Conditional Sellers, Hostile Claimants, and the Filing Period

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The common law, in the absence of applicable filing or recording statutes, recognizes the interest of a conditional seller as a claim superior to that of purchasers, encumbrancers, or creditors claiming under or through the conditional buyer. Such a result follows naturally as an application of the pervasive common law notion that no one can transfer to another a greater interest in property than the transferor himself possesses. The tendency of such a rule, however, is to subject persons dealing with conditional buyers, on the faith of apparent ownership, to hidden hazards, and incidentally to circumvent in a measure the chattel mortgage recording acts. It is, therefore, not surprising that, with the widening employment of conditional sales contracts, legislatures and courts have exerted themselves to correct this situation by conditioning the preservation of the conditional seller’s superiority of position as against designated classes of claimants upon compliance with the terms of filing or recording acts, until today such a requirement exists in something over thirty states of the Union. In West Virginia, there has been such a statute since the first decade of statehood. The state having adopted, in common with nine others, the provisions of the Uniform Conditional Sales Act, there have accordingly been some changes in detail from the terms and pro-

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1 See WmLLISTON, SALES (2d ed. 1924) 750; Newcomb v. Guthrie, 145 Va. 627, 134 S. E. 585 (1925).

2 See the somewhat variant lists in 1 WmLLISTON, SALES § 327, and 2 UNIFORM LAWS ANNOTATED (1922) 6, 7. The latter work also notes that in Kentucky the courts have construed the chattel mortgage recording act as applicable to conditional sales.

visions of the initial statute, but without alteration of the basic principle that full retention of the conditional seller's contract rights depends upon his filing the contract of record in the manner prescribed by statute.

Conceivably the statutes might go either to the one extreme of requiring the filing or recording to take place concurrently with the formation of the contract, or to the other of permitting the conditional seller to record at any time in the indefinite future and obtain the full advantage of cutting off both intermediate and subsequent claims. The latter alternative would obviously emasculate the recording acts altogether and has nowhere been adopted. The former is, in fact, the construction which has been placed on statutes that fix no time for filing, in so far as subsequently accruing claims of third persons are concerned, a construction well illustrated by Huffard v. Akers, applying the West Virginia statute which preceded the adoption of the Uniform Conditional Sales Act. Independently of that Act, this is apparently the more usual type of statutory provision although some states have indicated a specified time within which the contract shall be filed. With a view to alleviating the harshness incident to the requirement of virtually instantaneous registration, this device of designating a specific period for filing has been incorporated into the Uniform Act, which names the ten days after the making of the sale or

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6 The distinctions between the acts requiring filing and those requiring recording have no relevance to the subject of the present discussion, and accordingly the expressions will be used interchangeably hereafter in the paper.
7 3 Jones, CHATEL MORTGAGES & CONDITIONAL SALES (6th ed. 1933) § 1070.
8 52 W. Va. 21, 43 S. E. 124 (1902). The contract was recorded the thirteenth day after execution. The third party claim was a landlord's lien based on an existing contract for rental of the premises where the goods were delivered, and was deemed to have attached from the time of delivery although there was no change of position by the landlord prior to the recording of the contract.
9 The statutes are reprinted in 2 Uniform Laws Annotated 43-244. A summary of their terms in the particular referred to may be found in 3 Jones, op. cit. supra n. 7, § 1067. The Connecticut statute, Gen. Stat. Revision 1930, § 4697, is unique in specifying a filing "within a reasonable time".
10 The reason for the choice is stated in the Commissioners' Notes, 2 Uniform Laws Annotated 9, as follows: "It was thought unwise to require the seller to file immediately. The seller's office may be far distant from the filing district. He should have a reasonable time to mail his papers and get them filed."
11 Uniform Conditional Sales Act § 5, W. Va. Code (Michie, 1937) § 4011. In Alaska, the period has been extended to 60 days; in Indiana, the section is omitted; in New York, the clause of the section requiring filing in ten days is omitted.
after removal into another filing district, and the thirty days next preceding the expiration of the term of years for which the original filing is good, as the respective times for filing and obtaining the benefit of the act.

The fixing of a stated period after the transaction as the time for filing, while it renders the requirement practical and efficacious, yet presents special issues which could not otherwise arise. At least four situations may be distinguished. If the conditional seller files the contract within the time allowed, and thereafter third persons acquire claims as purchasers or creditors, the act by its clear tenor protects the seller's perfected claim. Conversely, if the time has been allowed to go by without filing, and then the adverse claims arise before the conditional seller acts under the statute to preserve his security, the third persons who have acquired assertable rights will prevail. But there are two intermediate situations. What if the interests of the third persons originate within the period allowed for filing but before there has been an actual filing? Or what if the conditional seller, having suffered the statutory time for filing to lapse without action, actually files the contract at a later time before the opposing claims have come into existence? These cases are not so clearly covered by the terms of the statutes. The purpose of the present discussion is to explore and criticize the authorities bearing on them, and especially those which involve the Uniform Conditional Sales Act.

The problem is one with respect to the interrelation between protected interests and time—the relative status of the seller's interest under the contract and of claims adverse to the contract, and the time allotted by statute for filing the agreement. Sound analysis and appraisal of the cases in which they have arisen in combination rests upon an understanding of each of these components independently. Full exploration of their ramifications is

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12 Uniform Conditional Sales Act, § 14, W. VA. CODE (Michie, 1937) § 4020. In Indiana the section is omitted. By the West Virginia statute, supra, the "county" is specifically mentioned in place of a general reference to the "filing district".

13 Uniform Conditional Sales Act, § 11, W. VA. CODE (Michie, 1937) § 4017. The original filing is good under the Uniform Act for three years, under the West Virginia modification for five years.

14 There are special provisions with respect to the filing of conditional sales contracts affecting fixtures, Uniform Conditional Sales Act, § 7, W. VA. CODE (Michie, 1937) § 4013, railroad and water carrier equipment, Uniform Conditional Sales Act, § 8, W. VA. CODE (Michie, 1937) § 4014, and goods sold for resale, Uniform Conditional Sales Act, § 9, W. VA. CODE (Michie, 1937) § 4015. This discussion will be confined to other goods not falling in those special categories.
not here possible. A brief resume of their more conspicuous features is presented, however, as a useful background for a consideration of the narrower subject.

Some efficacy the conditional seller’s retention of title has, from the moment of sale, regardless of when or whether the contract is filed. There are persons and kinds of claims that do not come within the purview of the recording acts; as to them, the seller’s remissness in filing late or not at all is not available and they stand subject to his title as at common law. The statutory scheme has been characterized as designed only for the protection of purchasers from and creditors of the conditional buyer and as having no bearing when the rights of no such parties are in issue. Whatever may be its accuracy and occasional helpfulness, this formula probably gives less information than does a categorical examination of the kinds of claims to which the seller’s unfiled or defectively filed title has been held immune. Dependent upon legislation as the whole modification of the conditional seller’s position is, the list naturally varies between jurisdictions as their several statutes vary; yet there is measurable agreement in many particulars.

It is uniformly held, regardless of the form of the particular statute involved, that, as between the parties to the transaction, conditional buyer and conditional seller, nothing depends upon the seller’s compliance with the provisions of the act, the retained title being as effectual before or without filing as after a timely proper record. So, too, third persons claiming from or under the buyer,

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15 The contract, aside from its title-retaining features, and in so far as it involves only the seller’s position as a general creditor claiming the unpaid installments of the purchase price, is of course unaffected by the statutes and is valid in the same way as any other contract of sale on credit. This is shown not only by the many cases involving distribution of an insolvent buyer’s estate, where the seller unsuccessfully claiming security is ranked with other general creditors, but also by the fact that this personal liability of the buyer to the seller has rarely, if ever, been disputed because of the latter’s failure to file. As a contract, the agreement is good and enforceable from its inception. Uniform Conditional Sales Act § 4, W. Va. Code (Michie, 1937) § 4010, is declaratory of this principle.

16 In re B & B Motor Sales Corp., 277 Fed. 808 (Dist. N. J. 1922) (Uniform Act, controversy between the assignee, and the trustee in bankruptcy, of a conditional seller); Harris v. Seaboard Air Line Ry., 190 N. C. 480, 130 S. E. 319 (1925) (suit by seller who had duly filed against tortfeasor who paid buyer judgment for damages and asserted such payment as a release not barred by the record).

17 This has been held under the Uniform Act, Depew v. C. W. Depew & Co., 98 N. J. Eq. 461, 131 Atl. 76 (1925); Central Chandelier Co. v. Irving Trust Co., 259 N. Y. 343, 182 N. E. 10 (1932); see Auto Sales Co. v. Yost, 91 W. Va. 493, 113 S. E. 758 (1922), and, under other statutes of varying types, Kennison v. International Clay Machinery Co., 13 F. (2d) 774 (C. C. A. 6th, 1926) (Ohio
whether as purchasers, encumbrancers, or creditors, are subject in any event to the paramount seller's security title where they take with actual notice of the existence of the contract or without having given consideration. Unless the claim asserted arose in good faith without notice for value it must yield to the contractual arrangement.

Except as the claim adversely asserted is one possessed by an innocent third person who acted unaware of the conditional sale, the seller need never have any fears concerning his title whatever the facts or the law as to filing; but within that exception may arise a motley variety of claims urged by purchasers, creditors, encumbrancers, and lienholders, who have nothing in common except their nonparticipation in the original transaction and their lack of acquaintance with its existence; and the really difficult problem is to determine which among them are, in at least some contingencies, potential beneficiaries of the recording acts. That depends on the terms of the applicable statute and the way the

statute); Gill v. Kahl-Holt Co., 47 App. D. C. 53 (1917); Wyatt v. Duncan, 149 Kan. 244, 87 P. (2d) 233 (1939); General Motors Acceptance Corp. v. Mayberry, 125 S. E. 503, 142 S. E. 767 (1928); Doyle v. Yoho Hooker Youngstown Co., 130 Ohio St. 400, 200 N. E. 123 (1936); New Jersey Fidelity & Plate Glass Ins. Co. v. General Electric Co., 160 Va. 342, 169 S. E. 425 (1933); J. Bernstein & Sons v. Allen, 127 Wash. 314, 220 Pac. 301 (1923). It has even been held, where the conditional buyer reacquired the property from a bona fide purchaser at execution sale, whose own title would have been protected and who could therefore in general have conferred title on others having notice or giving no consideration, that such conditional buyer must yield to the conditional seller's title, being estopped to deny it because it was his duty to have prevented it from being divested. Maryland Credit Finance Corp. v. Campbell, 8 W. W. Harr. 575, 195 Atl. 277 (Del. 1937) (decision under Uniform Act).

For a collection of the authorities see 55 C. J. 1244.


court construes it. Purchasers, in the ordinary popular sense, incontestably are, since the statutes without exception mention them particularly or make a sweeping contingent avoidance of the retained title as to third persons. As to mortgagees and pledgees, where the statute does not mention them in terms or apply to third persons generally, there is more diversity of opinion, with the courts rather inclined to extend the benefits of the legislation to the former and to deny them to the latter. But the Uniform Act has taken care of the matter by defining "purchaser" to include them both, and "purchase" to include their dealings. It is not altogether clear whether this includes antecedent mortgagees claiming under an after-acquired property clause aptly describing the goods. The general tendency under legislation other than the Uniform Act has been to exclude such mortgagees from the benefits of the recording acts. Probably like results will be reached under the Uniform Act, since, aside from situations where the after-acquired clause has been deemed not to cover the goods in question or where the mortgagee has not relied on the mortgage but on proceedings for foreclosure under it by virtue of which he had become an attaching creditor, the only relevant authority deals with the case where the mortgagee continued to make advances under his contract after the inception of the conditional sale agreement, giving him the benefit of the Act up until the time of the last advancement of funds but not thereafter. It may accordingly be

21 See the provisions of the several statutes, 2 Uniform Laws Annotated 43-244.
22 See 55 C. J. 1254.
23 The holdings are catalogued in 55 C. J. 1255.
24 Uniform Conditional Sales Act, § 1, W. Va. Code (Michie, 1937) § 4007 ("'Purchase' includes mortgage and pledge. 'Purchaser' includes mortgagee and pledgee."). But the seller's title is displaced only to the extent necessary to satisfy the pledge and may still be asserted as to the surplus beyond the secured credit, Joseph T. Ryerson & Son, Inc. v. A. V. O'Donnell, Inc., 253 App. Div. 1, 1 N. Y. S. (2d) 608 (1937).
28 Prudential Insurance Co. of America v. Estates of Cotsvoldt, Ltd., 17 N. Y. S. (2d) 303 (1939); accord, Alf Holding Corp. v. American Stove Co., 253 N. Y. 450, 171 N. E. 703 (1930) (installment payments under construction contract, to builder who was conditional buyer).
expected that, where the reliance is purely on the after-acquired clause without the element of continuing payments to the mortgagor, the mortgagee will not be entitled to claim the benefits of the Act or of the seller’s noncompliance with its terms respecting filing.

Aside from the Uniform Act, the extent to which creditors’ claims are protected by the recording acts is a subject of considerable difference of opinion. Whether they affect both prior and subsequent creditors or the latter only, general creditors or just lien creditors, are matters on which the courts have divided, with a decided tendency toward limiting their range of operation. In general, the requirement of filing and the protection which it affords would seem to relate only to the claims of lien, and not those of general creditors.30 The Uniform Act removes all doubt on this score by speaking in terms of a “creditor . . . who . . . acquires by attachment or levy a lien on” the goods.31 It will be noted that not even all lien creditors are included within the scope of this language.32 For example, non-possessory liens, such as the statutory liens for labor,33 which have been treated under some statutes as within the protection of the filing requirement34 would seem not to be within the Uniform Act. Perhaps the lien of a warehouseman is similarly unavailing against the unrecorded or tardily recorded title of the conditional seller.35 Manifestations of a legislative purpose that particular liens, even though in no way con-

29 See 3 Jones, op. cit. supra n. 7, §§ 1112, 1113; 55 C. J. 1250-1252.
30 “General creditors of the conditional buyer ordinarily do not under conditional sale recording acts get priority over the conditional seller whose contract is not recorded,” Vold, Sales (1931) 301; accord, 1 Williston, Sales § 327a. The West Virginia law under the statute which preceded the adoption of the Uniform Conditional Sales Act has been said to be contrary and to follow the minority doctrine of protecting general creditors, see 55 C. J. 1251 n. 1(c); but the cases cited for this proposition do not sustain it.
31 Sec. 5; W. Va. Code (Michie, 1937) § 4011. This clearly excludes general creditors. Cf. Bent v. Weaver, 106 W. Va. 164, 145 S. E. 594 (1928). It would seem to render the question of prior or subsequent creditor immaterial by directing attention solely to the time of the levy or attachment, in disregard of the time when the credit arose or was extended.
32 “To hold here that all lien creditors were protected under the terms of the statute would be to wholly ignore the use of the word ‘levy’ ”; Bent v. Weaver, 106 W. Va. 164 at 168, 145 S. E. 594 at 595 (1938).
33 In West Virginia, such a lien is allowed for work or labor in the construction, repair, or improvement of buildings or structures on realty, W. Va. Code (Michie, 1937) §§ 3726, 3727.
34 Cook v. Washington-Oregon Corp., 84 Wash. 68, 146 Pac. 156 (1915).
35 It was so held in Banker’s Capitol Furniture Co. v. Hall, 11 N. J. Misc. 13, 163 Atl. 556 (1932). But cf. Bloomingdale Bros., Inc. v. Cook, 8 N. J. Misc. 824, 152 Atl. 666 (1930) (sustaining seller’s claim because as to the particular claimant the filing was timely, and discussing the situation on the basis of the applicability of the Act).
nected with attachment or levy, are to have due precedence over the seller’s claimed security, may also alter the picture, as where they are subordinated to properly filed chattel mortgages and conditional sales (and thus by implication given priority over any not so filed), a provision quite common in connection with garagemen’s liens for repairs and storage. The effect of such a statutory provision as in West Virginia that “any lienor shall take such rights as a purchaser of the property deposited with him would take, and shall take subject to other titles, interests, liens, or charges in the same manner that a purchaser would take” seems never to have been litigated. It may be assumed that its operation is limited to the “miscellaneous liens and pledges” recognized in the particular article where it appears; but a lienor under that article may well be regarded as within the protection of the conditional sales act since his status is apparently not that of a mere lien creditor but that of a statutory purchaser.

Even the question of who is to be deemed a creditor who has “acquire(d) by attachment or levy a lien” on the goods is not free from difficulty. For one thing, there is the problem of the stage in the proceedings to take the goods at which the creditor can be said to have acquired by levy a lien on them. In West Virginia the point is settled by Bent v. Weaver, holding that the time of actual levy, rather than the teste or the delivery of the writ to the officer for execution, is the crucial moment. In so holding, the court recognized that it was departing somewhat from the general West Virginia doctrine that the time of delivery governs, but assigned the laudable desire to attain uniformity in the application of the act as its reason. The subsequent course of decision has disappointed that hope, since the few later cases dealing with

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38 Cf. Cherry’s, Inc. v. Sharpensteen, 33 Ariz. 342, 265 Pac. 90 (1928); O. I. T. Corp. v. Jorgensen, 66 S. D. 7, 242 N. W. 594 (1932) (both decided in favor of the conditional seller as against the garagekeeper, but expressly resting that result on a holding that there was compliance with the filing requirements of the Uniform Conditional Sales Act); accord, Commercial Credit Trust v. Barbier, 7 N. J. Misc. 1109, 147 Atl. 861 (1929).
37 W. VA. CODE (Michie, 1937) § 3918.
39 Id. at 169, 145 S. E. at 596 (“Then again, as the lien of an execution is made by statute to date from the levy in some states; in others, from the time the writ goes into the hands of the officer; and in others, from the teste as at common law, may we not assume that the Legislature had this contrariety of legislative action in mind, and in order to make the act uniform in its application in this respect, drew the line of protected creditors at actual levying creditors? We think so.”)
the problem reach varying results; and, failing the achievement of uniformity, it may be wondered if our court has not chosen the less wise course in making the claimant's right to the benefit of the act rest upon the diligence of the officers who have, at least in some jurisdictions, been known at times not to be so very alert in the performance of their duties. Another problem in fixing a claimant's status as an attaching creditor within the meaning of the Uniform Conditional Sales Act relates to the source of the authority upon which the taking is predicated. In New Jersey the view has been taken that the attachment must have been consequent upon judicial proceedings, to bring the creditor within the Act, and that, accordingly, a claim by virtue of a landlord's distress for rent has no standing as against the retained title of the conditional seller. In West Virginia it is not wholly settled what the law is in such a case. Under the anterior statute, the right of the distraining landlord was superior to that of the seller delinquent in recording the conditional sales agreement. There is good reason to believe that probably that is still true under the Uniform Act, and indeed it is possible that the landlord's lien, of itself, without distress for rent, suffices to entitle him to the benefits of the Act.

40 Compare Baker v. Hull, 250 N. Y. 484, 166 N. E. 175 (1929) (conditional seller preferred where issue of execution was before but levy not until after filing although in general lien attaches in New York at time of execution) and In re Avlon Syrup Corp., 25 F. (2d) 342 (N. D. N. Y. 1928) (expressing the opinion that in New York judgment creditor did not become attaching creditor upon mere issuance of execution or at any rate lien without levy continued only until return day of writ) with Williams Patent Crusher & Pulverizer Co. v. Reily, 118 Pa. Super. 64, 180 Atl. 156 (1935) (creditor deemed attaching creditor from the time of issue of the writ to the sheriff, if the sheriff thereafter before the return day makes the levy).


42 Huffard v. Akers, 52 W. Va. 21, 43 S. E. 124 (1902).

43 In Brown v. Woody, 98 W. Va. 512, 127 S. E. 325 (1925), a controversy between a distraining landlord and a conditional seller under an unrecorded contract, a directed verdict for the former was set aside and new trial awarded to permit a jury determination of the fact issue whether the landlord had actual notice of the contract at the time of the distress warrant. In Bent v. Weaver, 106 W. Va. 164 at 167, 145 S. E. 594 at 595 (1928), after noticing the New Jersey construction of the Act, the court remarked, "This court at least by implication has held to the contrary as to such distraint for rent", citing Brown v. Woody, supra.

44 In two cases since the adoption of the Uniform Act, Hawley v. Levy, 99 W. Va. 335, 128 S. E. 735 (1925) and Guthrie v. Howie, 110 W. Va. 164, 157 S. E. 169 (1931), the court has had to determine as between the claims of a conditional seller and of a landlord who, so far as appeared, had not distrained on the goods at any material time. In both the conclusion was reached, after care-
If the conditional buyer's finances fall into disorder and his
property is taken over or turned over for the benefit of his
creditors, whether the person placed in charge of his estate is with-
in the protection of the filing statute depends largely on the way
in which he acquires his authority. A trustee in bankruptcy, by
virtue of the 1910 amendment to the Bankruptcy Act, was ac-
corded from the time of his appointment the status of a lien creditor
able to rely on the provisions of the recording acts in the same
manner as other lienors might from the time of acquisition of their
respective liens. More than that, the continued recognition of the
applicability of the Uniform Act where a trustee in bankruptcy is
involved shows that he is not only a lien creditor but one who has
acquired his lien by levy or attachment within the meaning of that
Act. But equity receivers, assignees for the benefit of creditors,
in brief all custodians of insolvent estates except trustees in bank-
ruptcy, have only a derivative status, without statutory aider of
their respective claims. They succeed only to the position of the
insolvent, or the creditors, whom they represent, and, while they
may urge the filing acts in the few jurisdictions where general
creditors can do so, their designation gives them no independent
right to invoke the sanctions of such statutes as are limited to the
ful analysis of the facts, that there had been a timely, effective filing, and decision for the sellers was rested on that ground. In the latter case, the question of the efficacy of a landlord's lien as against an unrecorded conditional sale agreement was expressly reserved as being unnecessary to decide.

Mason's U. S. Code Tit. 11, § 75. Thereafter his status seems to have been only that of successor to the bankrupt, entitled to no greater rights against the conditional seller. Cf. York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 S. Ct. 782 (1906). In the recent recasting of the bankruptcy statutes, the substance of the provision, somewhat amplified and clarified, has been retained, see F. C. A. Tit. 11, § 110c.

3 Jones, op. cit. supra n. 7, at 209 et seq.; Vold, Sales 301; (1930) 16 Iowa L. Rev. 108. For a case recognizing the trustee's rights under the earlier West Virginia statute, see Citizens' Coal & Supply Co. v. Custard, 244 Fed. 425, 157 C. C. A. 51 (C. C. A. 4th, 1917).


Ward v. Southern Sand & Gravel Co., 33 F. (2d) 773 (M. D. N. C. 1929); Coble v. Wharton, 177 N. C. 323, 98 S. E. 818 (1919); Observer Co. v. Little, 174 N. C. 42, 94 S. E. 525 (1917).
protection of lien creditors, and, a fortiori, does not make of them creditors acquiring a lien by levy or attachment, as prescribed by the Uniform Act.

The state, or the United States, may constitutionally provide for the forfeiture of a chattel used in violation of law, without saving the rights of conditional sellers, however innocent of participation or acquiescence in the illegal use they are, a proposition illustrated by federal customs and revenue laws and some state liquor legislation. Most statutes are not so rigorous, however, and in any event, as Judge Poffenbarger pointed out in State v. Hall, refusing condemnation of a conditionally sold automobile for violation of the West Virginia liquor law, the state is not as to such matters a claimant within the reach or benefit of the recording act, there the Uniform Act. The decision is in complete accord with the holdings of other courts under filing statutes of various types. The flaw in the claim of the state is that it is not a purchaser or creditor. Hence, even though it may be regarded for some purposes as having some sort of a special statutory lien, it still does not bring itself within the class of adverse claimants mentioned by the legislation; and so, under the Uniform Acts at least, it has been denied standing to set up against the seller his remissness


51 3 JONES, op. cit. supra n. 7, §§ 1416-1421; VOLD, SALES 272, n. 76.

52 91 W. Va. 648, 114 S. E. 250 (1922).


54 State v. Hall, 91 W. Va. 648 at 653, 114 S. E. 250 at 252 (1922) ("That law establishes a policy respecting creditors and purchasers for value and without notice... But it does not invalidate nor qualify such a contract in respect of its operation as to any other persons or its effect upon them... The right asserted here by the State is not based upon the relation of either creditor or purchaser... "); General Motors Acceptance Corp. v. United States, 23 F. (2d) 799, at 802 (C. C. A. 4th, 1928) ("Such laws... are designed for the protection of creditors or purchasers for value without notice, and the government of the United States, in a forfeiture proceeding of this kind, does not come under either class").
in filing in a variety of situations not confined to liquor legislation but extending to enforcement of such diverse obligations as the conditional buyer's delinquent taxes and fines for overloading.

Just as the state, even though a lienor, is excluded from the statutory scheme because it does not qualify as a purchaser or creditor, it would seem that individuals attaching the property as a mere procedural device—for instance, those persons suing non-residents in tort and resorting to attachment under the familiar statutes designed to compel appearance and satisfaction of such judgment as may be rendered—would fall outside the statute. The law on this point perhaps may be what logically it must be, but the relevant decisions are few and inharmonious, so that it is impossible to speak with any assurance.

Too much space has no doubt been given to this introductory excursus on the issue of the persons who may claim the benefits of the act. The only justification lies in the possible utility of such a recapitulation for the practising lawyer. His first inquiry, in the event of conflicting claims between a conditional seller and an adverse claimant, should be whether the latter is such a one as comes within the operation of the act. If not, the seller's title is paramount in any case; unincluded persons gain nothing by the legislation, and their position is always exactly the same as it would have been had it arisen after the timely proper filing of the agreement. It is only those claimants who are within the coverage of the act who ever have rights predicated upon the absence or lateness of filing, and accordingly it is only where initial analysis discloses such a claimant that the existence or nature of such rights is material.

The other preliminary question is that of fixing the last date when the contract can be placed of record and the filing still be regarded as timely. No special considerations are involved so far....

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55 General Motors Acceptance Corp. v. Whitfield, 62 S. D. 415, 253 N. W. 450 (1934) (taxes which had accrued before the conditional sale).
58 In Universal Credit Co. v. Knights, 145 Misc. 876, 261 N. Y. Supp. 252 (1932), the position was endorsed that those attaching in the circumstances suggested in the text are not creditors acquiring a lien by levy or attachment, within the meaning of the Uniform Act, the existence of a debt antecedent to suit being necessary; but, in Hampton v. Universal Credit Co., 59 Ga. App. 568, 1 S. E. (2d) 753 (1939), where the attachment was of a similar character, judgment for the seller was sustained explicitly on the ground that there was a timely filing, the assumption being implicit that had there not been the attaching plaintiff could have taken advantage of the omission.
as the mere computation of the stated time interval is concerned. The ordinary rules established in that connection, such as the familiar doctrine that it is to be computed by excluding the first day from and including the last in the reckoning,59 recognized by statute in many states, among them West Virginia,60 prevail in fixing the time for the filing of conditional sales.61 The only real problem is the determination of that first day, that is to say, the ascertainment of the moment when the conditional sales transaction has advanced to the point where the prescribed time limitation with reference to recording commences to run. In this connection, original filing, resiling on removal, and resiling for renewal may best be considered separately.

First, then, as to the original filing. Under recording statutes imposing the requirement without specifying a time for its performance, it can seldom be a material inquiry at what time that requirement becomes operative; what indications there are point to the instant before delivery of possession into the hands or upon the premises of the buyer as the pertinent moment.62 Nor even under statutes mentioning a definite time for filing would there be much controversy if delivery of the goods were always concurrent with the formation of the contract, and if there were never more than a single contract and a single delivery involved. But often, perhaps usually, contract and delivery are not simultaneous; and sometimes there is more than one contract or more than one delivery to be considered. So the courts in order to settle on a starting point for computing the timeliness of filing must initially choose whether contract formation or delivery of possession is to control; and, secondarily, determine what contract or what delivery.

The date of acceptance of the offer, when the minds of the parties met and the contract arose, was held by a federal court, in

59 See 62 C. J. 984.
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Chicago Pneumatic Tire Co. v. Arnold, 63 to be controlling to the disregard of the later time of delivery, under a statute allowing ten days "after the making of the contract". But, so far as concerns goods first moving to the conditional buyer in consequence of the contract, the decision has few companions. It sometimes happens, however, that the buyer has a possession, independent of the contract under which the seller claims security, whether by virtue of a prior conditional sale or other arrangements. That mere delivery of the property, in contemplation of a conditional sales contract which is never consummated, initiates no requirement of filing is most directly demonstrated by Toledo Scale Co. v. Bailey; 64 and perhaps it is similarly unimportant where both possession and contract terminate pursuant to a voluntary mutual rescission before the time to record has run. 65 As a logical corollary, where one already in possession of goods in some other capacity enters as buyer into a conditional sales contract, the period for filing runs from the time of the contract and not from the original inception of his possession. 66 Analogously, where the parties cancel the original contract and in good faith substitute another with different terms, the buyer remaining continuously in possession, it has been held, at least as to claims posterior to the formation of the substituted contract, that the date when it is entered into is the significant date under the filing statutes. 67 The abandoned original contract becomes irrelevant. 68 But the foregoing applies only to

63 282 Fed. 43 (C. C. A. 1st, 1922). The authority, if not the persuasiveness, of the case is destroyed by the later inconsistent holding in Automatic Sprinkler Corp. of America v. Rosen, 259 Mass. 319, 156 N. E. 693 (1927) infra n. 72.
64 In re Gosch, 121 Fed. 602 (S. D. Ga. 1903) construing the Georgia statute in a similar manner was reversed on appeal in 126 Fed. 637, 61 C. C. A. 363 (C. C. A. 5th, 1903); cf. R. P. Andrews Paper Co. v. Southern Soda Fountain Co., 46 App. D. C. 84 (1917) (under statute by which contract was not recordable until acknowledged and was to be recorded within ten days after acknowledgment, recording six days after acknowledgment was timely although both formation of contract and delivery occurred much more than ten days before).
65 78 W. Va. 797, 90 S. E. 345 (1916) (delivery by agent under agreement in excess of his authority, which principal rejected). This case was under the earlier statute fixing no time for recording but the principle would no doubt be maintained under the present Uniform Act provisions. Accord, In re Bartlett, 281 Fed. 191 (N. D. Ga. 1922).
67 Lundquist v. Olympia Nat. Bank, 133 Wash. 600, 234 Pac. 453 (1925) (possession after foreclosure sale, conditional buyer being mortgagor and seller the purchaser at the foreclosure sale).
69 Cf. In re Baker, 5 W. W. Harr. 198, 162 Atl. 856 (Del. 1932) (Uniform Act, sustaining seller's title as to property covered by a contract never
abandonment and substitution of contracts, not to cases where the initial agreement, though subsequently modified as to some of its terms, remains alive and operative.\(^7\)

In the usual state of affairs, however, the contract precedes the delivery of the goods. Aside from a few aberrant decisions,\(^7\) it is the accepted view that the time of delivery is the beginning of the statutory period for recording.\(^7\) Nowhere is this more forcibly stated, or the reasons more fully developed, than in the opinion of the Supreme Court of Appeals in \textit{Guthrie v. Howie},\(^7\) where, after adverting specifically to the terms of the Uniform Act which speak of filing in ten days "after the making of the conditional sale", the construction is found to be confirmed by the fundamental purpose of the recording acts to protect those as to whom the conditional buyer is given a false appearance of ownership by reason of possession.\(^7\) Of course, the seller may estop himself, by recording a contract containing false recitals as to the time of delivery, from urging the subsequent true date when it did take place;\(^7\) this not because the contract controls but because of the impropriety of his urging, against those who have no means of information other than the record affords them, the false cast which he has given it. Delivery, rather than the contract, being of dominant importance, it does not extend the time for recording that the parties agree to postpone formal execution of the conditional

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\(^7\) Maryland Credit Finance Corp. v. Campbell, 8 W. W. Harr. 575, 195 Atl. 277 (Del. 1937).

\(^7\) See notes 63 and 64, supra.


\(^7\) See \textit{In re \textit{Gosch}}, 126 Fed. 627, 629, 61 C. C. A. 363, 365 (C. C. A. 5th, 1903) for a similar analysis of the general principle.

\(^7\) \textit{Grunbaum Brothers Furniture Co. v. Humphrey Investment Corp.}, 144 Wash. 620, 258 Pac. 517 (1927).
bill of sale pending certain intermediate events,\(^76\) nor that the sale is made with the privilege of a trial, at least where it is in the nature of a sale or return instead of a sale on approval.\(^77\)

Designation of the date of delivery as the material one for figuring the timeliness of filing goes a long way but still leaves untouched the frequently involved problem of what amounts to delivery for the purposes of the legislation. Where seller and buyer are located in different communities and the goods to be furnished under the contract are to be shipped to the buyer, a situation common enough in view of the kind of property typically sold conditionally, there are several possibilities, especially in view of the ordinary presumption that title is intended to pass upon delivery to the carrier.\(^78\) Either that delivery, or the delivery by the carrier to the buyer, or perhaps mere arrival of the goods at the destination named in the bill of lading might conceivably be taken as the effective delivery under the recording acts. The third seems never to have been so treated. As between the other two, the courts divide in results without amplifying the reasons for the choice made and it may be without always realizing that they are choosing. West Virginia decisions have stressed the date of delivery by the carrier to the buyer;\(^79\) Alabama has preferred the earlier delivery by the seller to the carrier,\(^80\) and two federal decisions, both applying the Georgia statute, have reached opposite results.\(^81\) Where interstate carriage is involved, the curious, though perhaps logical, consequence has been proclaimed that such filing as may be requisite in the place where the buyer is, and where the contract contemplates that the goods are to be, is not an original filing but a filing on removal, and subject to the rules with respect to mode and time which govern removal filings.\(^82\) Even more perplexing than the element of intermediate carriage is the situation arising where delivery is not single, but takes place piecemeal from time to time. Washington is firmly committed to the view that, if the contract is

\(^{76}\) National Bread Wrapping Machinery Co. v. Cowl, 137 Wash. 621, 243 Pac. 840 (1926) (pointing out the potential collusion and statutory evasion which might result under the opposite rule).

\(^{77}\) Anglo-American Mill Co. v. Dingler, 8 F. (2d) 493 (N. D. Ga. 1925).

\(^{78}\) See 1 WILLISTON, SALES § 278.


\(^{80}\) Brandon Printing Co. v. Bostick, 126 Ala. 247, 28 So. 705 (1900).


entire and not separable, the delivery of the last instalment fixes the time for recording,\(^3\) while Massachusetts insists that the first delivery under the contract governs.\(^4\) That the Massachusetts doctrine has at least the merit of simplicity is illustrated by the necessity the Washington court has found of elaborating and qualifying its position.\(^5\) A third possible approach, nowhere articulated in the reported cases, would be to take as to each instalment the date of its own particular delivery, regardless of whether the contract be severable or entire. This would conform with the rationale announced in \textit{Guthrie v. Howie}, of protecting third persons against delusive appearances of ownership in the buyer, and would impose no added burden except the slight inconvenience and small filing fees attributable to several filings instead of one. Moreover, since a filing which antedates final delivery protects the seller in any event,\(^6\) it would not deprive him of the privilege of effectively filing the entire agreement at once, if he chose that alternative and acted promptly.

Except for the Uniform Act, specific mention of removal between states or filing districts of goods held under a conditional sales agreement is rare indeed. Mostly the matter is left to be controlled by a judicious melange of conflicts doctrines and the general provisions respecting recording. Where they do exist, such provisions vary considerably. The somewhat commoner form provides simply for refileing within a specified number of days or months after removal or introduction.\(^7\) This was the manner in which the earlier West Virginia statute dealt with the problem.\(^8\) Without entering into nice refinements uncalled for by the facts presented, as to just what point in the transfer of property between

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\(^3\) Monotype Co. of California v. Guie, 134 Wash. 81, 234 Pac. 1046 (1925); Anderson v. Langford, 91 Wash. 176, 157 Pac. 456 (1916).
\(^6\) Allen v. Sterling Machinery Co., 110 Wash. 155, 188 Pac. 9 (1920).
\(^7\) See ALA. CODE ANN. (Michie, 1928), § 6898; ALTA. CONSOL. ORDINANCES (1915) c. 44, § 2(2); GA. CODE (1933) §§ 67-103; OKLA. STAT. ANN. (Perm. ed. 1937) tit. 46, § 58; SASK. REV. STAT. (1920) c. 201, § 3(2).
\(^8\) W. VA. CODE (Barnes 2d ed. 1918) c. 74, § 7 ("... the said writing shall, within three months after such removal, be admitted to record in the county to which the property is so removed. . . .")
CONDITIONAL SELLERS

states or counties should be taken as the time of removal or introduction of which the statutes speak, the judicial consensus under such statutes is that, once movement of the property is found to amount to a removal, the physical fact of change of location without more commences the running of the time to refile. Occasionally the applicability of the refile provision is confined by its terms to the situation where the conditional seller has permitted its removal, even under one statute to the case where he has consented in writing. Construction of such statutes does not seem to have found its way into the reported cases. Arguably they may demand a concurrence of removal and the stipulated permission or assent before the need to refile arises. Certainly they do look to the seller's being aware of the removal and so, by indirection, make notice of the fact an element. Aside from the Uniform Act, however, none of the statutes speak in terms of notice to the seller; but the well-known provisions of Section 14 of that Act call for refile within ten days "after the seller has received notice" of the new location of the goods. The language is unequivocal. The statement in Banks-Miller Supply Co. v. Bank of Marlinton that "The mere removal of such goods to another county . . . does not affect the seller's reservation. His rights are subordinated by the statute to those of creditors, only upon his failure to record his contract within ten days after receiving notice of the removal" seems uncontestably right. And the decisions under the Act are unanimous on the point that how much time may have elapsed since actual re-

89 Not every casual change of location is a removal. For example, merely driving an automobile on a journey into a state where it is not recorded is not so regarded, C. I. T. Corp. v. Guy, 170 Va. 16, 195 S. E. 550 (1938); and enforced detention by legal authority is not the basis for a change of location necessitating refile, General Motors Acceptance Corp. v. Hayes Motor Co., 112 N. J. Misc. 284, 172 Atl. 343 (1934) (alternative holding, Uniform Act). The analogy of domicile of natural persons may be found a useful method of approach to the issue of whether there has been such a removal as to set in operation the refile provisions. See (1931) 17 Va. L. Rev. 717.


91 Miss. Code Ann. (Harrison, 1930) § 2142.


94 106 W. Va. 583, 146 S. E. 521 (1929).

95 Id. at 586, 146 S. E. at 521. Italics in the original opinion.
moval is immaterial, the important thing being for the seller to record within ten days after he learns about the change.\textsuperscript{96} More obviously than as to the original filing, the statutes prescribe the commencement of the time for refiling pursuant to removal; and the differences in the results of the cases are closely responsive to corresponding statutory differences.

Still rarer are statutes limiting the effective life of the record, and requiring refiling in order to preserve the seller's recorded title from extinction by lapse of time. Such as do exist are quite uniform in what they direct, the only important difference being the length of time for which the original filing endures. The Uniform Act, in requiring a refiling for renewal "within thirty days next preceding the expiration of each period,"\textsuperscript{97} expresses the substance and almost reproduces the language of all the other provisions in the field.\textsuperscript{98} The beginning of the period is mechanically fixed, its ascertainment involving resort only to the calendar and a little simple arithmetic. Given the date when by the terms of the statute the first filing ceases to have effect, there only remains to check back thirty days according to accepted legal rules for computation of time; the interval represents the available period for refiling. The wonder is that there has been any occasion for construction at all — and there has not been much. One case under the Uniform Act holds, with obvious correctness, that a second renewal refiling

\textsuperscript{96} Cherry's, Inc. v. Sharpensteen, 33 Ariz. 342, 265 Pac. 90 (1928); Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 393, 241 Pac. 305 (1925); Commercial Credit Corp. v. Hild, 11 A. (2d) 428 (N. J. Sup. 1940); C. I. T. Corp. v. Jorgensen, 60 S. D. 7, 242 N. W. 594 (1932); Richardson v. Lumbermen's Ins. Co., 7 S. E. (2d) 436 (W. Va. 1940); Banks-Miller Supply Co. v. Bank of Marlinton, 106 W. Va. 585, 146 S. E. 521 (1929). The problem of what constitutes notice under the section may indeed call for construction. Thus, it has been held that any actual notice is sufficient, the provision not being limited to the formal notice prescribed by Section 13 of the Act, Maryland Credit Finance Corp. v. Campbell, 8 W. W. Harr. 575, 196 Atl. 277 (Del. 1937); on the other hand, the seller is under no duty to keep informed of the whereabouts of the property and is not chargeable with notice merely from the long continuance of the changed state of affairs, Bradshaw v. Kleiber Motor Truck Co., supra; Banks-Miller Supply Co. v. Bank of Marlinton, supra. For a collection of authorities on the subject see 2 Uniform Laws Annotated (Pocket Part Supp. 1939) 63.

\textsuperscript{97} Sec. 11; W. Va. Code (Michie, 1937) § 4017.

must be within a year from the actual date of the first renewal filing, it being insufficient that it is within a year of the time when the unrenewed original filing 'would have lapsed;' by filing in the first instance before the final date, the seller relinquishes his right to use that as the base date for subsequent refilings. Another decision holds that the vitiation by lapse of time runs from the initial filing rather than from refiling pursuant to removal, so that a renewal refiling more than three years after the former but within three years of the latter is bad, even though the original filing was in another state. The decision seems erroneous, not only because the purpose of the provision, to relieve from requiring too extended a search of the records, hardly applies to the case of extrastate records of which the purchaser has no notice and to which he has no access practically, but even more because it seems directly counter to the final sentence in section 14 of the Act.

The principles for deciding whether a third person's claim to the goods is such as is maintainable at all against that of the conditional seller and what is the proper period in which to file under the recording acts have been explored in some detail. Between them they provide complete solutions for those cases where (1) the seller having recorded in due time, subsequently acquired claims of whatever character are set up against his title, (2) the seller not having recorded in due time, claimants within a protected class have acquired their claims after the lapse of the prescribed period and before actual recording. In the first situation the seller, in the second the hostile claimant will prevail, in the absence of extraneous factors such as estoppel. No happy harmony of result obtains, however, where, admitting the claim to be of such a character that it might under appropriate circumstances be brought within the scope of the legislation, the claimant has obtained it before there has been any filing but while the prescribed period for filing

101 The Commissioners' Note in explanation of this somewhat unusual provision runs thus: 'If a contract extends over a period longer than three years, a fresh record should be made at the end of three years. Searchers should not be obliged to go back for an indefinite period to discover whether the title to a piano is in the possessor of it?; 2 UNIFORM LAWS ANNOTATED (1922) 10. Under the West Virginia modification fixing the life of the original filing at five years, the reason is even stronger.

102 "The provisions of Section 11 regarding the duration of the validity of the filing and the necessity for refiling shall apply to contracts or copies which are filed in a filing district other than that where the goods are originally kept for use by the buyer after the sale."
is still running, or (4) after the period has expired but also after
the contract has actually been filed. How do these situations stand
in respect to authority? and how in respect to reason?

So far as renewal refiling is concerned, one who has acquired
his rights in the final thirty day period preceding the termination
of effectives of the original record will not prevail against the
seller, even though the latter delays or omits refiling. A failure all,
although the record is doomed to die within a month at most, it is
still just as live as at the date of filing and continues so up until
the very last moment of its existence. The operation of the Uni-
form Act in this respect has been lucidly stated by the Wisconsin
Supreme Court in its opinion in American Laundry Machinery
Co. v. Larson, where it is said that,

"A failure to refile a conditional sales contract destroys its
validity only as to subsequent purchasers and creditors. It
does not operate to invalidate the contract as to those whose
rights during the three years following the filing were sub-
ordinate to the conditional sales contract. The commissioners’
notes to this section state that its purpose was to make unneces-
sary such an extended search as would be required if the effect
of filing was unlimited in time. This plainly indicates that its
provisions were designed only to protect creditors and pur-
chasers whose rights accrued after the expiration of the three
year period. The sole effect of the failure to refile is to termi-
nate, as to all persons who were not theretofore affected by it,
-the constructive notice accomplished by the filing."²⁰⁴

For the whole term appointed for refiling, by reason of the very
manner of defining that term, the seller’s title is secured by a valid-
ly filed contract, so that strictly the situation raises no question of
third party rights asserted against contracts unfiled but still
susceptible of timely record. In this connection, therefore, re-
newal refilings may be dismissed from consideration, and attention
fixed exclusively on original and removal filings.

West Virginia has been prolific of decisions bearing on the
question; a brief recapitulation of them affords perhaps as con-
venient a starting point as any for its consideration. In both
Hawley v. Levy²⁰⁵ and Guthrie v. Howie²⁰⁶ when the claim urged
(in both instances a landlord’s lien) arose, the contract was un-

(M. D. Pa. 1933); American Laundry Machinery Co. v. Larsen, 217 Wis. 208,
257 N. W. 608 (1934).
²⁰⁴ Id. at 213, 257 N. W. at 610.
²⁰⁵ 99 W. Va. 335, 128 S. E. 735 (1925).
filed, but it was thereafter recorded in due time; in deciding for the sellers, the court necessarily endorsed the position that, so far at least as original filing is concerned, actual timely record preserves the seller's security title against intermediate claims as fully as against those which accrue subsequently. Brown v. Woody,\textsuperscript{107} also involving a landlord's lien, presented the distinguishing circumstance that, while, as in the cases already mentioned, the claim arose in the open period, the contract was not thereafter recorded within the prescribed time, indeed not at all; while judgment for the claimant was reversed for jury resolution of a dispute as to whether he had notice before his claim accrued, the fact that it was remanded suggests subsumption by the court of the view that intermediate liens or conveyances may establish some sort of claim, however inchoate and defeasible, which may ripen into superior right unless defeated by timely action of the seller. If so, the attitude of the court toward the open period for original filing and that for renewal filing would seem to differ, since, in Auto Sales Company v. Yost,\textsuperscript{108} the position was taken that, throughout the open period for re-recording after removal to a different county, the seller's title was so far immunized that no adverse claim arising within the period could ever ripen into a superior right, even though thereafter the full period lapsed without any action being taken by the seller. The rather complete reliance of the reasoning on the operation of the original record in another county as notice despite removal re-enforces the idea that a distinction may exist between this situation and that of an original filing, where there is no record at all when the transaction occurs. It is true that the Yost case arose under the earlier West Virginia statute and is not direct authority for the construction to be given the Uniform Act; on the other hand, it has been cited with approval, and in part adopted as the basis of decision in the later case of Banks-Miller Supply Company v. Bank of Marlinton.\textsuperscript{109} The latter case does not, however, in either the facts or the syllabus,\textsuperscript{110} go beyond the situation where the seller, while not recording the contract, nevertheless does actually notify the hostile claimant of its existence within the period prescribed for filing; in such a case it settles the West Vir-

\textsuperscript{107} 98 W. Va. 512, 127 S. E. 325 (1925).
\textsuperscript{108} 91 W. Va. 493, 113 S. E. 758 (1922).
\textsuperscript{109} 106 W. Va. 533, 146 S. E. 521 (1929).
\textsuperscript{110} Ibid. ("Where the seller gives to the party to be affected by the recordation mentioned in section 14 . . . . actual notice of the reservation of property within ten days after receiving notice of the removal of the goods, recordation is unnecessary as to such party").
Virginia law in favor of the seller. Where the seller, instead of merely giving notice of his rights, retakes possession and restores the property to its original location before lapse of the ten days allowed for removal refiling, he would seem to occupy at least as solid ground, and it is accordingly not surprising that under such circumstances his superior right was recognized, in *Richardson v. Lumbermen's Insurance Company*.\(^{111}\) In all these cases of removal refiling, the hostile claims involved arose before the seller had notice of the removal, hence technically before the period for filing even commenced to run; but this appears to be a distinction without a difference, and nothing has been made of it in West Virginia or elsewhere. To summarize, in West Virginia the seller prevails against claims arising in the open period for filing where thereafter he acts within that period, either by filing as prescribed by the Act (certainly as to original filing and probably as to removal refiling) or by "equivalent" action, such as giving actual notice or repossession (certainly as to removal refiling and perhaps (?) as to original filing); the hostile claimant prevails where the seller remains inactive throughout the statutory period for original filing, but the rule may be otherwise as to inaction pending the time for removal refiling.

In so far as concerns the superiority of the seller's title over intermediate claims when the contract is filed within the time allotted, the authorities elsewhere without exception concur with West Virginia in recognizing it, and this without regard to whether original filing or refiling upon removal is involved.\(^{112}\) Indeed, this is so though the hostile claim attached before the contract was even recordable\(^{113}\)—a situation having some analogy to dealings with

\(^{111}\) 7 S. E. (2d) 436 (W. Va. 1940).


\(^{113}\) Burgsteiner v. Street-Overland Co., 30 Ga. App. 140, 117 S. E. 268 (1923) (statute required that notes be probated before recording, sale to bona fide purchaser occurred before probating).
removed property before the seller has notice of removal. Where a seller who has not filed within the statutory period relies on the fact that information was otherwise brought home to the buyer during that time, by notification, institution of or intervention in a suit, or the like, the cases are in conflict. Two other jurisdictions have held, construing section 14 of the Uniform Act relating to refiling on removal, that such circumstances of knowledge are no acceptable substitute for the filing commanded by the legislation, thus leaving West Virginia alone in its interpretation of the Act. Furthermore some states not having the Uniform Act sustain the hostile claim unless there is a filing within the prescribed time, regardless of what the facts show by way of actual notice within the period but subsequent to the inception of the claim. But in others the seller derives the same protection from such actual notice as from a timely filing. Where the seller goes beyond the mere imparting of information and lawfully retakes possession of the property from the buyer, thus in effect treating the sale as dissolved, it seems everywhere to be the rule that such a timely re-capture defeats intermediate liens and conveyances as effectually

114 Thayer Mercantile Co. v. First National Bank of Milltown, 98 N. J. L. 29, 119 Atl. 94 (1922); Universal Credit Co. v. Finn, 212 Wis. 601, 250 N. W. 391 (1933). The presupposition that the giving of actual notice is not equivalent to the prescribed filing is inferentially disclosed in such a case as Riccardi Motor Car, Inc. v. Weinstein, 98 Pa. Super. 41 (1929), where the court resorted to labored and highly questionable reasoning to find the statute inapplicable and render judgment for the seller, while the same result could have been reached quite easily by resort to the element of actual notice through institution of suit, had that been deemed sufficient to displace the hostile claim. Superficially, Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 393, 241 Pac. 305 (1925) may appear to reach a different result, in conformity with the West Virginia rule; but note that there the seller promptly upon going into possession under its replevin bond took the property back to the state whence it had come, thus bringing the case within the recaption qualification noticed infra, text and note 117.


116 Talmadge v. Oliver, 14 S. C. 522 (1881) (original, institution of suit); cf. Hinds v. Atlas Acceptance Corp., 183 Okla. 134, 80 P. (2d) 630 (1938) (removal, institution of suit). The same result has been obtained in part by holding the provisions for refiling to be inapplicable to property introduced from outside the state, as in Goetschius v. Brightman, 245 N. Y. 186, 156 N. E. 660 (1927) (under New York statute anterior to the Uniform Act).
as would a timely filing; if Banks-Miller Supply Company v. Bank of Marlinton represents a minority doctrine, Richardson v. Lumbermen's Insurance Company at any rate is an orthodox enough holding. Probably it is immaterial in any of these cases of actual subsequent notice during the filing period whether what is omitted is an original or a removal filing; at any rate, the cases cited on both sides apply the chosen rule indiscriminately and place no verbal stress on that circumstance. There remains the situation where the seller has taken no steps of any sort during the period designated for recording, to protect his security against lienors or purchasers. Can imperfect rights capable of ripening into preferred claims against the property arise at all in that time? or is it so thoroughly sterilized that whatever transactions take place then must forever be subject to the seller's title in like manner as those occurring in the final thirty days' existence of the initial filing? There is but little direct authority. So far as concerns the original filing, the cases uniformly support the background hypothesis of Guthrie v. Howie, Hawley v. Levy and Brown v. Woody that inchoate claims may arise which will take precedence of the conditional sales contract on expiration of the statutory time with nothing done by the seller. At least two states reach the same

117 Motor Sales Co. v. McNeil, 18 Ala. App. 132, 89 So. 89 (1921) cert. den. 206 Ala. 700, 89 So. 923 (1921); cf. Bradshaw v. Kleiber Motor Truck Co., 29 Ariz. 392, 241 Pac. 305 (1925) (Uniform Act). The Alabama decision is of particular significance since in that state the law is that the giving of notice to the claimant within the period does not protect the seller, In re Dancey Hardware & Furniture Co., 198 Fed. 336 (N. D. Ala. 1912) aff'd mem. 201 Fed. 1023 (C. C. A. 5th, 1913), supra n. 115.

118 Automatic Sprinkler Corp. of America v. Rosen, 259 Mass. 319, 156 N. E. 693 (1927); cf. Air Equipment Corp. v. Rubbercraft Corp., 79 F. (2d) 521 (C. C. A. 2d, 1935); Anglo-American Mill Co. v. Dingler, 8 F. (2d) 493 (N. D. Ga. 1928); Alf Holding Corp. v. American Stove Co., 233 N. Y. 450, 171 N. E. 703 (1930); see Prudential Ins. Co. v. Estates of Cotswold, Ltd., 17 N. Y. S. (2d) 302, 304 (1939). A statute not elsewhere encountered formerly provided in South Carolina that "the recording . . . of instruments . . . subsequent to the expiration of said ten days, shall, from the date of such record, have the same effect as to the rights of all creditors and purchasers without notice as if . . . said . . . instrument had been executed and delivered on the date of the record thereof." 3 S. C. Code (1923) § 5312. It is not found in the corresponding section of the current code, having apparently been repealed, see 3 S. C. Code (Michie, 1932) § 8875. Under it, claims arising after the conditional sale, whether before or after the time fixed for recording, were recognized as prior to the seller's title if lien claims, and on a parity if general creditor's claims, but, by virtue of the quoted provision, the seller could regain his priority as to any of the latter class which had not been converted into liens on the property prior to the actual recording, whenever that took place. Firestone Tire & Rubber Co. v. Cross, 17 F. (2d) 417 (C. C. A. 4th, 1927); Carroll v. Cash Mills, 125 S. C. 332, 118 S. E. 290 (1923). The significant feature of the cases for present purposes is their recognition that claims accruing in the period open for recording might potentially give the
result in dealing with the matter of refileing upon removal,\textsuperscript{119} thus rejecting the rule of \textit{Auto Sales Co. v. Yost}; but that case derives some support from an Arizona dictum\textsuperscript{120} and perhaps, though not unequivocally, from the Oklahoma decisions.\textsuperscript{121} It should be noted that cases already discussed which require actual filing to protect the seller's title and refuse to accept any substitute conduct, however timely or informative, as an equivalent, are authorities for sustaining the hostile claim in event of the seller's continued inaction throughout the period; if superior rights may originate in the filing period despite the fact that the seller does something to protect his title, \textit{a fortiori} they may if he does nothing. The converse is not true. Courts willing to accept actual notice as a substitute for filing are not committed to sustain the title of a seller who neither files nor notifies. Accordingly, all that group of cases (including the only constructions elsewhere of the Uniform Act) which refuse to treat timely notice as equivalent to timely filing upon removal stand opposed to \textit{Auto Sales Co. v. Yost}. The upshot is a substantial body of authority for the view that the intermediate claimant is to be preferred to the inert seller, regardless of whether the omission is of an original or a removal filing; while the doctrine of the \textit{Yost} case has but flickering and feeble support.

Turning to the situation where, the seller having filed tardily, the hostile claim accrues at a still later time, what do the cases show? The question is of course only pertinent where the third person has not, by examination of the record or otherwise, obtained actual notice of the conditional sales contract, since, as has already been seen, only the uninformed claimant falls within the statutory protection in any event.

So limited, the problem seems to have been presented but once in West Virginia, in \textit{Bent v. Weaver};\textsuperscript{122} in that case the Supreme Court of Appeals sustained the seller's title as against an attaching creditor who became such after the delayed filing. A like result has been reached in analogous cases elsewhere in apparently all the

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\footnote{Pulaski Mule Co. v. Haley, 137 Ala. 533, 65 So. 733 (1914); cf. North v. Goebel, 138 Ga. 738, 76 S. E. 46 (1912).}
\item \hyperlink{footnote:120}{\textsuperscript{120}}
\footnote{See C. I. T. Corp. v. First National Bank of Winslow, 33 Ariz. 483, 488, 266 Pac. 6, 7 (1928).}
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cases decided under the Uniform Act.\textsuperscript{122} This concord is the more surprising in that, aside from inapposite cases under statutes prescribing no time for filing\textsuperscript{122} or defining expressly the consequences of a belated record,\textsuperscript{122} the courts in applying legislation other than the Uniform Act rather seem to tend in the opposite direction. The decisions under the statute of one state, Georgia,\textsuperscript{2} and scattered dicta from other jurisdictions,\textsuperscript{127} conform with what is done under the Uniform Act in their benevolence to the procrastinating seller. But over against these are to be set holdings under a number of statutes, subordinating the seller’s security title to bona fide hostile claims perfected without notice where the conditional sale was recorded by the time such claims attached but not within the


\textsuperscript{124}Under such statutes the seller’s title is protected against hostile claims subsequent to actual filing, whenever that occurs, cf. Emerson-Brantingham Implement Co. v. Lawson, 257 Fed. 877 (S. D. Iowa 1918); Lawyers’ Cooperative Publishing Co. v. Rose, 60 Ohio App. 258, 20 N. E. (2d) 720 (1930). Since, as shown in Huffard v. Akers, 52 W. Va. 21, 43 S. E. 124 (1902), supra n. 8, the result of such a statute is to require immediate recording, it would be particularly unfair to the seller should a failure to file “on time”, i.e., at the very moment the sale occurred, forever preclude him from doing so with full effect. This difference in the legislation would seem to make decisions, under statutes prescribing no period, of little authority under statutes prescribing a period, and vice versa.

\textsuperscript{125}Under a superseded South Carolina statute, the relevant portions of which are quoted supra n. 118, a tardily recorded conditional sales contract was expressly given such effect as it would have had if executed at the time of record; this statute, which affected even intermediate claims accruing at any time before filing, a fortiori subordinated subsequent claims to the seller’s title, cf. Firestone Tire & Rubber Co. v. Cross, 17 F. (2d) 417 (C. C. A. 4th, 1927); Carroll v. Cash Mills, 125 S. C. 332, 118 S. E. 290 (1923).

\textsuperscript{126}In re Brown Wagon Co., 224 Fed. 266 (S. D. Ga. 1915); Holland v. Adams, 103 Ga. 610, 30 S. E. 432 (1898). In Twin Theatre Co. v. Liquid Carbonic Co., 134 Ga. 469, 67 S. E. 1033 (1910), the adverse claim accrued not only after record but also after possession of the goods had been surrendered to the conditional seller and the contract dissolved; under such circumstances, it seems likely that all courts would unite in recognizing the superiority of the seller’s title.

time fixed by statute, thus giving the time designation something of the character of a statute of limitations. Whatever the reason, if any, all cases cited happen to have involved delays in the original filings; there are no representatives of tardy removal filings; but it may perhaps be surmised that the situations would be treated alike, there being no indications to the contrary in the language of any of the opinions.

Three cases, all under the Uniform Act but none of them in a court of last resort, have passed upon the problem of delay in connection with a renewal refiling, with conflicting results. In New Jersey, the cases dealing with tardy original filing have been treated as controlling, and refiling after the lapse of the effectiveness of the original record has been allowed to defeat later hostile claims. In New York, on the other hand, belated refiling for renewal purposes has been dealt with specially, and held incapable of preserving the seller's priority as against adverse claimants. With so few authorities so equally divided, the question is a wholly open one; but the very fact of conflict between jurisdictions which both have the Uniform Act and which apply it alike where delayed original filing is involved, does show that the result in case of tardy refiling is not necessarily foreclosed by the decisions in case of belated original record. Courts which have not yet passed on the former need not feel their judgments coerced by their treatment of the latter unless they want to.

This review of the authorities gives a faithful and, the writer ventures to hope, a fairly exhaustive account of the present state of the law. Here journalism ends and criticism begins. Up to this point, the reasons and rationalizations assigned for preferring seller or hostile claimant as the case may be have been rigorously ex-


\[130\] In re Kaufman, 1 F. Supp. 368 (N. D. N. Y. 1933); American Laundry Machinery Co. v. Simon, 255 App. Div. 203, 6 N. Y. S. (2d) 943 (1938).
cluded, as they may always be in any discussion limited to the bare, hard content of the decisions. But, in projecting the probable or the proper course of development in the cases yet unsettled in any jurisdiction, they constitute the essential and only decent materials for prophecy. Whether and how far the rules in existing situations are to be extended, limited, or even abandoned, as new cases arise, sometimes does not but always should depend upon the weakness or strength of the reasons supporting those rules, whether articulated or not. The remainder of this paper is not concerned with either justifying or condemning the conclusions reached in particular cases, for the writer has frankly been unable himself to arrive at positive convictions, but with exploring their premises and suggesting the criteria for judgment.

The purely statutory origin of the device of recording conditional sales contracts would lead one to expect frequent analyses of the language and legislative history of the applicable enactments, in determining the consequences of action or inaction. And indeed reference thereto, at least by way of citation, is made in virtually all of the cases, with quotations of extensive portions of the legislation not uncommon.

The doctrine of construction according to the object and general purpose of the statute is sometimes alluded to; but there is an utter lack of agreement as to what that purpose may be. The pronouncements range from attribution of a design for “the protection of the seller and his assignee against purchasers and creditors of the buyer”¹³¹ (a characterization quite plainly wrong since, by virtue of the common-law validity of the seller’s title, it is more fully protected by the absence than by the enactment of filing statutes) to the finding of a “clear purpose... to protect innocent purchasers, mortgagees, and judgment creditors without notice,”¹³² a “principal, if not primary, purpose of protecting third persons from the frauds of vendors and vendees”;¹³³ with multi-form intermediate variations.¹³⁴ There emerges out of this welter

¹³¹ C. I. T. Corp. v. First National Bank of Winslow, 33 Ariz. 483, 486, 266 Pac. 6, 7 (1928).
¹³² Pulaski Mule Co. v. Haley, 187 Ala. 533, 539, 65 So. 783, 785 (1914).
¹³⁴ See, e. g. Morey & Co. v. Schaad, 98 N. J. L. 799, 801, 121 Atl. 622, 623 (1923) (“to give notice to a bona fide purchaser or creditor of the exact legal status and property rights of the parties, so as to enable such intending purchaser or creditor to guide himself accordingly”); American Clay Machinery Co. v. New England Brick Co., 87 Conn. 369, 375, 87 Atl. 731, 733 (1913) (“to protect persons who have acquired liens or interests in the property while in the vendee’s possession, not to give his creditors and others a perpetual right to
of statements the suspicion that there is no disclosed legislative purpose which shapes judicial decision — that instead the courts, probably unconsciously, mould the imputed legislative purpose so as to furnish the semblance of a reason for a conclusion otherwise grounded. This becomes obvious when direct testimony, tending to disclose an intention to accomplish something inconsistent with the favored construction of the statute, is unceremoniously dismissed in the course of judicial divination of meaning. However, in one particular there does seem to be some vitality in an aspect of the legislative purpose formula. The Commissioners' Note explanatory of section 4 of the Uniform Act has been vouched in support of the holding that a tardily recorded title is to be preferred to subsequent hostile claims. Yet it would be misleading to state a general proposition that the purposes manifested in the Commissioners' Notes will be controlling; for that part of the same note explaining the holding open of a time for filing solely on the ground of avoiding inconvenience to the seller, with its evident corollary that this is a matter of grace to him pointing out a way to escape hardships consequent upon filing statutes which appoint no fixed period, seems never to have been noticed in cases where

secure liens upon it, because of the temporary possession of the vendee'”); (1934) 32 Mich. L. Rev. 710, 711 (“to give notice to purchasers and creditors”); (1933) 81 U. of Pa. L. Rev. 628 (“To safeguard the rights of those who might otherwise rely upon the conditional vendee's apparent ownership”). 2 Uniform Laws Annotated (Pocket Part Supp. 1939) 8 lists judicial formulations of the purpose of the Uniform Act announced in various connections.

A conspicuous instance of this is afforded by Commercial Credit Co. v. Gaiser, 134 Kan. 552, 7 P. (2d) 527 (1932). There the court, construing the Arizona statute, an amended version of the Uniform Act, had before it the testimony of one of the Arizona code commissioners who drafted the amended section involved, that “My own reasons . . . was (sio) to compel vendors . . . to record their conditional sales contracts within ten days from the date of sale under penalty of having it declared void as to all persons except the buyer” (italics supplied). It was nevertheless held that a seller not recording within ten days should prevail against a purchaser acquiring the goods without actual notice at a still later date. The court was probably right in refusing to let the testimony of the code commissioner-draftsman fix the meaning but its brusque disregard of it suggests the true state of affairs respecting the extent to which legislative purpose really affects the decisions.

“A filing after ten days from the date of the making of the contract of course protects the seller against all subsequent purchasers or creditors who buy or levy on the goods”. 2 Uniform Laws Annotated (1922) 9.


138 “Under the statute the contract is valid for ten days without filing. It was thought unwise to require the seller to file immediately. The seller’s office may be far distant from the filing district. He should have a reasonable time to mail his papers and get them filed”. 2 Uniform Laws Annotated (1923) 9.
the adverse claimant acquires his interest innocently within the filing period before record and the seller, whatever else he may do, does not record betimes.\textsuperscript{139} Except perhaps for claims arising subsequent to tardy actual record under the Uniform Act, the object and general purpose of the legislation seems to be an element only in the reasoning, not in the reasons, of courts.

Adverting to a different ‘‘canon of statutory construction’’, one court has declared that the filing statute (which happened to be the Uniform Act), being in derogation of the common law, should be narrowly construed.\textsuperscript{140} Over against this may be set the remarks of a commentator objecting to another decision for disregard of the principle that ‘‘recording statutes are remedial and should be liberally construed so as to attain the object intended by them’’.\textsuperscript{141} True, the case and the comment had in common that the former applied strict construction to sustain judgment for a seller who never recorded, while the latter urged the impropriety of a holding against a seller who permitted the life of the original record to lapse before refiling. But what kind of a rule is it that does not cut both ways? and what genuine substance have the canons of strict or liberal construction when either one may be selected as a graceful way of phrasing the proposition that ‘‘the conditional seller wins’’? In view of what has heretofore been said about the status of conditional sales at common law, there is no doubt that the filing statutes do represent a departure from that system. And what of it? While some courts remain committed to the canon of strict construction of statutes in derogation of the common law,\textsuperscript{142} its baseless character\textsuperscript{143} is becoming generally recognized\textsuperscript{144} and it has been expressly abolished in a number of

\textsuperscript{139} Since the assigned reason for fixing a filing period shows that the consequences of non-immediate filing are displaced only to permit the leeway in time of filing which practical business considerations demand, and since, under statutes appointing no time for filing, a claimant acquiring without actual notice before record, however slightly delayed, would not be affected by later communication of information, institution of suit, or the like, the stating of the reason would seem to negative the contention that any altered result was intended where the seller did not file but did something else; but no court has been found emphasizing in this connection the purpose of the legislation as disclosed by the Commissioners’ Note.

\textsuperscript{140} Quinn v. Bancroft-Jones Corp., 18 F. (2d) 727, 728 (C. C. A. 2d, 1927).

\textsuperscript{141} (1933) 81 U. of Pa. L. Rev. 628.

\textsuperscript{142} See, e. g., Newhart v. Pennybaker, 120 W. Va. 774, 200 S. E. 350 (1938).

\textsuperscript{143} For an excellent exploration and explosion of the underlying premises, see Pound, \textit{Common Law and Legislation} (1908) 21 Harv. L. Rev. 383.

Even where the doctrine is in force, it is subject to the qualification that remedial statutes are to be construed liberally to effect their spirit and purpose. The situation is particularly complicated under the Uniform Act by reason of the express mandate of section 30 that "this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it". On the whole, it is doubtful that there is much help to be had from the standard canons respecting strict or liberal construction. The scarcity of explicit mention of them in judicial and extrajudicial discussions, whether it be due to the decadence of the doctrine or to recognition that the statute smacks strongly of remedial legislation, confirms the doubt. Here, as ever, nonuse of the doctrine argues strongly for its irrelevance to the case at hand.

Detailed verbal or contextual analysis of the applicable statute to show just how it envisages the result arrived at is rare. Very likely this is because court and counsel are often unaware of the presence of the issues constituting the central theme of this discussion. Whether the claim is such in character as to be maintainable in any event against the seller's title and whether the filing was timely are carefully explored and the matter dropped there, without apparent realization that there is anything further in the case. Such perfunctory treatment is no less unsatisfactory however because of being understandable. The usual technique is to incorporate the statutory provisions, by reference or by statement, in the opinion and let it go at that, evidently on the assumption that their language expressly disposes of the controversy without need for construction.

Occasionally a court has articulated the view that the statute expressly disposes of the issues or, more cautiously, has phrased

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145 See, e.g., IOWA CODE (1935) § 64 ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.")
146 Hasson v. Chester, 67 W. Va. 278, 67 S. E. 731 (1910); 59 C. J. 1128.
147 W. VA. CODE (Michie, 1937) § 4037.
148 This principle led the Supreme Court of Appeals in one case to reach a result designed to promote uniformity which was contrary to both the general statutory scheme of the state and its original common law doctrines on the subject of the effect of attachments. Cf. Bent v. Weaver, 106 W. Va. 164, 145 S. E. 594 (1928).
the same general thought in terms of plain inference from the statute. Here or there an atypical statute may very well admit of such summary treatment but it is the exception. Normally the ipse dixit merely carries the day without also carrying intellectual conviction. The Achilles heel of the plain inference approach is neatly pinned by two opinions which point out the ease with which the legislature could have disposed expressly of the respective claims of the parties in the various contingencies considered in this paper, had it wished to preclude construction; the cogency of the observation is demonstrated by instances such as the former South Carolina legislation where the consequences of untimely filing, upon the rights of intervening and subsequent claimants, are declared in apt language, thus showing that no unattainable finesse of specification is required should a legislature really wish to speak its will. Equally fatal to the notion that the statutes expressly dispose of cases where the hostile claimant without actual notice acquires his interest either within the filing period or after a tardy filing is the divergence of holdings in the application of identical statutes. Even disregarding cases where different jurisdictions have interpreted the Uniform Act differently, there remain enough instances where courts within the same state have derived inharmonious meanings from a single enactment to dispel any rational assurance that the statutes without interpretation or construction give the answer.

All this does not mean that the questions at issue lie outside the purview of the statutes. Indeed, under the Uniform Act, no

Monotype Co. of California v. Guile, 134 Wash. 81, 89, 234 Pac. 1046, 1048 (1926).


151 Such would seem to be the Georgia statute expressly analogizing the filing of conditional sales contracts to that of chattel mortgages and thus disposing of matters respecting the former which are settled as to the latter, discussed infra page 107.

152 See Bugbee v. Stevens, 53 Vt. 389, 393 (1881) (tardy record, subsequently acquired hostile claim); Universal Credit Co. v. Finn, 212 Wis. 601, 607, 250 N. W. 391, 393 (1933) (claim acquired in open period for renewal filing, seller notified but never filed).

153 Supra n. 117.

question between the seller and third persons can be independent of the statute, for, should no other provision apply, then section 4 gives the automatic answer — the seller shall prevail. But a statute comprehends and controls not only the situations with which it verbally expressly deals, but all those related situations which it implicates by proper interpretation or construction. Its text is only a skeleton which must be draped with the body of doctrine that it is adapted and designed to support if the bare bones of language are themselves to have life and motion; that body of doctrines is supplied by the courts in defining and construing it. The whole resulting mass of law integrated about the legislation may then properly be said to be provided for by the statute; but most of it is provided for only derivatively and not expressly. This may all sound highly theoretical. Its practical importance is that an understanding of it leads to straight thinking by judges and attorneys when they are faced with the bearing which a statutory provision has upon a given set of circumstances. It is lazy and inexact to shirk conscious construction by dismissing difficulties with the blithe assertion that a statute expressly provides thus and so; it is uninformative to rest decision on general principles or canons of construction unless the existence in the particular case of the conditions upon which the applicability of the canon is predicated is made to appear. Neither technique has much to offer in the matters here being dealt with; and, as the foregoing examination has shown, inconclusiveness, confusion, and shallowness have marked the instances of their use. One must look elsewhere, to cases where courts have tackled without shrinking the task of construction, for principles and suggestions which really mean much.

A characteristic response of the law to emergent institutions and procedures has been the assimilation of the novel to the familiar. It was foreseeable that this would take place in connection with conditional sales. However ancient their lineage may be, their modern widespread use seems fairly attributable to a wish to escape certain incidents of the law of chattel mortgages, a security form which to a substantial degree the conditional sale has supplanted. The historical and functional relations between the two almost inevitably inclined courts confronted by con-

156 "Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided".
157 See Vold, Sales 266.
ditional sales problems to look for parallels in the earlier-matured law of chattel mortgages. A very few statutes, after providing separately for the filing of conditional sales within a stated time, expressly direct that the laws with respect to chattel mortgages shall govern in the determination of the consequences of compliance or noncompliance; where they exist, the courts adhere faithfully to their direction, recognizing that discretion has been withdrawn from them and searching the body of rules developed as to chattel mortgages for precedents controlling like situations involving conditional sales, pursuant to the statutory reference.5

(Parenthetically, it may be noted that that was what led the Georgia court to hold that tardily recorded conditional sales should prevail over still later adverse claims, the leading case registering the view by way of dictum that the rule should be otherwise but for the legislative command to follow the law of chattel mortgages,159 thus weakening the force of the only unequivocal holdings, prior to or outside the range of the Uniform Act,160 in favor of the conditional seller’s title). Normally, the statutes make no mention of chattel mortgages. The Uniform Act among others is devoid of any such allusion.151 The omission has not eliminated and logically does not negative the use of chattel mortgage analogies; it leaves the courts free to take or leave them according as reason and sound judgment may suggest. The interesting thing is to see how far there has been an inclination in practice to borrow from the chattel mortgage field in working out the incidents of the conditional sales filing statutes. In so far as the parallelism is an implicit background assumption not articulated in the opinions, it is of course imponderable and undemonstrable. In so far as the association

159 See Holland v. Adams, 103 Ga. 610, 30 S. E. 432 (1898). Eminent commentators in approving the Georgia position as stating the sound general view, see Bogert, Commentaries on Conditional Sales, 2A Uniform Laws Annotated (1922) 90; 3 Jones, op. cit. supra n. 7, at 140, apparently have overlooked the fact that this court, the only one squarely supporting it before the Uniform Act, not only laid it down as a special doctrine arrived at under statutory compulsion but stated its view that absent the statutory declaration the contrary rule would be reached.
160 See the discussion supra text and notes 124-128.
151 While the Act makes no mention of chattel mortgage recording, its relation to the filing of conditional sales was discussed by its learned draftsman, see Bogert, supra n. 159, at 73, who seems to take the position that on principle they have much in common if indeed they are not strictly parallel.
of the two manifests itself merely in the choice of authorities cited to support or bolster decision, there exist the data relevant to appraisal; but the examination would be so tedious and complicated that it is doubtful whether it would be worth the doing. It is enough to review only that more limited group of authorities where the matter of correspondence between recording chattel mortgages and filing conditional sales is raised by the language employed.

West Virginia has accepted unreservedly the proposition that chattel mortgage cases are direct authority as to similar situations in connection with conditional sales, specifically in controversies between a claimant whose interest attached in the open period for removal refiling and a seller who failed to file but took other steps to assert his title. Under similar circumstances there has been a like reaction elsewhere. Furthermore, in other types of controversies, there has been this substantial identification of the filing of conditional sales and the recording of chattel mortgages. On the other hand, there is equally respectable authority denying the interchangeability of the law, whether as to the status of adverse interests arising in the open period for renewal refilings or as to the effect upon subsequently accruing claims of the failure to file within the time allotted. The divergence of holdings is not explainable

162 Cf. Richardson v. Lumbermen's Ins. Co., 7 S. E. (2d) 436, 438 (W. Va. 1940); Auto Sales Co. v. Yost, 91 W. Va. 493, 495, 113 S. E. 758, 759 (1922) ("Such is the great weight of authority as applicable to chattel mortgages; and we think the same rule is applicable to contracts of conditional sales with reservation of title"). The recent case arose under the Uniform Act, the earlier one under the prior West Virginia statute. It is interesting to note that the merger of doctrine has become so complete in this jurisdiction that the court in the Richardson Case was able to misread its own earlier decision in the Yost Case as a case which "applied to a chattel mortgage" without according it any less weight as an authority — surely an ultimate in the unification of the doctrines!

163 Cf. Commercial Credit Co. v. Gaiser, 134 Kan. 552, 555, 7 P. (2d) 527, 529 (1932) (where the court examined its local chattel mortgage decisions to discover the meaning of the Arizona conditional sales act, the corresponding Kansas statute providing "that conditional sales have the same potency as chattel mortgages and upon the same conditions"). The conditional sales situation has also been analogous to that of the absolute sale with retention of possession by the seller, In re Dancy Hardware & Furniture Co., 198 Fed. 336 (N. D. Ala. 1912).


165 Cf. Pulaski Mule Co. v. Haley, 187 Ala. 533, 539, 65 So. 783, 785 (1914).

on the ground of differences in statutory provisions; for it is to be observed that cases involving application of the Uniform Act are to be found on both sides of the doctrinal fence. On the pure logic of the matter, it is perhaps impossible to determine which side deserves the palm. If an analysis of the institutional attributes of the two forms of security disclosed no significant differences or if a historical examination showed that the legislature had the chattel mortgage model in mind when dealing with conditional sales, that would incline the scale toward treating them the same; but in none of the cases is there to be found either functional or historical analysis of their relation. For treating them alike, there may be instanced considerations of judicial convenience and certainty. Against it is the danger that a priori identification will tend to perpetuate in conditional sales law harsh or awkward results fixed in chattel mortgage law by the rule of stare decisis and the still graver danger, under the Uniform Act, that the variations in local rules bearing on chattel mortgages will substantially destroy the uniformity which the Act seeks to achieve. This last is perhaps the weightiest single factor to be considered in Uniform Act jurisdictions. In the prevailing absence of any clear consensus, the chattel mortgage cases, while pertinent, hardly seem independently sufficient as a basis of reasoning in the conditional sales field.

If the foregoing approaches to the problem leave the impression of mere shadow-boxing with the issues, the same objection cannot be levelled against those cases and discussions which treat of the relative rights of seller and claimant in terms of notice of the contract. Constructive notice is, of course, what is meant; for, as already observed, actual notice including knowledge of circumstances sufficient to arouse inquiry effectually excludes a claimant from the class of those who can in any event contest the seller's

1908); In re Excelsior Macaroni Co., 55 F. (2d) 496 (E. D. N. Y. 1931) (all dealing with tardy original filing); see (1933) 81 U. of Pa. L. Rev. 628, condemning In re Kaufman, 1 F. Supp. 368 (N. D. N. Y. 1932) supra n. 164, and characterizing the decision as "strongly influenced by an unfortunate analogy to mortgages" (italics supplied).


168 § 4; W. VA. CODE (Michie, 1937) § 4037.
title. Legislation respecting the filing of conditional sales contracts, like all the family of statutes with respect to public records, is rooted in the concept of constructive notice, that is to say, in the idea of contingently imposing upon persons in fact without notice of the true state of affairs the consequences of full knowledge. The open question under such statutes is the determination of the contingencies upon which innocent ignorance will be unavailing as a shield. So far as they address themselves to that question, the opinions give honest guides to the understanding, however much one may disagree with the particular choices made or the views of policy which they presuppose.

There is no dispute of the proposition that timely proper filing of the contract gives constructive notice of its existence while the goods remain within the filing district, throughout whatever period of time the law appoints for the life of the filing. Not only third persons whose claims to the goods arise after the filing, but also those acquiring their interests in the intermediate period following the sale, are charged with notice, provided that the filing has been timely. The troublesome questions are, (1) Are persons dealing with goods introduced into the state or the filing district from outside to be charged with knowledge of extraterritorial contracts?, (2) Are hostile claimants to be held as fully cognizant of a tardy filing as of a prompt and proper record complying with the statute?, (3) Does the retroactive character legislatively conferred upon timely filing extend as well to the furnishing of actual notice within the filing period, so as to relate such notice back? To each of these questions, answers affirmative and answers negative have been returned.

The West Virginia cases provide an interesting if slightly indecisive array of authorities on the question of how far those dealing with goods under the circumstances and within the period appointed for renewal refiling are chargeable with knowledge of the contract. The leading case held unequivocally that the original filing was notice to all the world, including that part of it beyond the bounds of the filing district, until expiration of the time for renewal filing, so as to prevent acquisition of adverse interests untainted by the consequences of knowledge, during that

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time. Such may still be the law for the case continues to be cited; but it is interesting to observe that in both the subsequent cases where the doctrine, in its most extended form, might have been applicable, the court preferred to rest decision on other grounds—in one, on the equivalence of timely actual notice to timely filing; in the other on the efficacy of a prompt retaking of possession to defeat third-party claims. The implications of Brown v. Woody would seem to suggest that, to affect the innocent purchaser with the consequences of notice, there must at least be some record somewhere and that he will not be charged with notice by the mere existence of the contract. Moreover, in West Virginia, he has to date been held only to a knowledge of the filing in a different county within the state and not yet disqualified on the more extreme ground of record in another state. In these respects, our court is not yet committed so fully to the imputation of notice as those in a few other states will hereafter be observed by the language or circumstances of their cases to be. On the other hand, West Virginia seems to have pursued the logic of the notice theory further than has elsewhere been done in treating the hostile claim as being thoroughly nipped in the bud by the accident of having attached during the open period for removal refileing, beyond possibility of revival by the seller's long-continued inaction.

The notion that record in one county gives notice in another during the running of the period for removal refileing has been endorsed elsewhere. Moreover, expressions in one case suggest that like effect is to be given to record in another state where the

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172 Ibid.
174 98 W. Va. 512, 127 S. E. 325 (1925) supra n. 107. The same complete absence of a record—none being required in Tennessee, the state where the property was located under the conditional sale and whence it was brought to West Virginia—was involved in Richardson v. Lumbermen's Ins. Co., 7 S. E. (2d) 436 (W. Va. 1940) and may have been a motivating circumstance in the court's election to rest the decision on a basis other than that of notice.
175 The extrastate character of the conditional sale, valid where made without record, may have influenced decision in Richardson v. Lumbermen's Ins. Co., 7 S. E. (2d) 436 (W. Va. 1940) supra n. 174.
176 See the discussion supra page 94.
177 See Commercial Credit Co. v. Williams, 174 Okla. 160, 50 P. (2d) 141, 142 (1935). In Smith v. Simmons, 35 Ga. App. 427, 133 S. E. 412 (1926), the same principle was announced; but it is to be noted that the Georgia statutes do not fix a time for, nor seemingly do they require a removal refileing when the removal is between different counties in the state but only when the goods are brought in from outside the state.
conditional sale took place. On the other hand, the operation of the record as notice even in a different county of the same state has been bluntly denied. There is nothing very startling in a state’s making notice effective throughout its borders instead of just in the particular county where the instrument is filed, if it so desires; and, while it is somewhat more extraordinary to require citizens to know at their peril the contents of the official records in the two thousand-odd counties of the other forty-seven states, a state is at liberty to go that far if it wishes, thus domesticating pro tanto recorded papers throughout the Union. Indeed, as to chattel mortgages the settled practice seems to be just that. But for courts to do so in connection with the filing of conditional sales is to invite headaches. If, for instance, there is to be constructive notice of contracts duly filed in other states, what about the situation of conditionally sold goods coming in from a state where no recording is required and the contract for which has accordingly not been filed? what of the even more complicated case where the contract has not been filed as provided by statute, so that the retained title would have been ineffective had the goods stayed at home? Confronted with these situations, the courts have either by dexterity or obtuseness avoided giving an answer; but that does not eliminate the logical difficulties if it be held that notice seeps across state lines. To differentiate initially valid contracts on the basis of whether the state of their making does or does not require recording seems an invidious attempt to exact concurrence with the procedures of the forum from other states as the price of recognizing transactions occurring within them. On the other hand, to charge the local community with notice of some unrecorded foreign contracts but not of others, depending upon the statutory schemes of other states, is at once to make an equally invidious distinction and to erect a presumption of knowledge of foreign law. If, in a liberal mood, the court holds people to notice of extrastate contracts even though unrecorded, it acts inconsistently with the manner in which it must act in the case of removal of

179 Pullaski Mule Co. v. Haley, 187 Ala. 533, 65 So. 783 (1914); cf. C. I. T. Corp. v. First National Bank of Winslow, 33 Ariz. 483, 266 Pac. 6 (1928) (by implication).
180 See 2 Jones, op. cit. supra n. 7, §§ 260, 260a; 14 C. J. S. § 758.
181 This was the situation in, e. g., Cherry’s, Inc. v. Sharpensteen, 33 Ariz. 342, 265 Pac. 90 (1928) and in Richardson v. Lumbermen’s Ins. Co., 7 S. E. (2d) 436 (W. Va. 1940).
182 As in, e. g., Commercial Credit Corp. v. Hild, 11 A. (2d) 428 (N. J. Sup. 1940) and Riccardi Motor Cars, Inc. v. Weinstein, 98 Pa. Super. 41 (1929).
goods between counties within the state, since there it cannot be held that there is notice of unfiled conditional sales without in effect repealing the recording acts. These difficulties might be thought to confirm the wisdom of the Supreme Court of Appeals in veering away from the rationale announced in Auto Sales Co. v. Yost when confronted in Richardson v. Lumbermen's Insurance Co. with goods of extrastate origin; but this approach, too, has its difficulties. Whatever might be said for it under statutes requiring refiling only as to removals within the state or only as to removals into the state, the Uniform Act deals indifferently with both, making no distinctions between them. To develop any distinction between interstate and intercounty movements under such a statute would seem to be the crassest kind of judicial legislation. And, even if the notice is only notice of contracts filed anywhere within the state and not of extrastate contracts, what then is the point in providing at all for refiling upon removal, or indeed of specifying any place for filing? Yet it is held that a filing at an improper place is nugatory although induced by the fraud of the buyer as to the place of intended use of the goods and that a failure to refile on removal precludes the assertion of title even as against a member of the buyer’s family acquiring the goods from him — cases in which the seller might certainly be thought to have strong equities if the original filing gives statewide notice and the refiling is merely an incident in the continuation of such notice. The simplest thing to do would be to scrap the whole doctrine that filing gives notice beyond the boundaries of the filing district. It is not necessary to employ it in order to protect a seller who records within the designated period for removal refiling; and aside from holding that period open, no decision except the Yost case has carried out the implications of the proposition. That case, indeed, treated the “notice” like actual notice or the more orthodox type of constructive notice, as clinging to the buyer forever; but elsewhere, even when recognized, it seems to be so only as a temporary sort of thing, not possessing the qualities of actual or even of normal constructive notice.

So evanescent a concept so beset

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185 In Oklahoma, the only other state where the doctrine has been as distinctly announced as in West Virginia, a mortgage placed upon the goods within the open period for renewal refiling was preferred to the conditional sale where the seller did nothing within the time to protect his title and where possession was surrendered to the mortgagee at a later date, the court recog-
with logical difficulties and which, except for the Yost case, has never accomplished anything that could not have been supported otherwise might better be discarded. The law would lose nothing of consequence and would gain in clarity if the notion of constructive notice of conditional sales beyond the borders of the filing district were rejected by the few jurisdictions that advance it.

Whether the consequences of notice extend beyond the filing district is a question different in kind from whether tardy filing serves thenceforth as notice or whether timely actual notice is the equivalent of timely filing even to the extent of operating retroactively. The former assumes the sufficiency of the facts set up to give constructive notice at least locally and inquires into the attributes to be ascribed thereto, involving the risks, canvassed above, which inhere in formulating a rational uniform treatment for accidental multiform fact patterns, in the event the extraterritorial thesis is adopted. The latter two problems have a common nucleus; they raise only the question whether particular matters do operate as constructive notice, without seeking to redefine the conventional incidents of such notice. Hence they are quite free from the logical and administrative difficulties which were seen to bedevil the other question. Disagreements as to them lie wholly in the realm of policy.

Addressing himself to the issue of postponed filing, a learned writer has commented:

"To say that under such circumstances the vendor has lost his claim to property is to say that the statute has erected an arbitrary limit, a dead line, as it were, beyond and after which recording is a useless act, and that no notice is imparted by a record made after the expiration of the time named." 186

This overlooks the rare case where the hostile claimant by examining the records in fact has actually learned of the contract before acting, in which case it would doubtless be as effective as any other actual notice; but with that minor qualification the quotation states the problem squarely. Its author expresses the firm conviction that the tardy filing should be constructive notice from the

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186 JONES, op. cit. supra n. 7, § 1068.
time it takes place.\textsuperscript{187} In this he is warmly seconded by the eminent draftsman of the Uniform Act.\textsuperscript{188} The same attitude, that the filing once it occurs operates as constructive notice, is to be found embedded in a number of decisions, both as to delayed original filing\textsuperscript{189} and as to renewal refiling after expiration of the initial record by lapse of time.\textsuperscript{190}

Again, where the issue is as to the equivalence of actual notice within the filing period, in place of the prescribed recording, as notice retrospectively cutting off intervening claims, the commentators are united behind the proposition that it should be received as a full and ample substitute.\textsuperscript{191} It is true that, with one exception,\textsuperscript{192} engrossed in sketching the parallel, they overlook the fact that the hostile claim has already attached and that the actual notice will thus operate in a different manner than ordinarily it does, but all stress the propriety of treating it the same as compliance with the statutory technique for giving constructive notice. The "notice argument", while used rather less by the courts in this connection than in that discussed in the preceding paragraph, has been advanced in opinions from West Virginia\textsuperscript{193} and South Carolina.\textsuperscript{194}

Still, the authorities are not all one way. Dealing with belated filings, whether original\textsuperscript{195} or renewal,\textsuperscript{196} and with the giving of actual notice in lieu of timely filing,\textsuperscript{187} decisions are to be found

\textsuperscript{187} Ibid.
\textsuperscript{188} BOGERT, \textit{loc. cit. supra} n. 159. The same substantive position is taken by the Commissioners' Note, quoted \textit{supra} n. 136, doubtless for the reasons articulated by the draftsman, although that is not expressly spelled out in the Note.
\textsuperscript{189} See Castaneda v. National Cash Register Co., 43 Ariz. 119, 122, 29 P. (2d) 720, 723 (1934); Commercial Credit Co. v. Gaiser, 134 Kan. 552, 557, 7 P. (2d) 527, 530 (1933); Moxer & Co. v. Schaad, 98 N. J. L. 799, 801, 121 Atl. 622, 623 (1923); accord, Holland v. Adams, 103 Ga. 610, 30 S. E. 433 (1898) (but stating that the contrary view would be taken except for the express terms of the local statute).
\textsuperscript{190} See Collingswood Trust Co. v. Brunswick-Balke-Collender Co., 112 N. J. Eq. 597, 599, 164 Atl. 689, 690 (1933).
\textsuperscript{191} See (1934) 47 HARv. L. REV. 714; (1934) 19 IOWA L. REV. 475, 476; (1934) 32 Mich. L. REV. 709, 710, all commenting adversely on Universal Credit Co. v. Finn, 212 Wis. 601, 250 N. W. 391 (1933).
\textsuperscript{192} See (1934) 19 IOWA L. REV. 475, 476.
\textsuperscript{194} See Talmadge v. Oliver, 14 S. C. 522, 527 (1881).
which reject the contention that the hostile claimant is bound to
know by reason of these deviant endeavors of the seller or is thereby
stripped of his status as a bona fide purchaser or creditor. Several
of these cases do not advance the argument beyond the assertion,
*ita lex scripta est*, the statute constrains us.\(^{198}\) It must be confessed
that casual examination of the statutes does not always disclose the
imperatives by which the courts feel themselves shackled; even
though they did, if no other considerations could be adduced in sup-
port of the result, it might well be subject to the reproach that it in-
volved a barren "stickling for form";\(^{199}\) "the performance of a
vain act."\(^{200}\) In two cases, however, there is a more searching anal-
ysis of what is involved; while both of them happened to involve
tardy original filings, their contentions are equally applicable to
belated renewal filings and to the timely giving of other notice
otherwise than in the manner directed by statute. Both construe
the statute as demanding timely filing and permitting no alter-
 natives, in order that there may be notice of the conditional sale;
but both re-enforce their interpretation of the statutory mandate
with an exposition of the considerations which might be supposed
to have induced its promulgation, in terms which are applicable
to all of the filing statutes.

In *Bugbee v. Stevens*,\(^{201}\) the Vermont supreme court had to
meet the argument that the situation was the same as that involved
in connection with record title to real estate, where the fact rather
than the time of record was admitted to be controlling. In denying
the analogy, it entered into an elaborate examination of the validity
of the premise that the filing of transactions with respect to personal-
ity were calculated to afford information as to the state of title with
respect to it, differentiating the real estate situation because of the
factor of immobility of the property as well as differences in the
characteristic structure of transactions affecting it, and emerging
with the conclusion that the extremely artificial character of the doc-
trine of constructive notice, from filing or recording conditional
sales, which it was almost certain the parties would never really know about, justified a confinement of the doctrine to instances of strict satisfaction of the legislative directions.\textsuperscript{202} In reaching the same conclusion over fifty years later, Judge Learned Hand put his finger on the same weakness of the doctrine that deviant conduct might take the place of filing at the time prescribed by the statute, when he said in \textit{Air Equipment Corp. v. Rubbercraft Corp.}:\textsuperscript{203}

"It is of course true that the evil aimed at is the false credit gained by the buyer's ostensible ownership, and the remedy is no more than the opportunity for information which filing gives. . . . But the situation is apparently treated less realistically, perhaps because creditors do not look at the records anyway, and because the notice imputed to them is a fiction. If the seller wishes to prevail after giving the buyer a delusive credit, he is held to a strict conformity with all the requirements, even though they do not in fact help to give notice to the creditors."\textsuperscript{204}

In thus reaffirming what everyone knows, that constructive notice is not notice at all but is something the legislature conditionally permits to be substituted for it, these decisions get down to fundamentals. To say that there is constructive notice is only to say that under the circumstances there is no need for notice. Every lawyer is aware that only in very rare instances does a layman ever inspect the records, with knowledge of the contents of which he is chargeable; indeed, conversation with highly intelligent members of the general public reveals that for the most part they do not even realize that there are public records to be examined;\textsuperscript{205} yet, given due filing

\textsuperscript{202} The argument of the court, \textit{id.} at 392-393, is too long for full quotation at this point but deserves reading. The core of the argument seems to lie in the following remarks: "No analogy exists between such records in regard to furnishing constructive notice, and records of the title of real estate, nor can the rules applicable to the latter be invoked in favor of the former. The title to real estate passes by deed, will, levy of execution, or other instruments in writing which are required to be recorded. . . . where all, interested in any portion of the real estate. . . . can examine and ascertain its condition. Hence it is reasonable to hold that such records are constructive notice of their contents to whomsoever may be interested therein or affected thereby. On the other hand, the title to personal property passes by delivery of possession; and no one would think of examining the town clerk's office to ascertain its ownership, excepting so far as the statute under consideration operates to render such records serviceable to that end."

\textsuperscript{203} 79 F. (2d) 521 (C. C. A. 2d, 1935).

\textsuperscript{204} \textit{id.} at 523.

\textsuperscript{205} Except, of course, as to real estate transactions as to which there is general public consciousness that the records are controlling. This phenomenon is noted in the quotation from Bugbee \textit{v.} Stevens, \textit{supra}, n. 202, and constitutes a significant difference in the way in which real estate and personality transactions are in practice carried forward.
or record pursuant to statute, such lack of knowledge makes no difference, because the legislature has said that something else shall take the place of information. So, those discussions\(^208\) which proceed on the assumption that actual and constructive notice are merely variants of a common concept, notice, do not get at the root of the matter. They are beguiled by a verbal, descriptive likeness into erecting a relation which does not exist. Nor does it help to say: there is a duty to know what is a matter of record. That is a mere rephrasing of the proposition that people are bound by what they do not know; the extent of the duty is measured by the extent of conclusiveness of the record. Another attempt at bringing constructive and actual notice within a common framework has been made by alluding to the opportunity for knowledge which the record affords, and to the fact that, if the person claimed to be charged with notice had but looked, he would have seen.\(^207\) This overlooks the fact that constructive notice is not a function of the opportunity to know. For example, where an instrument has been duly deposited or filed with the proper official, errors or omissions in entering or indexing it do not prevent its serving as constructive notice to persons dealing with the goods, even though they are thereby utterly disabled from discovering it — a settled rule as to conditional sales contracts,\(^208\) early adopted in West Virginia,\(^209\) and which has been announced and applied under the Uniform Conditional Sales Act.\(^210\) Conversely, where the instrument is filed so that by actual search third persons could in fact learn of the existence of the contract, it nevertheless does not operate as constructive notice where it is not in form what the statute requires.\(^211\) This all adds up to a lack of essential interdependence of constructive notice and opportunity to know. No relation which will bear scrutiny can be established between notice and constructive notice except the relation of substitution whereby the latter, under appropriate circumstances, replaces and dispenses with the former.

\(^{208}\) See, e.g., (1934) 47 Harv. L. Rev. 714; (1934) 19 Iowa L. Rev. 477.

\(^{207}\) See, e.g., Morey & Co. v. Schaaf, 98 N. J. L. 799, 802, 121 Atl. 622, 623 (1923) ("... one searching the records must have been confronted with their [the conditional contracts'] existence and contents, and so acquired the notice contemplated by the statute"); 3 Jones, op. cit. supra n. 7, at 140.

\(^{208}\) Id. \$ 1066; 55 C. J. 1258.


\(^{211}\) See 3 Jones, op. cit. supra n. 7, \$\$ 1062-1064; 55 C. J. 1262. Learned Hand, J., speaking for the court in Air Equipment Corp. v. Rubbcrcraft Corp., supra n. 202, alluded to this doctrine, saying, at page 524, "it appears to us that there is no difference between a bill of sale seasonably filed but not acknowledged, and one acknowledged but not seasonably filed, so far as concerns creditors who sell or lend after filing".
Since to say that third persons' claims will be rejected when they have constructive notice thus means that they will be rejected under certain conditions when they have had no notice, the relevant inquiry is, Under what conditions? In the event of exact and literal compliance with the statute, certainly, for so the legislature has directed; but if that is excused and anything else is given parallel operation, that is a matter of judicial grace to the seller in extension of the statutory protection. Thus, conceding that "if the party to be affected has actual notice, the very purpose of recordation is served", it does not follow, when the hostile claimant has acquired his interest without notice, that to exact the timely filing of the contract in order to disestablish that interest is to "require of the seller the performance of a vain act"; the vanity of the act consists in the judicial unwillingness to require it. Advance actual notice would have prevented innocent purchase; subsequent notice only defeats it and acts as a substitute because the court feels moved to enlarge the scope of protection against purchasers without notice. The same is true if tardy filing is permitted to serve the purpose of timely filing in dispensing with the need for notice. No implication is intended that the courts act improperly in making such additions to the legislative prescription, indeed it is their proper and most useful business to act as creative agencies in the development of legal rules and rights. They must, however, face the fact that any the slightest departure from the statutory formula is an addition made on their own responsibility to the conditions upon which a purchaser without notice will be defeated.

In electing between strict application of the statute and its extension by construction, the potential hardships to third persons and to the seller are to be compared. A hostile claimant who has inspected the files and discovered the record, however tardy, can be forgotten because he had actual notice when he acted and will lose in all events. A claimant who might have discovered had he inspected is theoretically perhaps also open to reproach. To let him prevail might be thought to impair the value of the recording scheme by condoning neglect to utilize it. On the other hand, failure to resort to the files, even ignorance that they are there to be examined, remain in stubborn fact, and the law, if it is to retain respect and support, must ultimately conform itself to popular habits and practices and cannot, save to a very minor degree, force life to conform to it. And what of the claimant who cannot

be expected to learn of the sale—who examines the record while negotiating for a purchase which is consummated thereafter, the conditional sales contract having been filed in the meantime?218 who takes his chattel mortgage before there is anything of record, recording it promptly but not until after intermediate filing of the contract?214 who makes advances under an existing mortgage with an after-acquired property clause?215 who repairs a damaged automobile or buys a car removed into the filing district before the seller has notice of the removal and necessarily before he has filed?218 What of the hostile claimant compelled to rely on others over whose diligence he has no control, such as an attaching creditor delivering his writ to the officer?217 Of course, in all these cases, he runs the risk of a timely proper filing; but that is a risk created by the legislature, for which the courts are not answerable. What they must determine is whether they wish to impose other and further risks upon those who will not probably and maybe cannot possibly have guarded against them. Over against this, what is the possibility of hardship to the seller? The loss of his security would often be a serious thing; but he has always the means to prevent it. All he needs do is what the legislature has told him.218 If he merely complies with the terms of a clear and simple statute, his security is safe beyond impairment; and it is to make sure that he can comply that the filing period has been introduced into the Uniform Act. Furthermore, while the ranks of hostile claimants are recruited from small fry whose infrequent dealings are not calculated to teach them the means of self-defense, conditional sell-

218 Cf. C. I. T. Corp. v. First National Bank of Winslow, 33 Ariz. 483, 266 Pac. 6 (1928). This difficulty is noted by the Vermont court in Bugbee v. Stevens, 53 Vt. 389, 393 (1881).
215 This was the situation involved in the cases cited supra notes 25-28, inclusive.
218 No difficulties are to be apprehended from the seller’s being induced to refrain from filing seasonably by representations of one receiving actual adverse notice within the filing period, since in such a case it would seem that the hostile claimant would be estopped from setting up the omission, cf. Thayer Mercantile Co. v. First National Bank of Milltown, 98 N. J. L. 29, 119 Atl. 94 (1923) aff’g 98 N. J. L. 29, 121 Atl. 927 (1923).
ers are typically concerns engaged regularly in that type of transaction, which may reasonably be expected to be familiar with its involvements. In the light of all this, the logic of the orthodox common law attitude toward avoidable consequences would seem to call for placing the resultant loss on a seller who has not seen fit to use the legislatively provided means for protecting his security.

Yet logic is only one element in the decision; there are others perhaps more important. In Uniform Act states, for instance, there is the over-riding policy of uniformity of decision which should probably by now compel acceptance of tardy filing on a parity with timely filing as constructive notice thereafter, whatever the intrinsic merits of that position — although, by the same token, other states should weigh that line of decisions in considering proposals to adopt the Act and might well find in it a ground for declining to do so, at least without amendments. A more general consideration, indeed the basic consideration where there is any leeway left the courts, is that, in holding the seller to or absolving him from the requirement of timely filing, they are deciding between relative encouragement and relative discouragement of a widely-used device for the distribution of chattels and the extension of credit. Informed decision must rest upon reasoned conclusions as to the merits of that device. Conflicting views as to this are tenable; enlightenment must be sought in acquaintance with economic materials219 — more acquaintance than is possessed by the writer who confesses himself unable to reach a conclusion. To the lawyer, one may suggest this as a relevant field for employment of the "Brandeis" brief. To the courts, one may emphasize that what they are doing here, wittingly or not, is expressing a choice between the spread or the restriction of a type of financing, a choice which is apt to be wiser the more consciously it is made and articulated.

As for West Virginia, with the law already so far advanced in supplanting legislative by judicial specification of the conditions when a third person without notice must bow to the conditional

219 Illustrative of the type of materials available, see National Bureau of Economic Research Bulletin 76-7, The Statistical Pattern of Installment Debt (1939); id. Bulletin 79, The Volume of Consumer Installment Credit, 1929-38 (1940); Seligman, The Economics of Installment Selling (1927). The former two publications are representative of purely objective materials, the third arrives at conclusions in favor of the device, on considerations which may perhaps demand partial re-examination in the light of changed business and economic conditions of the last decade, and typifies the conclusion-formulating material.
seller's title, one may venture the prediction that, on nearly all of the issues suggested in this paper, decision will be for the seller; though, of course, it still may be worthwhile to raise them in any cases not foreclosed by actual adverse holdings, hoping that they will be found distinguishable. As for courts elsewhere, we offer them a wealth of authority, if they conclude upon reflection that our West Virginia law is wise; if otherwise, we still serve for them the function which Patrick Henry suggested that Caesar and Charles II had for George III.