

Washington Law Review

Volume 9 | Number 3

10-1-1934

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Recommended Citation

William F. Starr, *Conditional Sales and Chattel Mortgages*, 9 Wash. L. Rev. 143 (1934).

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CONDITIONAL SALES AND CHATTEL MORTGAGES

WILLIAM F STARR*

The contract of conditional sale and the chattel mortgage perform a similar economic function. They are the principal devices by which the obligor may enjoy the use and possession of a chattel in which a security interest is held by another. Either may serve to secure the payment to the vendor of the purchase money, while in Washington the chattel mortgage only may be employed to secure the repayment of a loan or the performance of other obligations.

They arose out of different legal concepts, developed along different lines, gave rise to different rights and remedies, but in the form of the two Uniform Acts have achieved a striking similarity

It is the object of this article to relate the history of these security instruments in the State of Washington, to show the legal consequences of a choice between them, to point out a few of the changes which would result from the adoption of either Uniform Act in this State, and finally to offer for discussion suggestions for a Composite Act covering the entire field of security in personal property

THEORY AND FUNCTION

The sole function of a conditional sale contract is to enable the vendor to deliver to the vendee possession of a chattel and retain the legal title for his protection until the purchase price has been paid. Under a conditional sale, as distinguished from a sale upon condition, in case the vendee fails to perform as agreed, the vendor has a choice between asserting his right to enforce the affirmative obligation of the vendee to pay the purchase price, which converts it into an outright sale and vests legal title in the vendee or his assignee free from any lien for the purchase money, or forfeiting not only the vendee's right to acquire title but also any benefit to which the vendee otherwise would be entitled by virtue of the payments already made. If the instrument gives the vendor this choice, it will be regarded as a conditional sale, although the parties may have termed it a lease. But a lease with a mere option to purchase is not a conditional sale because the vendor cannot elect to hold the lessee for the purchase price.¹ However, if the so-called rent

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¹*Bank of California v. Clear Lake Lumber Co.*, 146 Wash. 543, 264 Pac. 705 (1928). Likewise a bill of sale cannot be shown to be a mortgage if there is no enforceable debt obligation. *Hays v. Bashar* 108 Wash. 491, 185 Pac. 814 (1919) *Petridge v. Osborne*, 120 Wash. 21, 206 Pac. 839 (1922).

covers all of the purchase price except a nominal sum, such as \$1.00, then it is a true conditional sale for the lessor-vendor has an enforceable claim for substantially all of the purchase price, and it is not essential that the vendor be given the right, immediately upon default, to accelerate the obligation and claim the entire purchase price at once. It is sufficient if he have an enforceable claim under the contract for the entire purchase price at some time, provided he also have the alternative to declare a forfeiture.² It is to be observed that the only purpose to which the conditional vendor may put his retained title, so far as the vendee is concerned, is to repossess the chattel on default and forfeit the contract, the title passes if he sues for the purchase price.

The cases abound with illustrations of the unhappy use of the word *rescind* as though it were synonymous with *forfeiture*.³ Contracts are rescinded because of fraud, accident, mistake, or undue delay, ordinarily this is allowed only when the parties can be put substantially in *statu quo* and the consideration must be returned.⁴ In one sense this results in a forfeiture, but it is a forfeiture only of the rights to which by the terms of the contract the other party became entitled when the contract was made. But as used in connection with conditional sale contracts, the forfeiture includes the payments which have been made. The misconception which may arise from the lack of precision in the use of these words is illustrated in a recent case. A conditional sale of realty provided for a forfeiture but omitted the usual provision that in that event the vendor should retain as liquidated damages the payments already made. The real contention of the vendee, although neither he nor the court so expressed it, would appear to have been that this contract gave the vendor merely the option to *rescind* on default by the vendee, but not to retain the payments. The court very properly held that the word *forfeiture* implied the retention of the payments already made and that it was not necessary specifically to provide for it.⁵

In Washington judicial decision restricts the conditional sale contract to the use of the actual vendor in the economic sense. It

Quinn v. Parke & Lacey Machinery Co., 5 Wash. 276, 31 Pac. 866 (1892) *Kidder v. Wittler Corbin Mach. Co.*, 38 Wash. 179, 80 Pac. 301 (1905). For a case distinguishing a consignment from a conditional sale, see 125 Wash. 301, 216 Pac. 14 (1923).

² *Grenelle v. Boulers*, 48 Wash. 310, 93 Pac. 421 (1908)
Bouvier's Dictionary.

³ *Grays Harbor Nat'l Bank of Aberdeen v. Jacobs & Hart et al.*, 169 Wash. 674, 14 Pac. (2d) 963 (1932) See also *Lundberg v. Kitsap Bank*, 79 Wash. 75, 139 Pac. 769 (1914).

is not adapted to the use of the financier or lender of money. He cannot use the device to avoid the usury laws, nor to obtain the extraordinary remedies of the conditional vendor. And it is immaterial whether he takes title from the borrower and executes a contract of conditional sale back to him,⁶ or whether he intercepts the passing of title to the vendee, takes title from the economic vendor, and himself executes the contract of conditional sale.⁷ The conditional vendor must be one who actually made the sale and assumed the risks incident to the business of selling goods. Where the court finds that it is merely a "security transaction,"⁸ or a method of securing a money loan,⁹ it is not enforceable as a conditional sale contract, and whether it may be enforced as a chattel mortgage depends upon questions of form, or filing, and of the parties who are contesting its validity. However, the court drew a sound distinction in a case in which the receiver of the economic vendor sought to contest the contracts as being in fraud of the creditors of the economic vendor when the latter had in fact been paid in full, and held that if the contracts were invalid only the purchasers or their creditors could legally complain.¹⁰

It is not intended to suggest that the conditional sale is restricted to the use of the regular merchant, nor that one may not buy an article merely for the purpose of selling it on conditional sale, nor even that one may not sell under such a contract an article he does not own and thereafter purchase it to fulfill his contract, but merely that the lender of money cannot step into the picture when the seller has found a purchaser, take title from the seller and execute the contract as nominal vendor. He may, however, as assignee of the vendor exercise all the rights reserved under the contract,¹¹

⁶ *Seaboard Davry Credit Corp. v. Paulson*, 174 Wash. 594, 25 Pac. (2d) 974 (1933). *Olson v. Legal Adj. Bureau*, 142 Wash. 446, 253 Pac. 643 (1927). But see *Dennis v. Montesano Bank*, 38 Wash. 435, 80 Pac. 764 (1905).

⁷ *Lyon v. Nourse*, 104 Wash. 309, 176 Pac. 359 (1918). *Mahon v. Nelson*, 148 Wash. 110, 268 Pac. 144 (1928).

⁸ *Kelley v. Price*, 148 Wash. 542, 269 Pac. 842 (1928).

⁹ *Lahn & Simmons v. Matzen Woolen Mills*, 147 Wash. 560, 266 Pac. 697 (1928), where the court also found it met its test of a chattel mortgage.

¹⁰ *Lloyd, Receiver, v. MacCallum-Donahoe Co.*, 127 Wash. 180, 21 Pac. 849 (1923).

¹¹ *Commercial Credit Co. v. Nat'l Cr Co.*, 143 Wash. 253, 255 Pac. 104 (1927). But the assignee can exercise only the rights of the assignor and where F advanced money to the vendee to meet payments, under an indefinite promise of some security, and subsequently paid the vendor the balance due and took an assignment of the contract, a tender of the amount of such balance, by the receiver of the vendee, vested title in the vendee free of the assignee's claim for the money advanced to the vendee to meet prior payments. *Duarte v. Munnick*, 85 Wash. 539, 148 Pac. 600 (1915).

but since the contract is not negotiable his position is not so advantageous as it would be were he allowed to enter it as vendor.

The chattel mortgage is adapted to the purposes of the dealer in money. From the mere act of advancing the money at the request of the vendee the law implies an unconditional promise by the vendee to repay him, unless the contract shows that a conditional obligation only was intended, and the mortgage gives him a security interest in the chattel. The mortgagor-vendee is bound to pay any deficiency after the application of the mortgaged property to the liquidation of this unconditional obligation, while he is assured, at least theoretically, of receiving the benefit of his investment if upon foreclosure more than the unpaid purchase price is realized.

Contrasted with the function of the chattel mortgage to secure an unconditional obligation, the conditional sale contract, so far as it is a security device, secures performance of a conditional obligation. If the vendor is willing to abandon his security, he may, indeed, treat it as an ordinary sale on general credit, and sue for the full balance of the purchase price. But so long as the vendor retains a security interest in the subject matter, the practical effect of the contract is to give the vendee an option to buy, for any action by the vendor to require the vendee to pay passes the title free of any lien.

Since the conditional sale and the mortgage are both a matter of contract, on the principle of freedom of contract it might seem that a vendor should be able to contract for the benefits of both types of security. The reason why the court has not allowed him to do so seems worthy of consideration. In one case where it had held that an action to collect the purchase price had resulted in vesting title in the vendee, by way of explanation the court said that it was inconceivable that the vendor might have an enforceable debt obligation against the vendee for the purchase money and at the same time retain an absolute title.¹²

It is believed that this formalistic logic is neither the best explanation of, nor the true reason for, the court's decision. In the first place, if *absolute* title means anything more than *legal* title, the vendor does not retain it, certainly no one could be said to have the absolute property in a chattel where another has the right to acquire it by acts within his own control. Chancellor Kent wrote, "Absolute property denotes a full and complete title or dominion over it, but qualified property in chattels is an exception to the

¹² *Eilers Music House v. Douglass*, 90 Wash. 683, 156 Pac. 937, L. R. A. 1916E, 613 (1916).

general right, and means a temporary or special interest, liable to be totally divested on the happening of some particular event."¹³ The vendor retains the right to forfeit the interest of the vendee in case of default, but his title is defeasible by proper performance of the vendee.

In the second place, on the basis of pure logic it is submitted that the occasion for the passing of title to the vendee might fully as well be the collection of the purchase price, as the assertion of the right to collect. It would not be illogical to give the vendor an additional election to sell the chattel for the account of the vendee and collect the deficiency

It would seem that in reaching the result the court is actuated by social or economic principles rather than logical restraints. The court feels that the vendor, who is believed to occupy a superior economic position, would become oppressive if permitted to stipulate for too many remedies. It has balanced the conditional vendor's drastic remedy of forfeiture against what in practice amounts to the permissive character of the vendee's obligation, while against the unconditional obligation of the mortgagee is balanced his greater assurance that he will receive the benefit of his investment.

The Uniform Conditional Sales Act applies a chattel mortgage theory to the conditional sale. It gives the vendor the right in any case to sell the chattel and collect the deficiency. If fifty per cent of the purchase price has been paid, the statute *requires* a sale, and if less than that has been paid the vendee may require the vendor to sell. And in case of sale, the vendor must account to the vendee for any surplus over costs and the balance of the purchase price.¹⁴ The Commissioners found as a practical matter that if less than fifty per cent had been paid, depreciation generally amounted to more than would be realized upon forced sale.

CONSTRUCTION AND INTERPRETATION

The variety of provisions which have been hopefully inserted in these instruments, and particularly in the contract of conditional sale, has given rise to much litigation. Some of these provisions have been enforced, others have been held merely invalid, and still others have been held to have automatically converted the purported conditional sale into a chattel mortgage.

An oral conditional sale contract is valid as between the parties,

¹³ Kent Com. 11th Ed., Vol. II, Lecture XXXV p. 427.

¹⁴ Sec. 19, 20. The Uniform Act has been adopted in Alaska, Arizona, Delaware, New Jersey, New York, Pennsylvania, South Dakota, West Virginia and Wisconsin.

and if a written contract does not contain all the essential provisions, these may be shown by parol.¹⁵ However, to constitute constructive notice, one must be able to determine the whole matter from the inspection of the records alone.¹⁶ Where the vendor's salesman signed a contract which provided that it was not to be binding until approved by the vendor, and such approval was not indicated upon the instrument, it was held that the filing of the instrument did not constitute constructive notice.¹⁷ Mr. Justice Tolman, concurring specially, argued that logically the requirements as to signature in order to give constructive notice should be less stringent than the requirements to determine whether the contract was binding between the parties. And it would seem that this contract at least would have put an inquirer on notice that such a contract might exist, particularly if the vendee were in possession of the chattel. But the Washington Court appears to have reversed the situation and to have required greater precision in the matter of signature to make filing constructive notice, than to make the contract binding as between the parties.¹⁸ Whatever the logic of the case, one cannot help but have considerable sympathy with the rule the court has followed, for constructive notice so frequently does not amount to actual notice until after a loss has occurred and an attempt is made to allocate it. If a party is to be given this extraordinary protection of constructive notice to offset the deceptive situation arising where possession is divorced

¹⁵ *Gaffney v. O'Leary*, 155 Wash. 171, 233 Pac. 1091 (1930). In *Worley v. Met. Motor Car Co.*, 72 Wash. 243, 130 Pac. 107 (1913), the court said that if a contract is not "signed" within ten days it is not a conditional sale, relying on *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108 (1910) but that case merely dealt with a contract not filed within ten days and said nothing about when it was signed. Of course, since it could not well be filed without some signature, if signed more than ten days after delivery it could not operate as constructive notice.

¹⁶ *Rychen v. Tacoma Farmers Creamery*, 127 Wash. 359, 220 Pac. 780 (1923).

¹⁷ *State ex rel Yates Am. Mach. Co. v. Sup'r Ct.*, 147 Wash. 294, 266 Pac. 134 (1928).

¹⁸ In *Seymour v. Landon*, 128 Wash. 682, 224 Pac. 3 (1924), a contract was held not valid as notice where it was signed, Vendor, by _____, with the blank not filled. In *Kennery v. No. Western Junk Co.*, 108 Wash. 656, 185 Pac. 636 (1919) it was held that the vendor could not forfeit the contract and recover from the transferee of the vendee, where it was signed, Times Square Garage, by _____, with the blank not filled. Holcomb, J., dissenting. But where the vendor took possession before any creditor obtained a specific lien, and before the appointment of a trustee in bankruptcy, it was held valid, although the vendor had not signed the contract at all. *Jennings v. Schwartz*, 86 Wash. 202, 149 Pac. 947 (1915), reversing 82 Wash. 209, 144 Pac. 39 (1914). See *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 Pac. 818 (1919) re requirement to bind the parties.

from title, perhaps it is not asking too much to require the record to disclose the precise facts in the case.

Where a chattel mortgage was not filed within the ten day period after its execution, but was subsequently re-dated and again acknowledged and filed, it was held invalid as notice because it was not again signed and because it did not contain a new affidavit of good faith.¹⁹

Where a chattel mortgage was not filed within the ten-day period state that the vendor may retain the payments already made, this may be implied, if one may reason by analogy to the land contracts.²⁰ A provision for retention of payments upon forfeiture is not a provision for a penalty, but for liquidated damages, for the longer the vendor is kept out of possession the greater is his actual damage.²¹ If payments are accepted late, a notice to the vendee that thereafter payments must be made on the due date or forfeiture will be declared will restore the strict rule as to future payments, and the parties may contract that no such notice shall be required and that acceptance of late payments shall not constitute a waiver of the right of forfeiture for delay in subsequent payments.²² Where the contract provides for the taking of negotiable notes secured by a mortgage on the subject of the sale, the giving of such notes and mortgage is a species of payment, and until they are given the vendor may declare a forfeiture for default.²³ The contract may validly provide that the vendee shall have no right to stipulate for the application of payments, and that the vendor may apply payments as he sees fit to any other indebtedness of the vendee to the vendor, retaining title to the chattel until all such indebtedness is paid.²⁴

A conditional sale contract is not negotiable, and cannot be made negotiable even by express provision, thus a contract which provided that the assignee of the vendor should take free of any counterclaim or recoupment was held not to protect the assignee from the defense of, and penalty for, usury²⁵ And where the vendee had signed a contract in triplicate, but before taking possession did not see to the cancellation of all copies of the contract, the

¹⁹ *Robinson et al. v. Whittier* 112 Wash. 6, 191 Pac. 763 (1920).

²⁰ Note 5, *supra*.

²¹ *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023 (1912).

²² *Lundberg v. Switzer* 146 Wash. 416, 263 Pac. 178 (1928). See also *Drumheller v. Bird*, 170 Wash. 14, 15 Pac. (2d) 260 (1932).

²³ *Edison Gen'l Elec. Co. v. Walters*, 10 Wash. 14, 38 Pac. 752 (1894).

²⁴ *Union Machinery v. Thompson*, 98 Wash. 119, 167 Pac. 95 (1917).

²⁵ *Motor Con. Co. v. Van Der Volgen*, 162 Wash. 449, 298 Pac. 705 (1931).
Automotive Collateral Co. v. Beckman, 152 Wash. 534, 278 Pac. 417 (1929).

of the car turned in another car and a ring in full payment, but purchaser of the contract from the vendor was held subject to the defense of payment.²⁶ Where the contract provided that all payments were to be made at a certain place, but did not mention a collateral agreement whereby the vendee was to be allowed to pay in advertising, the vendee was permitted to set up this collateral agreement against the vendor's assignee.²⁷ But where the contract read that payment was to be "spot cash" this was construed as an express stipulation against any offset at the time the contract was made.²⁸ Thus, although a conditional sale contract cannot be made fully negotiable by contract, it is possible for the vendee to stipulate for the existence of a state of facts at the time the contract is made, and if it appeared to have been made to induce an assignee to take the contract, presumably the vendee would be estopped from denying it.

A further distinction has been made between such contracts and commercial paper. The vendor was accustomed to add to his ordinary sale price the amount of the discount he was required to give to his assignee. The contract embodied within it a promissory note for the full amount. When the assignee sued the vendor on his guaranty, the latter set up the defense that the agreement was usurious. The court found that when the note and contract were embodied in one instrument it was not commercial paper, but a sale plus a guaranty.²⁹ It would perhaps be difficult to see any validity in the defense in any case.

Certain provisions of the contract may be valid and enforceable

²⁶ *Natl Mtg. Co. v. King*, 152 Wash. 614, 278 Pac. 697 (1929).

²⁷ *Doub v. Rawson*, 142 Wash. 190, 252 Pac. 920 (1927). But cf. *Long v. McEvoy*, 133 Wash. 472, 233 Pac. 930, 236 Pac. 806 (1925), where a party signed conditional sale as vendee believing it was a bill of sale of his old car, and was held liable to the assignee of the contract on the basis of comparative innocence.

²⁸ *Nat. Bank of Tacoma v. Puget Snd. Lbr Co.*, 104 Wash. 363, 176 Pac. 553 (1918).

²⁹ *Martin v. McAvoy*, 130 Wash. 641, 228 Pac. 694 (1924). As to the limitations of a guaranty and also a further indication of non-negotiability a recent case has held that a guaranty running to the vendor to secure performance by the vendee, is limited by the amount actually owing to the vendor. The original vendee sold his interest and induced the vendor to execute a new contract of conditional sale to the new vendee, himself signing as guarantor. The vendor with the consent of the guarantor then "discounted" the contract with the assignee, though perhaps it should have been called a pledge, for a portion of its value, but under an existing arrangement the assignee was to hold the balance of all contracts as security for an antecedent obligation. The contract assigned thus covered a secret equity of ownership of the guarantor, and the guarantor really owed the vendor nothing. The guarantor tendered the assignee an amount sufficient to cover his actual advances plus costs and a reasonable profit, and the court held that the assignee could not

even after the vendor has declared a forfeiture, notwithstanding the argument that the forfeiture extinguishes all rights arising out of the contract. The court has taken the very reasonable position that while the forfeiture extinguishes the obligation to pay the purchase price, it does not necessarily extinguish certain severable provisions looking to the situation after forfeiture. Thus the court has held the vendee liable on an agreement to pay attorney fees in an action to repossess;³⁰ or if he agreed to return the property in case of forfeiture, he is liable for the cost;³¹ and an agreement to pay freight on shipment both ways is an independent promise and may be enforced after forfeiture.³²

In view of these decisions the writer believes that lawyers might well consider what effect might be given to a provision that the vendee agrees, in case of forfeiture, to pay a reasonable rental for the property from the date of forfeiture, or after a reasonable time in which to return the property, until the actual physical and legal redelivery of the property to the vendor, whether the vendee actually uses the property or not. Such a provision would be of more value in case of a conditional sale of realty, but in the case of a large truck which might be at a considerable distance at the time of forfeiture, it might be important.

Where goods are sold on conditional sale to be put in the vendee's general stock of merchandise to be sold, the retained title is void as to creditors unless the contract provides for an accounting of the proceeds.³³ The same result is reached in the case of a chattel mortgage, and taking possession prior to bankruptcy does not perfect the vendor's claim.³⁴ Even if such mortgage forbids sale without consent of the mortgagee, it is invalid as to creditors unless it provides for a method of disposal and an accounting, and

hold the guarantor for more than the tender. *C. I. T Corp v. Stram*, Wash., 34 Pac. (2d) 440 (1934). See also re guaranty, *Sterling v. Loudenback*, 155 Wash. 36, 283 Pac. 476 (1929).

³⁰ *Motor Con. Co. v. Van Der Volgen*, *supra* note 25, *Seaboard Sec. Co. v. Berg*, 170 Wash. 681, 17 Pac. (2d) 646 (1932).

³¹ Note 1, *supra*.

³² *Union Mach. & Supply v. McCush*, 104 Wash. 62, 175 Pac. 559 (1918).

³³ *Schultz, Trustee in Bankruptcy, v. Wesco Oil Co.*, 149 Wash. 21, 270 Pac. 130 (1928) *Eisenberg v. Nichols*, 22 Wash. 70, 79 A. S. R. 917 (1900).

³⁴ *Warner v. Hibler*, 146 Wash. 651, 264 Pac. 423 (1928) *Tahoma Furnace Co. v. Schannon*, 138 Wash. 90, 244 Pac. 271 (1926). *Wineburgh v. Schaer*, 2 W. T. 328 (1884), which relies on *Robinson v. Elliott*, 22 Wall. 513. A chattel mortgage on a floating stock of merchandise has also been held void for indefiniteness as against attaching creditors, where it provided that the proceeds of all sales were to be held for the sole benefit of the mortgagee, either by paying the debt or keeping up or adding to the stock of goods. *Byrd v. Forbes*, 3 W. T. 318 (1887).

a judgment in a foreclosure action is not *res adjudicata* as to attaching creditors who were not parties to that action.³⁵

The question of when a lease will be construed as a conditional sale has been already considered.³⁶

A conditional sale contract which provides that on default the vendor can resell the property and hold the vendee for the deficiency, is a chattel mortgage,³⁷ and is void as to third parties unless it is executed and filed as such.³⁸ And even where the contract provided that *unless* the law in regard to conditional sales provided otherwise, the vendor could sell and hold the vendee for a deficiency, it was held to be a chattel mortgage, restricting the vendor to an action of foreclosure rather than replevin, although no third parties were involved and the question of holding the vendee for the deficiency had not arisen.³⁹ Mr. Justice Beals dissented on the grounds that the parties intended a conditional sale and thought the court should merely hold the provision for deficiency judgment invalid. In a later case,⁴⁰ involving a contract which provided that the vendor could pursue all remedies and failing to collect could then take the chattel back, the vendor having treated it as a conditional sale and repossessed, the court held the other provision invalid and the contract stood as a conditional sale. And in an earlier case where the vendee was to act as agent of the vendor to sell the goods, but the vendor reserved the right to take the goods back and hold the vendee for the deficiency, the vendor having repossessed, he was held to have made an election and was refused recovery for the balance in an action against the vendee and his guarantor.⁴¹ In still another case where the contract provided that on repossession the entire balance would become due, the vendor's assignee was allowed to repossess the car and avoid the sale, instead of confirming it and making the obligation for purchase money a debt.⁴²

If the provision for a deficiency judgment is a valid conditional

³⁵ *Spokane Merchants Ass'n v. Musselman*, 134 Wash. 116, 234 Pac. 1033 (1925).

³⁶ Note 2, *supra*.

³⁷ *Gervasi et al. v. Seattle & Rainier Valley Ry. Co.*, 148 Wash. 635, 269 Pac. 1050 (1928) *Roberts v. Speck*, 170 Wash. 324, 16 Pac. (2d) 463 (1932).

³⁸ *West Am. Finance Co. v. Finstad*, 146 Wash. 315, 262 Pac. 636 (1928) *Lahn & Simmons v. Matzen Woolen Mills*, note 9, *supra*.

³⁹ *Raymond Bros. Import Fertilizer Co. v. Thomas*, 159 Wash. 550, 294 Pac. 219 (1931).

⁴⁰ *Allis-Chalmers Mfg. Co. v. Hedlund Lbr & Mfg. Co.*, 164 Wash. 296, 2 Pac. (2) 708 (1931).

⁴¹ *Jordan v. Peek*, 103 Wash. 94, 173 Pac. 726 (1918).

⁴² *Commercial Credit Co. v. Nat. Cr. Co.*, note 11, *supra*.

sale stipulation by the law of the state where the contract is made it is similarly valid in Washington.⁴³

Thus the court would seem to have entertained two views as to the effect of a deficiency clause in its operations as between the parties, although it would probably never be allowed to operate as constructive notice unless recorded as a chattel mortgage. One view is that such clause automatically converts the contract into a chattel mortgage, even though the vendor's first effort is to assert a remedy incident to a valid conditional sale. The other is that such deficiency clause is invalid because repugnant. Thus far the problem has generally arisen where the vendor is asserting, or has previously asserted, a right to which he is entitled only in case it is a conditional sale. Since the formalities of executing and recording a chattel mortgage are more involved, the situation is not apt to arise where the creditors of the vendee are endeavoring to circumvent such an instrument because it was recorded as a chattel mortgage and not as a conditional sale. But since, because of the harshness of forfeitures, conditional sales are not favored in the law, it would probably be construed as a mortgage. As against a party with notice it has been held valid as a chattel mortgage.⁴⁴

A distinction has been drawn between a conditional sale and a sale and pledge. The vendor deposited roubles in escrow and took the vendee's note for the unpaid balance. The contract provided that the vendor could take back the roubles but contained no forfeiture clause. The court, apparently doubting the evidence of withdrawal of the roubles, held that in any case, since there was no forfeiture clause, it was a pledge and not a conditional sale, and allowed recovery on the note.⁴⁵

The subject matter of a chattel mortgage must be tangible property. An instrument in the form of a chattel mortgage covered the present and future earnings of a water company, but permitted the company to use half of its collections for specified purposes of its own. At the first hearing the court was disposed to find it invalid as against garnishing creditors because it lacked the required affidavit of good faith, but on re-hearing it found it to be an assignment and not a mortgage, but the garnishing creditors still prevailed for lack of evidence that the garnishment took over

⁴³ *Campbell v. Frets*, 167 Wash. 576, 9 Pac. (2d) 1083 (1932). The contract was made in North Dakota.

⁴⁴ *Morgan Organ Co. v. Armour*, 173 Wash. 462, 23 Pac. (2d) 887 (1933).

⁴⁵ *Lew v. Colby*, 137 Wash. 476, 243 Pac. 18 (1926).

half of the earnings.⁴⁶ The Uniform Chattel Mortgage Act provides for a chattel mortgage upon book accounts.⁴⁷

As to the subject matter of a conditional sale, an interesting case involved the following facts. Under an unrecorded contract, S delivered shingle bolts to B who was to pay for them at a price per thousand shingles, the price varying with the market. B's creditors attached the bolts. The court found that B impliedly agreed to manufacture the shingles, and that until they were manufactured there was nothing in existence to be the subject matter of the sale, that title of the bolts did not pass, and that there was no conditional sale to require recording. The dissenting opinion in the case argued that this was a sale of shingle bolts with title reserved until the value was determined, and that the majority holding avoided the object of the recording statute.⁴⁸

A consignment has been distinguished from a conditional sale, on the grounds that the consignee was not obligated to buy.⁴⁹ And where an owner places title in an agent to facilitate making repairs and selling the car, no recordation is required to protect his interest against a judgment creditor of the agent, and a judgment creditor buying on execution sale is not a bona fide purchaser for value.^{50*}

⁴⁶ *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128 (1917). On first hearing: 93 Wash. 595, 161 Pac. 489.

⁴⁷ Sec. 2. So far this Act has not been adopted by any state.

⁴⁸ *Peterson v. Woolery*, 9 Wash. 390 (1894)

⁴⁹ *Eilers Music House v. Fairbanks*, 80 Wash. 379, 114 Pac. 885 (1914).

⁵⁰ *Ransom v. Wickstrom*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A,

*To be continued.