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Bridgewater M. Arnold

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Recommended Citation
Bridgewater M. Arnold, Conditional Sales of Chattels in Maryland, 1 Md. L. Rev. 187 (1937)
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CONDITIONAL SALES OF CHATTELS IN MARYLAND

By BRIDGEBEATER M. ARNOLD

The purpose of this article is to collect the law of Maryland regarding contracts of conditional sale of chattels as found in Maryland statutes and in opinions of the Court of Appeals of Maryland. Occasional pertinent decisions of the Federal Courts are also to be considered. As Maryland has not enacted the Uniform Conditional Sales Act it is more than otherwise necessary to look to the decisions of the courts and to scattered statutes. There are relatively few cases in which the Maryland Court of Appeals has considered problems involving conditional sales. As a result of this paucity of decisions there are many problems arising out of conditional sale transactions which are as yet unanswered by our Court. The answer to these must await future cases in point.

DIVIDED PROPERTY INTEREST

The term "conditional sale" as used herein embraces the type of transaction in which the seller of goods delivers the possession and use to the buyer while the seller retains the property or title to the goods as security for the price until the buyer has paid all installments of the full purchase price. Such a conditional sale transaction is not considered in Maryland to be against public policy. The transaction involves a divided property interest. The seller retains the title while the buyer obtains the possession and use,
which is called by some authorities the buyer’s beneficial interest. This divided property interest has been recognized by the Court of Appeals and also by the motor vehicle law of Maryland under which the term “owner” includes any person, firm, association or corporation owning a motor vehicle or having the exclusive use thereof under a contract of purchase.4

In the event of injury to the chattel by a third person the vendor or his assignee has an interest in the chattel that will enable him to sue the tortfeasor for damage to his interest.5 The vendee’s interest was recognized in a case where a conditional vendor, having accepted possession of the goods for the purpose of storage and it not appearing that the vendee was in default, was held liable to the vendee for conversion for selling the goods to a third person.6

Where the contract gives the vendor the right to assign, his assignee acquires the assignor’s rights. “The assignment of the contract . . . by the seller carries with it the right of property, together with the right of possession for condition broken, . . .”7 After the vendor has assigned the contract to an assignee, the assignor cannot rescind the contract without the consent of the assignee, and an action by the vendee against the assignor to recover back his money

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3 "While the appellee (repairman) was chargeable with constructive notice of the title reserved to the appellant (seller) by a contract of conditional sale recorded under the provisions of the Act . . . yet it was apparent that the purchaser was permitted to have the exclusive possession and use of the car, and the repairs were essential to its operation," Myers v. Auto Company, 143 Md. 107, 109, 121 Atl. 916, 30 A. L. R. 1224, 1225 (1923); and also, “No doubt is entertained that the buyer under a conditional sales contract is, to paraphrase a clause of this sentence of section 54 (Art. 63), an owner or another person acting in the matter with his express or implied authority. Although the seller has retained the legal title as security for the payment of the residue of the purchase price, the buyer is the substantial owner. It is he who has the control, possession, care and maintenance of the machine . . . and this possession, use, and custody is exclusive of everyone else but the seller or its assignee, and of it only if and when he make a default in his obligation to pay or to perform some of the terms of the contract looking to the preservation of the security afforded by the reservation of the title in the article sold. . . ”; Credit Co. v. Marks, 164 Md. 130, 135, 168 Atl. 810, 812 (1933).
4 Md. Code, Art. 56, Sec. 173.
5 Barnes v. United Railways Co., 140 Md. 14, 22, 116 Atl. 855, 858 (1923). For right of vendee to sue see 38 A. L. R. 1337.
6 Besche v. Brady, 139 Md. 582, 116 Atl. 63 (1921).
could not be based on such rescission by the assignor. Quaere, if the contract is silent as to the right to assign, may the vendor or vendee assign his interest? Even when the contract expressly restricts the vendee’s right to transfer his interest will such a transfer be upheld?

Although the conditional sale contract may provide that the buyer shall not remove the car from the state, such a clause is construed to mean that the buyer may take the car into another state if he has the intention of returning to the original state. In Credit Co. v. Marks, the Court in construing such a clause said that such a promise did not confine the buyer of the automobile within the territorial limits of his State but was entirely consistent with driving across the boundary line with the intention of returning to the State. Such provision whether statutory or contractual was held only to import the idea of permanence in the removal.

In an action of replevin brought by the conditional vendor to recover goods upon the vendee’s default the vendee is estopped from setting up as a defense the fact that title and right to possession are in a third person, when such third person has acquired his rights as a result of the vendee wrongfully executing a mortgage on the goods.

Risk

There appear to be no decisions in Maryland on the risk of loss in the event the chattel is damaged or destroyed through neither the fault of the vendor nor the vendee. The Uniform Sales Act which is adopted in Maryland provides: "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained

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9 See Vold on Sales, 277, 285; Commentaries on Conditional Sales, 2A U. L. A. 31, 32, 46-51.
10 164 Md. 130, 140, 163 Atl. 810, 814 (1932).
12 Puffer Manufacturing Co. v. May, 78 Md. 74, 26 Atl. 1020 (1883).
13 Uniform Sales Act, Sec. 22A; Md. Code, Art. 53, Sec. 43A.
by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."14

Where an automobile was deliberately destroyed by the conditional vendor in an attempt to collect fire insurance,15 the vendor was enjoined from enforcing a confessed judgment against the vendee for the balance of the price, thereby, under these circumstances, putting the risk of loss on the vendor. In this case the vendor because he still retained the title contended that he could do as he pleased with the property although the buyer should be responsible for the purchase price. In disposing of this contention the Court said:

"We cannot agree with that somewhat arresting proposition, for it can hardly be said that the forcible seizure and destruction of a machine for the purchase price of which the appellee had given her note for $1,550 and $30 in cash was as a matter of law no concern of the appellee's."16

**Distinction Between Conditional Sales and Other Transactions**

From time to time the Court of Appeals has found it necessary to distinguish between a conditional sale and various other devices whereby one party to the transaction seeks to secure himself by acquiring or reserving either the possession or title to chattels.

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14 That the provisions of the Uniform Sales Act are applicable to contracts of conditional sale would seem to be implicit in the statement of the Court of Appeals: "The validity of these so-called conditional sales, where the contract provides that the title and ownership of the thing sold, although delivered to the purchaser, shall not vest in him until the purchase price therefor is paid, is recognized under what is known as the Uniform Sales Act, Article 83, sections 22 and 39." Dinsmore v. Maag-Wahmann Co., supra note 2. See also Williston, Sales, Sec. 1; Stieff v. Wilson, 151 Md. 597, 135 Atl. 407 (1926). Lippel, Law of Sales, 55.

15 For a case where under particular terms of insurance policy conditional vendee was denied right to recover for loss of piano from insurance company because of insured's failure to disclose that the possessed piano was under a contract of conditional sale, see Westchester Fire Ins. Co. v. Weaver, 70 Md. 536, 18 Atl. 1034, 5 L. R. A. 478 (1889).

16 Michael v. Rigler, 142 Md. 125, 136, 120 Atl. 382, 386 (1923).
Bills of Sale and Chattel Mortgages

In *Dinsmore v. Maag-Wahmann Co.*,\(^{17}\) the Court in holding that Art. 21, Sec. 44 (then Sec. 43) relating to the recording of bills of sale and chattel mortgages had no application to conditional sales, said:

"This provision, as we construe it, has no application to conditional sales where the vendor parts with the possession; the section referred to applies to cases where the vendor, the owner of the property, sells the property and retains possession of it. . . ."

In *Praeger v. Implement Co.*,\(^{18}\) the Court said:

"A bill of sale is only required where the vendor retains possession of the property sold, and a mortgage is a conveyance of property by the owner to secure the performance of a contract of the payment of a debt."

A contract for the sale of cans provided that the vendor should retain title to the cans and in the event of the vendee becoming financially embarrassed the debt should become immediately due and the vendor should be entitled to have delivered to it all the cans, filled or unfilled, remaining on hand. The vendor then had the right to sell the cans and their contents for the purpose of satisfying the debt. The Court of Appeals decided that this arrangement constituted a conditional sale as to the cans, the vendor having reserved title, and that it was a mortgage as to the contents which would be put into cans, the contents coming from a source other than the vendor.\(^{19}\)

If an agreement merely provides that only in the event of non-payment the vendor is then to own the property, that is, that the title may be given to the vendor sometime in the future, it is not a conditional sale.\(^{20}\)

\(^{17}\) 122 Md. 177, 182, 89 Atl. 399, 401, Ann. Cas. 1916A, 1270, 1273 (1914).
\(^{19}\) Roberts & Co. v. Robinson, 141 Md. 37, 18 Atl. 198 (1922)
\(^{20}\) Butler v. Gamon & Duvall, 53 Md. 333 (1879). See also Inslow v. Disharoon, 5 Atl. 469 (Md. 1886), where on particular facts of case it was decided there was not a conditional sale.
Consignment for Sale

The fact that goods are consigned for sale with the provision that the factor may retain from a sale of the property all the money in excess of the invoice price does not destroy the relation of factor and principal and render the transaction a conditional sale. It is merely a bailment for sale.\textsuperscript{21} The Fourth United States Circuit Court of Appeals, in construing a contract to determine whether it was a consignment for sale or a conditional sale, said in \textit{Reliance Shoe Co. v. Manly}:\textsuperscript{22}

"While it is true that the paper writing is called a consignment, . . . still the contract must be construed from a careful consideration of the entire language employed in the document, and the court is not bound by the name which the parties see fit to term themselves in the contract. It is less difficult to arrive at a proper construction by determining the benefits accruing and the burdens borne by the parties. It will be seen that the bankrupt had no right to return the merchandise shipped for any cause and be discharged from liability, except where the shoes failed reasonably to conform to the sample or were not the sizes ordered. No right was reserved to the Shoe Company to accept the unsold merchandise and terminate the contract. The bankrupt was required at all events to pay the Shoe Company the invoice price of the shoes. . . . There was no reservation of title, except for the purpose of securing the debt."

The Court held it to be a conditional sale.

The United States District Court for Maryland, speaking through Judge Coleman, has said:

"The feature which distinguishes a conditional sale from a consignment is that in the former the purchaser undertakes an absolute obligation to pay for the goods, while the latter is nothing more than a bailment for sale."\textsuperscript{23}

\textsuperscript{21} Sturtevant Co. v. Dugan & Co., 106 Md. 587, 68 Atl. 351 (1907).
\textsuperscript{22} 25 F. (2d) 381, 383 (1928), an appeal from In re Elchengreen, 18 F. (2d) 101 (1927).
\textsuperscript{23} In re Sachs, 31 F. (2d) 799, 800, 30 F. (2d) 510 (1929).
Lease

At times an agreement may be entered into between parties the exact nature of which it is difficult to determine. An instrument which on its face purports to be a lease (and hence not requiring recording) may upon analysis prove to be a conditional sale in disguise. Such a "lease" was before the United States District Court of Maryland in the case of In re Rainey; the Court said: "In order to determine the true character of the agreement, it is necessary to look through form to substance." And in determining that the agreement in that controversy was not a lease but a conditional sale, the Court pointed out that a lease contemplates the use of the property for a limited time and the return of it at the expiration of that time; while a conditional sale involves ultimate ownership by the buyer, the use of it by him in the meantime.

Conflict of Laws

With respect to what law will govern the construction and validity of a conditional sale contract the Court of Appeals has indicated that the law of the place where the contract is both made and to be performed will govern unless enforcing that law will contravene the settled public policy of the foreign state. In the case in question the Court indicated that it would thus give effect to the rights of the seller or his assignee under a contract made elsewhere even when the goods were in transit in Maryland in the possession of the buyer, a non-resident of Maryland, so long as doing so would not contravene our local policy.

Rights of Third Persons Dealing With the Vendee

The divided property interest which results from the conditional sale transaction is very often the cause of conflicting claims, not only between the vendor and the vendee,
but between the vendor and such third persons as bona fide purchasers for value from the vendee, creditors of the vendee, trustees in bankruptcy and receivers of the vendee’s estate, mortgagees and landlords of the vendee and persons asserting liens on the chattel for labor and material.

**Bona Fide Purchasers**

A bona fide purchaser of a chattel from the conditional vendee for value and without notice was protected in Maryland at common law and before the recording act.

Before the enactment of the Uniform Sales Act in Maryland, the Court, in *Hall v. Hinks*\(^\text{26}\) treated the bona fide purchaser from a conditional vendee in the same manner as one who purchased similarly from another whose possession had been obtained by fraud.

Also, in *Lincoln v. Quynn*,\(^\text{27}\) the Court recognized that the common law view of many jurisdictions did not protect the bona fide purchaser for value, but refused to follow that view, and held that in Maryland such purchaser is protected.

In 1910 The Uniform Sales Act was adopted in Maryland, six years before the recording act was enacted. Section 23 of the Sales Act\(^\text{28}\) may or may not have changed the common law rule in Maryland, it depending what construction would have been placed on this section had it been before the Court. Other jurisdictions differed in their construction.\(^\text{29}\) It is certainly arguable that it did. In *Praeger v. Implement Company*,\(^\text{30}\) the Court called attention to this provision in the Uniform Sales Act but stated that it was not necessary to determine whether the act changed the rule.


\(^{27}\) 68 Md. 299, 305, 11 Atl. 848, 849, 6 Am. St. Rep. 446, 448 (1887). See also *Central Trust Co. v. Arctic Ice Machine Co.*, 77 Md. 202, 222, 26 Atl. 469 (1893); *same case*, 79 Md. 103, 29 Atl. 69 (1893).

\(^{28}\) Md. Code, Art. 83, Sec. 44.

\(^{29}\) Sheerer Gillet Co. v. Long, 318 Ill. 432, 149 N. E. 225 (1925); *Anchor Concrete Machinery Co. v. Penn. Brick and Tile Co.*, 292 Pa. 86, 149 Atl. 766 (1928).

\(^{30}\) Supra note 26.
However, whether or not a bona fide purchaser for value from the conditional vendee would have been protected between 1910 and 1916 is merely an academic question today for in 1916 the recording act for conditional sale contracts was enacted. The effect of the statute is that if the contract is properly recorded everyone is charged with notice and hence there can be no purchaser without notice. Constructive notice is the equivalent of actual notice. If the contract is not recorded a bona fide purchaser for value without notice is protected. An unrecorded contract of conditional sale is valid as between the vendor and the vendee.

Resale

A type of case which occasions considerable difficulty for the Courts is where an automobile is sold to a dealer in automobiles under a conditional sale contract which is recorded and then some third person purchases the automobile from the dealer without actual notice that the dealer possesses the car under a conditional sale contract. If the dealer defaults, the original vendor may attempt to retake the car from the dealer's customer. It is certainly arguable under these circumstances that if the original vendor knows that the dealer is going to hold himself out to the public as having authority and right to sell the car, the vendor should be estopped from reclaiming the car from the dealer's customer, and it has been so held in some jurisdicti-
Maryland, however, seems to have very definitely decided to the contrary i.e. that the original vendor will prevail in such circumstances. The Court of Appeals has said:

"The plain answer to that contention (in favor of the bona fide purchaser) is that the public policy of a state is the policy which its people speaking through their legislature adopt,... And in answer to the suggestion that the operation of the statute under circumstances such as those involved in this case may result in loss to an innocent purchaser for value, it is sufficient to say, first, that if that is so, then it must be corrected by the legislature and not by the Courts, and second, that it is without substantial merit, because where such an agreement is spread on the public records under the provisions of a public general law, any person of ordinary prudence would, by the exercise of reasonable care, learn of its existence before purchasing property affected by it."

In this connection it might be noted that the Uniform Conditional Sales Act which has been enacted in several states and Alaska, although not in Maryland, protects the bona fide purchaser of goods sold for resale even where the contract has been recorded.

*Oil Tank Co. v. Middlekauff,* also involved the question of a resale by the conditional vendee of certain pumps to a third person who had actual knowledge of the contract of conditional sale. In this case, however, the vendee first wrote to the vendor stating that he had failed in business and had received an offer by a third person to buy the pumps. The vendor replied to the vendee's letter advising the vendee to sell, which the vendee did. The bona fide purchaser prevailed on the theory of vendor's authorization of the sale to him.

**Value**

In a situation where a bona fide purchaser for value will be protected as against the conditional vendor, the question

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arises as to what constitutes value. The question whether or not an antecedent debt is value arose in Stieff v. Wilson. The Court of Appeals pointed out that there had been previously no decision in the State on the question but that the Uniform Sales Act had enacted that an antecedent or pre-existing claim whether for money or not constitutes value. Although the Court did not emphasize it, the italicized phrase might have been useful in the Stieff case because there the conditional vendee under an unrecorded conditional sale transferred the chattel in question to the third person (alleged bona fide purchaser) in satisfaction of an antecedent contract for the delivery of such a chattel rather than for the payment of money. The Court held this sufficient value to make the third person a taker for value and able to prevail over the vendor.

Quaere whether the statutory definition: "Value is any consideration sufficient to support a simple contract . . ." will be construed so that the mere giving of a promise (which would be sufficient consideration to support a simple contract) will be considered "value" even where it is not performed before recording or notice? The Uniform Negotiable Instruments Act solves this problem by providing that promissory value shall only constitute the one giving it a holder in due course to the extent to which he shall have performed before receiving notice. No such specific exception appears in the Uniform Sales Act.

Creditors

The question often arises as to the rights of creditors of the conditional vendee to satisfy their claims by execution on or attachment of chattels of which the vendee is in possession under a conditional contract of sale. It readily can

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*151 Md. 597, 602, 135 Atl. 407, 409 (1926).*
*Cf. Ratcliff v. Sangston, 18 Md. 383 (1862).*
*Md. Code, Art. 83, Sec. 97. Consider also that the Uniform Negotiable Instruments Act uses practically identical language, Md. Code, Art. 13, Secs. 14, 44. The latter uses "antecedent debt" instead of "antecedent claim" and lacks the "whether for money or not" part. See 5 Uniform Laws Annotated, Sec. 25 and notes.
*See Williston on Sales, Sec. 620; Vold on Sales, 380.*
*Md. Code, Art. 13, Sec. 73.*
be seen that the divided property interest growing out of such transactions, the title remaining in the seller but the buyer having the possession and the use of the chattel, might work a fraud upon creditors of the buyer because of the ostensible ownership of the latter.

Before the enactment of the recording act in 1916 the law in Maryland was that the claim of the conditional vendor was superior to that of creditors. In *Dinsmore v. Maag-Wahmann Co.* the conditional vendor was allowed to prevail over an attaching creditor of the vendee. In *Praeger v. Implement Co.*, the Court held that, short of a recording act, "a conditional sale is ordinarily held to be valid as against creditors of the buyer; and in some cases this rule has been held to apply even though the creditor is a judgment creditor."  

In considering the rights of creditors, since the enactment of the recording statute, it will be convenient to divide the creditors into those who gave credit to the vendee prior to the conditional sales contract (antecedent creditors) and creditors who gave credit after the conditional sale and before the contract was recorded (subsequent creditors).

**Antecedent Creditors**

As to this class of creditors, in a contest with the conditional vendor the latter will prevail even though the contract is not recorded. The Court of Appeals in sustaining the claim of the vendor under an unrecorded conditional sales contract against judgment creditors of the vendee who had levied on the chattel said:

"All of the judgments of the defendants were on debts arising out of transactions long prior to the date of the conditional sales contract. The defendants therefore are within the class designated as prior existing creditors, whom the recording laws were not intended to protect. We said in *Stieff v. Wilson*, ... 'It is a recording statute, and it is to be presumed that it

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44 Supra, note 2.
45 Supra, note 25.
47 Md. Code, Art. 21, Sec. 55.
does not intend any departure from the well known American theory and purpose of recording claims to title, that is, to protect persons who might subsequently deal with the property and part with value for it without notice of the earlier conveyance."

The Court also pointed out that the same rule applied to mortgages and went on to say that the mere fact the creditors had reduced their claims to judgment or that they had permitted the debts to remain uncollected or interest to accrue after the conditional sale did not change the above rule.

In view of Stieff v. Wilson it would seem that if the antecedent creditor had accepted the chattel itself in satisfaction of his debt and he had no notice of the vendor's title he could prevail on the theory he was a bona fide purchaser for value, the value being the settlement of an antecedent debt; but if, instead, the creditor without notice reduces his claim to judgment and seeks to execute on the chattel he cannot prevail. This seems somewhat paradoxical.

Subsequent Creditors

As to creditors who give credit to the vendee after he is given possession under a conditional sale contract but before it is recorded (subsequent creditors) what is the result? In considering this question it may be advisable to divide subsequent creditors into two classes: (1) those who without actual notice of the conditional sale gave credit, reduced the claim to judgment and had a fi. fa. issued or attached the chattel before the conditional sale contract was recorded and (2) those who without actual notice gave credit before the conditional sale was recorded but did not obtain judgment and execute on or attach the chattel until after the conditional sale was recorded.

As to (1) the creditor will prevail over the conditional vendor. In Motor Car Co. v. First Nat. Bank, a subsequent creditor of the vendee attached an automobile which vendee possessed under a conditional sale contract. The

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49 Supra, note 39.
50 154 Md. 77, 140 Atl. 34 (1927).
contract had apparently been recorded in New York where the vendor and vendee lived. The attaching creditor was a bank located in Maryland that had cashed a check for vendee which had been returned protested. Due to lack of proper certification the Court held that the evidence of recording in New York was inadmissible and treated the case as if the contract had not been recorded in either New York or Maryland. The Court decided that the attaching creditor should prevail over the conditional vendor, on the ground that the recording statute said "void as to third persons without notice" until recorded.  

As to the result in class (2), subsequent creditors who, without actual notice, gave credit before the conditional sale was recorded but did not obtain judgment and execution or attach the chattel until after the conditional sale was recorded, there seems to be no decision of the Court of Appeals in which this fact situation has come squarely before the Court. However, there is language in *Roberts & Co. v. Robinson*, 52 which seems strongly to indicate that the creditor will be protected as against the vendor. Or to state it in another way, if the conditional sale contract is unrecorded at the time the creditor gives credit and he is without actual notice, he will prevail as against the vendor even though the vendor records the contract before the creditor obtains his judgment and executes on it. In the case mentioned the contest was between the trustee in bankruptcy of the vendee and the vendor under an unrecorded contract of conditional sale. It was pointed out by the Court that the trustee as a result of the 1910 Amendment to Section 47a of the National Bankruptcy Act was in the position of a judgment creditor holding an execution duly returned unsatisfied. However, the Court did say on page 45:

"It is not necessary to determine generally in this case the rights and remedies of judgment creditors holding executions returned unsatisfied, but it is suffi-
cient to state our conclusion that they are entitled, in view of our statute, to challenge a lien or title dependent upon an unrecorded agreement of which they were unaware when their claims were contracted." (Italics supplied.)

In the case of *In re Rosen*, the United States District Court for Maryland, speaking through Judge Soper, quoted from *Roberts & Co. v. Robinson* and subsequently said:

"The Court of Appeals has given the statute a very broad application, and has expressly said in *Roberts v. Robinson*, supra, that it was intended to protect, not only purchasers and lienors, but also general creditors. This interpretation goes further than the decisions of many, if not most, of the state Courts in their construction of similar statutes. Williston on Sales, Sec. 327a, says that, under the construction put upon most such statutes, creditors will not prevail over the seller's title, unless prior to registration thereof they have acquired a judgment lien or have levied an attachment or execution on the goods. The construction of the Kansas statute by the Supreme Court of Kansas, followed by the Supreme Court of the United States in *Bailey v. Baker Ice Machine Co.*, is an illustration. The reference by the Maryland Court of Appeals to the rights of general creditors may perhaps be considered an obiter dictum, since they were represented by the trustee in bankruptcy, who, as already pointed out, had the status of a lien creditor. Nevertheless, the language of the court is so clear and unmistakable as to furnish a safe guide for this Court until it is modified in a subsequent case."

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\[Footnotes:

88 The Court said also: "As between the immediate parties the contract is valid, but 'as to third persons without notice' it is declared to be void until placed upon the public records in the manner prescribed. The creditors who trusted Keel (vendee), in ignorance of the plaintiff's secret reservations of interest in the property which they committed to his apparent ownership, were undoubtedly included among the 'third persons without notice' for whose protection the act was passed. If it had been intended to protect only purchasers and lienors, that purpose would have been expressed. The general terms employed indicate that the statute was designed to safeguard the interests of all persons, acting without notice of the unrecorded contract, who would be injuriously affected if it were permitted to be enforced." 141 Md. 37, 43.

89 23 F. (2d) 657, 658-9 (1928), quoting the paragraph here quoted, supra, note 63.

90 See also *In re Shipley*, 24 F. (2d) 991 (1928).

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It might be noted that the Court of Appeals in *Roberts & Co. v. Robinson* took cognizance of *Bailey v. Baker Ice Machine Co.*; cited in the foregoing, but pointed out that it and the other cases cited were to be distinguished on the ground of different content of the recording statutes in question, in that they required that the creditor, in order to prevail over the vendor, must fasten a lien on the chattel before the recording.\(^{56}\)

It conceivably might be argued that the language of the Court of Appeals in *Motor Car Co. v. First National Bank*\(^ {57}\) could be construed to mean that a subsequent creditor has no higher claim than the vendor before the contract is recorded and that if recorded before the subsequent creditor obtains a lien the vendor will prevail. The language which is referred to is:

"In this respect Williston on Sales (2nd Ed.) Sec. 304, says the buyer has 'exactly the same power over them and right in regard to them that he would have if he had bought them and mortgaged them back to secure the price.' Defectively executed or unrecorded chattel mortgages have been held to be preferred in this state as to prior existing creditors, equal to general subsequent creditors, but subject to later lien creditors whose liens were duly executed and recorded or secured."

The Court then cited three cases\(^ {58}\) which, on examination seem hardly to support the construction suggested at the beginning of this paragraph.

What would be the result, if after credit had been given, the conditional vendor repossessed the chattel, there being no recording, in the event the creditor tried to follow the chattel into the vendor's possession to satisfy his claim? This question appears not to have been directly answered in Maryland, although some of the language used and the

\(^{56}\) 141 Md. 37, 50, 118 Atl. 198, 202 (1922).

\(^{57}\) 154 Md. 77, 82, 140 Atl. 34, 36 (1927).

attitude of the Court of Appeals in *Roberts & Co. v. Robinson* may indicate that the subsequent creditor would be given priority over the vendor.

Before leaving the consideration of the rights of creditors a few queries will be stated, the answers to which do not seem to have been given by the Court of Appeals: (1) Has the conditional vendor an interest in the chattel such that his creditors may reach it? (2) Has the conditional vendee, under a recorded contract, an interest in the chattel such that his creditors may reach it? (3) If creditors of the vendee may satisfy their claims out of the vendee’s interest, can the vendor by appropriate terms in the contract prevent creditors of the vendee from satisfying their claims? (4) If these interests are available to creditors what procedure should they pursue in order to subject the respective interests to the satisfaction of their claims?

**Bankruptcy**

In the event the vendee goes into bankruptcy what will be the result in a contest between the conditional vendor and the trustee? Prior to 1910 the conditional vendor would prevail.

The law after 1916, when the recording statute was enacted, was involved in the case of *Roberts & Co. v. Robinson*. There the vendors under an unrecorded conditional sale brought an action of replevin, when they knew the

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59 Commercial Credit Co. v. Foy et al., in the Baltimore City Court reported in The Daily Record, December 28, 1935, Judge Adams held that where a truck purchased by a vendee living in North Carolina and properly recorded in that State was seized by a creditor of the vendee in Baltimore under a non-resident attachment that the North Carolina conditional vendor’s claim was superior to the interest of the attaching creditor. The Court held that if the attaching creditor desired he could pay to the vendor the balance due under the conditional sale contract and thereafter proceed against the property in the hands of the sheriff.

60 See Williston on Sales, Sec. 326; Vold on Sales, 282; 55 C. J., Secs. 1402-5; Commentaries on Conditional Sales, 2A Uniform Laws Annotated 35, 51.

61 "Under section 47a (2) of the Bankruptcy Act (11 U. S. C. A. Sec. 75), it was the rule, prior to 1910, that the trustee, standing in the place of the bankrupt, could have no greater rights than the bankrupt himself had ... "Therefore, if under the state law an unrecorded instrument was good inter partes, it was good against the trustee ..." In re Shipley, 24 F. (2d) 991, 992 (1928). See also Roberts & Co. v. Robinson, 141 Md. 37, 118 Atl. 195 (1922).

62 Supra, note 61.
vendee was insolvent, three days before bankruptcy proceedings were instituted. The trustee intervened in the replevin suit. The Court upheld the trustee's claim.

In the case of In re Rosen, the vendee being in bankruptcy, the conditional vendor filed a petition in the bankruptcy proceedings claiming a lien for the unpaid purchase price. The contract was never recorded and there were subsequent creditors having claims. The Court said:

"It does not appear that any prior creditor changed his position on the faith of the bankrupt's ostensible ownership of the automobile. It may therefore be assumed, for the purposes of this decision, that, although the lien of the intervening petition was invalid as to creditors who became such subsequent to the sale, it was valid as to the parties thereto and the antecedent creditors. So far as the trustee in bankruptcy represents subsequent creditors, it is clear that his claim is superior to that of the petitioner."

The court then went on to hold that as the proceeds from the car belonged to the trustee in bankruptcy they should be distributed for the benefit of all the creditors, antecedent and subsequent, and that the conditional vendor could claim as a general creditor.

In another case arising in bankruptcy the conditional vendor sold equipment to the vendee on December 28, 1925; recorded contract on February 8, 1926; and on March 24, 1926, the vendee went into voluntary bankruptcy. The vendor petitioned the bankruptcy Court for priority of payment out of the proceeds derived from the sale of the equipment. There being no evidence of any subsequent creditors between the date of the sale and the date of the recordation, the Court sustained the claim of the vendor saying:

"The conclusion must therefore be that the petitioner is entitled to his lien, except as to any creditors who may have intervened in the period during which the contract was unrecorded. But there is no proof in the present case that any such creditors existed, so

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68 Supra, note 54.
that petitioner should be preferred as against the trustee in payment out of the proceeds in the hands of the trustee."

A question that might occasion difficulty is whether or not a retaking of the chattel by the vendor prior to the vendee’s bankruptcy would be considered as a preference. The Court of Appeals has indicated, although it was not necessary to the decision, that such a retaking under an unrecorded contract of conditional sale, with knowledge of the vendee’s insolvency within a few days prior to the filing of a petition in bankruptcy against the conditional vendee is such a preference which the trustee in bankruptcy can avoid. This would seem to be an academic question if there are any subsequent creditors without notice of the vendee in the bankruptcy proceeding because the trustee should be able to recover the goods under Sections 67a, 67e, 70e, supplemented by Section 47a of the Bankruptcy Act. If there are no subsequent creditors in the bankruptcy proceeding but only antecedent creditors then the question of whether such a retaking is a preference might become of importance. It would seem quite possible for a Court to hold that as to antecedent creditors there is no diminution of the insolvent estate and hence no preference.

Receivers

As to the conflicting claims of a conditional vendor and a receiver appointed to take charge of the assets of the vendees who were partners, the Court of Appeals said: "As an assignee for the benefit of creditors is not a bona fide purchaser, neither can a chancery receiver be so regarded. . . ."

The decision in this case was rendered

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44 In re Shipley, supra, note 61, 993. For other cases involving the consideration of Md. Code, Art. 21, Sec. 55 in bankruptcy proceedings see: In re Elchengreen, 18 F. (2d) 101 (1927); Reliance Shoe Company v. Manly, 25 F. (2d) 381 (1928); In re Rainey, 31 F. (2d) 197 (1929); In re Sachs, 31 F. (2d) 799 (1929); In re Federal System of Bakeries of Md., 278 F. 523 (D. C.) (1922), 283 F. 1021 (C. C. A.) (1923).

45 Roberts & Co. v. Robinson, 141 Md. 37, 45, 118 Atl. 198, 200 (1922).


prior to the enactment of the recording statute. There appears to be no decision as to the effect of this statute on the rights of a receiver when the contract has not been recorded.\footnote{See 2A Uniform Laws Annotated, 86; (1928) 37 Yale L. J. 494; (1927) 27 Col. L. Rev. 518.}

**Mortgagees**

Contests between the conditional vendor of a chattel, subsequently mortgaged by the vendee, and the mortgagee have arisen in Maryland. *Corse v. Patterson*,\footnote{6 H. & J. 153 (1824).} the earliest reported Maryland case involving a conditional sale which the writer has found, involved this problem. In that case Patterson sold two Negro boys to one Henrietta Briscoe in the Spring of 1818. The vendee took the possession, but the vendor reserved the property in the Negroes until the full purchase price was paid. Subsequently Henrietta Briscoe married one James Nowland, who mortgaged the Negroes to James Corse. The vendor then brought an action of replevin against the mortgagee. The Court affirmed the lower Court in giving judgment for the plaintiff-vendor, saying: “The plaintiff did not, at the time of the contract, part with his interest in the Negroes, . . . but had a right to assert his claim whenever he saw them passing into other hands, . . .”

There is nothing in the opinion to indicate whether the mortgagee at the time the mortgage was executed had knowledge of the vendor’s reservation of title. If he did not have knowledge then it would seem that the mortgagee was in the position of a bona fide purchaser for value. If this be so, then the Court in the cases of *Hall v. Hinks*,\footnote{21 Md. 406 (1839).} and of *Lincoln v. Quynn*,\footnote{69 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 446 (1887).} must have reversed *Corse v. Patterson*, for in *Lincoln v. Quynn* the court treated subsequent mortgagees without notice as bona fide purchasers for value\footnote{Under the Uniform Sales Act “purchaser” includes mortgagee and pledgee, Md. Code, Art. 83, Sec. 97 (1).} and protected them from the claims of the vendor. Counsel for the vendor in his brief in the *Quynn*
case relied upon Corse v. Patterson but the Court made no reference to the case in its opinion, nor did the Court in Hall v. Hinks mention Corse v. Patterson. Both of these decisions were rendered before the recording act, since the enactment of which a recording will protect the vendor against the mortgagee, and vice versa if there be no recording and no actual notice.

In Central Trust Co. v. Arctic Ice Machine Co., bonds were issued which were secured by a recorded mortgage which provided that the mortgage was a lien on all the property of the mortgagor and all machinery subsequently to be affixed to the property by the mortgagor. Subsequently the mortgagor purchased under a conditional sale contract machinery which was erected on the premises of the mortgagor, the contract provided that in the event of default the vendor could repossess the machinery. The mortgage being in default, the bondholders claimed that the installed machinery was subject to the mortgage. The Court found that the holders of all the bonds (except five bonds) had knowledge of and were instrumental in making of the conditional sale contract and accordingly protected the vendor. Speaking of the five bonds unaccounted for, the Court said:

"The remaining five the record does not disclose the ownership of, but if they are in possession of bona fide holders for value without notice, the decree in this case will not affect their title."

Fixtures

The parties to a contract of conditional sale may agree between themselves that the subject matter of the contract, although annexed to the realty, shall not be deemed a fixture, even though without such contract it would be so regarded.

When the subject matter of a recorded conditional sale is so annexed to the realty as to be deemed a fixture, conflicting claims arise between the conditional vendor and either landlords, mortgagees or purchasers of the realty.

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73 Supra, note 27.
74 Ibid, 77 Md. 223, 26 Atl. 494.
75 Lewis v. Schlicter, 137 Md. 217, 112 Atl. 282 (1920).
In *Wurlitzer Company v. Cohen,* the lessee of a theatre held possession of premises under a lease which provided that when the lease expired everything on the premises should belong to the landlord. The lessee purchased a pipe organ under a conditional sale contract. The organ was so annexed to the building and so incorporated therein that it could be removed without causing damage. A contest arose between the conditional vendor and landlord as to the right to the pipe organ. The Court upheld the claim of the vendor.

In *Credit Co. v. Bldg. & Loan Assn.,* the owners of a piece of land, which was subject to a mortgage, had a garage erected on the land. The contractor who built the garage in order to secure payment to himself took notes secured by a mortgage on the property and it was further agreed that title to the garage, regardless of in what degree it was annexed to the realty should not pass to the

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76 156 Md. 368, 375, 144 Atl. 641, 644, 62 A. L. R. 358, 364 (1928).
77 Ibid, 156 Md. 375, 144 Atl. 644, 62 A. L. R. 364: "As to the conditional vendor, even if the organ could be considered as a fixture, the provision of the lease, that property subsequently acquired by the tenant should at the termination of the lease become the property of the lessor, does not give the lessor a claim as against the conditional vendor. . . . The author of the note in 37 L. R. A. (N. S.), 119, says: 'The preponderance of authority is to the effect that where the removal of the fixture will not materially injure the premises, a seller thereof retaining title thereto may assert his right as against a prior mortgagee of the realty' . . . The author also says: 'The fact that a prior mortgage of real estate contains a provision that it shall cover additions thereto, does not give the mortgage a superior claim to chattels annexed thereto as against the vendor by conditional sale contract, since the after acquired property clause in a mortgage attaches only to such interest as the mortgagor acquires,' . . . The reason for the preponderant view, as expressed in one or more of them, is that the title to the chattel never vested in the purchaser; and that it therefore was not acquired by the mortgagee.

"And in 26 C. J., page 689, Sec. 60, in an article on fixtures, of which Mr. Herbert T. Tiffany is the author, it is said: 'As against a lessor of land, an agreement reserving the right of removal in favor of a person selling articles to the lessee has been held to be effective, and the fact that the lease provided that all improvements should belong to the lessor . . . has been regarded as immaterial in this respect'; and in 24 R. C. L. page 475, Sec. 769: 'It is the general rule that where a mortgagor of real estate purchases chattels, such as machinery, under a contract whereby the seller retains the title until the price is paid, and annexes such chattel to the reality in such a way that as between himself and his mortgagor the chattel becomes a part of the reality and covered by the mortgage, yet if the annexation is in such way that the chattel may be removed without injury to the reality, this will not enable the mortgagor to claim the same under his mortgage as against the seller; and the fact that the mortgage contains an after acquired property clause is held immaterial."
78 160 Md. 280, 153 Atl. 64 (1930).
vendees (land-owners) until the mortgage notes were paid. A paper purporting to be a memorandum of the contract was filed under the conditional sale recording statute. In a contest between the original mortgagee and the conditional vendor (contractor) the Court upheld the claim of the original mortgagee of the realty. It decided that the garage had become so incorporated in the realty as to become a part of it and that it could not be removed without material injury to it. The Court said that the provision in the conditional sale contract was not binding on the original mortgagee unless he consented.

In Realty Co. v. Sales Corp., the vendees under a contract of sale for the purchase of a house and lot went into possession and while in possession had an oil burner installed under a conditional sale contract. The vendees being unable to fulfill their contract to purchase the house and lot, surrendered the premises to the vendors. A contest then arose between the vendor of the oil burner and the vendors of the land whether the installed oil burner had become a part of the realty. The Court decided that the tank, control and burner had remained personalty but that some of the piping installed had become realty, and said:

"The circumstances that the three movable articles, although their detachability remains, are connected with immovable articles or fixtures, no more make those movables annexed as parcel of the freehold than do the gas fixtures and ranges or the electric light fixtures and heaters become a part of the realty merely because they, although preserving their detachability, are affixed to the frequently less expensive gas pipes and electric light wires which are admittedly a part of the freehold. . . ."

In Finance Corp. v. Bldg. Assn., the owners of real property which was subject to a mortgage, installed a hot water heating system which they purchased under a conditional sale contract which was recorded. A foreclosure sale was had and the conditional vendors excepted to the

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7 163 Md. 541, 163 Atl. 841 (1933).
80 Ibid, 168 Md. 549, 168 Atl. 844 (1933).
81 167 Md. 222, 173 Atl. 198 (1934).
sale. The Court, after first deciding that the chattel-vendor's remedy was by way of replevin if the chattels continued to be personalty then held that the heating system had become a part of the realty. The Court said:

"When a chattel is incorporated in the structure and becomes an integral part of the realty, it not only loses its character as personal property but the benefit of any notice which follows from recordation as well."\(^8\)

In the case of *Abramson v. Penn*,\(^8\) the vendor sold a number of gas steam radiators to vendee under a conditional sale contract which was duly recorded. Each radiator was a separate unit being connected only with the gas supply pipe. The vendee sold the garage to one Abramson. Abramson, in a contest with the conditional vendor, contended that the radiators having become fixtures the recording of the contract was not effectual as notice to him. The Court under the facts in the case sustained the conditional vendor. After stating that the recordation would not protect the vendor if he knew or anticipated that the chattel would be affixed to the realty, and that recordation would protect the vendor if he did not consent to annexation or could not reasonably anticipate annexation, the Court said:\(^8\)

"For instance, if one sold a number of domestic sewing machines under a conditional sales contract, the vendee could not, by permanently annexing them to a freehold without the vendor's assent, change their essential character as personal property, and one buying the realty to which they were annexed would be bound to take notice of that fact. But on the other hand, if one sold a steam heating system which, if used at all, must necessarily be permanently annexed to and incorporated with some freehold, he would be bound to know that when so incorporated it would lose its character as personalty and become real estate, and that

\(^8\) Ibid, 167 Md. 225, 173 Atl. 199 (1934).
\(^8\) 156 Md. 188, 143 Atl. 795, 73 A. L. R. 742 (1928), see page 192 of this case for a quotation from *Ewell on Fixtures* which considers the rights of creditors levyng on the land.
\(^8\) Ibid, 156 Md. 194, 143 Atl. 798, 73 A. L. R. 747.
the purchaser of such real estate would not be charged with notice of any lien or claim not recorded among the land and mortgage records."

From the cases above considered are we not justified in drawing the conclusion that if the chattel, though annexed to the realty, can be severed from it without damage to the realty, then the conditional vendor should prevail over the mortgagee, etc., but that if the subject matter of the conditional sale becomes so annexed to the realty that it cannot be removed without injury thereto then the mortgagee, etc., should prevail? And should not the above statement be qualified by saying that the mortgagee, etc., should prevail only when the vendor knew or should reasonably anticipate that the subject matter would be so installed that its removal would cause injury to the realty; but that if the vendor did not know or should not reasonably anticipate such a result, then the vendor should prevail even though the vendee so installed the subject matter that it could only be removed with injury to the premises, basing the latter qualification on the reasoning set forth in *Abramson v. Penn*? It would seem prudent in view of the above quoted case, for the vendor where he is in doubt as to whether or not a chattel sold might be so annexed to realty as to be construed a fixture to record among the land and mortgage records, as well as under Art. 21, Sec. 55. This should protect the vendor at least against persons dealing with the property subsequent to such recordations.

**Distress for Rent**

Maryland has a statute exempting certain property from distress for rent. After enumerating the various exempt chattels the statute provides that, except in cases of

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81 In the same case the Court, in commenting on Art. 21, Sec. 55, said, "It is not certain that it even requires that the written instrument containing the sale or contract itself must be filed, because, although it states in one place that the 'note, sale or contract' itself must be in writing . . . and be recorded, it later says that such recording shall be sufficient if a 'memorandum of the paper writing' setting out the amount due, when and how payable, and a 'brief description of the goods and chattels,' be filed." Ibid. 136 Md. 191.

personal property in office buildings, the landlord must ascertain whether any goods, chattels or other personal property distrained on are being purchased by the tenant under a conditional contract of sale and if it shall be found that any of such property is being purchased under such a conditional contract of sale which shall have been properly executed and recorded prior to the levy the landlord shall either release such property from the distraint proceedings or pay to the vendor the balance due him.

There appears to be only one decision of the Court of Appeals which has considered the part of this statute relating to chattels sold under a contract of conditional sale. In the recent case of *Wilhem v. Boyd*, the Court of Appeals held that where the conditional vendor repossessed the property and cancelled the indebtedness with the consent of the vendee and the chattels thereafter were permitted to remain on the premises leased by the vendee, the chattels could be distrained upon by the landlord. The Court ruled that the protection afforded to the conditional vendor by the statute just mentioned could not be invoked by the owner of the chattels as there was no longer any conditional sale relationship existing at the time of the distraint.

**Garageman’s Lien**

A problem that has had the consideration of the Court of Appeals on several occasions is the question of the rights of an unpaid garageman who, having repaired an automobile on the order of the conditional vendee, asserts his garageman’s lien in conflict with the conditional vendor who has sought to repossess the car.

In *Winton Co. v. Meister*, decided in 1918, the Court of Appeals upheld the common law repairman’s lien as against the claim of the vendor of an automobile under an unrecorded contract of conditional sale. The garageman was without notice of the vendor’s reservation of title. The

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**Footnotes**

86a 190 Atl. 823 (Md. 1937).

87 133 Md. 318, 105 Atl. 301 (1918).
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Court said:88 "... wherever the party has by his labor or skill, etc., improved the value of property placed in his possession, he has a lien upon it until paid."

In Myers v. Auto Company,89 decided in 1923, the contract of conditional sale had been duly recorded. In an action of replevin brought by the vendor against the garageman who was asserting a lien for repairs made at the request of the vendee the Court again sustained the garageman's lien. The Court recognized the lien under the Winton case and disposed of the contention that the reservation of title was recorded by pointing out that the purchaser was given the use of the car and that repairs were essential to this permitted user. The Court worked out an implied agency in the vendee to have repairs made for the benefit of the vendor.

However, the Legislature, in 1924, amended the garageman's lien statute90 to provide that the lien shall be superior to the rights of unrecorded conditional sale contracts, bills of sale, or chattel mortgages but shall be subordinate to properly recorded ones.

In Goldenberg v. Finance & Credit Co.,91 decided in 1926, the vendor sold an automobile to the vendee under a contract of conditional sale which provided, among other things, that the car should be kept in good condition, that any repairs should be at the vendee's expense and that all charges against the car should be paid by the vendee. The contract was recorded. Subsequently the car was repaired by defendant who had no actual notice of the conditional sale. Asserting a lien for repairs, the defendant refused to surrender the car to the vendor, the latter claiming the car because the vendee was in default. Vendor brought an action of replevin. In sustaining the vendor's superior

88 Ibid, 133 Md. 320, 106 Atl. 302. The Court also held that even though the garageman temporarily gave up possession of the car with the understanding it be returned (which it was,) no rights of innocent third persons having intervened during the time the car was out of the garageman's possession, the lien was not lost. See also the last sentence of Md. Code, Art. 63, Sec. 54.
89 143 Md. 107, 121 Atl. 916, 36 A. L. R. 1224 (1923).
90 Md. Code, Art. 63, Sec. 54.
91 150 Md. 298, 133 Atl. 59 (1928).
claim, the court decided that the rule of the Myers case had been changed by the subsequent statute. The court pointed out that the statute had entirely changed the common law rule as to the respective rights of garagemen and vendor.

The result of the statute and the decision in this latter case would seem clearly to be that a conditional vendor of a motor vehicle by appropriate terms in the recorded contract can protect himself from a garageman's lien where work is undertaken at the request of the vendee. Also, that any garageman before undertaking to repair a car, if he thinks he will have to assert a lien, should first search the records of the county (or Baltimore City) where the vendee lives.

However, if an automobile is sold by and purchased by a non-resident vendor and vendee and the contract is recorded in the state where the non-resident vendee resides, if a garageman repairs the machine in Maryland he may assert his lien as against the vendor. In Credit Co. v. Marks, it was said: "Nor did the recording of the conditional sales contract in the State of New York affect the garagemen in Maryland with constructive notice."

In view of the decisions in the Winton Co. v. Meister, and Myers v. Auto Co., recognizing a repairman's common law lien and in view of the fact that Art. 63, Sec. 54 limits itself solely to "motor vehicles" it is arguable that the doctrine of Myers v. Auto Company will still be applicable to all chattels other than motor vehicles, thus enabling the repairmen of radios, refrigerators, and similar articles to assert liens over the claims of the conditional vendors, even though the latter record their conditional sales contracts. If the statute is strictly construed as being in derogation of common law it would seem that the repairman should prevail.

**Remedies of the Seller and Waiver**

When a buyer is in default, the question arises what the seller may do. If he repossesses the chattel either by

164 Md. 130, 134, 163 Atl. 810, 811 (1933).
peaceable seizure or replevin, is that a rescission of the contract? If it is to be considered strictly a rescission should not the seller restore all payments to the buyer? Or, if the seller may retake the chattel and keep all payments, if very little remains unpaid and the value of the chattel is in excess of the unpaid amount, is it fair to the buyer? On the other hand, if very little has been paid by the buyer and the second hand value of the repossessed chattel is considerably less than the amount remaining unpaid by the vendee should not the vendor be entitled to proceed to judgment against the vendee for the unpaid amount less the second hand value of the chattel? Will a retaking of the chattel bar an action for damages or will an action for the price bar a retaking? Or, will whatever remedies the seller may have depend solely upon the specific terms of the particular conditional sale contract, however harsh or lenient these terms may be to the buyer? Although these problems have been considered in other jurisdictions and are taken care of under the Uniform Conditional Sales Act they have been treated but slightly in the Maryland Reports.

In *Lincoln v. Quynn*, the property of the vendee was placed in the hands of a receiver appointed by a Court of Equity. A large portion of the purchase price remaining unpaid, the vendor filed a petition in the Equity Court praying that the chattels should be delivered to him by the receivers; or, if the Court should think that the vendor was entitled only to the balance of the purchase money which was unpaid then that the receivers should be directed to pay the vendor said balance, etc. The Court of Appeals said:

"It was stipulated in the contract of sale that if Hoover made default in any credit payments, Lincoln might reclaim and take possession of the goods, and that all payments which had been made up to that time should be forfeited. A Court of Equity will not lend its aid to enforce a forfeiture of this kind. Against

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*See Commentaries on Conditional Sales, 2A Uniform Laws Annotated, 138-158; Vold on Sales, 289-295.*

*68 Md. 299, 11 Atl. 848, 6 Am. St. Rep. 4446 (1887).*

persons liable to his claim on the property he could in equity recover an interest in the goods equal to the amount of the unpaid purchase money. . . .”

It is to be noted that this proceeding was in Equity and as a general rule equity will not enforce what it considers to be a forfeiture.

In the comparatively recent case of *C. I. T. Corporation v. Powell,* the vendee under a conditional sales contract being in default, the vendor seized the chattel, sold it, deducted the expenses of the resale and, after crediting the vendee with the net amount realized on the resale, had entered up a judgment for the balance in reliance on a confessed judgment note which the vendee had executed. The vendee filed a motion to strike out the judgment. The Court of Appeals decided that there was no authority in the contract which authorized such confession of judgment, inasmuch as the warrant of attorney in the note was not applicable to such a case, because the damages were neither liquidated, nor susceptible of liquidation without reference to matters extrinsic to the note, and then went on to say:97

"From so much of the contract of sale as is recited above, it appears that in the event of the buyer’s default, under its terms, the seller could pursue in the alternative any one of three remedies: (1) He could take possession of the property, cancel the contract, retain all payments received on account of its purchase as liquidated damages for the rental of the property, and sue the buyer for any sums for which he is in default, at the time the apparatus was so taken; (2) recover from the buyer as agreed damages for ‘breaching the contract’, the unpaid balance of the note; and (3) pursue any other legal remedy.

"Appellant elected to follow the first remedy, took possession of the soda fountain, sold it, charged the appellee with what he refers to as ‘costs’ incurred in connection with the sale, and credited him with the net balance. By that action it necessarily abandoned the right to any of the other remedies open under the contract, except the right to recover any sums in de-

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96 *166 Md. 208, 170 Atl. 740 (1933).*
97 *Ibid, 166 Md. 214, 170 Atl. 742.*
fault, for they were not cumulative but in substitution for each other. And while the contract stipulated that the buyer should pay to the seller 'any sums for which he is in default' at the time the apparatus was taken, that liability could only have been enforced in an ordinary action at common law on the contract."

From the two cases above quoted, it is possible to infer that in Maryland the seller will be permitted to enforce whatever remedies are stipulated for in the contract, except that if it is necessary for him to assert his claims in Equity the latter Court will not enforce what it may consider to be a forfeiture.

In *Rosenstein v. Hynson*, the time for the payment of all installments having passed and $200.51 then being due, the conditional vendor sued for only $87.43, recovered judgment for that amount which was paid. Subsequently, because of the vendee's failure to pay the installments amounting to $113.80, the vendor brought a suit to replevin the chattel. The Court, in denying the vendor's right to recover, said:

"'In suing for a part only of the installments in arrears, when he was entitled to sue for all, the plaintiff disregarded the sound and settled rule that a fully accrued cause of action for the breach of a single contract must not be subdivided for the purposes of separate suits against the same party. The object of the rule is to protect a defendant from the vexations and burdens incident to a duplication or multiplication of actions to enforce a liability for which one suit would be sufficient. The consequence of a violation of the rule is that a judgment recovered for part of the accrued indebtedness sued for separately may be pleaded to a suit for the residue of the claim, which is treated as being merged in the recovery procured in the first litigation....'"

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* 157 Md. 626, 147 Atl. 529 (1929).
* Ibid. 157 Md. 628, 147 Atl. 529.
* Also, in this case it was held that the fact that the contract provides that the extension of the time for payment of installments, or the acceptance of smaller amounts, or that their payment at different times should not be construed as a waiver of any of the vendor's rights, does not alter the above rule.
If the vendor gives the vendee an extension of time for the payment of an installment, the vendor cannot before the expiration of the extension seize the chattel because of the buyer's default. To a seller's contention that there was no consideration for the extension the Court of Appeals has said:

"In these cases of conditional sales, the acceptance by the seller of an instalment of the purchase money after default is a recognition of the contract as still subsisting, and a waiver of the forfeiture. . . . And other acts than acceptance may have the same effect. . . . A party cannot take two inconsistent positions. If he has a right either to rescind a contract on account of a breach by the other party or to continue it in force, and he elects to continue it in force, he thereby abandons the right to rescind and is bound by the election so made."

However, the Court has also said:

"The acceptance by the plaintiff (vendor) of a number of payments which were less than the amount specified in the contract did not amount to a waiver of its rights to enforce the contract upon a further breach by the refusal or failure of the defendant to make any further payment on account of the purchase price. . . ."

### Criminal Provision

It is a misdemeanor, punishable by fine and imprisonment, for the purchaser of personal property under a conditional written contract to remove it beyond the city or county where it is located when purchased, or to secrete, hypothecate, destroy or sell the personal property with the intent to defraud the vendor, without first obtaining the latter's written consent.

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WARRANTY

Are the provisions of the Uniform Sales Act\textsuperscript{104} regarding warranties, express and implied, applicable to goods sold under contracts of conditional sale? It would seem that this question must be answered in the affirmative. The language of the Court of Appeals referred to earlier in this article\textsuperscript{105} would seem clearly to bring such sales within the purview of the Sales Act and therefore subject to its various provisions. This would also seem to follow from a case involving the sale of an oil burner where under the terms of the contract title was not to pass to the purchaser until full payment and under the terms of payment provision was made for monthly payments over a period of time. Although the Court in its opinion did not refer to this transaction as a conditional sale, by its terms the contract would seem clearly to come within that category. The Court in deciding the case applied various sections of the Sales Act dealing with warranties.\textsuperscript{106}

CONCLUSION

In conclusion the question inevitably arises as to the advisability of Maryland adopting the Uniform Conditional Sales Act.\textsuperscript{107} This Act, while adopted in some jurisdictions, notably New York, Pennsylvania, and some other commercially less important states, has not as yet received the widespread acceptance throughout the United States which has attended the Uniform Sales Act.\textsuperscript{108}

The enactment of the Uniform Conditional Sales Act in Maryland would, of course, help to bring about uniformity on the law of conditional sales throughout the United States. This is an objective which is generally considered

\textsuperscript{104} Md. Code, Art. 83, Secs. 32-37, 70, 90.
\textsuperscript{105} Dinsmore v. Maag-Wahmann Co., supra, note 2, as quoted supra note 14.
\textsuperscript{106} May Oil Burner Corp. v. Munger, 159 Md. 605, 152 Atl. 352 (1930). See also Williston on Sales, Sec. 607; 1 Uniform Laws Annotated, Sec. 13, notes.
\textsuperscript{107} See 2 Uniform Laws Annotated.
\textsuperscript{108} For a puzzling reference to the Uniform Conditional Sales Act (which Maryland has not enacted) see Oil Tank Co. v. Middlekauff, 140 Md. 216, 218, 117 Atl. 570, 571 (1922).
to be desirable in matters commercial. It would also tend to centralize the law on the subject and thus make the law more immediately available from the standpoint of research into the authorities.

Section 9 of the Uniform Act, dealing with conditional sale of goods for resale, might be a desirable step forward. Sections 16 to 25, dealing with the rights and remedies of the seller and the buyer when the buyer is in default, would have the advantage of definitely letting us know what these rights and remedies are. Under the present scarcity of decisions by the Court of Appeals there would seem to be room for considerable doubt as to the law of Maryland today on these points. The protection given to the buyer, particularly the buyer who has paid at least fifty per cent of the purchase price, under Sections 19 and 20 might be desirable.

On the other hand, the fact that there does not seem to be any particular agitation for reform in the field of conditional sales (at least none has come to the writer's attention) may be a fairly good indication that the people of Maryland are satisfied with the present operation of conditional sales transactions. It is possible, of course, that this ostensible lack of agitation may be due simply to the fact that the isolated vendees have no agency through which to make their dissatisfaction vocal.

The absolute requirement of the Uniform Act for a resale of the chattel if the vendee has paid at least fifty per cent of the purchase price, and for a resale at his option if he has paid less, could readily turn out to be a boomerang to the vendee. The vendor might well feel that the red tape and nuisance involved in such a resale would justify him in availing himself of Section 22 which authorizes him to recover any deficiency due on the contract, after deducting the expenses of the sale, of retaking, and of storing, from the proceeds of the resale. While it is true, under Section 21, that any balance left after all the above claims and expenses are deducted goes to the vendee, nevertheless the quick depreciation which a chattel sustains by virtue of having been used and become second-hand makes it
doubtful if, in very many cases, there would be any surplus left for the buyer.

Perhaps in most cases both the vendor and vendee would prefer that upon default the vendor keep whatever payments he has received, that he retake the chattel, and that both call it quits. This is a procedure which would not always be possible if the Uniform Act were the law of the State. Most of the other important provisions of the Uniform Act appear to be already taken care of in our law, either through statutes or decisions of the Court of Appeals. All in all, the present writer has some doubts as to the advisability of adopting the Uniform Act in Maryland.