

### *Symposium on Commercial Law*

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## AN ESSAY ON REAL AND PERSONAL PROPERTY, OR, FIXTURES UNMASKED

STEPHEN M. EGE\*

*[T]he mind in apprehending also experiences sensations which, properly speaking, are qualities of the mind alone. These sensations are projected by the mind so as to clothe appropriate bodies in external nature. Thus the bodies are perceived as with qualities which in reality do not belong to them, qualities which in fact are purely the offspring of the mind. Thus nature gets credit which should in truth be reserved for ourselves: the rose for its scent: the nightingale for his song: and the sun for his radiance. The poets are entirely mistaken. They should address their lyrics to themselves, and should turn them into odes of self-congratulation on the excellency of the human mind. Nature is a dull affair, soundless, scentless, colourless; merely the hurrying of material, endlessly, meaninglessly.<sup>1</sup>*

This quotation from Whitehead does not represent his view of the nature of things, for he believed it far more difficult to separate mind from nature than this passage suggests.<sup>2</sup> Lawyers might, with equal credulity, survey their landscape: what the author proposes to undertake here is an inquiry into the reality of real and personal property as existing legal entities. Philosophical pursuits in the study of law have seemingly always met with an impatient audience because they appear to be so far removed from the practical affairs of men. This reciprocal worldly indifference may account for the relative paucity of literature on the subject; what little there is perhaps indicates the difficulty of bringing the subject to life.<sup>3</sup> Legal reasoning, like nature, has, for the most part, been taken as it is: a shining patina has been taken for the structure itself.

Yet if nature is without sound, scent or color, it is just as true, and just as striking, to observe that nature is without owners. Nature is unowned. Surely any man who would maintain such a propo-

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1. A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 54 (1967).

2. The "philosophy of organism" is developed in outline in A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 103-07 (1967). It receives a full statement in A. N. WHITEHEAD, *PROCESS AND REALITY* (1969).

3. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961).

sition in the face of a world littered with property has, as it is said, taken leave of his senses. But there is certainly respectable authority for the proposition that something would still exist, even were there no bipeds such as we who walk the face of the planet and attest to the fact of the existence of things other than ourselves.<sup>4</sup>

But property, as an existing thing, is certainly a lower order of reality than are the primary or secondary qualities of things, as is demonstrated by the fact that property can disappear before our very eyes. A case in point:<sup>5</sup>

In Massachusetts in January of 1836 Davenport mortgaged his lot and dwelling house to Peirce to secure payment of a promissory note. Thereafter Davenport, the mortgagor, purchased another lot and undertook to move the house from his mortgaged lot to the new lot. After attempting to move the house whole, he disassembled it and carried it piece by piece. There he erected a new house, of approximately the same dimensions, partly from the removed materials and partly from newly purchased materials. When the new house was completed, Davenport conveyed the house and new lot to the defendant who, without actual knowledge of the mortgage, assumed possession.

The plaintiff mortgagee Peirce sued the defendant purchaser in trover on two counts: one, for the conversion of the newly erected house and the other, an apparently more limited claim, for the conversion of the old materials with which it was built. The plaintiff was nonsuited on both counts. The court reasoned that, although the house was originally owned by the mortgagee under Massachusetts law,<sup>6</sup> the house became the property of the owner of the land upon which it was placed. Thus Davenport came once again to "own" the house. "The materials used in its construction ceased to be personal property, and the owner's [the mortgagee's] property

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4. A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 89-90 (1967). The stuff "out there" is his "actual entities." Readers will be saddened to learn that it is neither "stuff" nor "out there." See, e.g., A.N. WHITEHEAD, *PROCESS AND REALITY* 54 (1969).

5. *Peirce v. Goddard*, 39 Mass. (22 Pick.) 559 (1839).

6. At that time in Massachusetts a mortgage was evidently being viewed as a conveyance of the legal estate upon a condition subsequent. *Erskine v. Townsend*, 2 Mass. 493 (1807); *Wheelock v. Henshaw*, 36 Mass. (19 Pick.) 341 (1837). One interesting discussion of the ownership of mortgaged land was "Judge Trowbridge's Reading," discussed in Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1 (1890), and apparently given the sanction of the Supreme Judicial Court of Massachusetts by virtue of a reprint in the law reports: 8 Mass. 551 (1812).

in them was divested as effectually as though they had been destroyed."<sup>7</sup> The newly erected house, then, was Davenport's to sell because he was the owner of the lot to which the house was removed. The mortgaged property simply disappeared!<sup>8</sup>

This astonishing phenomenon, of course, is an everyday occurrence; it happens when trees are cut, when crops are harvested, when minerals are extracted, and, going the other way, when bricks and mortar form a wall, and when that wall is painted.

That these occurrences are regarded as changes in kind, as the literal creation and destruction of existing things, is worth pondering. But we need not conclude at once that a two-fold scheme of property classification, one for detached things and one for attached things, is needed. Suppose only one man were to survive the seemingly inevitable holocaust which twentieth or twenty-first century man seems destined to inflict upon himself. He would likely, in surveying his lonely dominion, feel called upon to distinguish between rubble that moved or could be moved and that which did or could not. For the man of practical affairs it is true that, in infinite retrogression, things that do not move are always attached to something which is itself attached; only Archimedes' lever can disrupt

7. 39 Mass. (22 Pick.) 559, 562 (1839).

8. Interestingly, the result reached in *Peirce* (i.e., no liability in damages against the mortgagor's vendee) is evidently like that which the courts of England would have reached, under Dean Ames' analysis, before the expansion of the writs of replevin and detinue. Ames, *Disseisin of Chattels* (pts. 1-3), 3 HARV. L. REV. 23, 313, 337 (1889-90). Assuming the plaintiff mortgagee Peirce could somehow be regarded as seised of the constituent materials of the house, even though not in possession, then the removal of the house from the mortgaged lot could be regarded as a disseisin of chattels. Because of the hurdles imposed on the appeal of larceny, discussed in Ames, *The History of Trover*, 11 HARV. L. REV. 277, 278 (1897), the disseisee (plaintiff mortgagee) of chattels, unlike the disseisee of land, did not effectively retain a right in rem; the disseisee could not recover the goods. At some point this procedural quirk developed into the doctrine that the disseisor gained absolute ownership in the thing tortiously taken. Accordingly, a charge to the jury given in 1486, well after, according to Ames, trespass and replevin were no longer regarded as proceeding on inconsistent theories of ownership, is not surprising (though anachronous by Ames' own account):

If one takes my horse *vi et armis* and gives it to S, or S takes it with force and arms from him who took it from me, in this case S is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty.

Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 23, 29 (1889).

Thus, to return to *Peirce v. Goddard*, if it is the taking of materials of the house by the mortgagor of which the plaintiff mortgagee is complaining, Peirce would have no cause of action against the defendant vendee in 15th century England. The disassembly of the old house compounds Peirce's difficulties of recovery.

this truism. A brick is still a brick whether movable or embedded in a wall, but its utility in the two situations is greatly dissimilar; a brickbat is not a brick wall. Simply put, then, things movable or in motion differ profoundly in human significance from things at rest. They can be the source of our protection or the cause of our destruction. We therefore pay heed to the difference.

Enter Eve.

Society brings with it, as lawyers are aware, certain difficulties. One of them is the division of nature's bounty among its members. Physical things, in complex and diverse ways, give value to us: buildings provide shelter; the Colosseum, to the extent that it can withstand the onslaught of Roman traffic, reveals beauty; the facade of the Federal Archives building in Washington abjures us to "Study the Past." A similarly diverse catalogue of attributes could be provided for any physical thing.

Ownership derives from society's imperative that these values be divided among its members, that everything may not be held in common. And society has erected an apparatus to protect this division. If physical things were not owned, if everything floated freely about, then seemingly there would be no trespass, no theft, no tort even for physical injury to one's, as we say, own body (if we conceive of our relationship with our bodies as one of ownership). It is unquestionably true that the allocation of values associated with the ownership of a given thing has changed with time, but it also seems true that there is an irreducible residuum of values which may not be commonly shared. Society is impossible without some degree of ownership.

Once we accept the premise that ownership is a necessary condition of society, the necessity for a tagging system, a system which links a thing owned with its owner, arises. We may profitably return to our Massachusetts case in developing the tagging system. It will be remembered that in that case the court held that the mortgagee had no interest in the mortgaged house once it was moved from the plot on which it stood originally. The new owner's property interest in land flowed upward into the house, like ink on a blotter, rather than the mortgagee's property interest in the house flowing downward to the ground.<sup>9</sup> It seemed too much for the court to hold that

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9. Compare *Pulcifer v. Page*, 32 Me. 404 (1851) (involving only personalty) discussed in 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 31.2 (1965) [hereinafter cited

the house remained the property of the mortgagee once it had been moved to its new location. The mortgagee owned the first plot only. The court indicated that only the mortgagor Davenport could be held liable for the conversion of the materials; thus, the plaintiff was nonsuited.

The court, however, exhibited some ambiguity over what Peirce, the mortgagee, owned: the lumber or the space it occupied. Let us, in an attempt to tag what Peirce owned, posit the real estate property system solely, thereby excluding the personal property system. In so doing, we will introduce an abstraction which expresses a valuable incident of structures which we also wish to protect, *i.e.*, that physical things define space. Where physical things are not, there is space in which we may move.<sup>10</sup> The real estate property system posits that every point in space is owned. If it be asked, therefore, who owns a structure, one asks simply what the coordinates in question are, or more simply still, "Where is it?" So long as the coordinates may be ascertained,<sup>11</sup> and an index of owners and coordinates maintained, the real estate property system unerringly links the owner with his property. Moreover, Peirce will be delighted to find that under this tagging system he has nothing to lose. However much lumber Davenport may trot off with or however much earth he may gouge from the original plot, Peirce's space remains, sacrosanct.

A further interesting consequence of the real estate property system is that, as things move, ownership of them changes

as GILMORE]. It is difficult to determine which property accedes to which. See cases cited *id.* at 842, n. 6. See also Gilmore's discussion of when a security interest "carries over" into something of which it is a part, *i.e.*, the "product." *Id.* at 849. As to when this occurs, see *id.* § 31.5.

10. This is the doctrine of simple location, which underlies the whole philosophy of nature during the modern period. It is embodied in the conception which is supposed to express the most concrete aspect of nature. The Ionian philosophers asked, What is nature made of? The answer is couched in terms of stuff, or matter, or material—the particular name chosen is indifferent—which has the property of simple location in space and time, or, if you adopt the more modern ideas, in space-time.

A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 48-49 (1967).

11. Obviously, as man extends his dominion into the incredible expanses of space, what the author understands to be the primitive notions behind a scheme that envisions all of space as existing within a fixed, rigid and "unreal" three-dimensional lattice, must give way to the strictures of more advanced conceptions of space and time. It will be more difficult to say where a thing is and whether it is moving. See A. EINSTEIN, *THE MEANING OF RELATIVITY* 55 (5th ed. 1922).

chameleon-like. For as soon as Davenport moves the lumber over an adjacent tract, ownership passes to that tract's owner. Even when Davenport reaches his own tract, however, it takes an exercise of will to remember that as he carries his lumber about, his ownership of it is secure because he owns the space in which he moves, and not because he owns the space-obtruding, tangible lumber.

But if persons are to walk about a tract owned by another without finding themselves suddenly stripped of their former possessions, another system of ownership identification must be devised. It would not be sufficient merely to limit the effect of ownership when someone passes through owned space, for that would still leave open the question of who, if not the landowner, owns the object; either that or we create an exceedingly troublesome "roving coordinate" exception to the realty system.

Let us, then, momentarily cast aside the real estate property system as inconvenient and posit another, the personal property system. In so doing, we assume the exclusion of the real property system. We take, as a starting point, our insistence that Davenport owned the lumber itself, a tangible, physically describable thing; it will be owned regardless of where it might be. To identify his property the obvious solution for Davenport (or Peirce) is simply to point out the lumber; "That's it," he might say. In so doing he could rely on a tag,<sup>12</sup> paper or metal, or because his tag might be removed, on a description of the thing. Under the personalty system, if it be asked who owns something, we may respond "What is it?" The description of the appearance of a thing must be sufficiently general to be conveniently remembered and guard against the possibility of some obliteration of its distinctive features. Of course, the more general the description, the less distinctive the object owned and the more difficult it will be to assign ownership. Suppose Henry Ford's wildest dreams had come true, and the country were today traversed only by black sedans, but none having a serial number on the engine block. Truly, an horrible fabrication.

Suppose, now, relying exclusively on the personalty system, Peirce wishes to assert his interest in the mortgaged house moved to Davenport's newly acquired plot. Davenport's only objection can be that, by depositing Peirce's house upon Davenport's land, Davenport was deprived of the use of the land. Davenport may at

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12. It is by this method that it is proposed to identify spacecraft. M.S. McDOUGAL, H.D. LASSWELL & I.A. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 566-74 (1963).

least take comfort from his freedom to move in and out of Peirce's house at will, for Peirce owns the house only, not any space it may define and occupy. By concentrating our attention solely on the physical thing owned by Peirce or Davenport and making no reference to who may own the space which surrounds those objects, we destroy a valuable incident, namely, a space in which to use them. Assuming we may conveniently describe and index and sufficiently distinguish every physical thing (whether it be in terms of size, shape, color or even location), the personalty system would offer no security from physical intrusion into the space surrounding owned things.

Neither property identification system alone proves satisfactory, remembering, again, that we have undertaken this exercise because we have concluded that not all valuable aspects of the physical things which structure our environment (indeed, *are* our environment) may be commonly shared. We must, therefore, divide these values among society's members, and to do so, we must construct a tagging system, *i. e.*, a system that links the thing owned with the member of society who owns it. We have discovered that the realty system protects the integrity of space and unerringly indexes owners, but is so rigorous in its extension that movement out of the owned space necessarily operates to deprive the former owner of his ownership; there is no way that ownership can be regained short of acquiring ownership of the tract upon which the movable object is situated. The personalty system, on the other hand, by fixing upon things rather than space as the object of ownership, provides a sufficient owning tag for things in motion or stationary. There are minor irritations associated with it—it taxes the imagination of man in a world peopled by an abundance of mass-produced articles.<sup>13</sup> But there is a problem far more grave. The

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13. Whitehead's view is rather more inclusive:

[W]hen discussing general terms . . . [Locke] adds parenthetically another type of ideas which are practically what I term 'objectified actual entities' and "nexūs." He calls them "ideas of particular things"; and he explains why, in general, such ideas cannot have their separate names. The reason is simple and undeniable: there are too many actual entities. He writes: "But it is beyond the power of human capacity to frame and retain distinct ideas of all the particular things we meet with: every bird and beast men saw, every tree and plant that affected the senses, could not find a place in the most capacious understanding." The context shows that it is not the impossibility of an "idea" of any particular thing which is the seat of the difficulty; it is solely their number.

A.N. WHITEHEAD, *PROCESS AND REALITY* 67 (1969).



personalty system takes no account of the space needed in which to use things. Of course, some practical standards could be developed, perhaps a "utility space" in which to use the owned object. Even so, a scheme which posits that objects, not space, is owned would present an exceedingly confused state of affairs, especially as men, like Davenport, began moving things which, because they had been left "in place" for a time, had begun to be used as a point of reference. The world would be in a state of perpetual disruption as men shuffled their possessions, house and all, across the surface of the plant, willy-nilly.

The seeds of the realty system are thus planted in the personalty system. It is tempting to conclude that when a man owns a thing at rest, his utility space entitles him to prevent encroachment on his land, as Davenport would do to Peirce. Of course, if we go too far, and adopt the realty system, we are left again with the difficulties which it presents when carried alone to rigorous extension. Movement, as it were, fixes the tagging rule by creating practical impediments to the use of the alternate system.

But to repeat, without Eve, this gerrymandered system for the division of the value of things and of space would be unnecessary. The distinction between things that we regard as moving or capable of motion and as stationary or, as it is significantly said, between movables and immovables (*i.e.*, those which *we* can move),<sup>14</sup> reflects a circumstance of profound importance in our environment. Society brings with it the necessity to build an ownership scheme upon that distinction.

The "things," then, which are the subject of ownership are inextricably intertwined with the imperatives of the social condition, of sharing and keeping to oneself our physical environment, the space and matter in which we exist. This view is directly at variance with that of Professor Hohfeld, one of a small handful of men who have successfully given a philosophical dimension to the study of law. Professor Hohfeld, like Holmes before him,<sup>15</sup> sharply distinguished between "purely legal relations" and "the physical and

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14. The development of distinct rules for *res immobilis* and *res mobilis* is a late one in Roman law, W. W. BUCKLAND & A. D. McNAIR, *ROMAN LAW AND COMMON LAW* 57 (1936), was only of subordinate interest, W. W. BUCKLAND, *A TEXTBOOK OF ROMAN LAW* 186 (1932), and is apparently the outgrowth of a land-based economy, H. F. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* ch. 4 (1952).

15. O. W. HOLMES, *THE COMMON LAW* 169-70, 192-93 (M. Howe ed. 1967).

mental facts that call such relations into being."<sup>16</sup> He strongly criticized

the tendency to confuse or blend non-legal and legal conceptions . . . . The word "property" furnishes a striking example. Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate; then again—with far greater discrimination and accuracy—the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious *shift* from the one meaning to the other. At times, also, the term is used in such a "blended" sense as to convey no definite meaning whatever.<sup>17</sup>

"All legal interests," he said, "are 'incorporeal'—consisting as they do, of more or less limited aggregates of abstract legal relations."<sup>18</sup> Hohfeld proceeded thence to develop a scheme of legal relations which are embedded in a matrix of "legal opposites" and "legal correlatives." These relations he termed his "fundamental legal conceptions," into which he believed all legal relations may be cast. Just as mass of the seventeenth and eighteenth centuries existed, having primary (Newton's laws of motion) and secondary qualities (color, texture, smell),<sup>19</sup> there exists for Hohfeld only these relations, *and no others*; his fundamental conceptions are the total stuff of legal existence. He was not, however, as was Newton, concerned with cause and effect, and so Hohfeld is, quite properly, not to be viewed so much as undertaking to predict the outcome of legal disputes<sup>20</sup> as he is to be predicting the selection of parties-litigant. He was showing *who* was involved in legal relations.

The realty and personalty ownership identification scheme drawn above, however, indicates that we do not so freely as we suppose discriminate among the "facts" to which legal incidents attach. Society constrains the selection of operative facts which give

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16. W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 27 (W. Cook ed. 1919).

17. *Id.* at 28 [emphasis added].

18. *Id.* at 30.

19. A.N. WHITEHEAD, *SCIENCE AND THE MODERN WORLD* ch. III (1967).

20. M.S. McDUGAL & D. HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* 28 (1948).

rise to legal consequences even on so basic a question as the things we think we see before our very eyes. That is, under Hohfeld there still exists the problem of the conceptualization or realization of the physical things which are the *subject* of legal relations. It is as though he had articulated a doctrine of secondary and not, as he had supposed, primary qualities. In structuring our legal relations with one another we reason from "property" as an existing legal datum. Our environment is such that we have necessarily operated on two inconsistent bases in conceptualizing property. Returning to Whitehead, we have discovered an obvious instance of what he happily has termed "the fallacy of misplaced correctness."<sup>21</sup> Property is as close as the nose on your face.

Having thus reasoned our way this far, we should not be surprised to discover that the bankers have had a difficult time explaining to us the difference between their security interest and our ownership. We have just finished devising a system that operates to shift ownership from one person to another based upon profound physical and social imperatives. There is no event of comparable import which operates to create security interests. Things looking much the same as they had before the occurrence of the non-event, it is not entirely clear how ownership of the values associated with some property is to be segregated from a security interest in those values. Even with forty years' experience in drafting modern security interest legislation, no satisfactory regime has emerged. In comparison to ownership, security interests simply do not make sense.<sup>22</sup>

The security interest article of the Uniform Commercial Code, Article 9, is notable for its attempt to impose some order out of pre-existing chaos on both these points. But the draftsmen were more successful at prescribing the ritual of security interest "creation" (and succession) than they were at imagining what a security interest is like. *Rock. Book. House*. All call something to mind. But what of the "purchase money security interest in dealer's inventory?" Or "secured loan covering future advances and after-acquired property?" Here we are operating at a rather high degree of abstraction.

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21. A.N. WHITEHEAD, *PROCESS AND REALITY* 10 (1969). This is not to say a great deal, however. It would be of interest to place what might be termed the Fundamental Legal Objects, such as the two-fold property scheme, within his philosophy of organism. The author's references to "space," "matter": and the "subject" of legal relations would be viewed by Whitehead as utterances that were either abstract, or worse, archaic and, if presented as statements of philosophic or metaphysical truth, false.

22. Neither do future interests. Or leases. We have it that tenure played no substantial part in Roman law, *i.e.*, ownership was capable of horizontal succession but not vertical extension. W.W. BUCKLAND & A.D. MCNAIR, *ROMAN LAW AND COMMON LAW* 60 (1936).

And what does one have when one captures either of these things?

By way of explanation of these questions, the author proposes to discuss the rather dry and technical subject of fixture priority under Article 9.<sup>23</sup> It is the subject which first captured the author's rather perverse attention and anticipated the preceding discussion. Incidentally, an interesting episode in the Code's drafting history tends to confirm the vitality of the property ownership scheme. The Code, as it was originally submitted for adoption, attempted to do away with much of the distinction between real and personal property in controversies between real estate parties and fixture-secured lenders.<sup>24</sup> Under the Code as then submitted, however well-incorporated some collateral might be into real estate, the secured party could, under certain conditions, remove it. (The chief limiting principle was that the real estate owner be repaid for damages occasioned by removal of the personalty, thus giving partial recognition to realty ownership. Clearly, the realty owner loses something on removal.) Apparently the old pressures were stronger than the Code's draftsmen had supposed, for the realty distinction quickly reappeared in subsequent proposed official drafts.<sup>25</sup> "Incorporated" goods became realty. Of course, objections voiced by real estate interests could have played some part in circumscribing the availa-

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23. See UNIFORM COMMERCIAL CODE § 9-313 [hereinafter cited as UCC]. Because the 1972 revisions of 9-313 have not been widely adopted, all references are, unless indicated otherwise, to the 1962 Official Text of the Code. Other sections in the Article making explicit reference to fixtures are cited in Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1323 n. 11 (1962); they are 9-104(j), 9-302(1)(c) and (d), 9-401 and 9-402. For a discussion of the 1972 changes to 9-313 see PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT NO. 2 § A (1970); Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477 (1973); Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code* (pts. 1-2), 26 BUS. L. 1465 (1971), 27 BUS. L. 321 (1971); Hawkland, *The Proposed Amendments to Article 9 of the UCC—Part 3: Fixtures*, 77 COMM. L. J. 43 (1972); Panel Discussion, *A Look at the Work of the Article 9 Review Committee*, 26 BUS. L. 307 (1970). An earlier draft is discussed in Gordon, *Credit Sales of Installed Equipment—The Uniform Commercial Code's Uneasy Truce Between Realty and Chattel Financing Interests*, 64 NW. U.L. REV. 651 (1970); Henson, *Fixtures: A Commentary on the Official Proposed Changes in Article 9*, 52 MARQ. L. REV. 179 (1968); Leary & Rucci, *Fixing Up the Fixture Section of the U.C.C.*, 42 TEMP. L. Q. 355 (1969).

See 1 GILMORE § 30.2 n. 3 for citation to principle treatments of fixture priority. Also includable are Coogan, *Fixtures—Uniformity in Words or in Fact?*, 113 U. PA. L. REV. 1186 (1965); Gordon, Henson, Leary & Rucci, *all supra*. For a general review of the priority scheme of 9-313 and problems thereunder, see Gordon, *supra*.

A recent and interesting discussion of the operation of the distinction between real and personal property in another context appears in Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?* 73 COLUM. L. REV. 250 (1973), which presents the delightful difficulty of a tag upon a tag, with something, the "corporation", in between.

24. UCC § 9-313 (1952 Official Draft), *discussed in* 2 GILMORE § 30.2.

25. See, e.g., UCC § 9-313(2) (1972 Official Text).

bility of collateral for non-realty secured lenders.<sup>26</sup> But their objections seem to have come only after submission of the change, not before. Significantly, the new drafts were explained as being offered "primarily for clarification."<sup>27</sup>

But we digress. We hope, by what follows, to establish that the incidents of a Code security interest with "priority" (an answer to the question "What is a security interest?") have been indicated in only patchwork fashion, even though priority for security interests is a central or, one might even say, the only concern of Article 9. It will appear that lenders, in deciding what they would get from property, have chosen those incidents for legislative treatment which were most likely to encourage the borrower to disgorge his indebtedness and, as between lenders, to give the early bird the worm. This observation, together with our discussion of the property systems will, it is hoped, additionally prove useful to those who have wrestled with troublesome fixture priority problems. It will be helpful, at the outset, to consider three other problems general to the Code priority allocation scheme.

Doubtless among the most discussed problems of Article 9 are those related to what might be called the "transformation" of personalty collateral and its attendant effects on security interest priority. Raw materials or component parts become a finished product. Or, without any physical alteration, collateral may be transformed as the use to which it is put changes. Collateral in the hands of one person may be inventory, and in the hands of another, equipment or consumer goods.<sup>28</sup> After each transformation a question remains

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26. The real estate bar gave little help to the drafting of the Code's fixture section, Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 47 (1964), although evidently it was invited to do so. Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950). General acceptance of the Code was not without controversy. See Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798 (1958). Lenders who use real estate as collateral were evidently slow to awaken to whatever problems were created for them by the 1952 Official Text. Although the 1952 version of 9-313 seemed to invite a diversion of consumer hard goods financing from the savings and loan industry to the banking industry, a contemporary discussion of the "package mortgage" by representatives of the savings and loan industry contains no reference to the infant Code. Russell & Prather, *The Flexible Mortgage Contract*, 19 LEGAL BULL. 73 (1953). Objections by real estate interests apparently came into full bloom only after submission of the arguably more favorable 1956 version (which is the present version of 9-313). See Coogan, *Fixtures—Uniformity in Words or in Fact?*, 113 U. PA. L. REV. 1186, 1190 (1965). Perhaps the subsequent reaction is just another instance of rising expectations unmatched by comparable performance.

27. 2 GILMORE § 30.3.

28. UCC § 9-109 and accompanying comments; Coogan, *supra* note 26, at 1222.

whether a pre-existing security interest subsists in the reclassified collateral and whether it shall be entitled to priority over some conflicting interest. In these situations, section 9-312(5),<sup>29</sup> the Code's general rule for determining the "when" of priority (*i.e.*, whether A shall have priority over B) cannot apply to produce a result.

Essentially, the general "when" rule states that he who takes an interest in the thing first receives priority ("taking" to involve "attaching" and "perfecting" the security interest). There are, of course, numerous exceptions to this basic rule; special reasons are offered to justify them. In at least two situations this general rule will not provide a "priority" result. First, the lending party may make a series of advances instead of one, and if the security interest of some third party intervenes, a question remains whether subsequent advances are entitled to the same priority as those made prior to intervention.<sup>30</sup> The first taker rule of 9-312(5) is confounded when someone is *both* a first and second taker. Section 9-313 has resulted in a curious twist or two;<sup>31</sup> and when future advances are contemplated by the real estate mortgagee, he may in some circumstances reverse his usual posture.<sup>32</sup> The argument is detailed in the preceding footnote.

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29. There is some question where the general priority allocation rule resides. Gilmore, for example, suggests that it may be in all of 9-312, not just 9-312(5). 2 GILMORE § 29.4. He has also referred to 9-312(5) alone as the "general or residual rule." *Id.* at § 34.1. Another candidate is 9-201, although it seems to be largely overlooked in the literature.

30. Priority of future advances is discussed in Ege, *Priority of Future Advances Lending Under the Uniform Commercial Code*, in 2 P.F. COOGAN, W.E. HOGAN & D.F. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ch. 21B (1969).

31. 2 GILMORE § 30.6.2.

32. Where a real estate mortgagee makes future advances, as in a construction loan, he may in some circumstances reverse his usual posture. Usually, the question whether a series of advances creates one or many discrete security interests becomes important when a party argues that, because an earlier advance is preferred, a later advance should be also. The argument is that one interest is created by a series of advances, preventing the third party from coming in "ahead of" later advances, or to use more familiar terminology, because the later advances "relate back" to the earlier, and "prior," advance.

Suppose a real estate construction mortgagee, before affixation, agrees to provide advances for construction of the building to which fixture collateral will be affixed. The mortgagee records his mortgage. Subsequent to affixation of fixture collateral to which a fixture security interest has already attached, the construction mortgagee makes two advances, one before and one after perfection of the fixture security interest. Here the real estate party cannot look back to some golden advance entitled to priority over the fixture man; the fixture financier will be quick to cite 9-313(2). But the mortgagee can look forward. If the fixture security interest has attached prior to affixation of the collateral but the fixture security interest is not perfected until after the mortgagee makes an advance, the mortgagee will argue

Second, one item of collateral may be added to, mixed or worked into some other item of collateral. Unless there is some way to restore the status quo ante (as by disassembly), it is impossible to say which interest was taken first in the collateral. The identifying tag no longer serves to indicate the collateral subject to the secured party's interest or the order in which he took that interest. The physical, tangible thing subsists, however, so the security interest, too, must survive the change. Where no physical alteration occurs but the collateral classification is changed through use, the question of whether the "old" collateral subsists in the "new" seems attributable solely to the Code's classification scheme and not to the personal property ownership identification scheme; clearly an automobile is an automobile, whether held by a dealer as inventory or used by a consumer for personal, family or household purposes. Much difficulty derives from the absence of a well-worn and obvious test for shifting from one classification to another and the Code's cumbersome<sup>33</sup> ten-fold collateral classification.

Both of these general problems to the Code's first-taker rule may arise where fixture collateral is involved. As to the second, involving some change of the collateral, where fixture collateral is annexed to realty, there does not appear to be any correct view of the priority to which the fixture secured party is to be entitled or subject. Viewed apart from property reclassification, it is a little difficult to say which interest came first—the Code-created security interest in the "unattached" personalty or the real estate interest in the "fixed" realty to which it is later attached. Indeed, one is almost tempted to say that the collateral disappears (as when goods are "incorporated"). Where two tangible things, both subject to a security interest, are inseparably and indistinguishably joined, the gen-

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that his advances create a series of discrete security interests, not a single interest, so as to divorce his later advances from his earlier, subordinated one. This argument apparently still pinions the mortgagee for his post-fixture-perfection discrete advance. Of course, the mortgagee whose interest arose after affixation and before perfection of the security interest in the fixture collateral would argue a single rather than a multiple security interest view so as to entitle even post-perfection advances to priority. It is arguable that such result is permitted under 9-313(4) if the post-perfection advances were contracted for before perfection but after affixation. Section 9-313 may also be read to deny priority to persons specified in 9-313(4) if they had a real estate interest of any type existing at the time the fixture collateral was affixed. This result occurs by virtue of 9-313(2) in any case where these persons are not explicitly given priority under 9-313(4). Compare Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1329 n. 21 (1962).

33. See 2 GILMORE § 12.1.

eral rule of priority allocation cannot assign priority because a security interest attaches to personal property.

Still a third problem general to the Code's priority allocation scheme complicates analysis of fixture priority. Unlike the first two, it seems not to have been generally recognized or discussed. *What is a security interest having priority?* It is submitted that "priority" is a term of variable content, that greater attention upon the incidents of a security interest with priority is in order, and this very inattention accounts in part for the difficulty which has surrounded understanding of fixture priority. It is not the purpose here to develop a general scheme for the incidents of a security interest with priority or even a scheme for fixtures. If removal be the incident of chief commercial importance, such an exercise would have little utility in any event.<sup>34</sup> The purpose rather is to note the absence of such a scheme and some of the difficulties to which it leads, principally in cases where lenders try to assert incidents of their security interest unforeseen by the legislative draftsmen. A comment secreted under section 9-113 seems to acknowledge that the incidents may differ,<sup>35</sup> but the draftsmen did not, as did the authors of Com-

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34. Commentaries on Code fixture priorities regularly cite case law examples of the setting in which the disputes they propose to discuss take place. They leave it to the reader's surmise, however, to determine how representative of transactional and dollar volume such examples may be. Little improvement on this omission can be offered here except, perhaps, to note its presence. Some Federal Reserve statistics do give a clue to the incidence of fixture financing, but only a clue. Thus, the Federal Reserve indicated recently that outstanding term and non-term commercial and industrial loans of large commercial banks for January 1973 totaled over \$92 billion. Business expenditures on (but not necessarily borrowings for) new plant and equipment (but not necessarily fixtures) for all business for the third quarter of 1972 were \$22 billion, an annual adjusted rate of \$88 billion. At the end of December 1972, total consumer installment credit was over \$127 billion, about \$83 billion of which was for consumer goods paper (excluding automobile paper), personal loans, and repairs and modernization. Fed. Reserve Bull., February 1973, at A-31, A-50, A-56.

It is difficult, then, to ascertain the practical significance of fixture priority problems. The weight which lenders attach to having a security interest when they decide whether to extend credit, and particularly whether their security interest will have priority (whatever may be the effects of having it) is, of course, a measure of the practical significance of priority problems. It may be that for fixture secured lenders their priority status (as a necessary condition to their power to remove the fixture from the realty) is of more importance in their decision to extend credit than is the priority status to other secured lenders (especially since, as to non-fixture collateral, priority does not seem to determine the secured party's power to reduce collateral to possession. See UCC § 9-503).

35. Under the provisions of Article 2 on Sales, a seller of goods may reserve a security interest (see, e.g., Sections 2-401 and 2-505); and in certain circumstances, whether or not a security interest is reserved, the seller has rights of resale and stoppage under Sections 2-703 . . . and 2-706 which are similar to the rights of a secured party. Similarly, under such sections as Sections 2-506, 2-707 and 2-711, a



ment 1 of section 4-201,<sup>36</sup> attempt to set up a general rule to be applied in the absence of a specific provision otherwise; the omission of such a general rule has produced unfortunate results for the courts.

Unlike most earlier secured transaction legislation, Article 9 deals with the priority of the security interests it creates.<sup>37</sup> Prior to widespread enactment of the Code, its priority provisions were touted as providing "specific answers to specific priority problems."<sup>38</sup> While this assertion is strictly correct, it bears qualification. It may be that the Code settled, or at least attempted to settle, the priority problems that needed to be settled and left the rest. Nevertheless, it is instructive to explore some questions which its priority provisions, seemingly not of design, did not resolve.

Article 9 of the Code employs a variety of terms to indicate that the claim to collateral (the security interest) of one person is to be preferred over that of another. By far the most commonly used is "priority."<sup>39</sup> But the claim of one party may be preferred over that of another because his claim is "valid" against him,<sup>40</sup> even though "validity" seems to go to the enforceability of a security interest

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financing agency, an agent, a buyer or another person may have a security interest or other right in goods *similar to that of a seller* . . . .

UCC § 9-113 Comment 1 [emphasis supplied]. This comment, of course, is not explicitly limited to the rights of secured parties whose security interests have priority, although the cited sections look to situations bearing a similarity to the priority contests of Article 9.

36. Comment 1 to 4-201 reads:

This section states certain basic rules and presumptions of the bank collection process. One basic rule, appearing in the last sentence of subsection (1), is that, to the extent applicable, the provisions of the Article govern without regard to whether a bank handling an item owns the item or is an agent for collection. Historically, much time has been spent and effort expended in determining or attempting to determine whether a bank was a purchaser of an item or merely an agent for collection . . . . The general approach of Article 4, similar to that of other articles, is to provide, within reasonable limits, rules or answers to major problems known to exist in the bank collection process without regard to questions of status and ownership . . . available to cover residual areas not covered by specific rules.

37. 2 GILMORE 655.

38. Coogan, *Priorities Among Secured Creditors and the "Floating Lien,"* in 1 P.F. COOGAN, W.E. HOGAN & D.F. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 693 (1969). The essay, as originally published, did not contain this statement. See Coogan, *Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the "Floating Lien,"* 72 HARV. L. REV. 838 (1959).

39. The word "priority" (or "priorities" or "prior") used to indicate this preference appears in 9-301, 9-306, 9-308, 9-309, 9-310, 9-312, 9-313, 9-314, 9-315 and 9-316.

40. See UCC §§ 9-103, 9-201, 9-205, 9-313 and 9-314.

between secured party and debtor.<sup>41</sup> Still a third mode of expression is "protected against"<sup>42</sup> or the variation "protection of," popular among the commentators.<sup>43</sup> Finally, the Code occasionally, and solecistically, speaks of one *interest* being "subordinate to" "the rights of" another party.<sup>44</sup>

Assuming these are all various modes of expressing the same preferred status, one may ask what consequences result from a finding that a secured party has priority. What are the incidents of a security interest with priority over some other interest? They have been given, in some instances, by explicit Code provision. Apparently at least two incidents of priority are important: first, the finding stands as a bulwark against the trustee in bankruptcy. Priority over the trustee cum "lien creditor" gives assurances of reclamation of the collateralized debtor's property.<sup>45</sup> Uncertainties in character-

41. The ambiguity of the term "validity" is discussed in 2 GILMORE §§ 30.3, 44.11, which discuss respectively 9-313 and 9-103.

42. See UCC §§ 9-306(5)(d), 9-307 and 9-309.

43. See, e.g., Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 26 BUS. LAW. 1465, 1470 (1971); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 46 (1964).

44. See UCC §§ 9-301, 9-306(5)(c). Apparently still another Code priority phrase is the "rank equally" of 9-315(2).

45. [T]he liquidation provisions of the [Bankruptcy] Act (§§ 1-72) aim at distribution of the bankrupt's unencumbered assets (except exempt property) among his general, unsecured creditors, with certain of these creditors given a priority.

3 W.M. COLLIER, COLLIER ON BANKRUPTCY § 60.01 (J.W. Moore & L.P. King eds. 1969) [hereinafter cited as COLLIER].

Considerable confusion exists in bankruptcy administration because of a failure to distinguish clearly between a valid lien and a right to prior payment from unencumbered assets. The former entails a right to enforcement independent of bankruptcy; it may be created by agreement or statute, or by judgment of a court. The latter is a narrow right to payment at a certain relative point in the distribution of a bankrupt debtor's property, naked of any power of levy or attachment; it is a creature of the Bankruptcy Act. . . . A valid lien, subject to the qualifications and restrictions previously stated, is a charge against assets which must be met before distribution to unsecured creditors begins. A right to priority accords an unsecured claim a particular precedence over other claims in the distribution of the bankrupt's remaining assets.

3A COLLIER § 64.02(2). One must tread with caution, therefore, when speaking of priority in bankruptcy.

The trustee in bankruptcy will, under some appropriate provision of the act, "invalidate" a security interest, 3 COLLIER § 60.01, thus making the collateral available for distribution. To the extent that any Code provision prevents such invalidation it may be regarded as a priority section with regard to the bankrupt's unsecured and other creditors. From this point of view, then, 9-108, a response to § 60 of the Act, is a priority section. So, too, are 9-203 and 9-204, affecting the creation of security interests, since security interests created pursuant to these sections would be valid against the trustee and thus prior to the bankrupt's unsecured creditors absent the special avoiding powers given the trustee, e.g., in § 70 of the Act.

izing fixture collateral as either "real property" or "other than real property" complicate questions concerning the invalidation by the trustee of security interests in such collateral. Bankruptcy considerations have also led to criticisms of the Code's fixture priority section.<sup>46</sup> Second, should the collateral be sold by a secured party on

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One reaches a Code finding of priority and goes thence to the Act to prevent invalidation when the trustee seeks to assert his powers under § 70. A lien creditor without knowledge of a secured party's interest is subordinate to that interest if it is perfected. It would be a minor point to argue that it is, or should be, a secured party's priority by virtue of 9-301 of the Code, rather than the perfected status of his security interest, which gives his security interest validity over the trustee were the incidents of a security interest not so confused. Compare 1 GILMORE § 30.6 at 821, which is not necessarily inconsistent with this view.

It is not the purpose here to recount the battle between secured parties and the bankruptcy trustee. For an account, see 2 GILMORE § 45.

46. If, under § 60 of the Bankruptcy Act, a security interest is not good or perfected against certain parties prior to the time of filing the petition, the transfer "shall be deemed to have been made immediately before the filing of the petition." 11 U.S.C. § 96(a)(2). By statutory movement of the transfer forward, the debt becomes antecedent, and the security interest may then be avoided by the trustee if other conditions of a § 60 voidable preference are satisfied. The parties against whom the transfer must be good or prior at the time of filing of the petition vary with the nature of the collateral. If the collateral transferred is real property, then the transfer is deemed made "when it became so far perfected that no subsequent bona fide purchaser could create rights . . . superior to the rights of the transferee." *Id.* Thus, for real property, a transfer occurs presumably when the real estate interest is recorded (or is otherwise perfected). For "property other than real property" the transfer occurs when no "subsequent lien . . . could become superior to the rights of the transferee." *Id.* For such property, presumably, a security interest must be perfected under the Code. For both classes of property, the lender must exercise care to see that he does not, by delay in perfecting, himself cause the transfer to be given for an antecedent debt.

In attempting to reconcile § 60 of the Act and 9-313 of the Code, several questions are distinguishable: (1) the classification of fixtures as "real estate" or "other"; (2) the persons against whom transfers must be good; (3) the means by which such transfers may be made good, *i.e.*, by chattel filing, by fixture filing or by real estate recording (or by other means of real estate perfection); and (4) as to each of the preceding questions, which law—the Bankruptcy Act, the Uniform Commercial Code, or other law of the enacting state—applies. Given these variables, there are 36 possible combinations, some of which, of course, may be quickly eliminated. Assuming the Bankruptcy Act does not determine the first and third questions, one is left with the question of how to consider 9-313(1). That subsection expressly disclaims an intention to determine when goods become fixtures, pretending to leave that question to the local law of the enacting state. Subsection 9-313(1) does not, however, expressly leave the question of the classification of fixtures as goods or realty to such other law, just the question of when goods become fixtures. *Contra*, Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 62 (1964). In any event, such delicacy seems feigned, Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1348 (1963). Section 9-313 classifies fixtures as goods or realty; it also, by analogy, indicates when fixtures become real estate, *viz.*, upon "incorporation."

Assuming that by reading 9-313 one can decide whether an item is personalty, fixtures or real estate, it says that, for purposes of deciding whether the fixture security interest is or is not antecedent, the applicable test for the adverse claimant is left to the Bankruptcy Act, *i.e.*, either lien creditor or bona fide purchaser. Other questions, however, are decided by 9-313. The adverse claimant is regarded as asserting an interest in fixtures, not in personalty

debtor's default, priority establishes the order of distribution of proceeds generated by the sale.<sup>47</sup> Moreover, without regard to their participation in the distribution of proceeds, secured parties whose security interests are subordinate to that of a secured party will have their security interests discharged.<sup>48</sup> Apparently, a subordinate secured party may not discharge the security interests of those with priority over him, although he may dispose of the collateral without the consent of the secured parties who have priority over him.<sup>49</sup> The suggestion has been made in the fixture context, however, that if a fixture secured party is subordinate to a subsequent real estate interest, the real estate interest takes free of the fixture secured party's interest. Put differently, subordination of the fixture interest amounts to a discharge of that interest with respect to the real estate interest.<sup>50</sup> How difficult it is to maintain a distinction between affixed personalty and realty! Also, in the fixture context, priority has a special meaning; it conditions the fixture secured party's right to assume possession of the collateral. This precondi-

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or realty. Thus, perfection is by means of a fixture filing, not chattel filing or recording. Whether a lien creditor test or a bona fide purchaser test be used, the fixture filing is good against the adverse claimant, since there seems to be no adverse interest not caught up in the net of either 9-313(2) or (4). Section 9-313 has been criticized for requiring perfection against lien creditors, 2 GILMORE § 30.6; Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1342 (1962); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 59 (1964), but by doing so the draftsmen provided a basis for arguing that the security interest in fixtures is good under either test. Section 9-313 defines the item of collateral for purposes of means of perfection, excludes argument that the adverse party is taking an interest in personalty or real estate (so that perfecting must be by chattel filing or recording), leaves the applicable test adverse claimant to the Bankruptcy Act, but makes the fixture security interest good against either claimant if there has been a fixture filing. As to an item either personalty or real estate, a chattel filing or real estate recording is required, and the appropriate test will be the lien creditor or bona fide purchaser test.

Such, at least, are arguments which the fixture secured creditor who has perfected by fixture filing may make in response to the trustee. For a discussion of invalidation of the security interest under § 70, see Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 59 (1964).

47. UCC § 9-504(1).

48. *Id.* § 9-504(4). Sections 9-306(2) and 9-504(1) appear to give a definition of "disposed of." Under 9-504(4), any secured party, whether his interest is perfected or not, and without regard to his priority, may discharge the security interests or liens of subordinate parties.

49. UCC § 9-504(4) (by negative implication).

50. Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1343 (1962). On the other hand, Gilmore has intimated that the fixture secured party with priority has an "absolute priority," *i.e.*, that the removed fixture is not subject to the interests of real estate parties. He speaks of the "absolute priority which Article 9 gives to purchase money interests, fixtures interests and the like." 2 GILMORE § 32.5.

tion to possession is to be contrasted with the general rule that default is a sufficient condition to possession of non-fixture collateral.<sup>51</sup>

The foregoing, then, has highlighted what might be described as the Code's preference umbra—circumstances defined by the Code with some particularity in which a finding of priority directs certain consequences and tells the secured lender what he "gets." But Code priority also generates a penumbra, a shadow area where Code-specified consequences only partially block out the prior, and nonuniform, local rules of competing creditors' rights. Under the Code, priority has operated as a catchall term which directs that wheresoever and howsoever one security interest comes in conflict with another interest as to which it has priority, the secured party with priority "wins," pre-existing law notwithstanding.<sup>52</sup>

A sampling of recent Code cases indicates the variety of unforeseen contexts in which the priority question may be raised and reveals the uncertain content of the priority directive. Many courts seem to experience difficulty in deciding which particular Code provisions should be applied to a specific factual situation. Thus, there is New York authority for the proposition that, as between two

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51. UCC § 9-503. Under this section, a secured party may assume possession on debtor's default whether or not he has priority over certain other parties and whether or not his security interest is perfected. The 9-313 priority requirement is, like the reimbursement provision of 9-313(5), a recognition of the realty ownership interest.

52. A cognate problem concerns those areas seemingly without the Code priority penumbra and whether, given two possible rules, the court should adopt that which will create the most "victories" for the secured party. Riesenfeld, discussing 9-301, remarks:

[I]n limiting the protection of creditors against unperfected security interests to creditors who have acquired a lien by judicial process during the period of non-perfection the framers of the Code made a studious choice between the two principal approaches to that problem existing under the pre-Code law . . . . [I]n one the protection depended upon the extension of credit prior to the delayed perfection, while in the other the acquisition of a lien by judicial process was the essential criterion. . . .

Although the Code has reduced tremendously the great disparity existing among the states in that respect, nevertheless there is still room for variations for the reason that §§ 9-301(1)(a) and (3) leave it to the applicable state law to determine at what time and in what fashion the crucial lien is acquired and that the local laws differ widely in that matter.

S.A. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION 131 (1967). A New York court went further, intimating that if a judgment lien was "perfected" before the security interest of a secured party, the secured party's interest was discharged at the sheriff's sale, the purchaser took free of the security interest, and moreover, the secured party could not participate in proceeds generated by this sale. *William Iselin & Co. v. Burgess & Leigh, Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1967).

secured parties, the secured party whose security interest has priority over the other is entitled to possession, assuming both parties are under the terms of their respective security agreements.<sup>53</sup> The secured party with priority may, therefore, replevy the collateral from the possession of the subordinate secured party but the subordinate secured party who has obtained possession pursuant to his security agreement is not liable in damages to the prior party for wrongful detention.<sup>54</sup> And in Pennsylvania, a secured party whose security interest is unperfected and is subordinate to that of another secured party will apparently have his security interest discharged if the secured party with priority acquires possession of the collateral as a purchaser at an execution sale held at the instance of an unsecured judgment creditor. This result even though, under section 9-504(4), the collateral was not disposed of by the secured party with priority.<sup>55</sup> Also, there is New York authority for the proposition that a

53. *Recchio v. Manufacturers & Traders Trust Co.*, 55 Misc. 2d 788, 286 N.Y.S.2d 390 (Sup. Ct. 1968).

54. *Id.*

55. *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967), noted in 67 MICH. L. REV. 1421 (1969). In *Bloom*, the plaintiff brought a replevin action against the purchaser at a sheriff's execution sale. The court indicated, on authority of 9-301(1)(c), that purchasers without knowledge of a security interest would take the collateral free of an unperfected security interest. It is unclear whether, independent of the sale, a prior secured party in possession would take free of a subordinated security interest. Interestingly, the court straddles both 9-301(1)(a) (unperfected security interest v. persons entitled to priority under 9-312) and 9-312(5)(b) (security interest perfected other than by filing v. other security interest, however perfected, *i.e.*, priority as between two security interests, both already perfected) in awarding priority to the prior, perfected security interest. The case is at least susceptible to the reading that a secured party with a perfected security interest may acquire possession free of a subordinate, unperfected security interest. The court says the prior secured party is "protected to the extent of its security interest," 427 Pa. 463, 466, 234 A.2d 860, 863 (1967) and again, that the prior party "prevails over" the subordinate one, 427 Pa. 463, 467, 234 A.2d 860, 864 (1967).

It is noteworthy that in seeking to answer the question before it (*viz.*, entitlement to possession), the court found itself on an excursus concerning the disposition of proceeds. That the prior secured party bid only \$1 and received not only what he had sold the debtor but also \$7,500 worth of pipe to boot may in part account for the court's difficulty in maintaining focus. But surely one may distinguish questions of entitlement to possession from questions of entitlement to proceeds, just as one may distinguish among priority allocation rules, and as to them, which may apply to the case *sub judice* (if, indeed, any do). See Note, 67 MICH. L. REV. 1421 (1969), which argues that the disposition of interests at an execution sale is a matter left uncovered by the Code priority rules.

The questions of (1) the events which serve to discharge a security interest (with a consequent loss of a right to possession), and (2) the existence of a right to and the order of participation in the proceeds generated upon an execution sale are therefore distinguishable. If the Pennsylvania court provided answers to these questions, it seems that a measure of clarity would have been added to its opinion if it had distinguished them before proceeding

secured party with priority over a lien creditor may vacate his levy<sup>56</sup> and Wisconsin authority that he may do so only if his right to possession arose before rather than after the sheriff's execution.<sup>57</sup> Under other New York authority, the purchaser at a sheriff's sale takes subject to the interest of a secured party with priority over the lien creditor who caused the execution to be issued.<sup>58</sup>

The contrariety of views, if not of result, in this sampling of cases suggests a need to make concrete the effect of the award of priority to a secured party by specific Code provision. Or, as Madison Avenue would put it, to give security interests "new body," priority-wise.

In general, it can be said that insufficient attention has been given to the strategic position which lenders with collateral do and should occupy *inter se* and with respect to their borrowers. Their assertion of an interest akin to an ownership interest in return for supplying the borrower the financial wherewithal for some enterprise which he has undertaken and which may or may not relate to the collateralized property raises broad questions of policy. A debate

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to answer them. The results themselves seem permissible under (although hardly commanded by) provisions in the Code cited by the court; the court was operating within the Code's priority penumbra.

56. *William Iselin & Co. v. Burgess & Leigh, Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1967).

57. *First National Bank of Glendale v. Sheriff of Milwaukee County*, 34 Wis.2d 535, 149 N.W.2d 548 (1967). *William Iselin & Co. v. Burgess & Leigh, Ltd.*, 52 Misc. 2d 821, 276 N.Y.S.2d 659 (Sup. Ct. 1967) permitted the secured party to vacate the levy even though the secured party contended that its right to possession did not arise until after the levy attached. The Wisconsin court cited 9-312 and a Wisconsin amendment to the Code in support of its decision, stating that "creditors without the right of possession of the goods are protected only by the fact that the execution sale is subject to their interest." *First National Bank of Glendale v. Sheriff of Milwaukee County*, *supra* at 538, 149 N.W.2d at 551. The court did not indicate whether this protection meant that a purchaser at the sale took subject to the secured party's security interest or whether it meant that the secured party was entitled to participate in the distribution of proceeds generated by the sheriff's sale. Unlike the security interest in *Bloom v. Hilty*, 427 Pa. 463, 234 A.2d 860 (1967), the security interest in *Glendale*, *supra*, was apparently perfected. Also indicating that a secured party whose security interest has priority over a lien creditor may not vacate the levy is *Altec Lansing v. Friedman Sound Inc.*, 204 So.2d 740 (Fla. Dist. Ct. App., 3d Dist., 1967), but that court did not distinguish between a right to possession arising before and one arising after the levy. The security interest, the court said, will not be discharged by the sheriff's sale. The *Altec* court, in reaching its decision, relied upon pre-Code chattel mortgage law, a Code decision in a sister state, and 9-311!

58. *General Motors Acceptance Corp. v. Stotsky*, 60 Misc. 2d 451, 303 N.Y.S.2d 463 (Sup. Ct. Special Term, 1969). It does not appear in this case whether the default occurred before or after the judgment creditor's levy.

over the questions raged for years in the grammar of punctilious observance of the formal requisites of the "independent security devices." The stirring of recent interest is seen in the discussion surrounding the Federal Truth-in-Lending Act<sup>59</sup> and the Uniform Consumer Credit Code. And the Supreme Court's suggestion of late that the realization of collateral by the lender may raise questions of constitutional dimension and require a choice among competing values<sup>60</sup> may give further impetus to a systematic review of the place which secured credit should occupy in our economy or polity. Surely a better measure of the lender's claim to a power to dispose of an owner's property may be taken. It need not, of course, be limited to the consumer context nor slight the importance of finance to business enterprise (which, in turn, produces attendant benefits and burdens).

The incidents to a security interest with "priority," then, have been left in an untidy state. There is a general rule for determining *when* a secured party is to receive priority for his security interest (which works most of the time): the first-taker rule of section 9-312(5). There is, however, no general rule for determining *what* that security interest with priority shall constitute. This omission invites a variety of solutions which the courts, of necessity, have provided. It is not surprising, then, that analysis of fixture priority, with the exception of the question of removal, has been a rather free-swinging affair; the Code has not provided otherwise.

Directing our attention solely to fixture priority, the classification of property as either personalty or realty may be seen to further complicate priority disputes. Section 9-313 has been taken as an instance of the so-called "purchase money priority."<sup>61</sup> New money is, under the Code, given a circumscribed preference over old money. This purchase money priority is viewed as an exception to the first-taker rule of priority allocation because it permits later created interests "in the same collateral" (*i.e.*, the realty in fixture cases) to prevail over earlier created ones.

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59. Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601 *et seq.* (Supp. 1972).

60. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). For a discussion of the effect of the 1972 revisions to Article 9, see Davenport, *Default Procedures Under the Revised Article 9*, 7 VAL. U.L. REV. 265 (1973). The recently completed Hunt Commission Report makes no recommendations on the foreclosure power questions raised here. Its secured credit recommendations relate principally to improving the real estate mortgage markets. PRESIDENT'S COMMISSION ON FINANCIAL STRUCTURE AND REGULATION, REPORT (1971). *But see id.* at 121.

61. 2 GILMORE § 30.6.1.



But to view fixture priority as an exception to the first-taker rule is to commit certain analytical errors. Essentially, it is the problem of Mr. Davenport, in a realty-only world, moving lumber about his tract of land. Perhaps we see here some of the "shifting" or "blending" referred to by Hohfeld.<sup>62</sup> Any collateral fixed into the space owned by Mr. Davenport should belong to him, not because it becomes part of a physical structure, but because it passes into a space owned by Davenport. If the fixture remains movable, the realty party should have no interest whatever in it, save as it intrudes upon the valuable incident of space ownership. The personalty owner, of course, may insist upon some utility space. If he did, we would have a clear, as it were, conflict between two systems of ownership identification, two different kinds of space. To remain analytically pure, realty-secured and personalty-secured parties should never have an interest in a common physical thing: one either starts from the physical thing and builds an ownership system from there, or one starts with the owned space. Section 9-313, which insists upon realty and personalty parties having an interest in the same "thing," is in this respect incredibly bizarre and difficult to comprehend.<sup>63</sup>

Were property classification not to enter into the question, however, fixture emplacement could be viewed as just another instance of joined collateral for which the general allocation rule will provide no result. To assign priority, therefore, to the fixture secured party is not an exception to the result that would otherwise obtain under the general first-taker rule.

It has been argued that a Code-created security interest, even in goods not incorporated, may be extinguished for lack of priority.<sup>64</sup>

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62. See notes 16-18 *supra* and accompanying text.

63. It is interesting, in this light, that fixture priority received major attention in the revisions to Article 9. "There has probably been more dissatisfaction with Section 9-313 of the original Code than with any other section." Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 26 BUS. LAW. 1465, 1468 (1971).

64. See note 50 *supra*. A cognate problem attends 9-313(4). Under that section an unperfected security interest in fixtures does not take priority over certain real estate interests which arise "subsequently." Not unnaturally, therefore, the commentators have been led to ask "'subsequent' to what?" 2 GILMORE § 30.6.3; see also Coogan, *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319, 1327 (1962); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 71 (1964). These commentators have argued that certainly 9-313(4) may be read to deny priority to an unperfected security interest as against a real estate interest arising *after* physical annexation of the collateral, but that the subsection may also be read to deny priority to the secured party against real estate interests arising after attachment of the secured party's security interest

This view of things may have led to the requirement of a "new act" to reinstate the security interest in the new, attached thing.<sup>65</sup> But this position uncritically accepts the characterization of property as a determinant of the preferred (or unpreferred) status of a secured creditor, of the "what" of a security interest with priority. It is a confusion of the question of what the incidents of a preferred security interest shall be with the question of the necessity which gives rise to a shift in the tagging rules from personalty to realty. We may grit our teeth and insist that the security interest survives the transition from personalty to realty if it is our view that bankers should receive the values incident to a security interest in space ownership as well as the ownership of physical things. That personalty "becomes" realty tells us something about the wisdom of our decision.

It is not suggested here that any of the positions taken with regard to the appropriate preference for fixture-secured security interests or the substance of that preference (to the extent that they have been indicated at all) necessarily reflect inappropriate policy judgments. Instead, it is submitted that, whatever priority rules be deemed best, it will clarify discussion of the problem to distinguish the rules for the allocation of a preference from the rules defining the incidents or substance of a preference. It may also be appropriate to create (or to identify) a general rule specifying the incidents of a security interest with priority to handle new situations. The 1972 revisions of Article 9 leave both these central difficulties untouched.<sup>66</sup> Property creation and classification may be distinguished

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(see UCC § 9-204), *i.e.*, even before the collateral is physically wedded to the real estate. But a real estate party may claim an interest in the collateral only if it is real estate; it is difficult to see in what manner his real estate interest could arise before physical annexation. For goods to be subsequently "swallowed up" in the realty, the realty must first take a bite—the goods must alight on the deadly realty flower and then wait briefly so as to be ingested into the inconsistent realty system. The "subsequent" language of 9-313(4), therefore, seems to presuppose an analytic impossibility: the realty party takes an interest "subsequently" in something (the goods) that does not exist. Compare Leary & Rucci, *Fixing Up the Fixture Section of the U.C.C.*, 42 *TEMPLE L.Q.* 355, 370 n. 37 (1969).

65. 1 *GILMORE* § 2.3.

66. The 1972 Amendments to Article 9 are extensively discussed in Coogan, *The New UCC Article 9*, 86 *HARV. L. REV.* 477 (1973). This article will doubtless become, along with the proposed text and comments themselves, a principal rallying point when the Amendments are introduced for enactment by the legislatures. Readers of both, however, would do well to distinguish the priority allocation rules, which are the subject of Mr. Coogan's treatment, from the rules which define the substance of the "priority" preference, to whomever given. These latter directives, as is the case in earlier official drafts of the Code, are left largely to inference. Thus, in examining changes in the general priority allocation rule, 9-312(5), Mr. Coogan remarks:

from the above two problems. The process should not uncritically operate to determine the existence or incidents of the priority status. Discussion of fixture priority has been troubled by a failure to make these distinctions.

Property classification, then, operates in part as a function of ownership identification. As it has developed, it is an all-or-nothing affair. The reader is presumably willing, at this point, to suspend his belief and to admit that physical, space-obtruding objects are, in reality, neither personal nor real, but merely space-defining things. Havoc would reign, however, if an object could be both personalty and realty; only one system may be used to identify the owner. We would certainly go mad were not this the case. Fortunately, the profound difference in utility between things in motion and things at rest helps to hold this dread possibility in check—nature makes it easy. But fixtures, of course, are bugglers: they call to mind the structuring of our environment by physical things (suppose everything that is “emplaced” were disassembled piece by piece), they bring painfully to our attention that the use and enjoyment of our environment must be divided among society’s members, and finally, they challenge the ingenuity of our ownership allocation scheme by suggesting the quickly repressed horror that, under the alternate property schemes, an object may be owned by

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Two examples can help to illustrate the scope of present (5)(a) and (5)(b). Consider first the following case:

- (i) June 1—*A* files as to Debtor’s cotton but does no more at this time.
- (ii) June 2—*B* files as to Debtor’s cotton, executes a security agreement with him, and advances \$1,000.
- (iii) June 10—*A* executes a security agreement with Debtor and advances \$1,200.
- (iv) Debtor fails and the cotton is value at \$1,000.

In this situation all of the cotton would go to *A* as the first to file. By its terms paragraph (5)(a) controls regardless of the order in which the security interests arose and regardless of the order in which they were perfected.

*Id.* at 508. Mr. Coogan then goes on to show that new 9-312(5)(a) would change the priority result that presently obtains under existing 9-312(5)(b) where *B* perfects other than by filing. Under the new provision *A* takes priority if he is *either* first to file *or* first to perfect. “While the new Code does not change the result in the first example, the result in this second case is reversed by revised 9-312(5)(a),” he explains. *Id.*

It is perhaps a quibble to suggest that manifestly all the cotton does *not* “go” to *A* whether he takes priority under the old or new rule. In the first place, the 1972 revision leaves 9-503 unchanged, so *B* need only show a default to reduce the cotton to *his* possession. See note 51, *supra*. And in the second place, under 9-504(1) (1972 Official Text) *A* would be entitled over *B* to the *proceeds* generated upon a sale held subject to the provisions of new 9-504, not the cotton. *A* would take the cotton as purchaser at the sale, and not by virtue of his priority.

more than one person at once—owned twice, as it were. Every tangible is Janus-faced, but it must look one way or the other and so acknowledge its owner.

All this trouble proceeds from a prior necessity: to engender ownership into the indifferent world of physical reality.

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These are only minor points, though, since in the passage quoted Mr. Coogan is explaining the operation of the priority rules, not default procedures. But our point is made: a ready confusion of the “priority” allocation question with the “priority” incident question, the *what* of the preferred security interest. Consider 2 GILMORE at 653-57.

