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# Resolving Ambiguities Against the Conditional Sale

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## RESOLVING AMBIGUITIES AGAINST THE CONDITIONAL SALE

As a financing device, the conditional sales agreement has become very popular, but there are many legal problems arising from its use which are pitfalls for the unwary draftsman. There is a lack of harmony among the several jurisdictions as to the meaning of the term "conditional sale" and as to its incidents, once such a device is found.[1] In several cases the Washington court has indicated a hostility to this form of financing, holding a purported conditional sales agreement to be a chattel mortgage. It is important then to have a clear understanding of the limitations of the conditional sale, as construed by the local court, in order to know what device is properly used in a given situation, for the terminology of the instrument alone is not conclusive, and reliance on the recording statute is abortive unless the instrument is recorded according to its proper class. The object of this inquiry is to attempt to determine the basis upon which the Washington court construes a conditional sales agreement as a chattel mortgage.

Both the chattel mortgage and the conditional sales contract are devices which permit the obligor to have the use and possession of property in which the security interest is held by the obligee. In the lien theory states, of which Washington is one, the title to the mortgaged property remains in the obligor and under a conditional sales contract possession and use of the article sold pass to the obligor, who is purchasing the property, legal title remaining in the vendor until payment of the purchase price is completed. But a mortgage is security for a debt, while a conditional sale is a transfer of ownership for a price to be paid according to the terms or conditions of the agreement. Though the basic distinction seems clear, there is much confusion caused by the inclusion in a purported chattel mortgage of the advantageous clauses of the conditional sales agreement, and *vice versa*. Construction of an instrument at hand is influenced by the court's general attitude toward the security devices as much as by the intent of the parties, though the usual rationale in such a case is to attribute a certain intent to the parties. The conditional sale is not favored in the law[2] and the Washington court tends to construe ambiguous instruments as mortgages. In jurisdictions which have no recording statute for the conditional sale, it is understandable that the mortgage would be favored as giving the greatest protection to the third party. But in Washington, where both devices are covered by statute, there is more difficulty in rationalizing the attitude of the court.

Security is the keynote of either instrument. The equities of the two parties are measured and each is given protection through the divided interest which each holds in the property. Just how these rights are gained and protected forms a broad subject in itself and will not be considered here. But justification for the present limited discussion can be found in the realization of the different rights and remedies afforded by the two forms of security, which differences are fundamental to a choice of instrument for a given situation.[3]

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[1] 47 AM. JUR. 6, Sales § 828.

[2] Hughbanks, Incorporated v. Gourley, 12 Wn.(2d) 44, 120 P.(2d) 523 (1941).

[3] For a discussion of the salient distinctions between the conditional sale and the chattel mortgage, see Starr, *Conditional Sales and Chattel Mortgages*, 11 WASH. L. REV. 143, 183 (1934); 47 AM. JUR. 6, Sales § 828; 10 AM. JUR. 720, Chattel Mortgages § 8; 2 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES (1940) 883, § 513; VOLD, LAW OF SALES (1931) 309-312.

In contrast with the mortgage, which can secure any sort of obligation, the conditional sale can be resorted to only for the purpose of securing the purchase price of the goods to which it relates.[4] Some courts, including that of Washington, have gone far in upholding this doctrine and deny efficacy to a conditional sales contract which is executed for the purpose of securing the payment of a money loan where no actual sale takes place.[5] The sale agreement contemplates a vendor and vendee, without which it is construed as a chattel mortgage, even though all of the formalities for creating a conditional sales contract are observed.

The leading Washington case[6] in point arose out of an action in replevin to recover possession of an automobile and damages for its detention. Schabel, a Tacoma automobile dealer, asked respondent to finance his shipments from the distributor. The distributor shipped the cars to Schabel and sent the bills of lading attached to a draft for the sales price to a Tacoma bank, where respondent paid the draft and received the bills of lading, which he immediately turned over to Schabel. Schabel then paid respondent a fee amounting to 2 per cent of the sum advanced and respondent gave Schabel a conditional sales contract, in the usual form, which was filed of record. The particular automobile in this case was purchased by appellant who had no notice of respondent's right or claims except the constructive notice of the recorded bill of sale.

Normally, a recorded conditional sales contract would be good against transferees of the vendee,[7] but the Washington court, not stopping with appearances, examined into the facts of the transaction which gave rise to the bill of sale and found that the conditional sales contract actually was employed as security for a loan and hence was a chattel mortgage. It was intended by the distributor that title should vest in the dealer when he paid for the shipment. Though the respondent had possession for a short time of the bill of lading, he took up the draft and procured the bill of lading solely for the purpose of turning it over to the dealer and with no intention of securing title for himself. The evidence was undisputed that neither Schabel nor the respondent thought that the title would vest in the financing company simply through possession of the contract, and the distributor apparently did not intend that the sale should be made to the respondent as the draft was for the regular price to a dealer and such a concession would not have been made if sale were to a non-dealer.

Since the intention of the parties is generally regarded as of highest importance in resolving the question of passing of title,[8] the facts in the instant case do support the conclusion that the transaction was not a sale. Title, apparently, never vested in respondent. But this rationale is not one of construction of the *instrument* because the instrument, in this case, was admittedly a typical conditional sales agreement. The decision clearly is one dependent upon the *transaction*.[9] Prominent

[4] Glenn, *supra* n. 3, p. 884.
[5] 138 A. L. R. 664.
[6] Lyon v. Nourse, 104 Wash. 309, 176 Pac. 359 (1918).
[7] REM. REV. STAT. § 3790.
[8] 17 A. L. R. 1427.
[9] That all factors must be taken into account and that construction is not dependent on the instrument alone has been frequently recognized. Keane v. Kibbe, 28 Ida. 274, 154 Pac. 972 (1916); Bailey v. Baker Ice Mach.

thinkers in this field of the law uphold the position of the Washington court, as is evidenced by Section 113 of the Chattel Mortgage Act, providing that "when all or part of the purchase price . . . of goods is advanced to . . . the buyer by any person, not being the seller or the seller's agent, such person as security for reimbursement receives and reserves a security title to the goods although they pass into the possession of the buyer, such reservation of security title, whether or not by instrument in the form of a conditional sales contract or of a trust or bailee receipt, shall be deemed a mortgage."

In the *Lyon* case, the court ruled that it is not the office of a conditional sale to secure money loaned. According to the opinion, its function is only to permit an owner of personal property to make a *bona fide* sale on credit, reserving title in himself until the price is fully paid. The law will not permit one to use a conditional sale to secure his debt and thus to avoid the disadvantageous incidents of the chattel mortgage, which device is designed to cover loans. To support this proposition, laid down in the *Lyon* case, the statute[10] declaring a bill of sale to be void when the possession is left in the vendor, unless properly recorded within ten days, is cited by the court. But the cited statute is not appropriate because possession is not the controlling element here. By contract, under a conditional sale, the right to possession passes to the vendee, and in this case, possession was in the vendee. Would the result have been different if it were found that the title had passed to the respondent under the bill of lading? It is doubtful, as the court insists on a *bona fide* sale and the present transaction, stripped of any outward formalities, was a security transaction. This Washington case places great reliance on a Missouri decision, *Payne v. Parker*,[11] in which Payne and Little entered into an agreement by which Little was to sell to Payne the property in question and Payne was to resell it immediately to Little, reserving title in himself. Said the Missouri court in holding that Payne's conditional sale contract was not to prevail over the rights of another creditor:

> ". . . We cannot hold as a matter of law that Payne ever actually owned the mules here in controversy. The whole transaction must be examined . . . The sole purpose of the alleged sale to Payne was that title might momentarily vest in him for the purpose of an instantaneous resale, in order that the relation of the vendor and conditional purchaser might exist. The whole transaction might well be considered as nothing more than a verbal mortgage. . . . If this transaction is to be upheld, chattel mortgages will disappear. All borrowers upon personal property as security will simply agree with the lender to make a sale, accompanied by constructive delivery of the property, and buy the property back in the same transaction . . . In order for the seller to enforce his claim, he must be in fact the owner of the property, and make a *bona fide* sale thereof to a *bona fide* purchaser, by which sale the actual possession of the property shall be in truth changed."

Co., 239 U. S. 268, 60 L. ed. 275, 36 Sup. Ct. 50 (1916); Freed Furniture and Carting Co. v. Sorenson, 28 Utah 419, 107 Am. St. Rep. 721, 79 Pac. 564, 3 Ann. Cas. 634, (1905).

[10] REM. REV. STAT. § 5827.

[11] 95 Miss. 375, 48 So. 835 (1909).

It must be pointed out that Missouri had no recording statute so that the protection which would be accorded in the *Lyon* case if the contract had been construed to be a conditional sale and hence properly recorded to give constructive notice was entirely lacking. In the absence of a recording statute, the innocent third party is properly protected by the court in a decision such as that of Missouri. Where there is a recording statute, however, the third party has the opportunity to check the files and to determine the condition of the property. *Payne v. Parker, supra,* therefore, is not entirely analogous to the Washington situation and reliance on it indicates a failure on the part of the court to identify or accurately articulate the policy motivating its decision.

Perhaps justification for the conclusion in the *Lyon* case may be found in the fact that the automobile was left with a dealer for sale purposes, so that the purchaser from the dealer would logically assume that title was in him. A recent decision[12] upheld the innocent purchaser against a finance company on the theory that the purchaser who had no actual notice of the conditional sale or of its recording was the more worthy of protection. It would appear to be a fair inference from this latter opinion that one purchasing from an automobile dealer is not bound by notice of the recording statute unless the circumstances surrounding the sale are sufficient to put the purchaser upon inquiry as to the title.[13] Applying this to the *Lyon* case, the result reached therein would have been supported by the policy protecting persons purchasing from recognized automobile dealers without actual notice of lack of title in the dealer.[14] The "comparative innocence" doctrine would thus permit the court to reach the desired result without doing violence to the character of the agreement drawn between the parties.

In the case of automobile transactions the California court has recently rendered a decision[15] which indicates a willingness to recognize the conditional sales contract even though the transaction was for the purpose of obtaining a loan. The acceptance company financed the purchase of three Ford motor cars. It retained title and made conditional sales contracts which were executed prior to the delivery of the cars, under which it sold the cars to Gale personally, who then displayed them for sale in the salesroom of the Gale corporation. The attaching creditor attacked the validity of the conditional sales contract, contending that when the cars were purchased from Ford company, title passed to Gale and that in the absence of valid title, the acceptance company had only a chattel mortgage.

The court concluded, however, that title actually vested in the acceptance company because that company had adopted every course available to take and retain title to itself, and Gale's good faith in

[12] Northwestern Finance Co. v. Russell, 161 Wash. 389, 297 Pac. 186 (1931); wherein an automobile dealer had sold to the finance company a conditional sales contract running from the dealer to his sales agent, the finance company knowing that the car was to be kept at the employer's place of business and was to be used as a "demonstrator." When the dealer resold the car, the finance company brought an action in replevin but the court found in favor of the purchaser.

[13] 161 Wash. at 393 *et seq.*

[14] This same result would be obtained under the Uniform Conditional Sales Act § 9.

[15] Universal Credit Co. v. M. C. Gale, Inc., 40 Cal. App.(2d) 796, 105 P.(2d) 1003 (1940).

the transaction was shown by the fact that he had the cars registered immediately with the motor vehicle department in respondent's name as legal owner. The attaching creditor's claim was based on a pre-existing debt, negativing any possible argument that he had relied on the ownership of the automobiles as security for the loan, but the court did not give much weight to this fact when forming its opinion as to the nature of the transaction.

Under the language of the *Lyon* case, the Washington court would reach a different result on the facts of the *Gale* case, because it therein was persuaded by the purpose of the transaction rather than the formalities observed between the parties, and evidence of title in the ficancier would not be decisive in the eyes of a court which rendered the *Lyon* opinion. Although the Washington registration act,[16] adopted since the *Lyon* case, requires that the legal owner be named and under this act the court might very well, in the case of automobile transactions, adopt the view of the California court, the *Lyon* holding would in any event control in other instances where the conditional sales contract was used merely as security for a loan.

It is not feasible in Washington to use personal property under a conditional sales contract to secure a loan, because the court will not look to the form alone but will treat the transaction as giving rise to the legal relations incident to the chattel mortgage. This, as has been mentioned above, is predicated upon the theory that the conditional sales agreement is operative only in the event of a *bona fide* sale. The distinction drawn between the office of the chattel mortgage and that of the conditional sale is not entirely convincing, however, for the extension of credit under a conditional sales contract is, in effect, a loan. The ultimate function of each, therefore, is the same. Yet the cases make it abundantly clear that a distinction is recognized in the decisions. If the ultimate functions are in fact identical, the only explanation for the *Lyon* decision is that the court responded to the emotional antipathy felt toward the conditional sales agreement and attempted to restrict its use, regardless of the presence or absence of an economic basis for the restriction.

Without impairing the *Lyon* ruling, the court later handed down a decision[17] which upheld the use of a conditional sale. In the *Lloyd* case, prospective purchasers were taken by the dealer to the financier, who made a conditional sale to the purchaser, paying to the dealer the amount of the deferred payments which the purchaser was to pay to the finance company under the contract. By this means, the title vested in the finance company and all of the parties treated the transaction as

[16] Just what effect the statute, REM. REV. STAT., § 6312-7, will have on the necessity for recording mortgages or conditional sales contracts relating to automobiles has not been settled. The question was pertinent in but one case passed on by the Washington Supreme Court, and therein the decision went off on the basis of estoppel, Merchants Rating & Adjusting Co. v. Skaug, 4 Wn.(2d) 46, 102 P.(2d) 227 (1940), without deciding the effect of the statute. The question is not precisely within the scope of the present inquiry and is raised merely to indicate its relationship to the main problem. If the registration statute be construed as abrogating REM. REV. STAT. §§ 3780-3782, so far as automobiles and trucks are concerned, there will no longer be necessity for differentiating between conditional sales and chattel mortgages to determine the rights of third parties in dealing with these types of property.

[17] Lloyd v. MacCallum-Donahoe Co., 127 Wash. 180, 219 Pac. 849 (1923).

one of sale to the financial backer and resale by him to the ultimate purchaser. The dealer was paid in full and parted with possession. No incident of title remained in him, even when he was called upon to guarantee the contracts. Said the court in this opinion:

> "It is . . . difficult to understand why the transaction should not be regarded in law as the only parties interested regarded it in fact. It is a general rule that an owner of property may make such contracts with reference to it as he chooses, and that his contracts will be upheld by the courts so long as they violate no provision of express statute or do not run contrary to some rule of public policy."

This decision implies that a finance company can be a purchaser, which fact was subject to question until this definitive holding. Apparently, the crucial question is whether or not there is sufficient evidence to find that title was in the conditional vendor (the finance company). This brings the Washington doctrine into line with the California holding, *supra,* the language of which indicates strong reliance on title. But the Washington court has indicated a reluctance to find title in the finance company and the facts to overcome the evidence of a "loan" must be clear and convincing. To be a *bona fide* vendor one must have a certain stationary title, not one which is fleeting and merely given to comply with the formalities. Even when a borrower executes a bill of sale of the chattel security to his lender, if he immediately takes back a conditional sale of the same property the instrument will be held to be a chattel mortgage.[18] And, again, when the would-be purchaser of a tractor called on a finance company for assistance and the company purchased the tractor for immediate resale on conditional sales contract to the purchaser, the transaction gave rise to a chattel mortgage. This was the case of *Hughbanks, Incorporated, v. Gourley,*[19] the most recent opinion in pont, in which the court summarized the effect of teh preceding Washington cases as follows:

> ". . . The problem is not one of determining whether the parties intended to mold their transaction into the form of a conditional sale rather than that of a chattel mortgage, but of deciding whether in a pure financing arrangement the conditional sale can ever be adopted as a means of securing a loan. And the answer is that the contract of conditional sale may be used only by an actual vendor in the economic sense, and not by one who in a particular transaction occupies the status of a financier or lender of money, even though the latter may go through the form of taking title and possession of the chattel which he purports to sell, as respondent has done in this case. To permit the use of the conditional sale by mere lenders of money would enable them not only to avail themselves of the extraordinary remedies of the conditional vendor, but also to evade the provisions of the usury laws by marking up the 'price' charged to the borrower so as to include, in the guise of a 'profit,' a return in excess of that permitted by law."

In contrast to the position of the California court that if one does all he can to retain title in himself, he will be held to be a *bona fide* holder

[18] Olsen v. Legal Adjustment Bureau, 142 Wash. 446, 253 Pac. 643 (1927).
[19] 12 Wn.(2d) 44, 120 P.(2d) 523 (1941).

of title, the Washington court said in the *Hughbanks* opinion that "despite the care exercised in routing title through itself and in taking technical possession of the tractor, respondent was a mere money lender in a financing arrangement incident to the sale of the tractor." However, this case does not overrule *Lloyd v. McCallum-Donohoe Co., supra,* as the dealer in the *Lloyd* case had withdrawn from the transaction at the time payment was made to him.

One factor not mentioned as yet but which must be borne in mind in considering the question of construction is the effect of the presence of third persons. The emphasis on the intent and understanding of the parties in the *Lloyd* opinion is a warning that the court will be influenced by the introduction into the picture of one not a party to the transaction. In *Schumaker v. Patterson,*[20] the court finds that "because the rights of creditors are not involved"[21] the cases of *Lyon v. Nourse, Olsen v. Legal Adjustment Bureau* and *Kelly v. Price* were not applicable. Again, the court states in the *Schumaker* opinion that it must be remembered at all times "(1) that this is a contest between the original parties to the contract and that the rights of third parties, such as creditors, are in no wise involved." The question arose in a replevin action wherein *A,* the owner of a rooming house or hotel took, as down payment on the purchase price therefore, furniture of *B,* the purchaser. Possession of the furniture passed to *A* and a day or two later a bill of sale was made out to convey absolute title to her. At that time a conditional sales contract was executed which provided that *B* would buy all of the personal property contained in the hotel, including the furniture conveyed by *B* to *A.* In the action, *B* contended that the security could be obtained only by means of a chattel mortgage, though the conditional sales agreement indicated that the furniture conveyed by *B* to *A* was to be security for the contract as well as a down payment thereon. The inclusion of this furniture in the contract was held proper because the instrument evidenced the *intent* of the parties.

Compare this with the *Lyon* opinion in which intent as expressed in the instrument played no part in the decision, or the *Olsen* case wherein a bill of sale was given to the lender who, on the same day, gave a conditional sale back to the borrower but, as against a judgment creditor of the borrower, the conditional sales contract was ineffective for the purpose of securing the loan, despite the transfer of title by the bill of sale which is an even stronger factual situation to support the conditional sale than that of the *Lyon* case. The only explanation for the two lines of decision is the factor of the third party. There is no reconciling the outcomes except on the grounds of public policy and the desire to protect strangers to the transaction. Though the *Lyon* and *Olsen* cases are concerned with security for a loan and the *Schumaker* case is one dealing with security for a purchase price, the principle is the same in either situation. Since the nature of the contract is the specific question, there is no legal justification for the weight given the presence of the third person. The court attributes chameleon properties to these instruments and their character is determinable only by the relationship of the parties when suit is brought. This is forcibly presented in *Kelly v. Price*[22] which was an action in conversion

[20] 187 Wash. 33, 59 P.(2d) 927 (1936).

[21] It was also pointed out that there was a change of possession, but the third party factor appears to be more important in influencing the court.

[22] 148 Wash. 542, 269 Pac. 842 (1928).

to recover the value of an automobile. Purchase of the vehicle was financed by *X* (finance company), who was to have been given the bill of sale, but when *Y* (dealer), to whom *X* sold on conditional sale, took delivery from the distributor, no bill of sale had been made out. To avoid any question of title, because no bill of sale had been made out from the seller to *X*, *X* requested *Y* to make out a bill of sale, but this was merely a precautionary measure and was not intended to imply that title had ever been in *Y*. Still, when *X* brought action against the innocent purchaser from *Y*, it was held that this was merely an arrangement to finance the purchase and that the car was treated as security for the money advanced. The plaintiff relied on *Lloyd v. MacCallum-Donahoe Co.*, which was rejected by the court as authority in the present situation.[23] Chief reliance was placed on the *Lyon* decision and those which follow it which "were all contests in which the rights of subsequent purchasers or creditors were involved." In a contest between the parties, effect will be given their intentions at the time of the transaction as evidenced by the instruments executed at that time, but in cases involving the rights of innocent purchasers, "intention" refers to the transaction and not to subjective evidence of the interpretation of the parties.

Washington is not alone in finding that mere lenders of money cannot avail themselves of the extraordinary remedies of the conditional vendor. Other jurisdictions so holding place their decisions on the same basis as discussed herein, *viz.*, the necessity of a vendor-vendee relationship which requires a finding of title in the vendor and precludes use of the conditional sale as security for a loan.[24]

Further evidence of antipathy toward the conditional sale is reflected in a group of cases which hold that conditional sales contracts reserving remedies typical of the chattel mortgage will be characterized by the remedies so reserved. Thus, where *A* sold an automobile to *B* under a purported contract of conditional sale which provided that the retaking or sale of the property should not operate to release the buyer from payment of the full purchase price, the court construed the instrument to be a chattel mortgage.[25] Normally the remedies open to a conditional vendor are (1) the retaking of the goods on default, which rescinds the sale, *or* (2) suing for the purchase price, which passes title to the purchaser. These remedies are mutually exclusive, but the agreement between *A* and *B* provided that the purchaser would have to pay in any event, which was tantamount to making the property security for the debt. There is a long line of cases supporting the doctrine that if the vendor elects one of the remedies he has waived the other,[26]

[23] "If there were no subsequent innocent purchaser here the *Lloyd* case would be in point and would be ample authority for the affirmance of the judgment." Some question may be raised as to the validity of this distinction as the *Lloyd* case was decided on the theory of passage of title, which would support a conditional sale even if third persons had entered the suit.

[24] In accord are the Federal courts, Connecticut, Illinois, Indiana, Mississippi, Montana and California (where it has been made the rule by statute). 138 A. L. R. 664. Also, *see* 24 R. C. L. 43, Sales § 742; 47 AM. JUR. 17, Sales § 833, which are in accord with these cases.

[25] West American Finance Co. v. Finstad, 146 Wash. 315, 262 Pac. 636 (1928).

[26] III JONES, CHATTLE MORTGAGES AND CONDITIONAL SALES (Bowers ed.) 38 *et seq.*, Conditional Sales, § 1308.

but the question in this case arose as to the effect of the recording, necessitating the determination of the nature of the instrument. For this purpose the remedies reserved are actually only a single factor in the determination. However strong may be the weight of authority on the matter of election and waiver, the inconsistency of the remedies is not conclusive as to the construction of the instrument. The court in deciding the *Finstad* case could have merely declared the inconsistent remedy void without violating any established principles. By so doing, it would give effect to the intentions of the parties which, in this instance, would seem to be clearly to enter into a contract of conditional sale.

*Allis-Chalmers Mfg. Co. v. Hedland L. & M. Co.*[27] seemed to be a withdrawal from the position taken in the *Finstad* and succeeding cases. The court therein struck from the instrument the words which were inconsistent with a conditional sale and held the remainder to constitute a conditional sales contract. Among other things, the instrument provided that "if unable to collect (the vendor) may thereafter repossess the property," the language affording to the vendor the remedies of a mortgagee as well as those of a conditional vendor. No reference was made to the *Finstad* or other decisions; citing no authority whatsoever, the court struck the offending clause and upheld the contract as it was drawn, *i.e.*, as a conditional sales contract.

From the recent decisions relying on one or the other of these irreconcilable holdings, it is impossible to draw a generalization. No palpable distinction can be found in the facts of the *Allis-Chalmers* and the *Finstad* cases to justify the opposing conclusions they support. The court might have held that the *Allis-Chalmers* case overruled, by implication, the preceding decisions, but in *Robert v. Speck*[28] such a possibility is negatived expressly as the opinion reads:

> "In the case last cited *(i.e., Allis-Chalmers)*, neither the case of *Raymond Bros. etc. Co. v. Thomas* nor the other opinions of this court of similar tenor were referred to. It cannot be held that the doctrine laid down in these cases has been modified by the *(Allis-Chalmers)* case relied upon by appellants."

Again, in *Seaboard Securities Co., Inc. v. Berg*[29] both doctrines were adverted to, but no tangible distinction was drawn between them. The reservation of alternative remedies in the *Seaboard* case brings it without the scope of the preceding decisions, but it is interesting to note that the court gives approval to both lines of authority. However, there are no recent cases upon which to test the temper of the court. The last pertinent case[30] appealed went off on the question of election of remedies, without resolving the question of construction of the instrument. There still remains, consequently, an unsettled question as to what the court will do when once again confronted with an instrument which reserves both remedies.

It is to be hoped that the *Allis-Chalmers* case will be given more effect than heretofore because the parties should get the benefit of the

[27] 164 Wash. 296, 2 P.(2d) 708 (1931).
[28] 170 Wash. 324, 16 P.(2d) 463 (1932).
[29] 170 Wash. 681, 17 P.(2d) 646 (1932).
[30] Nat'l Cash Register Co. v. Seattle Ass'n of Credit Men, 18 Wn.(2d) 1, 137 P.(2d) 503 (1943).

contract they intended to have, if it does not violate public policy.[31] By striking the inconsistent remedy the court gives effect to the lawful intent of the parties, whereas construing the purported conditional sales contract as a chattel mortgage is to overlook the declared intent and to invite a new contract.

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[31] For a collection of cases see 92 A. L. R. 305.

# RECENT CASES

ACKNOWLEDGMENT—DUTY OF AUDITOR TO RECORD—CURATIVE STATUTE—STATUTORY CONSTRUCTION. In 1916, *A*, *B*, and *C* purchased a parcel of real estate. Title was taken by *C* for convenience. *C* executed a "declaration of trust" reciting that he held the property for the benefit of *A*, *B* and himself. The instrument was signed but not acknowledged. *C* died in 1942. Thereafter *A* and *B* presented the instrument to the county auditor, tendered the required fee, and requested that it be recorded. The auditor refused to accept it on the ground that it was not acknowledged as required by statute. *A* and *B* applied for a writ of mandamus to compel recordation. Auditor's demurrer was sustained and *A* and *B* appealed. *Held:* The county auditor may not be compelled to record an instrument which fails to attain the statutory requirement as to acknowledgment. *Eggert v. Ford*, 21 Wn.(2d) 152, 150 P.(2d) 719 (1944).

The statutes applicable to the question raised are as follows:

REM. REV. STAT. § 10596: "A conveyance of real property, when *acknowledged* by the person executing the same (the acknowledgment being certified as required by law), *may* be recorded in the office of the recording officer of the county where the property is situated. . . ." (Italics supplied.)

REM. REV. STAT. § 10596-10: "A recording officer, upon payment or tender to him of the lawful fees therefor, shall record in his office any instrument authorized or permitted by this act to be so recorded."

REM. REV. STAT. § 10599: "Every instrument in writing purporting to convey or encumber real estate situated in this state, or any interest therein, which has been recorded in the auditor's office of the county in which such real estate is situated, although such instrument may not have been executed and acknowledged, in accordance with the law in force at the time of its execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged, and recorded, in accordance with the laws regulating the execution, acknowledgment and recording of such instrument then in force."

REM. REV. STAT. § 10601: "He must, upon payment of his fees for the same, record separately in large and well-bound books:

"(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, powers of attorney to convey real estate, and leases which have been acknowledged or proved: . . .;