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Protecting Real Estate Contract Purchases

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anty Co. v. Cascade Construction Co.,¹³ wherein it was said, referring to the defense of *ultra vires*: "We would not be understood as abolishing this defense.

We would sustain it in any case where the transaction is prohibited, illegal, or immoral. We merely wish to be understood as following no Procrustean rule in such cases, but such defense must always be considered on the merits in law and fact."

It is contended by some with considerable plausibility that the rule in Washington as to the legal nature and enforceability of an *ultra vires* contract is technically inconsistent in that in some of the earlier cases an *ultra vires* contract is held void, and at the same time it is held that performance of the void contract by one party gives rise to certain rights thereunder by way of estoppel. However, such rights arise primarily not so much from the *ultra vires* contract as from the performance thereof and the fact that under the circumstances, either by reason of the benefits received therefrom by the other party or otherwise, it is recognized as unjust to allow him to deny the validity of the contract. Effect is given to the contract under such circumstances, not because it is valid, but because the defendant is not legally permitted to set up such invalidity as a defense. A strict adherence to the technical abstract rule that an *ultra vires* contract is void *per se* (except as there is resort to recovery upon *quasi* contract) frequently operates unfairly, dishonestly, and with manifest injustice. It is submitted that this is a commendable instance of a departure, in accordance with the modern tendency of the weight of authority among the state courts, from a strict interpretation of an old technical theory, in the direction of rendering the law a more effective instrumentality for the administration of justice.

Elwood Hutcheson.

PROTECTING REAL ESTATE CONTRACT PURCHASES.—Many assignees of the vendors' interests in installment contracts for the sale of real estate suppose that the recording of the assignment protects them by giving constructive notice of their rights. The increasing amount of investment in real estate contracts makes it important to determine the best method for protecting the assignee.

Our Supreme Court¹ has said that recording "is purely a creation of the statute", and since the recording of such assignments is not provided for by statute it would seem that no constructive notice follows from recording.

¹³ 106 Wash. 478, 483, 180 Pac. 463 (1919).

"A contract entered into by a corporation is presumed to be within the corporate powers unless the contrary appears, and the burden of proof is upon the one who attacks the contract as *ultra vires*." *Belch v. Big Store Co.*, 46 Wash. 1, 5, 89 Pac. 174 (1907), citing 1 CLARK AND MARSHALL, PRIVATE CORP., §174.

Ultra vires is a defense not favored in law. *U S. Fidelity & Guaranty Co. v. Cascade Construction Co.*, *supra*.

¹ *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923 (1901).

This conclusion is born out by two interesting Washington cases² holding, in effect, that the assignment of a vendor's interest in a chattel conditional sale contract does not give constructive notice of the rights of the assignee.

Another analogy may be pointed out. It was formerly the law in this state that the assignee of a real estate mortgagee's interest gained no protection, as far as constructive notice is concerned, by recording his assignment. The assignee's rights might be wiped out by an unauthorized satisfaction by the original mortgagee,³ and this regardless of the well known custom of recording such assignments.⁴ Three years after our Supreme Court had declared that the remedy for this "oversight of many years' standing" was with the Legislature, a law was passed expressly providing for the recording of such assignments.⁵ The effect of this change was, before long, noted in the decisions.⁶

It has also been held in this State that the recording of an assignment of a chose in action, such as a labor lien, does not give constructive notice and that a right subsequently acquired by the debtor against the assignor-creditor could be set up as against the assignee.⁷

It appearing, therefore, that the recording of an assignment of the vendor's interest in a real estate contract gives no constructive notice, we may point out several pitfalls existing for the unwary assignee.

² *State Bank of Black Diamond v. Johnson*, 104 Wash. 550, 177 Pac. 340 (1918), and *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321 (1923). The Supreme Court said the facts in these two cases were "completely duplicated." In each case we may say that an owner sold a motor car under conditional sale contract, thereupon assigning its interest to a bank. The purchasers gave up their contracts and returned the cars to the vendors, who wrongfully resold the cars to innocent purchasers. In each case the assignee bank brought replevin against the innocent purchaser.

The cases reach different results. In the first case the court held that there was a complete sale of the vendor's interest to the bank and that since no interest remained in the vendor he could pass none on to the innocent purchaser. The bank recovered. In the second case the facts showed that the assignment to the bank was for security only, the bank not becoming a purchaser of the property but receiving only the right to collect payments. The court held that title remained in the vendor and that this was passed on to the innocent purchaser. Nor was the bank protected as a pledgee, since there was lacking the delivery of possession requisite for the validity of a pledge. The bank was denied relief.

In the first case the court said, "It may well be argued that Johnson and Dahl (innocent purchasers from the vendor) had no constructive notice under the filing and recording provisions of our conditional sales contract statute, Rem. Code, §§3670 and 3671, since that statute makes no provision for the filing, recording or indexing of assignments of this nature."

³ *Howard v. Shaw*, 10 Wash. 151, 156, 38 Pac. 746 (1894) is the leading case.

⁴ *Howard v. Shaw*, *supra*, where the court said, "We had no doubt that the practice has long prevailed with the auditors in this state to record these instruments and charge for it, as suggested by appellant, but we find no authority for it in the statutes and the custom does not in this case make the law."

⁵ Laws 1897, Ch. V p. 5, Ch. XXIII, p. 23.

⁶ *Seattle National Bank v. Ally*, 66 Wash. 610, 120 Pac. 94 (1912).

⁷ *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157 (1909). "We are not aware of any statute and none has been called to our attention requiring or

It is possible that: (1) The vendor might deed to the purchaser. If the latter had not been notified of the assignment his payment to the vendor would discharge him from further obligation. Even if he had been notified, he might pass the title on to an innocent purchaser, depriving the assignee of recourse against the property itself. (2) The vendor might convey or mortgage the property, subject to the contract, to some innocent party. If, perchance, the contract had not been recorded and there was no actual notice of it, the innocent party would take free and clear. (3) If actual notice had not been given the purchaser, a payment to the vendor would discharge the purchaser *pro tanto*. (4) An attachment of the vendor's interest in the land, or a judgment lien, might take precedence of any right of the assignee as against the land itself. This is debatable, however, in view of the holding in many states, that an assignment of the purchase money debt impliedly carries the vendor's lien with it.⁸ (5) Particularly in case of the death of the vendor, the assignee, upon default by the purchaser, would find difficulty in having the contract forfeited.

We must consider not only the problem of protecting the assignee during the pendency of the contract but also the question as to his obligations when the contract is paid up. It seems that his rights during the pendency of the contract would be safeguarded by giving to the purchaser notice of the assignment and by taking from the vendor a warranty deed running to the assignee, but subject to the contract. This should be recorded in order to make secure the assignee's right to the property.

It has been recognized in this State that the rights and title of the vendor may be conveyed⁹ or mortgaged¹⁰ without working a breach

authorizing the recording of the assignment of a lien of the character of the one in this case. In the absence of such a statute the recording of the assignment to the respondent before the assignment to the appellant did not operate as constructive notice."

In this case a labor claimant assigned to the plaintiff his claim for \$969. He thereafter purported to assign this claim to the debtor, in consideration of a payment of \$375 by the debtor. The statement of the court that the assignment of a claim by a creditor to his debtor is a settlement of the claim, wiping out the rights of a prior assignee, is subject to criticism. While the debtor, not knowing of the assignment, should have had a defense to the extent of the \$375 paid, he should have derived no rights from the assignment *per se*, in view of the holding in this state that as between successive assignees of the same chose, the assignee prior in time prevails. See *Bellingham Bay Boom Co. v. Bribois*, 14 Wash. 173, 181, 44 Pac. 153, 155 (1896), and *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U. S. 182, 68 L. Ed. 628, 44 Sup. Ct. Rep. 266, 31 A. L. R. 867 (1923), citing the Washington case.

⁸ *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344 (1860), *Perry v. Roberts*, 30 Ind. 244, 95 Am. Dec. 689 (1868).

⁹ *Big Bend Land Co. v. Hutchings*, 71 Wash. 345, 128 Pac. 652 (1912).

¹⁰ *Baker v. Murrey*, 78 Wash. 241, 246, 138 Pac. 890 (1914), *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061 (1892).

¹¹ *Big Bend Land Co. v. Hutchings*, *supra*; *Fargo v. Wade*, 72 Ore. 477, 142 Pac. 830 (1914), *Laughlin v. North Wisconsin Lumber Co.*, 176 Fed. 772, 777 (1910).

of the contract with the purchaser.¹¹ The assignee or transferee will receive the right to forfeit the contract upon default.¹²

The question then arises as to the assignee's obligation when the purchaser has paid up. Assuming that the assignee has taken from the vendor and recorded a warranty deed subject to the contract, he must then convey the title on to the purchaser, which he may do by warranty deed. It has been held that the purchaser, in the case of the ordinary contract, cannot require a deed direct from the vendor, it apparently being sufficient if the vendor's warranty is somewhere in the chain of title, since the covenants run with the land and may be enforced against all the covenantors.¹³

It is apparent, however, that when the assignee conveys the property to the purchaser in this manner he becomes liable on his warranty. It would seem possible for the assignee to avoid this liability and at the same time fulfill the contract with the purchaser by placing in escrow a deed directly from the vendor to the purchaser and a special warranty or quitclaim deed from himself to the purchaser. A clear title and the warranty of the vendor would seem to be all that the purchaser could require under the contract.¹⁴ Thus the assignee would not be under the liability of a general warranty. Nor could the purchaser require him to make the title good, it having been held¹⁵ that, in the absence of express agreement, the assignee does not assume

¹² *Boyd v. Bondy*, 113 Wash. 384, 194 Pac. 393 (1920) *Lewis v. Bailey*, 62 Wash. 296, 113 Pac. 761 (1911).

¹³ *Big Bend Land Co. v. Hutchings*, *supra*. In *Gottschalk v. Mewenheimer* 62 Wash. 299, 113 Pac. 765 (1911), a vendor agreed to "execute or cause to be executed a warranty deed" to the purchaser. The land was held in the name of a partner as trustee. It was held that the purchaser was entitled to insist that the deed be executed by the vendor himself and that he need not accept a title passed through another. Cf. *Herrick Improvement Co. v. Kelly*, 65 Wash. 16, 25, 117 Pac. 705 (1911). It was held in *Big Bend Land Co. v. Hutchings* that the vendee is entitled to the kind of deed his contract calls for and that the assignee must warrant to the extent of the consideration recited in the contract.

¹⁴ This would follow from the reasoning and decision in *Big Bend Land Co. v. Hutchings*, *supra*, although the court said, "Here Garretson (vendor) conveyed by deed of general warranty to respondent (assignee) and it must convey by deed of general warranty to appellant (purchaser)." See Note 15, *infra*.

¹⁵ *Bimrose v. Matthews*, 78 Wash. 32, 138 Pac. 319 (1914). In this case the vendors placed in escrow a warranty deed from themselves to the purchaser. Later the vendors assigned the contract and gave the assignee a warranty deed to the property. The assignee then executed to the purchaser a special warranty deed and placed both deeds in escrow with the original contract and deed. It developed that there were certain liens against the property and the purchaser sued the assignee for specific performance of the contract. The suit was held properly dismissed, the court saying, "There was no express promise on the part of Matthews (assignee) to convey a perfect title. The title did not pass through him. It passed directly from Starkey and wife (vendors) to Bimrose (purchaser). All Matthews was required to do was to convey the title he had. It seems plain to us that Matthews neither expressly nor impliedly agreed to convey the title. As was said in *Big Bend Land Co. v. Hutchings*, *supra*, the vendee is entitled to the deed that his contract calls for. His contract in this case calls for a warranty deed from Starkey and wife, and that is all the appellants are entitled to."

the liabilities of the vendor, although he acquired all the latter's "right, title and interest"

If, as suggested, the vendor executes a deed to the purchaser and also one to the assignee, it may be argued that these deeds are, if executed and delivered at the same time, conflicting and nugatory; or that, if the deed to the assignee is executed and delivered later, the vendor has no title to pass. Where the deed to the purchaser is placed in escrow, however, the legal title still remains in the grantor¹⁶ until the condition has been performed. The deed to the assignee conveys only the vendor's interest, expressly subject to the contract. Upon fulfillment of the contract, the right of the assignee, the holder of this interest, is at an end.

In *Bimrose v. Matthews, supra*, it was stated that the title passed directly from the vendor to the purchaser.¹⁷ If the vendor had already conveyed all his interest to the assignee, it is difficult to see how this could be true. But whether the title passes directly or through the assignee, the purchaser, in the absence of special provisions in the contract, will have received all he is entitled to, the vendor will not have given a general warranty and, in the meantime, will have perfected his right to the purchase money by notifying the purchaser of the assignment and will have acquired the vendor's title as security by taking and recording the warranty deed from the vendor, subject to the contract.

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RECENT CASES

COMMUNITY PROPERTY—SEPARATE PROPERTY OF THE WIFE—COMMUNITY AND SEPARATE FUNDS.—Plaintiff entered into negotiations for lot 5. The purchase price was \$4,000. \$1,000 came from the plaintiff's separate funds and the balance was raised by the execution of a mortgage of \$2,500 and five notes of \$100 each signed by the community. Payments were made upon this mortgage until about January, 1922, and with \$1,600 still remaining unpaid a new mortgage was executed by the community upon the property for the sum of \$3,000, part of which was used to pay community debts. *Held*: The character of property is to be determined as of the date of its acquisition, and unless such action is taken thereafter as destroys its character it remains the same. Hence lot 5 is one-fourth separate and three-fourths community. *Zintheo v. Goodrich Co.*, 36 Wash. Dec. 161, 239 Pac. 391 (1925).

¹⁶In *May v. Emerson*, 52 Ore. 262, 96 Pac. 454, 1065 (1908), it was held that pending full payment of the price the legal title remained in the vendor and was subject to the lien of a judgment against the vendor to the extent of his interest therein.

¹⁷The court also said, "This deed was undoubtedly for the purpose of conveying the property to Matthews in case of the failure of Bimrose and wife to comply with the contract and in case the contract should, for that reason, be forfeited."