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Article 10

Fixtures - Mechanics Liens - Conditional Sales Contracts

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go only to prove or disprove the reasonableness of the contract. *Nordenfelt* v. *Nordenfelt,* (1894) Ap. Cas. 535; 8 Harv. L. Rev. 355 (1895). The plaintiff must show there was a valid consideration. *Durbrow Comm. Co.* v. *Donner,* 201 Wis. 175, 229 N.W. 635 (1930); that the breach causes irreparable damage. *Berlin* v. *Perry,* supra. But if the contract is valid there is a property right to be protected. *Palmer* v. *Toms,* 96 Wis. 367, 71 N.W. 654 (1897), and equity alone can furnish adequate relief. *Eureka Laundry Co.* v. *Long,* supra; *My Laundry Co.* v. *Schmeling,* 129 Wis. 597, 109 N.W. 540 (1906). The restraining clause must be ancillary to a contract for the transfer of the good will or other subject of property or to an existing employment or contract for employment. *Restatement,* Sec. 515-b; *Chain Belt Co.* v. *Von Spreckelsen,* 117 Wis. 106, 94 N.W. 78 (1903). It has been held that it is sufficient if the employee contracted not to cause the damage which would result from his competing with the employer after he left his employ, where the employee had personal contact with the customers and the employer did not. *Eureka Laundry Co.* v. *Long,* supra. If the terms of the contract indicate that it is unreasonable, because it extends over too long a period or too large a space, there is a conflict of authority as to whether a court should grant a decree enjoining the defendant as to a reasonable time and space. The court did so in *Whiting* v. *O'Connel,* (Mass. 1931), 179 N.E. 169, but this decision was criticized as being a peculiar doctrine to Massachusetts and Kentucky; that courts should not aid an employer who uses his advantage over an employee to frame an unreasonable restraining clause. 45 Harv. L. Rev. 751 (1932). Where the contract is unreasonable as a whole, but the language permits a construction that it is severable, it will be enforced within such smaller limits as are reasonable, but if such smaller limits are not defined by the contact itself the court cannot say how much is a reasonable restraint and enforce that. *General Bronze Corp.* v. *Schmeling* (Wis. 1932), 245 N.W. 469; 20 Harv. L. Rev. 154 (1906). Where areas are disjunctively described there is a proper basis for dividing the covenant and enforcing it in the territory which is properly restricted. *General Bronze Co.* v. *Schmeling,* supra. In the present case there is no indication that the contract was severable, and the court refused to grant an injunction as to a reasonable territory. The present contract is unreasonable in the light of present financial conditions. The present case does not overrule the Eureka Laundry Co. case, but indicates that such contracts may be reasonable in prosperous times, but unreasonable in times of depression.

JOHN F. SAVAGE

FIXTURES—MECHANICS LIENS—CONDITIONAL SALES CONTRACTS.—Defendant, conditional vendor of machinery under an unrecorded agreement, contested plaintiff constructor's suit against principal defendant to foreclose a mechanic's lien on building, machinery, and leasehold of a rendering plant, asking that such machinery be exempt from the lien. A finding that the machinery was permanently annexed to said realty raised the question of whether plaintiff's lien covered machinery, now annexed to realty, sold under a conditional sales agreement without notice to the plaintiff lienor. *Held,* that trade fixtures permanently affixed to the realty are subject to mechanic's liens unaffected by conditional sales contracts of which lienors had no notice. *Geer Co.* v. *Wolcott et al.* (Neb. 1933), 246 N.W. 456.

The annexation of fixtures to realty raises perplexing questions in this regard, and the decisions are by no means uniform. Practically all the cases hold notice prerequisite to the preservation of the conditional vendor's rights against

the lienor. *Landreth Mach. Co.* v. *Roney,* 185 Mo. App. 474, 171 S.W. 681 (1914); *Sowden & Co.* v. *Craig,* 26 Ia. 156, 96 Am. Dec. 125 (1868); *St. Mary's Mach. Co.* v. *Iola Mills Co.,* 97 Kans. 464, 155 Pac. 1077 (1916); *King* v. *Blickgeldt,* 111 Wash. 508, 191 Pac. 748 (1920). It is on this ground that the instant case is decided. *In re Superior Drop Forge & Mfg. Co.,* 208 Fed. 813 (N.D. Ohio E.D. 1913) creates an apparent exception, holding that an express agreement that property will remain personalty defeats the lienor's priority; but applies this rule only when the property can be removed without damage to the realty. What notice is sufficient to defeat the lienor's right is a disputed question. Whether the recording of a chattel mortgage or conditional sales contract binds an encumbrancer of realty without notice is not decided in the instant case, but the courts are clearly divided with Illinois, *Sword* v. *Low,* 122 Ill. 487, 13 N.E. 826 (1887); New Jersey, *Keeler* v. *Keeler,* 31 N.J.E. 181 (1879); New York, *Ford* v. *Cobb,* 20 N.Y. 344 (1859); and the Federal courts, *In re Atlantic Beach Corp.,* 244 Fed. 828 (S.D. Fla. 1917), holding that it does; and New Hampshire, *Tibbets* v. *Horne,* 65 N.H. 242, 23 A. 145 (1889); Ohio, *Brennan* v. *Whitaker,* 15 Oh. St. 446 (1864); and Texas, *Phillips* v. *Newsome,* 179 S.W. 1123 (Tex. Civ. App. 1915), taking a contrary stand. At any rate actual notice is preferable to constructive notice by recording. Where no ground of lack of notice was present, conditional vendor's rights have come before those of mechanic lienors. *Sowden & Co.* v. *Craig, supra,* which holds that annexation to realty did not extinguish conditional sales vendor's rights, even though the article was sold expressly for annexation. Likewise a chattel mortgage prevails over a mechanic's lien where sufficient notice is had. *Edwards & B. Lumber Co.* v. *Rank,* 57 Neb. 323, 77 N.W. 765 (1899). One case goes to the extreme and declares that the very act of recording prevents annexation and ipso facto bars mechanic lienholders. *St. Mary's Mach. Co.* v. *Iola Mill & Elevator Co., supra.* In Wisconsin the exact situation has not yet come up, but *Kendall Mfg. Co.* v. *Rundle,* 78 Wis. 150, 47 N.W. 364 (1890), passing upon the Wisconsin statute (Cf. 289.01 Wis. Stats. (1931) declaring that "such lien shall be prior to any other lien which originates subsequent to the commencement of the construction and repairs," holds that a mechanic's lien has priority over a recorded chattel mortgage. It is very likely then that in this state the conditional vendor's only remedy would be the filing of a materialman's lien, and thus come in on an equal basis with the mechanic lienholder.

EDWARD HERMSEN

MUNICIPAL CORPORATIONS—VILLAGES—FINDINGS OF FACT.—An application by taxpayers residing within a particular area for the incorporation of such area as the village of St. Francis was objected to by the city of Milwaukee and eleven electors and taxpayers residing within said territory. Although the right of the city of Milwaukee to object under an annexation petition signed by no electors and one-half of the property owners of a certain area was denied, the application for incorporation was not granted, the trial court finding that the territory involved was largely rural in character and concluding that the sector did not have the necessary characteristics to entitle it to be incorporated as a village. Appeal taken. *Held,* Affirmed; evidenced found to support trial court's conclusion. *In re Village of St. Francis,* (Wis. 1933), 245 N.W. 841.

There is no constitutional limitation upon the power of the Wisconsin legislature to incorporate cities or villages, as to area and density of population, except such as may be implied from the use of the words, "cities and villages,"