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Mortgages--Real--Personal--"After-Acquired" Clause (Manufacturers Trust Company v. Peck-Schwartz Realty Corporation, et al., 277 N.Y. 283 (1938))

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benefit of the second mortgagee. California [14] and North Dakota [15] have enacted similar legislation.

J. Z.

MORTGAGES—REAL—PERSONAL — "AFTER-ACQUIRED" CLAUSE. —The plaintiff is the holder by mesne assignments of a first mortgage. The defendant is the purchaser of the furnishings of the hotel which were sold under a chattel mortgage when the owner went into bankruptcy. The plaintiff instituted proceedings to foreclose the realty mortgage and claimed that the furniture, furnishings, kitchen equipment and other contents of the building were subject to the mortgage by virtue of a clause contained therein which, after describing the real property in detail, contained the following clause of coverage: "together with all fixtures and articles of personal property, now or hereafter attached to, or used in connection with the premises, all of which are covered by this mortgage." [1] The building loan mortgage provided that the loan should be advanced from time to time as the building progressed. When the final payment was made there was an outstanding conditional sales contract on file embracing furniture. Subsequently, a chattel mortgage upon the furnishings and movables was executed and delivered by the owner. On appeal from a judgment for plaintiff, *held,* reversed. The facts and circumstances with respect to the personal property in controversy do not justify a conclusion that it was included within the terms of the mortgage. *Manufacturers Trust Company* v. *Peck-Schwartz Realty Corporation,* et al., 277 N. Y. 283, 14 N. E. (2d) 70 (1938).

The movables in the instant case would come within the terms of the coverage clause: (1) if they became fixtures [2] as a matter of

146 Miss. 1, 111 So. 448 (1927) (the mortgagor repurchased foreclosed property from the grantee of buyer at foreclosure sale).

[14] CAL. CIV. CODE (Deering, 1937) § 2930.

[15] N. D. COMP. LAWS (1913–25) § 6731. Both California (see note 14, *supra*) and North Dakota have enacted that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution." It has been interpreted to apply to cases where the mortgagor had title, lost it, and subsequently reacquired title, as much as to cases where the mortgagor not having title at first acquired it subsequent to the mortgage. Jensen v. Duke, 71 Cal. App. 210, 234 Pac. 876 (1925); Merchants National Bank of Fargo v. Miller, 59 N. D. 273, 229 N. W. 357 (1930).

[1] This is the same clause as the one read into a mortgage by statute except that the words "now or hereafter" and "all of which are covered by this mortgage" are not included in the statutory form. N. Y. REAL PROP. LAW § 254, subd. 1, Cons. Laws, c. 50.

[2] Ford v. Cobb, 20 N. Y. 344 (1859). A fixture is a thing permanent in its nature which has lost the character of personal property and has become a part of a definite parcel of land by permanent annexation. Whether the thing has

law; (2) if they became part of the realty so as to be essential to its support;[3] (3) if there were an express agreement that they shall become part and parcel of the mortgaged realty;[4] (4) if there were no such express agreement but it clearly appeared from all the facts that the intent was to make them part of the security for the loan.[5] In the case at bar the movables did not fall within any of the above groups. No mention of furniture was made in the application for the loan; there was no stipulation in the mortgage for fire insurance on the furniture; the final payment was made on the loan even though there was an outstanding conditional sales contract on the furniture; and when the owner went into bankruptcy the chattels were sold under the chattel mortgage, and at no time during these proceedings did the plaintiff assert any title to the movables.[6] When an owner of real property affixes a fixture to his land or building, having purchased it under a contract of conditional sale or where he gives back a chattel mortgage to secure the purchase price, title to the fixture although it passes to the purchaser in the latter case, simultaneously reverts to the seller.[7] It is well settled in most jurisdictions that the chattel mortgage or conditional sales contract covering fixtures is valid and enforceable as against a prior real estate mortgagee even though the mortgage contained an "after-acquired" personalty clause. The fixture does not become part of the land, in fact or law, since title is not in the owner of the land.[8] The real estate mortgagee can claim

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become permanently annexed or not is a question of fact which must be decided according to the facts of each case. The test by which permanency of annexation is determined is the intent with which the annexation is made and the adaptability of the thing annexed to permanent use as part of the land. See note 7, *infra*.

[3] Tift v. Horton, 53 N. Y. 377 (1873) (this would be true if no such clause existed).

[4] Shelton Holding Corp. v. 150 East 48th St. Corp., 264 N. Y. 339, 346, 191 N. E. 8 (1934).

[5] Alf. Holding Corp. v. American Stove Co., 253 N. Y. 450, 452, 171 N. E. 703 (1930). In this case the plaintiff had a contract with a conditional vendee whereby the latter was to complete the building and finish it "in a fashion similar to buildings of the same type in said location". There is no denial that fulfillment of that covenant made it necessary to supply the building with ranges and like fittings without which apartments of that order would be unsuitable for tenants. *Cf.* Tift v. Horton, 53 N. Y. 377 (1873); Shelton Holding Corp. v. 150 East 48th St. Corp., 246 N. Y. 339, 191 N. E. 8 (1934).

[6] In a case with a factual situation precisely the same as the one in the case at bar, it was held that a mortgage on premises "and personal property attached to or used in connection with" given to secure a building loan *did not* include pianos, billiard tables, chairs, carpets, linens, utensils, furniture, or equipment of a fraternal club purchased on a conditional bill of sale, where the mortgagee was required to advance a stipulated amount regardless of furnishings and the prospectus offering certificates in the mortgage for sale, and fire insurance procured by the mortgagee, described the real estate only. *Ex parte* Benevolent Protective Order of Elks Brooklyn Lodge No. 22 Manufacturers Trust Co. v. Bachrach No. 235, 69 F. (2d) 816 (C. C. A. 2d, 1934).

[7] WALSH, REAL PROPERTY (2d ed. 1927) § 46.

[8] There is an exception to this rule where the chattel replaces an article of personalty already under the lien of the mortgage. The replacement impairs

no equity arising out of estoppel since the fixture was not annexed when he accepted the land as security and he was not misled in any way.[9] It is also uniformly held that a chattel mortgage or contract of conditional sale is good as against a subsequent mortgagee with notice.[10] It is often vital to the security of a real estate mortgage that items of personalty such as refrigerators, gas ranges, etc., be covered thereby. The parties to a mortgage agreement are allowed the utmost freedom of contract subject to certain well defined limitations, and they may, therefore, provide that articles of personal property will be covered thereby. The question presented, however, is the extent to which the courts will construe the broad clause referred to above or how far they will go in allowing the clause to include such items of personal property not so attached to the realty as to become fixtures, but which are purported to be covered thereby.

In the absence of intervening equities, the words contained in the statutory clause [11] do not necessarily bring within the coverage of the mortgage, movables which are not so attached to the realty as to become fixtures, and the expressions "now or hereafter" and "all of which are covered by this mortgage" added to the statutory form, do not, in and of themselves, extend the coverage.[12] The clause will include gas ranges, title to which is in the owner of the property and which are attached to the building when the mortgage is made and recorded,[13] but such a clause will not ordinarily include personal

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the security of the mortgage and for that reason the conditional sale vendor's lien is subordinate to the lien of the real estate mortgage. This would not be true, however, if the conditional vendor could prove that the article replaced was without value. Roche v. Thurber, 272 N. Y. 582, 4 N. E. (2d) 814 (1936).

[9] Tift v. Horton, 53 N. Y. 377 (1873), holding that where chattels are annexed to real estate with the intent that they shall not thereby become part of the freehold, as a general rule the intent will control without any concurrent intention of the prior mortgagees.

[10] Salt kettles were brought and mortgaged to the seller as personalty. They were imbedded in brick arches, but could be removed without injury to them by displacing a portion of the brick at inconsiderable expense; and the course of the manufacture required them to be thus removed and reset annually: *held,* that they continued to be personalty as against a subsequent purchaser of the salt works, who had no notice of the facts, other than constructively from the filing of the chattel mortgage. Ford v. Cobb, 20 N. Y. 344 (1859).

[11] See note 1, *supra.*

[12] The words "hereafter attached to" do not include lighting fixtures lying loose and unattached in the various rooms of the building. "This mortgage did not amount to a full and complete chattel mortgage so as to cover personal property delivered to and in possession of the vendee but not yet attached to the real estate." Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932).

[13] Cohen v. 1165 Fulton Ave. Corp., 251 N. Y. 24, 166 N. E. 792 (1929). The lien of a mortgage which, after describing the property covered continues "together with all fixtures and articles of personalty now or hereafter attached to or used in connection with the premises all of which are covered by this mortgage", attaches to gas ranges sold under a conditional sales contract and attached to the premises where the mortgage was taken without knowledge of the reservation of title.

property not in existence at the time the mortgage was made and recorded.[14]

In the instant case it was held that there was no express agreement that the personalty should become part of the realty and that the facts did not indicate such an intent. But *quaere,* what if it did affirmatively appear from the facts and circumstances that the maker of the mortgage intended that the after-acquired personalty should be deemed within the coverage of the mortgage, and it was then purchased under a conditional sales contract or a chattel mortgage? The result would be the same. The mortgagor's intention could not affect the rights of the conditional vendor which would be prior to the rights of the first mortgagee, because title to the chattels would still be in the conditional vendor and not in the owner of the property. The mortgagor could not mortgage property he did not own. It would appear, however, that the mortgage under these circumstances would cover the owner's equity in the chattels and upon satisfaction of the conditional sales contract or chattel mortgage, the personalty would come within the coverage of the mortgage in equity.[15]

F. D. M.

SALES — BREACH OF WARRANTY — DEATH ACTION UNDER DECEDENT ESTATE LAW SECTION 130.—An action was brought to recover for the wrongful death of plaintiff's wife. The defendant offered provisions and foodstuffs for sale to the public as part of its retail business. Among said foodstuffs were pork frankfurters or sausages, a quantity of which the deceased purchased and consumed, contracting therefrom the disease of trichinosis, of which she died. The plaintiff sought recovery on the theory of breach of the implied warranty of fitness for use. *Held,* breach of the implied warranty that the food was fit for human consumption was such a "default" or "wrongful act" as to bring the case within the purview of Section 130

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[14] Prudential Insurance Co. v. Sanford Real Estate Corp., 157 Misc. 563, 284 N. Y. Supp. 73 (1935), *aff'd,* 246 App. Div. 567, 282 N. Y. Supp. 840 (4th Dept. 1935). The mortgage is subject to the construction enjoined by statute (REAL PROP. LAW § 54) notwithstanding that it contains, in addition to the words of the statutory form, other provisions. Property not on the premises when the mortgage was given could not be covered by the mortgage unless it became a part of the realty. The mortgage could not cover personal property not then in existence. *Cf.* Perfect Lighting Fixtures Co. v. Grubar Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dept. 1930).

[15] Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890); Rochester v. Rasey, 142 N. Y. 570, 37 N. E. 632 (1894).