

# FIXTURES AND THE REAL ESTATE MORTGAGEE

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## I. INTRODUCTION

The success of earlier efforts to bring order out of the chaos of fixture law has not been such as to inspire confidence in ventures of this character.<sup>1</sup> The observation made by a Missouri Judge in 1877 that "the law in regard to fixtures is in a somewhat chaotic state," holds true today, as does his statement that "there is a most embarrassing conflict in the adjudged cases."<sup>2</sup> Two developments, however, the appearance in the cases of the *institutional doctrine* and the growing popularity of the *package mortgage*, which covers not only the building but the automatic heater, air conditioning unit, kitchen cabinet installation, ventilating and exhaust fans, laundry equipment, range, refrigerator, home-freezer units, garbage receptacle, and other such conveniences, suggest the need for a stock-taking, an appraisal of the decisions and trends from the standpoint of the real estate mortgagee.

Traditionally, the starting point for discussions of fixture law has been Chief Justice Bartley's formula in the leading case of *Teaff v. Hewitt*,<sup>3</sup> where he said:

" . . . the united application of the following requisites will be found the safest criterion of a fixture :

"1st, Actual annexation to the realty or something appurtenant thereto. 2d, Appropriation to the use or purpose of that part of the realty with which it is connected. 3d, The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of the *party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made."

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1. *E. g.*, Bingham, *Some Suggestions Concerning the Law of Fixtures* (1907) 7 COL. L. REV. 1, where the author indicates his purpose was to build "a solid pathway across this veritable slough of despond."

2. *State Savings Bank v. Kercheval*, 65 Mo. 682, 686 (1877).

3. 1 Ohio St. 511, 529-530 (1853).

## II. THE THREE TESTS

The fact of physical annexation to the land furnishes such an obvious and understandable link with the realty that courts have clung with great tenacity to the annexation requirement. Even in early times, however, the rule was not without its exceptions. As long ago as 1522 it was held that if a man has a mill and the miller takes the millstone out of the mill in order to make it grind the better, although it is actually severed from the mill yet it remains parcel thereof as if it had always been lying upon the other stone, and accordingly it will pass by a lease or conveyance of the mill.<sup>4</sup> To accommodate such instances of temporary disannexation it became necessary to rephrase the rule in terms of "habitual annexation" rather than "permanent annexation."<sup>5</sup> In Liford's case<sup>6</sup> it was observed that a house key passes as part of the freehold. Other instances thereafter occurred where, to give effect to the manifest intention of the parties, objects were treated as accessions to the freehold despite the absence of physical annexation,<sup>7</sup> and it was ultimately explained that such cases were governed by the doctrine of *constructive annexation*,<sup>8</sup> which in time won universal recognition.<sup>9</sup> The mere appearance in the reported cases of the phrase "constructive annexation" is significant, for it affords ample proof that factors other than physical annexation had begun to furnish a criterion of accession to the freehold. Even where courts continued to profess allegiance to the requirement of physical annexation, it was said that constructive annexation must suffice with respect to many things that are essential to the use of the premises.<sup>10</sup>

Eventually courts adhering to the older doctrine found it necessary to marshal arguments in defense of their position. In support of their views it was argued that by definition a fixture is something affixed to the realty.<sup>11</sup> To this argument there are two adequate an-

4. Wistow's Case of Gray's Inn, 14 Hen. VIII, f. 25b (1522).

5. Walker v. Sherman, 20 Wend. 636 (N. Y. 1839) (leading case); Bishop v. Bishop, 11 N. Y. 123 (1854).

6. 11 Coke 46b (1614).

7. Smith v. Carroll, 4 Greene 146 (Iowa 1853) (farm fence not fastened to ground); Roderick v. Sanborn, 106 Me. 159, 76 Atl. 263 (1909) (storm windows and storm doors stored in barn); Byrne v. Werner, 138 Mich. 328, 101 N. W. 555 (1904) (building material on site of partially completed building); Snedeker v. Warring, 12 N. Y. 170 (1854) (massive object held in place only by attraction of gravity); Ripley v. Paige, 12 Vt. 353 (1839) (fencing material distributed on land for immediate use in fencing).

8. Walker v. Sherman, 20 Wend. 636 (N. Y. 1839); Note, 109 A. L. R. 1424 (1937).

9. EWELL, FIXTURES 14 (2d ed. 1905); Note, 109 A. L. R. 1424 (1937).

10. Wolford v. Baxter, 33 Minn. 12, 21 N. W. 744 (1884); Walker v. Sherman, 20 Wend. 636 (N. Y. 1839).

11. Walker v. Sherman, 20 Wend. 636 (N. Y. 1839); Teaff v. Hewitt, 1 Ohio St. 511 (1853).

swers: In the first place the word "fixture" is of modern coinage and is not encountered in the early reports.<sup>12</sup> Cases dispensing with the physical annexation requirement will be found long before this expression gained currency.<sup>13</sup> In the second place it is unthinkable today that important questions of conflicting economic interests should be resolved by a study of words—as well resort to numerology.

Again, differences arose as to the decree of annexation required. By some it was said that slight annexation, as by bands or in any other way, so that the article could easily be detached, would suffice.<sup>14</sup> This mystic devotion to attachment by bolts and screws was quickly disposed of by the answer that it is illogical to make cases involving important interests turn upon the presence or absence of the slightest tack or ligament.<sup>15</sup> The older view, that an article could be deemed a fixture only where severance would occasion material injury to the freehold, still found occasional expression,<sup>16</sup> but stultifying exceptions could usually be marshalled from the court's own reports.<sup>17</sup>

Ultimately the progress of industrialization resolved the issue against the adherents of physical annexation. In *Lawton v. Salmon*,<sup>18</sup> Lord Mansfield held that salt pans affixed with mortar to the brick floor of a salt works were real estate passing to the heir, for the salt spring is a valuable inheritance, but no profit arises from it unless there is a salt work, which consists of a building for the purpose of containing the pans. Here is a clear recognition that the salt pans passed because adapted and designed for an establishment for the manufacture of salt.<sup>19</sup> In *Farrar v. Stackpole*<sup>20</sup> it was held that a detachable mill chain passed with the mill, on the ground that things fitted and prepared to be used with the real estate become part thereof. This new view, which substituted constructive annexation by adaptation for the older requirement of physical annexation, met with sharp rejection in *Walker v. Sherman*,<sup>21</sup> where the court sought to hold the doctrine of constructive annexation within narrow confines by enlarging upon the

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12. *Sheen v. Rickie*, 5 M. & W. 175, 182 (1839); EWELL, FIXTURES 127 (2d ed. 1905).

13. *E. g.*, cases cited notes 4 and 6 *supra*.

14. *Walker v. Sherman*, 20 Wend. 636 (N. Y. 1839); *Teaff v. Hewitt*, 1 Ohio St. 511 (1853).

15. *Voorhis v. Freeman*, 2 W. & S. 116 (Pa. 1841).

16. *Hill v. Wentworth*, 28 Vt. 428 (1856).

17. *Ripley v. Paige*, 12 Vt. 353 (1839) (fencing materials distributed on land for immediate use in fencing pass with the land although not physically annexed).

18. 1 H. Black. 259, n. (1782).

19. *Farrar v. Stackpole*, 6 Greenl. 154 (Me. 1829).

20. *Ibid.*

21. 20 Wend. 636 (N. Y. 1839).

dire consequences to be anticipated from an expansion of the doctrine.<sup>22</sup> The rebuff proved temporary, however, for only two years later in a landmark decision it was held that detachable rolls in a rolling mill passed to a real estate mortgagee with the land, the court observing that almost any sort of machinery, however complex in its structure, may with care and trouble be taken to pieces and removed without injury to the building, yet just as the easily removable doors and windows of a dwelling are fixtures, for without them the dwelling would be unfit for use, so the machinery of a manufactory without which it would not be a manufactory at all, must pass as part of the freehold.<sup>23</sup>

Despite occasional setbacks<sup>24</sup> this view had obtained a clear ascendancy before the turn of the century<sup>25</sup> and is now all but horn-book. In an overwhelming majority of the modern decisions, machinery indispensable to the functioning of an industrial plant is deemed a fixture passing to the real estate mortgagee.<sup>26</sup> Where the adaptation factor characteristic of the industrial cases is strong, courts dispense with the annexation requirement altogether, even though the article is useful elsewhere than on the mortgaged premises.<sup>27</sup>

A natural extension of this reasoning has taken place to businesses other than industrial concerns, such as hotels and apartment

22. Such adaptation theory, the court observed, might become extended even to domestic animals on a farm, and certainly to many implements in a manufactory which would never be recognized as fixtures. *Ibid.*, 654.

23. *Voorhis v. Freeman*, 2 W. & S. 116 (Pa. 1841).

24. The actual holding in *Teaff v. Hewitt*, 1 Ohio St. 511 (1853) was to the effect that machinery in a woolen mill connected with the motive power only by bands and straps did not pass to the real estate mortgagee even though such machinery was essential to the business. However, in *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493 (1887) it was held that machinery supplying motive power to a mill was a fixture though removable without material injury. In *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744 (1884) the court expressly declined to extend the doctrine of constructive annexation to large casks or hogsheads, fermenting tubs, and a copper cooler in a brewery, although the court was prepared to concede that machinery in a structure erected especially for a particular kind of manufacturing is a fixture though only slightly or not at all physically connected with the building.

25. *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 23 N. E. 327 (1890) (leading case); *Equitable Guarantee & Trust Co. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961 (1896); *Morotock Ins. Co. v. Rodefer Bros.*, 92 Va. 747, 24 S. E. 393 (1896).

26. *Re Theodore A. Kochs Co.*, 120 F. 2d 603 (7th Cir. 1941); *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 58 Atl. 409 (1904); *Roos v. Fairy Silk Mills*, 334 Pa. 305, 5 A. 2d 569 (1939); *First Nat. Bank v. Nativi*, 49 A. 2d 760 (Vt. 1946); *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S. E. 2d 345 (1941); *I JONES, MORTGAGES* 725 (8th ed. 1928); see Note 41 A. L. R. 601, 608 (1926), supplemented 88 A. L. R. 1114, 1115 (1934), and 99 A. L. R. 144, 145 (1935).

27. *Metropolitan Life Ins. Co. v. Kimball*, 163 Ore. 31, 94 P. 2d 1101 (1939) (trays not annexed to building but indispensable to functioning of prune dryer); *Thomsen v. Cullen*, 196 Wis. 581, 219 N. W. 439 (1929) (flasks necessary to operation of foundry business but not attached to premises); see Note 109 A. L. R. 1424 (1937).

buildings,<sup>28</sup> although, in this area resistance to the newer views is more pronounced. Gas stoves and electric refrigerators are so essential to the functioning of an apartment building that, according to many modern decisions, they must be deemed fixtures.<sup>29</sup> Rollaway beds in an apartment building have been held to be fixtures although in no wise attached to the building.<sup>30</sup> However, some courts seem reluctant to allow further encroachments upon the annexation test. For example, in Oklahoma, Murphy beds fastened to the wall on pivots are considered fixtures, but rollaway beds which are not fastened to the wall, are not.<sup>31</sup> In New York, gas ranges in an apartment house, attached to the building only by a simple coupling to the gas service pipe were held to be chattels removable as against a subsequent real estate mortgagee.<sup>32</sup> These last decisions, and others to like effect, seem unduly regressive. In a situation calling for intelligent adaptation to the changes modern appliances have wrought in our mode of life, they continue to attach "mystic importance to attachment by bolts and screws."<sup>33</sup> As a result of the New York decisions, it is a universal practice in that state to include a chattel mortgage clause in each real estate mortgage, which of itself is proof that the decisions fail to meet the community's needs.

A significant development of modern times is the position of pre-eminence achieved by the intention test.<sup>34</sup> Indeed, adaptation and mode of annexation are now frequently regarded as not separate tests at all, but as circumstances throwing light on the question of intention.<sup>35</sup> In determining the intention of the annexor of the article, where a controversy has arisen as to whether or not such article is a fixture, great weight must be accorded to the factor of the relationship of the parties.<sup>36</sup> Since a tenant ordinarily expects to take with him,

28. Land Title Bank and Trust Co. v. Stout, 339 Pa. 302, 14 A. 2d 282 (1940).

29. Guardian Life Ins. Co. of America v. Swanson, 286 Ill. App. 278, 3 N. E. 2d 324 (1936); First Mortgage Bond Co. v. London, 259 Mich. 688, 244 N. W. 203 (1932); Glueck & Co. v. Powell, 227 Mo. App. 1226, 61 S. W. 2d 406 (1933); Knoxville Gas Co. v. W. I. Kirby & Sons, 161 Tenn. 490, 32 S. W. 2d 1054 (1930). *Contra*: Madfes v. Beverly Development Corporation, 251 N. Y. 12, 166 N. E. 787 (1929). See note 64 A. L. R. 1222 (1930), supplemented 169 A. L. R. 478 (1947).

30. Doll v. Guthrie, 233 Ky. 77, 24 S. W. 2d 947 (1930); Leisle v. Welfare Bldg. & Loan Assn., 232 Wis. 440, 287 N. W. 739 (1939).

31. Gray v. Prudential Ins. Co., 182 Okla. 342, 77 P. 2d 563 (1938); *Accord*, Dunn v. Assets Realization Co., 141 Ore. 298, 16 P. 2d 370 (1933).

32. Madfes v. Beverly Development Corp., 251 N. Y. 12, 166 N. E. 787 (1929). Judge Cardozo, who voted with the majority of the court, later characterized this holding as "almost farcical" and stated that the decision turned on considerations of *stare decisis*. Cardozo, *The Stare Decisis of the Future*, 55 N. Y. S. B. A. REP. 293, 295-296 (1932).

33. Holt v. Henley, 232 U. S. 637, 641 (1914).

34. Killian v. Hubbard, 69 S. D. 289, 9 N. W. 2d 700 (1943).

35. Danville Holding Corp. v. Clement, 178 Va. 223, 16 S. E. 2d 345 (1941).

36. Blake-McFall Co. v. Wilson, 98 Ore. 626, 193 Pac. 902 (1921); Planters Bank v. Lummus Cotton Gin Co., 132 S. C. 16, 128 S. E. 876 (1925).

when he vacates the premises, all articles he has installed thereon, it would be absurd to ascribe to him the intention to make such articles a permanent part of the real estate, and normally he will be allowed to remove such articles, where removal will not cause material injury to the realty and where the lease does not restrict or prohibit such removal. *A fortiori*, where the annexation is made with the landowner's consent by one having no estate in the land, and hence no interest in enhancing its value, an agreement that the structure shall not become part of the freehold will be implied in the absence of circumstances tending to show a different intention.<sup>37</sup> On the other hand, articles that would, if installed by a tenant, be considered removable personal property, will, if installed by a real estate mortgagor, be deemed fixtures, since normally a landowner's additions to his property are intended to be permanent.<sup>38</sup>

It has often been said that intention, as the word is used in decisions employing the intention test, is not the secret intention of the annexor. The test is an objective one, and intention is determined from the nature of the article, relation of the parties, adaptation, mode of annexation and all the surrounding circumstances.<sup>39</sup> This exclusion of secret intent, it is plain, is intended primarily for the benefit of third parties. It is merely another way of saying that as to third parties who act in reliance on appearances and in ignorance of secret intent, the intention revealed by appearances must govern. This is certainly the meaning of the rule in the situation where a bona fide purchaser or mortgagee of the real estate is protected against a prior unrecorded conditional sale contract. As between mortgagor and mortgagee, where the issue involves articles annexed after the execution of the mortgage, evidence of secret intention is again excluded,<sup>40</sup> since no one could disprove the mortgagor's assertions regarding his secret intention, and were this secret intention to prevail he would be enabled to strip the premises bare.

A word of caution is in order as to reliance upon early cases holding that this or that article is or is not a fixture. As was aptly said in *Strain v. Green*:<sup>41</sup> "Many early cases though not expressly

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37. *Killian v. Hubbard*, 69 S. D. 289, 9 N. W. 2d 700 (1943). However, it has been argued that articles installed by licensees and tenants should be governed by the doctrine of accession, rather than by the intention test. Niles, *The Intention Test in the Law of Fixtures*, 12 N. Y. U. L. Q. Rev. 66, 83-90 (1934).

38. *Tyler v. Hayward*, 235 Mich. 674, 209 N. W. 801 (1926); *Blake-McFall Co. v. Wilson*, 98 Ore. 626, 193 Pac. 902 (1920); *Fuson v. Whitaker*, 28 Tenn. App. 338, 190 S. W. 2d 305 (1945).

39. *Snedeker v. Warring*, 12 N. Y. 170 (1854) (leading case); *Walker v. Puck*, 236 Iowa 686, 8 N. W. 2d 701 (1943); *Strain v. Green*, 25 Wash. 2d 692, 172 P. 2d 216 (1946).

40. *Snedeker v. Warring*, 12 N. Y. 170 (1854).

41. 25 Wash. 2d 692, 172 P. 2d 216 (1946).

overruled at least have become outmoded . . . The law relating to fixtures has slowly and gradually changed as times have changed. Various household appliances, not formerly held to be fixtures, have become so in this 'built-in' era. But the major changes are probably the result of an awareness of the fact that the luxuries of a given generation become the necessities of the next." Thus, there is evidence that in early times window glass went to the personal representative and not to the heir of a deceased landowner, for then a house was perfect, although it had no glass.<sup>42</sup> As early as Queen Elizabeth's time, however, window glass had moved into the category of fixtures.<sup>43</sup>

### III. EFFECT AS BETWEEN THE PARTIES OF MORTGAGE CLAUSE EXPRESSLY PROVIDING THAT ENUMERATED ARTICLES ARE FIXTURES

A mortgagee who forecloses his mortgage on a hotel, apartment building, factory, or other functioning unit naturally wishes to take over the property as a complete and functioning entity. He will wish to avoid taking over the building only, stripped of the articles that make it possible to carry on business; yet in view of the confusion in the cases as to what articles are to be deemed fixtures, for the mortgagee to place reliance on the mortgage alone as covering all necessary articles installed in the building is to run a very real and wholly unnecessary risk.<sup>44</sup> One approach to this problem requires resort to the rule that intention is a vital factor in determining whether or not an article is a fixture.<sup>45</sup> It is well established, for example, that a landowner may agree, either expressly or impliedly, with a credit vendor of chattels, that articles when installed on the land shall not become fixtures, but on the contrary shall remain personal property until fully paid for, and such an agreement will be given effect as between the parties thereto.<sup>46</sup> Conversely, if it is expressly agreed between the mortgagor and mortgagee of land that certain articles shall be deemed to be fixtures, such agreement is binding as between the

42. Bingham, *Some Suggestions Concerning the Law of Fixtures*, 7 Col. L. Rev. 1, 7 (1907).

43. *Ibid.* Gas chandeliers were once regarded as chattels. *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257 (1895). See also *Hook v. Bolton*, 199 Mass. 244, 247, 85 N. E. 175, 176 (1908) and *Mr. Justice Crane dissenting in Madfes v. Beverly Development Corp.*, 251 N. Y. 12, 19, 166 N. E. 787, 790 (1929).

44. *E. g.*, compare *Klaus v. Majestic Apartment House Co.*, 250 Pa. 194, 95 Atl. 451 (1915) with *First Wisconsin Trust Co. v. Adams*, 218 Wis. 406, 261 N. W. 16 (1935).

45. See note 34 *supra*.

46. *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 23 N. E. 327 (1890); *Frost v. Schinkel*, 121 Neb. 784, 238 N. W. 659 (1931); *Cohen v. General Motors Acceptance Corp.*, 51 R. I. 153, 152 Atl. 693 (1930).

parties,<sup>47</sup> except as limited in some jurisdictions by the doctrine of inherent chattels.<sup>48</sup> Proceeding upon this theory, a mortgagee may insert immediately following the land description in his mortgage, a clause enumerating various articles and providing that these "are and shall be deemed to be fixtures and an accession to the freehold and a part of the realty as between the parties hereto, their heirs, executors, administrators, trustees, successors or assigns, and all persons claiming by, through or under them, and shall be deemed to be a portion of the security for the indebtedness herein mentioned and to be covered by this mortgage."

#### IV. REAL ESTATE MORTGAGE TREATED AS A CHATTEL MORTGAGE

Instead of attempting to characterize mortgaged articles as fixtures, a real estate mortgagee may seek to have his mortgage operate as a mortgage on chattels. An instrument mortgaging both real estate and personal property may be a valid chattel mortgage as to the personal property included.<sup>49</sup> This is a common practice in New York, made necessary by that state's rigorous application of its doctrine of "inherent chattels."

The fact that the clause in the real estate mortgage is somewhat general in its description of the articles does not militate against its effectiveness. As between mortgagor and mortgagee, a particular description of the chattels is not required in a chattel mortgage,<sup>50</sup> and even as to third parties, such as purchasers of the chattels, a description designating the chattels as all the mortgagor's property of a certain kind in a specified locality is generally considered sufficient.<sup>51</sup>

Where a real estate mortgage contains a chattel mortgage clause, the question naturally arises as to the effect of recording such a document in the land records only.

Nearly all states make some statutory provision for the recording or filing of conditional sale contracts and chattel mortgages in some public office.<sup>52</sup> In a few states the law does not provide for land records separate from personal property records. In such jurisdictions

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47. *Guardian Depositors' Corp. v. Keller*, 286 Mich. 403, 282 N. W. 194 (1938); *First Mortgage Bond Co. v. London*, 259 Mich. 688, 244 N. W. 203 (1932).

48. *Madfes v. Beverly Development Corp.*, 251 N. Y. 12, 166 N. E. 787 (1929).

49. *Pierce v. Bound Brook Engine & Mfg. Co.*, 274 Fed. 221 (D. N. J. 1921); *Durst v. Battson*, 9 Cal. 2d 156, 69 P. 2d 992 (1937); *General Synod of The Reformed Church in America v. Bonac Realty Corp.*, 297 N. Y. 119, 75 N. E. 2d 841 (1947).

50. *Abernathy v. Worthy*, 221 Ala. 527, 129 So. 472 (1930).

51. *Emick v. Swafford*, 107 Kan. 209, 191 Pac. 490 (1920). See EWELL, FIXTURES 464-469 (2d ed. 1905).

52. *Hanna, The Extension of Public Recordation*, 31 COL. L. REV. 617, 638 (1931).



a real estate mortgage containing a chattel mortgage clause is, when recorded, effective as to third parties both as a real estate mortgage and as a chattel mortgage.<sup>53</sup> Hence, under the usual rule, in the absence of actual notice on the part of the mortgagee, such a mortgage would enjoy priority over prior unrecorded conditional sale contracts or chattel mortgages which the law requires to be recorded. Likewise such a mortgage would be operative as a recorded chattel mortgage as against subsequent purchasers, mortgagees and creditors. This would be true even if in actual practice different sets of books are kept and the mortgage is recorded only in the land records.<sup>54</sup>

However, it is now almost the universal requirement that the public records of chattel mortgages and conditional sale contracts (personal property records) be kept separate and apart from the records of deeds and mortgages (land records).<sup>55</sup> In such jurisdictions, a real estate mortgage which contains a chattel mortgage clause but which has been filed only in the land records must be treated as an unrecorded chattel mortgage.<sup>56</sup> Will such a mortgage enjoy priority over prior unrecorded chattel mortgages and conditional sale contracts? The prevailing rule is to the effect that a subsequent chattel mortgagee is protected against a prior unrecorded chattel mortgage even though he has failed to record his document,<sup>57</sup> and as a matter of business practice, it is perfectly obvious that recording of the second chattel mortgage is of importance only to subsequent dealers in the chattels.<sup>58</sup> Hence a real estate mortgagee whose mortgage contains a chattel mortgage clause should ordinarily be protected against prior unrecorded conditional sale contracts and chattel mortgages.<sup>59</sup> To be sure, in the few jurisdictions where the law does not require recording of conditional sale contracts, so that unrecorded conditional sale contracts are valid as to third parties, the rule will be otherwise. Where the real estate mortgagee has actual knowledge of the prior unrecorded chattel mortgage or conditional sale contract, he will not be protected against it.<sup>60</sup>

Assuming that a real estate mortgage which contains a chattel mortgage clause and which has been recorded only in the land records

53. *Woodbury Glass Co. v. Beeson*, 73 Ind. App. 385, 127 N. E. 573 (1920), 5 MINN. L. REV. 143; *Long v. Gorman*, 100 Mo. App. 45, 79 S. W. 180 (1902).

54. See note 53 *supra*.

55. Note, 15 WASH. L. REV. 252, 255 (1940).

56. *Pruitt v. Parker*, 201 N. C. 696, 161 S. E. 212 (1931).

57. *Spellman v. Beeman*, 70 Fla. 575, 70 So. 589 (1916); *Dixon v. Tyree*, 92 Kan. 137, 139 Pac. 1026 (1914); See Note L. R. A. 244 (1916D). *Contra*: *Cottrell v. Merchants and Mechanics Bank*, 89 Ga. 508, 15 S. E. 944 (1892).

58. Bogert, *Commentaries on Conditional Sales*, 2A UNIF. LAWS ANN. 79 (1924).

59. *Cohen v. 1165 Fulton Ave. Corp.*, 251 N. Y. 24, 166 N. E. 792 (1929); Kleps, *Uniformity Versus Uniform Legislation*, 24 CORN. L. Q. 394, 404 (1939).

60. Bogert, *op. cit. supra* note 58, at 80.

must be treated as an unrecorded chattel mortgage, we must next deal with questions of priority arising between the real estate mortgagee under the chattel mortgage clause and persons subsequently acquiring rights in the chattel. An unrecorded chattel mortgage is valid only as between the parties and as to third persons who acquire rights in the mortgaged chattel with knowledge of the chattel mortgage.<sup>61</sup> The same is true of a mortgage covering both land and chattels.<sup>62</sup> Consequently, to be effective in its coverage of chattels as against creditors and third persons, a mortgage which covers both real and personal property must be recorded in the personal property records as well as in the land records.<sup>63</sup> Where the mortgage is recorded in both the land records and the personal property records it is effective both as to the land and chattels.<sup>64</sup> It is, of course, a common practice in the mortgage loan business to require the mortgagor to execute a separate chattel mortgage, which is filed in the personal property records.

Where the real estate mortgage is also filed as a chattel mortgage or where a supplementary chattel mortgage is filed, the mortgagee enjoys the protection of the rule that where chattels subject to a recorded chattel mortgage are removed from the premises and thereafter sold to a purchaser, such purchaser takes subject to the rights of the chattel mortgagee.<sup>65</sup> This is in contrast to decisions denying protection to a real estate mortgagee against removal and sale of fixtures to a bona fide purchaser.<sup>66</sup>

A chattel mortgage given concurrently with a real estate mortgage for the purpose of insuring against possible mistake as to the character of the articles as fixtures does not fix the character of the articles as personalty.<sup>67</sup>

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61. *Detroit Trust Co. v. Detroit City Service Co.*, 262 Mich. 14, 247 N. W. 76 (1933).

62. *Wood v. Whelen*, 93 Ill. 153 (1879); *Raymond v. Clark*, 46 Conn. 129 (1878).

63. *In re 671 Prospect Ave. Holding Corp.*, 105 F. 2d 960 (2d Cir. 1939); *Bayne v. Brewer Pottery Co.*, 90 Fed. 754 (C. C. N. D. Ohio 1898); *Rudolph Wurlitzer Co. v. Cohen*, 156 Md. 368, 144 Atl. 641 (1929); *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 58 Atl. 409 (1904); *Pruitt v. Parker*, 201 N. C. 696, 161 S. E. 212 (1931).

64. *Pierce v. Bound Brook Engine & Mfg. Co.*, 274 Fed. 221 (D. N. J. 1921). Refiling may be necessary to keep the chattel lien alive. *Friedman, The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, 7 *FORD. L. REV.* 331, 342 (1938).

65. *Flora v. Julesberg Motor Co.*, 69 Colo. 238, 193 Pac. 545 (1920); *Hendley v. Harris*, 48 Kan. 606, 29 Pac. 1145 (1892); *Note*, 57 A. L. R. 702 (1928). See, however, *Hanna, Extension of Public Recordation* 31 *COL. L. REV.* 617, 648 (1931).

66. Cases cited note 216 *infra*.

67. *Studley v. Ann Arbor Sav. Bank*, 112 Mich. 181, 70 N. W. 426 (1897); *Homestead Land Co. v. Becker*, 96 Wis. 206, 71 N. W. 117 (1897); *cf. Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753 (1889).

## V. PRIORITIES BETWEEN REAL ESTATE MORTGAGEE AND HOLDER OF PRIOR CHATTEL MORTGAGE OR CONDITIONAL SALE CONTRACT

A. EFFECT OF FILING IN PERSONAL PROPERTY RECORDS: Having a title search made of the land records is, of course, standard practice for an intending mortgagee. The question remains as to whether or not such mortgagee is also required to search the personal property records for documents affecting articles installed on the mortgaged premises.

In a majority of the states a real estate mortgagee is not required to search the personal property records and, absent actual notice, is protected against prior chattel mortgages and conditional sale contracts recorded only in the personal property records.<sup>68</sup> The reason commonly adduced in support of the rule is that prospective purchasers or mortgagees of land cannot be expected to search records which relate primarily to personal property.<sup>69</sup> In these states, in the absence of a provision comparable to Section 7 of the Uniform Conditional Sales Act, recording of the conditional sale contract in the land records may be without legal effect, since in its usual form, at least, it is not a document entitled to recording in those records. Hence, a conditional vendor or chattel mortgagee is powerless to protect himself against loss of his lien where the articles in question are annexed to land so as to become fixtures and the land is subsequently sold or mortgaged to a bona fide purchaser or mortgagee. Such a situation is manifestly unjust to conditional vendors. It has been suggested, however, that the conditional vendor can secure protection by procuring from the landowner a waiver of his interest in the article, which waiver may be recorded in the land records.<sup>70</sup>

In those jurisdictions where the recording law makes no distinction between instruments relating to realty and instruments relating to personalty, recording of a conditional sale contract or chattel mortgage imparts constructive notice to a subsequent purchaser or mortgagee of the land, even though in actual practice separate sets of records are maintained.<sup>71</sup>

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68. *Elliott v. Hudson*, 18 Cal. App. 642, 124 Pac. 103 (1912); *Trull v. Fuller*, 28 Me. 545 (1848); *Tibbets v. Horne*, 65 N. H. 242, 23 Atl. 145 (1891); *XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp.*, 56 Ohio App. 188, 10 N. E. 2d 229 (1937); *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568 (1880).

69. 77 U. OF PA. L. REV. 1022 (1929); Note, 15 WASH. L. REV. 252 (1940); Note, 13 A. L. R. 448, 485 (1921), supplemented 73 *id.* 748, 773 (1931); 88 *id.* 1318, 1344 (1934); 111 *id.* 362, 387 (1937); 141 *id.* 1283, 1295 (1942).

70. *White Way Sign Co. v. Chicago Title & Trust Co.*, 368 Ill. 428, 14 N. E. 2d 839 (1939). A provision somewhat to this effect is incorporated in § 7 of the Uniform Conditional Sales Act. 2 UNIF. LAWS. ANN. 12 (1922).

71. *Monarch Laundry v. Westbrook*, 109 Va. 382, 63 S. E. 1070 (1909).

A minority of states have the rule that, as against a subsequent mortgagee of the land, a prior conditional vendor or chattel mortgagee who has recorded his conditional sale contract or chattel mortgage in the personal property records may remove the articles if they are not paid for.<sup>72</sup> This rule, it is submitted, is unsound. It is unreasonable to ask intending purchasers or mortgagees of land, in addition to searching the land records, to shoulder the burden of a personal property search as to any item that may be installed on the premises.<sup>73</sup>

Occasionally, in jurisdictions that maintain separate land and personal property records, a bona fide mortgagee or purchaser of land is protected against an unfiled conditional sale contract, and reference is made to the fact that the conditional sale contract was not recorded in the personal property records.<sup>74</sup> The question naturally arises whether recording of the conditional sale contract in the personal property records would be regarded as imparting constructive notice to purchasers and mortgagees of the land. These cases arrive at the correct result, but the reason assigned for the decision seems unsound. Recording the contract in the personal property records would make no difference, since purchasers or mortgagees of land need not, under the prevailing rule, search those records. Similarly, in all jurisdictions where the Uniform Conditional Sales Act is in force,<sup>75</sup> decisions protecting a purchaser or mortgagee of land should be based on Section 7,<sup>76</sup> the fixture recording provision, and not upon Section 5,<sup>77</sup> since the purpose of the latter provision is to protect purchasers of chattels, while the purpose of the former provision is to protect purchasers of land.<sup>78</sup>

In all jurisdictions a real estate mortgagee having actual knowledge of the existence of an earlier chattel mortgage or conditional sale contract takes subject to the chattel mortgagee or conditional vendor's right of removal.<sup>79</sup> Actual knowledge may be acquired by the mortgagee through the mortgagor's answers to questions appearing on the

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72. *Sword v. Low*, 122 Ill. 487, 13 N. E. 826 (1887); *Boergina v. Berry*, 96 Wash. 57, 164 Pac. 773 (1917); 77 U. OF PA. L. REV. 1022 (1929); 15 WASH. L. REV. 252, 254 (1940); Note, 13 A. L. R. 448, 484 (1921), supplemented 73 *id.* 748, 773 (1931); 88 *id.* 1318, 1344 (1934); 111 *id.* 362, 387 (1937); 141 *id.* 1283, 1295 (1942).

73. *In re Brownsville Brewing Co.*, 117 F. 2d 463 (3d Cir. 1941); 2A UNIF. LAWS ANN. 98 (1924); 1 JONES, CHATTEL MORTGAGES & CONDITIONAL SALES 224 (6th ed. 1933); Note, 15 WASH. L. REV. 252, 255 (1940).

74. *Patton v. Phoenix Brick Co.*, 167 Mo. App. 8, 150 S. W. 1116 (1912).

75. 2 UNIF. LAWS ANN. 6 (Supp. 1947).

76. 2 UNIF. LAWS ANN. 12 (1922).

77. *Ibid.* 5.

78. *Cf. Kommel v. Herb-Gner Const. Co.*, 256 N. Y. 333, 176 N. E. 413 (1931).

79. *Razatos v. Daniels & Fisher Stores Co.*, 110 Colo. 105, 131 P. 2d 417 (1942); *King v. Blickfeldt*, 111 Wash. 508, 191 Pac. 748 (1920).

loan application, through the mortgagee's credit search of the mortgagor, or through other sources. A "hireplate" attached to the article is of no effect as to parties who are unaware of it.<sup>80</sup>

B. EFFECT OF FAILURE TO FILE: Where (a) a chattel mortgage or conditional sale contract antedates the mortgage, and (b) has not been recorded, and (c) the real estate mortgagee makes the loan in ignorance of the existence of the chattel mortgage or conditional sale contract, and (d) the articles so purchased on credit are installed on mortgaged land in such manner that they would normally be considered fixtures, in an overwhelming majority of the states, the articles become subject to the mortgage and are not removable as to the real estate mortgagee. While the character of property as real or personal property may be fixed by contract with the owner of the real estate when the article is put in position, such contract cannot affect the rights of an innocent real estate mortgagee who has no notice of the agreement.<sup>81</sup> The practical reason for this rule is obvious. The annexed item apparently forms a part of the land. A purchaser or mortgagee of the land will examine and appraise the land and buildings thereon before making his investment. To permit third parties thereafter to remove portions of the structure by virtue of secret conditional sale contracts or chattel mortgages would upset the most careful calculations and would involve land titles in great confusion. To insure stability of titles to real estate, purchasers and mortgagees thereof must be protected against the unrecorded claims of third persons. The rule, then, according to some courts, owes its origin to the same policy that is expressed in the recording acts.<sup>82</sup> Other courts say that the real estate mortgagee having been misled and induced to part with his money on the credit of the property, his equity is paramount to that of the conditional vendor or chattel mortgagee.<sup>83</sup> Where one of two innocent persons must suffer, that one should bear the loss whose conduct or act placed it in the power of a third party to impose upon or deceive another.<sup>84</sup> A seller who agrees that fixtures

80. *Hobson v. Gorringer*, [1897] 1 Ch. 182.

81. *Hopewell Mills v. Taunton Savings Bank* 150 Mass. 519, 23 N. E. 327 (1890); *James Leo Co. v. Jersey City Bill Posting Co.*, 78 N. J. L. 150, 73 Atl. 1046 (1909); *XXth Century Heating and Ventilating Co. v. Home Owners' Loan Corp.*, 56 Ohio App. 188, 10 N. E. 2d 229 (1937); *McCullis v. Cole*, 25 R. I. 156, 55 Atl. 196 (1913); *Union Bank & Trust Co. v. Fred. W. Wolf Co.*, 114 Tenn. 255, 86 S. W. 310 (1905); *Note*, 13 A. L. R. 448, 478 (1921), supplemented 73 *id.* 748, 767 (1931); 88 *id.* 1318, 1338 (1934); 111 *id.* 366, 384 (1937); 141 *id.* 1283, 1293 (1942).

82. *Rowand v. Anderson*, 33 Kan. 264, 6 Pac. 255 (1885); *Muir v. Jones*, 23 Ore. 332, 31 Pac. 646 (1892); *Union Bank and Trust Co. v. Fred. W. Wolf Co.*, 114 Tenn. 255, 86 S. W. 310 (1904).

83. *Davenport v. Shonts*, 43 Vt. 546 (1871).

84. *Note*, 15 WASH. L. REV. 252, 253 (1940).

shall be converted in all outward appearance into real property assumes the risk of their being sold as such, and it would be contrary to justice to allow the seller to save himself by casting the consequences upon the purchaser of the realty,<sup>85</sup> and as to third parties, the intention evidenced by the conduct of the parties, not the secret intention, must govern.<sup>86</sup>

It is unfortunate that the theory upon which protection is extended the innocent purchaser or mortgagee has not been worked out with greater precision. Normally, an innocent purchaser of land draws upon two main sources of protection: the recording acts and the equitable doctrine of bona fide purchase. The protection afforded by the recording acts is defined by statute and is aimed against unrecorded documents entitled to recording in the land records, such as deeds and mortgages. Inasmuch as the recording acts afford no protection against documents or interests not entitled to recording in the land records, such statutes do not protect an innocent purchaser or mortgagee against interests not within the statutory scope, such as resulting trusts.<sup>87</sup> Equity, however, bridges this gap by protecting the innocent purchaser against the secret equity.<sup>88</sup> If we attempt solution of the problem on the theory that the conditional sale contract is entitled to recording in the personal property records, we are met with the rule generally prevailing that purchasers and mortgagees of realty are not required to search the personal property records. Section 7 of the Uniform Conditional Sales Act provides escape from the dilemma by permitting and requiring the conditional sale contract to be recorded in the land records. But in jurisdictions where the act is not in force this important rule rests upon an unsatisfactory foundation. This is so unless it can be argued that express statutory provision is not needed for filing in the land records a statement comparable to that required by Section 7 of the Uniform Act to the effect that certain described articles to be installed on certain described real estate shall not become part of the real estate until fully paid for.<sup>89</sup> It is not clear at present whether the rule is subject to the qualifications applicable under the recording acts. In some jurisdictions, for example, a grantee

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85. *Knowlton v. Johnson*, 37 Mich. 47 (1877).

86. *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 23 N. E. 327 (1890)

87. *East St. Louis Lumber Co. v. Schnipper*, 310 Ill. 150, 141 N. E. 542 (1923).

88. 3 SCOTT, TRUSTS 2173 (1939).

89. *White Way Sign Co. v. Chicago Title & Trust Co.*, 368 Ill. 482, 14 N. E. 2d 839 (1938). An instrument executed by a real estate mortgagee assenting to conditional vendor's removal of articles in the event of default in the installment payments is a document entitled to recording. *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. 2d 273 (1939); *Central Lithograph Co. v. Eatmor Chocolate Co.*, 316 Pa. 300, 175 Atl. 697 (1934).

in a quitclaim deed is not considered a bona fide purchaser entitled to the benefit of the recording laws.<sup>90</sup> It seems probable that in evolving the rule in question the courts have looked to the recording laws only for policy and analogy and do not feel bound by the technical limitations applicable to the recording acts.

The protection afforded by the rule extends to articles that would normally be considered fixtures as between buyer and seller of land, since it is on this basis that the mortgagee makes his appraisal.<sup>91</sup> The fact that the articles can be easily removed without damage to the building is immaterial.<sup>92</sup> The test must necessarily be an objective one, since the real estate mortgagee cannot be expected to know the secret purpose expressed in the unrecorded document. External indications must supply the sole criterion.<sup>93</sup>

C. THE NEW YORK RULE: It has occasionally been held that a bona fide real estate mortgagee will not be protected against prior unrecorded conditional sale contracts.<sup>94</sup> This was the early rule in New York.<sup>95</sup> Taking advantage of the ambiguity of the intention test of *Teaff v. Hewitt*,<sup>96</sup> New York developed its own test, under which the intention of the parties to the conditional sale was of decisive importance. As title was retained in the conditional vendor, it followed that the chattel remained his personal property and could not become a fixture. Hence, the reservation of title was valid even as against a subsequent bona fide purchaser or mortgagee of the land.<sup>97</sup> Since this rule worked great hardship upon innocent purchasers and mortgagees of land, legislation was enacted in 1884 providing for the filing of conditional sale contracts in the personal property records.<sup>98</sup> Under this statute, a bona fide purchaser or mortgagee of land was protected against unfilled conditional sale contracts.<sup>99</sup> It was evident,

90. *Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209 (1901); *Partridge v. Hemenway*, 89 Mich. 454, 50 N. W. 1084 (1891); 3 POMEROY, EQUITY JURISPRUDENCE 51 (5th ed. 1941).

91. Note, 90 U. OF PA. L. REV. 77, 78 (1941).

92. *Wood Hydraulic Hoist & Body Co. v. Norton*, 269 Mich. 341, 257 N. W. 836 (1934).

93. *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St 48, 19 N. E. 2d 273 (1939); *Cohen v. General Motors Acceptance Corp.*, 51 R. I. 153, 152 Atl. 693 (1930).

94. 1 JONES, MORTGAGES 713 (8th ed. 1928).

95. *Ibid.*

96. 1 Ohio St. 511 (1853).

97. *Godard v. Gould*, 14 Barb. 662 (N. Y. 1853); Bogert, *The Evolution of Conditional Sales Law in New York*, 8 CORN. L. Q. 303, 314 (1923); Note, 27 B. U. L. REV. 317, 319 (1947). See also *Lawton Pressed Brick & Tile Co. v. Ross-Kellar T. P. B. M. Co.*, 33 Okla. 59, 124 Pac. 43 (1912).

98. Bogert, *supra* note 97, at 314-316.

99. *Ibid.*

however, that the protection afforded purchasers and mortgagees of land was still inadequate, since it was manifestly unfair to require a prospective purchaser or mortgagee of land to search the personal property records as to every detachable article in the building.<sup>100</sup> Hence in 1904 the law was amended to require that conditional sales of articles attached or to be attached to buildings contain a brief description of the real estate and that they be filed in the land records.<sup>101</sup> Legislation of similar character was later enacted in Massachusetts, Pennsylvania, and Oregon.<sup>102</sup>

D. THE RULE UNDER THE UNIFORM CONDITIONAL SALES ACT: This fixture recording device of the New York law became Section 7 of the Uniform Conditional Sales Act. Under this section recording of the contract and statement imparts constructive notice to all subsequent purchasers and mortgagees of the real estate,<sup>103</sup> and bona fide purchasers and mortgagees of land are protected against conditional sale contracts not filed in accordance with the statute.<sup>104</sup> Mere filing of the conditional sale contract without the accompanying statement required by the act is not sufficient.<sup>105</sup>

Under this act it is clear that a real estate mortgagee need not search the personal property records in order to obtain a first lien upon articles that are deemed fixtures under the rules prevailing in his jurisdiction. It was an important objective of this legislation to relieve purchasers and the mortgagees of land of the necessity of making this search, while affording conditional vendors a means of protecting their rights by filing in the land records. As will presently appear, however, this highly desirable result was not wholly achieved.

Under the common law rule, protection is extended the real estate mortgagee only as to articles that become fixtures. Chattels installed on the mortgaged premises but not technically fixtures are removable as against the subsequent real estate mortgagee.<sup>106</sup> This rule occasions difficulty and hardship in jurisdictions like New York, where articles elsewhere regarded as fixtures are treated as "inherent chattels."<sup>107</sup> The difficulty is not removed by the Uniform Conditional Sales Act,

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100. *Ibid.*

101. *Ibid.*

102. *Ibid.*

103. *Treat v. Nowell*, 37 Ariz. 290, 294 Pac. 273 (1930).

104. *Kohler Co., Inc. v. Brasun*, 249 N. Y. 224, 164 N. E. 31 (1928); *Brunswick-Balke-Collender Co. v. Franzke-Schiffman Co.*, 211 Wis. 659, 248 N. W. 178 (1933).

105. *Capital Motion Picture Supply Corp. v. Mapes-Bergen Amusements, Inc.*, 117 N. J. L. 185, 187 Atl. 161 (1936).

106. Note, 20 B. U. L. REV. 370, 374 (1940).

107. Kleps, *Uniformity Versus Uniform Legislation*, 24 CORN. L. Q. 394, 409 (1939).



since Section 7 of that Act refers to articles that are affixed to realty "as to become part thereof," and therefore has reference to articles that would have become fixtures except for the provisions of the conditional sale contract.<sup>108</sup> Hence a real estate mortgagee must either make a search of the personal property records or determine at his peril whether or not articles installed on the mortgaged premises are technically fixtures.

The purchaser of a fixture is in somewhat the same dilemma. If he is sure the article is a true fixture, he need only search the land records for conditional sale contracts recorded in compliance with Section 7.<sup>109</sup> If, however, he is in doubt, he must also search the personal property records, where conditional sale contracts of chattels will be found.

E. THE MASSACHUSETTS STATUTE: In an effort to relieve purchasers of land and real estate mortgagees of the risk and burden of determining whether articles installed in the mortgaged premises are true fixtures, Massachusetts has adopted a law which protects a subsequent purchaser or real estate mortgagee against prior conditional sale contracts of certain specified articles "wrought into or attached to the real estate, whether they are fixtures at common law or not," unless the conditional sale contract is filed in the registry of deeds.<sup>110</sup> The statute is restricted to the articles specified therein<sup>111</sup> and affords no protection to a purchaser or mortgagee of land who has actual notice of the prior conditional sale contract.<sup>112</sup> Legislation having the same general purpose as the Massachusetts legislation has been passed in Washington.<sup>113</sup> The objective is laudable, but whether the desired result has been achieved remains a matter for conjecture. It seems probable that a substantial volume of litigation may be needed to bring into somewhat sharper focus the rather nebulous statutory concept of articles "wrought into or attached to the real estate."

F. OTHER PROBLEMS ARISING UNDER THE FIXTURE RECORDING LAWS: It should be pointed out that under the fixture recording laws, if a conditional vendor entertains any doubt as to whether or not his article will, on installation, become a fixture, he must, to be certain

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108. Kleps, *op. cit. supra* note 1; Note, 20 B. U. L. REV. 370, 375 (1940).

109. Kohler Co., Inc. v. Brasun, 249 N. Y. 224, 164 N. E. 31 (1928).

110. Gar Wood Industries v. Colonial Homes, 305 Mass. 41, 24 N. E. 2d 767 (1940); Note, 20 B. U. L. REV. 370 (1940).

111. Note, 27 B. U. L. REV. 317, 318 (1947).

112. Lawrenson v. Worcester Lunch Car & Carriage Mfg. Co., 300 Mass. 543, 15 N. E. 2d 978 (1938).

113. Note, 13 WASH. L. REV. 46, 54 (1938).

of protection, file his contract in both the personal property and real property records.<sup>114</sup> If the articles are not technically fixtures, recording in the land records will be without legal effect, and if the articles are fixtures, recording in the personal property records is likewise ineffective.

Under Section 7 of the Uniform Conditional Sales Act, removal of a fixture is not permitted against a real estate mortgagee who has not consented thereto if removal would entail material injury to the freehold.<sup>115</sup> The ambiguous character of the statutory test has given rise to much litigation and controversy.

Since Section 7 of the Uniform Act makes the conditional sale contract an instrument entitled and required to be recorded in the land records, no doubt the usual rules of recording law are applicable to this document. For example, if a real estate mortgagee who has actual notice of a prior unrecorded conditional sale contract assigns the mortgage to an assignee who purchases in ignorance of the conditional sale, the assignee would be protected.<sup>116</sup>

## VI. PRIORITIES BETWEEN REAL ESTATE MORTGAGEE AND LESSEE OF LEASE ANTEDATING MORTGAGE

In the absence of a subordination clause in the lease, the rights of a lessee under a lease that antedates a real estate mortgage are paramount to the rights of the mortgagee. Hence, as against the mortgagee, the lessee may remove any trade fixtures which would be removable as against the mortgagor, if the lease does not restrict this right.<sup>117</sup> Normally no question of recording will arise in such a situation, since the lessee's possession will impart constructive notice of his rights.<sup>118</sup>

## VII. RIGHTS OF REAL ESTATE MORTGAGEE IN ARTICLES ANNEXED AFTER RECORDING OF MORTGAGE

A. AS BETWEEN MORTGAGEE AND OWNER OF MORTGAGED PREMISES: As a rule, an owner of unencumbered land may make a separate sale or mortgage of articles previously annexed to the land and such sale has the effect of rendering such articles personalty although in no wise physically severed.<sup>119</sup> However, as to encumbered

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114. Kleps, *Uniformity Versus Uniform Legislation*, 24 CORN. L. Q. 394 (1939).

115. As to what constitutes material injury to the freehold, see Part IX.

116. 1 JONES, MORTGAGES 826 (8th ed. 1928).

117. *Id.* at 723.

118. Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574 (1903).

119. Soule v. First Nat. Bank of Ft. Smith, 202 Ark. 326, 150 S. W. 2d 204 (1941).

premises the rule is subject to the limitation that fixtures installed by the landowner on mortgaged premises become subject to the lien of the existing mortgage.<sup>120</sup> The character of the article as a fixture is determined from external indications, unaffected by the existence of the prior lien on the premises,<sup>121</sup> though there is greater tendency to resolve doubts against the mortgagee than in the situation where the article was annexed prior to the execution of the mortgage, for in the latter case it is likely that the article entered into the consideration of the mortgagee in estimating the value of his security.<sup>122</sup> If the article has been purchased under a conditional sale contract it becomes a fixture subject only to the conditional vendor's rights.<sup>123</sup>

Unlike trade fixtures installed by a tenant, trade fixtures installed by the landowner are not removable as against a prior mortgagee.<sup>124</sup> Where by the specific language of a real estate mortgage the mortgagee's lien extends to chattels installed by the landowner after the recording of the mortgage, such language will be given effect as between the mortgagee and the landowner.<sup>125</sup>

**B. AS BETWEEN MORTGAGEE AND LESSEE UNDER LEASE JUNIOR TO MORTGAGE:** Some authorities lay down the rule that inasmuch as the mortgagor cannot confer a greater right upon another than he possesses himself, fixtures annexed by a tenant of the mortgagor under a lease executed subsequently to the execution of the mortgage pass by a foreclosure sale to the purchaser at such sale, and cannot be removed by such a tenant.<sup>126</sup> However, in the majority of states, considerations of logic and consistency are outweighed by the strong policy in favor of the free removal of a tenant's trade fixtures, and the

120. *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611 (1900); *Snedeker v. Warring*, 12 N. Y. 170 (1854); *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S. E. 2d 345 (1941); Note, 41 A. L. R. 601 (1926), supplemented 88 A. L. R. 1114 (1934); 99 A. L. R. 144 (1935).

121. *Bell v. Bank of Perris*, 52 Cal. App. 2d 66, 125 P. 2d 829 (1942); *Danville Holding Corp. v. Clement*, 178 Va. 223, 16 S. E. 2d 345 (1941).

122. *Planters Bank v. Lummus Cotton Gin Co.*, 132 S. C. 16, 30, 128 S. E. 876, 881 (1925); 1 JONES, *MORTGAGES* 706 (8th ed. 1928). The argument for extending the mortgage lien to articles affixed after the execution of the mortgage is well stated in Niles, *The Intention Test in the Law of Fixtures*, 12 N. Y. U. L. Q. REV. 66, 73-74 (1934).

123. *Manufacturers Bank & Trust Co. v. Lauchli*, 118 F. 2d 607 (8th Cir. 1941); *Bell v. Bank of Perris*, 52 Cal. App. 2d 66, 125 P. 2d 829 (1942).

124. *Kelly v. Austin*, 46 Ill. 156 (1867); *Bowen v. Wood*, 35 Ind. 268 (1871); *Tyler v. Hayward*, 235 Mich. 674, 209 N. W. 801 (1926); *Frost v. Schinkel*, 121 Neb. 784, 238 N. W. 659 (1931); Note, 41 A. L. R. 601, 614 (1926), supplemented 88 A. L. R. 1114, 1117 (1934); 99 A. L. R. 144, 145 (1935).

125. *General Synod of the Reformed Church in America v. Bonac Realty Corp.*, 297 N. Y. 841, 75 N. E. 2d 841 (1947). See, however, *Friedman, The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, 7 *FORD. L. REV.* 331, 342 *et seq.* (1938).

126. EWELL, *FIXTURES* 412 (2d ed. 1905).

landowner's tenant is permitted to remove his trade fixtures even as against a prior real estate mortgage.<sup>127</sup> Removal is not permitted, however, where it would entail material injury to the mortgaged premises, thereby impairing the mortgagee's security.<sup>128</sup> In determining whether or not removal of such trade fixtures would materially injure the premises, courts are, in some states, influenced by the fact that the article installed by the tenant replaced one that was on the premises when he took possession. Under this view, if a tenant substituted a new fixture for one on the premises at the time of taking possession, and this latter has been injured or permanently removed, he must not remove the substituted article, since the effect would be to leave the premises in worse condition than when he took the lease.<sup>129</sup> Other courts, however, will permit removal under such circumstances. The fact that the lessee has actual knowledge of the mortgage has occasionally resulted in a holding in favor of the mortgagee.<sup>130</sup>

C. AS BETWEEN REAL ESTATE MORTGAGEE AND SUBSEQUENT CONDITIONAL VENDOR OR CHATTEL MORTGAGEE. (MAJORITY VIEW): There is a sharp conflict in the cases as to the rights of a prior real estate mortgagee in articles installed on the mortgaged premises under a conditional sale contract or chattel mortgage. Under the rule supported by the weight of authority, a chattel mortgagee or conditional vendor may remove such articles in case of default in payment on the theory that since the articles were installed after execution of the mortgage, the real estate mortgagee has parted with nothing in reliance on the subsequently installed articles.<sup>131</sup> The rule operates despite the fact that the chattel mortgage or conditional sale contract has not been recorded as required by law, since recording is required

127. *Kelly v. Austin*, 46 Ill. 146 (1867); *Old Line Life Ins. Co. v. Hawn*, 225 Wis. 627, 275 N. W. 542 (1937); *Standard Oil Co. v. LaCrosse Super Auto Service*, 217 Wis. 237, 258 N. W. 791 (1935); Note, 41 A. L. R. 601, 616 (1926), supplemented 88 A. L. R. 1114, 1119 (1934); 99 A. L. R. 144, 146 (1935).

128. *Broaddus v. Smith*, 121 Ala. 335, 26 So. 34 (1898); *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611 (1900).

129. *McHale v. Rosenblatt*, 56 R. I. 120, 184 Atl. 172 (1936); *Rosenblum v. Terry Carpenter*, 174 P. 2d 142 (Wyo. 1946).

130. *McHale v. Rosenblatt*, 56 R. I. 120, 184 Atl. 172 (1936).

131. *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279 (1888) (the leading case); *Detroit Steel Co. v. Sistrerville Brewing Co.*, 233 U. S. 712 (1914) (tanks necessary to operation of brewery); *Woodliff v. Citizens Bldg. & Realty Co.*, 240 Mich. 413, 215 N. W. 343 (1927) (elevator in apartment building); *Swift Lumber & Fuel Co. v. Elwanger*, 127 Neb. 740, 256 N. W. 875 (1934) (boiler, oil burner and tank); Note, 13 A. L. R. 448, 461 (1921), supplemented 73 A. L. R. 748, 755 (1931); 88 A. L. R. 1318, 1324 (1934); 111 A. L. R. 362, 372 (1942); 141 *id.* 1283, 1288. Occasionally the reason assigned is that the mortgage lien attaches only to the mortgagor's equity in the article. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237 (1898).

for the protection of subsequent purchasers of the chattels, not prior mortgagees,<sup>132</sup> nor is the operation of the rule affected by the fact that the real estate mortgage contains an after-acquired property clause.<sup>133</sup> The rule is of common law origin, and it was not the intention of the drafters of the Uniform Conditional Sales Act to change it.<sup>134</sup> The same rule is applicable to a vendor in the enforcement of his vendor's lien, for his equities are like those of a prior mortgagee.<sup>135</sup> However, removal will not be permitted where such removal would entail material injury to the freehold.<sup>136</sup>

An important economic consequence of the majority rule (and doubtless this factor accounts for the widespread acceptance of the rule) is the resulting encouragement of credit sales of fixtures.<sup>137</sup> Evidently this argument weighs heavily with the courts, for there are many dependent upon credit sales as a means of equipping and starting a business, for example the small grocer and restaurant keeper; and then there are those wage earners who are themselves a poor financial risk without some security, and who depend upon the sale on credit to buy furnaces or refrigerators.<sup>138</sup> A further consequence is the injecting of an element of uncertainty into mortgage lending, since the majority rule provides no effective method by which a mortgagee can protect himself against subsequent conditional sales. No doubt in a majority of cases a landowner who encounters financial adversity will default in both his mortgage and installment purchase payments. Faced with the threat of removal of needed items such as necessary machines, furnaces, oil burners, and elevators, the real estate mortgagee, who is already bearing the expense and possible loss incident to a mortgage foreclosure, will settle with the credit vendor, the result being to shift to the mortgagee's shoulders an unanticipated additional burden. In support of the majority rule it can be argued that such a foreclosing mortgagee takes over a building with equipment newer and presumably better than that installed at the time the mortgage loan was made.

132. *American Laundry Machine Co. v. Larson*, 217 Wis. 208, 257 N. W. 608 (1934).

133. *Holt v. Henley*, 232 U. S. 637 (1914); 1 JONES, MORTGAGES 714 (8th ed. 1928). The effect of the after-acquired property clause on after-acquired chattels installed in the premises is discussed in Friedman, *The Scope of Mortgage Liens on Fixtures and Personal Property in New York*, 7 FORD. L. REV. 331, 335 *et seq.* (1938).

134. Kleps, *Uniformity Versus Uniform Legislation*, 24 CORN. L. Q. 394, 405 (1939).

135. *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389 (1901).

136. *Brunswick-Balke-Collender Co. v. Franzke-Schiffman Realty Co.*, 211 Wis. 659, 248 N. W. 178 (1933). See Part IX.

137. Note, 22 CORN. L. Q. 421, 426 (1937).

138. *Ibid.*

D. AS BETWEEN REAL ESTATE MORTGAGEE AND SUBSEQUENT CONDITIONAL VENDOR OR CHATTEL MORTGAGEE (MINORITY VIEW): Under the minority or Massachusetts rule, articles installed on mortgaged premises by a conditional vendor or chattel mortgagee are not removable as against such real estate mortgagee.<sup>139</sup> The Massachusetts rule finds its technical justification in the argument that since the mortgagor cannot, in his own favor, withdraw articles annexed from the operation of the mortgage, he cannot do so in favor of another.<sup>140</sup> The economic justification advanced for the rule is that, as the mortgagee may suffer by the depreciation of the property arising from fluctuations in value, from accidents, and from neglect, so he should be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property or from any other cause.<sup>141</sup> Where the real estate mortgagee consents to the conditional sale, he thereby consents to the exercise of the credit vendor's right of removal.<sup>142</sup>

It is not singular in this troubled field that courts, while paying lip service to the locally prevailing rules, have yielded in some measure to the logic of competing doctrines. This tendency has been quite pronounced in the Massachusetts decisions. It has been held in that jurisdiction that the fact that articles were bought on conditional sale, even if unknown to the mortgagee, has some tendency to show an intention that the article retain its chattel character.<sup>143</sup> Similar expressions will be found in other jurisdictions that profess to follow the Massachusetts rule.<sup>144</sup> There are several reasons why this view is not tenable. In the first place, the conditional sale contemplates removal only in the event of default, and it is plain that the conditional purchaser intends to discharge his debt to the conditional vendor.<sup>145</sup> In the second place, the mortgagee is not party to the conditional sale contract, and under Massachusetts doctrine, ought not to be bound by it.<sup>146</sup> Finally, Massachusetts is committed to the view that the intention deducible from the acts of the annexor, not his secret intention, controls as to third parties "who have or may acquire interests

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139. *Waverly Co-Operative Bank v. Haner*, 273 Mass. 477, 173 N. E. 699 (1930); Notes, 13 A. L. R. 448, 471 (1921); 73 A. L. R. 748, 763 (1931); 88 A. L. R. 1318, 1335 (1934); 111 A. L. R. 362, 382 (1937); 141 A. L. R. 1283, 1292 (1942).

140. *Clary v. Owen*, 15 Gray 533 (Mass. 1860).

141. *Pennsylvania Chocolate Co. v. Hershey Bros.*, 316 Pa. 292, 299, 175 Atl. 694, 697 (1934).

142. *Hawkins v. Hersey*, 86 Me. 394, 30 Atl. 14 (1894).

143. *Medford Trust Co. v. Priggen Steel Co.*, 273 Mass. 349, 174 N. E. 126 (1930); Note, 27 B. U. L. Rev. 317 (1947).

144. *Cumberland County Power & Light Co. v. Hotel Ambassador*, 134 Me. 153, 183 Atl. 132 (1936).

145. *Metropolitan Life Ins. Co. v. Kimball*, 163 Ore. 31, 94 P. 2d 1101 (1939); Note, 27 B. U. L. Rev. 317, 321 (1947).

146. *Clary v. Owen*, 15 Gray 533 (Mass. 1860).

in the property.”<sup>147</sup> More recently the Massachusetts court has indicated a preference for the objective test of intention in this situation.<sup>148</sup> As to third parties, the test clearly should be an objective one.<sup>149</sup>

It is evident that when the Massachusetts rule jurisdictions admit evidence of secret intent as against a prior real estate mortgagee they are simply expressing dissatisfaction with the Massachusetts rule.<sup>150</sup> In some instances this dissatisfaction has been more overtly expressed.<sup>151</sup>

E. WHERE PROCEEDS OF LOAN ARE DISBURSED AFTER OR CONTEMPORANEOUSLY WITH INSTALLATION: Where machinery for operation of a brewery was installed under a conditional sale contract subsequently to the execution of a mortgage trust deed on the brewery premises, but the proceeds of the mortgage loan were not disbursed until later, it was held that the mortgage lien must be treated as coming into existence subsequently to the conditional sale, and therefore the situation was governed by the rule protecting subsequent mortgagees against prior conditional sale contracts.<sup>152</sup> Where the mortgage loan payout takes place contemporaneously with the installation of the articles, the mortgagee is likewise protected.<sup>153</sup> A mortgagee who pays out his funds as construction goes forward may legitimately assume that articles contemporaneously installed constitute parts of the mortgage security. The rule is the same under the Uniform Conditional Sales Act.<sup>154</sup>

Liberal recourse to the sound and sensible views announced in these cases would doubtless have often avoided the absurd and harsh results reached by blind application of the majority rule.

147. *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 522, 23 N. E. 327, 330 (1890).

148. *Commercial Credit Corp. v. Commonwealth Mortgage & Loan Co.*, 276 Mass. 335, 177 N. E. 88 (1931); *General Heat & Appliance Co. v. Goodwin*, 316 Mass. 3, 54 N. E. 2d 676 (1944).

149. Note, 27 B. U. L. Rev. 317, 323 (1947).

150. *E. g.*, *Medford Trust Co. v. Priggin Steel Garage Co.*, 273 Mass. 349, 174 N. E. 126 (1930) (steel garage on a concrete mounting held not a fixture).

151. *McHale v. Rosenblatt*, 56 R. I. 120, 184 Atl. 172 (1936) (expressing preference for the rule of *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279 (1888), note 131 *supra*).

152. *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009 (1894).

153. *Swift Lumber & Fuel Co. v. Elwanger*, 127 Neb. 740, 256 N. W. 875 (1934); *King v. Blickfeldt*, 111 Wash. 508, 191 Pac. 748 (1920); *cf.* *Allis-Chalmers Co. v. Atlantic*, 164 Iowa 8, 144 N. W. 346 (1913).

154. *Mississippi Valley Trust Co. v. Cosmopolitan Club*, 111 N. J. Eq. 277, 162 Atl. 396 (Ch., 1932); *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932).

F. AS BETWEEN REAL ESTATE MORTGAGEE AND SUBSEQUENT CONDITIONAL VENDOR OR CHATTEL MORTGAGEE AFTER FORECLOSURE SALE: If a real estate mortgagee buys the mortgaged land at his own foreclosure sale, and at that time remains unaware of the rights of the chattel mortgagee or conditional vendor, it has been held that he is entitled to protection, under the rule that a subsequent purchaser is protected against a prior unrecorded chattel mortgage or conditional sale contract,<sup>155</sup> but most courts continue to treat a mortgagee who has purchased at his own foreclosure sale as a prior mortgagee rather than as a subsequent purchaser.<sup>156</sup> However, an innocent third party purchaser at the foreclosure sale will be protected.<sup>157</sup> This is in harmony with the universally accepted view that a purchaser at a judicial sale is entitled to protection under the recording acts,<sup>158</sup> and is unquestionably the correct view under the fixture recording provision of the Uniform Conditional Sales Act. Occasionally a purchaser at an execution or judicial sale has been denied protection, without, however, any sound reason being advanced for such a view.<sup>159</sup>

#### VIII. MORTGAGEE'S REMEDIES AGAINST THIRD PERSONS<sup>160</sup> FOR REMOVAL OF FIXTURES

A. SUITS FOR DAMAGES: *Title States*: In strict title states, a mortgagee may maintain an action to recover damages from third persons for any injury to the mortgaged property, as by the removal of fixtures.<sup>161</sup> In these jurisdictions a mortgagee is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personalty by the mortgagor, the mortgagee's interest is not divested, but he remains the owner of the personalty, and may follow and recover it or its value of any one who has converted it to his own use.<sup>162</sup> The mortgagee's damages are measured by the extent

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155. *Holland Furnace Co. v. Trumbull Savings & Loan Co.*, 135 Ohio St. 48, 19 N. E. 2d 273 (1939).

156. *Viking Equipment Co. v. Prudential Ins. Co.*, 232 Ala. 543, 168 So. 566 (1936); *Home Owners' Loan Corp. v. Eyanson*, 113 Ind. App. 52, 46 N. E. 2d 711 (1943).

157. *Kohler Co., Inc. v. Brasun*, 249 N. Y. 224, 164 N. E. 31 (1928).

158. *Weir v. Snider Saw Mill Co.*, 88 Ohio St. 424, 103 N. E. 133 (1913).

159. *Yater v. Mullen*, 24 Ind. 277 (1865).

160. As to the mortgagee's remedies against the mortgagor or his grantee, see *Camden Trust Co. v. Handle*, 132 N. J. Eq. 97, 26 A. 2d 865 (Ct. Err. & App., 1942).

161. *Byrom v. Chapin*, 113 Mass. 308 (1873); *Howe v. Wadsworth*, 59 N. H. 397 (1879); *Federal Land Bank of Columbia v. Jones*, 211 N. C. 317, 190 S. E. 479 (1937).

162. *Burrill Nat. Bank v. Edminister*, 119 Me. 367, 111 Atl. 423 (1920); *Delano v. Smith*, 206 Mass. 365, 92 N. E. 500 (1910); *Searle v. Sawyer*, 127 Mass. 491 (1879).



of the injury to the property.<sup>163</sup> His right of action does not depend upon, and his damages are not to be measured by, proof of insufficiency of the remaining security, nor is he obliged to accept what remains as satisfaction *pro tanto* of his debt at any valuation whatever.<sup>164</sup> He is entitled to the full benefit of the entire mortgaged estate for the full payment of the entire debt, hence the measure of his damages is the full value of the fixtures removed.<sup>165</sup> Since the mortgagee's action is based on title, the defense of bona fide purchase for value is not available, the applicable principle being that which permits recovery of stolen property even from an innocent purchaser.<sup>166</sup> Since in title states the mortgagee has the legal title accompanied by the right of possession, he may maintain trespass q. c. f.,<sup>167</sup> trover,<sup>168</sup> trespass d. b. a.,<sup>169</sup> waste,<sup>170</sup> or, as will hereafter appear, replevin.<sup>171</sup>

*The Majority Rule:* Most of the states, including some title states and most lien theory states, allow the mortgagee to maintain an action against a third party for impairment of his security occasioned by removal of fixtures.<sup>172</sup> For injury to his security the mortgagee may have an action, analogous to an action on the case, since the mortgagee has no property in the severed article sufficient to maintain trover or trespass.<sup>173</sup> However, it has been held that even in lien states a mortgagee in possession may maintain an action of trespass as though title were vested in him unconditionally.<sup>174</sup>

*Limitations on the Right of Recovery:* The cases have marked out certain limits on the right of the mortgagee to recover damages. Where the mortgagor is permitted to retain possession, there is an

163. *Byrom v. Chapin*, 113 Mass. 308 (1873).

164. *Ibid.*

165. *Fitzgerald v. Chicago Mill & Lumber Co.*, 176 Ark. 64, 38 S. W. 2d 30 (1928); *King v. Bangs*, 120 Mass. 514 (1876); *Gooding v. Shea*, 103 Mass. 360 (1869).

166. *Burpee v. Athens Production Credit Ass'n.*, 65 Ga. App. 102, 15 S. E. 2d 526 (1941).

167. *Burrill Nat. Bank v. Edminister*, 119 Me. 367, 111 Atl. 423 (1920).

168. *Searle v. Sawyer*, 127 Mass. 491 (1879).

169. *Frothingham v. McKusick*, 24 Me. 403 (1844).

170. *Delano v. Smith*, 206 Mass. 365, 92 N. E. 500 (1910).

171. See cases cited *infra* Part VIII, B.

172. *Hummer v. R. C. Huffman Const. Co.*, 63 F. 2d 372 (7th Cir. 1933); *Easton v. Ash*, 18 Cal. 2d 530, 116 P. 2d 433 (1941); *Arnold v. Broad*, 15 Colo. App. 389, 62 Pac. 577 (1900); *Matthews v. Silsby Bros.*, 198 Iowa 1392, 201 N. W. 94 (1924); *City of Toledo v. Brown*, 130 Ohio St. 513, 200 N. E. 750 (1936); *Planter's Bank v. Lummus Cotton Gin Co.*, 132 S. C. 16, 128 S. E. 876 (1925); Note, 37 A. L. R. 1120 (1925).

173. *Federal Land Bank of New Orleans v. Davis*, 228 Ala. 85, 152 So. 226 (1934); *Cooper v. Davis*, 15 Conn. 556 (1843); *Peterson v. Clark*, 15 Johns. 205 (N. Y. 1818).

174. *Kiernan v. Jersey City*, 50 N. J. L. 246, 13 Atl. 170 (1888); *Johnson v. Pacific Land Co.*, 84 Ore. 356, 164 Pac. 564 (1917).

implied license to do any act usual and proper in the course of good husbandry and the mortgagee can maintain no action against third parties for damages for articles so removed.<sup>175</sup> This rule, it has been said, may well apply to minerals, timber and the like, which are intended for consumption, since otherwise the very means necessary for payment of the mortgage debt would be taken from the debtor and prudent purchasers would be reluctant to deal with him,<sup>176</sup> but it has been denied that the rule applies to sales of fixtures, for it is not by sale of the mortgaged property piecemeal that its profits are to be derived.<sup>177</sup> However, a strong case can be made for denying recovery even in the case of the sale of a fixture.

"Mortgagors in possession of estates subject to mortgages past due are constantly, for purposes of repair or profit, detaching and removing buildings, fixtures, fences, trees and other similar articles without intending to impair, or in fact impairing, the substantial rights of the mortgagee. If for every such removal the occupants and those into whose possession the detached articles come, are liable in trover or replevin, at the instance of parties whose real rights have not been infringed, the privileges of landowners are less than they are generally esteemed, and less than they need be for the purposes of justice."<sup>178</sup>

If this last quotation is to be taken at face value, innocent third parties dealing with the mortgagor should be protected, and it has so been held.<sup>179</sup> Viewed in this light, the question presents an aspect of the important problem of the extent to which a court will protect innocent third persons dealing with the mortgagor, a question discussed elsewhere.<sup>180</sup> Much the same implication is present in the cases confining recovery to instances of willful and fraudulent injury.<sup>181</sup>

In states other than strict title theory states, there is disagreement as to the mortgagee's right to sue for damages prior to the ascertainment of a deficiency by foreclosure sale.<sup>182</sup> There is also a diversity of opinion as to the proper measure of damages.<sup>183</sup>

175. *Searle v. Sawyer*, 127 Mass. 491 (1879); See Note, 57 A. L. R. 451 (1928).

176. *Angler v. Agnew*, 98 Pa. 587 (1881). See Note, 57 A. L. R. 451 (1928).

177. *Hoskin v. Woodward*, 45 Pa. 42 (1863).

178. *Kircher v. Schalk*, 39 N. J. L. 335, 339 (1877).

179. *McKelvey v. Creevey*, 72 Conn. 464, 45 Atl. 4 (1900).

180. See Part VIII, E.

181. *Van Pelt v. McGraw*, 4 N. Y. 110 (1850); *Gardner v. Heartt*, 3 Denio 232 (N. Y. 1846).

182. See *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 22 Pac. 184 (1889); *Arnold v. Broad*, 15 Colo. App. 389, 62 Pac. 577 (1900); *Taylor v. McConnell*, 53 Mich. 587 (1884); *Toledo v. Brown*, 130 Ohio St. 513, 200 N. E. 750 (1936); *Bowden v. Bridgman*, 141 S. W. 1043 (Tex. Civ. App. 1911).

183. See *Hummer v. R. C. Huffman Const. Co.*, 63 F. 2d 372 (7th Cir. 1933); *Arnold v. Broad*, 15 Colo. App. 389, 62 Pac. 577 (1900); *Elvins v. Del. & Atl. Tel. Co.*, 63 N. J. L. 243, 43 Atl. 903 (1889); *Van Pelt v. McGraw*, 4 N. Y. 110 (1850); Note, 10 TEX. L. REV. 477 (1931-32).

Occasional decisions will be found denying the mortgagee's right to recover damages against third persons for removal of fixtures, on the ground that the appropriate remedy for such removal is by injunction.<sup>184</sup> Conversely, it has been held that the very fact that a court of equity will interfere by way of injunction in such cases stamps the severance as a wrong to the mortgagee, and that he should not be denied the right to recover damages merely because his action was not brought until after the wrong had been committed.<sup>185</sup> One may well ask whether diligence in plundering the mortgaged premises is the kind of diligence courts ought to reward. On the eve of default, the mortgagor is often tempted to salvage what he can by stripping the premises bare, and it is unlikely that he will communicate his intentions in this regard to the mortgagee. To limit the mortgagee to an injunction suit is to deprive him of an adequate remedy.

**B. SUIT FOR RECOVERY OF SEVERED FIXTURES: *Title States:*** In title states, a mortgagee suing to recover possession of a severed fixture enjoys the advantages afforded him by the title doctrine. He is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personalty by the mortgagor, the mortgagee's interest is not divested; he remains the owner of the personalty and may follow and recover it.<sup>186</sup>

However, where the mortgagor is permitted to retain possession, there is an implied license to do any act usual and proper in the course of good husbandry, and the mortgagee cannot maintain an action against third parties for articles so removed.<sup>187</sup>

*Other States:* In jurisdictions other than strict title jurisdictions, there is an absence of agreement as to the mortgagee's right to follow severed fixtures. It has been held that a mortgagee may recover a lathe sold by the mortgagor to a purchaser and removed by the latter from the mortgaged premises, and in support of this result it was argued that the purchaser must take notice of the mortgage, for all purchasers take the risk of assuming the title of their vendors.<sup>188</sup>

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184. *Cooper v. Davis*, 15 Conn. 556 (1843); *Tomlinson v. Thompson*, 27 Kan. 70 (1882).

185. *Jones v. Costigan*, 12 Wis. 677, 683 (1860).

186. *Greenwald v. Graham*, 100 Fla. 818, 130 So. 608 (1930) (case involved trust deed, which is regarded in Florida as vesting legal title); *Burpee v. Athens Production Credit Assn.*, 65 Ga. App. 102, 15 S. E. 2d 526 (1941) (case involved loan deed, which is regarded in Georgia as vesting legal title); *Mosher v. Vehue*, 77 Me. 169 (1885); *Searle v. Sawyer*, 127 Mass. 491 (1879); *Howe v. Wadsworth*, 59 N. H. 397 (1879).

187. *Searle v. Sawyer*, 127 Mass. 491 (1879).

188. *Hoskin v. Woodward*, 45 Pa. 42 (1863).

Cases involving removal of coal and timber were distinguished on the ground that these are intended for consumption, but in the case of a factory or other building, it is by the use of it as it is, and not by its consumption or its sale piecemeal that all its profits are to be derived. The latter argument was expressly rejected in *Kircher v. Schalk*,<sup>189</sup> where the court held that a mortgagee was not entitled to maintain replevin for a steam engine severed from the mortgaged premises.<sup>190</sup>

Precisely the same view was later taken in Connecticut. There, after default, the mortgagor sold the furnace of the mortgaged house, and the purchaser removed the furnace from the premises. It was held that the mortgagee was not entitled to maintain replevin.<sup>191</sup> The court fundamentally assumed a lien position, preferring to regard the mortgagor as the owner of the mortgaged land even after default and therefore able to confer good title on the purchaser of the fixture. A like result was reached in *Clark v. Reyburn*,<sup>192</sup> an action of replevin by a mortgagee for a house sold by the mortgagor and removed by the purchaser from the mortgaged premises. The court pointed out that in lien states the mortgagee has no ownership and therefore no right of possession and further, that if the mortgagee's position was sound, replevin would lie for severed articles though their value would greatly exceed the mortgaged debt, whereas the mortgagee's right of recovery should be limited to his actual loss. Perhaps considerations such as this influenced the decision in *Kircher v. Schalk*,<sup>193</sup> where the court, while denying the right to sue in replevin, conceded the right of the mortgagee to sue for damages. For substantially similar reasons, other courts in lien jurisdictions have denied the right of the mortgagee to maintain replevin or its code equivalent.<sup>194</sup>

To the extent that these decisions are made to turn on the right of the mortgagee to possession, which is the issue in replevin, they appear to rest on solid ground.<sup>195</sup> In some lien theory states, any provision in the mortgage whereby the mortgagor agrees to give up possession on default is regarded as void as being opposed to public policy, and the mortgagee cannot obtain possession until foreclosure

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189. 39 N. J. L. 335 (1877).

190. See note 178 *supra*.

191. *McKelvey v. Creevey*, 72 Conn. 464, 45 Atl. 4 (1900).

192. 1 Kan. 266 (1863).

193. See note 189 *supra*.

194. *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 247, 22 Pac. 184, 185 (1889); *Buckout v. Swift*, 27 Cal. 433, 437 (1865); *Moore v. Moran*, 64 Neb. 84, 89 N. W. 629 (1902); *Knoll v. N. Y., C. & St. Ry. Co.*, 121 Pa. 467, 15 Atl. 571 (1888); *Contra: Sands v. Pfeiffer*, 10 Cal. 258 (1858).

195. *People's Sav. Bank v. Jones*, 114 Cal. 422, 46 Pac. 278 (1896); *Berthold v. Holman*, 12 Minn. 335 (1886); *Gill v. Weston*, 110 Pa. 312, 1 Atl. 921 (1885).

has been completed.<sup>196</sup> A holding in these jurisdictions that prior to completion of foreclosure the mortgagee cannot pursue a severed fixture is entirely consistent with this basic attitude. However, in other lien theory states a mortgage provision giving the mortgagee the right of possession on default is valid.<sup>197</sup> In these jurisdictions there ought not to be any technical obstacle to the mortgagee's recovery in replevin where he is entitled to possession of the remainder of the mortgaged premises, at least where the defendant is not a bona fide purchaser for value and the removal has occasioned impairment.

Even in lien states it is the rule that a mortgagee in possession may recapture a severed fixture that was once part of the mortgage security.<sup>198</sup> It would seem that in all states a mortgagee in possession should be permitted to maintain replevin for wrongfully severed fixtures, where the equities of a bona fide purchaser are not involved.

In some jurisdictions, replevin is permitted where the severance has resulted in impairment of the security.<sup>199</sup> This view is in harmony with the majority rule governing the mortgagee's other remedies.

The suggestion has been advanced that replevin does not lie for severed fixtures, since they remain part of the land and replevin lies only for the return of personalty.<sup>200</sup> This view seems unduly technical. Surely an injured mortgagee cannot be expected to file ejectment for the return of a severed lathe. Replevin, detinue, or their code equivalents are appropriate actions for the recovery of severed fixtures.<sup>201</sup>

C. INJUNCTION: In a few cases it has been held that any waste of the mortgaged property is sufficient ground for a mortgagee to maintain a suit to enjoin waste, but by far the greater weight of authority limits the right of a mortgagee to maintain a suit to stay waste to cases where the security of the mortgaged debt is impaired or there is danger of the property becoming an insufficient security for the mortgage.<sup>202</sup> In jurisdictions where the mortgagee by virtue of his title may maintain suits at law for any damage to the mortgaged

196. *Mutual Ben. Life Ins. Co. v. Canby Inv. Co.*, 190 Minn. 144, 251 N. W. 129 (1933); *Hall v. Hall*, 41 S. C. 163, 19 S. E. 305 (1893); *State ex rel. Gwinn v. Superior Court*, 170 Wash. 463, 16 P. 2d 831 (1932).

197. *Hall v. Goldworthy*, 136 Kan. 247, 14 P. 2d 659 (1932); *Penn Mut. Life Ins. Co. v. Katz*, 139 Neb. 501, 297 N. W. 899 (1941); *Hulseman v. Dirks Land Co.*, 63 S. D. 404, 259 N. W. 679 (1935).

198. *Johnson v. Pac. Land Co.*, 84 Ore. 356, 164 Pac. 564 (1917).

199. *Smith v. Altick*, 24 Ohio St. 369 (1873); *Waterman v. Matteson*, 4 R. I. 539 (1857).

200. *Roberts v. Dauphin Deposit Bank*, 19 Pa. 71 (1852).

201. *Adler v. Prestwood*, 122 Ala. 367, 24 So. 999 (1899); *Hensley v. Brodie*, 16 Ark. 511 (1855); *Dorr v. Dudderar*, 88 Ill. 107 (1878).

202. See Note, 48 A. L. R. 1156 (1927).

premises, it does not follow that the intervention of equity is called for in cases involving only trivial acts of waste.<sup>203</sup> The prevailing rule seems to be that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency.<sup>204</sup> He is entitled to have the mortgaged property preserved as sufficient security for the payment of the debt, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient to one whose purpose is to secure payment, and not to become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that if the debt is not yet mature it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become depreciated from causes not now known. This is a common sense recognition of the fact that a prudent mortgagee will limit his loan to some percentage of the value of the mortgaged property. The margin to which the mortgagee is entitled must be determined in the light of business principles.<sup>205</sup>

In lien jurisdictions that treat the mortgagor's prerogatives of ownership as including the right to sever and sell fixtures free and clear of the mortgage lien, it has been held that a court of equity will decline to interfere with this right by injunction.<sup>206</sup> Other courts that also stress the inconvenience of a rule permitting the mortgagee to follow or sue for severed fixtures nevertheless permit the mortgagee to take preventive action by means of an injunction suit.<sup>207</sup> Courts of the latter persuasion seem to be influenced by regard for the purchaser of the article, since by granting an injunction they, in effect, deny the mortgagor's right to sever, but if the article has been severed, they deny the right of the mortgagee to proceed against the purchaser.

D. OTHER REMEDIES: Fixtures which have been wrongfully severed and removed from the mortgaged land may be sold under a foreclosure sale without first recovering possession thereof by an action at law. The mortgage lien is not terminated by sale or removal of a

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203. *Fidelity Trust Co. v. Hoboken & M. R. R.*, 71 N. J. Eq. 14, 63 Atl. 273 (1906).

204. *Moriarity v. Ashworth*, 43 Minn. 1, 44 N. W. 531 (1890).

205. *Beaver Lumber Co. v. Eccles*, 43 Ore. 400, 73 Pac. 201 (1903).

206. *Buckout v. Swift*, 27 Cal. 433 (1865).

207. *Cooper v. Davis*, 15 Conn. 556 (1843); *Tomlinson v. Thompson*, 27 Kan. 70 (1882); *Berthold v. Holman*, 12 Minn. 335 (1867).

fixture.<sup>208</sup> In *First National Bank and Trust Company v. Hager Oil Company*,<sup>209</sup> the foreclosure court appointed a receiver to restore wrongfully severed fixtures to the mortgaged premises. Where trover or detinue are available, a bill in equity will not lie to compel restoration of severed fixtures.<sup>210</sup>

E. PROTECTION OF THIRD PARTIES AGAINST MORTGAGEE'S SUIT FOR SEVERED FIXTURES: In jurisdictions where such actions will lie, suits by a mortgagee for the severance and removal of fixtures or for the foreclosure of the mortgage lien thereon necessarily call for application of the rules of constructive notice. Clearly, since an innocent purchaser or mortgagee of all of the mortgaged premises is protected against an unrecorded real estate mortgage, even in title jurisdictions, an innocent purchaser or mortgagee of part of the premises, such as a fixture, must also be protected.<sup>211</sup> The converse of the proposition, that recording of a real estate mortgage imparts constructive notice to all purchasers of fixtures, does not necessarily follow. A purchaser or mortgagee of land can legitimately be required to search the land records, and normally this will be done, usually at the expense of the vendor or mortgagor. However, such a search ought not be required where the transaction involved is the sale of a used lathe or refrigerator which is at the time of the sale, to all appearances a chattel. Conceding that a person who buys an article while it is installed on the mortgaged premises is charged with notice of a recorded mortgage, to hold that this rule applies where the article has been severed and removed from the premises and offered for sale at a time when it is, to all appearances, a chattel, seems to press the doctrine of constructive notice to a harsh and illogical extreme. These considerations, unfortunately, are rarely adverted to in the decisions.

The strongest case for the mortgagee can be made in strict title jurisdictions. There a mortgagee who has filed his mortgage in the land records has discharged his only duty to third persons, and, as

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208. *Johnson v. Bratton*, 112 Mich. 319, 70 N. W. 1021 (1897); *Mills v. Pope*, 90 Mont. 569, 4 P. 2d 485 (1931); *Turner v. Mebane*, 110 N. C. 413, 14 S. E. 974 (1892); *Dakota Loan & Trust Co. v. Parmalee*, 5 S. D. 341, 58 N. W. 811 (1894). Decisions of this character in lien states seem inconsistent with decisions denying the right to maintain replevin. See notes 189 to 194, *supra*. This is particularly true where, as in *Johnson v. Bratton*, *supra*, a bona fide purchaser is denied protection. However, all cases cited *supra* in this note involved removal of buildings; hence it seems safe to assume that substantial impairment of security was present. Also, severance of such character certainly does not take place in the ordinary course of business. See note 217, *infra*.

209. 105 N. J. Eq. 62, 146 Atl. 878 (1929).

210. *Franks v. Cravens*, 6 W. Va. 185 (1873).

211. *Banton v. Shorey*, 77 Me. 48 (1885); *Security Co-operative Bank of Brockton v. Holland Furnace Co.*, 274 Mass. 389, 174 N. E. 721 (1931).

the technical owner of the wrongfully severed fixture, he may maintain actions of trespass, trover, or replevin, even as against innocent third persons.<sup>212</sup>

In states other than strict title theory states it is sometimes held that the purchaser of a fixture is charged with notice of a recorded mortgage.<sup>213</sup> On the other hand, it has been held that actual knowledge of the mortgage is necessary.<sup>214</sup> Of course, in any jurisdiction where constructive notice will suffice, actual notice will serve the same purpose.<sup>215</sup> Occasionally the decisions protect a bona fide purchaser of the severed article.<sup>216</sup>

Cases which, while conceding the mortgagee's right to protection by injunction against wrongful removal, deny the right of the mortgagee to maintain an action at law for the recovery of damages or for return of the article itself seem to rest in part at least on an inclination toward protection of purchasers who deal with a mortgagor in possession in the ordinary course of business.<sup>217</sup> Underlying these decisions

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212. *Fitzgerald v. Chicago Mill & Lumber Co.*, 176 Ark. 64, 3 S. W. 2d 30 (1928); *Greenwald v. Graham*, 100 Fla. 818, 130 So. 608 (1930); *Burpee v. Athens Production Credit Assn.*, 65 Ga. App. 102, 15 S. E. 2d 526 (1941); *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422 (1902); *Howe v. Wadsworth*, 59 N. H. 397 (1879).

213. *Johnson v. Bratton*, 112 Mich. 319, 70 N. W. 1021 (1897); *Webber v. Ramsey*, 100 Mich. 58, 58 N. W. 625 (1894); *Jackson v. Turrel*, 39 N. J. L. 329 (1877); *Smith v. Altick*, 24 Ohio St. 369 (1873); *Hoskin v. Woodward*, 45 Pa. 42 (1863); *Dakota Loan & Trust Co. v. Parmalee*, 5 S. D. 341, 58 N. W. 811 (1894).

214. *Wilson v. Maltby*, 59 N. Y. 126 (1874); *Van Pelt v. McGraw*, 4 N. Y. 110 (1850).

215. *Guardian Depositors Corp. v. Keller et ux.*, 286 Mich. 403, 282 N. W. 194 (1938); *Mills v. Pope*, 90 Mont. 569, 4 P. 2d 485 (1931); *Beck v. Zimmerman*, 75 N. C. 60 (1876).

216. *Cope v. Romeyne & Pitts*, 4 McLean 384 (C. C. 7th 1848); *Walch v. Beck*, 230 Iowa 146, 296 N. W. 780 (1941); *Betz v. Verner*, 46 N. J. Eq. 256, 19 Atl. 206 (1890); *Note*, 7 L. R. A. 273, 279 (1890); *cf. Fisher v. Patterson*, 197 Ill. 414, 64 N. E. 353 (1902). In two cases involving removal of buildings it was said that a bona fide purchaser of the land to which the building had been removed should be protected. *Holland Canada Mortgage Co. v. Fraser* [1926] 4 D. L. R. 993, 1003 (Sask. C. A.); *Travis-Barker v. Reed* [1923] 3 D. L. R. 927, 931 (Can. Sup. Ct.).

217. *McKelvey v. Creevey*, 72 Conn. 464, 45 Atl. 4 (1900); *Cooper v. Davis*, 15 Conn. 556 (1843); *Tomlinson v. Thompson*, 27 Kan. 70 (1882); *First Nat. Bank & Trust Co. of Woodbury v. Hager Oil Co.*, 105 N. J. Eq. 62, 146 Atl. 878 (1929); *Kircher v. Schalk*, 39 N. J. L. 335 (1877). The same result has occasionally been reached by applying what is, in effect, an extension of the "good husbandry" exception allowed in *Searle v. Sawyer*, *supra*, note 175. By leaving the mortgagor in possession the mortgagee, it has been said, impliedly authorizes him to carry on his business in the usual way, and toward this end to annex and sever fixtures; hence third persons dealing in good faith with the mortgagor in the ordinary course of business will be protected. *Gough v. Wood & Co.* [1894] 1 Q. B. 713, 720; *Sun Life Assur. Co. of Canada v. Imperial Lumber Yards, Ltd.* [1923] 4 D. L. R. 917, 921 (Sask. C. A.). The principle does not apply where the removal has not taken place in the ordinary course of business, as in the building removal cases. *Sun Life Assur. Co. of Canada v. Imperial Lumber Yards, Ltd.*, *supra*. One difficulty with this view lies in the fact that the mortgagee can effectively block this avenue of approach by a provision in the mortgage, for there can be no implied authority where the mortgage contains an express covenant against the removal of fixtures. *Ellis v. Glover & Hobson, Ltd.* [1908] 1 K. B. 388 (C. A.), criticized in *Niles, The Rationale of the Law of Fixtures*, 11 N. Y. U. L. Q. Rev. 560, 587 (1934); *Holland Canada Mortgage Co. v. Fraser* [1926] 4 D. L. R. 993, 1000 (Sask. C. A.).



is the conviction that if a mortgagor is to be permitted to occupy the mortgaged premises as the ostensible owner thereof, he must be allowed some freedom in dealing with third persons.

Where at the time of the sale or chattel mortgage of an article it is installed in mortgaged premises in such a way as to suggest its character as a fixture, the decisions tend to protect the real estate mortgagee.<sup>218</sup> The fact that the articles are annexed to the realty and adapted to its use serves to place purchasers and chattel mortgagees on inquiry as to whether such articles are personalty or real estate.<sup>219</sup> This solution, while not perfect, seems less objectionable than all others. To relegate the real estate mortgagee to a damage suit against the mortgagor is to compel him to rely upon the mortgagor's personal responsibility, which is precisely what he declined to do when he insisted that a mortgage be given. Any other rule would present the mortgagor with the temptation and opportunity to salvage something from his venture on the eve of foreclosure by stripping the mortgaged premises of all removable chattels.<sup>220</sup>

Considerations of commercial convenience seem to be definitely on the side of the rule protecting a bona fide purchaser of severed articles. A purchaser of articles that are to all appearances chattels may legitimately be required to search the chattel mortgage records prior to completion of his purchase, for this is a duty the existing law places on all purchasers of chattels, but to require a search of the land records for real estate mortgages running back many years beyond the refiling period applicable to chattel mortgages<sup>221</sup> seems to place an undue burden on purchasers or mortgagees of chattels where such chattels bear no evidence that they were once installed on land. Moreover such a search, if made, would more often than not fail to reveal the former connection of the article in question to the mortgaged premises. In general, it would seem that third persons are entitled to the benefit of an objective test. This is but the converse of the rule generally prevailing that if articles subject to a chattel mortgage are affixed to land so that they appear to be fixtures, persons dealing with the

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218. *Greenwald v. Graham*, 100 Fla. 818, 130 So. 608 (1930); *Guardian Life Ins. Co. v. Swanson*, 286 Ill. App. 278, 3 N. E. 2d 324 (1936); *First Mortgage Bond Co. v. London*, 259 Mich. 688, 244 N. W. 203 (1932); *Tyler v. Hayward*, 235 Mich. 674, 209 N. W. 801 (1926); *First Nat. Bank & Trust Co. of Woodbury v. Hager Oil Co.*, 105 N. J. Eq. 62, 146 Atl. 878 (1929); *John E. Mitchell Co. v. Chickasha Cotton Oil Co.*, 173 Okla. 272, 47 P. 2d 590 (1935).

219. *Russell & Teevan, The Package Mortgage*, 12 LEGAL BULL. OF THE UNITED STATES SAVINGS & LOAN LEAGUE 17 (1946); 78 U. OF PA. L. REV. 269 (1930).

220. *Leisle v. Welfare Bldg. & Loan Assn.*, 232 Wis. 440, 447, 287 N. W. 739, 742 (1939).

221. 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES 321 (6th ed. 1933); *Hanna, Extension of Public Recordation*, 31 COL. L. REV. 617, 648 (1931).

land are not obliged to search personal property records. The real estate mortgagee can protect himself by filing his mortgage in the chattel mortgage records, if the law permits, or by requiring and filing a separate chattel mortgage. Certainly this additional expense, no doubt passed on to the mortgagor with the other loan expenses, places less burden on the business community than a rule requiring all dealers in chattels to search the land records and to make inquiry of all real estate mortgagees whose liens are thus revealed, to determine whether the article in question was once annexed to the mortgaged land. The protection, moreover, should extend to all types of actions since it is little comfort to an innocent purchaser of the severed chattels to know he is safe against a replevin action if he may nevertheless be held liable in damages for impairment of the mortgage security.

Even in title states innocent purchasers of severed fixtures should be afforded protection. In these jurisdictions, a purchaser of a fixture is protected against an unrecorded real estate mortgage and a purchaser of land is protected against a prior unrecorded conditional sale contract. The issue is not one of title, but of notice. The chattel mortgage recording laws establish a policy of protecting innocent purchasers of chattels against unrecorded liens. The policy expressed in these decisions and statutes affords ample reason for protecting an innocent purchaser of an apparent chattel against a mortgage recorded only in the land records.

An innocent third party may occasionally invoke the doctrine of accession. Thus, in *Walch v. Beck*,<sup>222</sup> the mortgagor sold an old house on the mortgaged premises to the defendant for twenty-five dollars. The defendant, who was without actual knowledge of the mortgage, demolished the structure and used the materials thereof to erect a house on his own land at the cost of approximately \$900.00. In his foreclosure proceedings the mortgagee sought to impress a lien on the structure thus erected, but the court protected the defendant on the ground that where one, in reliance on a supposed right, without intending any wrong, expends labor and material on the property of another which greatly enhances its value, and the value of the original property is insignificant in comparison with the value of the finished product, title to the property in its converted form will pass to the person who has thus added his labor and materials, on his compensating the owner for the value of the original property.<sup>223</sup>

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222. 230 Iowa 146, 296 N. W. 780 (1941).

223. *Accord*, *Harris v. Bannon*, 78 Ky. 568 (1880); *Peirce v. Goddard*, 22 Pick. 559 (Mass. 1839).

## IX. THE QUESTION OF MATERIAL INJURY

The meaning of the phrase "material injury" differs according to the context in which it occurs, and it is important, therefore, that distinctions between the various situations be kept constantly in mind.

Under the older decisions the character of an article as a fixture or a chattel turned upon its removability without material injury to the premises. This is the annexation test, which, as has been pointed out, receives little emphasis in the modern decisions.<sup>224</sup>

Where the dispute is not one as to whether the article is or is not a fixture, but is one placing in issue the right of a credit vendor to remove articles installed on land, the question of material injury is often of decisive importance, but even here distinctions must be observed. In any situation involving the right of a credit vendor to remove the article on default, the question of incidental injury to the article itself would seem to be immaterial, despite numerous dicta to the effect that removal should not be permitted where it entails substantial injury to the freehold or "to the article itself".<sup>225</sup> Surely, where an article would otherwise be deemed removable, it is a matter of complete indifference to the landowner or real estate mortgagee that it must be removed piecemeal.<sup>226</sup>

Where the issue arises between the credit vendor and his purchaser, the decisions tend to permit removal despite rather substantial injury to the premises, apparently on the theory that the credit sale impliedly licenses such damage to the structure housing the article as is incidental to the removal thereof, and there is no reason why the contract should not be enforced between the parties thereto. Thus, where an oil well casing was sold under a conditional sale contract and was thereafter imbedded and cemented in a well far below the earth's surface, the court held that as between the immediate parties to the contract the casing was removable on default even though the conditional vendor had found it necessary to explode dynamite in the well to loosen the casing.<sup>227</sup> This approach seems sound. If there is present an element of public policy against destruction of improvements on land, surely it is so tenuous that it ought not override a con-

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224. *Supra* Part II.

225. Bogert, *Commentaries on Conditional Sales*, 2A UNIF. LAWS ANN. 98 (1924).

226. *Columbian Steel Tank Co. v. Vosika*, 145 Neb. 541, 17 N. W. 2d 488 (1945) (issue arose between a prior real estate mortgage and a subsequent conditional vendor, and court permitted removal of a copper kettle that could be dismantled and removed as scrap copper); *Accord*, *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701 (1902).

227. *Jones v. Jos. Greenspon's Son Pipe Corp.*, 381 Ill. 615, 46 N. E. 2d 67 (1943).

tract provision so universal and so useful in credit sales of fixtures. Cases involving articles like brick and stone that lose their identity under the law of accession<sup>228</sup> are not likely to arise, since such articles are not sold on conditional sale or chattel mortgage. Credit sales of building materials are common, of course, but the materialman looks to the mechanic's lien laws for his security.

Where the issue of removability arises between a credit vendor of fixtures and a subsequent mortgagee of the land who has actual or constructive notice of the prior sale of fixtures, removal is usually permitted. In such situations it is plain that the mortgagee acts with knowledge of the risks involved and is consequently entitled to only a minimum of consideration; and since the fixture recording laws were enacted for the precise purpose of affording the credit vendor of fixtures a chance to protect himself against subsequent purchasers and the mortgagees of the land,<sup>229</sup> the laws should, under the familiar rule, be so construed as to effectuate this purpose. To deny protection to the credit vendor of fixtures in this situation would force credit merchandisers to abandon credit sales of fixtures, a concededly undesirable result.<sup>230</sup> Presumably the mortgagee under such circumstances relies on the security of the premises without regard to the presence of the articles so purchased on credit, since he must have in contemplation the fact that on default such articles will be repossessed. Likewise the mortgagee must be held to consent to such damage to the structure housing the articles as is incidental to removal.

The situation productive of greatest controversy is that in which the issue arises between a real estate mortgagee and a subsequent credit vendor of fixtures. Under the majority rule,<sup>231</sup> removal is not permitted where it would involve material injury to the premises. In defining material injury this group splits into two camps: jurisdictions following the rule that material injury means physical damage to the remainder of the building arising in the process of removal of the articles, and jurisdictions following the institutional doctrine. The Uniform Conditional Sales Act seems to have had little effect on this division of authority, for the conflict of opinion existed at common law and continues to exist under the act.<sup>232</sup> Under Section 7 of the Act,

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228. *Walch v. Beck*, 230 Ia. 146, 296 N. W. 780 (1941); *Peirce v. Goddard*, 22 Pick. 559 (Mass. 1839); *Madfes v. Beverly Development Corp.*, 251 N. Y. 12, 166 N. E. 787 (1929).

229. 2 UNIF. LAWS ANN. 13 (1922).

230. Note, 22 CORN. L. Q. 421, 426 (1937), criticizing *Smyth Sales Corp. v. Norfolk Bldg. & Loan Assn.*, 116 N. J. L. 293, 184 Atl. 204 (1936).

231. *Supra* Part VII, C.

232. *People's Savings & Trust Co. v. Munsert*, 212 Wis. 449, 249 N. W. 527 (1933).

removability turns on "material injury to the freehold." Plainly the term "freehold" was not used in its technical sense;<sup>233</sup> hence the courts felt at liberty to read into this ambiguous phrase their own views of the respective equities of prior mortgagee and subsequent conditional vendor.

Under the view that material injury means physical damage to the buildings exclusive of the fixtures in question, it seems that material injury is not present as long as the shell of the building remains relatively intact, since almost everything else is deemed removable.<sup>234</sup> This shell consists of articles that have lost their identity.<sup>235</sup> Removal is permitted if it does not affect the "integrity of the structure on which the mortgagees advanced."<sup>236</sup> It has been held that Section 7 of the Uniform Act was intended to perpetuate this common law doctrine.<sup>237</sup> *Columbian Steel Tank Company v. Vosika*<sup>238</sup> affords an excellent illustration of material injury to the freehold in the sense the phrase is used by these courts. There a conditional vendor of equipment was denied the right of removal as against a prior real estate mortgagee where removal required the making of openings in the building walls and such would materially weaken the structure. This view, it is said, commands the support of most of the courts adhering to the majority view.<sup>239</sup> Certainly it has the virtue of simplicity, since the existence of material physical injury to the building is something that can be determined by the senses, whereas problems of interference with function involve troublesome abstractions.<sup>240</sup>

A numerically inferior faction espouses the institutional doctrine. These courts regard each building or enterprise as an operating whole, not an assembly of removable parts. Under this view, the right of removal should be denied the credit vendor of fixtures where removal would result in material impairment of the efficient functioning of the mortgaged property viewed as an operating institution.<sup>241</sup>

233. 30 MICH. L. REV. 469 (1931).

234. See cases cited note 131 *supra*. It is not always clear from the decisions whether the courts are laying down a test of fixtures or a test of impairment of the mortgage security. Material injury to the building occasioned in the process of removal has long been outmoded as a fixture test. If the courts mean to decide that there is no impairment of the mortgage security as long as the shell of the building remains standing, mortgage experience today is in flat contradiction.

235. Bogert, *Commentaries on Conditional Sales*, 2A UNIF. LAWS ANN. 98 (1924).

236. *Holt v. Henley*, 232 U. S. 637, 641 (1914).

237. *People's Savings & Trust Co. v. Munsert*, 212 Wis. 449, 249 N. W. 527 (1933).

238. 145 Neb. 541, 17 N. W. 2d 488 (1945).

239. *Keil Motor Co. v. Home Owners Loan Corp.*, 47 A. 2d 164 (Del. 1941).

240. Note, 22 CORN. L. Q. 421, 424 (1937).

241. *Dauch v. Ginsburg*, 214 Cal. 540, 6 P. 2d 952 (1931) (conditional vendor of plumbing fixtures installed in hotel building denied right of removal as against prior real estate mortgagee); *B. & O. Radio v. Prudential Ins. Co.*, 116 N. J. L. 301,

In appraising the merits of these two views of the respective equities of a prior real estate mortgagee and a subsequent conditional vendor, we must remember that the institutional doctrine is no novelty. As an application of the adaptation test of fixtures it has found useful application to industrial mortgages for over one hundred years,<sup>242</sup> and in situations not involving a dispute between a prior real estate mortgagee and a subsequent credit vendor of fixtures, this view has commanded very general support, even in the jurisdictions that have repudiated it under its new name.<sup>243</sup> Also, while the equities of the credit seller of chattels are entitled to consideration, the equities of the mortgage banker ought not be ignored. Mortgage loans on vacant buildings are rare. Where a mortgage loan is made to a businessman, it is the going concern with its going concern value<sup>244</sup> on which the mortgage banker relies.<sup>245</sup> Even a distressed property has going concern value,<sup>246</sup> and indeed the compelling motive of an equity receivership is the preservation of this going concern value.<sup>247</sup> When a credit vendor exercises his right of removal, leaving the walls of the building intact but disrupting operations, has he not occasioned a diminution of the going concern value of the security?<sup>248</sup> Recognition that such is indeed the case is implicit in the decisions denying the right of removal of replacement articles, for removal of such articles takes

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184 Atl. 208 (1936) (refrigerator system in apartment building held not removable as against prior real estate mortgagee); *Lumpkin v. Holland Furnace Co.*, 118 N. J. Eq. 313, 178 Atl. 788 (Ch. 1935) (conditional vendor of furnace in dwelling denied right of removal against prior real estate mortgagee); *Domestic Electric Co., Inc. v. Mezzaluna*, 109 N. J. L. 574, 162 Atl. 722 (1932) (conditional vendor of refrigerators and gas ranges installed in apartment building denied right of removal as against prior real estate mortgagee); *Land Title Bank and Trust Co. v. Stout*, 339 Pa. 302, 14 A. 2d 282 (1940) (conditional vendor of elevator installed in apartment building denied right of removal as against prior real estate mortgagee); cf. *General Heat & Appliance Co. v. Goodwin*, 316 Mass. 3, 54 N. E. 2d 67 (1944).

242. See *Voorhis v. Freeman*, 2 W. & S. 116 (Pa. 1841).

243. Compare the following: *Equitable Guarantee & Trust Co. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961 (1896), with *Keil Motor Co. v. Home Owners Loan Corp.*, 47 A. 2d 164 (Del. App. 1941); *Bass Foundry Works v. Gallentine*, 99 Ind. 525 (1844), with *Citizens Bank v. Mergenthaler Linotype Co.*, 216 Ind. 573, 25 N. E. 2d 444 (1940); also *First Wisconsin Trust Co. v. Adams*, 218 Wis. 406, 261 N. W. 16 (1935) and *Taylor v. Collins*, 51 Wis. 123, 130-131 (1880), with *Peoples Savings & Trust Co. v. Munsert*, 212 Wis. 449, 249 N. W. 527 (1933).

244. As to going concern value, see *Isaacs, The Unit Rule*, 35 YALE L. J. 838, 844-845 (1926).

245. It is the machinery and equipment which convert the four walls of the factory building into a valuable industrial property. *Land Title Bank & Trust Co. v. Stout*, 339 Pa. 302, 14 A. 2d 282 (1940).

246. In foreclosures of industrial mortgages the land, buildings and machinery must be sold as an entirety, since they are a unit and cannot be disintegrated and the parts sold separately without large depreciation. *Hill v. National Bank*, 97 U. S. 450 (1878); *Detroit Trust Co. v. Detroit City Service Co.*, 262 Mich. 14, 247 N. W. 76 (1933).

247. *Coriell v. Morris White, Inc.*, 54 F. 2d 255 (2d Cir. 1931).

248. Note, 83 U. OF PA. L. REV. 916 (1935).

away something that was present when the mortgage loan was made—going concern value.<sup>249</sup>

In the leading case of *Campbell v. Roddy*,<sup>250</sup> the court placed squarely on the chancellor's shoulders the duty of preserving "the right of the prior real estate mortgagee in the same degree of security which he would have enjoyed had the property remained as when mortgaged." Material impairment of the security is the test.<sup>251</sup> If removal will result in such impairment, "then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to the freehold from which it cannot be removed without diminishing or impairing an existing mortgage thereon."<sup>252</sup> This is the test laid down in an overwhelming majority of the decisions involving damages or injunction suits for removal of fixtures.<sup>253</sup> In determining whether material impairment of the security's value will take place, it would seem that all elements of value, including going concern value, should be considered.

Perhaps to some the institutional solution is suggestive of the dilemma of Shylock. The credit vendor may remove his pound of flesh, but must not shed a drop of going concern blood. The shadow of the right remains, but the substance is taken away. Moreover, if going concern value is of vital importance it is arguable that the property should be made to bear the expense of needed replacements.<sup>254</sup> Normally the credit vendor will be content to receive from the mortgagee the balance due on the contract, and the mortgagee could be protected by allowing him to add any sums thus advanced to the mortgage debt. If the mortgagor fails to make redemption, the mortgagee will be made whole by ultimate realization of the enhanced value of the premises. This solution, however, fails to take into account the possibility that the mortgagee, as depression experience frequently demonstrated, may simply lack funds to meet an emergency such as this. Moreover, the mortgagee is left without protection against an unannounced repossession that leaves the enterprise stripped of equipment essential to operation, for even the Uniform Conditional Sales Act provides for notice of repossession only to the buyer.<sup>255</sup>

However this controversy is ultimately decided, the fact remains that, for the present, the institutional tide seems to be running fairly

249. *Comly v. Lehmann*, 218 Iowa 644, 253 N. W. 501 (1934); *Bass Foundry Works v. Gallentine*, 99 Ind. 525 (1884); Note, 90 U. of Pa. L. Rev. 77 (1941).

250. 44 N. J. Eq. 244, 252, 14 Atl. 279, 283 (1888).

251. *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753 (1889).

252. *Id.* at 184, 19 N. E. at 756.

253. *Supra* Part VIII, A and C.

254. *Wolf Co. v. Herman Savings Bank*, 168 Mo. App. 549, 153 S. W. 1094 (1913).

255. UNIF. CONDITIONAL SALES ACT § 17, 2 UNIF. LAWS ANN. 28.

strong. While the jurisdictions formally committed to the doctrine are few in number, the view continues to gain adherents by the back door, so to speak. Often decisions are reached on institutional grounds, sometimes with citation of institutional authorities, but without apparent awareness of the allegiance thus declared.<sup>256</sup>

In jurisdictions that continue to adhere to the doctrine that no material injury is involved as long as the four walls of the building remain standing, it has occasionally been held that some compensation should be provided the mortgagee for such damage as does in fact occur. For example, in a case where the conditional vendor's right of removal was questioned by a prior real estate mortgagee, the court, while it held that removal of the machinery in question would not entail material injury to the freehold, required the conditional vendor to give adequate security that such damage as was in fact occasioned by the removal would be completely repaired by him after the machinery had been removed.<sup>257</sup> Pennsylvania has a statute making a somewhat similar provision.<sup>258</sup> Under the Pennsylvania amendments to the Uniform Conditional Sales Act removal is allowed as against a prior mortgagee even where material injury to the freehold is involved, but the conditional vendor must post a bond to repair any damage caused to the interest of the prior encumbrancer.<sup>259</sup> Statutory authority for the imposition of this condition or limitation on the conditional vendor's right of removal seems unnecessary. Where removal by the conditional vendor would occasion some diminution in the value of the freehold, then the depreciation must first be made whole to the real estate mortgagee before the conditional sale can be recognized.<sup>260</sup> Or as otherwise stated, where severance of the articles might impair the security of the prior mortgagee to some extent, the rights of the parties should be adjusted on equitable principles.<sup>261</sup> This might necessitate sale of the mortgaged premises with the articles installed therein, with an equitable division of the proceeds of sale.<sup>262</sup>

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256. *E. g.*, *Viking Equipment Co. v. Central Hotel Co.*, 230 Mo. App. 304, 91 S. W. 2d 94 (1936) (removal of sprinkling system from hotel would render building "almost wholly unfit for use as a hotel"); *Mortgage Bond Co. v. Stephens*, 181 Okla. 419, 74 P. 2d 361 (1937) (court quotes from *Ege v. Kille*, 84 Pa. 333, 340 (1877) that "if article is indispensable in carrying on the specific business, it becomes part of the realty"). See also authorities cited *supra* Part II.

257. *In re Voight-Pros't Brewing Co.*, 115 F. 2d 733 (6th Cir. 1940), 19 CHI.-KENT. REV. 297 (1941).

258. Kleps, *Uniformity Versus Uniform Legislation: Conditional Sale of Fixtures*, 24 CORN. L. Q. 394, 400, 407, 409 (1939).

259. *Id.* at 394, 407.

260. *Campbell v. Roddy*, 44 N. J. Eq. 244, 252, 14 Atl. 279, 284 (1888).

261. *Binkley v. Forkner*, 117 Ind. 176, 185, 19 N. E. 753, 757 (1889); *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237 (1898).

262. *Hurxthal v. Hurxthal*, 45 W. Va. 584, 32 S. E. 237 (1898).