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Article 9

The "Now or Hereafter Acquired Personal Property" Clause

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Such legislative action was attempted, but proved to be unsuccessful. On February 18, 1948, a bill[46] was introduced in the New York Assembly, the pertinent provisions of which are as follows:

§ 59. Negligence *and contributory negligence* of operator other than owner attributable to owner. Every owner of a motor vehicle . . . operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle . . . , in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. *The contributory negligence of any person legally using or operating a motor vehicle . . . , with the permission of the owner express or implied, in the business of such owner or otherwise shall be imputable to such owner.*

After its introduction, the proposal was referred to committee, from which it was never reported out. To pigeonhole such a corrective measure is to perpetuate New York's adherence to a basically unsound rule. Other jurisdictions have taken the initiative, so far as similar statutes were concerned, and it remains to be seen for how long a period New York will be content to lag behind. It is submitted that "By amending the Vehicle and Traffic Law so that the negligence of the driver will be imputed to the owner in all cases where the vehicle is used with his consent, express or implied, the legislature may achieve a result that is uniformly just."[47]

THE "NOW OR HEREAFTER ACQUIRED PERSONAL PROPERTY" CLAUSE

Introduction

Nowhere in the New York Law of Mortgages is "judicial surgery" and accurate statutory draftsmanship more needed than in that aspect of the law which treats of "personalty" clauses in real property mortgages. Hindered by loose language,[1] stare decisis,[2]

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[46] 1948 Sess. Int. 2260, Pr. No. 2414, introduced by Assemblyman Samuel Roman. At the same time, Senator Seymour Halpern introduced a similar bill in the New York Senate, 1948 Sess. Int. 1910, Pr. No. 2092.

[47] Note, 16 ST. JOHN'S L. REV. 222, 230 (1942).

[1] See note 26 *infra*.

[2] In a speech made before the New York State Bar Association, Judge Cardozo said: ". . . bearing in mind the fact that sellers of the ranges under contracts of conditional sale had made their sales in the faith that the ranges were personalty merely, and had refrained from taking measures to protect themselves by recording their bills of sale in ways that would have been appropriate if they had supposed that the ranges were annexations to the land . . . a majority of the court believed that in view of the probable reliance by innocent parties upon a decision which the same majority would have refused to make if the question had been a new one, there was nothing to do except

and the law's refusal to keep abreast of social [3] and financial [4] conditions, the mortgagee finds himself in the anomalous position of lending money upon security which, through no fault of his own, will not fall within the purview of his lien. To fully develop this problem, a treatment of the common law of fixtures,[5] the "Now and Hereafter Acquired Personal Property clause," and the effect of various "exclusionary" [6] and recording statutory provisions, is essential.

The Common Law of Fixtures

A fixture,[7] as the term is commonly used, refers to "a chattel annexed to land in a permanent way so that it has lost its character as a movable thing and has become permanently identified with the land to which it is attached as a part of it . . . provided it still retains its identity as a distinct thing, apart from the land." [8] The fixture is distinguished from a chattel that remains personal property as a matter of law [9] in that the former has been actually annexed to and is adaptable to use in connection with the freehold, and that there was an intention to make the same a permanent accession to the free-

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to adhere to what its predecessors had done, and let *stare decisis* control the judgment." Cardozo, *The Stare Decisis of the Future,* 55 N. Y. S. B. A. REP. 293, 296 (1932).

[3] "But there comes a time when the law must keep abreast of the changes in social conditions; when we as judges must recognize the circumstances under which the business of housing is now conducted." Judge Crane, dissenting in Madfes v. Beverly Development Corp. *et al.,* 251 N. Y. 12, 21, 166 N. E. 787, 790 (1929).

[4] ". . . the after-acquired property clause is designed to promote productive enterprise by providing security for credit expansion." Cohen and Gerber, *The After-Acquired Property Clause,* 87 U. OF PA. L. REV. 635, 649 (1939).

[5] "The rule of determination here is the law as laid down by the courts of the state of New York. No statute defines fixtures as distinguished from personal property. We must look to the decisions of the courts of New York as to what are fixtures as distinguished from personal property to guide our conclusion." *In re* Walker Bin Co., 9 F. Supp. 367, 368 (W. D. N. Y. 1935).

[6] See textual treatment *infra* dealing with the effect of Sections 65, 67 of the New York Personal Property Law upon after-acquired clauses.

[7] A fixture as discussed in this article will be limited to the fixture concept as it affects the mortgagor-mortgagee and the vendor-vendee relationships; for as to landlord-tenant, life tenant-remainderman, and heir-personal representative relationships, different rules prevail. For an excellent study of these differences, see Friedman, *The Scope of Mortgage Liens on Fixtures and Personal Property in New York,* 7 FORD. L. REV. 331, 338, n. 46 (1938).

[8] WALSH, THE LAW OF REAL PROPERTY § 37 (2d ed. 1937).

[9] Madfes v. Beverly Development Corp. *et al.,* 251 N. Y. 12, 166 N. E. 787 (1929) (gas ranges); Chasnov v. Marlane Holding Co., 137 Misc. 332, 244 N. Y. Supp. 455 (N. Y. Munic. Ct. 1930) (electric refrigerators); Kelvinator Sales Corp. v. Byro Realty Corp. *et al.,* 136 Misc. 720, 241 N. Y. Supp. 632 (N. Y. City Ct. 1930), *aff'd,* 233 App. Div. 653, 249 N. Y. Supp. 910 (1st Dep't 1931); New York Title and Mortgage Co. v. Grossman Properties, 142 Misc. 274, 253 N. Y. Supp. 533 (Sup. Ct. 1931), *aff'd,* 236 App. Div. 665, 257 N. Y. Supp. 1031, 1032 (1st Dep't 1932) (gas ranges and electric light fixtures).

hold.[10] By retaining its distinct identity, when affixed, the fixture will not become an integral and indistinguishable part of the realty.[11] Building materials such as lumber, brick, and stone which, when affixed, so merge with the land as to lose their identity as distinct things, regardless of the parties' intention, become realty by the doctrine of accession.[12] Those articles which become realty as a matter of law through application of this doctrine present little or no problem to attorneys or business men, since no clause covering such personal property is needed: upon annexation to the realty they, *ipso facto,* "feed" the real property mortgage.[13]

Although courts, in determining whether a chattel is a fixture, are still disposed to require actual attachment and an immovable character of articles brought upon and used in conjunction with the freehold, today, due to the type of article [14] and the nature of the premises [15] wherein the personalty will be used, judges, as a substitute for actual attachment, will seek the "object for and not the method of attachment" [16] in attributing "an immovable character to a movable object." [17] Thus, by the fiction of "constructive annexation" [18] what was once regarded as personal property as a matter of law is now, without protest, a fixture of the land.

Once having found an attachment either as a result of actual or "constructive annexation," we must then find the article's permanency and adaptability for use with the land.[19] It is the intent of the

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[10] Teaff v. Hewitt *et al.,* 1 Ohio St. 511 (1853) (leading case); Walker v. Sherman, 20 Wend. 636, 651-653 (N. Y. 1839); *accord,* McRea v. Central Nat. Bank of Troy *et al.,* 66 N. Y. 489, 495 (1876); Potter v. Cromwell, 40 N. Y. 287 (1869).

[11] *See* East New York Electric Co. v. Petmaland Realty Co. *et al.,* 243 N. Y. 477, 480-481, 154 N. E. 530, 531 (1926); De Bevoise *et al.* v. Maple Ave. Const. Co. *et al.,* 228 N. Y. 496, 500, 127 N. E. 487, 489 (1920); Davis *et al.* v. Bliss, 187 N. Y. 77, 83, 79 N. E. 851, 853 (1907); Ford v. Cobb *et al.,* 20 N. Y. 344, 350-351 (1859).

[12] Cases cited note 11 *supra.*

[13] Guaranty Trust Co. v. N. Y. & Q. C. Ry. *et al.,* 253 N. Y. 190, 199, 170 N. E. 887, 890 (1930).

[14] In cases involving the use of heavy machinery in factories and plants, the courts have been liberal in describing unattached property as fixtures. *See* McRea v. Cent. Nat. Bank of Troy *et al.,* 66 N. Y. 489, 495 (1876) (machines in paper mill); Potter v. Cromwell, 40 N. Y. 287 (1869) (grist mill); WALSH, THE LAW OF REAL PROPERTY § 44 (2d ed. 1937), and cases cited therein.

[15] Articles which are designed to fit a particular home or building, though detached, are considered realty for they go towards the completion of the building. Their adaptability for permanent use as part of the house shows conclusively the intent to make them fixtures. See WALSH, *op. cit. supra* note 14, § 45.

[16] Friedman, *supra* note 7, at 333.

[17] *Ibid.*

[18] BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 20 (1943); WALSH, THE LAW OF REAL PROPERTY §§ 40, 41 (2d ed. 1937).

[19] Teaff v. Hewitt, 1 Ohio St. 511 (1853); BROWN, PERSONAL PROPERTY § 137 (1936); BURBY, *op. cit. supra* note 18, § 20; Holmes, *Classification of Fixtures for Assessment,* 29 CALIF. L. REV. 21, 27 (1929).

parties which, at this point, is of prime importance: not the secret, unexpressed intent of the owner, but rather ". . . that the average man under the same circumstances would have intended to annex the chattel as a permanent accession to the freehold . . . ." [20] The mere declaration of the owner that he intends that they shall go with the house does not make them realty. If we, by applying the above tests, can find that the personalty annexed to the real property is a fixture, it would fall within the control of the realty mortgage without the need of a personalty clause. However, some courts, for some inexplicable reason, or when obligated to that overly demanding mistress, stare decisis, have not been disposed to utilize this test when dealing with certain articles found upon the realty. In *Central Union Gas Co. v. Browning*,[21] while determining whether gas ranges were included as part of the premises in a foreclosure sale, the court stated that ". . . these ranges were not so 'attached' to the building that, as a matter of law, they became part of it. . . . This is not such an attachment to the building as would give a mortgagee any right of ownership as against his mortgagor, and we do not see how a purchaser at a foreclosure sale could acquire any greater right. We think that these ranges situated as they were, lost none of their characteristics as personal property." [22] *Chasnov v. Marlane Holding Co.*[23] held electric refrigerators to be personalty as a matter of law without applying the before mentioned rules of construction, and in *Madfes v. Beverly Development Corp.* et al.[24] the court reiterated that a gas range (which obviously is a fixture) is personalty as a matter of law, so as to protect innocent parties who had relied upon past decisions. Despite the fact that more than twenty-five years had passed since gas ranges had first been declared personal property,[25] at a time when it was not common practice for landlords to fully equip kitchens with stoves, refrigerators, and sinks, as is the practice today, the Court of Appeals, through Judge Kellogg, stated that such a change must emanate from the legislature.[26]

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[20] WALSH, THE LAW OF REAL PROPERTY § 42 (2d ed. 1937).

[21] 210 N. Y. 10, 103 N. E. 822 (1913).

[22] Central Union Gas Co. v. Browning, 210 N. Y. 10-13, 103 N. E. 822-823 (1913).

[23] 137 Misc. 332, 244 N. Y. Supp. 455 (N. Y. Munic. Ct. 1930).

[24] 251 N. Y. 12, 166 N. E. 787 (1929).

[25] Cosgrove v. Troescher, 62 App. Div. 123, 70 N. Y. Supp. 764 (1st Dep't 1901).

[26] The trenchant comments of a law review writer, twenty-two years prior to the *Madfes* decision, *supra* note 24, are still apropos: "There is no branch of the common law against which the charge of incoherency has been laid more frequently than it has against that involving questions of rights in 'fixtures.' . . . There are some parts of our law that have been particularly favored dumping grounds for loose, inaccurate legal phraseology, careless definition of legal issues, artificial generalizations, and other such débris which in the course of the years have obscured the real criteria of judicial decisions and have unnecessarily rendered the law difficult of apprehension. The law of 'fixtures' has been one of these dumping grounds." Bingham, *Some Suggestions Concerning the Law of Fixtures*, 7 COL. L. REV. 1 (1907).

With such precedents existing, the draftsmen of a mortgage can hardly rely upon the principles of accession or fixtures to create sufficient security. Thus, a personal property clause is currently used whenever it is desired that personalty now or hereafter acquired is or shall be subject to the lien of the mortgage.

The Personal Property Clause

The personal property clause as it is found in real property mortgages is, generally, one of two types. The first is a duplication of the clause found within Section 254 of the Real Property Law which reads as follows: "Together with the appurtenances, and all the estate and rights of the party of the first part in and to said premises, together with all fixtures and articles of personal property attached to, or used in connection with, the premises." The second, and more common variety, is an enlargement of the statutory form and covers articles not only presently attached to the fee, but, also those articles annexed after execution, delivery, and recordation of the mortgage. To be certain that these clauses will cover cases of personal property not attached to the freehold, or which, though attached to the realty, are personalty as a matter of law [as has been previously discussed], the phrase "used in connection with the freehold" has been inserted. Chattels which, when used in conjunction with the realty, reveal an "organic unity" [27] with the realty, for example, rugs, furniture, appliances, etc., are encompassed by this phrase.

A legal mortgage operates *in praesenti,* and conveys only the then-existing property mentioned therein.[28] Therefore, a lien upon non-existent things, being impossible at law, is equitable in nature.[29] Equity acting upon the mortgagor's conscience and considering ". . . that which ought to be done as done," [30] construes ". . . the instrument as operating by way of present contract, to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party." [31] This covenant or contract to give a lien does not run with the land but rather,

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[27] Friedman, *supra* note 7, at 347.

[28] There is an exception to this rule. As to crops not yet grown or as to the increase of animals not yet in *esse,* title may be passed by a grant or contract of sale made in advance of the physical existence of the subject of grant or sale. See BROWN, PERSONAL PROPERTY § 159 (1936). Under Section 86 of the New York Personal Property Law it is provided that when the parties purport to effect a *present sale* of future goods the agreement operates as a contract *to sell* goods. By express provision the act excludes mortgages, so that today an effective legal mortgage on these potential goods may be made in New York.

[29] Stone, *The "Equitable Mortgage" in New York,* 20 COL. L. REV. 519, 525 (1920).

[30] Cohen and Gerber, *supra* note 4, at 646.

[31] Kribbs v. Alford *et al.,* 120 N. Y. 519, 524, 24 N. E. 811, 812 (1890).

in the absence of an assumption by a grantee of the mortgaged premises, is personal to the obligor.[32] Equity may refuse, however, to utilize this fiction where interests of third persons are involved for these persons may have relied upon what would prove to be false security if this equitable lien is effectuated. In *Rochester Distilling Co. v. Rasey*[33] the court, discussing an after-acquired clause in a chattel mortgage stated: "Such provisions seem . . . to exclude the idea . . . that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property."[34]

These clauses, certainly clear and unambiguous upon their faces, ofttimes have not been given their just due. In many cases this is attributable to a reluctance by the court to control a man's future property for the sake of present credit. "There is little if any, question but that the personal property clause covers, generally, such *attached* articles as are subsequently installed by the mortgagor though not of such nature as would be deemed to be a part of the realty."[35] However, its coverage of unattached articles used in conjunction with the realty has perplexed jurists, and has not been uniformly resolved. In Ex parte *Benevolent and Protective Order of Elks, Brooklyn Lodge No. 22*[36] the circuit court in applying New York law found that "Under settled interpretation, the words, 'used in connection with the premises,' add nothing. They relate to chattels attached to the realty, and do not include those unattached which are merely employed in the business conducted thereon."[37] So too, in *Manufacturers Trust Co. v. Peck-Schwartz Realty Corp.* et al.[38] it was stated that "The words contained in the statutory form [the personal property clause] do not necessarily bring within the coverage of the mortgage movables which are not so attached to the realty as to become fixtures."[39]

Contrasting these unqualified refusals to give effect to the personal property clause, per se, are *Shelton Holding Corporation v. 150 East 48th Street Corporation* et al.[40] In re *Downtown Athletic*

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[32] New York Trust Co. *et al.* v. Bull, 52 N. Y. S. 2d 182, 184 (Sup. Ct. 1944).

[33] 142 N. Y. 570, 37 N. E. 632 (1894).

[34] Rochester Distilling Co. v. Rasey, 142 N. Y. 570, 579, 37 N. E. 632, 634 (1894). *But cf.* Kribbs v. Alford *et al.*, 120 N. Y. 519, 24 N. E. 811 (1890) (an equitable mortgage of chattels, including a mortgage of after-acquired chattels, is valid and enforceable against purchasers from the mortgagor with notice and when recorded, the record is constructive notice to purchasers).

[35] Friedman, *supra* note 7, at 345, n. 76, and cases cited therein.

[36] 69 F. 2d 816 (2d Cir. 1934).

[37] *Id.* at 818.

[38] 277 N. Y. 283, 14 N. E. 2d 70 (1938).

[39] Manufacturers Trust Co. v. Peck-Schwartz Realty Corp. *et al.*, 277 N. Y. 283, 286, 14 N. E. 2d 70, 71 (1938).

[40] 264 N. Y. 339, 191 N. E. 8 (1934).

Club of New York City, Inc.,[41] and *General Synod of Reformed Church v. Bonac R. Corp.* et al.[42] In the *Shelton* case, a prior realty mortgagee, whose mortgage contained the after-acquired clause, acting to forestall an attempt to remove kitchenette equipment by a subsequent chattel mortgagee, brought an action praying that the chattel mortgage be cancelled of record, and that enforcement of the chattel mortgage be enjoined. The court directed judgment in favor of the plaintiff in accordance with the prayer of the complaint, since "The only fair inference under these circumstances is that the parties intended . . . to install the kitchenette equipment as part of . . . the apartment hotel . . . ." [43] By giving the words ". . . an effect corresponding to . . . [their] plain sense . . . ," the federal district court in the *Downtown Athletic Club* case held that a building loan mortgage covered the furnishings not affixed to the building.[44] In distinguishing the *Peck-Schwartz* holding from the issue before him in the *Bonac* case, Judge Desmond remarked: "The argument that, absent such proof and such a finding, there is no coverage of such articles, even when there is an 'after-acquired property' clause in the mortgage, is based . . . on statements in the opinion in *Manufacturers Trust Co. v. Peck-Schwartz Realty Corp.* . . . . If the statement in the opinion as to the fourth requirement is read to mean that there must be affirmative clear and unequivocal proof, apart from the mortgage itself, that the parties in fact intended to have the mortgage cover these appliances, then plaintiff failed to prove its case, for there is no such separate showing of intent in this record. But we do not read *Manufacturers Trust Co. v. Peck-Schwartz Realty Corp.* . . . as insisting on such additional evidence, in every case. In that case, . . . there was much to suggest that the parties to the mortgage never in fact considered the furnishings covered; and there was no finding, one way or the other, as to their intent. In the present case the Trial Justice had before him only the mortgage covenant, which in clear and nontechnical language put the movables, presently in the house or thereafter to be acquired, under the lien. Appellant bought the building subject to that same mortgage, and, charged with knowledge of the after-acquired personalty clause, bought and installed new appliances. With such proof, and nothing else, before him, the Trial Justice here properly found that the refrigerators, ranges, and showers 'are covered by the consolidated mortgage.' We read that as an affirmative and sufficient finding of intent." [45] In commenting upon the *Bonac* holding it has been asserted that: "The ruling of

[41] 18 F. Supp. 712 (S. D. N. Y. 1936).
[42] 297 N. Y. 119, 75 N. E. 2d 841 (1947).
[43] Shelton Holding Corporation v. 150 East 48th Street Corporation *et al.*, 264 N. Y. 339, 347, 191 N. E. 8, 11 (1934).
[44] *In re* Downtown Athletic Club of New York City, Inc., 18 F. Supp. 712, 715 (S. D. N. Y. 1936).
[45] General Synod of Reformed Church v. Bonac Realty Corp. *et al.*, 297 N. Y. 119, 123-124, 75 N. E. 2d 841, 842 (1947).

the New York Court of Appeals . . . [that case] goes far towards removal of the former uncertainties and marks a stride toward re-establishment of the plain, and on principle the obvious, proposition that, granting the validity of such clauses, their construction is only a matter of getting at the intention of the parties as disclosed by the instrument itself, absent ambiguity." [46]

The Personal Property Clause and the Recording Statutes

The protection afforded the mortgagee, who incorporates such a clause within his realty mortgage, by the recording statutes is of vital concern to him and also to parties dealing with the mortgagor without actual notice of the mortgagee's interest. In viewing the pertinent statutes there exists some doubt as to whether recording will constitute constructive notice. As it is presently worded the "personalty" clause found in Section 254 of the Real Property Law makes no mention of personalty which will feed the mortgage after execution and recordation.[47] Speaking only of presently acquired chattels, and being the only statute in the Real Property Law covering the recording of this dual-natured mortgage, it would seem that, despite recording, purchasers or chattel mortgagees of the mortgagor, without actual notice, should not be charged with this imputed notice. In few cases has this problem been directly involved, but finance companies, in negotiating with mortgagor-owners, and intending to use their after-acquired personal property as additional security, have experienced difficulties in determining when and how to conduct a thorough title search.[48]

Various methods of circumventing the statute have been suggested, *e.g.*, so wording the clause that all personalty will be deemed a part of the realty; or a part of security.[49] But statutory clarification, by way of modification and amendment, is essential to complete understanding and assurance, for there is no guarantee that the courts will give these suggestions greater effect than the clauses currently in use.

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[46] See Note, 175 A. L. R. 401, 423 (1948).

[47] Manufacturers Trust Co. v. Peck-Schwartz Realty Corp. *et al.*, 277 N. Y. 283, 286, 14 N. E. 2d 70, 71 (1938). Section 254 treats of the construction of clauses and covenants in mortgages and bonds, and includes the presently acquired personal property clause as set forth above.

[48] Tersely stated, need the prior mortgagee also file his mortgage as a chattel mortgage, under Section 230 of the Lien Law, since it effects personalty not presently attached to the premises?

[49] Friedman, *supra* note 7, at 352.

The Effect of Various "Exclusionary" Statutory Provisions Upon the After-acquired Clause

Statutes [50] changing the common law rule, under which the retention of title by a conditional seller (or purchase-money chattel mortgagee) was paramount to any subsequent purchaser, lienor, or mortgagee who had relied upon possession by the conditional-vendee as indicating ownership,[51] have not affected the efficacy of such reservation by the vendor-owner in opposition to a prior realty mortgagee's after-acquired clause. Since the filing statutes are prospective in nature and intended to protect only *subsequent* purchasers for value without notice, ". . . the inference is that the legislature meant the common law rule to apply to such a case." [52] Under the common law in New York, a subsequent conditional vendor without filing took precedence over a prior mortgagee of the real estate.[53] The case of *Herold v. Cohrone Boat Company* [54] mirrors a present day affirmation of this view while distinguishing situations where such view will not control. The issue before the court was whether or not the personal property clause was superior to a subsequent chattel mortgage. The court, answering in the affirmative, reasoned: "Defendant [chattel mortgagee] . . . relies chiefly upon cases which concern contests between a real property mortgagee with such an after-acquired personal property clause and vendors of personal property under conditional sales agreements. He misapprehends the basic distinction between the powers of a possessor of personal property *without title,* holding the same under a conditional sales agreement, and the powers of the possessor of subsequently acquired personal property *with title* thereto. . . . In one instance, as here, the mortgagor has or acquires title to certain personal property which he can subject to the lien of a real property mortgage with an after-acquired personal property clause, while in the other, the mortgagor does not have title and, therefore, the real property mortgage with the after-acquired personal property clause which he executes is ineffectual to create a lien on such personal property, the title to which he has not acquired." [55] Professor Whitney, discussing these filing provisions, asserts: "The conclusion that prior realty mortgages were not intended by the Legislature to be protected as against any unfiled

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[50] Sections 65 and 67 of the New York Personal Property Law render conditional sales contracts, unless properly filed or recorded, depending upon whether the property in question is personalty as a matter of law or a fixture as determined by the "removable" nature of the property annexed, void both against subsequent bona fide purchasers for value from the conditional vendee and against attachment or lien creditors without notice.

[51] VOLD, LAW OF SALES § 97 (1931).

[52] WHITNEY, LAW OF SALES 80 (4th ed. 1947).

[53] *Ibid.*

[54] 249 App. Div. 318, 292 N. Y. Supp. 81 (2d Dep't 1936).

[55] Herold v. Cohrone Boat Company *et al.*, 249 App. Div. 318, 319-320, 292 N. Y. Supp. 81, 83-84 (2d Dep't 1936).

conditional sale contract is strengthened by considering the probable effect of the words 'before such purchase (mortgage)' found towards the end of the second sentence of Section 67 referring to the time before which the conditional sale contract must be filed. If these words mean 'before the mortgage is executed and delivered,' they obviously cannot refer to a *prior* mortgage, for it would be impossible for a subsequent conditional vendor to file his contract before the antecedent mortgage was made."[56]

Thus, in New York, a prior real property mortgage with a now or hereafter acquired personal property clause does not incorporate property sold by the conditional vendor notwithstanding his failure to file.

Conclusion

No greater single stride in the right direction has been made than that of the Court of Appeals in the *Bonac* case. By adopting this common-sense approach to the problem, rather than stringently adhering to the "rules" of fixtures or annexation, the court has given effect to the obvious intent of the parties. It is submitted that the continued use of such a criterion and the drafting of clearer recording provisions, so as to give sufficient notice to subsequent interested parties, will turn what was considered a nebulous and arbitrary segment of the law into a straightforward and understandable one.

UNAUTHORIZED APPEARANCE

The State of New York is committed to an anomalous rule of law by which the unauthorized acts of a responsible attorney at law may bind an unserved resident by a judgment rendered by a court of record. The rule is such that—in its extreme application—a solvent attorney at law *finding* a summons on the street and entering a general appearance for the defendant named therein could bind him to a final judgment although the party had never seen the summons, had never known of the action, and had never authorized the attorney to act.

Denton v. Noyes,[1] decided by the Court of Appeals in 1810, established this rule in New York. In that case, the defendants were *A* and *B*, acceptors, and *C*, drawer, of three several drafts. *C*, being unable to comply with the terms demanded by the plaintiff's attorney, offered other terms. The attorney agreed to discuss the counter offer with the plaintiff only if some attorney of the court would stipulate

[56] WHITNEY, *op. cit. supra* note 52, at 81.

[1] 6 Johns. 296 (N. Y. 1810).