The choice of remedies made by the plaintiff operated even more harshly to the plaintiff's disadvantage in *Little v. Blue Goose Motor Coach Co.* (Ill. 1931) 178 N. E. 496. The plaintiff recovered a judgment for five thousand dollars for the death of her husband, the petition charging negligence on the part of the defendant. The defendant had previously sued the deceased in a justice of the peace court for damages to its bus and had recovered judgment. The deceased appealed from the justice's decision but the appeal was later dismissed for want of prosecution. The deceased's wife was substituted as plaintiff in the circuit court case upon the death of her husband. It was held that when the appeal was dismissed, and *procedendo* issued, the justice's judgment became a final determination between the parties and those in privity with them, and the circuit court judgment was reversed. Since there was a trial on the issue of negligence in the justice court, it seems that the apparent injustice is due entirely to the failure of the deceased to prosecute the appeal and that the principle of the case is in accord both with logic and established law. H. H. G., '33.

CHATTEL MORTGAGES—RECORDING—RIGHTS OF INNOCENT THIRD PARTIES. —To secure the purchase price on refrigerating units installed in two apartment houses in St. Louis County, chattel mortgages were executed and filed for record in the City of St. Louis. The defendant purchased the property at a foreclosure sale under deeds of trust securing loans on the realty. The owner of these deeds of trust had purchased them sometime previous to the foreclosure without actual notice of the chattel mortgages. The plaintiff brought an action in replevin to recover possession of the refrigerators. *Held*, that by the installation of the units, they lost their character as personalty and became fixtures, and that as between the vendor and a third party, an encumbrancer of the realty, the filing of the chattel mortgage in the City of St. Louis was not notice, actual or constructive, of the plaintiff's rights so as to enable plaintiff to recover. *Kelvinator St. Louis, Inc. v. Schader* (Mo. App. 1931) 39 S. W. (2d) 385.

To determine whether personal property becomes a fixture three elements are usually considered by the courts: annexation, adaptation, and intent. *St. Louis Rad. Mfg. Co. v. Carroll* (1897) 72 Mo. App. 315. The latter two are most important for the courts have shown a tendency to pay more regard to the intent of the parties, as affected by the custom of the locality, and the nature of the article, rather than to consider the facility of displacement. *In re Danville Hotel Co.* (C. C. A. 8, 1930) 38 F. (2d) 10. See (1919) 18 MICH. L. REV. 405. The mode of annexation, however, is important in determining the rights of one who intends to purchase or encumbrance the realty to which the article is attached, with regard to the aspect of notice of prior rights of other persons in that fixture. In the principal case, because the articles appeared by their physical attachment to be a part of the realty, they were so construed.

The authorities are in unison to the effect that such a chattel mortgage is binding on the original parties and on all subsequent purchasers or en-

cumbrancers of the realty who have notice, actual or constructive, of the chattel mortgage. They take subject to and are bound by the terms of the mortgage. Ewell, FIXTURES (1905) 486; 26 C. J. 683 sec. 48; *St. Paul Trust Co. v. U. S. Cereal Co.* (Minn. 1925) 206 N. W. 385. Prior encumbrancers also may be subject to the chattel mortgage where the fixture is severable, so that their security would not be diminished. *Fred W. Wolf Co. v. Hermann Savings Bank* (1913) 168 Mo. App. 549, 153 S. W. 1094; or that they are not encumbrancers without notice, *Perfect Lighting v. Grubor Realty Co.* (1930) 228 App. Div. 141, 259 N. Y. S. 286. It is in the answer to the issue whether the recording of the chattel mortgage is constructive notice to intending purchasers or encumbrancers of the realty that the courts have reached conflicting results. The view that the recording of the chattel mortgage is not constructive notice, with which the instant case accords, is supported by the numerical weight of authority. Jones, CHATTEL MORTGAGE (4th ed. 1894) sec. 134; *Cunningham v. Cureton* (1895) 96 Ga. 489, 23 S. E. 420. The reasons advanced as bases for the decisions are (a) that the principle of estoppel should apply against the chattel mortgagee because it is his act which has made it possible for the owner to deceive, *Boeringer v. Perry* (1917) 96 Wash. 57, 164 Pac. 773; or, (b) that where the statutes require chattel mortgages to be separately recorded and indexed, the intending purchaser or encumbrancer is not bound to examine the records of chattel mortgages, *Brennan v. Whittaker* (1864) 15 Ohio St. 446; or, (c) that to require such examination would work a serious hardship upon such purchasers and encumbrancers and practically nullify the recording statutes, *Schmidt v. Carroll* (Wis. 1930) 231 N. W. 181. On the other hand, the view that the recording of a chattel mortgage is sufficient to charge intending purchasers or encumbrancers of the realty with notice has received a strong minority support on the ground that it is no more unjust that a third party should be required to take notice of chattel mortgage records than to investigate and take notice of tax liens or judgment liens. *Eaves v. Estes* (1872) 10 Kan. 314, 15 Am. Rep. 345; *Sword v. Low* (1887) 122 Ill. 487; 113 N. E. 826; *Kribbs v. Alford* (1890) 120 N. Y. 519, 24 N. E. 811; *Ford v. Cobb* (1859) 20 N. Y. 344. See also *Liddell v. Cork* (1922) 120 S. C. 481, 113 S. E. 321.

Since the principal case is one of first impression in Missouri, and the decision accords with the majority view, further thought is presented as to the means that should be adopted for the protection of a chattel mortgagee. Perhaps the best remedy so far devised is found in the Uniform Chattel Mortgage Act, art. 5, sec. 45, which requires a statement of the transaction signed by either mortgagor or mortgagee, briefly describing the realty and stating that the goods are, or are not to be affixed thereto, to be filed in the office where deeds of realty are recorded or registered, and thus affect such realty and operate as notice to all persons dealing with it. As a present practical means of improving his position, it is suggested that the chattel mortgagee secure a deed duly executed and acknowledged by the mortgagor, prior mortgagees, and other lien holders or persons having any present interest in the realty, releasing for themselves, their heirs

and assigns, their interest in the fixtures. Since the mortgagor and mortgagee may, as between themselves, treat the property as either real or personal in its nature, there appears to be no serious objection to recording the transaction as involving an interest in land, with a view to furnishing constructive notice to subsequent purchasers or encumbrancers of the premises. Recording the chattel mortgage at the same time is justified as a protection and notice to possible vendees of the chattel mortgagor who might wrongfully sever the fixtures and attempt to sell them.

It is interesting to note the Personal Property Laws of New York (Cahill, 1923) c. 4, art. 4, secs. 65, 66, 67, and their classification of chattels into three classes: first, chattels, which because of their character, remain personal property after annexation to the real estate, even without an agreement between the parties to that effect (and interpreted to include refrigerators or their units); second, chattels, which because of their character, inherently become a part of the realty (such as bricks, concrete piers, etc.); and third, chattels, which, after annexation, continue to be personal property or realty according to the agreement between the immediate parties. See *Chasnow v. Marlane Holding Co.* (1930) 137 Misc. 332, 244 N. Y. 455. L. S., '33.

INSURANCE—INCONTESTABLE CLAUSE—RIGHT IN EQUITY TO CANCELLATION FOR FRAUD AFTER INSURED'S DEATH WITHIN PERIOD.—After the death of the insured, the insurance company brought a bill in equity against the beneficiary to cancel the life insurance policy because of fraudulent misrepresentations made by the deceased. *Held*, such a suit is proper if the policy contains a clause making it incontestable after a certain period from date except for non-payment of premiums; but the bill must be filed within that period and must allege that no suit at law had been instituted by the beneficiary, so that the company had not been able to use this fraud as a defense at law. *Aetna Life Ins. Co. v. Daniel* (Mo. 1931) 42 S. W. (2d) 584. This case is in accord with an earlier case before the St. Louis Court of Appeals, *New York Life Ins. Co. v. Cobb* (1926) 219 Mo. App. 609, 282 S. W. 494; but the present case was certified to the Missouri Supreme Court because of the alleged conflict between the latter case and the sweeping dicta against suits in equity to cancel insurance policies after the death of the insured which were contained in many earlier Missouri cases, based upon a statute which seems mandatory in its demand that the issue whether the misrepresentation was material or not should be left to the jury. R. S. Mo. (1929) sec. 5732; *Schuerman v. Union Central Life Ins. Co.* (1901) 165 Mo. 641, 65 S. W. 723; *State ex rel. John Hancock Mutual Life Ins. Co. v. Allen et al.* (1926) 313 Mo. 384, 282 S. W. 46. The Supreme Court explained away this conflict by showing that in none of the previous cases had there been an incontestable clause and that if the insured could not bring such a suit in equity, the beneficiary might deprive the former of a valid defense by delaying suit until the period of contestability had passed. Thus, the present suit was likened to a bill *quia timet*, while the former attempts to sue in