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FIXTURES — CONDITIONAL SALES — EFFECT OF RECORDING UPON SUBSEQUENT MORTGAGEE OF THE REALTY — Two furnaces were sold and installed by plaintiff's assignor on a conditional sale contract that was duly recorded. The vendee then mortgaged the land on which the furnaces were annexed to the defendant. He defaulted on payments under the conditional sales contract and the plaintiff obtained a decree foreclosing the vendee's equity. Defendant filed a petition to have the decree vacated. *Held*, that as defendant was a subsequent mortgagee without notice the decree should be vacated. *Twentieth Century Heating & Ventilating Co. v. Home Owners Loan Corp.*, 56 Ohio App. 188, 10 N. E. (2d) 229 (1937).

It is generally held that an agreement by the owner of land that articles to be annexed to his land are to retain their character as chattels is effective against a subsequent purchaser or mortgagee of the land who has notice of the agreement.¹ A few courts hold that such an agreement is effective even though the subsequent realty claimant had no notice of it.² And under the majority rule there is no unanimity as to what constitutes notice, particularly when the question involves the effect of recording a conditional sale contract or chattel mortgage. Some courts hold that the recording of such an instrument is sufficient to charge the subsequent realty purchaser or mortgagee with notice.³ Such notice is

¹ I TIFFANY, REAL PROPERTY, 2d ed., 922 (1920); 26 C. J. 681 (1921); *Workman v. Henrie*, 71 Utah 400, 266 P. 1033, 58 A. L. R. 1346 at 1352 (1928); *Kittelson v. Collette*, 61 N. D. 768, 240 N. W. 920 (1932). This rule is limited usually to cases where the articles may be removed without material injury to the realty or to themselves. BROWN, PERSONAL PROPERTY 686 (1936); *Lasch v. Columbus Heating & Ventilating Co.*, 45 Ga. App. 200, 164 S. E. 211 (1932), *affd.* 174 Ga. 618, 163 S. E. 486 (1932). See generally, 18 MINN. L. REV. 812 (1934).

² *Lawton Pressed Brick & Tile Co. v. Ross-Kellar Triple Pressure Brick Machine Co.*, 33 Okla. 59, 124 P. 43, 49 L. R. A. (N. S.) 395 at 396 (1912); *Continental Gin Co. v. Clement*, 176 Ark. 864, 4 S. W. (2d) 901 (1928); *Standard Motors Finance Co. v. Weaver*, 199 N. C. 178, 153 S. E. 861 (1930).

³ *Sword v. Low*, 122 Ill. 487, 13 N. E. 826 (1887) (chattel mortgage); *Liddell*

often limited to articles which retain their individual character after being annexed to the realty and are removable without causing material injury to themselves or to the realty.⁴ That recording is notice is often due to particular wording or interpretation of the recording statute.⁵ It has also been suggested that such recorded instruments are in the line of title of the real estate to which the article is annexed.⁶ And it is said that the burden put upon the realty purchaser in searching the chattel records of those articles annexed to the realty which were once chattels and might still be, by agreement, is not so great as to warrant cutting off the rights of the conditional vendor or mortgagee of those chattels.⁷ It has also been suggested that commerce will be encouraged by giving chattel vendors this protection.⁸ However, the recording statute must be strictly complied with in order that it be effective in giving notice.⁹ The greater number of courts adopt the view, approved by text writers,¹⁰ that recording does not give notice to the subsequent purchaser or mortgagee of the realty.¹¹ He has the right to rely upon the apparent condition of the property and has no duty to search the chattel records of all the articles annexed to the land.¹² Such a duty

Co. v. Cork, 120 S. C. 481, 113 S. E. 327, 23 A. L. R. 800 at 805 (1922) (conditional sale).

⁴ *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345 (1872); *Allis-Chalmers Co. v. City of Atlantic*, 164 Iowa 8, 144 N. W. 346 (1914); *Ritchie v. Southern Gem Coal Corp.*, (D. C. Ill. 1926) 12 F. (2d) 605.

⁵ *Boeringa v. Perry*, 96 Wash. 57 at 62, 164 P. 773 (1917), in which Wash. Code (Rem. 1915), § 3662, was considered, the statute making filing of a chattel mortgage "full and sufficient notice to all the world of the existence and condition thereof." *Lasch v. Columbus Heating & Ventilating Co.*, 45 Ga. App. 200, 164 S. E. 211 (1932), *affd.* 174 Ga. 618 at 622, 163 S. E. 486 (1932): "Our statute provides for the record of retention-title contracts, and makes such record notice to the world. Civil Code (1910) § 3320." *Monarch Laundry, Inc. v. Westbrook*, 109 Va. 382, 63 S. E. 1070 (1909), wherein the statute contained a single provision for the recording of instruments relating to realty and chattels.

⁶ "The presence of such fixtures in quantity should put a prospective purchaser of the land upon inquiry as to their history. Instruments covering property of that character, even if separately recorded pursuant to the express provisions of the statute in the chattel mortgage book, cannot be said to be instruments which are not in the line of the title of the real estate to which such property may be annexed as fixtures." *Liddell Co. v. Cork*, 120 S. C. 481 at 488, 113 S. E. 327, 23 A. L. R. 800 (1922); *Catlin v. C. E. Rosenbaum Machinery Co.*, 180 Ark. 739, 22 S. W. (2d) 906 (1929).

⁷ *Lasch v. Columbus Heating & Ventilating Co.*, 174 Ga. 618, 163 S. E. 486 (1932); *Sword v. Low*, 122 Ill. 487, 13 N. E. 826 (1887).

⁸ *Liddell Co. v. Cork*, 120 S. C. 481, 113 S. E. 327, 23 A. L. R. 800 at 805 (1922); *Monarch Laundry, Inc. v. Westbrook*, 109 Va. 382, 63 S. E. 1070 (1909).

⁹ *Cunningham v. Curetin*, 96 Ga. 489, 23 S. E. 420 (1895); *Capital Motion Picture Supply Corp. v. Mapes-Bergen Amusements, Inc.*, 117 N. J. L. 185, 187 A. 161 (1936) (defect under Uniform Conditional Sales Act).

¹⁰ I JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th ed., 135 (1933); EWELL, FIXTURES, 2d ed., 319 (1905).

¹¹ *Brunswick-Balke-Collender Co. v. Franzke-Shiffman Realty Co.*, 211 Wis. 659, 248 N. W. 178 (1933); *Kelvinator St. Louis Inc. v. Schader*, 225 Mo. App. 479, 39 S. W. (2d) 385 (1931); *Schmidt v. Carrol*, 201 Wis. 631, 231 N. W. 181 (1930).

¹² *Kelvinator St. Louis, Inc. v. Schader*, 225 Mo. App. 479 at 491, 39 S. W.

would be a considerable burden.¹³ The policy of the law is to discourage encumbrances on real titles that are not apparent on the realty records.¹⁴ It has been suggested that the chattel claimant to protect himself should take a mortgage on the real estate,¹⁵ or file the chattel mortgage or conditional sale contract with the realty records.¹⁶ The latter is the procedure required by the Uniform Conditional Sales Act.¹⁷ The principal case, in holding that recording a conditional sale contract is constructive notice only of an incumbrance upon goods and chattels and does not give notice of an incumbrance upon the realty to which the chattel is attached, is consistent with prior Ohio decisions.¹⁸ The difficulty with the view taken is the hardship it puts on the conditional vendor or chattel mortgagee who has conformed to the recording statute but is still unprotected. Probably a more widespread adoption of a provision similar in principle to article 7 of the Uniform Conditional Sales Act would be desirable in that it would give at least the chattel vendor an opportunity to protect himself by complying with the recording statute, without putting too great a burden on the realty purchaser or mortgagee.

(2d) 385 (1931), citing *Ice, Light & Water Co. v. Lone Star L. & B. Works*, 15 Tex. Civ. App. 694 at 698, 41 S. W. 835 (1897): "And the better opinion is that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records for chattel mortgages, for he is not affected by the record of a chattel mortgage upon fixtures of such realty" [Quoting, JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES, 6th ed., § 134 (1933)]; *Brennan v. Whitaker*, 15 Ohio St. 446 (1864); *Tibbets v. Horne*, 65 N. H. 242, 23 A. 145, 15 L. R. A. 56 (1889).

¹³ *Skinner v. Stewart Plumbing Co.*, 42 Ga. App. 42, 155 S. E. 97 (1930), discussed in note in 9 N. C. L. Rev. 205 (1931).

¹⁴ *Ritchey v. Southern Gem Coal Corp.*, (D. C. Ill. 1936) 12 F. (2d) 605; *Tibbets v. Horne*, 65 N. H. 242, 23 A. 145, 15 L. R. A. 56 (1889); *Phillips v. Newsome*, (Tex. Civ. App. 1915) 179 S. W. 1123.

¹⁵ *Brennan v. Whitaker*, 15 Ohio St. 446 (1864); *Tibbets v. Horne*, 65 N. H. 242, 23 A. 145, 15 L. R. A. 56 (1889).

¹⁶ *Trull v. Fuller*, 28 Me. 545 (1848) (chattel mortgage of fixture in place); 8 CAL. L. REV. 442 (1920). But see *Deane v. Hutchinson*, 40 N. J. Eq. 83 at 89, 2 A. 292 (1885); *Tibbets v. Horne*, 65 N. H. 242, 23 A. 145, 15 L. R. A. 56 (1889).

¹⁷ "If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are about to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty." Uniform Conditional Sales Act, § 7, 2 UNIFORM LAWS ANN. 12 (1922). Alaska, Arizona, Delaware, Indiana, New Jersey, Pennsylvania, South Dakota, West Virginia, and Wisconsin have adopted the Uniform Act. 2 UNIFORM LAWS ANN. (1936 Supp.), p. 5. Massachusetts and Oregon have similar statutes. 2 Mass. Gen. Laws (1932), c. 184, § 13; 3 Ore. Code Ann. (1930), §§ 64-201, 64-202.

¹⁸ *Brennan v. Whitaker*, 15 Ohio St. 446 (1864) (chattel mortgage); *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493 (1887) (chattel mortgage and conditional sale).