AUTOMOBILE IS SUPERIOR TO PLAINTIFF'S INTEREST.

A. PLAINTIFF'S SECURITY INTEREST IN THE SUBJECT AUTOMOBILE WAS UNPERFECTED AT THE TIME OF DEFENDANT'S PURCHASE.

B. UNDER LOUISIANA LAW, DEFENDANT'S INTEREST IN THE SUBJECT AUTOMOBILE IS SUPERIOR TO PLAINTIFF'S UNPERFECTED SECURITY INTEREST.

1. Louisiana choice of law rules direct the application of Texas law which holds Defendant's interest superior to that of Plaintiff's interest.

2. Louisiana case law protects Defendant's interest in the subject automobile as a bona fide purchaser for value.

C. AS A MATTER OF POLICY, THE FACTS OF THIS CASE SUPPORT THE APPLICATION OF UTAH LAW WITH RESPECT TO THE ISSUE OF PRIORITY.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT DEFENDANT CONVERTED THE SUBJECT AUTOMOBILE.

A. DEFENDANT DID NOT EXERCISE UNAUTHORIZED ACTS OF POSSESSION OVER THE SUBJECT AUTOMOBILE.

B. PLAINTIFF DID NOT HAVE AN IMMEDIATE RIGHT TO POSSESSION OF THE SUBJECT AUTOMOBILE.

1. Louisiana law controls the determination of the immediate right to possession as between the parties to the security agreement.

2. Louisiana law does not give a secured creditor an immediate right to possession of the collateral upon default by the debtor.

IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST NATIONAL BANK OF COMMERCE,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 19287
JEOFFREY MEACHAM,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

NATURE OF CASE

This case is an action for replevin.

DISPOSITION IN THE TRIAL COURT

This action for replevin was brought by Plaintiff, a secured party, alleging an interest in the subject automobile superior to that of Defendant, a subsequent purchaser for value.

The District Court found that Plaintiff's security interest was unperfected at the time of Defendant's purchase. The Court also felt that since Defendant failed to ascertain if any liens were outstanding on the subject automobile, he was not a bona fide purchaser for value under Louisiana law.

Defendant was found to have converted the subject automobile under Utah law because Plaintiff had an immediate right to possession of the vehicle upon default in the underlying security agreement. Therefore, any transfer amounted to a conversion. The Court felt this was true whether Defendant was a bona fide purchaser for value or not.

Summary judgment as to possession of the automobile was granted in favor of Plaintiff with the issue of damages being reserved for future determination.

RELIEF SOUTHT ON APPEAL

Defendant, JEOFFREY A. MEACHAM, respectfully requests this Court to reverse the judgment of the trial court as a matter of law or, in the alternative, remand the case for a determination of the genuine issues of material fact existing in the record.

STATEMENT OF FACTS

Sometime prior to the spring of 1980, Richard and Shawn Carey, who are not parties to this action, purchased a 1978 Ferrari GTS automobile, serial number 26897. (R.291 Meacham Deposition, p.9.) This automobile is the subject of this action. On January 12, 1981, the Careys borrowed money from the Plaintiff/Respondent, FIRST NATIONAL BANK OF COMMERCE (hereinafter referred to as "Plaintiff"). Its principal place of business is located in the Parish of Orleans, State of Louisiana. (R.166.) The Careys granted a chattel mortgage in the subject automobile in favor of Plaintiff to secure the loan amount. A certificate of title was issued covering the automobile by the State of Louisiana on April 16, 1981 showing the Careys as owners and Plaintiff as being the first lienholder as of January 12, 1981. (R.93-94, 170-171).

The Careys sold the subject Ferrari for $36,000 to Tucker F. Amann, Jr., purportedly on March 11, 1981. Plaintiff facilitated this purchase by loaning Amann $25,000. On the sale

date, Amann executed a Promissory Note obligating him to pay the principal plus interest, and a chattel mortgage in the automobile in favor of Plaintiff. (R.84-87, 96, 172-173, 177.) Plaintiff, by Affidavit, states that Amann made his first scheduled payment on or about April 27, 1981, and he has failed to make any further payments under the note. (R.161,167.) As a condition of the sale of the subject automobile to Amann, Plaintiff released its lien exhibited on the Carey's Certificate of Title. (R.94, 171.) This release was apparently effective on the date of the sale to Amann, March 11, 1981.

On or about May 27, 1981, Plaintiff attempted to perfect its security interest in the subject automobile relative to the Amann loan by submitting an application for Certificate of Title with the required documents and fees to the Louisiana Department of Public Safety. (R.167, 174.) The Department of Public Safety returned the above-mentioned documents and, in a letter dated June 10, 1981, made additional requests of Plaintiff, including that the Carey's title be endorsed by them and the additional fee of $2,853.40 be submitted. (R.179.) The date which the application for Certificate of Title was again delivered to the Department of Safety has not been established. The Louisiana Certificate of Title covering the Ferrari was issued in Amann's name on September 8, 1981, showing Plaintiff as first lienholder.

In or about June, 1981, Defendant/Appellant, JEOFFREY A. MEACHAM (hereinafter referred to as "Defendant") and Richard Carey discussed the possible purchase of the subject automobile by

Defendant. The agreed purchase price was $5,000 cash and 7,000 shares of U.S. Rich Hill Minerals Corporation (now T.D.Two, Ltd.) stock, which was trading at between $5.00 and $5.50 per share. (R.291, Meacham Deposition, pp.10, 15.) In that same month, Carey delivered the subject automobile to Defendant in Oklahoma City, Oklahoma. Accompanying the car was a registration card issued by the State of Louisiana, showing Shawn Carey as the registered owner, with no Certificate of Title having been proffered by Carey. (R.291, Meacham Deposition, pp.10-11.) At that time, Carey represented that no liens existed on the automobile and that he would give Defendant the title upon Carey's return to his home in Houston, Texas. (R.291, Meacham Deposition, p.16.) Defendant had no knowledge of Amann's ownership interest or of Plaintiff's security interest in the subject automobile. Since Carey did not want to take the car with him, he left it in Defendant's possession. Defendant then caused the Ferrari to be driven to Salt Lake City, where he added necessary improvements to the car costing $2,300. (R.291, Meacham Deposition, pp.17,50-52.)

Defendant subsequently wired $5,000 to Carey in Houston, Texas, and placed the shares of U.S. Rich Hill Minerals Corporation stock with a transfer agent. (R.291, Meacham Deposition, pp.12-14, 21-22.)

During the month of July, 1981, Defendant was contacted by both Plaintiff and Amann concerning the status of the subject automobile. Amann stated that the car belonged to him and that Plaintiff had a lien on it. (R.291, Meacham Deposition, pp.6-7.) Defendant then contacted Carey who admitted having

previously sold the Ferrari to Amann. Carey also stated that he had given the $5,000 to Amann, which Amann later confirmed. (R.291, Meacham Deposition, pp. 9, 23.) Having learned this, Defendant told Amann that if $7,300 (representing $5,000 given for the purchase and $2,300 in necessary improvements) were to be forwarded to Defendant, he would have the car delivered to Amann at his home in Houston, Texas. (R.291, Meacham Deposition, p.23.) Amann agreed to return $5,000, but refused to pay for the improvements. In or about August of 1981, Amann arrived in Salt Lake City with Mavis Bond Montecino, his alleged fiancee. At that time, Montecino gave Defendant a $5,000 check drawn on a Houston bank for the return of the subject automobile. Defendant inquired as to the sufficiency of funds in the account on which the check drawn, the Houston bank responding that it was a new account with an approximate balance of $50. (R.291, Meacham Deposition, pp.23-25, Exhibit A.) When confronted with this fact, Amann stated that the funds would be transferred. The funds were not transferred, and Amann and Montecino left Salt Lake City. The Defendant has had no further contact with them. (R.291, Meacham Deposition, pp.25-26.)

Dan Ross, Plaintiff's agent, also contacted Defendant in or about July, 1981. Defendant informed Ross, as he had Amann, that he (Defendant) had expended $7,300 on the Ferrari and, if that amount was tendered, he would deliver the automobile to Plaintiff. After further discussion, however, it was agreed that if Plaintiff could furnish clear title, Defendant would pay $21,000 (represented by Ross as being the payoff of Plaintiff's

...ion) for the automobile. (R.291, Meacham Deposition, pp.27-30.) On July 21, 1981, a customer's draft was presented for payment in ...vor of Plaintiff at Defendant's bank in the amount of ...6,314.83. (R.98.) Various documents were also presented. The Certificate of Title was, however, not included. Because of this, Defendant instructed his bank to return the documents and terminated any further communication with Ross. (R.291, Meacham Deposition, pp. 30-31.)

During this period, Defendant contacted the Louisiana Department of Public Safety, whose records reflected that the Careys were owners of the subject vehicle. (R.291, Meacham Deposition, p.37.)

Later, John Pitts, Plaintiff's Vice President, contacted Defendant. Again, a deal was struck whereby Plaintiff was to furnish clear title in return for Defendant's payment of $21,000. (R.291, Meacham Deposition, pp.29, 35-40.) A customer's draft, dated October 1, 1981, was presented at Defendant's bank in favor of Plaintiff in the amount of $26,314.83. (R.97.) A letter, dated November 30, 1981, to Defendant from Pitts, also referred to an amount of $26,314.83. (R.101-102.) Having previously agreed to a price of $21,000, not $26,314.83, Defendant felt Plaintiff had again taken advantage of him, and had no further communications with representatives of Plaintiff. The present action ensued. Pursuant to stipulation, the subject automobile has been delivered to the custody of the Salt Lake County Constable pending outcome of ths action.

ARGUMENT

I

DEFENDANT'S INTEREST IN THE SUBJECT AUTOMOBILE IS SUPERIOR TO PLAINTIFF'S INTEREST

In approaching a choice of law problem, a statutory directive of the forum court's state is first followed in approaching a choice of law issue. Restatement (Second) of Conflict of Laws §6(1)(1971). Since, the issues on appeal revolve around a security interest created by a chattel mortgage, the Utah Uniform Commercial Code is the controlling forum statute. Utah Code Ann. §70A-9-102(2) (Repl. Vol. 1980).

In determining the relative priorities of the parties, perfection or nonperfection of Plaintiff's security interest is the controlling issue. Therefore, the Code's general choice of law provision is applicable. It provides that §9-103 governs issues of perfection of a security interest. Utah Code Ann. §70A-1-105(2) (Repl. Vol. 1980). §9-103(2) provides, in part, that:

> (a) This subsection applies to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection.
>
> (b) Except as otherwise provided in this subsection, perfection and the effect of perfection or non-perfection of a security interest are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate....

Utah Code Ann. §70A-9-103(2) (Repl. Vol. 1980).

The subject automobile is covered by a certificate of title issued pursuant to statutes of Louisiana under which indication of a security interest thereon is a condition of perfection. La.Rev.Stat.Ann. §§32:701 et seq (West 1963). Louisiana law, therefore, governs the issue of perfection.

A. PLAINTIFF'S SECURITY INTEREST IN THE SUBJECT AUTOMOBILE WAS UNPERFECTED AT THE TIME OF DEFENDANT'S PURCHASE.

Louisiana's Vehicle Certificate of Title Law, La. Rev. Stat. Ann. §§32:701 et seq (West 1963), is the sole and exclusive method of executing and recording chattel mortgages and governs the priorities of such mortgages on motor vehicles. La. Rev. Stat. Ann. §9:5366 (West 1950); §32:710 (West Supp. 1982). A brief discussion of this law follows. All references are to Chapter Four of Title 32 of the Louisiana Revised Statute of 1950, as amended. (La. Rev. Stat. Ann. §§32:701 et seq.)

Chapter Four applies to the sale and mortgaging of vehicles of the sort and kind required to be licensed in Louisiana §704. Since it was contemplated that the subject automobile would be registered and licensed in Louisiana, the chattel mortgage between Amann and Plaintiff is subject to the provisions of Chapter Four. §705 requires the seller of a vehicle to deliver a certificate of title issued under Chapter Four with a signed endorsement of sale and assignment to the purchaser. §706 states that no person buying a vehicle shall receive marketable title until a certificate of title to said vehicle is obtained; provided, however, that the negotiation of a chattel mortgage on a vehicle will not be delayed by this provision. §706 further provides that a chattel mortgage shall be effective as to all persons from the time of its execution if the mortgage is received and validated by the vehicle commission (hereafter "commissioner") within fifteen (15) days after such date of execution; otherwise, from the date of notation of the chattel mortgage on the face of the certificate of title. Applications for certificates of title

are to be by prescribed form, sworn before a notary public within five (5) days after delivery of such vehicle and accompanied by the prescribed fee. If a certificate of title has been previously issued for the vehicle, said certificate, duly endorsed, shall accompany the application §707. If satisfied that the applicant is the owner of the vehicle and the application is in proper form, the commissioner shall issue a certificate of title, but not otherwise §707. When a lien is shown on the certificate, it shall be forwarded by the commissioner to the mortgagee of first rank for retention until its mortgage is satisfied §708. Upon full liquidation of the mortgage, the first mortgagee shall deliver the title with proper release of said mortgage to the registered owner, or next ranking mortgage holder. The owner or chattel mortgage holder may present the certificate to the commissioner for cancellation of the mortgage §708. Every chattel mortgage subject to Chapter Four shall be in writing describing the nature of the obligation secured thereby and the mortgaged vehicle §710. In order to affect third persons, the chattel mortgage must be by authentic act or by private act duly authenticated, and is effective against third persons as of the time of its execution if received and validated by the commissioner's office within fifteen (15) days after such execution. Otherwise, the chattel mortgage is effective as to all persons when it is delivered to the commissioner §710.

The above-described steps for perfection make it clear that Plaintiff's security interest was unperfected when Defendant purchased the subject automobile. At the outset, it

should be noted that the application was not received and validated within fifteen (15) days of the execution of the chattel mortgage between Plaintiff and Amann. Therefore, the mortgage did not affect third persons from the date of said execution, purportedly March 11, 1981. c.f. §§706,710.

The record shows that §707 was not followed in that the certificate of title previously issued to the Careys was not duly endorsed by them. Furthermore, the Careys' title had not been returned to the commissioner's office for cancellation as of November 5, 1982. (R.179, 205.) c.f. §§705,707.

There are, at the very least, issues of material fact to be resolved as to whether the Amann chattel mortgage was duly authenticated, and the application for certificate of title was properly sworn before a notary. c.f. §§707,710.These issues arise because of the past practices of Plaintiff's in-house notary, Charles J. Pisano. Articles 2234 et seq of Louisiana's Civil Code control authentic acts. They provide in substance that authentic acts must be executed before a notary or, if under private signature, acknowledged by the party against whom it is adduced. See La. Civil Code Ann. art.'s 2234, 2242 (West 1952). It is obvious from the record that Pisano's siganture attesting the Careys' endorsement on March 11, 1981 conflicts with the Department of Public Safety's letter of June 10, 1981 rejecting Amann's application. The letter states that the Careys' title had not been endorsed. (R.93-94, 170-171, 179.) Certainly, the Careys could not have executed their signatures nor acknowledged the same before Pisano on March 11, 1981, as he so attests.

Indeed, John Pitts, Plaintiff's Vice President, confirms in a letter to Defendant, dated November 30, 1981, that title had not been properly transferred from the Careys to Amann as of July 20, 1981. (R.101-102.) The customer's draft referred to in the Pitts letter is dated July 20, 1981. (R.98.)

These actions throw in doubt the whole evidentiary chain of events in which Pisano is the notary. For example, was the Bill of Sale between Amann and the Careys, attested by Pisano, actually executed on March 11, 1981 (R.96, 177), or was the sale executed after Defendant purchased the subject automobile? Furthermore, was the Amann chattel mortgage (R.85, 172) properly attested by Pisano so as to meet a condition of perfection, c.f. §710? Viewed in a light most favorable to Defendant, Pisano's past practices give rise to material isues of fact that cannot be answered by the documents themselves, and which are best resolved by the trier of fact and not by summary judgment. Hall v. Warren, 632 P.2d 848 (Utah 1981); Thorncock v. Cook, 604 P.2d 934 (Utah 1979); Utah R. Civ. P. 56(c).

Assuming arguendo, however, that both the sale between Amann and Carey and the Amann chattel mortgage were properly executed on March 11, 1981, Plaintiff's security interest was still unperfected because of its failure to properly "deliver" the application to the commissioner as required by §710B before the date of Defendant's purchase. c.f.§710B. (The exact date of Defendant's purchase has yet to be established. Defendant recalls it to be near the end of June, 1981, and no later than July 4, 1981 (R.291, Meacham Deposition, p.15). Amann, by affidavit,

states that Carey took possession of the car on June 22, 1981 (R.162).)

Plaintiff contends that the Amann application for Certificate of Title was delivered to the commissioner as early as May 27, 1981, and no later than June 10, 1981. (R.110.) This application originally submitted May 27, 1981 (R.174) was returned to Plaintiff by the commissioner with a letter dated June 10, 1981 and a further notation of June 22, 1981 on the same letter (R.179). There is nothing in the record to suggest that Plaintiff resubmitted the application prior to Defendant's purchase of the subject automobile. As noted supra, delivery of a chattel mortgage (included in the application) to the commissioner is a condition of perfection §710B.

Even if the chattel mortgage was delivered prior to Defendant's purchase, Plaintiff's security interest was still not perfected at that time. "Delivery" as used in §710B should be construed as meaning the application is delivered in proper form and is approved by the commissioner.

Although there is no Louisiana case law on this point, the filing provisions of Article 9 of the Utah Uniform Commercial Code provides a useful analogy. Filing of a financing statement is the method by which most security interests are perfected under the Code. Utah Code Ann. §70A-9-302 (Repl. Vol. 1980). Statutes which provide for indication of a security interest on certificates of title are, of course, excepted. id. § 70A-9-302(3)(b). "A financing statement substantially complying with the [filing provisions] is effective even though it contains

minor errors which are not seriously misleading." id. §9-402(9). Thus, under the Code, a financing statement presented for filing which is substantially correct and not seriously misleading perfects the security interest. id. §9-403(1). Delivery of the application for certificate of title under La. Rev. Stat. Ann. §32:710B (West Supp. 1982) could, by analogy, be said to perfect the security interest if done so in the proper form which is substantially correct and not seriously misleading.

A well-reasoned opinion discussing this analogy with respect to certificate of title applications is In re Poteet, 5 Bankr. 631 (Bankr. E.D. Tenn. 1980). In In re Poteet, the court was faced with the issue of whether a bank's retention of a security interest in an automobile constituted a preference under 11 U.S.C. §547(b)(Supp. 1980); the court thus having to determine the date on which the bank perfected its security interest. The applicable statute provided that constructive notice of a lien relates from the time of receipt and filing a request for notation of the lien upon the certificate of title. Tenn. Code Ann. §§55-3-125,-126 (Repl. Vol. 1980).

In Poteet, an application for certificate of title in the debtor's name with the bank's lien noted thereon was made outside the preference period. This application was rejected by the Tennesee Motor Vehicle Department. The resubmitted application was subsequently approved upon receipt of requested documents within the preference period. 5 Bankr. at 633. The Court held that, by analogy to the filing provisions of Article 9 of the Tennessee Uniform Commercial Code, Tenn. Code Ann.

§§ -9-101 et seq (Repl. Vol. 1979), the first application did not perfect the bank's security interest, perfection occurring only when it was submitted in proper form and approved by the Motor Vehicle Department. The security interest, therefore, constituted a preference. 5 Bankr. at 636.

En route to its holding, the court in Poteet noted that, under Tennesee law, a certificate of title will issue only if the Motor Vehicle Department is satisfied that the applicant is the owner of the vehicle and any lien that is noted is proved. 5 Bankr. at 634. The court also expressed concern that constructive notice of a lien is given only when an application is accepted. Otherwise, "[t]here [is] no proof that when an application is rejected notice will somehow be given of security interests that were to be noted on the certificate." 5 Bankr. at 635.

In the case at bar, the initial Amann application for certificate of title was rejected and returned to Plaintiff because the Careys' title had not been duly endorsed (R.179). Furthermore, the Carey title had not been returned to the Louisiana Department of Public Safety as of November 5, 1982 (R.179, 205). (It is not clear why Amann's certificate was in fact issued on September 8, 1981 showing Plaintiff's lien thereon. It is clear, however, that Plaintiff's lien was considered unperfected by the Department as of November 5, 1982 (R.205)). The Amann application was, therefore, misleading in that the old Carey title, if not duly endorsed and presented for cancellation, could mislead third persons as to the ownership of the vehicle. Morever, since, the application was rejected, there

is no guarantee that notice of Plaintiff's security interest would somehow be given to Defendant. Indeed, when Defendant inquired, the records showed Carey as the owner of the subject automobile. (R.291, Meacham Deposition, p.37.) Finally, like the Tennessee statute in In re Poteet, supra, §32:707G of the Louisiana Revised Statutes states that certificate of title will issue only if the commissioner is satisfied that the applicant is the owner of the vehicle and the application is in proper form, but not otherwise. The commissioner was obviously not satisfied as to the ownership of the subject vehicle where the Carey certificate was not duly endorsed. Plaintiff's own Vice President, John Pitts, admitted to Defendant that this had not been accomplished as of July 20, 1981. (R.101-102, 98.) Therefore, in order to effectively give notice to third persons, "delivery" as used in §32:710B of the Louisiana Revised Statute, requires an application for certificate of title to be made in proper form and be accepted by the commissioner's office. This was not done prior to Defendant's purchase of the subject automobile and, therefore, Plaintiff was unperfected at this time.

There is another issue of material fact that, if resolved against Plaintiff, would also leave it unperfected. As discussed supra at 10, the record discloses that the Careys did not endorse the certificate of title issued in their names on March 11, 1981 as Charles J. Pisano, Plaintiff's in-house notary, so attests. In fact, it would have been a physical impossibility since the Carey title was not issued until April 16, 1981. (R.93-94, 170-171.) It may, therefore, be questioned whether any

the documents attested by Pisano were, in fact, properly executed as required by law. See La. Civil Code Ann. art's 2234 et seq (West 1952.) Perfection under Louisiana's Vehicle Certificate of Title Law, La. Rev. Stat. Ann. §32:710B (West Supp. 1982), requires the chattel mortgage be by authentic act or by private act duly authenticated in any manner provided by law. Given his actions, Pisano's attestation of the Amann chattel mortgage (R.85, 172) creates an inference that that mortgage is likewise defective.

The foregoing suggests that, and the District Court so found (R.241), Plaintiff was unperfected at the time of Defendant's purchase as a matter of law. At the very least, inferences are raised concerning the date which Plaintiff delivered the second Amann application to the commissioner and the effectiveness of Pisano's attestation of the Amann chattel mortgage, so as to give rise to material issues of fact required to be resolved by the trier of fact. Hall v. Warren, 632 P.2d 848 (Utah 1981); Thorncock v. Cook, 604 P.2d 934 (Utah 1979); Utah R.Civ.P. 56(c).

Plaintiff thus having been established as unperfected at the time of Defendant's purchase, the next step is to determine the parties' relative priorities with respect to the subject Ferrari.

B. UNDER LOUISIANA LAW, DEFENDANT'S INTEREST IN THE SUBJECT AUTOMOBILE IS SUPERIOR TO PLAINTIFF'S UNPERFECTED SECURITY INTEREST.

As noted supra at 7, the controlling statutory directive with respect to the issue of perfection of Plaintiff's

security interest points to the application of Louisiana law. Utah Code Ann. §§70A-1-105(2), 9-103(2) (Repl. Vol. 1980). §9-103(2) provides, in part, that "perfection and the effect of perfection or nonperfection of the security interest [in goods covered by certificate of title legislation] are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate..." Utah Code Ann. §70A-9-103(2) (Repl. Vol. 1980). Since the subject automobile was covered by Louisiana's Certificate of Title Law which requires notation on the certificate as a condition of perfection, §9-103(2) thus points to Louisiana law (including its conflict of laws rules) to resolve issues of perfection and the effects of perfection or nonperfection.

1. Louisiana choice of law rules direct the application of Texas law which holds Defendant's interest superior to that of Plaintiff's interest.

Louisiana's general statutory choice of law provision provides, in part, that:

> The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.
>
> But the effect of acts in one [state] to have effect in another [state], is regulated by the laws of the country where such acts are to have effect.

La. Civil Code Ann. art. 10 (West Supp. 1982).

With respect to priorities involving security interests, this provision has been held to mean that the validity of a foreign security interest against subsequent purchasers and creditors is determined by the law where the property was located

when the security interest attached. If entitled to priority in the foreign state, the security interest will be recognized in Louisiana if the collateral is removed to Louisiana without the knowledge or consent of the secured creditor. However, if the property is removed with the knowledge and consent of the secured creditor, priority is determined by the law of the state to which the property is removed. See e.g. Fischer v. Bullington, 223 La. 368, 65 So.2d 880 (1953); Scott Truck and Tractor Company v. Daniels, 401 So.2d 590 (La. Ct. App. 3d Cir. 1981). See generally Annot. 42 A.L.R. 3d 1168, 1186, 1195 (1972) and cases cited therein. In addition, Louisiana courts will also apply the law of the state to which the property is removed where the secured creditor, with due diligence, would have discovered the removal. Due diligence is a factual issue to be determined by the trier of fact. Figuero v. Figuero, 303 So.2d 801 (La. Ct. App. 3d Cir. 1974).

The record discloses that Plaintiff consented or knew, or with due diligence should have known, of Amann's removal of the subject automobile to Houston, Texas. The removal was not transitory or inadvertent. Plaintiff's own records reflect that Amann lived and conducted business in Houston, Texas (R.82). Furthermore, when Amann and his fiancee came to Salt Lake City seeking the return of the subject automobile, the "bad" check written by his fiancee was drawn on a Houston bank and showed the same Houston address as Plaintiff's records. (R.291, Meacham Deposition, Exh. A.) Defendant was also under the impression that

both Amann and Carey maintained their residences in Houston. (R.291, Meacham Deposition, pp.9,16,23,25.)

Thus, Plaintiff having known and consented to Amann's removal of the subject automobile to Texas, it should have been aware of the possible application of Texas law. Therefore, Louisiana choice of law rules correctly mandate the application of Texas law with respect to the issue of priority. Fischer v. Bullington, supra; Scott Truck and Tractor Company v. Daniels, supra. At the minimum, there exists a genuine issue of material fact as to whether Plaintiff should have known of such a removal by the exercise of due diligence. Figuero v. Figuero, supra. This question cannot be resolved on summary judgment and should be remanded for determination. Durham v. Margetts, 571 P.2d 1332 (Utah 1977); Utah R.Civ.P. 56(c).

Texas law, under its version of the Uniform Commercial Code, Tex. Bus. and Com. Code Ann. §§1.101 et seq (Vernon 1968), grants Defendant priority over Plaintiff's unperfected security interest. In particular, Defendant is entitled to priority by virtue of §9.301(a)(3), which states:

> (a) Except as otherwise provided in Subsection (b), an unperfected security interest is subordinate to the rights of . . . (3) in the case of goods,...a person who is not a secured party and who is a transferee in bulk or other buyer in not the ordinary course of business...to the extent he gives value and receives delivery of the collateral before it is perfected.

Tex. Bus. and Com. Code Ann. §9.301(a)(3) (Vernon Supp. 1983).

Defendant is not a secured party. The transaction between Defendant and Carey was clearly a sale which was not

intended to create a security interest. c.f. §9.102(a)(1). Defendant is also not a buyer in the ordinary course of business. §1.201(9) defines that term as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind..." It is undisputed that neither Carey nor Amann are in the business of selling automobiles, or that Defendant acted otherwise than in good faith or honesty. c.f. §1.201(19).Defendant gave value for the subject automobile, in that any consideration sufficient to support a simple contract is "value." §1.201(44). Defendant gave $5,000 cash and tendered 7,000 shares of U.S. Rich Hill Minerals Corporation stock, which was trading between $5.00 and $5.50 per share. (R.291, Meacham Deposition, pp.10,15.)

Defendant took delivery of the subject automobile before Plaintiff's security interest was perfected (see supra at 9)."Knowledge" of a fact is when a person has actual knowledge of it. §1.201(25). There is no evidence in the record which would suggest Defendant had actual knowledge of Plaintiff's security interest. Moreover, Plaintiff, as a secured creditor, has the burden of proving Defendant's knowledge. Kulik v. Albers, Incorporated, 91 Nev. 134, 532 P.2d 603 (1975); Levine v. Pascal, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).

Plaintiff's unperfected security interest is, therefore, subordinate to Defendant's interest. See Victory

National Bank of Nowata v. Stewart, 6 Kan. App. 847, 636 P.2d 788 (1981); McKenzie v. Oliver, 571 S.W.2d 102 (Ky. Ct. App. 1978).

2. Louisiana case law protects Defendant's interest in the subject automobile as bona fide purchaser for value.

In the alternative, assuming the discussion above is resolved against Defendant and Louisiana law is found to be controlling as to priority, Louisiana cases clearly protect Defendant as a bona fide purchaser for value (bfp). In finding that Defendant was not a bfp under Louisiana law, the District Court quotes from Ballard v. McBryde, 275 So.2d 464 (La. Ct. App. 2d Cir. 1973):

> We are of the opinion the Vehicle Certificate of Title Law is designed to afford the public a means of proper determination of ownership and encumbrance of vehicles subject thereto and to protect innocent purchasers who have relied thereon.

id. at 467 (R.239).

The District Court further states that Louisiana law requires a purchaser to protect himself by ascertaining who holds title to the vehicle and if any liens are outstanding. Kaplan v. Associates Discount Corp., 253 La. 137, 217 So.2d 177 (1968); Theriac v. McKeever, 405 So.2d 354 (La. Ct. App. 2d Cir. 1981); Ballard v. McBryde, supra. (R.240.) In the absence of actual notice of an adverse interest in the vehicle, a fair reading of the above-cited cases does not require a purchaser to inquire as to potential liens beyond a search of the public records. The Vehicle Certificate of Title Law protects those "who have relied thereon." Ballard v. McBryde, supra.

Contrary to the District Court's finding (R.239), Defendant did in fact rely on Louisiana public records.

(R.101-102, 291, Meacham Deposition, p.37.) The search showed Carey as the record owner of the subject Ferrari. (R.203-204, 291 Meacham Deposition, p.37.) While Defendant did not inquire of the public records when the car was delivered in Oklahoma City, he did so only two to three weeks later when notified of a possible problem. The fact that Defendant searched the records only after he took possession of the automobile does not defeat his status as a bfp.

Consideration of the circumstances surrounding the transaction which brought the subject automobile into Defendant's possession is appropriate. Theriac v. McKeever, supra, 405 So.2d 354, 357. Defendant had seen the Ferrari in Carey's possession more than one year earlier, at which time Carey represented that it was a wedding gift from his new bride. (R.291, Meacham Deposition, p.9.) Upon delivery the registration certificate found within the subject vehicle showed Shawn Carey as the registered owner. (R.291, Meacham Deposition, 10-11, 16-17.) Also, at the time of delivery, Defendant did not tender consideration because the title was not then delivered. Subsequently, however, and prior to his knowledge of Plaintiff's security interest, Defendant gave value in the form of cash and shares of stock. (R.291, Meacham Deposition, 15, 17, 50-52.) Given the above circumstances, it cannot be said that Defendant acted unreasonably in relying on the Careys' appearance as owners of the subject vehicle which was also reflected in the public records of Louisiana. Thus, Defendant is an innocent purchaser

for value, as defined by Louisiana law. Ballard v. McBryde, supra.

The argument that if Carey was shown as record owner, Plaintiff's security interest would also be reflected as evidenced by the certificate of title issued to Carey on April 16, 1981, cannot be resolved on the record before the Court. Louisiana law provides that upon satisfaction of a chattel mortgage on a motor vehicle, the chattel mortgagee shall deliver the title with proper release thereon to the registered owner. And, upon final discharge of a chattel mortgage, the owner, or chattel mortgagee, may request the cancellation of the mortgage from the public records. La. Rev. Stat. Ann. §32:708 (West Supp. 1982.) The record shows that Plaintiff's lien has been noted as satisfied on the Carey title, the date, if any, being illegible. (R. 93-94, 170, 171.) It is not clear, however, whether the title was not returned to Carey and he in turn caused Plaintiff's lien to be stricken from the public records. It is also possible that the lien was erased from the public records when the first Amann application for certificate of title was delivered to the Louisiana Department of Public Safety on May 27, 1981. (R.167, 174.) Furthermore, the Department of Public Safety had not received the Carey title for cancellation as of November 5, 1982 (R.205). The above, when considered with the fact that the Carey title had not been properly transferred to Amann at the time of Defendant's purchase (see supra at 10, 11), raises an inference of fact which cannot be properly resolved in a motion for summary

judgment. Hall v. Warren, 632 P.2d 848 (Utah 1981); Thorncock v. Cook, 604 P.2d 934 (Utah 1979).

The District Court further held that Plaintiff's security interest was maintained as long as it retained possession of the title to the subject automobile. Commercial National Bank of Shreveport v. McWilliams, 270 Ark. 606 S.W.2d 363 (1980) (applying Louisiana law). (R.240.) Aside from its suspect precedential value, the Arkansas court cited no Louisiana case nor has it been subsequently relied upon by a Louisiana court, McWilliams is distinguishable. In McWilliams, the bank had taken all the necessary steps to perfect its security interest under Louisiana law, and thereafter retained the issued certificate of title in the secured vehicle. An Arkansas purchaser of the vehicle requested a certificate of title from Louisiana authorities who erroneously issued a certificate not showing the bank's lien noted thereon. 606 S.W.2d at 363-364. The Arkansas court held that as long as the bank retained the certificate of title, it maintained its security interest which was superior to the Arkansas purchaser. id. at 364-365.

The case at bar differs in that Plaintiff had not properly perfected its security interest at the time of Defendant's purchase. (See supra at 8) Moreover, Plaintiff did not even have possession of the Amann title until September 8, 1981. (R. 168, 180-181.) If Plaintiff relies on its possession of the Carey title, it is not clear, as discussed supra, that Plaintiff did, in fact, retain possession of that title. In any

event, Plaintiff's lien was shown as satisfied on the Carey title, the date, if any, being illegible. (R. 94, 171.)

In finding that Defendant was not a bona fide purchaser under Louisiana law, the District Court also referred to the maxim that where one of two innocent purchasers must suffer a loss, it must be borne by the one whose conduct rendered the injury possible. Flatte v. Nichols, 233 La. 171, 96 So.2d 447 (1957) (R.240). Plaintiff certainly cannot be considered innocent since it created much of the initial confusion by not acting expeditiously in perfecting its security. Actions by Plaintiff's agents also contributed to this matter not being settled extrajudicially (R. 101-102, 291 Meacham Deposition, pp.30-32, 39-41). It is also factually unfounded that Defendant paid his money and took his chances (R. 241). As discussed supra at 22, Defendant relied not only upon the reasonable appearances as to the state of the title of the subject vehicle, but also upon Louisiana public records which showed Defendant's vendor as the record owner (R. 203-204, 291 Meacham Deposition, p. 37). Plaintiff's actions, of failing to properly perfect its security interest, rendered the injury possible. Therefore, Plaintiff must bear the resultant loss.

Finally, the Louisiana Court of Appeals has recognized the right of a third party to retain possession of an automobile when the public records reflected ownership in her vendor. Tarver v. Tarver, 242 So.2d 374, 377 (La. Ct. App. 2d Cir. 1970). In the instant case, the public records reflected

ership in Defendant's vendor, Carey. (R. 101-102, 291, Meacham position, p. 37.)

Defendant, having thus relied on the Louisiana public records, purchased the subject vehicle from one whom those same records reflected as the owner. Defendant did so without constructive or actual knowledge of Plaintiff's security interest. Defendant is, therefore, protected under Louisiana law as an innocent purchaser for value and his interest in the subject vehicle is superior to the interest of Plaintiff. Ballard v. McBryde, supra; Tarver v. Tarver, supra.

C. AS A MATTER OF POLICY, THE FACTS OF THIS CASE SUPPORT THE APPLICATION OF UTAH LAW WITH RESPECT TO THE ISSUE OF PRIORITY.

In the alternative to the application of Louisiana law, the record indicates that Utah has a significant interest in having its law determine the priorities between the parties. The Restatement's policy considerations offer guidance in reaching this conclusion. Restatement (Second) of Conflict of Laws §6(2)(1971).

1. The needs of interstate and international systems. The Uniform Commercial Code, adopted in Utah, Utah Code Ann. §§70A-1-101 et seq, provides a uniform law to meet the needs of commercial and secured transactions which intersect many states in our mobile society. The Code's application in the present case would further these needs.

2. The relevant policies of the forum. Expanding the range of the Code's application would promote commercial interaction within Utah by furthering the justified expectation that this universally adopted law will be applied. Furthermore,

the Defendant is a Utah resident which invokes this state's policy in protecting the bona fide interests of its residents. Finally, since the subject automobile is in the custody of the Salt Lake County Constable, the policies of this state dictate that Utah law govern questions which affect this property.

3. The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue. Louisiana has an interest in protecting the interests of its resident creditors. However, Louisiana has no interest where the resident creditor did not comply with the system set in place by the state to protect them; the transaction took place outside the state with a nonresident purchaser; the subject property is now located outside the state; and the creditor knew or should have known the subject vehicle was primarily used outside the state.

4. The protection of justified expectations. Defendant, a resident of Utah, a Code state, purchasing the subject vehicle in Oklahoma, a Code state, from a person whom Defendant considered a resident of Texas, also a Code state, could justifiably expect the U.C.C. to be the governing law. In addition, Plaintiff knew that Louisiana has not adopted Article 9 of the U.C.C. and it knew or should have known the subject Ferrari was primarily located in Texas. Plaintiff could, therefore, justifiably expect that the U.C.C. would be applied in some manner.

5. The basic policies underlying the particular field of law. The U.C.C.'s underlying purposes and policies are

"to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and to make uniform the law among the various jurisdictions." Utah Code Ann. §70A-1-102(2)(a)-(c) (Repl. Vol. 1980). These policies will be furthered by the application of Utah law.

6. Certainty, predictability and uniformity of result. Because the U.C.C. has been universally embraced by the various jurisdictions, the Code's application will promote certainty, predictability and uniformity of result concerning the issue of priority.

Utah law thus has a significant interest in having its law applied with respect to the issue of priority. Therefore, the transaction "bears an appropriate relationship to this state" justifying the application of Utah law. Utah Code Ann. §70A-1-105; Clayton v. Crossroads Equipment Co., 655 P.2d 1125, 1131 (Utah 1982). See generally Annot., 63 A.L.R.3d 341 (1975).

Utah law, as applied to the present case, grants Defendant's interest in the subject automobile priority over Plaintiff's unperfected security interest. The discussion of Texas law supra at 19 is applicable. In particular, Plaintiff's unperfected security interest is subordinated to the rights of Defendant by virtue of Utah Code Ann. §9-301(1)(c) (Repl. Vol. 1980). See Victory National Bank of Nowata v. Stewart, supra, 636 P.2d 788; McKenzie v. Oliver, supra, 571 S.W.2d 102.

II

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT DEFENDANT CONVERTED THE SUBJECT AUTOMOBILE

Assuming, as did the trial court, that Utah law is applicable to the issue of conversion, and viewing the facts and all reasonable inferences therefrom in a light most favorable to Defendant, the District Court erred in holding as a matter of law that Defendant converted the subject Ferrari. Hall v. Warren, 632 P.2d, 848 (Utah 1981).

Under Utah law, conversion is an act of willfull interference with a chattel, done without lawful justification, which deprives the person entitled to the chattel of its use and possession. Allred v. Hinkley, 8 Utah 2d 73, 328 P.2d 726 (1958); Frisco Joes, Inc. v. Peay, 558 P.2d 1327 (Utah 1977). See generally Prosser, Law of Torts, Ch.3, §15 (4th ed. 1971). An action for conversion also requires that the Plaintiff be entitled to the immediate possession of the property at the time of the alleged conversion. Johnson v. Flowers, 119 Utah 425, 228 P.2d 406 (1951); Larsen v. Knight, 120 Utah 261, 233 P.2d 365 (1951).

With respect to secured transactions, this Court has recognized the prinicple that:

> One who has an immediate right to possession, such as a chattel mortgagee or conditional seller after default, may maintain an action for conversion against one who has exercised unauthorized acts of dominion over the property of another in exclusion or denial of his rights or inconsistent therewith.

Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164 (1971).

In affirming the trial court's judgment, the court in Murdock relied on the proposition that, upon default, §9-503 of the Utah Uniform Commercial Code, Utah Code Ann. §70A-1-101 et seq

repl.Vol.1980), as well as the security agreement, grants to the secured party an immediate right to possess the chattel thereby giving rise to a cause of action for conversion as against a subsequent levying creditor. Murdock v. Blake, supra, 484 P.2d at

V. DEFENDANT DID NOT EXERCISE UNAUTHORIZED ACTS OF POSSESSION OVER THE SUBJECT AUTOMOBILE.

In the case at bar, the District Court, on the basis of Murdock v. Blake, supra, held that since Amann was in default on the loan with Plaintiff, the Plaintiff had an immediate right to possession of the collateral under §9-503. Therefore, "anyone who took or kept possession after default converted the vehicle." (R.241.) See Murdock v. Blake, supra, 484 P.2d at 169. The District Court further held that even if Defendant were a bfp, Allred v. Hinkley, supra, prevents him from obtaining good title to the subject vehicle from a converter of the goods. id. at 728. (R.241.) A necessary implication in the Court's holding is that Amann, upon default, had converted the Ferrari.

Defendant respectfully submits that since Plaintiff was unperfected at the time of Defendant's purchase and Defendant was a bfp (see supra at 8, 19, 21), Murdock and Allred are inapplicable as to the issue of conversion.

Murdock should be applied only where the debtor is in default under the security agreement and the secured creditor has a properly perfected security interest which is superior to that of the purchaser. This was the case in Murdock where the secured creditor, Atlantic Richfield, had a perfected security interest,

and the debtor, Blake, was in default under the security agreement. Furthermore, Murdock, a subsequent levying creditor, had an interest in the collateral which was subordinate to the rights of a perfected security interest c.f.Utah Code Ann.§§9-301(1)(b),(3); 9-312(5)(a). The court in Murdock correctly held that Murdock converted the collateral.

The cases cited in Murdock support this proposition. In both Platte Valley Bank of North Bend v. Krael,185 Neb. 168, 174 N.W.2d 72 (1970) and William Iselin & Co. v. Burgess & Leigh, Ltd., 52 Misc. 2d 821, 276 N.Y.S. 2d 659 (1967) the secured creditors held perfected security interests which were superior to that of the intervening levying creditor.

In First National Bank of Bay Shore v. Stamper, 93 N.J. Super. 150, 225 A.2d 162 (1966), also cited in Murdock, the Plaintiff secured creditor had a security interest in an automobile which was properly perfected in New York. The debtor then removed the vehicle to New Jersey where he sold it to Defendant Sharp within four months thereafter. In holding that the purchaser was liable for conversion, the court found that on the basis of N.J. Stat.Ann. §12A:1-103(3) (West 1962) (now §12A:9-103(2)(b) (West Supp. 1983)) of the Uniform Commercial Code, the security interest properly perfected in New York, continued to be perfected in New Jersey for a period of four months. First National Bank of Bay Shore v. Stamper, supra, 225 A.2d at 168-169. Since Sharp purchased the automobile within the

four-month period, the court thus held him liable for conversion. Id. at 169.

However, the Stamper court pointed out that:

> If the [secured creditor] fails to file within the four-month period, the protection of his security interest ceases upon the expiration thereof, and his imperfected security interest is thereafter subject to be defeated under the Code. A subsequent purchaser for value, without notice of the unprotected security interest, would take a superior title. N.J.S. 12A:9-301, 9-307,1-201(a), N.J.S.A. (Emphasis added.)

First National Bank of Bay Shore v. Stamper, supra, 225 A.2d at 169.

This reasoning is echoed in First National Bank of Highland v. Merchant's Mutual Insurance Company, 89 Misc. 2d 771, 392 N.Y.S. 2d 836 (1977) aff'd 65 A.D.2d 59, 410 N.Y.S.2d 679 (1978), wherein it is stated that "in order to establish a cause of action for conversion, a Plaintiff must show: (1) legal ownership or an immediate superior right to possession, and (2) the exercise by Defendant of unauthorized acts of dominion over the [collateral] in question, to the exclusion of Plaintiff's rights." id. 392 N.Y.S. 2d at 836 . (Emphasis added.) See also Chemical Bank v. Miller Yacht Sales, 173 N.J. Super.90, 413 A.2d 619, 623 (1980) (and cases cited therein); Walker v. Security Loan Inv. Co., 259 S.W.2d 599, 602 (Tex. Civ. App. 1953).

The key to the issue at hand is whether Plaintiff had an immediate superior right to possession of the subject Ferrari. Assuming that Plaintiff had an immediate right to possession upon [illegible]'s default, which Defendant denies he had (see infra at 34), [illegible] does not have a superior right as against a third party where Plaintiff's security interest was unperfected at the time of

Defendant's purchase, and Defendant is a bfp. (See supra) Utah Code Ann. §70A-9-301(1)(c) (Repl. Vol. 1980). Indeed, were it held otherwise, it would be a mockery of the perfection and priority provisions of the Uniform Commercial Code, and would render them sterile where the debtor is in default. Certainly the draftsmen of the Code did not intend to engage in such a futile exercise.

With respect to the significance of Defendant as a bfp, the above reasoning applies to the District Court's reliance on Allred v. Hinkley, supra, 328 P.2d 726, wherein it is stated: "Thus a bona fide purchaser of the goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods." id. at 728. The District Court felt that, upon default, anyone, including the debtor Amann, who retained possession converted the subject vehicle (R.241). This completely ignores the Code's provision allowing the debtor to transfer his rights in the collateral notwithstanding a provision in the security agreement prohibiting any transfer. Utah Code Ann. §70A-9-311 (Repl. Vol. 1980). In addition to rendering the perfection and priority provisions of the Code useless, the District Court's holding places an unreasonable restraint on the alienation of property which, in today's society, would unduly chill commercial transactions.

Murdock v. Blake, supra, is not to the contrary. In harmonizing §9-311 with §9-503, Murdock granted that the collateral may be sold, but it is done so subject to a security

interest which is superior to that of the levying creditor. Murdock, 484 P.2d at 169.

Therefore, the Plaintiff being unperfected at the time of Defendant's purchase and Defendant being a bfp, Defendant had a superior right to possess the subject vehicle. First National Bank of Highland v. Merchant's Mutual Insurance Co., supra; Utah Code Ann. §70A-9-301(1)(c) (Repl. Vol. 1980). Thus, Defendant did not exercise unauthorized acts of dominion over the Ferrari. Murdock v. Blake, supra.

B. PLAINTIFF DID NOT HAVE AN IMMEDIATE RIGHT TO POSSESSION OF THE SUBJECT AUTOMOBILE.

In addition, Defendant did not convert the Ferrari because Plaintiff did not have an immediate right to its possession.

As noted above, this Court stated in Murdock v. Blake, supra, 484 P.2d 164, that upon default, §9--503 of the Utah Uniform Commercial Code, as well as the default provisions in the security agreement, gives a secured party the immediate right to possess the collateral. This gives rise to an action for conversion. 484 P.2d at 169. The District Court felt that, since Amann was in default under the security agreement at the time of Defendant's purchase, Plaintiff had an immediate right to possession of the subject automobile. (R.240-241.) The District Court also implicitly relied upon the construction given §9-503 by its citation to Murdock v. Blake, supra.

Louisiana law conrols the determination of the immediate right to possession as between the parties to the security agreement.

A court should first follow a statutory directive of its own state. Restatement (Second) of Conflict of Laws §6(1) (1971). The issues on appeal revolve around a security interest created by a chattel mortgage. The Utah Uniform Commercial Code is, therefore, the controlling forum statute. Utah Code Ann. §70A-9-102(2) (Repl. Vol. 1980). The Code's general choice of law provision states that, absent agreement otherwise, it "applies to transactions bearing an appropriate relation to this state." Utah Code Ann. §70A-1-105(1) (Repl. Vol. 1980). Perfection not being germane to the rights of the parties to the security agreement, §§1-105(2) and 9-103 of the Code are irrelevant to the issue at hand.

In determining whether the transaction between Plaintiff and Amann bears an "appropriate relation" to this state, the Code's official comment is instructive. The comment provides, in part, that :

> Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

Uniform Commercial Code, Official Com. 2, 1U.L. A. 35 (1976). Clearly Plaintiff and Amann contracted with reference to Louisiana law: the chattel mortgage agreement continually refers to Louisiana law (R.84-87, 172-173); Plaintiff's principal place of business is in Louisiana; and the contract was executed in Louisiana. Furthermore, since the obligation secured by the chattel mortgage was to be paid at New Orleans, Louisiana, the

place of performance is also in Louisiana. Walker Bank & Trust Co. v. Walker, 631 P.2d 860 (Utah 1981.)

The Restatement's position is that the validity and effect, and enforcement and redemption of a security interest is determined by the law of the state which has the most significant relationship to the parties; greater weight being given to the location of the chattel when the security interest attached than any other contact. Restatement (Second) of Conflict of Laws §§251, 254 (1971). Louisiana has the most significant relationship with respect to the rights of the parties to the security agreement. It cannot be said that Utah has any interest in having its law applied where, as in the present case, a chattel mortgage is executed in Louisiana between a Louisiana bank and a non-Utah resident, and where the collateral was presumably located in Louisiana at the time of execution.

Louisiana law, as the governing law, is further supported by prior decisions of this Court. It has long been the rule of Utah that the law of lex loci contractus controls the validity, interpretation and effect of the contract. Crofoot v. Thatcher, 19 Utah 212, 57 P. 171 (1899); Blyth and Fargo v. Huntz, 24 Utah 62, 66 P. 611 (1901); American Leather Co. v. Standard Gig Saddle Co., 9 Utah 87, 33 P. 246 (1893). This principle was recently reaffirmed in Morris v. Sykes, 624 P.2d 681 (Utah 1981).

Therefore, as a matter of choice of law, Utah law points to the application of Louisiana law with respect to the rights of the parties to the security agreement. Thus, Louisiana

law governs Plaintiff's right, as secured creditor, to the immediate possession of the subject Ferrari upon default.

2. Louisiana law does not give a secured creditor an immediate right to possession of the collateral upon default by the debtor.

In addition to its reliance on Utah Code Ann. §70A-9-503 (Repl. Vol. 1980), the District Court also found that "the security agreement provides that the Plaintiff has the right to cause the mortgaged vehicle to be seized and sold if Amann [were in default]." (R.238) The more complete default provision reads "if Borrower [Amann]. . .defaults. . .under this contract, Holder [Plaintiff] may cause the mortgaged vehicle to be seized and sold under executory or any other legal process, in the manner provided by law,. . .". (Emphasis added.) (R.86, 173.) Unlike §9-503 of the Code which gives the secured creditor an immediate right to possession upon default through extrajudicial foreclosure, c.f. Murdock v. Blake, supra, Louisiana provides no comparable remedies. Under Louisiana law, a chattel mortgagee must foreclose its mortgage in the ordinary judicial manner, or ex parte before a judicial officer via executory process.

Louisiana's Chattel Mortgage Act extends all remedies and processes available to creditors under mortgages affecting immoveables to those creditors of obligations secured by mortgages affecting moveables, the right of executory process being specifically granted. La. Rev. Stat. Ann. §9:5363 (West Supp. 1982). The method of executing and recording mortgages on vehicles covered by a certificate of title is excepted from the Chattel Mortgage Act, La. Rev. Stat. Ann. §9:5366 (West 1950), and is exclusively governed by the Vehicle Certificate of Title Law,

La. Rev. State. Ann. §§32:701 et seq (West 1963). The remedies and methods available to enforce mortgages on motor vehicles are still governed, however, by §9:5363 of the Chattel Mortgage Act. See La. Rev. Stat. Ann. §32:710K (West 1963); General Motors Acceptance Corporation v. Anzelino, 220 La. 1019, 64 So.2d 417 (1953).

Since executory process is the method, because of its summary nature, by which most Louisiana creditors reach their security, it will be briefly discussed below. Indeed, the chattel mortgage between Plaintiff and Amann anticipates its use by providing for a Confession of Judgment, Waiver of Notice of Demand and Authorization for Use of Executory Process. (R.84-87, 172-173.)

La. Code Civ. Proc. art's. 2631 et seq (West 1960) control. Article 2631 defines executory proceedings as those effecting seizure and sale of property, without previous judgment, to enforce a mortgage evidenced by an authentic act importing a confession of judgment. See Cameron Brown South, Inc., v. East Glen Oaks, Inc., 341 So.2d 450 (La. Ct. App. 1st Cir 1976). Article 2634 provides that a filing of a petition is a mandatory prerequisite to an executory proceeding. See Chrysler Credit Corp. v. Stout, 404 So.2d 304 (La. Ct. App. 3d Cir. 1981); Myer v. U.S., 647 F.2d 591 (5th Cir. 1981) (Applying Louisiana law). Authentic evidence to prove the right to use executory process is also required to be submitted with the petition. Articles 2635, 2636. Finally, if the mortgagee has met the prerequisites, the court then shall order a writ of seizure and sale. Article 2638.

See generally Comment, Executory and Special Proceedings; Executory Process, Attachment and Sequestration, 22 Loy. L. Rev. 190 (1975-76).

Louisiana courts have taken the posture that executory process is a harsh remedy and requires strict compliance with its procedure and sufficient authentic proof to support every link in the chain of evidence. See e.g. Myrtle Grove Packing Co. v. Mones, 226 La. 287, 76 So.2d 305 (1955); American Security Bank v. Delville, 368 So.2d 167 (La.Ct.App. 3d Cir. 1979); American Budget Plan, Inc. v. Small, 229 So.2d 190 (La.Ct.App. 4th Cir. 1969).

It is clear that, unlike the majority of jurisdictions adopting Article 9 of the Uniform Commercial Code, Louisiana's policy is to not subject debtors to extrajudicial, self-help repossesion, and to provide a summary determination of the rights of the parties before collateral may be repossessed. Hood Motor Co., Inc. v. Lawrence, 320 So.2d 111 (La. 1975).

Thus, the applicable Louisiana law does not, and did not, give Plaintiff an immediate right to possess the subject automobile upon default by Amann without resort to the appropriate, albeit summary, procedure. The record does not disclose that Plaintiff complied with the executory procedure or a foreclosure of the mortgage in the ordinary judicial manner. Since Plaintiff had no immediate right to possession, the District Court erred, as a matter of law, in holding Defendant liable for conversion. Johnson v. Flowers, supra; Murdock v. Blake, supra.

CONCLUSION

Based upon the foregoing, Defendant respectfully requests this Court to reverse the judgment of the trial court as a matter of law or, in the alternative, remand the case for a trial on the genuine issues of material fact existing in the record.

DATED this 1ST day of September, 1983.

GREGORY S. BELL & ASSOCIATES

By Lester A. Perry

Lester A. Perry

Certificate of Service

I hereby certify that on the 2nd day of September, 1983 I mailed a true and copy of the foregoing Brief of Appellant, postage prepaid, to James L. Christensen, NIELSEN & SENIOR, 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah, 84111.

Merri Raymond