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UNRECORDED CHATTEL MORTGAGES—EFFECT OF AMENDMENT TO THE RECORDING ACT, SECTION 443.460, RSMo 1959

I. INTRODUCTION

The common law method of mortgaging chattels required a mortgagor to transfer possession of his goods as well as title to the mortgagee; where the mortgagor kept the goods, the conveyance of title alone to the mortgagee was considered fraudulent and was held invalid as to third parties dealing with the mortgagor.[1] The advent of the notice statute has permitted the retention of the chattels by the mortgagor without impairment of the mortgagee's lien and has provided protection for third parties by means of a simple system of registration:

> No mortgage . . . of personal property . . . shall be valid against *any other person than the parties thereto,* unless possession of the . . . property be delivered to and retained by the mortgagee . . . or unless the mortgage . . . be . . . recorded, or . . . filed . . . .[2] (Emphasis added.)

This language which appeared in the Missouri statutes as early as 1845[3] is to be contrasted with that of the recent 1959 amendment:

> No mortgage . . . of personal property . . . shall be valid against *any creditors who acquire a lien by judicial proceedings or subsequent purchasers, mortgagees, encumbrancers and pledgees on such personal property,* unless possession of the . . . property be delivered to and retained by the mortgagee . . . or unless the mortgage . . . be . . . recorded, or . . . filed . . . .[4] (Emphasis added.)

A mortgagee's failure to record, to file,[5] or to take possession creates apparent unencumbered ownership in the mortgagor which enables him to hold himself out to others as absolute owner of the chattels. Because of this consequence the statute invalidates an unrecorded chattel mortgage,[6] but not as to all persons with whom the mortgagor deals; "an unrecorded mortgage is not pronounced void absolutely and under all circumstances . . . ."[7] This comment summarizes the protection accorded to various individuals under the earlier statute and suggests the changes made by the 1959 amendment.

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1. See 1 JONES, CHATTEL MORTGAGE AND CONDITIONAL SALES § 176 (6th ed. 1933).
2. § 443.460, RSMo 1949.
3. C. 67, § 8, at 527, RSMo 1845.
4. § 443.460, RSMo 1959.
5. Filing is treated the same as recording for purposes of this article.
6. "Its [the statute's] object is to protect persons dealing with him who claims to be the owner of the property with which he may be dealing, or upon the faith of which others may be dealing with him." Landis v. McDonald, 88 Mo. App. 335, 339 (K.C. Ct. App. 1901).
7. First Nat'l Bank v. Connett, 142 Fed. 33 (8th Cir. 1905). This is one of the more comprehensive cases on the effect of a failure to record a chattel mortgage.

II. Chattel Mortgage Recording Act, 1845-1959

A. *Parties to the Instrument*

By virtue of the express exclusion of parties to a chattel mortgage by the earlier statute, the validity of the instrument as between the parties was not affected by the mortgagee's failure to record or take possession. This result logically follows once it is understood that "the requirement of filing is to cut off rights of third parties."[8] Thus in spite of the mortgagee's omission the mortgagor remained bound by his obligation to pay the mortgagee's claim, and as to the mortgagor the security interest in the chattels was unimpaired.[9]

B. *Third Parties Generally*

A literal interpretation of the earlier statute would have rendered an unrecorded chattel mortgage invalid against "any other person than the parties thereto;"[10] however, not all third parties were protected. "Broad as this statutory phrase . . . is, it does not apply to strangers; and one claiming the mortgage to be void must have some right to, or claim upon, the mortgaged property."[11] Thus a third party without any claim of right to chattels taken from the mortgagor could not successfully assert the statute as a defense to an action of replevin or trover by a mortgagee who failed to record.[12] Likewise an unrecorded chattel mortgage was held valid against a voluntary assignee of the mortgagor for the benefit of creditors since he was not regarded as a purchaser for value and therefore could acquire no rights greater than those possessed by the mortgagor.[13] Probably a donee of the mortgagor would not have been entitled to protection for the same reason although the rights of a donee were not adjudicated under the earlier statute. On the other hand an unrecorded chattel mortgage was void as to an administrator of the mortgagor's insolvent estate, "who was not only a representa-

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8. First Nat'l Bank v. Johnson, 221 Mo. App. 31, 297 S.W. 724 (Spr. Ct. App. 1927).

9. Cummings v. Badger Lumber Co., 130 Mo. App. 557, 109 S.W. 68 (K.C. Ct. App. 1908). (A mortgagee who failed to record his chattel mortgage was entitled to an accounting by the mortgagor who sold the chattels to a third party destroying the mortgagee's lien as to such purchaser.)

10. § 443.460, RSMo 1949.

11. Landis v. McDonald, *supra* note 6, at 339.

12. K-M Supply Co. v. Moran, 53 S.W.2d 419 (K.C. Ct. App. 1932). (A mortgagee successfully maintained an action of replevin against a sheriff who levied upon chattels in the mortgagee's possession under a void writ of attachment.) Johnson v. Brown Bros. Iron & Metal Co., 208 Mo. App. 189, 231 S.W. 1011 (K.C. Ct. App. 1921). (A purchaser of chattels in the mortgagor's possession from one who had no authority to sell the goods was liable in the mortgagee's replevin suit.) Elliott v. Washington, 137 Mo. App. 526, 119 S.W. 42 (St. L. Ct. App. 1909). (A mortgagee successfully maintained an action of trover against a purchaser from the mortgagor's wife, who had no power to sell her husband's chattels.)

13. Jacobi v. Jacobi, 101 Mo. 507, 14 S.W. 736 (1890); Riddle v. Norris, 46 Mo. App. 512 (K.C. Ct. App. 1891).

tive of the deceased, but also a trustee for the creditors of the estate."[14] As explained by one court:

> The reason . . . that an assignee of the vendee for the benefit of his creditors may not, and the administrator or executor of the estate of an insolvent vendee may, disregard . . . the unrecorded condition of a sale, is that the powers of the former are conferred by the voluntary act of the vendee, and they cannot be greater than those which the vendee possessed, while the powers of the latter are conferred by the law and the appointment of the court, and include, not only the powers of the vendee, but the powers and rights of his creditors.[15]

The position of a receiver appointed in a creditor's suit against an insolvent mortgagor was found analogous to that of an administrator on the basis of the involuntary character of the proceeding.[16]

C. *Subsequent Purchasers and Mortgagees*

Subsequent purchasers and mortgagees of mortgaged chattels were protected under the earlier statute and could successfully assert the invalidity of a prior mortgagee's unrecorded lien unless the mortgagee could take advantage of the reasonable time for recording doctrine discussed below.[17] Logically this should be the result on the theory that it is the mortgagee's failure to record which enables the mortgagor to hold himself out to such parties as unqualified owner of the chattels. Yet even subsequent purchasers and mortgagees who had actual notice of the unrecorded mortgage and thus were not deceived by the mortgagee's omission were protected by the Missouri courts' strict construction of the statute:

> The statute is imperative in requiring the deed to be recorded, or the possession of the property conveyed to be transferred, and all questions of actual notice are purposely avoided.[18]

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14. Hemley v. Harmon, 103 Mo. App. 233, 77 S.W. 136 (K.C. Ct. App. 1903); see also Hughes v. Menefee, 29 Mo. App. 192 (K.C. Ct. App. 1888).

15. T. L. Smith Co. v. Orr, 224 Fed. 71, 73 (8th Cir. 1915), where the court used chattel mortgage law in determining the effect of an unrecorded condition in a conditional sales contract.

16. *Ibid.*

17. Hussey v. Ellerman, 215 S.W.2d 38 (St. L. Ct. App. 1948). (A mortgagee who took possession of chattels after a sale from the mortgagor to the plaintiff was liable to such purchaser in an action for conversion.) Barnard State Bank v. Lankford, 223 Mo. App. 519, 11 S.W.2d 1084 (K.C. Ct. App. 1928). (A purchaser of corn from the mortgagor at a time when the chattel mortgage was not of record was not liable to the mortgagee in an action for conversion.) Cummings v. Badger Lumber Co., *supra* note 9; Saunders v. Ohlhausen, 127 Mo. App. 546, 106 S.W. 541 (K.C. Ct. App. 1907). (A landlord could not successfully maintain an action for conversion against a purchaser of wheat from the tenant since the lease provision purporting to give the landlord a lien on the crop was unrecorded.)

18. Bevans v. Bolton, 31 Mo. 437, 443 (1862). *Accord,* State *ex rel.* Kaufman v. Sitlington, 51 Mo. App. 252 (K.C. Ct. App. 1892). (A subsequent mortgagee with actual notice of an unrecorded chattel mortgage successfully maintained a suit for damages against a sheriff who attached a stock of goods on behalf of the prior mortgagee.) Rawlings v. Bean, 80 Mo. 614 (1883). (Unrecorded chattel mortgage was void as to purchasers of a stock of drugs from the mortgagor, even though they had actual notice of the mortgage.) Wilson v. Milligan, 75 Mo. 41

However, actual notice of a defectively recorded chattel mortgage was held to deprive a purchaser of statutory protection.[19]

The reasonable time for recording doctrine was first enunciated in Missouri by way of dictum:

> Our statute prescribes no time within which a deed or conveyance shall be recorded. Under such circumstances, a party must have a reasonable time for that purpose, which is to be determined from the circumstances of each case; and when a deed is recorded within a reasonable time, it has relation back to the time of execution.[20]

Although the fiction of relation back in its broad unqualified form would make it possible for a mortgagee who recorded his chattel mortgage within a reasonable time after its execution to assert the superiority of his lien as to intervening purchasers and mortgagees, this writer can find no case in which the principle was applied against such purchasers and mortgagees.[21] When the mortgagee sought an application of the principle, even relatively short delays in recording were found unreasonable.[22] Speaking of the *Bryson* case, a later court stated:

> [W]hat was meant by the court when it spoke of a "reasonable time" was that the mortgagee, if he is to have a retroactive application of the statute to the time of the execution of the mortgage, must have filed it for record with no more delay than such time as is reasonably necessary

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(1881). (Unrecorded chattel mortgage was held invalid against a purchaser with actual notice.) Bryson v. Penix, 18 Mo. 13 (1853). (Subsequent mortgagee was protected against a prior unrecorded mortgage on the same cattle even though he had knowledge of the existence of the mortgage.)

19. Emerson-Brantingham Implement Co. v. Rogers, 216 S.W. 994 (Spr. Ct. App. 1919). Failure to make an index of the mortgage and recording it in the wrong book constituted the defect in this case. The court distinguished this situation from one in which the mortgagee fails to record, stating:

> The statute making unrecorded chattel mortgages void regards the party failing to record the same as a wrongdoer, and in that respect not to be protected against one purchasing even with actual knowledge, each being in pari delicto; it is quite different where the mortgagee has done his full duty as to recording and stands as an innocent party, while the purchaser is not innocent, in that he took the property with actual knowledge of the mortgage.

20. Bryson v. Penix, *supra* note 18, at 15. (The mortgagee who unreasonably delayed in recording was not successful in having the doctrine applied against an intervening mortgagee.) Even though the statement in the text above is dictum, it has been the most frequently quoted statement in support of the reasonable time for recording doctrine in intervening purchaser, mortgagee and creditor cases alike.

21. The mortgagee's success has not been much better in the creditor cases. In two early cases, Huiser v. Beck, 55 Mo. App. 668 (K.C. Ct. App. 1894), and Way v. Braley, 44 Mo. App. 457 (St. L. Ct. App. 1891), the chattel mortgages were given effect as of the date of execution to defeat creditors attaching during the interval when the mortgages were not of record. In these cases the delays in recording were longer than would be construed as reasonable today since the mortgages were not executed in the county seat and the mortgagees did not have available any modern means or transportation.

22. See, *e.g.*, Wilson v. Milligan, *supra* note 18. (A delay in recording of only one day, during which a purchaser intervened, was held unreasonable.)

> after its execution to present it for filing. So . . . if the mortgage is excuted in the county seat, within a few blocks of the recorder's office, the only time reasonably necessary for recording the mortgage would be the hour or two required to walk to the courthouse and record the mortgage.[23]

Although as to purchasers and mortgagees who become such before recording the consequence of an unreasonable delay in recording was regarded the same as that of a failure to record, as to purchasers and mortgagees after the chattel mortgage was recorded, the mortgagee was entitled to a secured status regardless of the length of any previous delay.[24]

D. *Prior and Subsequent Creditors*

Under the earlier statute creditors were accorded different treatment depending upon when the mortgagor incurred the indebtedness. A distinction was made between prior creditors, whose claims accrued before execution of the mortgage, and subsequent creditors, whose claims arose after the date of execution but before the recording of the mortgage. Consonant with the subsequent purchaser and mortgagee cases, indebtedness created after a recording was held not to impair the mortgagee's lien.[25]

Clearly a mortgagee's failure to record a subsequent mortgage cannot influence the prior creditor's decision to give credit to the mortgagor, but it may be a factor in such creditor's later extension of the time of payment or in his forbearance from enforcing or securing his claim. Although there were dicta indicating that such a change of position would entitle the prior creditor to protection,[26] it was usually held that a prior creditor had to secure a lien before the mortgagee recorded or took possession in order to assert the invalidity of the mortgagee's

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23. *In re* Coombs, 37 F. Supp. 495, 496-97 (W.D. Mo. 1940).

24. First Nat'l Bank v. Johnson, *supra* note 8. (In spite of delays of eight and nine days in the recording of two chattel mortgages on crops, the recording gave the mortgagee's lien priority over the claim of one who took a mortgage on the same crops after the recording.)

25. *In re* Billings, 170 F. Supp. 253 (W.D. Mo. 1959). (A delay in recording a chattel mortgage was held immaterial and did not affect the validity of a mortgagee's lien as to a trustee in bankruptcy where no intervening rights attached.) In Ozark Acceptance Corp. v. Yellow Truck & Coach Mfg. Co., 137 S.W.2d 965 (Spr. Ct. App. 1940), the court stated: "Any indebtedness that may have been created after the filing of the chattel mortgage by the plaintiff [mortgagee], could not in any manner have affected the rights of plaintiff." 137 S.W.2d at 968.

26. "In case of prior creditors, if the mortgage be recorded, or the mortgagee takes possession of the property before such creditor obtains a lien thereon or changes position in relation thereto, it validates the mortgage as to him." Landis v. McDonald, *supra* note 6, at 339 "We have no doubt that under our statute any creditors have a right to avoid an unrecorded mortgage who have, during its absence from record, done anything material, which they may be fairly considered to have done on the basis of its non-existence." Charles Root & Co. v. Harl, 62 Mich. 420, 422, 29 N.W. 29, 30 (1886), quoted with approval in Harrison v. South Carthage Mining Co., 95 Mo. App. 80, 68 S.W. 963 (K.C. Ct. App. 1902) (dictum), and State *ex rel.* Mayer v. O'Neill, 151 Mo. 67, 52 S.W. 240 (1899) (dictum).

lien.[27] Thus the mortgagee could validate the chattel mortgage as to the prior creditor by complying with the statutory requirement at any time before such creditor obtained his lien,[28] or even after that time if the recording was within a reasonable time after the execution of the mortgage.[29]

On the other hand, the unrecorded chattel mortgage was invalid as to a subsequent creditor, notwithstanding his failure to obtain a lien before the mortgagee recorded or took possession.[30] As explained by one court:

> It is true that in order to assert his rights he [the subsequent creditor] must have an attachment or execution, or some lien thereon, but the right accrues to him when he becomes a creditor during the period the mortgage is withheld from the record. When he secures his attachment, execution, or other lien, he is in position to enforce his right as of the day it accrued.[31]

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27. Rock Island Nat'l Bank v. Western Lumber Co., 134 Mo. 432, 34 S.W. 869 (1896) (en banc). (Chattel mortgage on a stock of lumber was held invalid against a prior creditor who attached the goods on the day before the mortgage was recorded.) Collins v. Wilhoit, 108 Mo. 451, 18 S.W. 839 (1891) (en banc). (In determining the effect of an unrecorded condition, a conditional sale was treated the same as a chattel mortgage transaction so that a prior creditor was protected by execution under a judgment before the condition was recorded.)

28. Ozark Acceptance Corp. v. Yellow Truck & Coach Mfg. Co., *supra* note 25. (Where after the sale of a truck on credit the debtor executed a chattel mortgage to one other than the creditor and the creditor took no steps to secure his claim prior to a recording of the mortgage, the creditor's repossession of the truck rendered him liable to the mortgagee for conversion.) Brunswick-Balke-Collender Co. v. Kraus, 132 Mo. App. 328, 112 S.W. 20 (K.C. Ct. App. 1908). (In spite of a five day delay by the mortgagee in recording during which time the mortgagor promised to give his lessor [a prior creditor] a lien on several billiard tables to secure back rental payments, the mortgagee's subsequent recording validated the chattel mortgage as to the lessor who had not taken steps to obtain a lien.) Dobyns v. Meyer, 95 Mo. 132, 8 S.W. 251 (1888). (A mortgage was held valid against a prior creditor where the mortgagee took possession of planing-mill stock before the creditor's levy of attachment.)

29. Cases cited note 21 *supra.*

30. Bentrup v. Johnson, 223 Mo. App. 299, 14 S.W.2d 537 (St. L. Ct. App. 1929). (An unrecorded bill of sale was held to be in effect a chattel mortgage and invalid as to subsequent creditors.) American Book Co. v. Baker, 119 Mo. App. 275, 95 S.W. 957 (K.C. Ct. App. 1906). (Where after an unreasonable delay in recording a chattel mortgage during which creditors intervened, the mortgagee recorded, took possession of the property and sold it, such creditors were entitled to garnish the mortgagee for amounts owing on a judgment against the mortgagor.) Harrison v. South Carthage Mining Co., *supra* note 26. (Chattel mortgage was void as to creditors selling goods to the mortgagor when the mortgage was not of record.) *Accord,* Exchange Bank v. Morgan, 222 F.2d 567 (8th Cir. 1955); Mercantile Trust Co. v. Kahn, 203 F.2d 449 (8th Cir. 1953); U.S. Hoffman Mach. Corp. v. Lauchli, 150 F.2d 301 (8th Cir. 1945); *In re* Bothe, 173 Fed. 597 (8th Cir. 1909); *In re* Alton Milk Co., 157 F. Supp. 23 (W.D. Mo. 1957); *In re* Patterson, 139 F. Supp. 830 (W.D. Mo. 1956); *In re* Coombs, *supra* note 23; *In re* Wade, 185 Fed. 664 (W.D. Mo. 1911); Stewart v. Asbury, 199 Mo. App. 123, 201 S.W. 949 (Spr. Ct. App. 1918); Landis v. McDonald, *supra* note 6. In all of these cases a chattel mortgage was held void as to a trustee in bankruptcy representing creditors who extended credit while the mortgage was not of record.

31. Harrison v. South Carthage Mining Co., *supra* note 26, at 87.

This statement of the subsequent creditor's protection must be qualified to the extent that a mortgagee's prompt recording entitled him to an application of the fiction of relation back;[32] however, here again comparatively short delays were readily held fatal to the mortgagee's security interest.[33] The theory upon which subsequent creditors were accorded protection has been stated as follows:

> When a chattel mortgage exists and is concealed, it is, under the statute, void for the reason that it produces a false appearance of entire solvency when in fact a person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security; and those who deal with such a debtor are liable to be defrauded by appearances. . . .[34]

However, such creditors were not required to show that they were deceived by a failure to record; even those who had actual notice of the existence of the mortgage and thus could not have been misled were protected.[35]

E. *Trustee in Bankruptcy*

The validity of an unrecorded chattel mortgage as to a trustee in bankruptcy of a mortgagor was dependent upon the rights of creditors whom he represented, this by virtue of section 70(e) of the Bankruptcy Act:

> A transfer made or suffered or obligation incurred by a debtor adjudged bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable . . . by any creditor of the debtor having a claim provable under this title, shall be null and void as against the trustee of such debtor.[36]

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32. Case cited *supra* note 20 and accompanying text.

33. *In re* Patterson, *supra* note 30. (A delay of seven days was held unreasonable.) Mercantile Trust Co. v. Kahn, *supra* note 30. (A delay of five business days was found unreasonable where "the physical act of taking this mortgage from the dealer's place of business to the recorder's office . . . could be accomplished within an hour.") *In re* Coombs, *supra* note 23. (A delay from October 22d to October 25th [with a weekend intervening] and a delay from December 24th to December 28th [with a weekend and a Monday holiday intervening] were found unreasonable where the mortgages were executed within a mile of the recorder's office.)

34. Crippen v. Fletcher, 56 Mich. 386, 389-90, 23 N.W. 56, 57 (1885), quoted with approval in Landis v. McDonald, *supra* note 6, at 340.

35. "The Supreme Court of Missouri has strictly construed . . . this statute [the recording act], even where the third party affected had actual knowledge of the existence of the mortgage at the time he dealt with the mortgagor." Standard Computing Scale Co. v. Adam, 287 Fed. 347, 348 (8th Cir. 1923). "[W]hether the plaintiff had knowledge of the existence of the mortgage, when it made the sale to defendant [mortgagor], it seems to us of no importance, for . . . a chattel mortgage which is not recorded . . . is void as to creditors who have actual notice of its existence." Martin-Perrin Mercantile Co. v. Perkins, 63 Mo. App. 310, 315 (K.C. Ct. App. 1895). "[A] regular written mortgage, duly acknowledged, but *not* recorded, is void, though creditors have actual notice of it." Hughes v. Menefee, *supra* note 14, at 203.

36. 66 Stat. 429 (1952), 11 U.S.C. § 110(e) (1958). *Accord,* cases cited note 30 *supra.*

Furthermore, subsection (c) of that section,[37] conferring upon the trustee the status of the "perfect" or "ideal" hypothetical creditor, did not eliminate as a requirement for the trustee's attacking the mortgage the necessity of an existent prior or subsequent creditor.[38] If the chattel mortgage was recorded within four months before the filing of a petition in bankruptcy, the trustee could attack the recording as a preferential act under section 60 of the Bankruptcy Act[39] provided that the reasonable time for recording doctrine could not be applied to give the mortgage effect as of a date of execution prior to the four month period.[40]

III. Chattel Mortgage Recording Act as Amended, 1959

The language of the 1959 amendment of the chattel mortgage recording act is explicit as to the parties to be protected: "[C]reditors who acquire a lien by judicial proceedings or subsequent purchasers, mortgagees, encumbrancers and pledgees."[41] The enumeration of these parties eliminates the possibility of protecting a donee of the mortgagor or one without any interest in the chattels, a construction to which the earlier statute was susceptible. The inclusion of subsequent purchasers and mortgagees makes likely a continuation of the same protection previously accorded to those parties under the earlier statute—protection which is desirable where such parties rely on the mortgagor's apparent ownership of chattels. This same element of reliance does not exist in a situation of actual or inquiry notice as a reason for invalidating the chattel mortgage. Such notice accomplishes the same protection of third parties as statutory notice, and perhaps the Missouri courts will use the 1959 amendment as an opportunity for reexamining the desirability of adding a good faith (*i.e.*, without notice) requirement as a gloss to the statute. *Quaere* whether the reasonable time for recording doctrine, the benefit of which has been denied to the mortgagee in the vast majority of the cases in which its application has been sought,[42] will be continued under the amended recording act. As a practical matter, in most cases if a mortgagee records within the short time heretofore construed as reasonable by the Missouri courts,[43] the mortgagee will not have to rely on the fiction of relation back.

More noteworthy, the 1959 amendment makes no distinction between prior creditors and subsequent creditors; its coverage extends to "creditors who acquire a lien by judicial proceedings . . . ."[44] In order to enforce their rights under the earlier statute both prior and subsequent creditors were required to obtain liens,

37. "The trustee . . . shall be deemed vested as of such date with all the rights, remedies and powers of a creditor than holding a lien thereon by such proceedings, whether or not such creditor actually exists. Bankruptcy Act § 70(c), 66 Stat. 429 (1952), 11 U.S.C. § 110(c) (1958).
38. *In re* Billings, *supra* note 25.
39. 64 Stat. 24 (1950), 11 U.S.C. 96(a) (1958).
40. First Nat'l Bank v. Connett, *supra* note 7; Babbitt v. Kelley, 96 Mo. App. 529, 70 S.W. 384 (St. L. Ct. App. 1902).
41. § 443.460, RSMo 1959.
42. See note 21 and accompanying text.
43. Cases cited notes 22, 23, and 33 *supra* and accompanying text.
44. § 443.460, RSMo 1959.

although at significantly different points of time;[45] perhaps upon this basis the Missouri courts will interpret the new provision in conformity with a century of case law which established the separate treatment of the two classes of creditors. However, there is a strong likelihood that both classes of creditors will be treated alike by a different construction protecting only those creditors, prior or subsequent, who levy or attach before a recording or possession taken by the mortgagee. This interpretation would eliminate the possibility of protection of a prior creditor where he merely refrains from enforcing his claim without obtaining a lien. More important, a subsequent creditor's mere extension of credit to a mortgagor while the mortgage is not of record would not make the instrument invalid as to such creditor as it formerly did.

The diminished protection of a subsequent creditor under the latter construction would also reduce the rights of a trustee in bankruptcy to avoid an unrecorded chattel mortgage. Of course if a mortgagee fails to record or records within four months of the filing of the petition in bankruptcy, the mortgage is void as to the trustee in bankruptcy;[46] however, if prior to the preference period a mortgage is recorded after an unreasonable delay, the mere intervention of general creditors would not warrant the trustee's avoidance of the mortgage. In this situation it would be necessary for the trustee to prove (1) the actual existence of a prior or subsequent creditor, and where no such creditor exists, this requirement cannot be supplied by section 70(c) of the Bankruptcy Act,[47] and (2) such creditor's acquisition of a lien while the mortgage was not of record, and where no lien has been obtained, section 70(c), giving the trustee a lien effective as of the date of bankruptcy, but not as of an earlier date when the mortgage was not of record, is of no avail.[48] In addition, if a good faith requirement is added to the 1959 amendment, the trustee would not be required to show that any or all creditors which he represents lack actual notice since section 70(c) gives the trustee the status of a creditor without notice.[49]

The protection of the subsequent creditor under the earlier statute was based upon his supposed reliance upon the mortgaged chattels as a basis for extending credit. Certainly the existence of reliance upon unencumbered ownership of chattels in a credit transaction, especially in those involving small sums of money, is more doubtful than in a subsequent purchaser or mortgagee situation where such parties deal with the mortgagor with reference to the specific mortgaged chattels.

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45. Cases cited notes 27, 31 *supra* and accompanying text.
46. Cases cited note 40 *supra* and accompanying text.
47. *In re* Billings, *supra* note 25.
48. See, *e.g.*, Lewis v. Manufacturers' Nat'l Bank, 364 U.S. 603 (1961). Section 70(c) did not enable a trustee in bankruptcy to defeat a chattel mortgage where no lien creditors intervened during a four day delay in recording some months prior to the date of bankruptcy. The court stated: "[T]he rights of creditors . . . to which the trustee succeeds are to be ascertained as of 'the date of bankruptcy,' not at an anterior point of time." 364 U.S. at 607.
49. See, *e.g.*, Hoffman v. Cream-O-Products, 180 F.2d 649 (2d Cir. 1950), where the court stated: "The trustee by operation of law has the status of a creditor without notice and need make no showing as to lack of notice on the part of actual creditors." 180 F.2d at 650.

If the amended recording act is construed to require a creditor to secure a lien prior to a mortgagee's recording or taking possession in order to obtain statutory protection, still a creditor without a lien is entitled to maintain an action of fraud against the mortgagee if he can prove that the mortgagee deliberately withheld the chattel mortgage from record resulting in a false representation upon which he relied.[50] Or equitable estoppel may be applied against the mortgagee if he withholds a mortgage with the expectation that fictitious credit will result and a creditor detrimentally relies thereon.[51] Otherwise under such a construction of the statute the protection of creditors, both prior and subsequent, would hinge upon their diligence in obtaining a lien.

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50. "Every conveyance or assignment in writing, or otherwise, of any estate or interest . . . in goods and chattels, . . . and every charge upon . . . goods, . . . made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands . . . shall be . . . deemed and taken, as against said creditors . . . to be clearly and utterly void." § 428.020, RSMo 1949. "[A] failure to record a chattel mortgage does not make it fraudulent as to creditors, unless before it is recorded, or before the mortgagee takes possession thereunder, third persons are induced to give credit to the mortgagor, believing his property to be free from incumbrance." Miller-Arthur Drug Co. v. Curtis, 67 S.W. 712, 713 (K.C. Ct. App. 1902).

51. The elements of an equitable estoppel are set out generally in Board of Educ. v. St. Louis County, 347 Mo. 1014, 149 S.W.2d 878 (1941). Although the case does not deal with a chattel mortgage, the same principle would apply where elements existed in a chattel mortgage situation.