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Richard Cosway

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# FIXTURES UNDER THE UNIFORM COMMERCIAL CODE

by

Richard Cosway\*

WITH very few exceptions,<sup>1</sup> the Uniform Commercial Code does not have any application to or impact upon the law of real property. The exceptions arise where the distinctions between real and personal property blur, or where the factual patterns involved are not easily categorized. One such exception involves the concept of fixtures, and in article 9, dealing with secured transactions, some specific provisions govern the perfection of security interests in fixtures and also the priority problems consequent upon such interests.

A creditor may have a choice of security mechanisms in the area of fixtures. He may, for example, advance credit against a mortgage on the real property to which personalty is to be affixed.<sup>2</sup> He may, on the other hand, rely upon a materialman's or mechanic's lien<sup>3</sup> against the real property to which his work or materials have been added. Neither of these two devices is within the scope of this discussion, save to observe on occasion some points of difference. Often these mechanisms are not available or are not as advantageous to the lender as would be a security interest in the personal property to be added to the realty. The real property may already be heavily mortgaged, for example, or the priority achieved through the mechanic's lien laws may be insufficient.<sup>4</sup> In such instances, the secured creditor, typically a conditional seller, will seek to preserve an interest in particular personalty. Then the Code must be reckoned with.

## I. DEFINITION OF "FIXTURE"

Selection of a workable definition of the word "fixture" is almost impossible, because the definition adopted will usually reflect a preconceived judgment concerning the merits of the particular case. The issue posed in a controversy is bound to influence how particular goods are classified. By way of illustration, carpeting might well be viewed as part of the real estate as between the vendor and vendee of the real estate.<sup>5</sup> It might be similarly viewed as between the tenant, who installed it, and the landlord,<sup>6</sup>

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\* A.B., Denison University; LL.B., University of Cincinnati. Professor of Law, University of Washington.

<sup>1</sup> UNIFORM COMMERCIAL CODE §§ 2-105(1), 2-107, 2-304, 9-105(f), 9-205(4), 9-302, 9-313.

<sup>2</sup> Note, *Ohio Lien Priority Rules Affecting Mortgages, Mechanics' Liens, and Fixture Security Interests*, 18 W. RES. L. REV. 1284 (1967).

<sup>3</sup> 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 30.3 (1965). It is doubtful whether both remedies may be pursued at the same time. Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 B.C. IND. & COM. L. REV. 61, 67 (1964). There is no requirement that a materialman's lien be taken if the creditor is desirous of a Code security interest. See *Crabb v. Keystone Pipe & Supply Co.*, 177 S.W.2d 989, 991 (Tex. Civ. App. 1944) *error ref.*

<sup>4</sup> Note, *supra* note 2, at 1295.

<sup>5</sup> *Joiner v. Pound*, 149 Neb. 321, 31 N.W.2d 100 (1948); *Nicklas v. Pickford*, 160 Misc. 254, 289 N.Y.S. 174 (Sup. Ct. 1936); *Doll v. Guthrie*, 233 Ky. 77, 24 S.W.2d 947 (1929); Annot., 55 A.L.R.2d 1044 (1957).

<sup>6</sup> Cf. *Havefield Co. v. Siegal*, 366 S.W.2d 790 (Tex. Civ. App. 1963) *error ref.*; *Hartberg v. American Founders' Sec. Co.*, 212 Wis. 104, 249 N.W. 48, 91 A.L.R. 536 (1933).

although the landlord's case does not have the appeal that the purchaser's case presents. Add to the pattern a question of construction of an insurance policy, and new configurations appear.<sup>7</sup> It would thus appear that defining the term "fixture" is much less significant than applying the definition to particular fact patterns.

A standard definition is:

A fixture is a thing which, though originally a movable chattel, is, by reason of its annexation to land, regarded as a part of the land, partaking of its character and belonging, in the ordinary case at least, to the person or persons owning the land. The underlying principle of the law of fixtures is represented by the maxim *quicquid plantatur solo, solo cedit*, that is, that whatever is annexed to the soil becomes part thereof, this being but one application of the theory of accession, as it existed in civil law.<sup>8</sup>

The simplistic origins of the fixture concept emphasized the significance of the attachment and the substantiality of the attachment.<sup>9</sup> It did not take long, though, to reveal that physical attachment presents differences in degree rather than in kind. For example, sheer weight of a machine may be enough to hold it in place and thus enough to suggest the existence of a fixture.<sup>10</sup> Virtual unanimity is now accorded to the view that the intention of the parties with respect to the dedication of the personalty to the use and value of the real estate is the critical determinant.<sup>11</sup>

Because of the frequently obscure manifestations of the parties' intention, however, certain standardized tests have been developed as a guideline. Once again the mode of annexation is introduced.<sup>12</sup> In addition, determination of the parties' intent will necessitate an appraisal of the nature of the article involved,<sup>13</sup> the relationship of the parties,<sup>14</sup> and all other circumstances which might give a reasonable basis for saying how the parties would have classified the goods, had their attention been directed to the matter.

Legislative efforts to give a meaningful definition of the word "fixture" have not been very helpful.<sup>15</sup> Perhaps because of the previous failures, those who drafted the Uniform Commercial Code refrained from defining the term. There is substantial doubt among those who have commented on

<sup>7</sup> *Ruby v. Cambridge Mut. Fire Ins. Co.*, 348 S.W.2d 943 (Tex. Civ. App. 1962). See also *Millers Mut. Fire Ins. Co. v. Jackson*, 359 S.W.2d 510 (Tex. Civ. App. 1962).

<sup>8</sup> 2 H. TIFFANY, *LAW OF REAL PROPERTY* § 606 (3d ed. 1939). This definition invites trouble by directing the focus on real rather than personal property concepts. See also 25 *TEX. JUR. 2d Fixtures* § 1 (1961).

<sup>9</sup> R. BROWN, *PERSONAL PROPERTY* § 137 (2d ed. 1936).

<sup>10</sup> 25 *TEX. JUR. 2d Fixtures* § 7 (1961). *Contra* under the Code, *In re Collier*, 3 U.C.C. Rep. 1076 (E.D. Tenn. 1966).

<sup>11</sup> *Murray Co. v. Simmons*, 229 S.W. 461 (Tex. Comm'n App. 1921); C. GALVIN, *CASES AND MATERIALS ON TEXAS PROPERTY SECURITY* 98 (1963).

<sup>12</sup> 1 G. THOMPSON, *REAL PROPERTY* 198 (perm. ed. 1964).

<sup>13</sup> 2 H. TIFFANY, *supra* note 8, § 610.

<sup>14</sup> *Id.* § 611.

<sup>15</sup> See, e.g., GA. CODE ANN. § 85-105 (1933): "Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Machinery, not actually attached, but movable at pleasure, is not a part of the realty. Anything detached from the realty becomes personalty instantly on being so detached." See Macey, *Bringing Your Fixtures up to Date*, 16 *MERCER L. REV.* 404 (1965).

the Code as to the seriousness of this omission.<sup>16</sup> One would predict, however, that whatever the definition, the factual patterns are so variable and the emotional appeals of various claimants so complex, that each case will ultimately be decided on its particular facts.<sup>17</sup>

The Code approach can be reduced to manageable proportions only by signaling at the outset the kinds of cases and kinds of issues covered. The major concerns of the Code are twofold: First, the steps necessary for a secured party to perfect his security; and second, the priority rights of such a secured party, measured against the interests of third persons who have, or who acquire, rights in the personalty or in the realty to which it is annexed. For these limited purposes, it is feasible to draw particular rules without the necessity of re-examining the whole body of fixture law.

In drawing rules, the drafters of the Code found it possible to make certain inroads on the accepted fixture concept or definition. Frequently stated is the thought that a removable fixture is a solecism.<sup>18</sup> This idea may be helpful if the issue in a particular case can only be resolved by classification of property as either fixture, and thus realty, or non-fixture, and thus personalty. Disputes between heirs and devisees may be of this nature.<sup>19</sup> Disputes between chattel security holders and realty claimants can, however, be handled in a simpler way, as is apparent from the Code approach. Although the Code purports to leave the definition of fixture purely to other sources of state law, section 9-313(5), permitting removal of collateral in certain cases, cannot be harmonized with a doctrine that it is in the nature of a fixture not to be removable.<sup>20</sup>

Closely related to the concept of irremovability of fixtures is the doctrine that limits removability to situations where no substantial harm to goods or real estate will result.<sup>21</sup> Many states, including Texas,<sup>22</sup> adhered to some form of this doctrine. Indeed, the Uniform Conditional Sales Act, which preceded the Code, incorporated it.<sup>23</sup> Under the Code, so long as

<sup>16</sup> Professor Gilmore concludes that the definitional problem is insoluble, and that the consequent lack of definition is not critical, since multiple filing will meet any obstacle. 2 G. GILMORE, *supra* note 3, § 30.5, at 819-20. Mr. Coogan concludes, however, that a definition is essential, and he offers such a definition. 2 P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER U.C.C. §§ 17.09, 17.14(2), 17.14(4) (1967). Professor Kripke is wary of any definitional attempt predicated on the degree of attachment, and he would suggest as a definition: "[A]nything that would pass by a real estate conveyance by the owner of the property, but excluding the sand, plaster, structural members, and so on, to which the rules of accommodation do not apply." Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 64 (1964).

<sup>17</sup> The Supreme Court of Washington once said: "We will not undertake to write a treatise on the law of fixtures. Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take." *Strain v. Green*, 25 Wash. 2d 692, 162 P.2d 216 (1946).

<sup>18</sup> *Teaff v. Hewitt*, 1 Ohio St. 511 (1853); *cf.* 25 TEX. JUR. 2d *Fixtures* § 2 (1961).

<sup>19</sup> 1 G. THOMPSON, *supra* note 12, § 65.

<sup>20</sup> UNIFORM COMMERCIAL CODE § 9-315(5); 2 G. GILMORE, *supra* note 3, § 30.4, at 815; P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 16, §§ 17.09, 17.14(2), 17.14(4).

<sup>21</sup> *Stiller, The Maryland Law of Fixtures*, 25 MD. L. REV. 21, 22 (1965).

<sup>22</sup> *Texas Power & Light Co. v. Malone*, 42 S.W.2d 845 (Tex. Civ. App. 1931) *error dismissed*; *Hugh Cooper Co. v. American Nat'l Exch. Bank*, 30 S.W.2d 364 (Tex. Civ. App. 1930); 25 TEX. JUR. 2d *Fixtures* § 7 (1961). The doctrine has been used to treat easily removable goods as pure chattels, *i.e.*, non-fixtures. *Goodyear Serv. Stores v. Clegg*, 361 S.W.2d 445 (Tex. Civ. App. 1962); *Burns v. Union State Bank*, 265 S.W.2d 164 (Tex. Civ. App. 1954) *error ref. n.r.e.*; *Weisenberger v. Lone Star Gas Co.*, 257 S.W.2d 331 (Tex. Civ. App. 1953) *error dismissed*.

<sup>23</sup> UNIFORM CONDITIONAL SALES ACT § 7 (act withdrawn 1943).

the secured party is willing to pay for the damage to the real estate, it would appear that the quantum of damage is not material.<sup>24</sup>

The Code, however, does have a limiting factor with regard to the removal of fixtures in that "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like" cannot be removed "unless the structure remains personal property under applicable law."<sup>25</sup> Because of the great doubt surrounding this Code provision some effort will be made to refine it. There really is nothing novel about this principle,<sup>26</sup> but its appearance in a modern Code, without meaningful guides as to its boundaries, has shocked some.

Thus, the predicament facing the would-be security holder is to select from several courses of action. Those who provide structural items which lose their identity on becoming part of a larger whole have available real property mortgages and some form of mechanic's or materialman's lien.<sup>27</sup> They do not have the opportunity to claim their goods as personalty under the Code even as fixtures security.

On the other hand, certain items are so obviously personalty that they will remain chattels and can only be treated as such.<sup>28</sup> The creation of a security interest in real estate or a lien against that real estate will not include such personalty.<sup>29</sup> On the other hand, the security holder may create a security interest in the personalty without being bothered by the requirement of reimbursement for damage to realty. He will also perfect his security interest as a chattel security interest, ignoring the fixture rules.<sup>30</sup>

In a third category a chattel, while retaining its integrity, is physically annexed to realty. The Code security claimant will treat this as a fixture, which means in essence that he will perfect as a fixture interest,<sup>31</sup> and that his remedy of repossession on default will be qualified by a requirement that he reimburse the realty claimant (other than the debtor, of course) to whom his claim is prior for any harm done to the real estate by the removal.<sup>32</sup>

Perhaps there is a fourth category—the vast area of in-between where reasonable minds may differ as to the precise classification of the collateral.

<sup>24</sup> UNIFORM COMMERCIAL CODE § 9-313(5), by negative inference, requires that the Code security holder be prior to real estate claimants before he is permitted to remove. Once that priority is established, he may remove on condition of paying or securing the amount of harm to the realty.

<sup>25</sup> UNIFORM COMMERCIAL CODE § 9-313.

<sup>26</sup> In *Murray Co. v. Simmons*, 229 S.W. 461, 465 (Tex. Comm'n App. 1921) these words appear: "Thus it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or materials of which the walls of a house are composed."

<sup>27</sup> 2 G. GILMORE, *supra* note 3, § 30.3, at 813.

<sup>28</sup> *Ruby v. Cambridge Mut. Fire Ins. Co.*, 358 S.W.2d 943, 946 (Tex. Civ. App. 1962): "For example, ordinary chairs, tables, dishes and kitchen utensils are in a broad sense a part of the owner's dwelling, yet we cannot say they become fixtures for insurance purposes merely because their owner intended for them to be."

<sup>29</sup> Of course, it is possible that the real estate mortgagee will also claim a mortgage on personalty. For the anomalous situation which results under the Code in this situation, see 2 G. GILMORE, *supra* note 3, § 30.6, at 823 n.3.

<sup>30</sup> The method of perfection will, of course, vary, depending on the classification of the goods as consumer goods, equipment, inventory or farm equipment or products. UNIFORM COMMERCIAL CODE §§ 9-109, 9-302, 9-401.

<sup>31</sup> UNIFORM COMMERCIAL CODE §§ 9-312, 9-401, 9-402, 9-403.

<sup>32</sup> UNIFORM COMMERCIAL CODE § 9-313(5); 2 G. GILMORE, *supra* note 3, § 30.5, at 818.

The Code security claimant will do well to fulfill the Code's requirements for any classification that might be deemed appropriate.<sup>33</sup>

## II. MAJOR POLICY DECISIONS

The Code's major policy decisions are expressed in section 9-313, dealing with priority.<sup>34</sup> A distinction is drawn between a security interest, typically a conditional sale, attaching before the personal property is annexed to the real estate, and a security interest which comes into existence after such annexation. In the first category, the Code follows what appears to have been the generally accepted approach, protecting the Code security interest against the claims of real estate claimants except to the extent that the latter have been misled by non-perfection, that is to say, non-filing. In the second category real property claimants whose claims exist at the time of the attachment of the fixture security may defeat that security.<sup>35</sup>

The second category, a security interest which comes into existence after annexation to the real estate, probably is so restricted as not to be significant; but, on the other hand, it forms part of a larger pattern.<sup>36</sup> Frequently, a real property security interest will be created, and associated with the real property will be personalty connected in varying degrees thereto. Disputes will arise between the real property encumbrancer and persons who have dealt with the debtor in a manner to indicate that they treated the personalty as purely personal property.<sup>37</sup> Only if they have attempted to take a security interest does the Code determine their rights.<sup>38</sup> If they have purchased the chattel, on the other hand, the Code does not articulate their relative position to that of the real property security holder. In view of the Code's inapplicability, it seems a safe prediction that the relative permanence of the annexation, with the concomitant degree of physical harm to the real estate, will be the major factor in determining priority of the claims. Thus, the pre-Code cases will continue to set the pattern, and the Code's limitations on removability will have no effect.<sup>39</sup>

The major concern of the Code's authors was the relative priority to be given real property encumbrancers and Code security claimants. The apparent thesis is that failure to perfect (as by filing) will invalidate the security only as to real property claimants who have in some way been misled by the filing omission. Thus, prior mortgagees of the real estate have

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<sup>33</sup> 2 G. GILMORE, *supra* note 3, § 30.5, at 820; Note, *Sales: Secured Transactions: Fixtures*, 50 CORNELL L.Q. 106, 115 (1964). The sanction for improper filing is, of course, defeat of the security interest by persons identified in UNIFORM COMMERCIAL CODE § 9-301. *In re Venango Limestone Co.*, 1 U.C.C. Rep. 591 (W.D. Pa. 1960); *In re Moraski*, 1 U.C.C. Rep. 575 (W.D. Pa. 1960).

<sup>34</sup> UNIFORM COMMERCIAL CODE § 9-313.

<sup>35</sup> Stiller, *supra* note 21, at 28. The merits of this particular Code subsection have been questioned. 2 G. GILMORE, *supra* note 3, § 30.3, at 810.

<sup>36</sup> Professor Gilmore argues that virtually all fixture security cases will involve purchase money security interests, and it will be very rare for a borrower to create a security interest in goods already affixed to land. 2 G. GILMORE, *supra* note 3, § 30.3, at 810.

<sup>37</sup> See, e.g., *Edinburg Theatres v. Richter*, 367 S.W.2d 354 (Tex. Civ. App. 1963); *Compton v. W.F. & J.F. Barnes Lumber Co.*, 99 S.W.2d 634 (Tex. Civ. App. 1936) *error dismissed*.

<sup>38</sup> UNIFORM COMMERCIAL CODE § 9-313 governs the priority of real estate and personal property (Code) security claimants only.

<sup>39</sup> See *Edinburg Theatres v. Richter*, 367 S.W.2d 354 (Tex. Civ. App. 1963).

an inferior claim to a Code financier of annexed goods.<sup>40</sup> The fixture may be removed by the Code financier whose interest attached before annexation, so long as he will pay or secure the reimbursable damages to the realty.<sup>41</sup>

This is obviously not the only approach possible, and a case may be made for protection of the real property mortgagee—to give him the advantage of any fixtures attached to the real estate to which he looks for security. Ohio, indeed, has expressly adopted this policy.<sup>42</sup> The Ohio position, though a minority one, can be sustained on the basis that one who provides personal property of a nature usable only when annexed to real estate must be held to anticipate that real property claimants will seek to look thereto as part of their security. Clearly when the new chattels are replacements for old fixtures which are removed, the appeal of the real property encumbrancer is strong.<sup>43</sup>

The Code, though, rejects the appeal of the real property encumbrancer, permitting priority to the Code security claimant and consequently authorizing his removal of the collateral with only a limited duty of reimbursement.<sup>44</sup> There is no requirement that the real property security claimant be reimbursed for the value of the previously removed fixture. By way of illustration, if a new furnace were installed to replace an older one, the fixture security holder could remove the furnace, being responsible presumably to pay the cost of filling any holes in the real estate left by the removal, or of smoothing out the floor where the furnace once stood. It is highly conjectural how much esthetic evaluations will enter the determination of the harm to the real estate, but there is no room for doubt that the Code financier is not restricted in any way by the fact that he will leave the real estate without a means of heat.<sup>45</sup>

<sup>40</sup> UNIFORM COMMERCIAL CODE § 9-313. The rule applies to security interests which attach prior to affixation of the goods, but not to post-affixation security interests.

The rule will not be affected by an after-acquired property clause in the real property encumbrance. Nor is the priority altered by the failure of the Code security claimant to perfect. The last point may have been overlooked in *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964), noted in 19 ARK. L. REV. 384 (1966).

The Code rule was the pre-Code Texas rule, except that removal was precluded if substantial harm would result to the real estate. *Weisenberger v. Lone Star Gas Co.*, 257 S.W.2d 331 (Tex. Civ. App. 1953) error dismissed; *Texas Power & Light Co. v. Malone*, 42 S.W.2d 845 (Tex. Civ. App. 1931) error dismissed; 25 TEX. JUR. 2d *Fixtures* § 20 (1961).

To be observed is the non-retroactivity of the Code's provisions. A deed of trust to real estate, executed prior to the effective date of the Code, has been interpreted according to pre-Code law insofar as its priority over a Code security interest is concerned. *Wilson v. Prudential Ins. Co. of America*, 239 Ark. 1071, 396 S.W.2d 300 (1965).

<sup>41</sup> UNIFORM COMMERCIAL CODE § 9-313(5). The details of this requirement will be developed subsequently, with emphasis here being on the priority issue.

<sup>42</sup> See Coogan, *Fixtures—Uniformity in Words or in Fact*, 113 U. PA. L. REV. 1186, 1211 (1965); Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788 (1964).

<sup>43</sup> Stiller, *supra* note 21, at 28. Suggestions have been made that the removal of the old equipment might result in liability on the part of the remover. 2 G. GILMORE, *supra* note 3, § 30.6, at 836; Kripke, *supra* note 16, at 78. The mortgagee or security holder would not be liable unless he participated in the removal. See *Murray Co. v. Simmons*, 229 S.W. 461 (Tex. Comm'n App. 1921).

<sup>44</sup> UNIFORM COMMERCIAL CODE § 9-313.

<sup>45</sup> In *Crabb v. Keystone Pipe & Supply Co.*, 177 S.W.2d 989 (Tex. Civ. App. 1944) error *ref.*, a chattel mortgagee was permitted to foreclose on casings used in an oil well, even though that removal would have the effect of plugging the wells. The theory there was that the casing remained personalty. The same result would be expected under the Code, but it could be conceded that the casings were fixtures without destroying the privilege of removal.

Justification for removal stems, to repeat, from the fact that the real property encumbrancer did not rely on the new chattel in making his loan. In the Code view mere forbearance from foreclosure, relying in the debtor's apparent affluence, is not enough to merit protection. On the other hand, some changes of position will merit protection, and these are stated in subparagraph (4) of section 9-313.<sup>46</sup> The anomalous results to be produced by the classifications stated in that section have been commented on;<sup>47</sup> suffice it here to illustrate: If a lender were to insist upon a real property mortgage from his debtor at the time of the loan, and a fixture were to be annexed to the realty, the fixture security holder would prevail over the real property mortgagee, whether or not he had perfected under the Code. On the other hand, had the lender dealt without security in making his loan and had he, after the fixture was annexed but before it was perfected, obtained a judgment lien, he would defeat the Code security claimant.<sup>48</sup>

There are other troublesome matters awaiting judicial interpretation, particularly the lack of antecedents to the words "subsequent" and "subsequently" in section 9-313.<sup>49</sup> If the underlying motivation is to protect persons who have in some fashion relied on the state of the record, it would appear that they will have acted after the fixture is annexed to the real estate.<sup>50</sup> There will always be the possibility of reverting to the fiction of "constructive annexation" to cover goods delivered to the premises but not actually in place at the time of the creation of the realty encumbrance.<sup>51</sup> However, it is doubtful whether a further stretch can be made to protect the construction mortgagee who makes his advances merely in the expectation that new property will be added to enhance his security. He seems to be a prior mortgagee, denied priority by the Code's provision.<sup>52</sup>

These illustrations demonstrate only that perhaps greater attention should be paid to wording the statute's identification of the real property interests which are prior to the Code security in fixtures. If reliance is the key, it should be more consistently insisted upon, and certainly it should be

<sup>46</sup> UNIFORM COMMERCIAL CODE § 9-313.

The security interests described in subsections (2) and (3) do not take priority over

(a) a subsequent purchaser for value of any interest in the real estate; or  
(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

<sup>47</sup> 2 G. GILMORE, *supra* note 3, § 30.6.

<sup>48</sup> *Id.* The illustration is Professor Gilmore's. As was true under pre-Code law, the person taking a subsequent real estate mortgage, or making a purchase of the real estate, or getting a lien must act without notice, or without actual knowledge of the security interest. *Metals Dev. Co. v. United States*, 322 F.2d 210 (5th Cir. 1963).

<sup>49</sup> See P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 16, § 17.04(2).

<sup>50</sup> 2 G. GILMORE, *supra* note 3, § 30.6, at 825.

<sup>51</sup> R. BROWN, *supra* note 9, § 139.

<sup>52</sup> See Shanker, *supra* note 3, at 65.



the key which a court must use in implementing the meager Code provision.

### III. OUTLINE OF RELEVANT CODE PROVISIONS

Once a decision to proceed under the Code is reached, the security claimant must deal with all of article 9, but several sections will be of particular concern.

Section 9-104(j) observes that, fixtures aside, the Code does not apply to the creation of security interests in real property.<sup>53</sup> Further, section 9-104(b) excludes landlord's liens, thus preserving the pre-Code law in that area.<sup>54</sup>

Section 9-105(f)'s definition of goods, which includes fixtures, becomes relevant, as, less specifically, do other of the definitions therein contained.<sup>55</sup>

Section 9-107, which defines a purchase money security, will have direct relevance to almost all of the cases wherein fixture financing is involved.<sup>56</sup>

Section 9-109's classification of goods into "consumer goods," "inventory," "farm products," and "equipment" will be of concern, because the classification there stated is basic to several of the operative provisions of the Code.<sup>57</sup>

Section 9-110's provision is of direct concern, for in effect it eliminates any requirement of a detailed description of real estate or personalty involved in security transactions, so long as reasonable identification is provided.<sup>58</sup> Vis-à-vis fixtures, this means that technical, "legal" descriptions of real estate involved are not required.<sup>59</sup>

Section 9-201, being of general application to all security agreements, obviously applies to fixture financing.<sup>60</sup> Section 9-203 is of the same class of sections, but contains some very important conditions precedent to enforceability of a security interest.<sup>61</sup> In relation to fixtures, enforceability will almost always depend upon the existence of a debtor-signed security agreement describing the collateral.<sup>62</sup> Though section 9-203 does not require for fixtures a description of the involved land, there is no reason for not including this information, if known.<sup>63</sup>

<sup>53</sup> UNIFORM COMMERCIAL CODE § 9-104(j).

<sup>54</sup> UNIFORM COMMERCIAL CODE § 9-104(b). See *Universal C.I.T. Credit Corp. v. Congressional Motors, Inc.*, 228 A.2d 463 (Md. Ct. App. 1967). The Texas rule with respect to the relative priority between security interests and landlord's liens appears in *Shwiff v. City of Dallas*, 327 S.W.2d 598 (Tex. Civ. App. 1959) *error ref. n.r.e.*; *Lynch v. Cook*, 195 S.W.2d 773 (Tex. Civ. App. 1946) *error ref. n.r.e.*; *Cave v. Talley Co.*, 298 S.W. 912 (Tex. Civ. App. 1927); *David v. Roe*, 271 S.W. 196 (Tex. Civ. App. 1925) *error dismissed*.

<sup>55</sup> UNIFORM COMMERCIAL CODE § 9-105(f).

<sup>56</sup> *Id.* § 9-107. Professor Gilmore has suggested that as a practical matter there is need for protection only for purchase money security interests in fixtures. 2 G. GILMORE, *supra* note 3, § 30.6, at 822.

<sup>57</sup> UNIFORM COMMERCIAL CODE § 9-109.

<sup>58</sup> *Id.* § 9-110.

<sup>59</sup> 2 G. GILMORE, *supra* note 3, § 30.5, at 817.

<sup>60</sup> UNIFORM COMMERCIAL CODE § 9-201.

<sup>61</sup> *Id.* § 9-203.

<sup>62</sup> It will be most unlikely that a secured creditor will be able to retain possession of something designed for use as a fixture, and therefore eliminate the need for a security agreement. See UNIFORM COMMERCIAL CODE § 9-203.

<sup>63</sup> Indeed, if the document is to be used as the financing statement, description of the land is a necessity. See UNIFORM COMMERCIAL CODE § 9-402.

Section 9-204 is another of the critical Code provisions of general application relevant to fixtures, because therein are articulated the requirements for "attachment," a significant Code term.<sup>64</sup> The word "attachment" does not, it should be noted, share any of the overtones of attachment common in fixture terminology. The attachment of the Code is metaphysical rather than physical, and it is a term used to identify the event of the creation of the security interest in particular property as between debtor and creditor. It is important to remember that section 9-204 is concerned neither with enforceability as between the parties, nor with effectiveness as against third party claims.

The perfection requirements of the Code appear in section 9-301,<sup>65</sup> and at this point the relative merits of the claim of the security holder and those of third persons begins. Paramount concern here focuses on the trustee in bankruptcy who is protected as a lien creditor. Because of the impact of section 9-301, the secured party is required to take note of the filing requirements of the Code.

In subsection (2) of section 9-301, a particular provision is made for the purchase money security interest which is advantaged by the only "relation back" provision of the Code. Such an interest, though not indicated by filing at or prior to its attachment, will be prior to judicial liens and the like, coming into existence between attachment<sup>66</sup> and filing, if filing occurs within ten days after the debtor gets possession of the chattel.<sup>67</sup> Of immediate concern, though, is the question whether this ten-day period is available to the purchase money security holder who finances acquisition of a fixture. The answer is sufficiently in doubt as to suggest that no reliance be placed, as to fixture financing, in subsection (2) of section 9-301.<sup>68</sup> Wherever possible, the filing should precede the delivery of possession to the debtor. An attorney entering the transaction where this critical observation has not been followed may still develop an argument to give his client the advantage of the ten-day period, but he ought not to create a situation in which the argument is necessary. Note that section 9-313, in setting out details about fixture financing, omits the ten-day period of relation back.<sup>69</sup>

To pursue the issue of whether a filing is or is not needed, section 9-302 states the general requirements, with two direct references to fixtures in the provisions respecting farm equipment and consumer goods.<sup>70</sup> The directive is: File.<sup>71</sup> The major threat to unperfected security interests will usually be the trustee in bankruptcy.<sup>72</sup> In the case of fixtures, however, establish-

<sup>64</sup> *Id.* § 9-204.

<sup>65</sup> *Id.* § 9-301.

<sup>66</sup> The word "attachment" in the Code, it will be recalled, is not used in the fixture sense. See text accompanying note 64 *supra*.

<sup>67</sup> For another priority treatment of purchase money security interests see UNIFORM COMMERCIAL CODE § 9-312(3), (4).

<sup>68</sup> 2 G. GILMORE, *supra* note 3, § 30.6, at 827.

<sup>69</sup> UNIFORM COMMERCIAL CODE § 9-313.

<sup>70</sup> *Id.* § 9-302.

<sup>71</sup> The automatic protection accorded to consumer goods and certain farm equipment, which are perfected without filing, is not accorded to fixtures. KY. ATT'Y GEN. OP. No. 64-267, 2 U.C.C. Rep. 194 (1964). The point was overlooked in *In re White*, 2 U.C.C. Rep. 192 (E.D. Ky. 1964).

<sup>72</sup> See UNIFORM COMMERCIAL CODE § 9-301.

ing of perfection is but one aspect of the problem, because the relative priority of a security interest will often depend upon the time and manner of perfection.

Priority among conflicting security claimants is governed by section 9-312, but a particular priority rule for fixtures appears in section 9-313.<sup>73</sup> Though section 9-313 is directed only to priority between realty claimants and the secured party, there does not appear to be much room for application of section 9-312 to a fixture case. Between two secured parties looking exclusively to the chattel, only if both treat the chattel as purely personal would section 9-312 seem to apply.<sup>74</sup> If one perfects as for a fixture and the other as for a chattel, the victory goes to the one who guessed correctly, because only one of the filings could be recognized; the other would be abortive.<sup>75</sup> As respects the bankruptcy trustee, appropriate filing is essential. If certain steps are required and are not met, the trustee as lien creditor takes all.<sup>76</sup> Inasmuch as the details for perfection of fixture security interests differ from those stated for ordinary chattels, proper classification or multiple perfection is a *sine qua non* of safe security.

Section 9-315 is not without significance in fixture financing, because there will no doubt be circumstances in which commingling will have occurred in dealing with property annexed to real estate.<sup>77</sup> Because of the exclusion stated in section 9-313(1), however, excluding many structural supplies from the fixture concept, these circumstances would seem to be rare.<sup>78</sup>

Part 4 of article 5 deals directly with the requisites of filing. Insofar as fixtures are concerned, the appropriate place for filing in Texas is "in the office of the County Clerk in the county where the real estate concerned is located."<sup>79</sup> The language suggested for adoption, though, is "in the office where a mortgage on the real estate concerned would be filed or recorded."<sup>80</sup> Neither statement of the rule is easily applied to goods whose future status as fixtures is unknown. Similarly, complications are presented by goods designed for use as fixtures in cases where the particular land for their use has not been selected at the time of the creation of the security interest.<sup>81</sup>

<sup>73</sup> *Id.* §§ 9-312, 9-313.

<sup>74</sup> *Cain v. Country Club Delicatessen, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (Super. Ct. 1964).

<sup>75</sup> The precise relationship between §§ 9-312 and 9-313 is not, however, clearly established. See *United States v. Baptist Golden Age Home*, 226 F. Supp. 892 (W.D. Ark. 1964), noted in 19 ARK. L. REV. 384 (1966); *In re Royer's Bakery, Inc.*, 1 U.C.C. Rep. 570 (E.D. Pa. 1963), noted in 50 CORN. L.Q. 106 (1964).

<sup>76</sup> Mr. Coogan would approach the matter differently, by separating perfection problems from the priority problems in § 9-313. Since the main threat to unperfected security interests is posed by the bankruptcy trustee, who typically does not represent anyone who has dealt with the debtor's real estate in mind or who has relied on the real estate records, he would require perfection as to him. He would not impose the added risk that the trustee could also take advantage of the priority rules established in § 9-313 for resolving disputes about claims to the real estate. P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 16, §§ 17.05(4)(b), 17.06.

<sup>77</sup> UNIFORM COMMERCIAL CODE § 9-315.

<sup>78</sup> *Id.* § 9-313(1).

<sup>79</sup> Tex. Laws 1967, ch. 735, § 4, at 1985.

<sup>80</sup> UNIFORM COMMERCIAL CODE § 9-401.

<sup>81</sup> See *In re West Hartford Club Car, Inc.*, 2 U.C.C. Rep. 738 (D.C. Conn. 1964) and the *Editor's Note*, at 738.

Though multiple filing seems to be the one certain means of protection, one commentator has pointed out insuperable obstacles to this course of operations.<sup>82</sup> In at least some instances, reliance will of necessity be placed in the wording of section 9-401(3), by which a change in use which would alter the method of perfection does not vitiate a prior proper filing.<sup>83</sup> About all that can be affirmed with assurance is that section 9-401(3) is of doubtful application to the fixture pattern.

There is no substitute for proper filing, and an erroneous guess as to whether a particular item is or is not a fixture may subject the security interest therein to claims of those persons identified in section 9-301.<sup>84</sup> In the past it has been quite customary to insert into security agreements a provision to the effect that the chattels dealt with are to remain chattels and are not to become part of the realty, however attached.<sup>85</sup> The language is obviously aimed at cutting out any real property claimants who might otherwise assert that, insofar as they are concerned, the property has amalgamated into real property to which their claim is paramount. But the language has a different effect under the Code, because it has been construed as identifying the classification of the goods for purposes of filing.<sup>86</sup> Thus a security holder who inserts that language in his agreement must act "consistently" and file on the goods as if they were chattels. A filing under the fixture provisions is not adequate.<sup>87</sup>

In view of the substantive rights in fixtures provided for the security holder, language identifying the property as personal rather than real property ought to be omitted. More appropriate would be language indicating the parties' intention that the chattels involved are intended to be fixtures under article 9 of the Uniform Commercial Code, if any language is thought necessary. One would doubt whether inclusion of any such language would preclude a court's determination that the goods were, indeed, something else.<sup>88</sup>

Section 9-402 specifies what is to be filed.<sup>89</sup> In Texas, since June 1967, the formal requirements applicable to fixture financing statements differ from those applicable to simple chattels.<sup>90</sup> Only in the case of fixtures must a description of the real estate and the name of the record owner thereof

<sup>82</sup> P. COOGAN, W. HOGAN & D. VAGTS, *supra* note 16, § 17.05(4).

<sup>83</sup> UNIFORM COMMERCIAL CODE § 9-401(3): "A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed."

<sup>84</sup> UNIFORM COMMERCIAL CODE § 9-301.

<sup>85</sup> A dictum in *Citizens' Nat'l Bank v. Elk Mfg. Co.*, 29 S.W.2d 1062 (Tex. Comm'n App. 1930) suggests that inclusion of an express provision that mortgaged chattels shall remain personalty is essential to defeating claimants against real estate to which they are attached. It would appear that, under the Code, such language might eliminate liability for repair costs under § 9-313(5), but there seems no further effect. As the text following this note seems to demonstrate, consistent behavior on the part of the chattel encumbrancer is thereafter required. See *Hugh Cooper Co. v. American Nat'l Exch. Bank*, 30 S.W.2d 364 (Tex. Civ. App. 1930).

<sup>86</sup> *Cain v. Country Club Delicatessen, Inc.*, 25 Conn. Supp. 327, 203 A.2d 441 (Super. Ct. 1964).

<sup>87</sup> *In re Collier*, 3 U.C.C. Rep. 1076 (E.D. Tenn. 1966); *In re Keystone Baking Co.*, 1 U.C.C. Rep. 606 (E.D. Pa. 1958). On the effect of an agreement that chattels shall not become part of the realty, see *First Nat'l Bank v. Hickman*, 45 S.W.2d 808 (Tex. Civ. App. 1931).

<sup>88</sup> *Ruby v. Cambridge Mut. Fire Ins. Co.*, 358 S.W.2d 943 (Tex. Civ. App. 1962).

<sup>89</sup> UNIFORM COMMERCIAL CODE § 9-402.

<sup>90</sup> Tex. Laws 1967, ch. 735, §§ 1-11, at 1984.

be included. Further, for fixtures the financing statement must state that "[c]ollateral is or includes fixtures."<sup>91</sup> The statutory language suggests that a single financing statement might include fixtures and non-fixtures, but further language of the statute seems to dictate the use of multiple financing statements, because, "[W]here the financing statement bears the statement 'Collateral is or includes fixtures' or its substantial equivalent, the filing officer *shall* index the financing statement in a separate book endorsed 'Security Interests in Fixtures.' The filing of a financing statement bearing the above described statement perfects a security interest only in goods which are or are to become fixtures."<sup>92</sup> Thus, quite obviously, for non-fixture goods a filing statement must be in such a form as not to make this language operable. Tender of two statements, both bearing the fixture flag, would not produce proper indexing.

In many doubtful cases, indeed, prudence will suggest double filing and double financing statements to guarantee perfection, whatever the hindsight classification might be. Where prudence prevails over expedience, indeed, multiple filings ought to be made in any case where some innocent third person may deal with the debtor in a way to be misled by the absence of a filed statement. The Code is satisfied if, in the case of a fixture, the filing appears in the separate book. The possibility seems to exist, though, that a debtor might transfer an interest to an innocent third person by dealing with the goods as personalty. Thus, he may sell the goods instead of attaching them to his real estate. Or, even after he has attached them, nothing will preclude his removal thereof and selling them or using them as security for a debt to an innocent third person. The latter case appears simpler than the former, and one would predict that once a fixture had been attached and the security interest perfected by filing in the fixture method, his interest would be prior to that of the purchaser of the removed item. In both instances, double filing might prevent the loss of the security.

The Texas version may permit another reading, providing greater ease to the security holder. It is possible that a properly filed fixture claim gives protection against both subsequent real estate claimants and claimants dealing with the goods as personalty. The statute which preceded the one now in force was express on the matter, insofar as it concerned manufactured goods attached to real estate. The provision stated that proper registration "shall be notice to all persons thereafter dealing with or acquiring any right or interest in said . . . manufactured article, or the realty upon which the same is located."<sup>93</sup> The language seems to broaden the effect of the notice. Perhaps the same broadening effect may be read into the Code provision.

The Texas statute is obviously designed to shift the burden of deciding where to index from the county clerk to the secured party. In the case of consumer goods, and certain low-value farm equipment, the filing is to be made with the county clerk and not the secretary of state.<sup>94</sup> In these cases,

<sup>91</sup> *Id.* § 5, at 1985.

<sup>92</sup> *Id.* § 7, at 1986 (emphasis added).

<sup>93</sup> TEX. REV. CIV. STAT. ANN. art. 5498 (1958).

<sup>94</sup> Tex. Laws 1965, ch. 721, § 9-401(a), at 170.

filing may not be required by virtue of section 9-302(1)(c) and (d), but may be desirable to prevent a bona fide purchase under section 9-307.<sup>95</sup> If fixtures are involved, filing is required under section 9-302.<sup>96</sup> The Texas version implements this requirement by helping the county clerk know how to handle the documents tendered for filing. He will separately index fixture financing statements so that persons claiming an interest in real estate may look to that index, rather than to the index of other financing statements covering non-fixture chattels.<sup>97</sup> Failure to identify the fixture nature of the chattels, if such identification is pertinent, will result in improper filing and thus in non-perfection.

Texas' further insertion of a requirement that the name of the record owner of the pertinent real estate be shown is patterned after the provisions in many other states correcting an omission from the official version of the Code.<sup>98</sup> If the filing on a fixture is to be in the chain of title, and the fixture is annexed to land owned by someone other than the debtor (as, for example, in the case of a tenant's annexing goods to leased land) the record owner must be identified.<sup>99</sup>

However, a nice balancing of the burdens is made in Texas. Often a conditional seller or other secured party will not know and will not be able to identify, without elaborate search, the identity of the true owner. To eliminate the need for such a search by suppliers of relatively inexpensive goods, a cut-off price of \$1,500 is stated.<sup>100</sup> For goods of and below that price the debtor's name is enough, even though he is not the record owner, unless the secured party knows the name of that owner.<sup>101</sup> While this will not make the chain of title complete in every case, the accommodation to the chattel security holder seems highly meritorious and to place Texas in a position likely to be emulated.<sup>102</sup>

The final particularization of fixtures for special treatment concerns remedies. The rights of the secured party on default are stated in part 5 of the Code, without specification of discreet rules for fixtures.<sup>103</sup> Section 9-313 effects a limitation on remedy in fixture cases previously discussed

<sup>95</sup> UNIFORM COMMERCIAL CODE §§ 9-302(1)(c), (d) and 9-307.

<sup>96</sup> *Id.* § 9-302.

<sup>97</sup> Tex. Laws 1967, ch. 735, § 7, at 1986. Indexing errors of the clerk, not attributable to the secured party, will not defeat the security interest. *Continental Gin Co. v. Herner*, 79 S.W.2d 670 (Tex. Civ. App. 1935). See UNIFORM COMMERCIAL CODE § 9-403(1).

On the other hand, misfiling attributable to the security holder will invalidate the security interest against claims of those persons specified in §§ 9-313(4), 9-301. *Texas Power & Light Co. v. Malone*, 42 S.W.2d 845 (Tex. Civ. App. 1931); *Schumann v. Jenkins*, 40 S.W.2d 214 (Tex. Civ. App. 1931); *Cave v. Talley Co.*, 298 S.W. 912 (Tex. Civ. App. 1927) (adds the landlord as a possible party to upset the security interest). See also *In re Riordan*, 238 F. Supp. 5 (E.D. Tex. 1965).

<sup>98</sup> Tex. Laws 1967, ch. 735, § 5, at 1985. The insertion also improves the language of an earlier Texas statute. See *Lone Star Gas Co. v. Sheaner*, 157 Tex. 508, 305 S.W.2d 150 (1957), reversing in part 297 S.W.2d 855 (Tex. Civ. App. 1956), noted in 12 Sw. L.J. 116 (1958), 36 TEXAS L. REV. 247 (1957).

<sup>99</sup> Tex. Laws 1967, ch. 735, § 5, at 1985.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See *Shanker*, *supra* note 3, at 63.

<sup>103</sup> UNIFORM COMMERCIAL CODE §§ 2-501 to -515.

by providing for removal with the only requirement being reimbursement for repair costs.<sup>104</sup> No other particular provision is made.

#### IV. CONCLUSION

Though future modification of the fixture provisions of the Code is extremely likely, the present version has been cited as "workable." Certain of the classification problems may evade solution, but where possible multiple perfection will solve those problems. In areas not specifically affected by the Code's theory that the only effect of injury to the freehold is in the remedy of the secured party, not in his right to enjoy his security, pre-Code cases will have continued validity. In operating under the Code, however, the factor of that harm will be of diminished significance, and thus many of the decisions rendered under previous statutes will require reconsideration.

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<sup>104</sup> *Id.* § 9-313.