

founding it seems peculiarly appropriate to print this excerpt from his writings, which appeared originally in the Moot Court Record of the School of Law and which has not heretofore been published in any medium of general circulation. The Moot Court Record has been published continuously for the law students at Washington University for the past forty years. At present it contains only the proceedings of the practice court of the School of Law.

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## PROTECTION THROUGH RECORDING OF CONDITIONAL SALES OF FIXTURES

This note involves a consideration of the problems which have arisen in settling the conflicting rights of conditional sellers of fixtures and of subsequent purchasers of the realty. Take a typical case: A purchases from B on a conditional sales contract a machine, installing it in his factory, the circumstances being such that it becomes a fixture. B records his contract.<sup>1</sup> Before B is paid in full, however, A sells his factory to C, who now resists B's claim against him for a return of the machine. Can C successfully resist this claim? In other words, by filing the conditional sale contract, did the conditional seller B thereby give constructive notice to all subsequent purchasers or encumbrancers of the realty?

An answer to this problem would be simple but for the fact that in practically all states, including Missouri,<sup>2</sup> there are two separate sets of records for the recording of instruments, one for those relating to realty and one for those relating to personalty, the latter including conditional sales contracts and chattel mortgages. The solution depends upon whether or not the filing of a conditional sale agreement in its own proper book gives constructive notice to a subsequent purchaser of the realty who looks only to the real estate records.

Suppose a prospective purchaser of realty goes to the office of the recorder of deeds to look up the title. He searches through the real estate records, finds the title clear, and purchases. Had he searched the personal property records, he would have found a conditional sale contract covering fixtures ordinarily part of the realty. Is he to be deprived of these fixtures? On the other hand, has not the conditional vendor of the fixtures done all that he reasonably could do to protect himself?

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<sup>1</sup> Statutes generally provide that conditional sales shall be void as to creditors and subsequent purchasers in good faith unless recorded. See R. S. Mo. 1919, Sec. 2284.

<sup>2</sup> R. S. Mo. 1919, Sec. 10570: "Instruments in writing, conveying chattels or personal property alone, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

Such is the problem the courts have faced, and there has been a difference of opinion as to who should be protected. In the Uniform Conditional Sales Act we find a solution to the difficulty, because it provides for the filing of conditional sales on the realty records. A brief discussion of the two lines of holdings, and of the Uniform Act in its provision for fixtures, follows.

Cases from Ohio,<sup>3</sup> New Hampshire,<sup>4</sup> California,<sup>5</sup> and Texas,<sup>6</sup> hold that the purchaser of land is not bound to examine the chattel mortgage and conditional sale contract records to ascertain whether there is any conditional sale contract or chattel mortgage on chattels which have been affixed to the realty. The reasoning behind this line of authority is clearly set forth in *Brennan v. Whitaker*,<sup>7</sup> and in *Elliott v. Hudson*.<sup>8</sup> The latter case points out that the California statute requires mortgages of personal property to be separately recorded in a different book from the records of deeds, and concludes that as each record is constructive notice of transactions authorized to be made matter of record therein but no further, the purchaser of land need not look to the record of chattel mortgages and is not bound by what is recorded therein.

The opposite view, to the effect that the filing of the conditional sale contract is sufficient to charge intending purchasers of the realty, is held by cases from Illinois,<sup>9</sup> Kansas,<sup>10</sup> New Jersey,<sup>11</sup> Virginia,<sup>12</sup> Michigan,<sup>13</sup> New York,<sup>14</sup> and Georgia.<sup>15</sup> This is the majority view. As pointed out in *Sword v. Low*,<sup>16</sup> the examination of title to realty should

<sup>3</sup> *Brennan v. Whitaker* (1864) 15 Ohio St. 446; *Case Mfg. Co. v. Garven* (1887) 45 Ohio St. 289, 13 N. E. 493.

<sup>4</sup> *Tibbetts v. Horne* (1889) 65 N. H. 242, 23 A. 145, 15 L. R. A. 56, 23 Am. St. Rep. 31.

<sup>5</sup> *Elliott v. Hudson* (1912) 18 Cal. App. 642, 124 Pac. 103, 108.

<sup>6</sup> *Ice, Light and Water Co. v. Lone Star Engine and Boiler Works* (1897) 15 Tex. Civ. App. 694, 41 S. W. 835; *Phillips v. Newsome* (1915) 179 S. W. 1123 (Tex. Civ. App.).

<sup>7</sup> *Supra*, Note 3. A widely quoted paragraph from this case declares:

"The filing of chattel mortgages is made constructive notice only of encumbrances upon goods and chattels. The defendants purchased and took a conveyance of real estate of which the property now in question was, in law, a part; and in our opinion, it devolved upon the plaintiffs, who sought to change the legal character of the property, and create encumbrances upon it, either to pursue the mode prescribed by law for encumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such encumbrance, or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice."

<sup>8</sup> *Supra*, note 5.

<sup>9</sup> *Sword v. Low* (1887) 122 Ill. 487, 13 N. E. 826.

<sup>10</sup> *Eaves v. Estes* (1872) 10 Kan. 314, 15 Am. Rep. 345.

<sup>11</sup> *Keeler v. Keeler* (1879) 31 N. J. Eq. 181.

<sup>12</sup> *Monarch Laundry v. Westbrook* (1909) 109 Va. 382, 63 S. E. 1070.

<sup>13</sup> *Burrill v. Wilcox Lumber Co.* (1887) 65 Mich. 571, 32 N. W. 824.

<sup>14</sup> *Ford v. Cobb* (1859) 20 N. Y. 344; *Kribbs v. Alford* (1890) 120 N. Y. 519, 24 N. E. 811; *Rowland v. West* (1892) 62 Hun. 583, 17 N. Y. S. 330; *Jermyn v. Hunter* (1904) 93 App. Div. 175, 87 N. Y. S. 546.

<sup>15</sup> *Int'l. Clay Mach'y Co. v. Moultrie Baking Co.* (1925) 34 Ga. App. 396, 129 S. E. 877.

<sup>16</sup> *Supra*, note 9.

necessarily involve the examination of the conditional sale and chattel mortgage record to determine whether articles apparently attached to the soil as permanent fixtures are subject to liens as personalty, and that there is no hardship in thus requiring the purchaser of realty to take notice of what is upon the public record.

The ultimate effect of this majority view is that a prospective purchaser of the real estate, to escape being deprived of fixtures ordinarily a part of the land, must search the personal property records for contracts of conditional sales and chattel mortgages. Why not go a step further, and provide for the filing of these instruments in the real estate records, where in such cases as these they naturally belong? This is precisely what Section 7 of the Uniform Conditional Sales Act provides,<sup>17</sup> as far as conditional sales contracts are concerned.<sup>18</sup> This section is modeled in the main after similar laws previously existing in Massachusetts,<sup>19</sup> New York,<sup>20</sup> Oregon,<sup>21</sup> and Pennsylvania,<sup>22</sup> to the effect that the condition reserving title to fixtures shall be void as against subsequent purchasers or mortgagees of the realty who have no notice of the conditional sale, unless the conditional sale contract or a copy thereof is recorded in the office and upon the records where a deed of land would have to be recorded to affect such realty.

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<sup>17</sup> Uniform Conditional Sales Act, Section 7, Fixtures: "If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty."

The Uniform Conditional Sales Act has been adopted as a whole in Arizona, Delaware, New Jersey, New York, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Alaska.

<sup>18</sup> Chattel mortgages of fixtures, however, are still filed as personal property records. No doubt a provision covering them is necessary to complete the adjustment of the rights of chattel vendors, who retain title or lien; and subsequent buyers of the realty. In New York City there is a special provision requiring such chattel mortgages to be filed as real property records, if they are to be constructive notice. N. Y. Laws, 1909, c. 45, Personal Property Law, Sec. 63.

<sup>19</sup> See Mass. Laws, 1921, c. 42, s. 67.

<sup>20</sup> See New York Laws, 1923, c. 42, s. 67.

<sup>21</sup> See Oleson's Oregon Laws, 1920, s. 10189.

<sup>22</sup> See Pa. Statutes, 1920, s. 19731.

The value of this provision of the Uniform Act, offering a way of protecting the rights of both the vendors of fixtures and subsequent purchasers or encumbrancers of the realty, is self evident. Professor Bogert, who drafted the Uniform Conditional Sales Act, comments on the purpose of this new provision: "The theory of the Act is that a conditional seller of a fixture should be given protection and allowed to retain title as security for the payment of the price of the fixture, but that in order to retain such title he should be required to give notice adapted as nearly as possible to reaching dealers in real property. The conditional seller of the fixture should not get protection by filing the contract with ordinary conditional sale contracts and making a record similar to that made in the case of chattel mortgages. It is unreasonable to ask purchasers and mortgagees of realty to search the personal property records regarding every article connected with a building which might have been sold separately."<sup>23</sup>

An analysis of Section 7 of the Uniform Act<sup>24</sup> shows that it consists of three sentences, each covering a particular situation in the law of fixtures. What these situations are, and what the conditional vendor must do in each situation, will now be briefly pointed out:

(1) If the goods are so affixed to the realty as not to be severable without material injury to the freehold only express assent by the subsequent vendee will reserve title. Hence in this class of cases, filing the conditional sale contract alone does not protect the seller. This provision seems just, since it is intended to apply in cases where the chattels lose their identity with the realty.

(2) If the goods are affixed to the realty but readily severable without material injury, the conditional seller protects himself by putting a record upon the real estate records. It might be noticed that this record consists of the contract or a copy thereof, and also a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto.

(3) The last sentence of Section 7 covers the peculiar case of the sale of goods to a contractor to be affixed by him to the real property of another, and provides for filing a record as in the second class above.

New York has adopted the Uniform Conditional Sales Act,<sup>25</sup> and there are three recent cases from its appellate courts decided under or considering the section on fixtures.

*Metropolitan Stone Works, Inc. v. Probel Holding Corporation*,<sup>26</sup> is decided on the basis of the Act. Here the contract of conditional sale

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<sup>23</sup> Bogert, Commentaries on Conditional Sales (1924) 98. Taken from Cornell Law Quarterly, April, 1928, p. 437.

<sup>24</sup> *Supra*, note 17.

<sup>25</sup> *Supra* note 17. Section 7 of the Uniform Act is found in New York Pers. Prop. Law, s. 67, added by Laws 1922, c. 642, s. 2.

<sup>26</sup> 227 N. Y. S. 414 (Feb., 1928).

for a concrete fountain and concrete flower boxes, actually attached by cement to the realty, was duly recorded. There was every indication that the intention of the party making the annexation was to make it a permanent accession to the freehold. The defendant purchased the realty at foreclosure sale.

The court in part of its opinion declares: "Here clearly the chattels have become part of the realty. The only question is: Are these chattels severable or not without material injury to the freehold? . . . that is the only question involved, because the first sentence of Sec. 67, present Personal Property Law, seems to make that the sole test, thus changing the ruling of the Court of Appeals,<sup>27</sup> where the intent of the parties was the paramount test, as to whether chattels, so affixed to the realty, shall remain personalty or not." The court found that the chattels here could be removed without material injury,<sup>28</sup> and held for the conditional seller. He had filed his contract, and since the chattels were severable easily, express assent by the defendant was not necessary.

*Cohen v. 1165 Fulton Ave. Corp.*,<sup>29</sup> brings out another result of the Uniform Act. There the plaintiff claimed under a recorded realty mortgage made after the conditional sale of 39 gas ranges installed in an apartment house. The conditional seller had failed to file his contract as the Act provides he may. It was held that the unrecorded reservation of title was void against the subsequent real estate mortgagee, and that the gas stoves passed as part of the realty.<sup>30</sup> The earlier New York cases held that gas ranges in an apartment house, connected by the usual service pipes, were personal property.<sup>31</sup> But

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<sup>27</sup> *Davis v. Bliss* (1907) 187 N. Y. 77, 1. c. 82, 79 N. E. 851, 10 L. R. A. (N. S.) 458; *McCloskey v. Henderson* (1921) 231 N. Y. 130, 1. c. 134, 131 N. E. 865.

<sup>28</sup> On this point, the court said: "The evidence shows there is a very simple way of removing the fountain and flower boxes, by loosening and breaking the cement binding and unscrewing the iron pipes in the fountain and disconnecting the electric wires. Thus the freehold will remain uninjured, and other boxes and another fountain may replace the ones removed."

<sup>29</sup> 226 N. Y. S. 209 (Jan., 1928).

<sup>30</sup> There has been some dispute as to whether removable ranges in an apartment house should pass as part of the realty. However, the better view today seems to be that they should, since they are a part of the necessary and permanent equipment of a tenement house. *Mechanics & Traders Bank v. Bergen Heights Realty Corp.*, 137 App. Div. 45, 122 N. Y. S. 33. Also see *Hanson v. Vose*, 144 Minn. 264, 175 N. W. 113. *Cornell Law Quarterly*, 13:438, truly declares: "The jurisdictions which held that gas ranges were not fixtures seemed to be carrying one step further an already mistaken analogy. From lamps and candlesticks used for lighting, it was reasoned that gas chandeliers for the same purpose, and easily removable, remained personalty. And from that, that gas ranges connected in the same way, which could be detached and used elsewhere, belonged in the same class."

<sup>31</sup> *Cosgrove v. Troesch* (1901) 62 App. Div. 123, 104 N. Y. S. 764; *Central Union Gas Co v. Browning* (1913) 210 N. Y. 10, 103 N. E. 822, reversing same case in 131 N. Y. S. 464. In regard to the latter case, the *Metropolitan Stone Works* case declares that section 7 of the Uniform Act was intended to remedy the condition disclosed therein. Hence the court's holding in the *Cohen* case, decided under the Uniform Act, looks proper.

Proskauer, J., in the present case, declined to follow those cases, on the ground that the Uniform Act had changed the New York law of fixtures.

*Kohler Co. v. Brasum*,<sup>32</sup> gives some attention to the section on fixtures under their present laws,<sup>33</sup> though not resting the decision upon this provision. Nothing unexpressed in the two above cases is mentioned.<sup>34</sup>

These three cases, which are probably examples of what may be expected in the future, clearly reveal the beneficial effect of the adoption of Section 7 of the Uniform Act in outlining an adequate and practical method of adjusting the conflicting rights of conditional sellers of chattels to become annexed to the realty and subsequent purchasers of the realty. This provision is without a doubt one of the finest recent developments in the law of sales, and its adoption should be heartily endorsed everywhere.

D. A. MACPHERSON, JR., '29.

<sup>32</sup> 226 N. Y. S. (60) (Dec., 1927).

<sup>33</sup> *Supra*, note 25.

<sup>34</sup> For a full discussion of the Kohler case and the Cohen case, see Cornell Law Quarterly, 13:435-8.

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## REMOVABILITY WHERE RESIDENT CO-DEFENDANT IS NOT SERVED

In *Rodgers v. Gaines Bros. Co.*<sup>1</sup> a resident of Missouri brought an action for personal injuries in the state court, alleged to have been caused by the joint negligence of the defendant corporation, organized in Oklahoma, and the defendant foreman, a citizen of Missouri. The corporation was alleged to have furnished an unsafe wagon and the foreman was alleged to have directed the plaintiff to drive it in a dangerous place. The resident foreman was not served with summons. The defendant corporation filed a petition for removal to the federal court, on the ground of diversity of citizenship. The petition was denied, and the defendant excepted. During the taking of the defendant's evidence, the plaintiff dismissed as to the resident foreman. It was held that the petition for removal had been properly denied.

The time when a cause of action such as the one in the principal case becomes removable is a question which the courts have fairly definitely settled, but one which is still likely to trip up the unwary lawyer.<sup>2</sup> It is the purpose of this note to state the rules which the courts have formulated.

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<sup>1</sup> 295 S. W. 492 (Mo. App.).

<sup>2</sup> Of course, in many cases in which it appears that the lawyers had been caught asleep it is possible that they had had no serious desire to remove the cause; that the point had originally been raised solely for the purpose of delay; and that they paid no more than slight attention to it until after the case had been lost in the trial court.