

Most of the authorities adopting the majority rule do so without any discussion of the type of trade fixtures to which the rule applies, and presumably regard all such fixtures as being within its range. New York, however, has recognized the distinction and has excepted store fixtures from the operation of the rule.¹² The application of this distinction is fraught with an uncertainty that is generally disfavored in the field of property law. Nevertheless, the opinion squares more closely with the expectations of both the landlord and tenant and represents a desirable limitation upon the product of an outworn fiction of the common law. It is certainly to be hoped that if the *dictum* of the *Gerbert* case is clothed with the halo of *stare decisis* it will be further circumscribed by decisions written in the vein of the *Goerke Company* opinion. Perhaps the ideal solution would be legislation permitting the removal of all fixtures, where there will be no substantial injury to the freehold, notwithstanding a renewal lease silent as to that right.

REMOVABILITY OF CHATTELS SOLD UNDER CONDITIONAL SALE AND AFFIXED TO REALTY—The body of the common law dealing with the problem of fixtures seems presently possessed of little but historic significance when dealing with a chattel sold under a conditional sale.¹ The Uniform Conditional Sales Act² is said to have abrogated the earlier common law principles.³

The pertinent provisions of the act are sections 5 and 7.⁴ Section 5 governs in all cases except those covered by section 7, which is intended

¹² *Smusch v. Kohn*, 49 N. Y. Supp. 176, 22 Misc. 344 (Sup. Ct. 1898), criticizes *Loughran v. Ross* (*supra* note 6) saying:

"The decision was based upon technical grounds but is not a case whose principle should be extended and that it would be a dangerous doctrine to hold that the ordinary movable store fixtures of a tenant pass to his landlord by the mere act of renewing the term."

See also *Devin v. Dougherty*, 27 How. P. (N.Y.) 455, where the tenant had built an awning in front of his shop, and it was held that reservation of the right to remove was not necessary.

¹ *Bank of America National Ass'n v. LaReine Hotel Corp.*, 108 N. J. Eq. 567, 156 Atl. 28 (Ch. 1931).

² P. L. 1919, p. 462, 2 C.S. Supp. (1911-1924) 3129.

³ Case cited note 1 *supra*; *G.M.A.C. v. Smith*, 101 N.J.L. 154, 127 Atl. 179 (E&A 1925).

⁴ Section 5 reads, "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 a 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."

Section 7 reads, "If the goods are so affixed to realty, at the time of a conditional sale or subsequently as to become part thereof, and not to be severable wholly or in any portion without material injury to the freehold, the reservation

to cover chattels which would be considered fixtures under the common law⁵ and is operative only "if the goods are affixed to the realty . . . as to become a part thereof." While under the common law the controlling consideration in determining whether goods were so affixed to the realty as to become a part thereof was the intent with which they were annexed, it has been held that the test under the act is the mode of annexation.⁶

The express language of section 7 bars the suggestion that mere affixation or annexation of a chattel to realty renders it applicable. In two New Jersey cases decided in 1930 it was held that heavy factory machinery and a central refrigerating plant in an apartment house did not become part of the realty by their affixation to the realty through bolts, unions, etc.⁷ These cases were followed in a later case involving a central refrigerating plant.⁸

In *Future B. & L. Assn. v. Mazzocchi*,⁹ however, Vice-Chancellor Backes held that refrigerators, gas ranges, cabinets and closets which were installed in an apartment house, all became part of the realty and

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 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 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 not to be affixed thereto, shall be filed before such purchase in the office where a deed of 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 affixed to the realty as to become part thereof, but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed in the office where a deed would be recorded or registered to affect such realty." (Paraphrased for convenience in reference.) P. L. 1919, p. 462, 2 C.S. Supp. (1911-1924) 3129.

⁵ *Madfes v. Beverly dev. Co.* 251 N. Y. 12, 166 N.E. 787 (1929).

⁶ See *Future B. & L. Ass'n v. Mazzocchi*, 107 N. J. Eq. 422, 152 Atl. 777 (Ch. 1931). The problem we are now discussing should be carefully separated from that of determining when goods which are attached so as to become a part of the realty are severable without material injury thereto. The latter problem becomes academic in any particular case in which it is decided that the goods do not become a part of the realty at all. The later cases in New Jersey do not clearly divide both problems but it is believed that for purposes of analysis it is extremely helpful.

⁷ *Lifschitz v. Vorclone*, 8 N. J. Misc. 83, 148 Atl. 899 (Ch. 1930); *Mfr's B. & L. Ass'n. v. P. S.*, 106 N. J. Eq. 68, 150 Atl. 196 (Ch. 1930). The case of *Crown v. Regna Const. Co.*, 146 Atl. 346 (Ch. 1929) is not considered because it was admitted therein that the goods were controlled by Section 7, so that the question was not presented.

⁸ *Workingmen's B. & L. Ass'n. v. Smith*, 108 N. J. Eq. 349, 155 Atl. 20 (Ch. 1931).

⁹ 107 N. J. Eq. 422, 152 Atl. 777 (Ch. 1931).

were governed by Section 7.¹⁰ The opinion by the Vice-Chancellor does not isolate the foregoing problem and the manner in which the earlier cases are distinguished¹¹ is hardly satisfying¹² In *Domestic Centre Co. v. Mezzalina*¹³ the Court of Errors and Appeals, citing only the *Mazzocchi* case, held that a central refrigerating system in an apartment house became a part of the realty and that the rights of the parties were consequently governed by section 7.

Under this section if the goods, although part of the realty, are severable without material injury to the freehold the conditional vendor may still protect himself by a proper filing of the contract in accordance with the second and third sentences of the section.¹⁵ If, however, the goods are not severable without material injury to the freehold the reservation of property in the seller is void except as to persons expressly assenting to the reservation. It therefore becomes necessary, if section 7 governs, to determine whether the goods are severable without material injury to the freehold.

The cases¹⁶ which had held that central heating and refrigerating systems did not become a part of the realty of necessity held that the goods might be severed without material injury to the freehold. But the Chancery cases which directly passed upon the problem reached diametrically opposite results.

The *Mazzocchi*¹⁷ case (and the *Satterthwaite*¹⁸ case which followed it) adopted the functional test and said: "The word 'material' as used in the statute in one sense means material injury to the structure, but it also connotes injury to the institution of which the structure is a part."¹⁹ And having found as a fact that an apartment house could not function

¹⁰ It has been said that such part of the decision as purports to hold the chattels in question became part of the realty is not binding as precedent because it was *obiter dicta*. *Bank of America v. LaReine Hotel Corp.*, *supra*, note 1. The case involved a subordination agreement and the result of the case can be sustained on that ground. However, the opinion places the decision on alternative grounds.

¹¹ The court attempts to distinguish the case of *Mfr's. B. & L. Ass'n. v. P. S.*, *supra* note 7, on the ground that there the adversary of the conditional vendor was a subsequent mortgagee. But the bearing this would have on the determination of the factual issue depending upon mode of annexation does not seem clear. No mention is made of the *Vorclone* Case, (*supra* note 7), in the *Mazzocchi* case.

¹² See *MacLeod v. Satterthwaite*, 109 N. J. Eq. 414, 157 Atl. 670 (Ch. 1932) where the *Mazzocchi* case was followed. This case is on appeal before the Court of Errors and Appeals.

¹³ 109 N. J. L. 574, 162 Atl. 722 (E&A 1932).

¹⁴ *Supra*, note 9.

¹⁵ Where the goods are severable without material injury to the freehold the contract, or a copy thereof, with a separate statement annexed signed by the seller, describing the premises and stating that the goods are to be affixed thereto must be filed in the office where deeds of real estate are registered, and these contracts are entered in a separate volume used only for conditional sale contracts affecting realty. See Section 7 *supra* note 4; also P. L. 1931, p. 741.

¹⁶ Cases cited notes 7-8, *supra*.

¹⁷ *Supra*, note 9.

¹⁸ *Supra*, note 12.

¹⁹ 152 Atl. 778, 779.

as such without an electric refrigeration system the court held that the goods were not severable without material injury to the freehold. On the other hand in *Bank of America v. LaReine Hotel Corp.*²⁰ Vice-Chancellor Berry looked to the physical effect of severance upon the freehold and held that refrigerators, ovens, dough mixing machines, electric transformers, window and door screens, and washing and ironing machines, were severable without material injury to the freehold.

In the *Mezzaluna* case²¹ the Court of Errors and Appeals approved the functional test set forth in the *Mazzocchi* case. Of course there still remains a question of fact in each case as to how much functional loss will result from the proposed severance and conflicting findings of facts in similar situations may be expected. The detrimental business effect of this uncertainty graphically appears in *Reliable B. & L. Ass'n v. Purifoy*²² where Vice-Chancellor Backes²³ found that removal of a central heating system consisting of a furnace, pipes, and radiators placed in an apartment house would not materially impair the functioning of the apartment house. An attempt is made in the opinion to distinguish the *Mezzaluna* case on the ground that in the *Purifoy* case the system had been installed after the erection of the building while in the *Mezzaluna* case it had been installed during the construction of the building.²⁴

The protection the law gives to a conditional sale determines the ease with which prospective purchasers may buy on credit. There should therefore be a very definite incentive to protect the conditional vendor. But innocent strangers to the transaction who may be deceived by a situation in which title to property is in one while another has all the indicia of ownership equally require protection. The attempt to accomplish both of these objects has resulted in elaborate recording systems. But once the public record is made and the danger of diligent strangers being deceived by physical appearances is practically overcome there would seem to be little reason to emasculate the recording system by denying its efficacy to protect legitimate transactions.

²⁰*Supra*, note 1.

²¹*Supra*, note 13.

²²163 Atl. 151 (Ch. 1932).

²³This is the same judge who decided the *Mazzocchi* case, *supra*, note 9.

²⁴The factual question before the court was whether an apartment house today could function without a central heating system. It seems immaterial when the system was installed if the functioning of the institution is to be considered as of the time of the proposed severance. Indeed, it may be argued that installation of a system subsequently to the erection of a building is more cogent proof of its necessity to the proper functioning of the building, for if the building functioned properly without the expensive system why was it installed. *Quere*: is the proper test to be the functioning of the building as it was originally constructed measured against the economic and sociological background then existing.

The court might have gone on the ground that the goods were not affixed to the realty in such a way as to become a part thereof. The furnace and radiators were not in anyway affixed to the realty and the pipes were not in the walls but merely ran up through holes cut in the floors.

There can be no serious quarrel with the holding of the *Mezzaluna* case that the chattels involved were governed by Section 7 and not Section 5.²⁵ A subsequent purchaser of realty might reasonably expect to find the records of interests in chattels affixed to realty to be linked up in some way to realty records. Where the law imposes a duty upon a conditional vendor of chattels detachable from realty without any material physical injury thereto to file his contract in the office where deeds affecting realty are recorded²⁶ it would seem that the rights of all parties have been accorded adequate protection. Credit can then be safely extended with injury to no one and the statute seems to aim at this economically desirable result. By adopting the functional test of severability, however, the beneficial credit device recognized by the statute is unnecessarily restricted. Furthermore, the formula does not have the commercial advantage of ease of application and certainty of result.²⁷

The *Mezzaluna*²⁸ and *Satterthwaite*²⁹ cases further extend the rigors of the statute by holding that if any portion of a system cannot be removed without material injury no part can. The statute by its express terms anticipates such situations and provides that only the portion which is not severable may not be removed.³⁰

It is submitted that the *Purifoy*³¹ case is based upon a more proper evaluation of the interests involved and it may well be the first of a series of forthcoming cases which will limit the effect of the economically undesirable decision in the *Mezzaluna* case.

²⁵ This is probably a minority view. The following cases held that similar, and often identical chattels, did not become a part of the realty by affixation, *Madfes v. Beverly Development Co.*, 251 N. Y. 12, 166 N.E. 787 (1929); *Cohen v. 1165 Fulton Ave. Corp.*, 254 N. Y. 24 (1929); *Kelvinator Sales v. Biro*, 136 N. Y. Misc. 720 (1930); *In re Banos*, 8F (2d) 95 (D. Pa. 1925); *Kanowha Nat. Bank v. Blue Ridge Coal Corp.*, 107 W. Va. 307, 148 S.E. 383 (1929) *Com. Cred. Corp. v. Gould*, 175 N.E. 264 (Mass. 1931); *Southwestern P. S. Co. v. Smith*, 31 S.W. (2d) 472 (Tex. 1929); *Cf. Uniform Cond. Sales Act, Section 30.* "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

²⁶ *Supra*, note 15.

²⁷ See *Reliable B. & L. Assn. v. Purifoy*, *supra*, note 22.

²⁸ *Cf. Case cited supra*, note 22.

²⁹ *Supra*, note 4.

³⁰ See first sentence of Section 7, *supra* note 4. In none of the cases was any claim made by the conditional vendor to pipes which ran through the wall. These were admittedly non-severable. The claims were all for such portions of the systems which could be removed without any material physical injury.

³¹ *Supra*, note 22.