

Opinion No. 17-1989

May 10, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. W. C. Zerwer, County Clerk, Clovis, New Mexico.

Conditional Sale Contracts Must Be Acknowledged Before Recording.

OPINION

I am in receipt of your letter of the 7th instant enclosing copy of form of contract between The Underwood Typewriter Company and purchasers of typewriters. You state that you have advised The Underwood people that such instruments are not entitled to filing and recording on the ground that they are not acknowledged as required by law, and ask for an opinion from this office relative to such subject.

The form of contract submitted by you sets forth the price of the typewriter and the amount of the deferred payments and when due, with a provision that upon full payment of the purchase price the title to the property purchased should vest in the purchaser. The purchaser is referred to in the contract as lessee and recitals in the contract are to the effect that the typewriter is leased to the purchaser. It is further provided in the contract that until such payments have been made in full, that the title of said property shall remain in The Underwood Typewriter Company, and that said company shall have the right to take immediate possession of said property without legal proceedings upon failure of the purchaser to fill any part of the agreement. The contract is signed by the company and the lessee and witnessed by or before a witness. Regardless of what the contract may be called by the parties, the same is what is termed by the courts as a conditional sale contract. The important feature of this contract, to which I call your attention, is that no acknowledgment is attached to the same. Section 567, Code 1915, in part reads as follows:

"That hereafter all chattel mortgages, or other instruments of writing, having the effect of a mortgage or a lien upon personal property, shall be acknowledged by the owner or mortgagor and recorded in the same manner as conveyances affecting real estate in the county or counties wherein the mortgaged property is situate at the time of the execution of any such chattel mortgage or other instrument of writing having the effect of a mortgage or lien upon personal property."

This section further provides for the recording of chattel mortgages. The section quoted is superseded and repealed by Chapter 71, Laws of 1915. Section 2 of the last named act reads as follows:

"That hereafter all chattel mortgages or other instruments of writing having the effect of a mortgage or a lien upon personal property, shall be acknowledged by the owner or mortgagor in the same manner as conveyances affecting real estate."

The act further provides for the filing of chattel mortgages instead of recording, as provided for under the old act.

I quoted Section 567 for the purpose of showing that, under the old law, it was necessary that a chattel mortgage be acknowledged before it was entitled to record and to show that, under the new law, it was necessary to be acknowledged before it could be filed. In other words, so far as the acknowledgment of the instrument is concerned, the same requirements as to filing are made under the new act as were as to recording under the old act. Section 4795, Code 1915, in part, reads as follows:

"Any instrument of writing, duly acknowledged and certified to, shall be entitled to be filed and placed of record. Any instrument of writing, not so acknowledged and certified to, shall not be entitled to be filed and placed of record, nor considered of record though so entered."

In *McBee, v. O'Connell*, 16 N.M. 467, 120 Pac. 734, our Supreme Court in construing Section 4795 held that an unacknowledged instrument was not entitled to record, and that the spreading upon the records of such an instrument does not make the same a matter of record.

Again, in *Vorenburg v. Basserman*, 17 N.M. 433, 130 Pac. 438, our Supreme Court held that a chattel mortgage not properly acknowledged is not entitled to record and furnishes no constructive notice.

You will further note that in both Section 567 and in Section 2 of Chapter 71, Laws of 1915, the instruments authorized to be filed are not confined to chattel mortgages, but the law includes "other instruments of writing having the effect of a mortgage or a lien upon personal property." In this connection it was held, in *Maxwell v. Tufts*, 8 N.M. 396, 45 Pac. 979, that Section 567 did not apply to the recording of a conditional sale contract and that such contract did not have the effect of a lien within the meaning of this section. This doctrine was also announced in *Redewill v. Gillin*, 4 N.M. 72, 12 Pac. 872.

In my opinion you were correct in refusing to file such instrument under our chattel mortgage statute, for two reasons: First, because the same was not acknowledged in the same manner as a conveyance affecting real estate. Second, because the same is not an instrument of writing having the effect of a mortgage or a lien upon personal property.

(See Opinion 2024.)