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Mortgages-Place of Recording

MORTGAGES—PLACE OF RECORDING—Action to foreclose a mortgage. Defendant, a resident of Allen County, owned two grain elevators located respectively on lands leased from the Baltimore and Ohio Ry. Co. and the Wabash R. Co., in DeKalb and LaGrange Counties. The leases[1] provided that the defendant

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[39] An inexplicable variation is the limitation of burial expense (sec. 7c) to $100 in occupational diseases cases, while it is $150 in the Workmen's Compensation Act (sec. 39).

[40] Nelson, *Silicosis Problem Solved in Wisconsin* (1936), 26 Am. Labor Leg. Rev. 53, 57.

[41] Sayers and Jones, *op. cit. supra* note 3, p. 27, "Preliminary and periodic physical and roentgenological examination should be made of all employees engaged in industrial processes where there is a potential if not actual exposure to excessive concentrations of silica in the atmosphere."

[42] Sayers and Jones, *op. cit. supra* note 3, p. 28-30. The use of methods (1) to prevent the esape of the dust into the workroom atmosphere, (2) to remove the dust from the atmosphere, and (3) the use of mechanical personal protective equipment is advocated.

In Science News Letter, Mar. 18, 1939, Vol. 35, p. 163, is an account of the use of aluminum dust inhalations as a preventive of silicosis. The aluminum dust so inhaled dissolves in the body fluids to form colloidal aluminum hydroxide which is then absorbed and firmly held on the silica crystals and renders the dust harmless.

[1] The language of the instrument quoted in the present case seemed to indicate that one of the leases was only a license but the court in its treatment of the case considered both as leases. The writer in his discussion of

had the right to remove such properties on the termination of the term. The mortgage covered both the elevators and the leasehold interest. In executing the mortgages, chattel mortgage forms were used; but contrary to the Chattel Mortgage statute,[2] they were recorded in the counties where the respective properties were located. Subsequently, the properties were subleased to one Levy, who claims priority over the mortgagees on the ground that the mortgages were improperly recorded. Held, that such properties do not constitute "goods" under the Chattel Mortgage Act but are interests in land under the real estate recording statute;[3] therefore the mortgages were properly recorded. *Wayne v. Nathan* (Ind. 1939), 19 N. E. (2d) 243.

Whenever it is doubtful what the exact nature of mortgaged property is, realty or personalty, the question of where to record the mortgage instrument is of considerable importance. The significance of this event arises out of the fact that if the instrument is improperly recorded it does not constitute constructive notice to third persons,[4] thereby offering only limited protection to the holders of the improperly recorded instrument. The instant case raises the question of the appropriate treatment of fixtures annexed to a leasehold by a lessee. Are they to be recorded (under the Chattel Mortgage Act) in the county where the mortgagor resides, or (under the statute relevant to mortgages on real property) in the county where the properties are situated?

A general definition of goods includes all chattels personal other than things in action and money[5] while the phrase "any interest in realty" has been interpreted to mean all property properly classified as real estate and all other interests connected thereto, including fixtures and chattels real. Elevators and structures appurtenant thereto, like those involved in the present case, would be classified ordinarily as fixtures and regarded as part of the land if erected by a landowner on his own realty.[6]

However, where property is placed upon the premises by a tenant, con-

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the case has followed the interpretation of the court due to lack of sufficient data on this point.

[2] Burns' Ind. Stat. (1933), 33-301. "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides, if he resided in this state, and if not a resident of the state, then in the county where said property is situated within ten days after the execution thereof." This provision has since been modified by Burns' Ind. Stat. (1933 Supp.) § 51-501, § 51-504, § 51-509.

[3] Burns' Ind. Stat. (1933), § 56-119. "Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years shall be recorded in the recorder's office of the county where such lands shall be situated and every conveyance, mortgage or lease shall take priority according to the time of the filing thereof, and such conveyance, mortgage or lease shall be fraudulent and void as against any subsequent purchaser, lessee, or mortgage in good faith and for a valuable consideration, having his deed, mortgage, or lease first recorded.

[4] Jones, Chattel Mortgages and Conditional Sales, Vol. I, Sec. 250, p. 426.

[5] Willard v. Hegdon (1914), 123 Md. 447, 91 A. 577, Ann. Cas. 1916 C 339.

[6] Tiffany, The Law of Real Property (1920), Vol. I, p. 903; Teaff v. Hewitt (1853), 1 Ohio St. 511, 530; Wheting v. Lubec (1922), 121 Me. 121, 115 A 896.

stituting trade fixtures,[7] the character of the property is more difficult to determine. "On this point there has been much confusion, the courts having held that trade fixtures are not for all purposes, personal property, or real property, but that they constitute a twilight zone of rights in which both types intermingle, the rights of one type being emphasized for some purposes and the rights of the other type for other purposes."[8] For example, for execution purposes by a creditor of the lessee they are treated as chattels[9] while for purposes of a mortgage by the lessee of his interest they are treated as realty.[10]

It is submitted that in light of these decisions that the classification of a trade fixture is a nebulous one depending largely on the policy which the courts wish to uphold and the particular factual setup involved. A good example is the instant case, which is complicated by the additional factor that the leaseholds were mortgaged together with the fixtures, injecting a new element into the typical case. The courts in such instances have held that policy would seem to dictate that the property should be considered as an interest in realty until severed, rather than personalty.[11]

Another element relevant to the determination of the present problem is the treatment of the chattel real under the recording laws. This classification, including all interests in real estate less than a freehold, was regarded by the common law as personalty for many purposes.[12] However, under the broad definition of the real estate recording law which includes "every conveyance or mortgage of any interest in lands",[13] chattels real have uniformly been held recordable under the real estate statute. Thus where, as in the present case, a leasehold is involved, it is often held that buildings and machines annexed by a tenant follow the term and partake of its character.[14]

On the application of the above reasons to the instant problem, it is easily discernable that the property constitutes an interest in land under the recording laws, and that the recordation in the county where the lands lay was valid. It is submitted that although the case as decided may not be entirely in harmony with the Indiana decisions,[15] the result reached is a desirable one and is in accord with the better authority.[16] F. L. M.

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[7] The properties in the instant case constitute trade fixtures since they were used for trade purposes. Brown, On Personal Property, p. 655; Van Ness v. Pacard (1829), 2 Pet. (U. S.) 137.

[8] Brown, On Personal Property, pp. 659, 661.

[9] Freeman v. Dawson (1883), 110 U. S. 264, 4 S. Ct. 94.

[10] San Francisco Breweries v. Schultz (1894), 104 Cal. 420, 38 Pac. 92.

[11] San Francisco Breweries v. Schultz (1894), 104 Cal. 420, 38 Pac. 92: First Nat'l Bank of Joliet v. Adams (1891), 138 Ill. 483, 28 N. E. 955; Meux v. Jacobs (1875), L. R. 7H. L. 481.

[12] 22 R. C. L. 65: Hyatt v. Vincennes Nat'l Bank (1884), 113 U. S. 408, 5 S. Ct. 573; Newhoff v. Mays (1891), 48 N. J. Eq. 619, 23A. 265.

[13] Burns' Ind. Stat. (1933) § 56-119.

[14] Hyatt v. Vincennes Nat'l Bank (1884), 113 U. S. 408, 5 S. Ct. 573. The above statement is true even when the tenant makes an agreement with the landlord that he may remove such property after the termination of the lease.

[15] Merril v. Garner (1913), 54 Ind. App. 514, 101 N. E. 152; Central Trust and Savings Co. v. Wallace (1918), 66 Ind. App. 629, 118 N. E. 593; Perry v. Acme Oil Co. (1909), 44 Ind. App. 207, 88 N. E. 859; St. Joseph Hyraulic Co. v. Wilson (1893), 133 Ind. 465, 33 N. E. 113 These cases, however, may be distinguished from the present case in as much as they were only concerned with the character of the fixtures alone while in the case at bar the mortgage concerned both the leasehold interests and the fixtures. 22 R. C. L. 65.

[16] Tiffany, On Real Property (1920), Vol. I, p. 932; Freeman v. Dawson (1883), 110 U. S. 270, 4 S. Ct. 94.