

of 1935 (Acts of 1935, Chap. 110, page 407) decided on a change of policy, *and since this law became effective an appropriation by the county council of these 'special road funds' is necessary.*"

Williams, et al., v. Willett, et al., 1 N. E. (2d) 664, 670.

It is my opinion, therefore, that in view of the above provisions the duty rests upon the county council to appropriate these funds to the uses provided by statute, and this is true both as to funds for maintenance of highways as well as funds for the construction of the same.

It is my opinion, therefore, that as to any surplus remaining in any of these funds, additional appropriations by the county council will be required before such funds could be expended for any purpose.

MOTOR VEHICLES, BUREAU OF: Authority to issue title on motor vehicle repossessed by a mortgagee under a chattel mortgage.

September 9, 1937.

Hon. Benjamin Friedman,
Chief Title Clerk,
Bureau of Motor Vehicles,
State House,
Indianapolis, Indiana.

Dear Mr. Friedman:

I have before me your letter of September 3, 1937, in which you request an official opinion concerning your authority and duty in the issuance of certificates of title in cases where finance companies have found it necessary for them to repossess a motor vehicle. You state that you have always honored an application for certificate of title when accompanied by a certificate of repossession in the form prescribed by the Bureau of Motor Vehicles in the case of a repossession pursuant to the terms of a conditional sales contract. You state further that this conclusion was based upon the theory that the title remained in the vendor.

As I understand your letter, the inquiry now is as to whether you are authorized to follow the same rule in case

possession is obtained by the mortgagee pursuant to the terms of a chattel mortgage. You desire first of all to be advised as to whether you should require the mortgagee in such a case to present your office with the necessary certified papers showing that proper foreclosure proceedings were had. You also inquire as to whether it would make any difference if the mortgagee would present satisfactory proof to the department showing that he already has physical possession of the vehicle in question, and as to whether there would be any difference growing out of the manner in which the mortgagee came into possession of the property.

The above questions evidently originate out of the thought expressed in your letter that in most cases of a chattel mortgage the title of the vehicle remains in the mortgagor. That, however, is not the rule with respect to chattel mortgages. The rule generally stated as to such instruments is that "a chattel mortgage is at law a conditional sale, which vests the legal title and, *prima facie* the right of possession to the thing mortgaged, in the mortgagee.

Lee v. Fox, et al., 113 Ind. 98 at p. 101;

Sapirie v. Collins, 70 Ind. App. 529 at p. 532.

Moreover, under the common law the mortgagee of chattels was entitled to their immediate possession unless otherwise provided in the mortgage.

Broadhead v. McKay, 46 Ind. p. 595.

Upon the basis of the foregoing decisions, I think you would be authorized to treat for title purposes the case of the repossession of an automobile pursuant to the terms of a chattel mortgage in the same way as you are now treating such cases where the instrument is a conditional sales contract. I do not find any statute which would alter the above rule, but on the contrary do find a statute approved March 7, 1935, expressly authorizing the inclusion in a chattel mortgage of a power of sale in the mortgagee.

Acts of 1935, p. 498.

Apparently, however, whether the mortgage contains such a power of sale or is silent on the subject, the result would be the same. As stated in Lee v. Fox, et al., *supra*, "whether a mortgage contains a power of sale or not, the mortgagor's

equity of redemption may be foreclosed by a bill in chancery, *or if possession has been taken, the equity of redemption may be as completely foreclosed by a sale, upon due notice, as by a decree of court.*" Lee v. Fox, et al., 113 Ind. 98 at p. 101. (Our italics.) This seems to be based upon the theory that in the absence of some special act to the contrary, the mortgage has the effect of transferring the title, conditionally it is true, to the mortgagee.

A practical application of this theory is presented in the case of Blumberg v. Coleman, 75 Ind. App. 293. In that case the appellee had mortgaged a team of horses, wagon and harness to the appellant. The mortgage contained a condition that the appellee should retain possession of the mortgaged property until the note became due, and if the note was not paid when due, appellee was to have the right of possession. The note was not paid when due. The appellee refused to give possession to appellant and he was obliged to secure possession by a writ of replevin. The appellant thereupon advertised the property for sale and sold it pursuant to the terms of the mortgage. The appellee then commenced an action for the conversion of the mortgaged property. The court disposed of this contention in the following brief paragraph:

"Appellee when he began this action did not have title, possession, or the immediate right of possession to the property alleged to have been converted and was not in position to maintain an action for its conversion."

Blumberg, et al., v. Coleman, 75 Ind. App. 293 at p. 294.

It seems to me that the Secretary of State is sufficiently complying with the statute which requires him to use diligence in ascertaining whether the applicant in such a case is the lawful owner of such a vehicle by requiring the execution of a certificate of repossession similar to the one enclosed with your request in this case. I do not think it would be necessary to require the person applying for a certificate of title to show that proper foreclosure proceedings had been taken, since it is not absolutely necessary that a foreclosure be had.

You ask whether it would make any difference if the mortgagee presents satisfactory proof to the department showing that he already has physical possession of the vehicle in question. I think it would make just this difference; namely, that it would show that the mortgagee had *both* title and possession, but for practical purposes in the issuance of a certificate of title I doubt whether it makes any difference.

As to your last question, of course if possession was taken pursuant to a foreclosure or a replevin, that fact should be shown in order to complete your files.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Building and loan associations—liability of stockholders.

September 10, 1937.

Hon. R. A. McKinley, Director,
Department of Financial Institutions,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of September 1 in which you ask the opinion of the Attorney General as to the liability of stockholders in building and loan associations in the event of insolvency of such corporations.

In reply to this question, beg to say that a building and loan association is not a bank or banking company as designated in the Constitution of the State of Indiana, and it is my opinion that section 6, article 11 of the Constitution of the State of Indiana, which imposes on the stockholders in every bank or banking company a liability to an amount over and above their stock equal to their respective shares of stock does not apply.

It will be noted, however, that section 263 of the Financial Institutions Act contains the provision that:

“The unpaid demands of withdrawing shareholders shall not constitute an indebtedness against the association and the withdrawing shareholders shall not be deemed creditors of the association for any withdrawals at any time remaining unpaid.”

Your attention is further directed to section 268 of the Financial Institutions Act, which reads as follows: