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Chattel Mortgages: Filing Statutes: Adjustments Between Secured and Unsecured Creditors (Page 248 Includes Editorial Board).

Vernon X. Miller

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NOTES

CHATTEL MORTGAGES—FILING STATUTES—ADJUSTMENTS BETWEEN SECURED AND UNSECURED CREDITORS.—The statutory requirement about the filing or recording of security instruments like chattel mortgages has been a convenient and effective device which legislatures and courts have used in effecting adjustments between the claims of secured and unsecured creditors of a common debtor. The mortgagor-debtor may be a borrower or he may be a purchaser. The mortgagee-creditor may be a lender, in fact, or he may be a seller who insists on security in the form of a chattel mortgage to secure the unpaid purchase price. If the mortgagor is a borrower in fact, and only a borrower, he does not need a bill of sale from the mortgagee; he already has title. If the mortgagor is a buyer he may get a bill of sale from the mortgagee first and then give the mortgagee a chattel mortgage to secure the unpaid purchase price. The mortgagor has the chattel to use in his business, or for his pleasure, and the mortgagee has title to secure his getting his money from the mortgagor. To protect that title against third persons the mortgagee must record or file a copy of his mortgage as prescribed by statute.

This is "elementary law." Whether title is technically in the mortgagor or in the mortgagee apparently cuts little figure in the decisions until some controversy arises between a third party and the mortgagee

who has failed to record or file a copy of his mortgage. It is suggested here that whether the mortgagee or the mortgagor "technically" has title cuts little figure even in these situations.[1]

The filing statute in Wisconsin is ambiguous.[2] The mortgage, according to the statute, is not valid against third persons if the mortgagor keeps possession of the chattel and if the mortgagee does not file a copy of the mortgage as prescribed. The statute is open for interpretation by the court. As between the holder of an unfiled mortgage and a subsequent attaching or execution creditor of the mortgagor, subsequent encumbrancer or purchaser without notice, the mortgagee loses his security.[3] Are any other third persons protected against the mortgagee who has not filed? The Wisconsin court has held that whether the subsequent purchasers, encumbrancers, or lien creditors have notice or not is not a pertinent enquiry.[4] The holder of the unfiled chattel mortgage loses his security even against those third persons who come in with notice of the transaction between the mortgagor and mortgagee. And the court has held, too, in some instances, that the mortgagee, who has not filed, but who has seized the chattels covered by the mortgage, must account for the proceeds from a sale on foreclosure or for the goods themselves, to some one or more of the general creditors of the mortgagor who had secured no lien in the chattels by way of attachment or execution.

These last cases may be divided into two groups. There are those where the mortgage covers a stock of goods to be sold in trade, and there are a few cases where some element of estoppel seems to justify the court's taking away from the mortgagee the security for which he had bargained. In the first class of cases the court seems to proceed with the idea that it is a fraud upon creditors, perpetrated by the mortgagor and the mortgagee, when the latter without filing his mortgage, permits the mortgagor to retain control over the stock and to sell therefrom without accounting to the mortgagee for the proceeds derived in the course of sale.[5] This type of case is now controlled by a special statute.[6] The mortgagee must not merely file a copy of his mortgage to perpetuate his security, but he must see that the mortgagor files in-

[1] Whether a vendor or vendee, mortgagee-seller or mortgagee-lender, mortagor-buyer or mortgagor-borrower has title is not a particularly pertinent inquiry in any kind of case. For all practical purposes the vendee or the mortgagor is the owner. He enjoys the use of the chattel. He is protected in that use against third persons, even against the vendor or mortgagee. He has contracted with the vendor or mortgagee that the latter shall have a security interest in the chattel. That security interest is protected against others than the vendee or mortgagor if the vendor or mortgagee complies with the standards set up by the legislatures and the courts.

[2] Section 241.08, Wis. Stats., 1933.

[3] See *Graham* v. *Perry*, 200 Wis. 211, 228 N.W. 135, 68 A.L.R. 269 (1929), where the court compares the filing state with the section requiring the filing of an affidavit of renewal, section 241.11, Wis. Stats., 1933. If the creditor does not file the affidavit of renewal he loses protection only against those third parties who come in as encumbrancers, purchasers, or lien creditors without notice.

[4] *Parroski* v. *Goldberg*, 80 Wis. 339, 50 N.W. 191 (1881); *Dornbrook* v. *M. Rumeley Co.*, 120 Wis. 36, 97 N.W. 493 (1903).

[5] *Blakeslee* v. *Rossman*, 43 Wis. (1877); *Ryan Drug Co.* v. *Hvambsahl*, 89 Wis 61, 61 N.W. 299 (1894); *The Charles Baumbach Co.* v. *Hobkirk*, 104 Wis. 488, 80 N.W. 740 (1899); *Durr* v. *Wildish*, 108 Wis. 401, 84 N.W. 437 (1900).

[6] Section 241.14, Wis. Stats., 1933.

ventories at various times as prescribed also by the statute. If both parties to the transaction comply with these statutory provisions the interest of the mortgagee in the goods is perpetuated, and is extended to cover additions to the stock, providing it was intended by the parties in the first place that the additions should be covered by the mortgage. If the parties do not comply with these provisions of the statute, the court has held that the mortgagee's interest is lost as against general creditors, and that a general creditor can reach by garnishment the proceeds derived from a sale on foreclosure after the mortgagee has stepped in and taken the goods.[7]

In the other cases where the court has protected the general creditor against the mortgagee who has not filed but who has taken possession of the goods, there has been something suggesting estoppel.[8] The mortgagee perhaps has held his mortgage off the record by agreement with the mortgagor. The general creditor has either examined the record or has relied upon credit reports from some agency which does examine the records in making up reports on businessmen's credit ratings. In a recent case the Wisconsin court has permitted a lending bank to catch by garnishment the property already in the possession of another creditor who had bargained with the debtor for security in the goods seized.[9] The other creditor was a surety company that had executed a bond with the common debtor, a construction contractor. The contractor had had to furnish the bond to a town to secure performance of a paving contract he had with the town. The surety company had caused the contractor to execute to it an assignment covering the contractor's equipment to secure the company's claim for reimbursement if the contractor should fail to perform with the town. The bank had loaned substantial sums to the contractor on the statement furnished by him showing that his equipment was unencumbered. When the contractor failed to complete the job with the town, the company assumed his obligations, stepped in and seized the equipment under their assignment.

Unless there is some element of estoppel in the case, or some idea of equities because of the use to which the sums borrowed by the contractor were put, this decision may seem to suggest that any general creditor is entitled to protection against a secured creditor who has not filed his chattel mortgage even where that secured creditor has taken the goods covered by his mortgage before the general creditor has as-

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[7] *Thomas Produce Co.* v. *Letman,* 184 Wis. 211, 199 N.W. 79 (1924). See Recent Decision, 18 Marquette Law Review 195.

[8] *The Standard Paper Co.* v. *Guenther,* 67 Wis. 101, 30 N.W. 298 (1886); *Sanger* v. *Guenther,* 73 Wis. 354, 41 N.W. 436 (1889); see *National Bank of Commerce* v. *Brogan,* (Wis., 1934) 253 N.W. 385.

[9] *National Bank of Commerce* v. *Brogan,* supra, note 8; cf *Saint Louis Clay Products* v. *Christopher,* 152 Wis. 603, 140 N.W. 351 (1913), where a creditor, who had sold materials to a contractor on credit and without security, began an action against the contractor to recover the price and at the same time caused an attachment to be levied upon certain of the contractor's equipment and materials. The contractor had executed an assignment of all his equipment and materials to protect a surety company that had executed with him a bond running to the city. The contractor had abandoned the job. The surety company had not yet stepped in to take the equipment. The attachment failed because, as the court held, the attaching creditor had not substantiated his contentions that there was danger of the contractor's transferring these assets in fraud of creditors.

serted his claim. The general creditor in this case, the bank, had not bargained for security. The bank had relied upon the statements of the borrower that the equipment was unencumbered. It did not examine the record. Had it done that, and had it found that there was nothing there, then, obviously, it should have been protected against the other creditor claiming the security interest in the chattels. No instrument was in fact recorded because no mortgage had been executed. The secured creditor had no more than an enforceable contract on the part of the debtor to give him security, an equitable mortgage. There was nothing in the case to suggest that there had been any plan as between the contractor and the surety company to give security but to keep the security instrument off the record. It is suggested here that both the bank and the surety company could have insisted upon some form of security instrument, chattel mortgages for instance, to secure their respective claims. It is true that their claims were unliquidated or were to depend upon future happenings, but that would not have made the giving of chattel mortgages to secure those claims impossible nor impractical. Neither creditor did so insist. The surety company got in first to get the equipment. The bank had not been misled by anything the surety company had failed to do when the former made its loan without insisting upon some form of security. The decision seems to approach the suggestion that any general creditor is to be protected where the mortgage has not been filed even after the mortgagee has stepped in and has seized the goods. It is doubtful whether the filing statute, ambiguous as it is, gives the court any excuse for such a sweeping decision. The decisions cited by the court during the course of its opinion do not sustain the broad proposition.

The legislature in adopting the Uniform Conditional Sales Act has specified particularly that the security interest of the vendor shall not be protected against any subsequent lien creditor without notice, good faith purchaser or encumbrancer through the vendee, where the vendor has failed to file within the time prescribed.[10] The statute in that form is not ambiguous. Although the legislature has spoken that definitely the court still has power to work out an adjustment in favor of the general creditor where circumstances suggest that the secured creditor ought to be estopped to assert his security interest against him. The chattel mortgage statute might well be redrawn. There is no reason why it ought not in this respect read like the statute covering the filing of conditional sales agreements.

VERNON X. MILLER.

CONTRACTS—COLLECTIVE BARGAINING AGREEMENTS—RIGHTS OF UNIONS AND INDIVIDUALS.—"A trade agreement, or a collective labor agreement, is a term used to describe a bargaining agreement entered into by a group of employees, usually organized into a brotherhood or union, on the one side, and a group of employers, or a corporation, such as a railroad company, on the other side. Such an agreement may be a brief statement of hours of labor and wages, or, on the other

[10] Section 122.05, Wis. Stats., 1933.