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FINANCING NEW MACHINERY FOR MORTGAGED PENNSYLVANIA INDUSTRIAL PLANTS.

FAIRFAX LEARY, JR.†

IF THE LIFE OF THE LAW is experience and not logic, as Mr. Justice Holmes once remarked, then from time to time we should re-examine doctrines long taken for granted and apply to them the test of experience. We should re-visit the scenes of ancient legal struggles to be sure that, through long repetition, we are not, parrot-like, quoting sentences out of full context, or applying dicta to situations never in the minds of the judges responsible for the words, and to which they might not, themselves, have applied those words. Indeed, considerations of policy not only today, but in earlier times, may have cried out for a different result.

It is the thesis of this Article that the so-called “Pennsylvania Industrial Plant Mortgage Doctrine”¹ is a case in point. At the hands of some authors, and in the language of the opinions of some judges, a far greater effect has been given to the doctrine than the matters to be decided have required, with possible damage to the development of the economy of Pennsylvania. Who can say what factors actually determine the decision to locate or not to locate a new plant in Pennsylvania? Economic considerations play the vital role, of course. Tax considerations play an important part. But rules of law play a part too, and a rule of law that inhibits the future growth of a company by placing obstacles in the path of financing its future expansion is not a rule of law that will tend to persuade businessmen to locate new plants in Pennsylvania. Nor is it a rule of law that will aid businesses


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already in Pennsylvania in the competitive struggle to expand, and through expansion to provide greater employment, greater tax revenue and so promote the welfare of the Commonwealth and its people.

If a careful examination of the original bases of the doctrine should disclose no necessity or reason to apply it to certain situations, the effort will not have been wasted. *Cessat ratione lex, cessat ipse lex,* is a maxim not without force today. Translated somewhat loosely it means that a rule of law should not be extended beyond the needs for satisfying the policy giving rise to the rule.

**General Factual Situation**

The factual situation with which we will be concerned in this Article is the conflict between the holder of a validly perfected and recognized chattel security interest in a chattel subsequently affixed to the realty or integrated in a plant or structure, and the holder of a prior real property mortgage. Specifically, we can suppose a case where the owner of an industrial plant desires to acquire, on conditional sale, new machinery to enable him to diversify his line of products. He has space in his existing building and his credit is such that a bank or other financing institution will take an assignment of the vendor's interest in the conditional sales contract upon terms satisfactory to the manufacturer and the equipment vendor. But there is a prior real estate mortgage on the plant. The real estate mortgagee may claim that the new machinery becomes subject to the lien of his mortgage as soon as it is used in the plant. The conditional vendor and the financing institution will not permit the sale to go through unless they can be assured of a first and prior lien on the machinery so acquired and the right to re-possess the same in the event of default by the vendee in making his installment payments.

A resolution of the conflict between these two interests actually involves questions extending beyond the two interests nominally involved. Policy considerations require that thought be given to the effect of conflicting solutions on plant modernization programs, the development of new products and processes, the ability of Pennsylvania corporations to afford continued employment by financing the acquisition of new machinery and new lines of business, and the consequent effect on the revenues of the Commonwealth.

It is easy to say, as some have, that a decision preferring the interest of the prior real property mortgagee can cause no hardship
to subsequent chattel vendors, as they can readily obtain the consent of the mortgagee.\textsuperscript{2} Such statements are, however, somewhat unrealistic, and certainly show a somewhat provincial concept of who an industrial mortgagee may be. Consider first the case of the corporate trust mortgage securing a substantial bond issue. The corporate trustee will not or cannot give consents binding upon the bondholders unless specific provision for such an agreement to subordinate the mortgage lien is clearly present in the trust indenture. Securing the necessary two-thirds consent of the bondholders for an amendment is almost an impossibility, and if the subordination is not permitted by the terms of the usual article on amendments, it can be guaranteed that 100% consent will not be obtainable. Even assuming the industrial plant mortgage is held by one interest, that interest may be an elderly female, a suspicious and illogical individual, a minor not capable of giving consent except after lengthy legal proceedings, or a trustee under a will or deed of trust which does not specifically authorize the giving of consent. Most of us are familiar with the rule of policy guiding many trustees which apparently reads “You cannot be surcharged for saying no.” Consent of the mortgagee is not a readily obtainable document, and a rule of law based upon a supposed “readily obtainable consent of the mortgagee,” is a rule granting priority to the real estate mortgagee. Indeed, the rule may have certain implications fostering restraint of trade and tending toward monopoly if the mortgagee is a financial institution.\textsuperscript{3} The “readily obtainable” consent may be consent conditioned upon financing through the mortgagee and upon his terms.

**Legislative Policy**

To the extent that the legislature declares the preferred policy of the Commonwealth, it has stated that the interest of the state is best served by preferring the interest of the chattel vendor, both in 1935\textsuperscript{4} and again in 1953 when the Uniform Commercial Code was enacted.\textsuperscript{5} Actually, such legislative intent was indicated as long ago as 1915,\textsuperscript{6}

\textsuperscript{2} See, e.g., Shaffer, J. in Central Lithograph Co. v. Eatmor Chocolate Co., 316 Pa. 300, 175 Atl. 697 (1934) and 83 U. Pa. L. Rev. 916 (1934).

\textsuperscript{3} Compare the cases and legislation against mortgages requiring that insurance be placed through affiliated insurance brokerage outfits, and the general antitrust prohibitions against “tie-in” sales.

\textsuperscript{4} The Act approved July 12, 1935, P.L. 658 (since repealed by the Uniform Commercial Code) amending the Uniform Conditional Sales Act.

\textsuperscript{5} PA. STAT. ANN. tit. 12A, § 9-313 (1953).

\textsuperscript{6} Act of June 17, 1915, P.L. 866.
and reiterated in language not sufficient to do the job in 1923, 1925 and 1927.7

It has been stated that the industrial plant mortgage doctrine may require that the prior real estate mortgagee be preferred, and that it may be beyond the power of the legislature to change this rule as to mortgages placed of record before the enactment of the legislative rule.8 The writer believes that neither of these propositions is necessarily correct, and that a court faced with the problem today could and should reach the opposite conclusions.

It is, therefore, appropriate that we examine in some detail the origins of the doctrine, and the extent of its application. One further preliminary word, however. The writer does not belong to what might be called the Gertrude Stein school of legal reasoning which says: "Real Estate is real estate is real estate;" that is, a decision classifying a thing as real estate in a certain context does not have binding force as precedent in all other situations where the conflicting interests are not the same. Classification as real estate may be useful in achieving a proper solution between vendor and purchaser (no other interests being involved), but a personal property tag may be thought desirable to reach the equitable result in a case involving landlord and tenant. This possibility has long been recognized and accepted by most judges9 and should, at this date, occasion no surprise.

Origin of Doctrine

The Pennsylvania Industrial Plant Mortgage Doctrine traces its ancestry to the celebrated 1841 decision of Chief Justice Gibson in Voorhis v. Freeman.10 The contest was between a purchaser at a mortgage foreclosure sale and a creditor of the mortgagor who had levied upon certain rolls in an iron rolling mill. The levy was made after the mortgage foreclosure sale. The rolls in dispute included duplicates reserved for use in case of breakdowns. The purchaser

7. Conditional sales acts relating to the fixture problem were adopted in 1923 and 1925. In 1925 the Uniform Act was also adopted, and was amended in 1927. See the Act of May 1, 1923, P.L. 117; the Act approved May 14, 1925, P.L. 722. The Uniform Act was the Act of May 12, 1925, P.L. 602; and it was amended by the Act of May 12, 1927, P.L. 979 and later by the Act cited in note 4, supra.
8. See Arenberg, Chattel Mortgages and Industrial Plant Mortgages, 23 PA. BAR ASS'N Q. 125 (1952); Robinson, McGough, and Scheinholtz, supra note 1.
9. See, e.g., Kratovil, Fixtures and the Real Estate Mortgage, 97 U. PA. L. REV. 180, 199 (1948) referring to the different rules for determining fixtures applicable as between landlord and tenant, as compared to those existing between mortgagor and mortgagee by reason of "the strong policy in favor of the free removal of a tenant's trade fixtures." The basis of such a policy would seem equally applicable to the holder of a purchase money interest in a like fixture.
10. 2 W & S 116 (Pa. 1841).
of the realty contended that the rolls were realty passing to him upon the foreclosure sale, and the creditor naturally contended for a classification of the property as personalty.

Chief Justice Gibson held that the rolls belonged to the purchaser at the mortgage foreclosure sale. The mortgage contained the following language referring to the mortgaged property:

"A lot or piece of ground with one iron-rolling mill establishment situate thereon with the buildings, apparatus, steam engine, boilers, bellows &c attached to the said establishment."

The classic and oft-quoted passage from the opinion, of course, is where the learned Chief Justice says:

"Whether fast or loose, therefore, all the machinery of a manufactory necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold. This is no more than an enlargement of the principle of constructive attachment. . . ." 11

Duplicate rolls, not in use, but necessary and proper for an emergency, were also held to pass as realty by analogy to an earlier case which had held that duplicate keys of a banking house passed to a purchaser of the realty.

In determining why a case was decided the way it was, not only is the language of the opinion to be carefully analyzed, but the rules of law and the practice in other fields familiar to lawyers of the times must be borne in mind. From the point of view of giving a money-lender a security interest in a manufacturing establishment as a going concern, the decision was a must. Just twenty-one years before this time a chattel mortgage was outlawed, 12 and 15 years earlier the conditional sale was accorded like treatment. 13 With no legal basis for mortgaging chattels, there was therefore, no way, except that chosen by Chief Justice Gibson, in which a security interest could be arranged so that the lien would cover the plant as a going concern. The bailment lease, later highly developed as the only chattel security device recognized by the common law of Pennsylvania was then in its infancy. 14 In any event, it, like the conditional sale, could be made to do the job only if the financing was simultaneous with the acquisition. Unfortunately, this situation was not commented on in the opinion. Other contemporary rules of law, however, were mentioned.

A considerable passage in the opinion is devoted to the plight of a poor cotton spinner, and his troubles with his creditors if the rule were otherwise. In such a case, his plant could be dismembered by separate levies upon his machinery, and it would thus, in time of trouble, be no longer able to function as a plant and earn income. Thus, argued the court, the owner of the cotton mill would be deprived of the protection afforded debtors by the Pennsylvania inquisition statute. This act prohibited a sale of a debtor's real estate if the rents and profits of the land, as estimated by a sheriff's jury, would be sufficient to pay the debt with interest in seven years.

Somewhat startling, therefore, in the light of subsequent developments, is the fact that the origin of the industrial plant doctrine lies not only in the protection of the security of mortgage investments, but even more in the protection of commercial debtors. Concern for the policy of that statute may seem a bit strange today to lawyers accustomed to "inquisition waived" clauses in every printed form. But Chief Justice Gibson obviously felt that the rule he adopted was necessary to keep manufacturer and farmer upon an equal plane.

The court was also concerned with the confusion that might result if the rolls were classified as chattels and so passed to an executor for administration, while the building descended to the heir. Yet the judge was astute enough to realize that applying the real estate label for one purpose did not necessarily require that the label be applied for all purposes. Significantly, the much quoted "fast or loose" passage is immediately followed by this sentence, not usually quoted:

"I speak not here of questions between tenant and landlord or remainderman, but of those between vendor and vendee, heir and executor, debtor and execution creditor, and between co-tenants of the inheritance."

One can, of course, only speculate as to what Chief Justice Gibson would have said of questions between a prior real property mortgagee

16. This is illustrated by the following passage from the opinion:
"In Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits, shall have been found by an inquest insufficient to satisfy the debt in seven years, not only might this conservative provision be evaded, but a cotton spinner, for instance, whose capital is chiefly invested in loose machinery, might be suddenly broken up in the midst of a thriving business, by suffering a creditor to gut his mill of everything which happened not to be spiked and riveted to the walls, and sell its bowels not only separately but piecemeal." Voorhis v. Freeman, 2 W & S 116, 119 (Pa. 1841).
and the holder of a perfected purchase money interest in a chattel thereafter affixed to the realty or used in an industrial plant. It seems clear enough, however, that he would have recognized that different policy considerations were operating in such a case and that he would have attacked the problem in the light of those considerations.

**Early Cases**

Let us, then, trace the subsequent development of the rule of Voorhis v. Freeman to see the various applications of the doctrine.

In the same year in which Voorhis was decided, the doctrine was reiterated in Pyle v. Pennock, where the property was not only rolls not in place in a rolling mill, but certain iron plates held in place by their own weight on the floor of a bar-iron mill. The contest was between a voluntary assignee for creditors and a purchaser of the realty at a subsequent sheriff's sale under a mortgage. Applying the "part of the freehold" classification, the purchaser of the realty prevailed.

Eleven years later the court was faced with the contention that a mortgage of the Emmaline Furnace made when it was run by water power, did not cover a subsequently installed steam engine, boiler, bellows and other equipment, paid for in full by the mortgagor. The machinery was attached by bolts to bed plates in the walls and could be removed by backing the nuts off the bolts.

The contending parties here, however, were a second mortgagee and the mortgagor's brother who obtained a judgment against the mortgagor. The mortgagor gave his creditor-brother a bill of sale to the steam power plant, and his brother removed the power plant from the furnace. To the contention that since this machinery had been installed long after the mortgage was given, it could be removed without doing any wrong to the mortgagee, the court said:

"But this is not so. As the mortgagee may suffer by the depreciation of the property, arising from fluctuations in value, from accident, and from neglect, so he may be benefited by its appreciation, whether the same arises from the proper cultivation and improvement of the property, or from any other cause. No other rule would be at all practical."

The quoted passage, however, relates to property bought and paid for by the mortgagor, and therefore does not necessarily apply to the

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18. 2 W & S 390 (Pa. 1841).
20. Roberts v. Dauphin Deposit Bank, supra note 19 at 76.
perfected security interest of an unpaid conditional vendor of a chattel affixed to the realty.

In 1857 Christian v. Dripps was decided. Aside from its being a case not involving a rolling mill, the issues and decision conformed to prior law. The fact that a lathe had been contributed to the plant by one becoming a partner after the mortgage was placed did not prevent the mortgage lien from attaching to it, nor did the fact the lathe was but seldom used. Johnson v. Mehaffey, in 1862, again focuses our attention on rolling mills. Here the rolls had been purchased for the mill and had been delivered to it some three years before the transaction arose but had never been turned down, fitted to the mill or actually used in the mill. The court, basing its holding on the fact of no prior use in the mill, held that the rolls retained their character as chattels. The contest was between a purchaser of the rolling mill and an execution creditor of the former owner. The court said:

“A very provident man is quite sure to have on hand materials which he sees will some time be necessary for the repair of his works, or for supplying deficiencies in them; but his having them with this intention does not make them constituent parts of his works. Thus he will provide extra saws for a saw mill, or bolting cloth for a flour mill, or extra castings for the running gear, or lumber, nails, screws, and other materials to make improvements or repairs; but this prudence does not convert personal into real property, so long as the fact remains that they are not yet made constituent elements of the mill, or other structure. This fact we can ascertain and define with reasonable certainty, but we can have no measure for the ever-varying degrees of prudent forethought.”

Not until Hill v. Sewald, in 1867, do we find a case involving a conflict between the holder of a recognized interest in chattels, and the holder of a prior mortgage upon the plant in which the chattels were used. The facts are not without interest. Sewald held a purchase money mortgage on a steam powered sawmill he had sold to one Snodgrass who, shortly after his purchase, joined the “Boys in Blue.” While he was at war, the boilers he left behind him burned out, and his wife, to keep the mill fires burning, leased substitute boilers from Hill at a rental of four dollars a month, Hill reserving the right to remove the boilers at his pleasure. The court stated that the

22. 43 Pa. 308 (1862).
23. Johnson v. Mehaffey, supra note 22 at 309. The desire for a simple, easily administered rule appears not to have lingered in the law, however.
24. 53 Pa. 271 (1867).
boilers "could be removed without any other injury than taking down the boiler wall, which was built of brick and stood under a shed outside of the mill."

When Snodgrass came home again, he affirmed his wife's contract but was unable to keep up the payments on his mortgage. Sewald foreclosed. At the foreclosure sale Hill read a notice claiming title to the boilers. When Sewald refused to give them up, Hill brought an action of trover.

Although the lower court entered a judgment n.o.v. against him, Hill prevailed in the supreme court. The court's analysis was that when Hill severed the boilers from his own sawmill they became chattels in his hands. As such they came onto the land of Snodgrass, and until permanently annexed to the freehold the prior real estate mortgagee could have no interest therein. According to the court, the issue was the intention with which the chattels were placed on the real estate for use with the mill. In determining intention the court was obviously not seeking to determine the mental processes of Mrs. Snodgrass, but to weigh the conflicting interests of the lessor, the owner and the mortgagee. The decision represents, therefore, a determination that the interest of the lessor outweighed the interest of the mortgagee.

In 1868, therefore, the court saw no insuperable difficulty in holding that machinery forming a part of a manufactory was protected from seizure on execution by general creditors because considered as real estate, and therefore subject to the lien of a mortgage; and at the same time, preserving the interest of a lessor of machinery, by rejecting the claim of a mortgagee that the machinery had become real estate and thus subject to the mortgage lien in preference to the lessor's reversion. While the decision was couched in terms of the "intent" with which the chattels were affiliated with the realty, it seems inescapable that the lessor's reservation of his rights to remove the leased chattel was a factor influencing the finding as to the owner's intent, at the time of affixation, not to make a permanent addition to the realty.

Bailment Lease Cases

From the Civil War to the depression of the 1930's, the interest of one denominated as a lessor, even though only a bailment-lessee, seemed to prevail. In Collins v. Bellefonte Central R.R. Co., in 1895,

the interest of a lessor of locomotives prevailed over the purchaser at the sheriff's sale under a prior real property mortgage covering the railroad and its rolling stock. The mortgage contained a very broad after acquired property clause. At the sheriff's sale Collins, the lessor who was a substantial stockholder in the railroad, read a notice of his interest. The locomotive was used by the railroad under a lease containing an option to purchase. If the option were exercised all prior rentals would be applied on the purchase price. In other words, the property was held on bailment lease. The court permitted the lessor to recover in replevin even though the lease had not been filed as provided in the railroad equipment statute.

The significant passages of the opinion were:

"... [T]here was abundant proof in the case that Collins was the actual owner of the property claimed by him on his writ; ... [I]t never was property 'acquired' by the railroad company under the description in the mortgage, unless acquired by the lease from Collins; and the Company up until after the sale on the mortgage never pretended to assert possession in hostility to Collins' title. Nor if notice to the purchaser at that sale was given, as is contradicted, would the Act of 1883 operate to divest his title . . . ." 26

Thus, the court had no difficulty in disposing of a mortgagee's claim based, not only on the doctrines of accessions or fixtures, but also on the terms of an after acquired property clause. Furthermore, since the case involved a railroad, statutory authority to mortgage chattels as well as the realty existed 27 so that a classification of realty was not necessary in order to spread the lien of the mortgage to the locomotive. Yet the court adopts the conventional approach that the mortgage only attached to the railroad's interest in the property, subject to the perfected rights of others therein at the time of acquisition by the railroad company. 28

Two years later, a federal court sitting in Pennsylvania, applied Pennsylvania law to a bailment lease of a refrigeration plant in a brewery, even as against a subsequent mortgagee without notice of the lease. 29

A decade later, in a case involving a bailment lease of boilers to a tenant operating a paper plant on leased premises, the court had

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27. See the Act of June 12, 1878, P.L. 183 and particularly the preamble thereof.
no difficulty in protecting the bailment lessor’s right to remove the boilers as against the contention of the mortgagee of the landlord that the boilers were realty subject to his mortgage lien. Wetherill v. Gallagher, the case so deciding, is also significant because the boilers obtained on bailment lease replaced old boilers which the tenant had removed. The court refused to condition the bailment lessor’s right of removal upon the filing of an undertaking to replace the old boilers which were still lying on an adjoining lot. The ground for this refusal was that the bailment lessor had not participated in the removal, and the mortgagee’s action for waste lay only against the tenant.

In 1925 the court decided a replevin action against the purchaser at a bankruptcy sale of the Giles Manufacturing Company, brought by a salesman of the bankrupt who had purchased and paid for fifteen knitting machines and leased them to the bankrupt knitting mill under a bailment lease. The court permitted the bailment lessor to recover, even though the bailment lease contract was not reduced to writing until two weeks after the knitting mill was in possession of the machines and notwithstanding the fact that the machines were consigned directly to the knitting mill by the machinery manufacturer. The machines were, however, marked with the salesman’s name as owner and lessor, and there was no question but that he had paid for them.

It apparently did not occur to anyone connected with the case, including the justices of the court, that it was worth arguing, as against a bailment lessor, that the machines had become realty and passed with the sale of the real estate free of the chattel interest of the bailment lessor.

When the point was later argued in 1932, in American Laundry Machinery Co. v. Miners Trust Co. of Nanticoke, the result was the same. This case involved two bailment leases of laundry machinery to a commercial laundry, one made before and one after the laundry company placed a mortgage on its land and buildings. The bailment lease device was, of course, valid as against creditors without recordation or filing. The mortgagee contended that the machinery had become real estate under Voorhis v. Freeman. The lower Court, however, found to the contrary, based upon the terms of the bailment lease and the fact that the machinery was either held in place by its own weight, or was screwed or bolted in place, so that removal was

30. 217 Pa. 635, 66 Atl. 849 (1907).
possible without physical injury to the structure. On appeal, the decision was affirmed in an opinion of several pages citing several cases, but denominated per curiam.\textsuperscript{83}

Other Applications

The doctrine of Voorhis v. Freeman, during this period flourished in other contexts, however.\textsuperscript{84} It was applied, in Ege v. Kille,\textsuperscript{85} to permit an innocent trespasser to offset, against a claim for mesne profits, the value of the permanent improvements made by him during his occupancy including machinery that became a part of the realty. Two years later the court held as against general creditors that the vendor's purchase money mortgage covered machinery, even though to convey the property the parties used both a deed and a bill of sale.\textsuperscript{86} In one amusing case just before the turn of the century a creditor's levy on steam radiators was permitted to prevail over the claim of the mortgagee. The latter prevailed as to the pipes in the walls. The court said:

"That a steam-heating apparatus is indispensable to the occupancy and enjoyment of a dwelling house as such cannot be pretended. . . . That as a means of heating dwellings it may in a short time be superseded by something superior to it seems but a reasonable expectation." \textsuperscript{37}

Titus v. Poland Coal Company,\textsuperscript{88} another trespasser case, required the trespasser to pay to the landowner the value of an electric fan and motor he had removed from colliery buildings after a final ejectment order.

Thus, prior to the depression of the 1930's, with but one minor exception in a lower court,\textsuperscript{39} the bailment lessor's interest was preferred
over that of the prior real property mortgagee. It now remains to con-
sider the fate of the conditional vendor whose contract was originally
regarded as a fraudulent device.

Conditional Sale Cases

In 1906, before any statutory protection was given him, a condi-
tional vendor prevailed over the prior real property mortgagee as to
to "engines and fixtures for the purpose of generating electric light and
power" in an amusement park. At the time of installation the park
property was subject to a mortgage containing an after acquired
property clause securing an issue of bonds. At the receiver's sale
the conditional vendor gave notice of his claim. The court, in *Wickes
Bros. v. Island Park Ass'n* 40 permitted recovery by the conditional
vendor, saying:

"A purchaser at the receiver's sale, with notice, or a holder of
bonds secured by a mortgage given before the machinery was
sold, had no higher right than the association."

A few years later, in *Bullock Electric Manufacturing Co. v. Lehigh
Valley Traction Co.*, 41 a similar issue arose involving a conditional
sale of electric generators to a street railway company. The generators
were installed in the company's power plant, replacing generators in-
 stalled with bondholders money obtained from the first mortgage bonds
of the company. Removal could be effected with but slight physical
damage. There was still no statute validating conditional sales and,
therefore, a judgment creditor's levy on the generators, if they were
classified as personalty, would have come ahead of the interest of the
conditional vendor.

The action before the court was replevin by the conditional vendor
against the federal equity receivers operating the street railway. The
court applied the *Voorhis v. Freeman* doctrine to spread the lien of
the mortgage to the generating equipment. Another ground for the
decision was that, the corporation being insolvent, the federal equity
receivers appointed on behalf of the bondholders had the rights of a
levying creditor and so prevailed over the conditional vendor. 42 Finally,
in disregard of the standard bailment lease practice, the court said

40. 229 Pa. 400, 78 Atl. 934 (1906).
41. 231 Pa. 129, 80 Atl. 568 (1911).
42. Apparently the law of Pennsylvania gives the receiver of an insolvent corpo-
ration the rights of a levying creditor, but a receiver for a solvent but embar-
nassed corporation has no higher rights than the corporation he represents.
that replevin was not the proper form of action as the generators had become realty.

Between Wickes and Bullock two points of distinction can be made. Electric lighting could not have been considered as essential to an amusement park in 1906 as electric power was to a street railway. But what of power for the amusement park's machines? Then, the contending parties were different. In Wickes the issue was between the conditional vendor and a purchaser at a sheriff's sale under a mortgage, and in Bullock the issue was between the conditional vendor and federal equity receivers who represented general creditors and had, under applicable Pennsylvania law, the rights of an execution creditor. The court, therefore, had the choice of reversing a long line of precedent holding in favor of levying creditors against the conditional vendor, or of reaching the very result contended for in Voorhis v. Freeman, namely, spreading the lien of the mortgage to machinery so as to prevent levying creditors from effecting a piecemeal dismemberment of the plant.

In 1915 a general conditional sales act was passed, and shortly thereafter the conditional vendor to a mining company of a motor generator set having a value of $4,300 found his claim to priority over his vendee's landlord, and the landlord's mortgagee, before the court. The set was installed by the tenant as a part of his obligation under the lease to install some $50,000 of improvements, to become the landlord's property. The conditional sale contract was duly recorded under the Act of 1915. The landlord and his mortgagee contended for priority on the ground that the generator set had become realty. The court agreed with this contention, conceding that in ordinary circumstances the doctrine of Titus v. Poland Coal Co. and allied cases would apply. Notwithstanding this concession, however, the

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43. Act of June 17, 1915, P.L. 866. The language relating to chattels affixed to the realty reads as follows:

"Every such contract for the conditional sale of any goods or chattels, attached or to be attached to any real property or chattels real, shall be void as against subsequent bona fide purchasers, or encumbrances of such real property or chattel real, without notice, and as to them the sale shall be deemed absolute unless such contract shall have been recorded and indexed, as herein provided, before such goods or chattels are so attached, or before the date of such purchase or encumbrance of such real estate or chattel real.

"Except as above provided, said goods or chattels shall not, by reason of their being attached to any real property or chattels real, become an accession thereto; but shall be treated as severable, and subject to removal as against the conditional vendee, his heirs, executors, administrators, successors, and assigns, and also as against all other persons having any interest in or liens against such real property or chattels real, upon the tender of a sufficient bond to all such persons holding prior interest in or liens against the same, conditioned for repairing all damage caused by such severance and removal."

45. See supra note 39.
holding was in favor of the conditional vendor who had complied with the terms of the 1915 Act. The statute was also held constitutional against the contention that it was special legislation changing the method of collecting debts and providing a new type of lien.\footnote{46}

In its language relating to the fixture problem the wording of the 1915 conditional sales act is strikingly similar to the wording of Section 9-313 of the Uniform Commercial Code which governs the problem today,\footnote{47} and about which more must be said later. One can, of course, only speculate as to what future cases would have held had the statutory language remained unchanged. The subsequent statutes injected a test based upon a verbal formula of removal “without material injury to the freehold,”\footnote{48} and thereby gave judges, learned in the law that deemed conditional sales a fraudulent device to be striken down wherever possible, an excuse to continue to discriminate against the conditional sale.

A legislative oversight provided the first opportunity and foreshadowed the events to come. The 1925 legislature adopted two conditional sales acts, which were signed by the Governor two days apart. One was the Uniform Act,\footnote{49} and the other a modification of

\footnote{46. PA. CONST. art. 3 § 7.}
\footnote{47. Compare the wording of the 1915 Act set forth in note 43 supra, with the provisions of Section 9-313 of the UNIFORM COMMERCIAL CODE, as follows:

"(1) When under other rules of law goods are so affixed or related to the realty as to be a part thereof, a security interest in such goods which attaches before they become part of the realty takes priority as to such goods over the claims of all persons who have an interest in the realty except

(a) a subsequent purchaser for value of any interest in the realty; or

(b) a subsequent judgment creditor with a lien on the realty; or

(c) a prior encumbrancer of the realty to the extent that he makes subsequent advances provided that the purchaser or lien creditor becomes such or the prior encumbrancer makes such advances without knowledge of the security interest and before its perfection. A purchaser of the realty at a foreclosure sale is a subsequent purchaser within this Section unless he was the prior encumbrancer."

48. This was first injected in the Act of May 1, 1923, P.L. 117, where the priority provisions (§ 2) read as follows:

"Third. As against a prior mortgagee or other prior encumbrancer of the realty, who has not assented to the reservation of property in the chattels, if any of the chattels are so attached to the realty as not to be severable without material injury to the freehold, the reservation of property in the chattels so attached shall be void, notwithstanding the filing of the contract or statement, unless such injury, although material, be such as can be completely repaired, and the seller before retaking such chattels furnishes or tenders to such prior mortgagee or encumbrancer a good and sufficient bond conditioned for the immediate making of such repairs. Prior, as used in this paragraph, refers to the time of attaching the chattels to the realty."

49. Act of May 12, 1925, P.L. 602. As at first adopted, Section 7 provided:

"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."

(Balance of section relates to situation where goods are severable without material injury.)
the Act of 1923 applying to conditional sales of goods affixed to the
realty.\textsuperscript{50} 

\textit{Beloit Iron Works v. Lockhardt}\textsuperscript{51} involved the rights of a condi-
tional vendor of a so-called “cylinder machine” to a paper mill, and a
receiver of the insolvent paper mill who had, therefore, the rights
of a levying creditor. The conditional vendor had not filed his contract.

The court disposed of the Uniform Act by holding that, as passed,
it did not apply since the definition of “goods” excluded goods affixed
to the realty. How the express provisions of Section 7 of the Uniform
Act relating to the problem were to be construed, the court did not say.

Passing to the Act of May 14, 1925, the court also held that it
had no provision applicable to the instant case. Section 3 of that statute
did provide that the contract of conditional sale “shall be filed” and
voided unfiled contracts as to “subsequent mortgagees, or other sub-
sequent encumbrancers,” but did not expressly mention a receiver or
a levying creditor. Neglecting what, to the writer, appears the obvious
solution, \textit{viz.}, that the term “subsequent encumbrancer” was broad
enough to include receivers and levying creditors, the court expounded
upon the theme that a statute changing one of the common law rules
“will not be extended by interpretation to make any further innova-
tion thereon than as expressly declared in or with reasonable certainty
to be implied from the Act itself.” \textsuperscript{52}

The 1927 Legislature had, of course, promptly corrected the
1925 oversight,\textsuperscript{53} but this was after the facts in \textit{Beloit} arose and could,
therefore, be ignored by the 1928 court.

\textsuperscript{50} Act of May 14, 1925, P.L. 722. The severance provisions here were identical
with those of the Act of 1923, \textit{supra} note 48. Note the emphasis \textit{against}
protecting the conditional vendor as compared with the emphasis in favor of the chattel security
interest in the 1915 Act, \textit{supra} note 43.

\textsuperscript{51} 294 Pa. 376, 144 Atl. 283 (1928).

\textsuperscript{52} Beloit Iron Works \textit{v. Lockhardt}, \textit{supra} note 51, 294 Pa. at 383, 144 Atl.
at 285.

\textsuperscript{53} Act of May 12, 1927, P.L. 979. This Act changed the wording of the
definition of goods, and amended Section 7 to read as follows:

"First. As against a subsequent purchaser, subsequent mortgagee, or other
subsequent encumbrancer of the realty, for value and without notice of the
reservation of property in the goods, such reservation shall be void as to any
goods so attached to the realty as to form a part thereof, unless the conditional
sales contract, or a copy thereof, shall be filed, as required in section six, before
such purchase is made or such mortgage is given or such encumbrance is
effected. 'Subsequent,' as used in this paragraph, refers to the time of attach-
ing the goods to the realty.

"Second. As against an owner, a prior mortgagee, or other prior en-
cumbrancer of the realty, who has not assented to the reservation of property
in the goods, if any of the goods are so attached to the realty as not to be
severable without material injury to the freehold, the reservation of property
in the goods so attached shall be void, notwithstanding the filing of the con-
tact or a copy thereof, unless such injury, although material, be such as can be
completely repaired, and the seller, before retaking such goods, furnishes or
tenders to such owner, prior mortgagee, or encumbrancer, a good and sufficient
Background Cases on Fixtures

Before considering in detail the cases under the 1925 and subsequent conditional sales legislation, two additional and oft-cited background cases must be discussed.

The first of these cases was Commonwealth Trust Co. of Pittsburgh v. Harkins, 54 decided in 1933. The contest was between the federal equity receivers of an embarrassed but solvent corporation, and the holder of a second mortgage. The actual petition before the court was brought by the receivers to set aside a sale on foreclosure of the mortgage of certain tools, jigs, dies and machinery included in the sale as realty.

One unusual facet to the normal situation was present here. The machinery, tools, jigs and dies, except for their scrap value, and possibly except for expensive alterations, were suitable only for the manufacture of patented articles. The patents were not covered by the mortgage, and so passed to the receivers. The receivers argued that the mortgagee and any purchaser could not use the machinery, jigs and dies and so these items should be held to pass with the patents. The court, evidently feeling that a deadlock would force a compromise beneficial to all, ruled otherwise, saying:

"We think the facts that the machines are removable without injury to the property, and that the patterns, jigs and dies were made solely for the purpose of manufacturing patented machinery and the patents are owned and controlled by the printing company, if admitted, do not take them out from under the lien of the mortgage in view of the rules which have been laid down by us in a number of cases and which, accordingly, have become rules of property . . . ." 55

However, the so-called "rule of property" did not prevent the court from envisaging a different result in other situations, as the court also said:

"This is not the case of the mortgaging of a bare piece of land and the erection of a building thereon by a subsequent purchaser of the land. Nor is it the case of the erection of a build-

54. 312 Pa. 402, 167 Atl. 278 (1933).
The second of the two cases is Clayton v. Lienhard. Here a sprinkler system was installed under a bailment lease at the time a building was being erected. The owner of the realty and the bailment lessor agreed, in the bailment lease contract, that the system should remain personal property and be subject to removal. The owner defaulted on an early installment, and the bailment lessor filed a mechanics lien against the building. The defaulting owner made three arguments against the filing of a mechanics lien. First, he argued that the sprinkler system was not a proper subject for a mechanics lien; second, that no title to the sprinkler system had passed to the owner and so no lien could be filed, and, finally, that the specific agreement that the system remain personal property operated as a waiver of the right to file a mechanics lien. The court, obviously sympathetic to the installer, held against the defaulting owner of the building on all points. One holding was that the bailment lease agreement was a contract of additional security, and that the installer had not thereby waived any other legal remedies he might have.

To sustain the bailment lessor's right to file a mechanics lien, the court, in an opinion that has become a landmark in the Pennsylvania law of fixtures, divided chattels or goods in some way relating to the realty into the three following classes:

1. Those articles that are manifestly furniture and are not peculiarly fitted to the property with which they are used. These always remain personalty.

2. Those which are so affixed to the realty that they cannot be removed without material injury to themselves and to the real estate itself. These articles become real estate despite the intent of the parties.
3. Those which, although physically connected with real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves or the property to which they are annexed; these become part of the realty or remain personalty depending upon the intention of the parties at the time of the annexation; in this class fall such chattels as boilers and machinery affixed to reality for the use of an owner or tenant but readily removable.\(^{61}\)

The court next turned to an examination of the particular sprinkler system then before it. Since the system had been planned as an integral part of the original construction, with pipes buried in the floor and walls, it was quickly placed in the second class, thus vindicating the installer's action in filing his mechanics lien against the entire building. Such a holding, the court concluded, did not stultify or render unenforceable the contract of bailment lease. As between the parties, the court said that the owner can grant the right to sever a part of the reality, and upon severance it will become personalty.\(^{62}\)

Thus the installer of the sprinkler system could have his cake and eat it too. He could treat the sprinkler as realty and file his mechanics lien, or he could, if the time for mechanics lien filing had elapsed, exercise his contract right to sever and reconvert to personalty. Or could he? What about the lien of a prior real property mortgage?

**Summary of Law Before Eatmor Cases**

At this point, in view of the cases we next must consider, it may be advisable to summarize briefly the cases we have discussed. *Voorhis v. Freeman* introduced the so-called industrial plant mortgage doctrine as a rule applying between mortgagee and levying creditor, as much to ensure the benefit of the inquisition statute to mill owners as for any other policy. The opinion expressly recognized that a different rule would apply between landlord and tenant. The rule was applied in

99 Pa. 320 (1882), to a Kentucky case as to a coal tipple and to a Massachusetts case as to a house. Later the court cited Kinneen v. Scenic Railways Co., 223 Pa. 390, 72 Atl. 809 (1909) (scenic railway structure as part of existing building), *In re Morrison, Jones, Taylor, Ltd.*, 1 Ch. 50 (1914), and also cases from Arkansas, California, Delaware, Iowa, and New York.

61. For this class the court cited American Laundry Machinery Co. v. Miners Trust Co., 307 Pa. 395, 161 Atl. 306 (1932) (Here again the reference to this case gives no indication of the subsequent cavalier treatment to be accorded it. See *infra* note 79); Ridgway D & E Co. v. Werder, 287 Pa. 358, 135 Atl. 216 (1926); Bullock Electric Mfg. Co. v. Lehigh Traction Co., 231 Pa. 129, 80 Atl. 568 (1911); Wickes Bros. v. Island Park Ass'n, 229 Pa. 400, 78 Atl. 934 (1911); Wick v. Bredin, 189 Pa. 83, 42 Atl. 17 (1899); Hill v. Sewald, 53 Pa. 271 (1867); Harlan v. Harlan, 20 Pa. 303 (1853); Shell v. Haywood & Snyder, 16 Pa. 523 (1851); and White's Appeal, 10 Pa. 252 (1849).

many situations, but in the case of a conflict between a prior mortgagee and the bailment lessor of machinery, the court consistently favored the only recognized form of chattel security, the interest of the bailment lessor. The verbal formulae found in the opinions to the effect that the issues are resolved according to the "intention of the parties" or because of affixation for a "temporary purpose," of course are not tests that are of any real validity when the issue involves the rights of a prior real property mortgagee who has no part in the acquisition of the chattel. The intent, even the so-called objective intent gathered from actions and not from contractual declarations, of vendor and vendee of the chattel should not affect the rights of the mortgagee. The real issue should be a frank weighing of the policies to be served by a decision in favor of the prior mortgagee, or his successors, and the policies to be served by a decision favoring the holder of a purchase money interest in the new machinery.

The Eatmor Chocolate Co. Cases

These conflicting interests first held the stage under the 1925 Act in a case involving theatre seats sold to a theatre on conditional sale in 1930 with the contract properly filed under the Uniform Act as amended by the 1927 amendment. The real property mortgage was placed in 1923. The mortgagee had bid the property in at the sheriff's sale and had sold the property to the defendant in the action of replevin brought by the conditional vendor. The court applied the Conditional Sales Act literally and ruled against the purchaser of the


64. The basic issue is whether the policy of favoring subsequent purchase money financing is to prevail, or the policy of increasing the security of the prior mortgage is to be favored. Yet cases have gone to the jury under instructions to find the "intention" of the mortgagor at the time of affixation of the chattel. See, e.g., Benedict v. Marsh, 127 Pa. 309, 18 Atl. 26 (1889) (character of engine, boiler, and machinery, bolted to blocks, set in ground, purchased and attached after judgment lien attached to land is for jury and evidence of intent to purchase as a portable saw mill is admissible). Cf. In re Ginsberg, 255 F.2d 358 (3d Cir. 1958) (evidence of intention not relevant where no showing that intention existed at time of affixation); cf. also Albert v. Ulrich, 180 Pa. 283, 36 Atl. 745 (1897) (mill owned by wife, operated by husband, but not as tenant, and machinery admittedly was removable by tenant as trade fixture, but as husband was not tenant, it was presumed he "intended" a gift to his wife, for, as it turned out, the benefit of the mortgagee).

On analysis, is not the policy favoring removal of trade fixtures by a tenant, a vote in favor of a policy of modernization and a vote favoring the one whose money purchased the machinery?

realty, because he was a subsequent purchaser against whom the statute preferred the interest of the conditional vendor. The court also stated that its decision was consistent with its ruling in *Clayton v. Lienhard.*

Thus, when properly protected by statute, the conditional vendor prevailed over the prior mortgagee under the 1915 Act and again under the 1927 statute. Or so the cases at this point would lead one to believe. And, as we have seen, the bailment lessor also prevailed.

The court was next faced with five appeals arising out of the financial embarrassment of a chocolate candy company called the Eatmor Chocolate Company. Perhaps the ensuing difficulties were caused by the fact that the court heard simultaneously two cases involving conflicts between the prior mortgagee and receivers representing general creditors and three cases involving conflicts between the prior mortgagee and conditional vendors, but more probably the trouble was with the language of the 1925 and 1927 versions of the Uniform Conditional Sales Act, which had departed from the crisp, clear language of the 1915 statute and had introduced the statutory test of removability “without material injury to the freehold,” or if the injury were material, but was capable of being completely repaired, then the conditional vendor’s right of removal was conditioned upon the giving of a bond to reimburse the prior mortgagee for the cost of necessary repairs.

In the *Eatmor* cases involving the conflict between the mortgagee and the receivers for a solvent, but embarrassed corporation, the lower court held, on the authority of prior industrial plant mortgage cases that the mortgagee prevailed. This holding was affirmed almost entirely on the lower court’s opinion, with an added reference to the *Bullock* decision.

In the cases involving conditional sales, all of which involved various failures to comply with the requirements of Section 7 of the

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66. See *supra* note 57.
68. See *supra* notes 48, 49, and 50.
69. In Pennsylvania, the rights of a receiver for a solvent but embarrassed corporation are apparently no greater than those of the corporation itself. The receiver for an insolvent corporation has, however, the rights of a levying creditor.
70. Central Lithograph Co. v. Eatmor Chocolate Co., *supra* note 67, 316 Pa. at 300, 175 Atl. at 697.
Conditional Sales Act, the lower court ruled in favor of the conditional vendor in two of the cases, both involving candy machines removable with but slight physical damage to the realty, although responsible for one half, in one instance, and one third, in the other, of the factory's candy output. In the case of a refrigeration machine, ammonia condenser and motors pertaining thereto, where the cost of removal would exceed $2,000 and the machinery had been rather completely integrated with the former machinery, the lower court's ruling was in favor of the mortgagee.

In the candy machinery cases, the lower court held that the ease of physical removal took the cases out of Section 7, and that, therefore, a prior mortgagee had no standing to complain of a failure to file under the act. The lower court rejected the mortgagee's contention that the statutory words "severable without material injury to the freehold" meant "severable without diminishing the productive capacity of the plant," stating: "If the mortgagee's theory were to be adopted, no vendor could make an effective conditional sale with any purchaser whose plant was mortgaged."

The Pennsylvania Supreme Court, however, thought otherwise, saying:

"To give the language used the meaning for which appellee contends and to which the lower court assented would be to change our common law, and 'a change in the common law cannot be presumed; it must appear to have been meant, or it will be held not to have been made.'..."

To determine what the common law meant by "the freehold," the court quoted at length from Voorhis v. Freeman, and Commonwealth Trust Co. v. Harkins, without indicating that the issues there involved were between mortgagee and general creditors; without in any way indicating Chief Justice Gibson's "I speak not of matters

71. For one thing the description of the realty was not signed by the seller; the contract was not filed within 10 days after the making thereof nor was it refiled within 30 days prior to the expiration of 3 years from the original filing thereof. This last fault was excusable, perhaps, as the receivership has intervened. Given the Pennsylvania hostility to conditional sales, the other defects would seem sufficient to dispose of the case, especially in a jurisdiction later depriving a chattel mortgagee of his lien because a duly acknowledged chattel mortgage was not witnessed. See Arcady Farms Milling Co. v. Sedler, 367 Pa. 314, 80 A.2d 845 (1951).

72. Central Lithograph Co. v. Eatmor Chocolate Co. (Appeal of Eline's) and Ibid. (Appeal of Minneapolis Securities Corp.), supra note 67.

73. Ibid (Appeal of Ball Ice Machine Co.), supra note 67.

74. The passage from the lower court's opinion is taken from the record on appeal. The passage from the opinion of the Supreme Court is from Appeal of Eline's, Inc., supra note 67, 316 Pa. at 309, 175 Atl. at 701.

75. See supra notes 10 and 54.
between landlord and tenant limitation; or the distinction, recognized in the Harkins case, of cases involving the interest of a bailment lessor. The prior cases were distinguished by admitting that

". . . while [they were] cases of conditional sales and a bailment lease in which we decided that the conditional vendor or lessor had the right to remove the property, [they] are none of them cases of manufacturing establishments in which the removal of the property sold would impair the integrity of the plant." 77

The American Laundry Machinery Co. case was also brushed aside by stating that the case

"was decided by us per curiam and the broad question here presented was not passed upon. The point in issue, whether the machinery was personal or real property, was decided solely on the intention of the parties when it was installed. This is not the controlling factor in the present case." 79

These purported distinctions do not coincide with the holdings or the discussion in the cases themselves. 80 It appears that the court

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76. See text at note 56 supra.
77. Central Lithograph Co. v. Eatmor Chocolate Co. (Appeal of Ball Ice Machine Co.), supra note 67, 316 Pa. at 315, 175 Atl. at 702. The cases so distinguished were Wickes Bros. v. Island Park Ass'n, note 40 supra; Ridgway Dynamo & Elec. Co. v. Werder, note 44 supra; National Theatre Supply Co. v. Mishler Theatre Co., note 65 supra and Moller, Inc. v. Mainker, 314 Pa. 314, 171 Atl. 476 (1934). The Court does not discuss why loss of electricity does not impair the integrity of an amusement park (Wickes), a motor generator set the integrity of a mine (Ridgway), seats the integrity of a theatre (Mishler) or a pipe organ the integrity of a theatre (Moller, Inc.).
78. See text at notes 32 and 33 supra.
80. See supra note 77. As to the American Laundry Machinery Co. case the quoted statement may literally be true under the language of the per curiam opinion, which was several pages long. The statement ignores the following from the opinion of Valentine, J. in the C.P. Court of Luzerne County.

"The main contention of the defendant is, that as the machinery in question was necessary to the operation of the plant, it became a fixture, and as such a part of the real estate. Titus v. Poland Coal Co., 275 Pa. 432. . . ."

Record on appeal p. 16a. This puts the industrial mortgage doctrine squarely in issue!

The purported distinction also ignores the entire issue as tendered by Appellant in its brief, namely that the machinery had become realty (brief of appellant p. 35) and its lengthy citations from Bullock v. Traction Co. (brief of appellant p. 47), the discussion of Case v. L'Oeble, 84 Fed. 582 (brief on appeal pp. 38-39) and the entire arguments of apparent ownership in the mortgagor created by the bailor when he installed machinery creating a laundry in an empty building.

The chronology of the American Laundry case was 1st a bailment lease, 2nd a mortgage of land, buildings and machinery, with a clause covering after acquired machinery, and 3rd a subsequent bailment lease of additional machinery. The bailment lessor won on both leases.

That the lower court did not decide the case solely on the intent of the parties is also indicated by the following passage from its discussion of the case:

"As between the Laundry Company and the intervening Trust Company it might be inequitable to regard the machinery as personalty, so also as between the Trust Company and other creditors of the Laundry Company. But does it
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Construed the words “material injury to the freehold” so as to compel the holder of a legislatively recognized chattel security interest to give a gift to a prior real estate mortgagee. Thus, the real estate mortgagee was given greater rights than he had been given in the prior decisional law.

Equally noteworthy is the fact that the court did not prefer the interest of the prior real property mortgagee upon any theory of vested property rights not subject to legislative change, but purely as a matter of statutory interpretation against a change in what the court, erroneously as this writer believes, conceived the common law to be.81

Cases After the Eatmor Decisions

What the legislature conceived the law to be, was rather promptly made clear by the amendatory act of 1935, which specifically provided that chattels subject to conditional sales agreements did not become part of any industrial plant.82 Strangely, only one case has been found under the 1935 amendment, and this, as we shall see, gave it but a passing mention.83 The other cases all involve the “material

81. The court said “To give the language used the meaning for which the appellee contends and to which the court below assented would be to change our common law and a change from the common law cannot be presumed; it must appear to have been meant or it will be held not to have been made.” (citing cases).

82. Act of July 12, 1935, P.L. 658 amended § 7 of the Uniform Act to read in part, “Goods to be affixed to the 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...”

injury to the freehold" language. Once the Eatmor construction of this language is adopted, the provision for severing, even though the injury is material, upon posting a bond to cover the cost of repairs, becomes meaningless, as the amount of the damage to be repaired would be the cost of replacing the machinery being removed.84

The interpretation preferring the prior real estate mortgagee established in the Eatmor case furnished precedent for many situations. The conditional vendor lost in the following cases: a furnace in a private house,85 elevators in a multi-story office building,86 beer meters required by law to be installed in a brewery,87 quarrying machinery for conversion of a coal mine to a stone quarry,88 and elevators in a five story apartment building.89 The doctrine did not prevent a conditional vendor from removing a pipe organ from a church, the prayer book of which nowhere required the playing of an organ,90 or a conditional vendor of furniture to a hotel from repossessing the furniture.91

84. This probably accounts for the absence of cases on whether the tendered bond was sufficient, and for the frequent failure to tender any bond, and to attempt to show that the machinery was in no way "affixed", and hence did not come within § 7 at all. See, e.g. In re Lloyd, 6 F. Supp. 515 (M.D. Pa. 1934) (conditional sale of refrigeration machinery and a failure to file for two and one half years not fatal under § 5 of Uniform Act, § 7 not applicable); cf. In re Inber Bros., Inc., 5 F. Supp. 513, aff'd sub nom. Lamson v. Blad, 68 F.2d 369 (3d Cir. 1933).


86. Medical Tower Corporation v. Otis Elevator Co., 104 F.2d 133 (3d Cir. 1939). In this case the district court held for the conditional vendor. It distinguished the Eatmor cases on the ground that in those cases the conditional sales contracts had not been properly filed, and that the amendatory act of 1935, supra note 82, showed that the proper criterion under the 1927 act was physical damage.

87. In re Penn Brewing Co., 21 F. Supp. 633 (M.D. Pa. 1937) aff'd sub nom. Smith v. McKenna Brass Co., 98 F.2d 537 (3d Cir. 1938). Here also on other machinery the mortgagor's consent to removal under the conditional sale contract bound him as purchaser at foreclosure sale. Obviously, on a properly filed contract, all subsequent purchasers would be bound, including, perhaps purchasers at a foreclosure sale. What of purchasers at a foreclosure sale under a mortgage where the mortgagee is entitled to prevail over the conditional sale? Presumably the purchaser must succeed to the rights of the mortgagee. But cf. National Theatre Supply Co. v. Mishler Theatre Supply Co., supra note 65 (subsequent purchaser lost).

88. McClure v. Atlantic Rock Co., 339 Pa. 296, 14 A.2d 124 (1940) (But here interest of holder of purchase money interest was not involved. Issue was between creditor and tenant and purchase money mortgagee of landlord who bought as operating coal plant, tenant converted to quarry). A similar holding was made in Continental Bank & Trust Co. v. American Assembling Machine Co., 350 Pa. 300, 38 A.2d 220 (1944). Special factors were present in each case which further justified the holding as an exception to the tenant fixture rule.

89. Land Title Bank & Trust Co. v. Stout, 339 Pa. 302, 14 A.2d 282 (1940). Actually in this case, as in Medical Tower Corp. v. Otis Elevator Co., supra note 86, the doctrine was not necessary to the decision. On the basis of Clayton v. Lienhard, supra note 57, elevators could have been classed as being in the first class. Then, too, as the elevators were purchased by a contractor in connection with new construction, the case could have been handled as a conditional sale for resale, and the mortgagee and owner protected as bona fide purchasers in ordinary course.


On the conventional side, not involving a retained purchase money interest in a chattel, the doctrine was applied to prefer the real estate mortgagee over the trustee in bankruptcy with respect to occasionally used machinery of an ornamental iron works, to preserve the lien of a judgment on machinery of a food processing and wholesale business as against a trustee in bankruptcy where the judgment antedated bankruptcy by more than four months, to prevent the removal by a lessee of the mortgagor of electric transformers and a large air conditioning machine used in a restaurant.

Equally, it was made clear that the granting clause of the real estate mortgage need make no mention of machinery or equipment, or that a factory or industrial plant is involved.

So far as the cases are concerned, the doctrine of the “industrial plant mortgage” was thus applied to a private house, a multi-story office building, a five story apartment house, an ornamental iron works, food wholesaler, a restaurant, a stone quarry, and was considered in the case of a church and a hotel. What then, is to be considered an industrial plant?

Applications in Tax Law

Those who are troubled by a feeling that there should be a symmetry of decision in the law will be disturbed by a contemporaneous development in the law of taxation where the court says it is applying the Voorhis v. Freeman rule. In 1948, in United Laundries v. Board of Property Assessment, the court sustained the Allegheny County

94. City of Philadelphia, Trustee v. Kugler’s Restaurant Co., 52 D & C 375 (C.P. Phila. 1943) (Here, as in the Continental Bank case, supra note 88, the lessee and lessor-mortgagor were, respectively, corporations of common stock ownership and parent and subsidiary. It is possible that this relationship had a powerful influence on the result). Cf. 339-41 Market Street Corp. v. Darling Stores Corp., 355 Pa. 312, 49 At. 686 (1946) where, on an issue between landlord and tenant, the tenant was allowed to remove from a store for the sale of women’s apparel, a 3,000 pound air conditioning unit in the basement connected to the upstairs store by air ducts.
95. Roos v. Fairy Silk Mills, 334 Pa. 305, 5 A.2d 569 (1939) (first mortgage, making no mention of machinery, has prior lien over second mortgage expressly referring to machinery). See also First National Bank v. Reichneder, 371 Pa. 463, 91 A.2d 277 (1952) (first mortgage on land and appurtenances has lien on machinery subsequently placed in plant prior to chattel mortgage, not for purchase money, placed on the machinery after installation). The problem in Reichneder cannot arise under the Code since, under § 9-313, the security interest must attach before affixation or integration into the operating plant.
96. 359 Pa. 195, 58 A.2d 822 (1948), reversing 161 Pa. Super. 412, 54 A.2d 912 (1947) holding that laundry establishments did not come within the words of the statute taxing “All real estate to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries,
Board of Property Assessment in applying the industrial plant doctrine to a laundry company and including the value of all of its machinery as real estate for tax purposes. The court specifically ruled that the doctrine was not limited to manufacturing plants, ignoring the distinction in *Eatmor* of prior cases on the ground that they did not involve manufacturing plants.\(^7\)

As a result of this decision, several of the laundries later objected to the valuation of their real estate on the basis of a systematic under-assessment of similar properties.\(^8\) The gravamen of their complaint was that the Allegheny County Board was guilty of discrimination in not applying the industrial plant rule to "other industries such as cabs, theatres, service stations, automobile repair companies, restaurants, stores, office buildings, hotels, beauty shops, banks and self service laundries. . . ."

This challenge was accepted by the court in 1951, which stated that the issue was whether any of the classes of establishment mentioned by the complaining laundries was an industrial plant.\(^9\) But then the court, which had applied the *Eatmor* doctrine to an apartment house, and had approved decisions applying the doctrine to an office building and a private residence, went on to say:

"The answer to that question is self evident. By no stretch of the imagination could a bank building, a hotel, a theatre or any

\(^{97}\) Actually, the sentence making the distinction is in the alternative, i.e., that the cases either do not involve industrial plants, or do not involve machinery essential to the integrity of the operating plant. The non-essential character of the machinery involved in the cases (note 77 supra) does not seem a valid distinction in view of the actual decrees in the *Eatmor* cases, as set out in the record on appeal, which spread the lien of the mortgage to such things as the sign board in the factory, neon sign on smokestack, electric scales, boxes of electric light bulbs, house telephone system, soap dispensers in wash rooms, boxes of screws, bolts, nuts, etc., hand drills, grease guns, portable welders and hand trucks for moving materials and supplies in the factory. Excluded from the lien of the mortgage were the office furniture and machinery, one lawn mower, one garden hose and sprinkler and three step ladders. In *Reichneider*, the exclusions were the office machinery and equipment and the beer delivery trucks.

The writer confesses to an inability to understand why soap dispensers and an intra-mural telephone are essential to the operating integrity of a plant, while inability to keep records or send out bills (caused by the lack of office furniture and machinery) is not considered significant.

Yet such are the holdings under the industrial mortgage doctrine in a jurisdiction in which, under the rule that a levying creditor may not seize a railroad piecemeal, office furniture and machinery has been held to be essential to the operation of the railroad. See, e.g., McNulty Bros. v. Pennsylvania R.R. Co., 272 Pa. 442, 116 Atl. 362 (1922).

\(^{98}\) In Pennsylvania such a ground is sufficient for judicial relief from an assessment.

of the other business establishments referred to by plaintiff be considered as an industrial plaint. It is true that we sometimes speak of the ‘movie industry,’ ‘the hotel industry’ or ‘the banking industry’ but that is merely a loose use of language to convey the idea that the business is a sizeable one. In spite of that colloquialism we do not speak of the buildings housing such businesses as ‘industrial plants’... The law can do no better than to define an industrial plant as that type of establishment which an ordinary man thinks of as such. Certainly a commercial laundry comes within that definition but the other businesses here mentioned do not.”

Recent Cases

Two further cases involving conditional sales deserve mention. The first is Schnebbe Fire Protection Co. v. Sandt Estate, involving a possible conditional sale of a sprinkler system to a public garage, and salesroom for automobiles, and the conflicting interest of a prior real estate mortgagee. The case is not very satisfactory because counsel for the sprinkler vendor did not file a clear complaint, and, when his motion for judgment on the pleadings was denied, introduced little or no evidence. Nevertheless, it was obvious from the pleadings that the sprinkler system was installed long after the building was constructed, and, therefore, could have been installed in a fashion that would permit easy removal.

From an adverse judgment, the sprinkler company appealed. The parties argued whether the contract involved was or was not a conditional sales agreement; whether, under Section 7 of the Uniform Act, plaintiff could or could not remove the property as against the prior real estate mortgagee; and whether on the record before the court the sprinkler system was or was not integrated into the realty.

100. North Side Laundry Co. v. Board of Property Assessment, supra note 99, 366 Pa. at 639-40, 79 A.2d at 421. The exclusion of theatres may be a possible explanation of the holdings in Mishler supra note 63, and Moller, Inc. supra note 77. The exclusion of self service laundries must have been particularly irksome. Newspaper publishing plants have, however, been held to be within the purview of the taxing statute.


102. The record on appeal discloses that counsel declared as for money loaned, secured by a written contract! The contract was one whereby the Schnebbe Co. agreed to install a “series of fire retarding devices” and procure fire insurance at reduced rates. The garage owner made annual payments equal to the insurance premiums previously paid. The Schnebbe Co. was to repay itself over the term of the contract out of the savings in insurance rates. There was no averment connecting the sprinkler system with the “series of fire retarding devices” referred to in the contract, or to show who owned the sprinkler system before it was installed, or as to the extent of the injury that would occur both to the building and to the sprinkler system. Hence a trial was necessary.
On the basis of *Clayton v. Lienhard*, and completely ignoring the discussion in that case of the detailed integration of the particular sprinkler system into the building, and further ignoring the fact that the *Clayton* decision was one protecting the installer of the sprinkler system, the court in *Schnebbe* ruled that the sprinkler system had become real estate, irrespective of the intention of the parties, as belonging in the second of the three classes delineated in *Clayton v. Lienhard*.

The court then stated that this ruling made it unnecessary to consider questions about conditional sales.

This case involved a factual situation occurring in 1930, but not reaching the court until 1950. Such a time schedule cried out against a decision for a new trial. Actually, therefore, the case can mean no more than a holding that a conditional vendor cannot replevy a sprinkler system on pleadings which do not describe the mode of affixation or the extent of integration into the building.

Finally, we have, in the superior court, the case of *Royal Store Fixture Co. v. Patten*, which was a replevin action by the conditional vendor of a frozen custard stand and walk-in cooler erected for a tenant on land leased from defendant. The lease was dated March 2, 1953, and the conditional sales contract was dated April 13, 1953, and was duly filed on April 18, 1953. Thus the case is the only case the writer has found involving the Uniform Conditional Sales Act as amended by the Act of 1935.

Under the lease, buildings erected by the tenant became the property of the landlord at the end of the term. The landlord, however, signed a "landlord's waiver" which said that "the aforesaid equipment shall be exempt from distress for rent as long as title thereto remains in Royal Store Fixture Co." Before signing the form as presented, the landlord had added a clause stating that the waiver "shall in no other way affect" the lease.

The building was thereafter assembled on defendant's land, erected on foundations provided by the lessee, and connected to water lines, electric lines and to a cesspool.

103. See *supra* note 57.
104. See text at notes 59, 60 and 61, *supra*.
105. Actually, this was the holding of the C.P. Court on motion for judgment on the pleadings. At the trial counsel for the Schnabbe Co. sought a ruling that he could introduce evidence without prejudice to his right to appeal from the refusal to grant him judgment on the pleadings. When this ruling was not forthcoming he offered no further evidence. Decision, of necessity, had to be against the plaintiff. The Supreme Court, it seems, felt that some fifteen years of litigation was enough and rendered an opinion terminating the litigation.
The landlord contended that the building was realty, not subject to replevin, and that the waiver relating only to distress for rent did not waive other provisions of the lease vesting title in the landlord.

As is customary in Pennsylvania, the jury was asked, inter alia, to determine whether the building was personalty or realty. The jury found for the plaintiff, the conditional vendor.

On appeal, the superior court felt that *Clayton v. Lienhard* stated the controlling rule, but made the following points. First, it could not be ruled as a matter of law that the building was real estate regardless of the intent of the parties. While buildings ordinarily fell into the second class of the *Clayton v. Lienhard* trilogy, the court felt that this need not always be the case. Second, the amendment to the Uniform Conditional Sales Act in 1935 showed that there was no merit to the landlord's contention about material injury to the freehold under Section 7 of the Uniform Conditional Sales Act. Third, that the immunity granted from distress for rent included the right of the conditional vendor to remove the building on default, notwithstanding the added clause reserving all other rights.

The two most recent judicial applications of the industrial plant mortgage doctrine do not involve the major conflict of interest with which we are here concerned. *First National Bank of Mount Carmel v. Reichneder* was a conflict between a prior real estate mortgagee and a chattel mortgagee of chattels affixed or related to the realty before the chattel mortgage was placed thereon. The prior real estate mortgagee was expressly preferred by the terms of the Chattel Mortgage Act of 1945 which stated that "any real estate mortgage covering the realty and chattels attached to the realty shall remain a prior lien to a chattel mortgage placed subsequently thereon. . . ." The second case, *In re Ginsburg*, in the United States Court of Appeals for the Third Circuit, involved a conflict between the lien of a judgment entered more than four months before bankruptcy and the trustee in bankruptcy acting for general creditors, a classic case for the application of the doctrine.

110. 225 F.2d 358 (3d Cir. 1958).
Effect of the Uniform Commercial Code

Where does all of this leave us? The Uniform Commercial Code in Section 9-313, as adopted effective July 1, 1954, in clear and unequivocal language, prefers the unpaid purchase money security interest over the prior real estate mortgagee. Is there anything in the so-called industrial plant mortgage doctrine which prevents the court from giving effect to this statutory rule?

The foregoing discussion of the cases sustains, the writer believes, the conclusion that, prior to the Eatmor decisions, the court sustained the recognized chattel security interest, as against the interest of a prior real property mortgagee, in every case in which the conflict arose. As between the general creditors of the mortgagor, and others whose rights could rise no higher than the mortgagor, the industrial plant mortgage doctrine preferred the real property mortgagee. This preference is perfectly consistent with the policy against piece-meal dismemberment of industrial plants that so disturbed Chief Justice Gibson in Voorhis v. Freeman.112

Eatmor113 and subsequent cases, except the Royal Store Fixture Co.114 case, are all cases decided under a statute making the test one of material injury to the freehold, interpreted as meaning injury to the operating integrity of the thing mortgaged.115 This interpretation of the 1925 statute, it is submitted, arose largely from the well known Pennsylvania common-law hostility to the conditional sale as a chattel security device. This device has now had four decades of respectability. Judges familiar with the many uses of the conditional sale can be expected to have a more tolerant attitude toward the more definite language of the Uniform Commercial Code. Furthermore, as the court itself recognized in Eatmor, that case enunciated no great constitutional principle, it was merely a case of statutory interpretation against a change in what the court considered to be the common-law meaning of the word “freehold.”116

112. It must be reiterated that Justice Gibson, apparently, was concerned with the policy of the “inquisition” statute and the need to assure to the cotton-spinner the same ability to pay off his debts from the profits of his business as the farmer had. See supra note 16.
113. See supra note 67.
114. See supra note 106.
115. This was the test introduced under the Act approved May 1, 1923, P.L. 117, and was continued in the Uniform Act until the amendment of the Act approved July 12, 1935, P.L. 658.
116. See supra note 81.
Constitutional Issues

If the foregoing analysis is correct, the application of Section 9-313 of the Uniform Commercial Code to Pennsylvania mortgages made prior to July 1, 1954, the date of the adoption of the Code, presents no insuperable problem. The law of the obligation of contract is the law as it existed when the mortgage was made. If court or legislature subsequently enlarge a mortgagee’s rights by interpretation of a subsequently enacted statute, it is constitutional to restore the status quo. Thus, mortgages given before the Eatmor decision, or at least before the enactment of the statute it interpreted, had no rights superior to those of a recognized bailment lease interest, that is, of a recognized purchase money chattel security interest. As to such mortgages, the restoration of the interpretation placed on the Act of 1915 by the Ridgway case is clearly constitutional. As to mortgages placed in the period when the Act of 1925, as interpreted by the Eatmor cases, was in force, that is, in the decade from 1925 to the amendment of 1935, the situation is a bit more obscure. Eatmor did not refer to the industrial plant mortgage rule as a rule of property. When the court did so in Harkins it was careful to exclude cases involving the rights of a bailment lessor. The right, if it existed, of a mortgagee to divest the retained title of a vendor of a chattel, if the mortgagor should ever purchase a chattel in such circumstances, seems of a different quality from the right of an income beneficiary of a trust, which has come into being and operation, to insist upon the rules allocating funds between income and principal, and the like.

117. See, e.g., Beaver County Bldg. & Loan Ass’n v. Winowich, 323 Pa. 483, 489, 187 Atl. 481, 484 (1936).
119. See supra note 44. This case clearly disposes of any claimed invalidity under the Pennsylvania constitutional prohibition against special legislation creating new liens or altering the method of collecting debts. Pa. Const. art. 3, § 7.
120. See text at note 56 supra.
It is submitted that none of these decisions is controlling. Crawford’s Estate is summarized in the text. Winowich held unconstitutional a Deficiency Judgment Act which removed the mortgagee’s remedy completely; the statute acted directly upon the contract between mortgagor and mortgagee. Williamson’s Estate held that the repeal of a statute forbidding two commissions on principal to one who was both executor and trustee could not affect the right of beneficiaries of a trust created
The mortgagee cannot claim a vested right in all of the rules of the common law. Most courts have uniformly held that the legislature cannot give a mechanics lien general priority over a prior existing mortgage, but where the priority has been limited to the fixture installed by the lienor, or the added value so created, the change in law has been upheld even as to prior mortgages. The analogy seems apt in the situation under consideration; and in the case of security interests in chattels to be affixed to realty, created after July 1, 1954, Section 9-313 of the Uniform Commercial Code should govern the rights of mortgages created between 1925 and 1935.

**Conclusion**

What then, is the dividing line between the cases, if any, in which the interest of the prior real property mortgagee will be preferred, and those in which the subsequent financer of the chattel will prevail? It is submitted that the distinction lies in an intelligent application of the doctrines of *Clayton v. Lienhard*. That case also explains the actual decisions in the cases involving recognized chattel security interests.

Where, as in *Clayton v. Lienhard* itself, the particular apparatus or machinery is a physically integrated portion of a structure classified as real estate, the interest of the prior real estate mortgagee should be preferred. This could justify decisions preferring such mortgagee in the case of attempted conditional sales of elevators to be installed prior to the repeal against the trustee-executor agreeing to become such also prior to the repeal.

*Farmers Nat'l Bank* involved the rights, as against creditors, of one claiming under an unrecorded deed taken when by law such deeds were valid against creditors. The case is really one of statutory construction, the court concluding that the absence of a grace period for recording of prior deeds proved a legislative intent not to affect such prior deeds.

*Crawford's Estate* specifically recognized that no one has a vested interest in a rule of law as such, saying at 362 Pa. 458, 464, 67 A.2d 124, 128 (1949):

> "Where, however, the interest is inchoate or a mere expectancy the Legislature may modify or terminate it . . . . Thus in the case of inchoate dower the Legislature may modify or destroy the interest during the life of the spouse, but not after the death, as the interest becomes consummate by the death of the husband . . . ."

Statutes converting joint tenancies into tenancies in common during the life of both tenants, and converting a fee tail into a fee simple were also cited by the court.

The interest of the prior mortgagee in chattels that might later be affixed by the mortgagor seems equally a "mere expectancy."


123. See, e.g., Dunham Lumber Co. v. Gresz, 71 N.D. 491, 2 N.W.2d 175 (1942); cf. the reference to the Illinois statute in Myer v. Berlandi, 39 Minn. 438, 40 N.W. 513 (1888).

124. See supra note 57.
in multi-story buildings as a part of the original construction.\textsuperscript{125} No industrial plant doctrine need be applied here. The decision can be justified on the rationale that the particular items have lost their character as "goods" or even as "goods affixed or related to the realty" and have become realty itself. One would expect such a result to be reached in the case of bricks, lumber, mortar, structural steel and like items fashioned into parts of a building, and Section 9-313 of the Uniform Commercial Code as adopted in Connecticut, Massachusetts and Kentucky specifically so provides.\textsuperscript{126} The more difficult issues will be as to the "and like" items.\textsuperscript{127} Cases involving machinery bolted or screwed to the floors of buildings, or resting thereon of their own weight should be placed in the third classification of the \textit{Clayton v. Lienhard} trilogy.\textsuperscript{128} \textit{Eatmor} and allied cases can and should then be recognized for what they were, namely, cases interpreting a statute, the language of which is no longer applicable.

Decision in cases of the third class should be made on the basis of an evaluation of the conflicting interests before the court, and a determination of the policy to be served. As Chief Justice Gibson recognized a century ago,\textsuperscript{129} a decision between mortgagee and general creditors necessarily "speaks not" of matters between landlord and tenant, or, for that matter, between a prior mortgagee of the realty and the subsequent holder of a perfected security interest in a chattel affixed to the realty. The so-called industrial plant mortgage doctrine should be recognized, with the limitations inherent in its origin, as applying between mortgagor and mortgagee, mortgagee and general creditors of the mortgagor, and between the prior real estate mortgagee and any subsequent non-purchase money chattel security interest.\textsuperscript{130}
Thus, Pennsylvania industry will be able to secure adequate financing for expansion and modernization of plants, so necessary for business survival in the rapid technological advancement of today. And such a result will not be at all unfair to the interests of mortgagees. The lien of the mortgage will, of course, attach to the mortgagor's interest in the chattels. In the day of trouble the unpaid chattel vendor's right of removal can, of course, be conditioned upon the failure of the receiver, trustee in bankruptcy, mortgagee, or bondholders' committee to give adequate assurance of the payment of the unpaid portion of the purchase price. Thus, the interests of both real estate mortgagee and the holder of the purchase money security interest in new machinery can be protected, and neither will be forced to make an unwarranted gift to the other.

Titus v. Poland Coal Co., supra note 38; Commonwealth Trust Co. v. Hawkins, supra note 54; Pennsylvania Chocolate Co. cases, supra note 67; Ross v. Fairy Silk Mills, supra note 95; First Nat'l Bank v. Reichneder, supra note 95 and In re Ginsberg, supra note 1.

131. As was in fact recognized in Collins v. Bellefonte Central R.R. Co., supra note 25, the courts under Chapter X of the Federal Bankruptcy Act appear to divide on whether they have power to restrain a conditional vendor's exercise of the right of repossession on the ground of whether the debtor may be considered to have "property" in the chattel where title is retained by the vendor. As any one familiar with the cases on municipal debt limitations knows, the interest in preserving the "equity" built up by prior payments has been considered sufficient to make the unpaid balance under a conditional sales agreement a debt. The same interest should be a sufficient "property" to permit the reorganization court to control the exercise of the right of repossession. Such control affords additional protection to the industrial mortgagee.