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Recording Chattel Mortgages on Fixtures

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COMMENTS

RECORDING CHATTEL MORTGAGES ON FIXTURES

Chattels that usually would become fixtures when annexed to realty are commonly sold under some type of installment plan necessitating a conditional sales contract or a chattel mortgage to secure an unpaid part of the purchase price.

Such an instrument will, as between buyer and seller, preserve the chattel character of the annexed item as the instrument is either expressly or by necessary implication an agreement that the item shall remain personal property.[1] As against antecedent encumbrancers of the realty such an agreement will be given effect if no material injury to the freehold will result from removal of the chattel.[2] A more troublesome problem that sellers face is in protecting their lien against the claims of subsequent purchasers or encumbrancers of the real estate. Where the grantee of the realty takes *with notice,* actual or constructive, of the rights of the seller of the chattel, these rights may be asserted against him.[3] It is generally felt it would be inequitable to allow a grantee who had notice of the lien upon the chattel to destroy it by purchasing the land. Correlatively, where a purchaser for value of the

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[1]Provident Mutual Ins. Co. v. Smith, 175 Wash. 356, 27 P. (2d) 580 (1933); Boeringa v. Perry, 96 Wash. 57, 164 Pac. 773 (1917); German Savings & Loan Society v. Weber, 16 Wash. 95, 47 Pac. 224 (1896); Brinkley v. Forkner, 117 Ind. 176, 19 N. E. 753 (1889); Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56 (1889); Ford v. Cobb, 20 N. Y. 344 (1859); Henkle v. Dillon, 15 Ore. 610, 17 Pac. 148 (1888); 2 TIFFANY, REAL PROPERTY (3d ed, 1939) § 612. Even buildings annexed to realty by concrete and wooden piers have been held removable. Schmidt v. Dubois, 201 Wis. 631, 231 N. W. 181 (1930).

This rule is subject only to the limitation that the chattel cannot completely lose its identity in its annexation. BROWN, PERSONAL PROPERTY (1936) § 153, p. 680.

[2]In the leading case on this doctrine, Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 AM. STAT. REP. 889 (1888), the court based its decision upon the ground that if the chattel can be removed without material injury to the freehold, the antecedent encumbrancer of the land loses none of the security for which he originally bargained. *Accord:* Holt v. Henley, 232 U. S. 637 (1914); Provident Mutual Ins. Co. v. Smith, 175 Wash. 356, 27 P. (2d) 580 (1933); Ballard v. Alaska Theater Co., 93 Wash. 655, 161 Pac. 478(1916); German Savings & Loan Society v. Weber, 16 Wash. 95, 47 Pac. 224 (1896). For a case where the court felt the removal would diminish the real estate mortgagee's security, see Comly v. Lehmann, 218 Iowa 644, 253 N. W. 501 (1934).

An after-acquired property clause in the mortgage will not include the subsequently annexed chattel. Wood v. Holly Mfg. Co., 100 Ala. 326, 13 So. 948 (1893). *Contra:* Clary v. Owen, 15 Gray 522 (Mass. 1860); Pa. Choc. Co. v. Hershey Bros., 316 Pa. 292, 175 Atl. 694 (1934).

[3] Sword v. Low, 122 Ill. 487, 13 N. E. 826 (1887); Harvard Financial Corp. v. Greenblatt Const. Co., Inc., 261 N. Y. 169, 184 N. E. 748 (1933); Gen. Pet. Corp. of Calif. v. Schefter, 141 Ore. 349, 16 P. (2d) 645 (1932); Wolf Co. v. Kutch, 147 Wis. 209, 132 N. W. 981 (1911). See Notes (1921) 13 A. L. R. 448; (1931) 73 A. L. R. 748; (1934) 88 A. L. R. 1318. *Cf.* Fifield v. Farmers' Bank, 148 Ill. 163, 35 N. E. 802 (1893).

realty takes *without notice* of the chattel mortgage or conditional sales contract, it is generally held his rights are not affected by the instrument.[4] Most of the cases explain this result by pointing out the fact that the annexed item apparently forms a part of the land and that purchasers of realty should be protected from adverse claims which do not appear in real property records. Some courts have reasoned that the chattel lienor, by leaving a chattel in the possession of the landowner to annex to realty, has enabled the annexor to mislead a purchaser of the land and must sustain the loss of his security.[5]

The scope of this comment is limited to the problem of the chattel mortgagee in assuring notice of his lien to those who subsequently purchase or encumber the realty. The situation of the conditional vendor has been simplified by a 1933 amendment to the conditional sales contract filing statutes which provide that where the chattel is to be attached to a building, in addition to being filed, the contract also must be indexed and recorded with real estate mortgages.[6] However, since there are several factors which may make the use of a *chattel* mortgage more desirable than a *conditional sales contract,* it is more than merely academic to discuss the possibility of giving constructive notice where a chattel mortgage is used to secure the transaction. The Washington court has been openly hostile to conditional sales contracts and on occasion has said that these instruments "are not favored in law."[7] The conditional sales contract cannot be used in instances where the credit is actually advanced by someone other than the seller.[8] The chattel

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[4]Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56 (1889); Kohler Co. v. Brasun, 249 N. Y. 224, 164 N. E. 31 (1918); Brennan v. Whitaker, 14 Ohio St. 446 (1864); Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649 (1898). This viewpoint was approved by the Washington court by the dictum of Parker, J., in King v. Title Trust Co., 111 Wash. 508, 191 Pac. 748 (1920): "...it [an agreement that the chattel shall remain personalty] . . . will not preserve the personal status of the material or thing so sold and prevent it from becoming a fixture and a part of the realty as against a subsequent encumbrancer who has no notice . . ."

See also Notes (1921) 13 A. L. R. 448; (1936) 34 MICH. L. REV. 426; BROWN, PERSONAL PROPERTY (1936) 685. *Cf.* Peaks v. Hutchinson, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279 (1902).

[5]Thompson v. Smith, 111 Iowa 718, 83 N. W. 789, 50 L. R. A. 780 (1900); Davenport v. Shants, 43 Vt. 546 (1871).

[6]REM. REV. STAT. §§ 3790, 3791. A similar provision is found in section 7 of the Uniform Conditional Sales Act, 2 U. L. A. 12 (1922), which provides that where chattels are annexed to realty, the contract must be filed with the conveyances of land or the reservation of title is void as against grantees without notice of the realty. This rule is made applicable only to those cases in which the chattel is "severable without material injury to the freehold." It is difficult to see a sound reason for this limitation. If a grantee of the realty has notice of the conditional seller's right to remove the chattel, the grantee should not take any greater right than his grantor. Against the grantor, the conditional seller may remove, even though material injury may result. Note 1, *supra.*

[7]Lahn & Simmons v. Matzen Woolen Mills, 147 Wash. 560, 266 Pac. 697 (1928); West American Finance Co. v. Finstad, 146 Wash. 315, 262 Pac. 636 (1928).

[8]For example: *A* wishes to buy a furnace from *B*, who insists upon cash. *C* advances the money and secures the repayment by a conditional sales contract from *C* to *A*. If a loan of money is actually secured, the courts will declare the instrument a chattel mortgage in spite of the fact that it

mortgage allows the mortgagee to realize on his security and, at the same time, retain his right to recover any deficiency—an advantage which is not open to the conditional vendor in a state that requires him to elect to repossess or sue for the unpaid part of the purchase price.[9] Also, as a matter of business policy, some firms may find that the use of a chattel mortgage is more desirable because of the public attitude that conditional sales contracts expose purchasers to unnecessary risks of forfeiture.

There is some controversy as to just what will give the grantee of the realty notice of a chattel mortgage on a chattel attached to the realty. A growing minority of jurisdictions hold that the filing of such an instrumant with the regular chattel mortgages gives constructive notice of the seller's rights in the chattel to purchasers of the realty.[10] These holdings are usually based upon the theory that the presence of the fixture should place a purchaser upon inquiry as to its history and that the filed chattel mortgages cannot be said to be out of the line of title to the real estate. Washington, in the case of *Boeringa v. Perry*,[11] which involved imbedded pipes sold subject to a chattel mortgage, on the land of a desert land entryman, seemed to commit itself to this view. The chattel mortgage was filed with the chattel records only and subsequently a second entryman took over the land. The mortgagee of the pipes brought a foreclosure action which was sustained against the second entryman. Speaking for the court, Judge Holcomb said:

> ". . . our statute . . . provided . . . that every such mortgage filed and indexed in pursuance of this act 'shall be held and considered to be full and sufficient notice to all the world of the existence and conditions thereof.' The effect of this provision is that the due filing of a chattel mortgage . . . imports as much as actual and positive notice of the mortgage and of all its conditions to all persons dealing with the chattel thereafter . . . The respondent had notice, by the filing of the chattel mortgage, that the pipe embedded and installed in the land

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purports to be a conditional sales contract. Mahon v. Nelson, 148 Wash. 110, 268 Pac. 144 (1928); Olsen v. Legal Adjustment Bureau, 142 Wash. 446, 253 Pac. 643 (1927); Lyon v. Nourse, 104 Wash. 309, 176 Pac. 359 (1918).

[9]The conditional vendor must either repossess or affirm the sale and sue for the purchase price. He cannot do both. Kimble Motor Car Co. v. Androw, 125 Wash. 225, 215 Pac. 340 (1923); Stewart & Holmes Drug Co. v. Reed, 74 Wash. 401, 133 Pac. 577 (1913); Jones v. Reynolds, 45 Wash. 371, 88 Pac. 577 (1907). A purported conditional sales contract which provides for repossession and resale of the property with the right of a deficiency against the buyer is a chattel mortgage in the view of the Washington court. Morton Organ Co. v. Armour, 173 Wash. 462, 23 P. (2d) 887 (1933); Roberts v. Speck, 170 Wash. 324, 16 P. (2d) 463 (1932); Raymond Bros. Impact Pulverizer Co. v. Thomas, 159 Wash. 550, 294 Pac. 219 (1930). For an extensive comparison of the chattel mortgage with the conditional sales contract, see Starr, *Conditional Sales and Chattel Mortgages* (1934) 9 WASH. L. REV. 143.

[10]Sword v. Low, 122 Ill. 487, 13 N. E. 826 (1887); Sowden & Co. v. Craig, 26 Iowa 156, 96 Am. Dec. 125 (1868); Ford v. Cobb, 20 N. Y. 344 (1859); Monarch Laundry v. Westbrook, 109 Va. 382, 63 S. E. 1070 (1909). Note (1921) 13 A. L. R. 485. *Cf.* Comment (1928) 13 ST. LOUIS L. REV. 255 which suggests this is the weight of authority.

[11]96 Wash. 57, 164 Pac. 773 (1917).

was chattel property upon which the appellant had a lien by his chattel mortgage." [12]

The force of this case is considerably weakened by the fact that there was an alternative ground for the result in that the second entryman had given no value. Later, in *King v. Title Trust Co.*,[13] our court said that the true basis for the *Boeringa* decision was that the claimant of the realty was not a purchaser for value. Therefore, it is doubtful whether the *Boeringa* case is definitive in aligning Washington with the view of the minority of jurisdictions that the filing with the chattel records alone will impart constructive notice to grantees of the realty. The weight of authority is that the chattel instrument cannot give constructive notice to the purchasers of the realty as the prospective mortgagee or purchaser of real property cannot be expected to search records which relate primarily to personal property.[14] This position appears to be sound. The almost universal practice is to keep the realty and personalty records separately. It is advisable to discourage all claims adverse to the title of land which do not appear in the *real property* records. Even where a common index is used for both chattel and realty records, a searcher is apt to check only the latter when investigating the title to land.

If the Washington court should decide to overlook the language of the *Boeringa* case and follow the majority view, then the only possibility of the chattel mortgagee's serving constructive notice of his rights on purchasers of the land is to record his mortgage upon the chattel with the real estate records. However, it is essential that if such recording is to carry constructive notice to anyone, there must be a statute authorizing the recording. Our court has followed the general rule that recordation without statutory authorization for such is a nullity.[15]

Although there is no statute clearly covering the recording of chattel mortgages with the realty records comparable to that provided for conditional sales contracts,[16] it may be reasonable to say that the chattel mortgage, after the annexation of the item, is an encumbrance upon the realty and as such is entitled to be put on record with real property mortgages.[17] The instrument seems to be one ". . . by which the title to . . . real property may be affected . . ." and thus within the definition of a "conveyance" entitled to be recorded under our real property act.[18] Certainly, if a jurisdiction follows the view that a *bona fide* purchaser of the realty may take the chattel as part of the land, such purchaser cannot object to recordation of the chattel mortgage as an encumbrance upon realty as the very basis for the theory upon

[12] *Id.* at 62.

[13] 111 Wash. 508, 191 Pac. 748 (1920).

[14] Elliot v. Hudson, 18 Cal. App. 642, 124 Pac. 103 (1912); Tibbetts v. Horne, 65 N. H. 242, 23 Atl. 145, 15 L. R. A. 56 (1889); Brennan v. Whitaker, 15 Ohio St. 446 (1864); Schmidt v. Dubois, 201 Wis. 631, 231 N. W. 181 (1930); 2 TIFFANY, REAL PROPERTY (3d ed. 1939) § 613, n. 16; BROWN, PERSONAL PROPERTY (1936) § 154, n. 52.

[15] Flynn v. Garford Motor Truck Co., 149 Wash. 264, 270 Pac. 806 (1928); Dial v. Inland Logging Co., 52 Wash. 81, 100 Pac. 157 (1909); Howard v. Shaw, 10 Wash. 151, 38 Pac. 746 (1894); Gen. Motors Acc. Corp. v. Kline, 78 F. (2d) 618 (C. C. A. 9th, 1935).

[16] REM. REV. STAT. §§ 3790, 3791.

[17] Book Review (1903), 16 HARV. L. REV. 531.

[18] REM. REV. STAT. § 10596-1.

which the grantee of the land recovers is that the chattel had become a part of the realty. Additional support is given the efficacy of such recording by the view sometimes expressed that the chattel mortgage does not actually keep the chattel from becoming realty, as the language of most opinions indicates, but is more accurately a license to sever and reconvert to personalty a part of the realty.[19]

There are two other statutes which afford a possible basis for recordation of the chattel instrument with realty records, but both appear to contemplate situations different from the one under discussion. In addition to the chattel mortgage filing statute, there is a separate provision for the recording of chattel mortgages securing a debt of over $300.[20] However, the purpose of such recording has been construed as being to minimize the danger of the instrument being lost or stolen.[21] Another statute provides for the recordation with real estate mortgages of a mortgage upon property of a mixed character, consisting in part of realty and in part of personalty.[22] From its terms, however, this statute is intended primarily to cover mortgages upon railroad property and it is probable that a chattel mortgage upon annexed personalty would be held to be without the purview of this section.

Under the present statutes and cases, the person who wishes to sell personalty which will be attached to realty, and to use a chattel mortgage rather than a conditional sales contract to secure the transaction, cannot be sure how he must proceed to protect his lien from subsequent purchasers or encumbrancers of the realty. He may file it as a regular chattel mortgage and hope that the Washington court will sustain such filing as constructive notice to those dealing with the land. He may record it with real property mortgages in the hope that the statutes

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[19]In Powers v. Dennison, 30 Vt. 749, 756 (1858), the court says: " . . . these articles, though chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold, and though it is in his power to reduce them to the state of goods and chattels again by severing them, yet *until they are severed they are part of the freehold.*" (Italics supplied).

Although holding that filing with chattel records would not impart notice to those subsequently dealing with the realty, Brennan v. Whitaker, 15 Ohio St. 446 (1864), contains the following statement: "It devolved upon the chattel mortgagee who sought to change the legal character of the chattels after they were annexed to the realty . . . to pursue the mode provided by law for encumbering the kind of estate to which it appeared to the world to belong . . ."

Oakland Bank of Savings v. Calif. Pressed Brick Co., 183 Cal. 295, 191 Pac. 524 (1920) held that a conditional seller, from the fact that he knew the chattel would be attached to realty, thereby agreed that the personalty was to be converted into real property and by this transformation the conditional sale was brought under the operation of laws for the recording of contracts affecting realty. See also Comments (1920) 8 CALIF. L. REV. 442; (1934) 18 MINN. L. REV. 812; Note (1910) 10 COL. L. REV. 581.

[20]REM. REV. STAT. § 3785. This statute is permissive so far as protecting the lien from those subsequently dealing with the chattel. Goddard v. Morgan, 193 Wash. 83, 74 P. (2d) 894 (1937). Thus it might be argued that it was intended as statutory authority for recording with the real property record.

[21]First National Bank v. White Dulany Co., 121 Wash. 386, 209 Pac. 861 (1922).

[22]REM. REV. STAT. § 10597. There are apparently no cases construing this statute.

will be construed as giving authority for such recording so that it will carry constructive notice to grantees of the realty. Under either procedure, he subjects himself to the possibility that his hopes will not be realized.

To clear up the course open to such a chattel mortgagee and to fairly protect purchasers of the land from claims of chattel mortgagees which are not in the real property records, it is suggested that a provision requiring recordation with the realty records similar to that at present provided for conditional sales contracts would be a highly desirable legislative enactment. Such a statute seems to afford the best way to adjust the rights of the chattel mortgagee and those who subsequently deal with the realty.

Ross Reid.

RECOLLECTION ON THE WITNESS STAND

The art of witness interrogation is difficult where the witness on the stand is unable to narrate the event which he has observed because of some present defect in his recollection.[1] In such case there are the following possibilities:

A. The impressions once made upon the mind of the witness may be revived by some means. This is "present recollection revived".[2]

B. If a record has been made of the witness' impressions, such record may come in as evidence if certain requirements be met. This is "past recollection recorded".[3]

The purpose of this comment is to collect the Washington cases involving these situations and to indicate whether or not our court follows the usual rules, analyzing those cases which have departed therefrom which special regard to some recent decisions which seem out of line.[4] Reference will also be made to illustrative cases from the Ninth Circuit Court of Appeals as indicative of the rules followed by the Federal Court for this circuit.

A. Present Recollection Revived

The witness testifies as to what is actually called up from the recesses of his memory. For the purpose of reviving a recollection anything may be used.[5] Most commonly it is a writing, around which centers most of the difficulty because of the frequent failure to distinguish between the present situation where the witness is now testifying as to what has been recalled to his mind and the situation, treated subsequently, where the witness, though without any present

[1] Essential testimonial qualifications are observation, recollection, and narration. 1 Wigmore, Evidence (2d ed. 1923) § 478.

[2] 2 *id.* § 758 *et seq.*

[3] 2 *id.* § 734, *et seq.*

[4] State v. Harkness, 1 Wn. (2d) 530, 96 P. (2d) 460 (1939); Clausen v. Jones, 191 Wash. 334, 71 P. (2d) 362 (1937).

[5] Jewett v. United States, 15 F. (2d) 955 (C. C. A. 9th, 1926); Hinkleman v. Pasteelnick, 3 N. J. Misc. 1010, 130 Atl. 441 (1925); Note (1926) 24 Mich. L. Rev. 420