Conditional Vendors and Prior Realty Mortgagees

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CONDITIONAL VENDORS AND PRIOR REALTY MORTGAGEES

When courts, yielding to business necessity, relaxed the early common law rule that whatever is annexed to the soil belongs to the soil, and permitted tenants to remove those fixtures which they had erected for purposes of trade or agriculture, there was opened up a possibility for confusion as to the character of such fixtures during the period of annexation. The fact that such fixtures after annexation were removable by the tenant, made possible the extension of the installment-buying title-reserved sales business to chattels which were to be affixed to the reality, since the conditional vendor relied on the right of removal as his security. But inevitably, conflicts arose between mortgagees of the reality and such conditional vendors as to whether the removal should be permitted. This article proposes to deal only with the comparative rights of conditional vendors and prior mortgagees in such a situation.

It is the rule at common law that a realty mortgage, even without an express clause to that effect, covers not only the land as it was at the time the instrument became a mortgage, but also any improvements or additions subsequently made thereto which became reality as a matter of law. Thus the mortgagee of vacant land is entitled to a house subsequently built on that land as part of his security, without any express provision to that effect in the mortgage. And if the house

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1 See Note (1907) 20 HARV. L. REV. 565.
2 Raht v. Attrill, 106 N. Y. 423, 13 N. E. 282 (1887); Gates v. De La Mare, 142 N. Y. 307, 37 N. E. 121 (1894).
was already on the land at the time the mortgage sprang into existence, the realty mortgage covers any permanent additions thereto without express clause so stating, if their nature or method of annexation is such that they became realty as a matter of law, notwithstanding the intention of the mortgagor and conditional vendor to the contrary shown by the express reservation of title in the conditional sale contract.³

It is only in reference to conditionally sold chattels, which after annexation to the realty do not become realty as a matter of law, that the unpaid conditional vendor may have the right of the removal as against a prior realty mortgagee. As to such chattels three different views were entertained at common law.

According to the Massachusetts doctrine all chattels affixed to realty went to a prior real estate mortgagee, conditional sale contract or chattel mortgage, notwithstanding,⁴ for the reasons, first, that the conditional vendor, although ignorant of the mortgage, nevertheless had consented to make his property part of the soil, and so must be content to abide the consequences ⁵ and secondly, that the reservation of title in the conditional vendor is invalid, since all fixtures are covered by the mortgage and the mortgage contract cannot be changed by an agreement to which the mortgagee is not a party.⁶ At the other extreme was the New York doctrine that a chattel mortgagee⁷ or a subsequent conditional vendor⁸ took precedence, without filing, against a prior mortgagee of the real estate, because when a chattel was annexed after the execution of the realty mortgage, the mortgagee was not misled into thinking that the fixture was part of his purchase and no injustice resulted if it were not included in the mortgage. The third view, known as the New

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⁴Note (1849) 3 HARV. L. REV. 55; (1895) 10 HARV. L. REV. 190; (1919) 32 HARV. L. REV. 732.
⁵FRYE, READINGS ON PERSONAL PROPERTY (3d ed. 1938) 1027; (1927) 11 MINN. L. REV. 667.
Jersey rule, steered a middle course between the other two views, avoiding the extreme position of either. According to this view, which was also sometimes known as the Vermont rule, the intention manifested by the conditional sale agreement to preserve the character of the chattel as personalty after annexation to the realty, prevails against the prior mortgagee of the realty, so that the chattel may be removed by the conditional vendor, unless its severance would so injure the freehold as substantially to diminish its value as security.9 The theory back of this third view is that as the mortgage is merely security, the prior mortgagee has advanced nothing in reliance on the value of the subsequently annexed chattels, and he should not be permitted to acquire them, as a part of his security, contrary to the intention of the party making the annexation and to the injury of the unpaid conditional vendor.10 The prior mortgagee has parted with nothing on the strength of a belief that the articles would be annexed and will lose none of his original rights if they are removed, whereas the conditional seller depends on them for his security.11 This third view that where a removal of the fixtures will not materially injure the mortgagee's original security, the conditional vendor may assert his right as against the prior mortgagee of the realty, was the majority rule at common law in the United States12 and even an after acquired property clause in the mortgage was held not to invalidate the agreement between the conditional seller of the chattel and the mortgagor-purchaser.13

The Uniform Conditional Sales Act, Section 7, covering the subject of "Fixtures" provides:

9 Detroit Steel Cooperage Co. v. Sisterville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753 (1914); Beatrice Creamery Co. v. Sylvester, 5 Colo. 569, 179 Pac. 154 (1919); Northwestern Mutual Life Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028 (1889); Campbell v. Roddy, 44 N. J. Eq. 244 (1888); Blanchard v. Eureka Planing Mill Co., 58 Ore. 37, 113 Pac. 55 (1911); Davenport v. Shants, 43 Vt. 546 (1870).
10 See note 6, supra; (1919) 32 Harv. L. Rev. 732.
11 Fryer, op. cit. supra note 6, at 1029; (1901) 15 Harv. L. Rev. 236; (1935) 19 Minn. L. Rev. 342.
"If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty [and containing the name of the owner thereof (added by the New York Legislature in enacting Section 67 of the New York Personal Property Law)] 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 [who is not the buyer of the goods (added by the New York Legislature in enacting Section 67 of the New York Personal Property Law)] 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 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 containing the name of the owner thereof (added by the New York Legislature in enacting Section 67 of the New York Personal Property Law)] 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."
This section has been enacted by the New York Legislature in Section 67 of the Personal Property Law exactly as it appears in the Uniform Conditional Sales Act with the exceptions of the provisions contained within the brackets in the above quotation.

It is proposed to treat the subject in the following three situations: I. The rights of a prior realty mortgagee against the unpaid conditional vendor who has not filed, to chattels the conditional sale contract of which is required to be filed under Section 67 of the New York Personal Property Law, i.e., chattels which do not as a matter of law remain personalty after annexation, but the status of which thereafter depends upon the intention of the parties as shown in the conditional sale contract; II. The rights of a prior realty mortgagee with a personal property clause against the unpaid conditional vendor who has not filed, to chattels which remain personalty as a matter of law after annexation, where the prior realty mortgagee had advanced all the mortgage money prior to the execution of the conditional sale contract; and III. Where he advances some of the mortgage money after the execution of the conditional sale contract and after the installation of the fixtures.

I.

The first sentence of the section purports to govern the rights of the parties where the affixed chattels are not severable from the realty without material injury to the freehold and declares that the reservation of title is void "as against any person who has not expressly assented to the reservation," i.e., void as against purchasers or mortgagees of the realty. Thus a conditional vendor of such chattels would have no right of removal as against mortgagees of the realty. The second sentence governs the rights of conditional vendors and subsequent mortgagees of the realty where the chattels are so affixed as to be severable without material injury to the freehold. In order to come within the scope of the second sentence of this section, the nature of the chattels and the manner of their annexation must be such that they would ordinarily be deemed
part of the realty so as to pass with it under purchase or devise of the realty, were it not for the express reservation of title in the conditional vendor. In reference to such chattels the statute does not expressly provide for the protection of a prior realty mortgagee against an unfiled conditional sale contract. The inference is that the Legislature meant the common law rule in New York to apply to such a case.

In Madfes v. Beverly Development Corp., 251 N. Y. 12, 15, 166 N. E. 787, 788 (1929) Kellogg, J., said: "Certain chattels have such a determinate character as movables that they remain personal property, after their annexation to real estate, independently of any agreement between the owner of the chattels and the owner of the realty which so provides. Other chattels, such as the brick, stone and plaster placed in the walls of a building, notwithstanding an agreement to the contrary, conclusively become real estate after annexation thereto.

"Between the two classes of chattels, those which after annexation, due to the inherent nature of the subject or the mode of annexation, remain personalty, and those which, due to the mode and purposes of annexation, conclusively become real estate, there was, at common law, a large class of movables which, after attachment, continued to be personal property, or became real estate, accordingly as the owner of the chattels and the owner of the real estate might have agreed.

Self-evidently, the provision quoted from Section 67 of the Personal Property Law was intended to affect only chattels belonging to the class which we have denominated third."

The following chattels when affixed to realty have been treated by the courts as chattels of the third class described by Judge Kellogg and hence within the provisions of Section 67 of the New York Personal Property Law. A boiler for steam-heating purposes to install which the hallway flooring of the building was left unfinished to permit the boiler to be placed on the concrete bottom of the cellar, Curry v. Geier Constr. Co., 225 App. Div. 498, 234 N. Y. Supp. 59 (2d Dept. 1929); a machine to furnish electric power and light so affixed to real estate as to become a part thereof although easily severed therefrom without material injury to itself or to the freehold, Kohler Co., Inc., v. Brasun, 249 N. Y. 224, 164 N. E. 31 (1928); a concrete stone fountain and concrete flower boxes, attached by cement, the fountain to the land, the flower boxes to the building, and provided with pipes so that water flows therein and with electric wires, so that it may be lighted, the whole providing ornamentation for the building, Metropolitan Stone Works v. Probel Holding Corp., 131 Misc. 519, 227 N. Y. Supp. 414 (1928); a heating system of which the boiler mains were suspended by means of collars screwed to the ceiling of the cellar, and risers mounting from the mains to the radiators on the various floors, and passing through holes cut in the floors for that purpose, Modern Security Co. v. Thwaites, 138 Misc. 469, 246 N. Y. Supp. 405 (1930), aff'd, 234 App. Div. 671, 252 N. Y. Supp. 930 (1st Dept. 1931); a pipe organ installed in a space especially made for it in the walls of a building, In re St. Mark's Hospital, 59 F. (2d) 1001 (C. C. A. 2d, 1932); an ice-making and refrigerating plant set on concrete foundation with pipes running through the flooring of the building, Voss v. Melrose Bond & Mortgage Corp., 160 Misc. 30, 288 N. Y. Supp. 576 (1936); an elevator installed in a building, Breene v. Elkins, 134 Misc. 118, 235 N. Y. Supp. 438 (1929); Harvard Financial Corp. v. Greenblatt Constr. Co., 261 N. Y. 169, 184 N. E. 748 (1932); theatre chairs affixed directly to a concrete floor by means of expanding screws, In re Albanese, 44 F. (2d) 602 (N. D. N. Y. 1930).

In Prudence-Bonds Corp. v. 1000 Island House Co., Inc., 141 Misc. 39, 252 N. Y. Supp. 60 (1931) it was held that the prior mortgagee was not
Nor can the prior realty mortgagee obtain any comfort from the Real Property Recording Act, since that Act states that recording of mortgages shall operate as constructive notice only as to subsequent purchasers or subsequent mortgagees of the realty, and a conditional vendor of chattels later affixed, is neither a subsequent purchaser nor a subsequent mortgagee of the realty.

protected by the second sentence of Section 67. In that case a prior realty mortgagee instituted a foreclosure action making as co-defendants, with the mortgagor, the conditional vendor of a sprinkler system installed so as to become a part of the realty but easily and readily removable without material injury to the freehold, or to the system itself, and a judgment creditor of the mortgagor, who had issued execution on the premises. It was held that the conditional vendor had the right to remove the sprinkler system as against both the prior realty mortgagee and the judgment creditor. The Supreme Court, through Mr. Justice Dowling, said at p. 43: "Nor does the second sentence of Section 67 of the Personal Property Law avail either the plaintiff or the defendant Ahlheim Bros., Inc., (the judgment creditor) because, if the case comes within the provisions of said sentence of the Personal Property Law, the conditional sales contract, although unfiled, would be good, except as against subsequent purchasers and mortgagees for value and without notice. The plaintiff is a prior mortgagee and Ahlheim Bros., Inc., a creditor. Neither one, therefore, falls within the class as to which an unfiled conditional sales contract is void." See also, Duffus v. Howard Furnace Co., 8 App. Div. 567, 40 N. Y. Supp. 925 (4th Dept. 1896), in which it was held that a furnace, so placed in the cellar of a house that it can be removed without substantial injury to the building, does not pass under a prior mortgage of the house, in case it was placed therein under a contract providing that it should remain the property of the seller until paid for.

However, in the following situations a prior realty mortgagee was protected under Section 67: (1) where he purchased at the foreclosure sale for he is then treated as a subsequent purchaser for value and without notice where the conditional sale contract was not filed, Voss v. Melrose Bond & Mortgage Co., 160 Misc. 30, 288 N. Y. Supp. 576 (1936); Realty Associates v. Conrad Constr. Co., 185 App. Div. 464, 173 N. Y. Supp. 23 (2d Dept. 1918); (2) where a prior realty mortgagee before making a further advance on the mortgage is informed by the vendor of chattels annexed to the building that he has not reserved the title until the same are paid for, the prior mortgagee takes precedence to the extent of such advance over the conditional vendor who had made the misrepresentation, the elements of an estoppel in pais existing, De Bevoise v. Maple Ave. Constr. Co., 228 N. Y. 496, 127 N. E. 487 (1920).

33 N. Y. REAL PROP. LAW § 291: "A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, or tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

N. Y. REAL PROP. LAW § 290: "The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration. ** The term 'conveyance' includes every written instrument, by which any estate or interest in real property is created, transferred, mortgaged ** **"
At this point attention may be called to the fact that Section 65 of the New York Personal Property Law, requiring filing of conditional sale contracts as to certain persons, requires that the contract be filed as against any purchaser (which includes mortgagee as well), whereas Section 67 states that the contract must be filed as against a subsequent purchaser (including mortgagee). Hence by familiar rules of statutory construction it would seem that the Legislature did not intend to give any protection to prior realty mortgagees against an unpaid conditional vendor of the class of goods described in Section 67. This conclusion 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 and referring to the time before which the conditional sale contract must be filed. If those words mean “before the mortgage is executed and delivered”, then obviously they cannot refer to a prior mortgage, for it would be impossible for the subsequent conditional vendor to file his contract before the antecedent mortgage was executed and delivered. Since the law never requires the doing of an impossible act, the words “before such mortgage” must be construed to mean before the instrument had legal inception as a mortgage. When is that? The New York Court of Appeals has held that an instrument purporting to secure the repayment of advances made, has no legal inception as a mortgage until the advances of money have been made by

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Section 65: “Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale.”

Section 61: “‘Purchase’ includes mortgage and pledge.

‘Purchaser’ includes mortgagee and pledgee.”

It should be observed that while Section 67 (second sentence) expressly protects subsequent purchasers for value, Section 65 does not require that the purchaser shall have paid value. But in explanation of this omission Prof. George G. Bogert, who drafted the Uniform Conditional Sales Act, Section 5 of which is enacted without change in that respect into Section 65 of the New York Personal Property Law, says in his notes to Section 5: “This element of value is necessarily implied in the word ‘purchaser’. There is no equity in protecting donees of the buyer by the recording section. In view of the great variety of definitions of ‘value’, it is deemed wise to leave that question to be determined by the pre-existing local law and not to attempt to make uniform the law by a definition in this act.”
Thus it is seen that in order for the realty mortgagee to be protected under Section 67, he must have made an advance of money to the mortgagor before the conditional sale contract is filed.

It is submitted that this conclusion, if sound, opens the way to protecting a realty mortgagee whose instrument antedates the conditional sale contract, if after the chattels, described in Section 67, have been annexed, he advances some of the mortgage loan to the mortgagor before the conditional sale contract is filed. The prior "mortgagee" does not in legal effect become a mortgagee until the advances are made. As to advances made after the conditional sale contract is entered into and after annexation of the chattels, the "prior" mortgagee is pro tanto a "subsequent" mortgagee and as such, and to that extent, should be protected under Section 67.

II.

If the nature of the chattels is such that upon annexation to the realty they retain their legal status of personal

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18 In Kommel v. Herb-Gner Construction Co., 256 N. Y. 333, 337, 176 N. E. 413, 415 (1931), Mr. Justice Kellogg in writing the unanimous opinion of the Court of Appeals said: "An instrument purporting to secure the repayment of advances made according to the terms of a certain bond, in the hands of a mortgagee named, who has neither made advances nor caused them to be made, is not a legal instrument; it is not a mortgage; nor is its holder a mortgagee." See also on this point, Schafer v. Reilly, 50 N. Y. 61 (1872); Payne v. Burnham, 62 N. Y. 69 (1875); Eastman v. Shaw, 65 N. Y. 522 (1875); Clatlin v. Boorum, 122 N. Y. 385, 25 N. E. 360 (1890); Spicer v. First National Bank, 55 App. Div. 172, 66 N. Y. Supp. 902 (3d Dept. 1901), aff'd without opinion, 170 N. Y. 562, 62 N. E. 1100 (1902); Verity v. Sternberger, 62 App. Div. 112, 70 N. Y. Supp. 894 (1st Dept. 1901), aff'd without opinion, 172 N. Y. 633, 65 N. E. 1123 (1901). With reference to the leading case of Holroyd v. Marshall, 10 H. L. Cas. 191 (1861), in which it was established that the mere agreement to mortgage personal property subsequently to be acquired gave the mortgagee a lien upon the property as soon as it was acquired, good against all but purchasers for value, Williston says: "It is essential that the mortgagee shall have actually advanced his money. If the contract is wholly executory, the doctrine of Holroyd v. Marshall is not applicable." Williston, Transfers of After-Acquired Personal Property (1906) 19 Harv. L. Rev. 557, 560.

Walsh, Mortgages (1934) § 15, at 77, says: "Mortgages given to secure advances to be made in the future create no lien either at law or in equity until such advances are made. As money is advanced under a mortgage of this kind a lien at law arises thereunder to the extent of the advances actually made." Where a prior mortgagee has made advances to the mortgagor after annexation of the articles, without knowledge of the conditional character of the sale, it is recognized that he is entitled to priority over the conditional seller. (1934) 18 Minn. L. Rev. 812, 824.
property as a matter of law, the rights of the parties are governed in New York State by Section 65 of the Personal Property Law, which reads as follows:

"Every provision in a conditional sale reserving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale. This section shall not apply to conditional sales of goods for resale."

Here again according to Section 61 of the same Act the word "purchaser" is defined to include mortgagee and the word "purchase" to include mortgage.

It has been held that conditional sale contracts of this class of chattels do not need to be filed in accordance with the requirements of Section 67 for they are not affixed to the reality "as to become part thereof". Hence the provisions of Section 67 do not apply to the kind of chattels now under dis-

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cussion. Instead, since they remain personalty after annexation as a matter of law, the filing requirements of Section 65 apply.\textsuperscript{21}

Since such chattels never became part of the realty as a matter of law, the only way in which a realty mortgagee can reach them after annexation is by including in the realty mortgage a clause such as the following:

"Together with all articles of personal property now or hereafter attached to or used in connection with the said premises, all of which shall be included in this mortgage."\textsuperscript{22}

Obviously, if the realty mortgage contains no such clause, it cannot cover such chattels after annexation, at least as against an unpaid conditional sale contract, even though the latter was never filed, and it makes no difference whether it was a prior or subsequent mortgage. If there is such a clause, it has been held that a subsequent realty mortgagee is entitled to previously conditionally bought and installed chattels in the absence of filing by the conditional vendor.\textsuperscript{23}

Assuming there is such a clause, may a prior mortgagee be entitled to conditionally bought and annexed chattels as against an unpaid conditional vendor who has not filed? Section 65 states the contract must be filed as against "any purchaser" (mortgagee). Certainly the term "any purchaser" (mortgagee) is broad enough to include a prior as well as a subsequent mortgagee. Hence it would seem that the Legislature meant the word "purchaser (mortgagee)" to be without any limitation as to time, and that if the Legislature meant only a subsequent purchaser (mortgagee) to be protected under Section 65, it would have said so as in Section 67. Since it did not, it may well be argued that it intended to include a prior as well as a subsequent purchaser (mort-

\textsuperscript{21} Ibid.
\textsuperscript{22} Cohen v. 1165 Fulton Ave. Corp., 251 N. Y. 24, 166 N. E. 792 (1929).
But it has been held that this clause does not necessarily bring within the coverage of the mortgage, movables which are not so attached to the realty as to become fixtures, such as conditionally sold furniture installed in a hotel, Manufacturers Trust Co. v. Peck-Schwartz R. Corp., 277 N. Y. 283, 14 N. E. (2d) 70 (1938).
\textsuperscript{23} Cohen v. 1165 Fulton Ave. Corp., 251 N. Y. 24, 166 N. E. 792 (1929).
gatee) in the protection afforded in Section 65 by a failure to file the contract.

However, until this year's amendment of Section 65,24 the conditional vendor was required to file before the purchaser purchased from the conditional vendee. If the words "any purchaser" were construed to include a prior purchaser—i.e., one who purchased the article from the conditional vendee before the conditional sale contract was made, the section would have been requiring an impossibility in calling for the conditional sale contract to be filed before it is made. Such a construction would have resulted in manifest injustice to the conditional vendor. For that reason alone the words "any purchaser" before the recent amendment, could not have meant a prior purchaser from the conditional vendee. The reasonable construction to have placed on Section 65 was that it meant only to protect a purchaser who had purchased from the conditional vendee after the conditional sale contract was made and before it was filed. Thus, the practical effect of the section was to protect only a subsequent purchaser from the conditional vendee although it used the words "any purchaser". But this objection to including a prior purchaser in the protection afforded by a failure to file under Section 65 seems to have been eliminated by the recent amendment requiring filing within ten days after the making of the conditional sale contract, instead of before the purchaser bought from the conditional vendee, as theretofore. The objection of requiring an impossibility no longer stands.

In passing, attention may be called to the fact that the recent amendment of Section 65 in substance declaring that as against purchasers (mortgagees) without notice, the reservation of title is void unless filed within ten days after the making of the conditional sale, in effect provides that the reservation of title shall be valid without filing for a period of ten days after the contract of conditional sale contract is made, even as against purchasers (mortgagees) who have acquired their interest within the ten-day period in ignorance.

24 N. Y. Laws 1938, c. 625, § 2, in effect Sept. 1, 1938. This amendment makes Section 65 conform to Section 5 of the Uniform Conditional Sales Act which reads: "Unless such contract or copy is so filed within 10 days after the making of the conditional sale." See Legis. (1938) 13 St. John's L. Rev.—.
of the conditional sale. In his notes to Section 5 of the Uniform Conditional Sales Act (from which Section 65 of the New York Personal Property Law is taken), Professor Bogert, the draftsman of the Act, says: "Under the statute the contract is valid for ten days without filing. It was thought unwise to require the seller to file immediately. The seller's office may be far distant from the filing district. He should have a reasonable time to mail his papers and get them filed." This amendment would seem to operate to deprive a subsequent realty mortgagee, with personal property clause, who acquired his interest, even without notice, during the ten days intervening between the making of the conditional sale and the filing thereof. It would also follow that against a prior realty mortgagee with after-acquired personal property clause, the conditional vendor does have an interval of time after the making of the contract and possibly after the annexation of the fixtures in which to protect his reservation of title by filing the contract.

There have been some cases in the Appellate Division of the Supreme Court of New York in which it has been said

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25 Thus in Perfect Lighting Fixture Co. v. Grubar Realty Corp., 228 App. Div. 141, 239 N. Y. Supp. 286 (1st Dept. 1930) there was a prior realty mortgage with a hereafter attached personal property clause. Thereafter the mortgagor purchased some electrical fixtures under a conditional sale contract and the day they were delivered on the premises, the contract was filed. The mortgagor-conditional vendee defaulted and the vendor brought replevin to recover the fixtures, making the realty mortgage a defendant. In deciding in favor of the conditional vendor, Judge Merrill said at p. 144: "It seems absurd to claim that a mortgagor of real property could give a mortgage of personal property not in existence and to which he had no title * * *. Undoubtedly he could mortgage all to which he at the time had title or which he might subsequently buy and pay for, but we do not think it was within his power to mortgage property not in existence, or which he might at some future date acquire under a conditional sales contract." See also Prudential Ins. Co. v. Sanford Real Estate Corp., 157 Misc. 583, 284 N. Y. Supp. 73 (1935). In Herold v. Cochrone Boat Co., Inc., 249 App. Div. 318, 292 N. Y. Supp. 81 (2d Dept. 1937) there was a realty mortgage with a hereafter acquired personal property clause. Thereafter the mortgagor bought some machinery under an outright purchase and attached it to the premises. Later on he gave a chattel mortgage on that machinery to a third person for a loan of money and the third person duly filed the chattel mortgage. Subsequently, the realty mortgagee brought a foreclosure action and sought to include this machinery in the foreclosure. The chattel mortgagee objected. It was held that the prior realty mortgagee took precedence. The court pointed out that when the mortgagor bought the machinery under an outright purchase, he (the mortgagor) acquired the title to it, hence could give a valid lien on it to the prior realty mortgagee; that the latter's lien attached to the machinery under the personal property clause as soon as the machinery was annexed to the realty, but that if the machinery had been purchased under a conditional sale contract, the mortgagor-conditional
that it is not in the power of the mortgagor to mortgage property which he might at some future date acquire under a conditional sale contract; that a mortgagor cannot give a valid lien on chattels which he does not own; that if they are chattels of the second class mentioned by Judge Kellogg in the Madjes case,\textsuperscript{26} such as gas ranges, he does not own them even after they have been attached, and so the prior realty mortgagee with an after-acquired personal property clause can never have a lien on such fixtures which will be valid as against an unpaid conditional vendor even if the conditional sale contract was never filed. These Appellate Division cases have held that since the conditional vendee-mortgagor does not have title, the prior realty mortgage cannot attach.

But the very purpose of the filing statute\textsuperscript{27} is to protect innocent third persons purchasing or taking a mortgage from a conditional vendee who does not have title. For example, one who purchases the conditionally sold article from the conditional vendee without notice is protected by Section 65 even though the conditional vendee did not have title, and under Section 67 a subsequent realty mortgagee is protected against the unfiled conditional sale contract even though the conditional vendee-mortgagor had no title to the affixed chattels. In Cohen v. 1165 Fulton Ave. Corp.\textsuperscript{28} the conditional vendee-mortgagor had no title to the affixed gas ranges and yet the Court of Appeals held that the lien of the subsequent realty mortgagee attached to them under the personal property clause. If the absence of title in the conditional vendee-mortgagor is fatal to the prior realty mortgagee's lien, why should not it also be fatal to the subsequent realty mortgagee's lien? If the subsequent mortgagee's lien attaches even though the conditional vendee-mortgagor did not have title, why should not the prior mortgagee's lien attach as soon as the chattels are affixed even though the conditional vendee-mortgagor did not have title? The reason given by the Appel-

\textsuperscript{26}See note 19, supra.

\textsuperscript{27}N. Y. Pers. Prop. Law § 65.

\textsuperscript{28}251 N. Y. 24, 166 N. E. 792 (1929).
late Division that the mortgagor cannot give a lien on chattels he does not own, applies as well to subsequent mortgagees as to prior mortgagees, and yet in the Cohen case the subsequent mortgagee was held to have a valid lien on the gas ranges, which were not owned by the conditional vendee. In a subsequent realty mortgage the conditional vendee is attempting to give a lien on chattels which he does not own just as much as in a prior realty mortgage. It would, therefore, seem that the reasoning of these Appellate Division cases is fallacious. However, the conclusion reached by them that the prior realty mortgagee, even with a hereafter attached personal property clause, is not entitled to subsequently sold fixtures, where he had advanced all the mortgage money previously to the execution of the conditional sale contract, even though the latter is not filed, is in accord with the common law of New York State. Such a mortgagee has not parted with value (the advances of the mortgage money) in reliance on the fixtures as part of his security and, it is submitted, that this, rather than the reason given by the court in the cases referred to, is the sounder one. A distinction may be made between a prior and a subsequent mortgagee in that in the case of the subsequent mortgagee, the chattels have already been affixed and are a visible part of the security on which the mortgagee relies, whereas in the case of the prior mortgagee there may never be any after-acquired property and so the reliance of the mortgagee is purely speculative. Thus, although the conditional vendee-mortgagor had no title in either case, the subsequent mortgagee has the fact of reliance in his favor, while the prior mortgagee has not.

Inasmuch as the instrument does not become a mortgage until the advances are made, it would appear that if the prior realty mortgagee makes some of the advances after the

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conditional sale contract is made and the chattels affixed, he
is, to that extent, a subsequent mortgagee, and if the realty
mortgage contained a hereafter attached personal property
clause, his lien would be superior to that of the conditional
vendor who had not filed within ten days after the contract
was made. In *Central Chandelier Co. v. Irving Trust Co.*\(^1\) it
appears that after conditionally sold lighting fixtures had
been delivered to an apartment house that was being erected
under a building and loan mortgage, some of the fixtures
were attached to the walls and then building operations
ceased. The rest of the fixtures were left lying on the floors.
Building operations were never resumed. The mortgagor de-
defaulted both on the building loan mortgage and on the con-
ditional sale contract. The building loan mortgagee fore-
closed. The Court of Appeals held that the mortgagee was
entitled to those fixtures which were attached as against the
unfiled conditional sale contract, but that the conditional
vendor was entitled to those fixtures which were lying loose
and unattached in the rooms of the building at the time of
the foreclosure, because they were not being used in connec-
tion with the premises and hence were not covered by the
personal property clause. The report of the case states that
the conditional bill of sale was made on the 14th day of
March, 1929; the lighting fixtures covered by it were deliv-
ered on April 15 and April 17, and that on April 23, the title
company made the final payment under the building loan
mortgage, by which time the conditional sale contract had
not been filed. Since the Court of Appeals in *Kommel v.
Herb-Gner Constr. Co.*\(^2\) had previously held that an instru-
ment purporting to secure the repayment of advances has
no inception as a mortgage until the advances have been made
by the mortgagee, it would seem to follow that the building
and loan mortgage in the *Central Chandelier* case\(^3\) appar-
ently entered into before the conditional sale contract was
made, had no legal inception as a mortgage until April 23
which was after the conditional sale contract was entered
into and after the fixtures had been delivered. Thus although

\(^1\) 259 N. Y. 343, 182 N. E. 10 (1932).
\(^2\) 256 N. Y. 333, 176 N. E. 413 (1931).
\(^3\) *Central Chandelier Co. v. Irving Trust Co.*, 259 N. Y. 343, 182 N. E. 10 (1932).
prior in point of time to the conditional sale contract, the building loan mortgage was in legal effect a "subsequent mortgage" within the meaning of Section 67 of the Personal Property clause which was applied by the court to the case.

In conclusion the following propositions are submitted:

1. In the case of conditionally sold chattels which do not remain personalty as a matter of law after annexation, the prior realty mortgagee is not protected either under Section 67, nor at common law, unless by advancing some of the mortgage money after the annexation of the chattels, he becomes, in legal effect, a subsequent realty mortgagee to the extent of those advances.

2. In the case of conditionally sold chattels which remain personalty as a matter of law after annexation, the prior realty mortgagee is protected only if (a) the realty mortgage contained a hereafter attached personal property clause, and then only as to the chattels actually annexed, and (b) the mortgagee has advanced some of the mortgage money after such annexation and after the ten-day period allowed the conditional vendor for filing the contract and before the conditional vendor thereafter files.

3. In the case of conditionally sold chattels which remain personalty as a matter of law after annexation, the prior realty mortgagee is not protected by a hereafter attached personal property clause if he had advanced all the mortgage money before the conditional sale contract was made, unless he becomes the purchaser at the foreclosure sale without actual knowledge of the unfiled conditional sale.

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