Cornell Law Review

Volume 24
Issue 3 *April 1939*

Article 3

Uniformity Versus Uniform Legislation Conditional Sale of Fixtures

Ralph N. Kleps

UNIFORMITY VERSUS UNIFORM LEGISLATION: CONDITIONAL SALE OF FIXTURES

RALPH N. KLEPS*

I.

A prominent attorney in New York City numbers among his best clients a company which furnishes electric ranges, lighting fixtures, and wiring installations for many of the large-scale construction projects being carried out in that region and in the metropolitan areas of nearby New Jersey and Pennsylvania. These construction materials are sold on credit in many instances, and the conditional sale is the credit device by which the supply house attempts to retain title to its goods as security for the payment of the purchase price. These goods, however, are immediately delivered to the buyer and installed in the buildings for which they are designed. In many instances, the buildings are being financed on borrowed money, secured by mortgages on the land. Installments on these loans are usually advanced as the building nears completion, and the security relied on by the mortgagee is the land and the completed structure. If the new venture prospers and its debts are paid, the electrical company eventually collects the money due it, and no difficulties ensue. In recent years, however, such projects have often failed to achieve success, and the problem of the attorney for the conditional seller has been to protect the interests of his client in the unpaid-for articles against the desperate attempts of rival creditors to seize any tangible assets which might be applied to the satisfaction of their claims.

In discussing this situation recently with a practicing lawyer from a western state, the New York attorney mentioned the fact that his difficulties are caused, not only by the uncertainty and complexity of the situation in New York, but also by the fact that he is compelled to keep abreast of the developments in the law of New Jersey and Pennsylvania, into which states a considerable bulk of his client's products find their way. The western lawyer consoled him as he said, "Even so, these three states have the Uniform Conditional Sales Act in effect. Think how much worse your situation would be if you had to handle this problem in my part of the country where there is no such unifying link between the states!"

But to this the New York attorney replied, "I was handling cases of this sort before the Uniform Act was passed; and you mark my words, I'm no better off than I was twenty years ago. There are just as many elements of diversity between the states today as there were then. And the situation of the lawyer who is trying to comply with laws in all three states is probably worse, because he may be lulled into false security by the belief that uniformity

*The author wishes to acknowledge the assistance given him by Professor W. H. Farnham, of the Cornell Law School, in the preparation of this article.

does exist. No! The Uniform Act hasn't helped me a bit; in fact, I suspect I'm worse off today than I was before the Act was passed."

II

The Uniform Conditional Sales Act was drafted to make uniform the laws of the states which adopted it in the field of conditional sales, and the hope was expressed that its adoption would result in "unification of doctrine and decision".[1] The act was not widely adopted, but perhaps the twenty years which have passed since its proposal have given a sufficient perspective so that it is possible to answer the question implied by the narrative related above. That is, what has been the effect of this uniform legislation on the law of the states which adopted it? Has its adoption resulted in any appreciable improvement in the direction of uniformity?

It is the purpose of this article to suggest an answer to these questions. Practical considerations require that this paper be limited to a small portion of the entire field covered by the Uniform Conditional Sales Act. It will, therefore, be limited to the problem of our New York attorney in protecting the conditional seller of articles which are attached to the realty; that is, it will be confined to the situation arising upon the conditional sale of a fixture.[2]

The conclusions which can be drawn from this study must be limited to the field actually examined. Only a much more extended study could, therefore, justify any conclusion as to the efficacy of uniform legislation in general. But it is hoped that this paper will indicate the trend in one important field in which "uniform" legislation exists, and will, perhaps, suggest the need for added investigation as to the efficacy of the Uniform State Laws in producing uniformity.

III. Situation Prior to the Uniform Act

Prior to the adoption of the Uniform Conditional Sales Act, our New York attorney had three important factors to consider within each of the three states in determining the safety of his client's security when marketing fixtures under conditional sale contracts: (1) the position taken generally within the jurisdiction as to the validity of the contract of conditional sale;[3] (2) the position taken in the law of fixtures with regard to the

[1]Burdick, *Codifying the Law of Conditional Sales* (1918) 18 Col. L. Rev. 103, 107.

[2]The use of the word "fixture" needs clarification. "Fixture" has been used loosely to mean a variety of things. For example, it may mean a chattel so attached as to become a part of the realty; or it may mean a chattel which, although attached to realty, may be removed and is to be treated as personalty. Also it may mean a chattel which may be either realty or personalty depending upon the intention of the parties. It is in the latter sense that "fixture" is used here. See Bronson, Law of Fixtures (1904) § 3, p. 7; Bingham, *Suggestions Concerning the Law of Fixtures* (1907) 7 Col. L. Rev. 1, 13.

[3]At common law the contract of conditional sale was recognized in almost all jurisdictions as being valid as between the parties to the contract. Bogart, Com-

circumstances under which a chattel became a part of the realty to which it was attached, that is, the circumstances under which an article would become land if annexed in an unencumbered condition by an owner to his own unencumbered land;[4] and (3) the statutory modifications within each state which affected the two factors first mentioned.[5] Concerning each of these elements there was some diversity among the jurisdictions, a diversity which produced a considerable lack of uniformity in the decisions with regard to the priority of the interests of competing claimants to the fixtures.[6]

1. *In New York*

Although New York recognized the validity of the conditional sales contract, our attorney had to remember two specific New York peculiarities when advising as to the conditional sale of fixtures in New York prior

---

MENTARIES ON CONDITIONAL SALES (1924), 2a U. L. A. 55-56. The validity of the contract of conditional sale was recognized in New York and New Jersey not only against the conditional buyer, but also against his creditors and subsequent purchasers of the chattel from him. Ballard v. Burgett, 40 N. Y. 314 (1869); Cole v. Berry, 42 N. J. L. 308, 34 Am. Rep. 511 (1880). See BOGERT, *supra*, at 58-59; Burdick, *Codifying the Law of Conditional Sales* (1918) 18 COL. L. REV. 103. But in Pennsylvania the conditional sale was valid only between the parties to the contract and was invalid against third parties who dealt with the buyer. Martin v. Mathiot, 14 Serg. & Raw. 214, 16 Am. Dec. 491 (Pa. 1826). See BOGERT, *supra*, at 58-59; 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. by Bowers, 1933) § 905 pp. 7-8, n. 15. *Cf.* Harkness v. Russell, 118 U. S. 663, 676, 7 Sup. Ct. 51, 59 (1886).

[4]All three jurisdictions adopted the principles stated in Teaff v. Hewitt, 1 Ohio St. 511 (1853), that whether the chattel became a part of the realty to which it was attached was to be determined from its annexation to the realty, the appropriation to the use of the realty, and the intention of the party making the annexation. Tifft v. Horton, 53 N. Y. 377, 383 (1873); Brearly v. Cox, 24 N. J. L. 287 (1854); Vail v. Weaver, 132 Pa. 363, 19 Atl. 138 (1890). See BROWN, PERSONAL PROPERTY (1936) § 137, p. 628.

[5]New York passed a general filing statute applicable to conditional sales in Laws of 1884, Chap. 315, § 1. This afforded no protection to persons who acquired an interest in the realty, since it was designed to protect subsequent purchasers of the chattel itself. But Laws of 1904, Chap. 698 provided, ". . . Every such contract for the conditional sale of any goods and chattels attached, or to be attached, to a building, shall be void as against subsequent *bona fide* purchasers or encumbrancers of the premises on which said building stands, and as to them the sale shall be deemed absolute, unless . . . such contract shall have been duly and properly filed and indexed as directed. . . ." This filing requirement was later limited by decision to situations where the articles were so attached as to have become part of the land. Central Union Gas Co. v. Browning, 210 N. Y. 10, 103 N. E. 822 (1913). See Bogert, *Evolution of Conditional Sales Law in N. Y.* (1923) 8 CORNELL L. Q. 303, 312-315.

New Jersey had passed several general filing statutes applicable to conditional sales but none of them was designed to protect a person who acquired an interest in the land. P. L. 1889, c. 271, p. 421; P. L. 1895, c. 44, p. 302; P. L. 1898, c. 232, pp. 699-700. See Comp. Stat. of N. J. (1910), pp. 1561-1563, Tit. "Conveyances", §§ 71-73.

Pennsylvania had passed statutes the general effect of which was to change the common law rule and to validate the conditional sale of fixtures provided there was compliance with the terms of the statute. Laws of 1915, p. 866; Laws of 1923, p. 117. See Burdick, *Codifying the Law of Conditional Sales* (1918) 18 COL. L. REV. 103.

[6]The diversity and uncertainty prevailing in this field of conditional sales has often been the subject of comment. BROWN, PERSONAL PROPERTY (1936) §§ 152-155; 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. by Bowers, 1933) § 906; Burdick, *loc. cit. supra* note 5, at 107.

to the Uniform Act. One peculiarity existed in New York with regard to the basic law of fixtures; for the New York courts tended to include in the classification of inherent chattels, that is, objects which were incapable of becoming realty despite their annexation to land, certain articles such as gas fixtures and gas ranges which could conceivably have become part of the land in other states.[7]

In addition, our attorney had to comply with the provisions of a New York statute passed in 1904[8] and in effect until the adoption of the Uniform Act, which required the contract for the conditional sale of chattels which were to be attached to land to be filed in the city or county where the realty was located. Failure to do so meant that the contract was void as against "subsequent *bona fide* purchasers or incumbrancers of the realty".

a. *Prior holders of a realty interest*: Such persons were often either holders of prior mortgages on the land, or sellers of land under installment contracts who retained a vendor's lien on the land to which the fixtures were subsequently attached. Against such persons our attorney could assure his client that in New York the conditional sale would effectively protect his interest in nearly every situation, and with no need to file under the "fixtures statute".[9] Only if his goods were so attached that removal would injure the realty was his title reservation insecure against the holder of the prior realty interest.[10] Thus, in this specific business, only in the wire installation jobs might there be doubt as to the safety of the security when marketing in New York under a conditional sale contract, for the court might hold the wiring to have become inseparably part of the realty.

b. *Subsequent holders of a realty interest*: This class was composed of persons who purchased the land, or took a mortgage on the land, or advanced further money under a pre-existing mortgage after the attaching

[7]Central Union Gas Co. v. Browning, 210 N. Y. 10, 103 N. E. 822 (1913) and the cases discussed therein.

[8]Laws of 1904, c. 698, amending LIEN LAW § 112. *Supra* note 5.

[9]Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851 (1907) (contract vendor of land); DeBevoise v. Maple Ave. Constr. Co., 228 N. Y. 496, 127 N. E. 487 (1920) (prior realty mortgagee); Ratchford v. Cayuga Co. Cold Storage, etc., Co., 217 N. Y. 565, 112 N. E. 447 (1916) (prior realty mortgagee). See (1921) 13 A. L. R. 448, 457 and 460.

An analogous situation arose where the conditional buyer was not the owner of the land to which he attached the chattels, as for example, where a contractor purchased fixtures conditionally and attached them without the knowledge of the owner of the land. New York cases were in some confusion, but ultimately it was decided that the same rule would apply as with the prior mortgagee of the realty. Crocker-Wheeler Co. v. Genesee Recreation Co., 160 App. Div. 373, 145 N. Y. Supp. 477 (4th Dep't 1914), *aff'd*, 221 N. Y. 565, 116 N. E. 1042 (1917); Creamery Package Mfg. Co. v. Horton, 178 App. Div. 467, 165 N. Y. Supp. 257 (3rd Dep't 1917).

[10]*Cf.* DeBevoise v. Maple Ave. Constr. Co., 228 N. Y. 496, 127 N. E. 487 (1920). But if the prior mortgagee of the land made additional advances after the installation of the fixtures and in reliance upon their presence, the courts gave him the status of a subsequent mortgagee of the realty. Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932); Cohoes Iron Foundry, etc., Co. v. Glavin, 190 App. Div. 87, 179 N. Y. Supp. 357 (3rd Dep't 1919).

of the conditionally-sold fixture. The filing statute specifically required that the contract be duly filed in the county where the land was located in order for the conditional seller to be protected against persons in this class. His client would be completely protected in marketing his goods by conditional sale in New York (with the ever-present exception of goods which could not be severed from the land without physical injury) *only* if he had complied with all the filing requirements,[11] or if the holder of the realty interest fell outside the protection of the filing statute, as for example, if he had purchased the land with actual notice of the conditional seller's interest.[12]

2. *In New Jersey*

In New Jersey, as in New York, the validity of the conditional sale contract was recognized and New Jersey had the same common law background which existed in New York. But New Jersey had passed no statute requiring the filing of conditional sales contracts for chattels to be attached to land in the county where the land was located. Nor had New Jersey courts actually rendered any decisions to the effect that there were certain chattels which were incapable of becoming land even though attached to the realty. The New Jersey cases followed the great case of *Campbell v. Roddy*,[13] and they held that the security interest of the conditional vendor would be protected so long as removal would not diminish the security to which the holder of the realty interest was entitled. And the latter was held entitled only to the land as it was when he took his mortgage, plus the interest of the mortgagor in any subsequent additions as that interest accrued.[14]

---

[11]Cohoes Iron Foundry, etc., Co. v. Glavin, 190 App. Div. 87, 179 N. Y. Supp. 357 (3rd Dep't 1919) (subsequent mortgagee of the realty); Colwell Lead Co. v. Home Title Ins. Co., 154 App. Div. 83, 138 N. Y. Supp. 738 (1st Dep't 1912), *aff'd without opinion*, 208 N. Y. 591, 102 N. E. 1100 (1913) (subsequent purchaser of the land); East N. Y. Refrig., etc., Co. v. Halpern, 140 App. Div. 201, 125 N. Y. Supp. 111 (2d Dep't 1910) (subsequent mortgagee). *Cf.* McCloskey v. Henderson, 231 N. Y. 130, 131 N. E. 865 (1921).

[12]See Fitzgibbons Boiler Co. v. Manhasset Realty Corp., 198 N. Y. 517, 92 N. E. 1084 (1910), *reversing* 125 App. Div. 764, 110 N. Y. Supp. 225 (1st Dep't 1908) on the dissenting opinion of Scott, J. In Crocker-Wheeler Co. v. Genesee Recreation Co., 160 App. Div. 373, 376, 145 N. Y. Supp. 477, 480 (4th Dep't 1914), *aff'd*, 221 N. Y. 565, 116 N. E. 1042 (1917), the court says that the filing statute is in derogation of the common law and one seeking its protection has the burden of showing clearly that he is within its terms.

[13]44 N. J. Eq. 244, 14 Atl. 279 (1888).

[14]The New Jersey courts refused to adopt the New York position that an agreement preserving the chattel nature of articles attached to land should be given legal effect against both prior and subsequent mortgagees of the realty. It adopted as its solution the equitable principle that the chattel was removable so long as it did not diminish the original security of the realty mortgagee. *Cf. loc. cit. supra* note 13, at 249.

It has been said that the protection of the conditional vendor's security in New Jersey depended upon the "equitable doctrine" that he might remove the fixture so long as the interest of the mortgagee of the realty was not diminished, while the New York cases were said to rest upon a "legal doctrine" that the intention of the parties that the chattel should remain personalty was controlling. ESTRICH, INSTALLMENT SALES (1926) § 130, p. 242; (1921) 13 A. L. R. 448, 460.

a. *Prior holders of a realty interest*: The New York attorney could safely advise his client that as to these persons the conditional sale would effectively protect his security interest in New Jersey without compliance with any special filing requirements applicable to fixtures. Only if the removal of the articles attached would damage the security of the party interested in the realty, that is, would cause physical harm to the realty viewed as it originally was, might his security be jeopardized.[15] This situation was not materially different from the situation relating to prior holders of a realty interest in New York.

b. *Subsequent holders of a realty interest*: Cases were few in New Jersey prior to the adoption of the Uniform Act, but from them our attorney could reasonably infer that if his client's goods were so attached as to become a part of the land, he would be defeated by a subsequent *bona fide* purchaser or mortgagee of the realty upon equitable considerations. That is, since the subsequent *bona fide* party had reasonably relied upon the goods being a part of the land, the conditional seller would not be heard to assert that they still remained personal property.[16] Only if the goods actually remained personalty, even though attached to the land, was the conditional seller's security safe as against a subsequent *bona fide* taker of an interest in the land. No opportunity was given him, as by filing in New York, to protect his interest in chattels which had become a part of the land. Thus, there was a far narrower protection available against subsequent holders of a realty interest than that afforded in New York.

3. *In Pennsylvania*

In Pennsylvania, our attorney had two important peculiarities to remember. The first was the fact that at common law the conditional sale was valid in Pennsylvania only between the parties to the contract, even where no attachment to realty was involved.[17] The other was the unusual length to which Pennsylvania had developed the doctrine of constructive annexation in hold-

[15]General Electric Co. v. Transit Equip. Co., 57 N. J. Eq. 460, 42 Atl. 101 (1898) (prior realty mortgagee); Oil City Boiler Works v. N. J. Water & Light Co., 81 N. J. L. 491, 79 Atl. 451 (1910) (one in the position of a prior mortgagee of the realty); Palmateer v. Robinson, 60 N. J. L. 433, 38 Atl. 957 (1897) (contract vendor of land).

[16]In Campbell v. Roddy, 44 N. J. Eq. 244, 250, 14 Atl. 279, 282 (1888) the court said, ". . . there seems to be no equitable ground upon which the lien of the chattel claimant should be recognized against an innocent subsequent mortgagee or purchaser [of the land] for value." This dictum was followed in Leo Co. v. Jersey City Bill Posting Co., 78 N. J. L. 150, 73 Atl. 1046 (1909).

[17]*Supra* note 3. BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924), 2a U. L. A. p. 58-59; BURDICK, LAW OF SALES (3rd ed. 1913) § 311, p. 218; 3 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. by Bowers, 1933) § 905, p. 7-8, n. 15. *Cf.* Harkness v. Russell, 118 U. S. 663, 676, 7 Sup. Ct. 51, 59 (1886), where the Pennsylvania doctrine is said to result from a misconception of the English cases, which depended upon a special statute, but were treated as though expressive of common law principles.

ing that light machinery and small tools essential to the functioning of a manufacturing plant became a part of the realty even though not attached to the land.[18] On the other hand the statute in Pennsylvania operated to validate as against third parties the contract for the conditional sale of fixtures when it was filed in express compliance with the provisions of the statute.[19]

a. *Prior holders of a realty interest*: Our attorney could assure his client that his security could be protected against these persons in Pennsylvania if he complied with the statute, that is, filed his contract properly and posted a bond to repair any material injury which removal might cause to a prior mortgagee.[20] But his security was safe only when the statute was specifically followed.

b. *Subsequent holders of a realty interest*: The situation was the same here as with the prior holder of the realty interest, except that no bond was required. The security of the client would be safe only if the provisions of the filing statute were met, that is, if the contract were properly filed prior to the acquisition of any subsequent interest in the realty.[21]

4. *Summary of the situation prior to the Uniform Act*

It is clear that there were many significant distinctions between the jurisdictions here hastily reviewed. In New York the conditional seller had a common law protection afforded him against the prior mortgage of the land, and provided he complied with the filing statute, he could take advantage of a statutory protection against subsequent purchasers or mortgagees of the land. In New Jersey a similar common law protection was afforded the conditional seller where prior mortgagees of the land were involved, but there was no statutory protection given as against subsequent holders of a realty interest. In Pennsylvania, since these was no protection at common law against any third parties, a statutory protection was granted, against both prior and subsequent holders of a realty interest, to the conditional

[18]Bullock Electric Mfg. Co. v. Lehigh Valley Traction Co., 231 Pa. 129, 80 Atl. 568 (1911); Ott v. Sweatman, 166 Pa. 217, 31 Atl. 102 (1895).

[19]Ridgway Dynamo & Engine Co. v. Werder, 287 Pa. 358, 135 Atl. 216 (1926). *Cf.* Anchor Concrete Mach. Co. v. Penna. Brick & Tile Co., 292 Pa. 86, 140 Atl. 766 (1928). Laws of 1923, p. 117, § 2.

[20]Laws of 1923, p. 117, § 2: ". . . Third. As against a prior mortgagee or other prior incumbrancer of the realty, who has not assented to the reservation of property in the chattels . . . the reservation of property in the chattels so attached shall be void, notwithstanding the recording . . . unless such injury although material be such as can be completely repaired, and the seller . . . furnishes or tenders . . . a good and sufficient bond conditioned for the immediate making of such repairs. . . ."

[21]Laws of 1923, p. 117, § 2: ". . . Second. As against a subsequent purchaser, subsequent mortgagee, or other subsequent incumbrancer, of the property for value and without notice of the reservation of property in the chattels, such reservation shall be void as to any chattels so attached to the realty as to form a part thereof, unless the conditional sale contract . . . shall be recorded, as required . . . before such purchase is made or such mortgage is given or such incumbrance is effected. . . ."

vendor who complied with the filing statute. And there were further differences which resulted from varying conceptions as to what articles became land and as to the circumstances required to produce that result.

These apparent differences were not necessarily productive of dissimilar results in similar situations. The variations in the terms of the specific statutes, however, did provide an important element of diversity between these states. Our investigation now proceeds to discover whether the unification of the *statutory* requirements operated in fact to unify the *law, i.e.,* the "doctrine and decision", within these states, as it relates to the conditional sale of fixtures.

IV. Adoption of the Uniform Conditional Sales Act

At Cleveland, Ohio, on August 26, 1918, the National Conference of Commissioners on Uniform State Laws adopted a resolution approving "an Act Concerning Conditional Sales and to Make Uniform the Law Relating Thereto" and expressed the intention of presenting it to the various state legislatures for enactment.[22] This act was the result of an investigation started in 1915 and was the third draft to be presented to the Commissioners. It was the product of three years of earnest work by a distinguished and learned group of lawyers and scholars.[23]

The proposed act provided in Section 4: "Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided." The Commissioners' note says that this merely states the general rule of the common law, which is thus accepted by the statute.[24]

The situation here discussed is provided for by Section 7 of the proposed act:[25]

> "Section 7. [Fixtures.] If the goods are so affixed to the realty, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation.
>
> "If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the

[22] Proceedings, National Conference of Commissioners on Uniform State Laws (1918) 356.
[23] *Id.* at 357-358.
[24] *Id.* at 363; 2 U. L. A. Sec. 4, p. 6. However, it has already been pointed out that this general common law rule was not followed in Pennsylvania as a matter of common law. See *supra* note 17.
[25] Proceedings (1918) 366-367; 2 U. L. A., Sec. 7, p. 12.

conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty.

"As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become a part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty."

The Note to this section states that it is modeled in the main after similar filing statutes in New York, Pennsylvania, Massachusetts and Oregon.[26] It will be noted that this statute was made applicable only to articles which would have become land if affixed by their owner to his own land, and thus in all cases to be decided under the statute, there was preserved the difficult question as to whether the chattel was so attached as to have become land.

Further, it will be seen that removability depends primarily upon whether such removal causes "material injury to the freehold". If removal does cause such injury, the first portion of Section 7 says that removal by the conditional seller is possible only against a person who expressly assented to such removal. This is, of course, merely a codification of the situation which had formerly existed in New York as to articles which were considered to have become inseparably part of the realty because removal would cause physical injury to the land.

If the fixture has become part of the realty but is removable without material injury, the second part of Section 7 says that the conditional sale contract has to be filed where a deed affecting the realty would be filed in order to be valid against a subsequent purchaser of the realty. Under Section 1 "purchaser" includes "mortgagee" and "pledgee". This, too, is very similar to the previous situation in New York. The third portion of Section 7 provides for the special case where the conditional buyer affixes the chattel to land which does not belong to him, for example, where a contractor affixes conditionally-bought articles to the land of the one for whom he is putting up the structure. In such case, filing prior to the attachment of the chattel to the land is required.

This statute was adopted in New Jersey in 1919,[27] in New York in 1922,[28] and in Pennsylvania in 1925.[29]

---

[26]*Id.* at 367; 2 U. L. A., p. 13.
[27]P. L. 1919, c. 210; REV. STATUTES (1937) Tit. 46, c. 32, sec. 14.
[28]Laws of 1922, c. 642; PERSONAL PROPERTY LAW § 67.
[29]Laws of 1925, p. 603.

V. Situation After the Uniform Act

Let us return to our New York attorney and the problem which he faces in endeavoring to protect the conditional seller of electrical fixtures who markets goods throughout the states of New York, New Jersey and Pennsylvania. Is there any evidence supporting his suggestion that his position has not improved in regard to uniformity despite the passage of the Uniform Act?

1. *In New York*

New York has made only minor statutory changes in Section 7 since it was adopted,[30] and those are designed merely to clarify the original provisions of the section. But New York has retained its former classification of certain chattels which are incapable of becoming part of the land despite annexation to the realty.[31] This category was retained over strong judicial protest,[32] but New York has even tended to extend the group.[33] Such articles are exempt from filing under Section 7 since they are not attached so as to become a part of the land no matter how apt they may be to deceive third persons who become interested in the realty.[34] In accordance with previous decisions in New York, "material injury to the freehold" has been interpreted to mean physical harm to the land, but no case has yet been presented to the New York court in which such harm was found. Most of the many decisions[35] in New York since the Uniform Act was

[30]Laws of 1930, c. 874.

[31]Alf Holding Corp. v. American Stove Co., 253 N. Y. 450, 171 N. E. 703 (1930); Madfes v. Beverly Develop. Corp., 251 N. Y. 12, 166 N. E. 787 (1929), in which the court said at p. 15, "Certain chattels have such a determinate character as movables that they remain personal property, after their annexation to real estate, independently of any agreement . . . which so provides."

[32]Crane, J., dissenting in Madfes v. Beverly Develop. Corp., 251 N. Y. 12, 166 N. E. 787 (1929), said at p. 21, "The gas range or cook stove and electric light fixtures and ice boxes are now common in most every apartment . . . they are considered a part of the realty and are so treated by every owner and by the tenants. . . . The mortgagee would be startled if all the ranges and radiators were removed by the mortgagor." And again at p. 23, "To me it is quite evident that . . . cook stoves and ranges placed in the ordinary apartment house . . . form 'a part of the realty'; they are goods which are so affixed to the realty as to become a part thereof, . . . within the meaning of Section 67. . . ." [Section 7 of Uniform Act.]

[33]Kommel v. Herb-Gner Constr. Co., 256 N. Y. 333, 176 N. E. 413 (1931) (lighting fixtures); Blumberg v. 4602-14th Ave. Corp., 232 App. Div. 844, 248 N. Y. Supp. 751 (2d Dep't 1931) (electrical fixtures); Chasnov v. Marlane Holding Co., 137 Misc. 332, 244 N. Y. Supp. 455 (Mun. Ct., N. Y. 1930) (refrigerators); Kelvinator Sales Corp v. Byro Realty Corp., 136 Misc. 720, 241 N. Y. Supp. 632 (City Ct. N. Y. 1930) (refrigerators).

However, two recent cases may be cited as indicating a tendency to limit, rather than extend, the category of articles which are inherent chattels despite annexation to land. Lightolier Co. v. Del Mar Club Holding Co., 237 App. Div. 432, 262 N. Y. Supp. 32 (1st Dep't 1933), *aff'd*, 263 N. Y. 588, 189 N. E. 711 (1934) (electric light fixtures held not to be inherent chattels); Voss v. Melrose Bond & Mortgage Corp., 160 Misc. 30, 288 N. Y. Supp. 576 (Mun. Ct. N. Y. 1936) (refrigerating plant held not determinate personalty).

[34]Madfes v. Beverly Develop. Corp., 251 N. Y. 12, 166 N. E. 787 (1929).

[35]See, N. Y. Consolidated Laws Ann. (McKinney 1938) Personal Property Law, § 67, pp. 265-276.

adopted have been concerned with the judicial construction of specific terms of the statute. In regard to some of them there is little unanimity of opinion even among the New York courts, without regard to the situation in other states.[36]

a. *Against a prior holder of a realty interest*: Our attorney will find in New York that the conditional sale is effective to protect his client's security against prior mortgagees of the land with no need to file the contract under the "fixtures section".[37] Only in the event that the removal of the article will cause material physical injury to the land must some extra precaution be taken, and then only the express assent of the person against whom the removal is sought to be enforced will suffice.

b. *Against a subsequent holder of a realty interest*: Against such persons the contract of conditional sale is effective to protect his client's security in an article which has become a part of the land only if the contract is filed

[36]What constitutes "material injury to the freehold"? No case has been found in New York where the court held that removal of the conditionally-sold articles would cause material injury. Typical examples: Harvard Financial Corp v. Greenblatt Constr. Co., 261 N. Y. 169, 184 N. E. 748 (1933) (elevators held removable without material injury even though beams had to be taken out also); Metropolitan Stone Works v. Probel Holding Corp., 131 Misc. 519, 227 N. Y. Supp. 414 (City Ct. N. Y. 1928) (concrete fountain and flower boxes held removable without material injury); Modern Security Co. v. Thwaites, 138 Misc. 469, 246 N. Y. Supp. 405 (Sup. Ct. 1930) (heating system held removable, even though it would leave holes in the ceilings); Prisco & Soverio v. Bifulco Bros., 234 App. Div. 122, 254 N. Y. Supp. 459 (2d Dep't 1931) (kitchen cabinets, though attached to walls of apartment house by nails); Prudence-Bonds Corp. v. 1000 Island House Co., 141 Misc. 39, 252 N. Y. Supp. 60 (Sup. Ct. 1930) (sprinkler system, though removal would leave holes).

Who is a "subsequent *bona fide* purchaser of the realty, for value and without notice"? Kohler v. Brasun, 249 N. Y. 224, 164 N. E. 31 (1928) (purchaser at the foreclosure of a prior realty mortgage, held a subsequent *bona fide* purchaser of the land); Harmony Realty Co. v. Bronxwick Holding Corp., 137 Misc. 16, 242 N. Y. Supp. 125 (Sup. Ct. 1930) (one who subordinates his mortgage to a subsequent one after the installation of fixtures, said not to be a subsequent *bona fide* purchaser of the land), *cf.* concurring opinion by Hogan, J., in McCloskey v. Henderson, 231 N. Y. 130, 131 N. E. 865 (1921); Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932) (prior mortgagee who advanced money after fixtures installed, held a subsequent *bona fide* party). But see Greater N. Y. Develop. Co. v. Ka-ro Bldg. Corp., 256 N. Y. 657, 177 N. E. 181 (1931) (mortgagee who extends time on his mortgage after the installation of fixtures, held not a subsequent *bona fide* purchaser of the land).

What is the effect of a clause in a realty mortgage to the effect that "all articles of personal property now or hereafter attached to the land" shall be subject to the mortgage? Such a clause in a subsequent realty mortgage has been held to make the realty mortgagee also a *bona fide* purchaser of the conditionally-sold articles as chattels. Cohen v. 1165 Fulton Ave. Corp., 251 N. Y. 24, 166 N. E. 792 (1929); Kommel v. Herb-Gner Constr. Co., 256 N. Y. 333, 176 N. E. 413 (1931); *cf.* Alf Holding Corp. v. American Stove Co., 253 N. Y. 450, 171 N. E. 703 (1930). But such a clause in a prior realty mortgage cannot aid the land mortgagee since he can in no way be considered a *subsequent* purchaser of the chattels. N. Y. Title & Mort. Co. v. Mapark Holding Co., 236 App. Div. 219, 258 N. Y. Supp. 378 (1st Dep't 1932); Perfect Lighting Fixtures v. Grubar Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dep't 1930).

[37]The statute expressly names "*subsequent* purchasers of the realty" as the group against whom filing is required in order to protect the conditional seller's interest. *Cf.* Greater N. Y. Develop. Co. v. Ka-ro Bldg. Corp., 256 N. Y. 657, 177 N. E. 181 (1931).

properly before the acquisition of such a subsequent interest in the realty.[38] If removal cannot be accomplished without material injury to the freehold, the express assent of the person against whom it is sought to be enforced is required. However, the recognition of a category of chattels in New York which cannot become a part of the realty even though attached to it means that, as to such goods, the contract of conditional sale will protect his client's security even against subsequent parties with no need to file under Section 7.[39] Our attorney, however, will have some difficulty in deciding which of the articles sold by his client will fall under the category of inherent chattels in New York.[40]

2. *In New Jersey*

New Jersey has made no statutory alteration in the section since it was adopted; nor have its decisions definitely marked out a category of chattels which are exempt from filing under Section 7 because they are incapable of becoming part of the land even though attached to it. Its chief variation has been the totally unexpected adoption of a broad interpretation of "material injury to the freehold". The New Jersey courts have committed themselves to the proposition that "material" means more than "physical injury", despite the indicated intention of the drafters of the Act and previous New York decisions which had purported to define the phrase.[41] "Material injury" is said to be caused by the removal of any chattel which is permanently essential to the completeness of the structure and the functioning of it. If the severance will prevent the structure from being used for the purposes for which it was intended, then the chattel is not removable without material injury to the freehold.[42] This interpretation neces-

[38] *Supra* note 37. Harvard Financial Corp. v. Greenblatt Constr. Co., 261 N. Y. 169, 184 N. E. 748 (1933); Kohler v. Brasun, 249 N. Y. 224, 164 N. E. 31 (1928).

[39] *Supra* notes 31 and 34.

[40] *Supra* note 33.

[41] The intention of the drafters of the Uniform Conditional Sales Act was to perpetuate the common law rule, as applied in New York, that removal would not be allowed where the article conditionally sold was so closely incorporated with the realty that removal would seriously injure the land. See BOGERT, COMMENTARIES ON CONDITIONAL SALES (1924), 2a U. L. A. 98-99, § 66. Other states in applying the Uniform Act have given effect to the intention of the drafters of the Uniform Act by holding that "material injury to the freehold" means *physical* injury to the land. Harvard Financial Corp v. Greenblatt Constr. Co., 261 N. Y. 169, 184 N. E. 748 (1933); People's Savings & Trust Co. v. Munsert, 212 Wis. 449, 249 N. W. 527 (1933). *Cf.* Treat v. Nowell, 37 Ariz. 290, 294 Pac. 273 (1931); Industrial Bank of Richmond v. Holland Furnace Co., 109 W. Va. 176, 153 S. E. 309 (1930).

[42] This doctrine, which has been called "the institution theory of material injury", bears certain resemblances to the long-standing Pennsylvania doctrine as to machinery essential to manufacturing plants. See *supra* note 18.

The doctrine was announced in New Jersey by way of dictum in Future Bldg. & Loan Ass'n v. Mazzocchi, 107 N. J. Eq. 422, 152 Atl. 776 (1931). Since then it has been adopted and developed by the Court of Errors and Appeals in Domestic Electric Co. v. Mezzaluna, 109 N. J. Eq. 574, 162 Atl. 722 (1932); Russ Distributing Corp. v. Lichtman, 111 N. J. L. 21, 166 Atl. 513 (1933); Lumpkin v. Holland Furnace Co., 118 N. J. Eq. 313, 178 Atl. 788 (1935); Smyth Sales Corp. v. Norfolk Bldg. & Loan Ass'n, 116 N. J. L. 293, 184 Atl. 204 (1936).

sitates express assent of the holder of the realty interest in many situations where the statute intended proper filing to be a complete protection despite the fact that the seller's articles had become part of the land. Under this interpretation the conditional seller of goods which may be held essential to the functioning of the institution can protect his security only by obtaining the express assent of any party against whom he may seek to remove the goods. The practical difficulties in obtaining such assent from all prior holders of a realty interest are great; those involved in attempting to get express assent from all who might subsequently acquire a realty interest are insurmountable.[43]

a. *Against prior holders of a realty interest*: As in New York, our attorney will find that the conditional sale is effective to protect his client's security against prior parties with no need to file under the "fixtures statute".[44] But the extended definition of "material injury to the freehold" in New Jersey means that nothing short of express assent will protect his client's security in any situation where the articles might be held essential to the functioning of the institution.[45] The difficulty in which this places our New York attorney can be appreciated only by a realization of the fact that it is extremely difficult to determine what articles the New Jersey courts will include within the operation of their "institution theory of material injury", and consequently, in what instances express assent is the only adequate protection.[46]

b. *Against subsequent holders of a realty interest*: If the article is so attached as to have become a part of the land, our attorney can protect his

[43]See (1937) 22 CORNELL L. Q. 421, criticizing the extension of the institution theory of material injury in New Jersey and suggesting that the impossibility of obtaining express assent may force the abandonment of the conditional sale in merchandising these goods. See also (1938) 23 CORNELL L. Q. 324.

[44]*Supra* note 37. Reliable Bldg. & Loan Ass'n v. Purifoy, 111 N. J. Eq. 575, 163 Atl. 151 (1932).

[45]Such instances of "material injury to the freehold" have been found with startling ease in New Jersey, particularly when contrasted with the fact that no New York case has found such injury. A fairly complete list of New Jersey cases which find such material injury that the conditional seller could not have been protected in the absence of express assent follows: Domestic Electric Co. v. Mezzaluna, 109 N. J. Eq. 574, 162 Atl. 722 (1932) (refrigerating equipment); Fidelity Bldg. & Loan Ass'n v. Elizabeth Ave. Holding Co., 119 N. J. Eq. 11, 180 Atl. 881 (1935); Future Bldg. & Loan Ass'n v. Mazzocchi, 107 N. J. Eq. 422, 152 Atl. 776 (1931) (refrigerators, gas ranges, cabinets); Lumpkin v. Holland Furnace Co., 118 N. J. Eq. 313, 178 Atl. 788 (1935) (pipeless heating system in a house); MacLeod v. Satterthwait, 109 N. J. Eq. 414, 157 Atl. 670 (1932), *aff'd*, 113 N. J. Eq. 238, 166 Atl. 163 (1933) (refrigerating system); Russ Distributing Corp. v. Lichtman, 111 N. J. L. 21, 166 Atl. 513 (1933) (refrigerating system); Smyth Sales Corp. v. Norfolk Bldg. & Loan Ass'n, 116 N. J. L. 293, 184 Atl. 204 (1936) (heating system in a house). See, Layne New York Co. v. President Hotel Co., 111 N. J. L. 338, 168 Atl. 442 (1933) (well and pumping equipment); Mugler Auto Pit Co. v. Tide Water Oil Co., 14 N. J. Misc. 471, 185 Atl. 542 (1936) (garage auto-greasing pit).

[46]See (1938) 23 CORNELL L. Q. 324, indicating the uncertainty of the conditional seller in New Jersey and the difficulty in estimating what articles will come under the operation of the "institution theory."

client's security only by filing properly before the acquisition of any subsequent interest in the land.[47] But again the extended definition of "material injury to the freehold" in New Jersey may mean that nothing short of express assent will protect his client's security if the articles are such as to be held essential to the functioning of the institution.

3. *In Pennsylvania*

Pennsylvania has furnished the logical extreme in this development toward non-uniformity by substituting its own version of a "fixtures section" in place of Section 7 of the Uniform Act. Great uncertainty seems to have characterized the actions of the Pennsylvania legislature; two days after they had adopted the Uniform Act on May 12, 1925,[48] they re-enacted the prior Pennsylvania conditional sales legislation in regard to fixtures.[49] In 1927, they amended Section 7 of the Uniform Act so that it contained the essentials of the prior Pennsylvania legislation and then repealed their extra statute.[50] Finally, in 1935, they enacted Section 7 in its present form,[51] leaving out of the new section the difficult phrase concerning "material injury to the freehold". The present statute provides that the conditional vendor of fixtures who has properly filed his contract can always remove his goods. But he may be required to post a bond to repair any damage caused to the interest of "an owner or prior encumbrancer" upon demand by such a

[47]*Supra* note 37. Sellitto v. Heating & Plumbing Finance Corp., 116 N. J. Eq. 247, 174 Atl. 147 (1934), *aff'd*, 117 N. J. Eq. 19, 174 Atl. 708 (1934).

[48]Laws of 1925, p. 603 (May 12, 1925).

[49]Laws of 1925, p. 722 (May 14, 1925). In Beloit Iron Wks. v. Lockhart, 294 Pa. 376, 144 Atl. 283 (1928) it was said that the old statute, re-enacted, applied to "machinery" to be attached to realty, and that the Uniform Act, § 7, applied to other articles attached to realty.

[50]Laws of 1927, p. 979.

[51]Laws of 1935, p. 658; PENNA. STATUTES ANN. (Purdon, 1938 Supp.) § 404: "Goods to be affixed to realty shall not become a part of the said realty, or of the freehold to which they are attached or are to be attached, or of any operating plant of which they may form a part, but shall be treated as severable and subject to removal as against the conditional vendee, his heirs, executor, administrator, successors and assigns, and, also, as against any mortgagee, encumbrancer, owner, purchaser or other persons having any interest in or liens against such real property or freehold, until the unpaid balance due . . . has been paid if, prior to the said affixing or attaching of the goods to the realty, the conditional sale contract or a copy thereof . . . shall have been filed. . . . Provided, however, if an owner or prior encumbrancer of the said realty shall demand a bond to protect him against loss resulting from damage which may be caused to the land or to the physical structure of the buildings . . . the conditional seller or his successor in interest shall deliver . . . a good and sufficient bond, conditioned for the immediate making of such repairs. . . ."

The Pennsylvania courts had reaffirmed the old doctrine with regard to machinery in manufacturing plants in Central Lithograph Co. v. Eatmore Chocolate Co., 316 Pa. 300, 175 Atl. 697 (1934) and had extended the doctrine to include a furnace in a house in Holland Furnace Co. v. Suzik, 118 Pa. Super. 405, 180 Atl. 38 (1935). This was, in effect, a position similar to that of New Jersey under its "institution theory". See (1935) 83 U. OF PA. L. REV. 916, 917. It might be suggested that the new statute in Pennsylvania in 1935 was designed to avoid the consequences which would have followed such an interpretation if Sec. 7 of the Uniform Act had been retained there.

prior party. Failure to file would subject the conditional seller to the rights of any party interested in the realty in a situation where the goods would be held to have become part of the realty.

a. *Against prior holders of a realty interest*: In contradistinction to the situation in both New York and New Jersey, our attorney will find that he must file the contract of conditional sale in Pennsylvania, even against prior mortgagees of the land. And in the event that removal might cause physical injury to the land, his client may be required to put up a bond to compensate for the injury caused. However, proper filing and compliance with the statute will adequately protect his client's security in all instances in Pennsylvania.

b. *Against subsequent holders of a realty interest*: Proper filing under the "fixtures statute" will protect the client's security in Pennsylvania as to such subsequent mortgagees without regard to ease of removal and without reference to difficult tests such as material injury to the freehold.

VI. Summary

It will be seen that our New York attorney, in advising the conditional seller of electric ranges and lighting equipment who distributes them throughout the area bounded by the three states of New York, New Jersey, and Pennsylvania has a difficult task in determining what steps he should take in each jurisdiction and in deciding how safe his client's security will be. It will be remembered that, prior to the adoption of the Uniform Act, New York and New Jersey extended similar common law protection to the conditional seller as against prior mortgagees of the land, while only New York granted him the privilege of protecting his security by filing his contract as against subsequent purchasers and mortgagees where his article became part of the land. It will further be remembered that the Pennsylvania statute granted protection only upon proper filing and compliance with the statute in all situations, whether prior or subsequent holders of a realty interest were involved.

By the adoption of Section 7 of the Uniform Act the three states involved destroyed the differences indicated above. In addition, they standardized the requirement for the filing in the county where the land was located of any contract for the conditional sale of an article so attached to land as to become a part thereof. However, although a step toward uniformity was taken by the adoption of the Uniform Act, it is apparent that that step has followed by a series of backward steps leading in the direction of non-uniformity.

In New York the common law protection against prior mortgagees of the land and the privilege of acquiring protection, by proper filing, against

subsequent purchasers and mortgagees has continued much as it was prior to the Uniform Act. But New York's retention of its category of inherent chattels, which makes it unnecessary to file contracts affecting such articles under Section 7, is an element productive of non-uniformity. The conditional seller in New York must determine whether to file his contract under the realty records, thus making the assumption that it is so attached as to have become a part of the land, or whether to file it under the chattel records, thus making the assumption that it continues to be a chattel despite its attachment to land. Such a determination is impossible in the absence of court decision; and filing under both chattel and realty records, while a practical rule of thumb with which to extricate the conditional seller from his dilemma, is hardly conducive to uniformity in this field among the three states.

In New Jersey the original element of diversity was eliminated by the adoption of the Uniform Act; and Section 7 now purports to afford the same sort of protection against prior holders of the realty interest and against subsequent holders which is available in New York. However, the adoption of the "institution theory of material injury" in New Jersey, coupled with the provision of Section 7 that express assent is required against any holder of a realty interest where removal of the article causes material injury, has resulted in a very narrow protection indeed being afforded to the conditional seller in New Jersey. For if his articles are apt to fall under the operation of the institution theory, a determination which he must make in advance and at his peril, nothing can protect the conditional seller's security except the express assent of the party against whom he may later wish to remove it. Only if the conditional seller can be sure that his articles fall outside the operation of the institution theory can he be assured of the protection against prior parties and against subsequent parties which is given in New York, and which Section 7 appears to give him in New Jersey.

In Pennsylvania the standardization produced by the adoption of the Uniform Act has been converted by a series of events into a situation almost parallel in lack of uniformity to the situation which existed prior to the adoption of the Act. In its attempt to avoid the consequences of the courts' acceptance of the institution theory, so clearly exemplified in New Jersey, the Pennsylvania legislature has so amended Section 7 that it bears no resemblance to the section recommended by the Uniform Act. The differences produced by this amendment may be summarized by saying that filing is required in any situation where the article is attached to the land, and in addition a bond may be required to compensate prior holders of a realty interest where physical injury is caused by removal. This affords a statutory protection for the conditional seller in all situations provided he complies with the statute; but, however admirable the Pennsylvania version

of Section 7 may be on its merits, it contributes much toward the re-creation of the sort of non-uniformity which existed twenty years ago.

It is the thesis of this paper that the situation which obtains today in the jurisdictions here studied presents little improvement in regard to uniformity despite the adoption of the Uniform Act. While this is not the place in which to attempt to define the reasons for the failure of the Act to produce uniformity, it might be suggested that the situation is due to the inherent difficulties in attempting to make uniform a law concerning which there are separate tribunals of highest appeal in the separate jurisdictions. The situation which exists today is characterized by the refusal of courts in the different states to follow the same interpretation of the Uniform Act, and by the freedom of any state to change the act, either in adopting it or subsequently, without regard to the situation in other states. These inescapable prerogatives of free sovereignty have operated in this instance practically to negative the laudable attempt to bring about a condition of uniformity in the law regarding conditional sale of fixtures.

It is submitted that, either by the process of judicial interpretation or by legislation alteration, the hopes with which the Uniform Conditional Sales Act was adopted have been defeated. It cannot be said, twenty years after the proposal of the Uniform Act, that any substantial unification of "doctrine and decision" has resulted within the states here studied and with regard to the problem considered. Our New York attorney has a respectable amount of evidence with which to support his assertion that his situation today shows no improvement with regard to uniformity. Can it be, perhaps, that Uniform State Laws do not furnish a practicable solution for the lack of uniformity found within our system of independent state sovereignties?