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TRAILER OR SEMI-TRAILER—WEIGHT IN EXCESS OF 4000 POUNDS—REPOSSESSED UNDER TERMS OF CHATTEL MORTGAGE—MORTGAGE EXECUTED PRIOR TO SEPTEMBER 1, 1951—CLERK OF COURTS AUTHORIZED TO ISSUE CERTIFICATE OF TITLE—APPLICANT MUST PRESENT AFFIDAVIT OF PERSON OR HIS AGENT TO WHOM POSSESSION PASSED SETTING FORTH FACTS ENTITLING HIM TO OWNERSHIP—COPY OF INSTRUMENT UPON WHICH CLAIM IS FOUNDED—SECTION 6290-10 G. C.

SYLLABUS:

A clerk of courts is authorized by Section 6290-10, General Code, to issue a certificate of title for a trailer or semi-trailer weighing in excess of four thousand (4000) pounds, which has been repossessed under the terms of a chattel mortgage, executed prior to September 1, 1951, upon presentation by the applicant of an affidavit of the person, or his agent, to whom possession has passed, setting forth the facts entitling him to ownership and possession, together with a copy of the "instrument" (the chattel mortgage) upon which such claim is founded.

Columbus, Ohio, September 29, 1952

Hon. Frank T. Cullitan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have before me your request for my opinion which presents the following question: Where, subsequent to September 1, 1951, a trailer or semi-trailer, whose weight exceeds four thousand pounds, is repossessed by the mortgagee under the terms of a chattel mortgage executed and recorded prior to the amendment of Section 6290-2a, General Code, effective September 1, 1951, must such mortgagee, in applying for a certificate of title, produce to the clerk of courts a journal entry or court order showing him to be entitled to the possession and ownership of such trailer or semi-trailer in order to obtain such certificate of title?

Prior to September 1, 1951 certificates of title were not required for any trailer or semi-trailer, except such as were designed "for human habitation." Effective September 1, 1951, Section 6290-2a, General Code, was amended to include within the definition of a "motor vehicle," as that

term is employed in Sections 6290-2 to 6296 of the General Code, those "trailers and semi-trailers whose weight exceeds four thousand pounds." One of the results of such amendment was to extend the application of the Certificate of Title Law, Sections 6290-2 to 6290-17, General Code, to such trailers and semi-trailers.

Prior to September 1, 1951, the execution and filing of chattel mortgages on such trailers and semi-trailers was governed by the ordinary chattel mortgage statutes, Sections 8560 to 8572, General Code. By virtue of such amendment, the execution and filing of chattel mortgages on such trailers and semi-trailers is now governed by the provisions of Section 6290-9, General Code, which requires a notation thereof on a certificate of title of all "motor vehicles." The latter section, however, is only applicable to such chattel mortgages as are "made hereafter." It is clear, therefore, that the legal status of a chattel mortgage properly executed and recorded prior to September 1, 1951, in conformity with Sections 8560 to 8572, General Code, has not been affected by the amendment of Section 6290-2a, and that any rights to ownership and possession created by such instrument are still in full force and effect.

It has been universally recognized in Ohio that under a chattel mortgage, the mortgagee or general owner of the mortgaged property is entitled to the possession of it unless, by the terms of the mortgage, possession is reserved to the mortgagor; and the mortgagee, after condition broken, is entitled to the possession subject to a liability to account for the surplus of its value after the satisfaction of his own claim. 7 Ohio Jurisprudence, 343.

While the General Assembly, by the enactment of Section 8565-3, General Code, effective September 16, 1949, limited in certain respects the right of the mortgagee to collect any deficiency from the mortgagor without a court proceeding to foreclose the mortgage, it is clear that this statute recognized the long established right of such mortgagee to repossession upon condition broken without court action if the terms of the instrument do not forbid the same.

Thus, it would appear that no court order would be necessary in order to vest in the mortgagee both ownership and right to possession of such trailer or semi-trailer. The chattel mortgage, properly executed and filed in conformity to Sections 8560 to 8572 would be the instrument evidencing such ownership and right to possession.

Having such ownership and right to possession, the mortgagee is now confronted with the problem of securing a certificate of title to the trailer or semi-trailer since he may not now transfer title or execute a chattel mortgage or other lien until such certificate of title has been secured.

His problem, in essence, is similar to that which confronted an automobile owner at the time of the passage of the original Certificate of Title Law in 1938, and that which confronted the owner of a "house trailer" when such "house trailers" were first placed under the Certificate of Title Law in 1943.

As a basic proposition, the procedure for such "transition" is provided by Section 6290-5, General Code, which reads in part:

" * * * If a certificate of title has not previously been issued for such motor vehicle * * * in this state said application, unless otherwise provided for in this chapter, shall be accompanied by a manufacturer's or importer's certificate as provided for in this chapter; or by a proper bill of sale or sworn statement of ownership, the originals of which have been duly filed with the clerk of courts, or a duly certified copy thereof; * * *. The clerk of courts shall retain the evidence of title presented by the applicant and on which the certificate of title is issued. The clerk of courts shall use reasonable diligence in ascertaining whether or not the facts in said application are true by checking the application and documents accompanying same with the records of motor vehicles * * * in his office; and if satisfied that the applicant is the owner of such motor vehicle * * * and that the application is in proper form, the clerk of courts shall issue a certificate of title over his signature and sealed with his seal, but not otherwise. * * *"

The procedure for obtaining a certificate of title in case of repossession upon default in performance of the terms of a chattel mortgage is provided by Section 6290-10, General Code, which reads in part:

"In the event * * * repossession is had upon default in performance of the terms of a chattel mortgage, * * * the clerk of courts of the county in which the last certificate of title to said motor vehicle was issued, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof to the said clerk of courts of ownership and right of possession to such motor vehicle, and upon payment of the fee prescribed in this chapter, and presentation of an application for certificate of title, may issue to the applicant a certificate of title thereto. Only an affidavit by the person, or agent of the person to whom possession of such motor vehicle has so passed, setting

forth facts entitling him to such possession and ownership, together with a copy of the journal entry, court order or instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession. * * *"

While it would appear that the provisions of Section 6290-10 are applicable to the facts herein set forth to the exclusion of Section 6290-5, it should be observed that the basic requirements of each are substantially the same. Where no certificate of title has previously been issued, each requires an affidavit by the applicant showing proof of ownership and right of possession. The problem involved in your request apparently arises from the requirement of Section 6290-10 that such affidavit be accompanied by "a copy of the journal entry, court order or instrument upon which such claim of possession and ownership is founded." It would seem reasonable to assume that a copy of a journal entry or court order would only be required where the same would be necessary to establish the rights of ownership and possession in the applicant. As heretofore pointed out, however, such court order is not necessary to establish such rights of ownership and possession in the case of a chattel mortgage. The mortgage is itself the "instrument" by which such right of ownership and possession is established. It would follow, therefore, that under the provisions of Section 6290-10, an affidavit by the applicant for a certificate of title accompanied by the "instrument" evidencing such right of ownership and possession, i.e., the chattel mortgage, may be considered by the clerk of courts as satisfactory proof of ownership and right of possession.

This same conclusion was reached by one of my predecessors in interpreting Section 6290-10, General Code. While holding that under the provisions of this section a garage repairman could not assert title to a motor vehicle based upon a storage and repair lien and obtain a certificate of title without an order of court, the then Attorney General said, at page 860:

"* * * It seems clear that in referring to 'the instrument upon which such claim of possession and ownership is founded,' reference is made to 'a chattel mortgage, trust receipt, conditional sales contract or other like agreement.' In other words, it appears that unless the claim of possession and ownership is based on such an instrument, court action is necessary. * * *"

In specific answer to your question, it is my opinion that a clerk of

courts is authorized by Section 6290-10, General Code, to issue a certificate of title for a trailer or semi-trailer weighing in excess of four thousand (4000) pounds, which has been repossessed under the terms of a chattel mortgage, executed prior to September 1, 1951, upon presentation by the applicant of an affidavit of the person, or his agent, to whom possession has passed, setting forth the facts entitling him to ownership and possession, together with a copy of the "instrument" (the chattel mortgage) upon which such claim is founded.

Respectfully,

C. WILLIAM O'NEILL
Attorney General