

FIXTURES—UNIFORMITY IN WORDS OR IN FACT?

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I. THE PROBLEM

In the three years since this author first raised questions in *The Harvard Law Review* as to whether the fixture provisions of article nine (sections 9-401(1) and 9-313) of the Uniform Commercial Code adequately expressed the rules which they seemed to establish concerning perfection and priority of fixture security interests,¹ two states have rejected the principal priority section (9-313) (Ohio,² in spirit, and California,³ in its entirety), and several other states have found it necessary to alter the language of section 9-401(1) which deals with fixture filing.⁴ The editorial board of the national sponsors has asked three members (including this writer)⁵ of the article nine subcommittee to consider whether some modifications of article nine's fixture provisions are advisable. Each of these three shares some responsibility for not having fully appreciated the scope of the fixture

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¹ *Security Interests in Fixtures Under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962), reprinted with additional material in COOGAN, HOGAN & VAGTS, 2 SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE, ch. 17 (1964) [hereinafter cited as SECURED TRANSACTIONS].

² OHIO REV. CODE ANN. § 1309.32 (Page Supp. 1964). For the history, see Hollander, *Imperfections in Perfection of Ohio Fixture Liens*, 14 W. RES. L. REV. 683 (1963); Pfeiler, *Uniform Commercial Code—Adverse Effect on Real Estate Mortgages*, 29 LEGAL BULLETIN U.S. SAVINGS & LOAN LEAGUE 201 (1963).

³ The Uniform Commercial Code was approved by the Governor, June 8, 1963, effective January 1, 1965. Concerning reasons for the rejection, see the various documents reprinted as SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE (1961). See, e.g., *id.* at 576-78.

⁴ The principal variations are collected in REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT ON VARIATIONS TO CODE IN ADOPTING STATES §§ 9-313, 9-401(1)(b). See also UNIFORM COMMERCIAL CODE §§ 9-313, 9-401(1)(b).

⁵ The other members are Professor Grant Gilmore, who was associated with the drafting of article nine from the beginning (but who did not draft either the original or the revised version of § 9-313) and Homer Kripke, Esquire, who also participated from an early date in the deliberations on article nine.

problem when section 9-313 was redrafted in 1956;⁶ each has recently attempted to enlist the thinking of others by discussing the problem in professional journals⁷ and otherwise.⁸

The problem has proven no less difficult than important. If obtaining a security interest in fixtures were an uncommon transaction, some lack of clarity in the Code's fixture rules might be permitted as a minor defect in an otherwise generally sound statute. However, a question of whether or not the Code's fixture provisions apply occurs every time an owner of an old house buys on secured credit a new furnace,⁹ a new oil burner,¹⁰ or a new kitchen sink,¹¹ or when he adds storm windows to the house.¹² Fixture problems exist any time that a real estate construction mortgagee finances the construction of a house to which the owner adds plumbing or heating equipment financed by or through its vendor¹³—and again when an interest in that house is later created by way of a purchase or a mortgage.¹⁴ The concept of fixtures is also important whenever a manufacturing plant adds goods bought under conditional sales contracts or other secured credit arrangements if those goods are somehow "affixed" or "attached" to the realty;¹⁵ and at least in some states, even when the goods so purchased, though not physically affixed, are necessary for the operation of the industrial plant (for example, beer kegs which go in and out of a brewery¹⁶). Furthermore, these same questions apply when a tenant buys on secured credit any of the articles previously mentioned.

Fixture interests generally arise from some type of purchase money or conditional sale transaction, and little attention will be given here to the rare transaction under section 9-313(2) which does not involve

⁶ 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 290-91 (1957). The present text of § 9-313 appeared in the 1957 official edition and all subsequent editions.

⁷ Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964).

⁸ The members of the fixture subcommittee have considered the problem in panel discussions with lawyers from many states. See, e.g., 1963 PROCEEDINGS OF THE REAL ESTATE SECTION OF ABA CONVENTION (remarks of Messrs. Coogan and Kripke).

⁹ See, e.g., *Holland Furnace Co. v. Suzik*, 118 Pa. Super. 405, 180 Atl. 38 (1935).

¹⁰ See, for example, a discussion of the New Jersey "institutional doctrine cases" in *Communication and Study Relating to Conditional Sales of Fixtures*, in NEW YORK LAW REVISION COMMISSION REPORT 671, 680-98 (1942).

¹¹ *Compare Walker Dishwasher Corp. v. Medford Trust Co.*, 279 Mass. 33, 180 N.E. 517 (1932), with *Bainway v. Cobb*, 99 Mass. 457 (1868).

¹² See, e.g., Mass. Acts & Resolves 1937, ch. 245, at 281, as amended, Mass. Acts & Resolves 1943, ch. 52, at 46, as amended, Mass. Acts & Resolves 1956, ch. 160, at 89.

¹³ See Gilmore, *supra* note 7, at 1367, 1398; Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 61, 65 (1964).

¹⁴ UNIFORM COMMERCIAL CODE § 9-313(4).

¹⁵ 5 AMERICAN LAW OF PROPERTY § 19.12 (Casner ed. 1952). See generally *id.* §§ 19.1-.14.

¹⁶ *First Nat'l Bank v. Reichneder*, 371 Pa. 463, 91 A.2d 277 (1952).

a purchase money interest¹⁷ or the equally rare situation covered by subsection (3).¹⁸ When a vendor insists on retaining a purchase money security interest in particular goods, he indicates that he is unwilling to sell to the debtor unless he can retain the right to remove the goods if the debtor does not complete his payments, and in this way the vendor hopes to get back at least part¹⁹ of his money by otherwise disposing of the collateral. This means that he must be able to remove his collateral over the objections of any other secured party who has acquired an interest in it. Collateral which is tangible only in the sense that it is embodied in, or evidenced by, a piece of paper, and many tangible kinds of goods as well, never become part of the realty on which they happen to be located. The right to remove this type of collateral is not affected by the acquisition of rights in the realty. On the other hand, sometimes business equipment or consumer goods are so used by the debtor that, even though sold on secured credit and not yet paid for, rights therein arise in favor of the holder of a present or future interest in the real estate of which they become a part. The Code divides collateral which somehow became a part of the realty into two classes and provides drastically different treatment for each class. (1) If the goods become incorporated into a structure, no security interest, and hence no right to remove, under article nine can survive;²⁰ but (2) if the goods have become fixtures, a right to remove can be preserved by one who satisfies the fixture provisions of the Code.²¹ To the natural question of when its fixture provisions apply, the Code responds only that they apply to goods which are or will become fixtures. Not only does the Code fail to define fixtures, but there is no

¹⁷ The typical fixture security interest will be a purchase money security interest which falls under subsection (2). It is theoretically possible for a debtor who already owns an item which has not yet been affixed to create a nonpurchase money mortgage thereon and give to a secured party under § 9-313(2) a priority over earlier realty interests. This corresponds roughly to the priority given to purchase money interests of nonfixtures over earlier chattel filers through compliance with § 9-312(4). The writer would agree with Professor Gilmore that on balance the priorities given to fixtures by § 9-313(2) should be there limited to purchase money interests, as they usually are in fact. Gilmore, *supra* note 7, at 1388-89.

¹⁸ Section 9-313(3) provides a mechanism through which a debtor who does not own the real estate upon which a fixture is located can create a security interest even after the goods have been affixed. He must, however, get consent of all holders of interests in the realty. Thus this is a method of making a severance agreement effective against future purchasers by a fixture filing. Perhaps its greatest value is in providing a mechanism by which one who takes a nonpurchase money security interest in borderline collateral can by consent and double filing protect himself against a later claim that the goods were fixtures. Subsection (3) may also be useful in states where banking laws, for example, make it decidedly easier to create a security interest under chattel law than under real estate law.

¹⁹ Removal damages under § 9-313(5) may further reduce the secured party's net recovery.

²⁰ UNIFORM COMMERCIAL CODE § 9-313(1) (first sentence).

²¹ UNIFORM COMMERCIAL CODE §§ 9-313, 9-401(1) (b).

generally accepted non-Code meaning of the word.²² A would-be conditional vendor therefore has the difficult problem of determining *at the time of the sale* of equipment or consumer goods whether or not the purchase price can be secured under any Code rules, and if the answer is yes, whether he should proceed to protect his interest by complying with the rules applicable to fixtures or those applicable to nonfixtures. For purposes of this discussion, we shall use the term fixtures as though it described a class of collateral. Actually the question to be decided by the conditional vendor is more abstract, *i.e.*, into which of three sets of rules will his transaction fall:

A. The rule of the first sentence of section 9-313(1) is that if the goods to be conditionally sold will be "incorporated into a structure" which is realty, the conditional vendor can retain no chattel security interest in them regardless of the number of times and places he files or records under article nine. In the eyes of the law these former chattels have been completely merged into the realty, and in practice they will have more or less completely lost their former chattel identity. In a rare case perhaps the conditional vendor may be able to obtain an agreement which allows him to sever the collateral on default, but this must be done by executing and filing a severance agreement under the generally more burdensome requirements of real estate law.²³ Otherwise, the vendor must rely on the debtor's unsecured promise to pay, or get what assurance he can through a real estate mortgage or a mechanic's or supplier's lien²⁴ on the entire real estate including the newly added goods (in either case a claim usually inferior to an existing real estate mortgage). Bricks built into a chimney, plaster added to a wall or ceiling, lumber built into the outside of a house are clear examples of goods "incorporated into a structure" in which no Code security interest may be retained. We may call such goods "*A* goods" or "straight realty." As we shall see, in pre-Code cases even these *A* goods are

²² Dictionaries do not provide much help in defining a fixture, see, *e.g.*, BLACK, LAW DICTIONARY (4th ed. 1951); WEBSTER, INTERNATIONAL DICTIONARY (1961), and common usage of the term includes many items not affixed to the real estate or within the purview of a fixture conditional sales statute (for example, fixtures in a shoe store might include such wholly removable objects as foot stools, portable x-ray equipment, portable showcases, and the like). We may note in passing that article two pointedly avoids the use of the term fixtures "because of the diverse definitions of this term." UNIFORM COMMERCIAL CODE § 2-107, comment 2. Article nine followed this policy until the present form of § 9-313 was redrafted in 1956. See 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 290-91 (1957). Section 9-313 does not use the term "part of the realty," but the phrase was used in the pre-1956 drafts of § 9-313, and similar language was used in its predecessor, § 7 of the UNIFORM CONDITIONAL SALES ACT (USCA).

²³ The term "severance agreement" is used to indicate an instrument executed and recorded in accordance with applicable real estate law, whereby one to whom the property would normally fall by way of accession agrees that a particular item may be severed from the real estate.

²⁴ See Shanker, *supra* note 13, at 67-68.

sometimes referred to as "fixtures,"²⁵ but for clarity we confine the term "fixture" (as does the Code in effect) to the *C* goods described below.

B. The rules of article nine govern security interests in unaffixed goods, such as chairs and typewriters, which are legally and factually independent of the real estate on which they happen to be located and may be referred to as "straight personalty or chattels." Clearly the objections of any holder of the real estate are ineffective in preventing the removal of these *B* goods. This is true whether or not there has been any fixture filing.²⁶

C. The Code's special fixture filing rules (section 9-401(1)(b)) and the rules which govern perfection and priority of security interests in fixtures (section 9-313) apply to goods whose association with realty is closer than that referred to in B (straight personalty or chattels), but not so close as the association referred to in A (incorporated into a structure which is realty). While *A* goods become a "part of the realty" for all purposes and *B* goods do not become part of the realty for any purpose, fixtures become part of the realty for some purposes (as their name indicates, they are *affixed*), but retain their identity and are capable of being converted back into chattels with relative ease. So far as article nine is concerned, fixtures can be removed from the realty against the wishes of the real estate interests *only by a secured party* who meets the double conditions of section 9-313(5)—that he has acquired the requisite "priority," and that he satisfies the duty to repair certain types of damage caused by the removal.

In all cases under article nine, a fixture-secured party has the proper priority if he has made a proper and timely filing in the realty records.²⁷ If a fixture security interest attached before the goods were affixed, and no interest in the realty is purchased between the time of affixation and the time of removal, the fixture secured party has the necessary priority to remove even if he has made no fixture filing; but, as a practical matter, a fixture filing is always necessary because the secured party's right to remove is lost if after affixation and prior to his filing, any interest in the realty is "purchased" (which in the Code includes an advance under an earlier or subsequent mortgage, or a lien

²⁵ See, e.g., *Teaff v. Hewitt*, 1 Ohio St. 511 (1853).

²⁶ Failure to file even in the chattel records would create no rights in one claiming under real estate law, but would be material if one who later purchases the realty also purchases this particular property as personalty.

²⁷ UNIFORM COMMERCIAL CODE §§ 9-401(1)(b), 9-302(1)(c), 9-302(d).

created by legal proceedings).²⁸ A prudent conditional vendor must assume that between the time of affixation and the time of removal there will be some such purchase.

The secured party's right to remove his fixtures is not diminished by the fact that some physical or economic damage to the goods or the remaining realty is caused by removal (or that the value of some real estate interest is thereby decreased), and the remover's duty to repair is confined to repairing physical damage done to the remaining realty by removal.²⁹

To state these principal fixture rules of the Code is simple, but to apply them to an item of collateral to be used in a certain manner in connection with certain real estate is often extremely difficult. While section 9-313 seems to establish its own rules as to what is a fixture—that is, what is removable by one who satisfies the conditions of its subsection (5)—the second sentence of subsection (1) looks the other way: "The law of this state other than this Act determines whether and when other goods [in other words, goods other than those incorporated into a structure] become fixtures." In some states there are cases which will support any conclusion a fact-finder may reach as to what class of goods a particular item of collateral is, and some of these cases are inconsistent with the apparent policy of section 9-313. For example, a household furnace attached or affixed in what appears to be the same manner may in one case fall into category *A*, in another into category *B*, and in still another into category *C*.³⁰

A wrong guess by the conditional vendor may make his security interest worthless. If the conditional vendor guesses that the item of goods added by him has become a fixture—category *C*—and it is later determined to have remained a chattel—category *B*—even though he has filed in the fixture records, the collateral may be sold free and clear to a chattel purchaser who takes it without knowledge, or it may

²⁸ UNIFORM COMMERCIAL CODE §§ 9-313(3), 9-313(4), 9-301. For brevity in this discussion I use the all-inclusive word "purchaser" with respect to interests in real estate as § 1-201(32) uses it with respect to personality.

²⁹ UNIFORM COMMERCIAL CODE § 9-313(5).

³⁰ See *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 19 N.E.2d 273 (1939); *XXth Century Heating v. Homeowners Loan Corp.*, 56 Ohio App. 188, 10 N.E.2d 229 (1937). Compare *Gardner v. Buckley & Scott, Inc.*, 280 Mass. 106, 181 N.E. 802 (1932), with *Gar Wood Indus., Inc. v. Colonial Homes, Inc.*, 305 Mass. 41, 24 N.E.2d 767 (1940). If the court in *Holland Furnace Co. v. Suzik*, 118 Pa. Super. 405, 180 Atl. 38 (1935), decided only that the secured party's interest was unprotected because he did not file his collateral as a fixture, the opinion is unduly wasteful of words.

These results are by no means peculiar to household furnaces. Compare *Commercial Credit Corp. v. Commonwealth Mortgage & Loan Co.*, 276 Mass. 335, 177 N.E. 88 (1931), with *Commercial Credit Corp. v. Gould*, 275 Mass. 48, 175 N.E. 264 (1931), involving the same type of installation in Massachusetts of a domestic refrigeration system discussed at pp. 1209-10 *infra*.

be attached by one who obtains a lien by legal process³¹ on it as personalty, and a trustee in bankruptcy can succeed to the rights of such a creditor. Even if no such creditor exists, the trustee may represent a hypothetical creditor of any one of the Code's three classes.³² If a filing is made in the chattel records, and the goods are later determined to have become fixtures—category *C*—the security interest is not good against a subsequent purchaser of the realty,³³ nor one who obtains a lien on the realty by legal process;³⁴ and again the door is opened to attack by the trustee in bankruptcy³⁵ representing either the real or hypothetical creditor or purchaser.³⁶

It has been argued that, however defective section 9-313 may be in theory, the defect is of little consequence because there is a practical answer: Let the secured party who is doubtful as to whether he has a "fixture" simply file his collateral both as a fixture and as a chattel. Such double filing does give the secured party protection if the collateral is ultimately held to fall into category *B* or category *C*. However, so long as it is not possible to distinguish clearly between goods which have become incorporated into the realty (*A*) and those which are Code fixtures (*C*), he runs the chance that even with double filing he may get no protection because the goods may be held to have been incorporated into the realty. A number of pre-Code cases in states which had adopted section 7 of the Uniform Conditional Sales Act (UCSA) (for example, Pennsylvania³⁷ and New Jersey³⁸) held that even goods affixed in such a way that they were physically removable without significant damage to themselves or to the realty from which they were severed had nonetheless become nonremovable parts of the realty, and hence not subject to the fixture filing rules of the predecessor of section 9-313, USCA's section 7.³⁹ The prime difficulty with section 9-313 is that a too literal reading of the last two sentences of section 9-313(1) may lead a court into recognizing life in these old decisions—and their counterparts in non-UCSA states—which section 9-313 as a whole is meant to supersede. In the majority of Code states, the UCSA was

³¹ UNIFORM COMMERCIAL CODE § 9-301.

³² See discussion of bankruptcy aspects in 2 SECURED TRANSACTIONS, chs. 16-17, at 1681-1817.

³³ A secured creditor cannot assume that the bona fide purchaser test applicable under § 60 of the Bankruptcy Act, 52 Stat. 869 (1938), as amended, 11 U.S.C. § 96 (1958), as amended, 11 U.S.C. § 96(d) (Supp. V, 1964), will not apply to fixtures.

³⁴ UNIFORM COMMERCIAL CODE § 9-313(4).

³⁵ See note 32 *supra*.

³⁶ See note 33 *supra*.

³⁷ See pp. 1200-01 *infra*.

³⁸ See p. 1219 *infra*.

³⁹ The text of § 7 of UCSA in its recommended form will be found at note 154 *infra*.

never in force, and it is impossible to determine from many pre-Code cases whether the court is saying that the goods in question would fall under what we have called the *A* rules or the *C* rules.

If section 9-313 is unsatisfactory to the chattel secured party, it does not follow that it is acceptable to real estate interests. Uncertainty as to the rights of chattel secured parties is matched by uncertainty as to the rights of holders of realty interests. One who purchases an interest in the realty after affixation should be able to learn from the real estate record of the existence of fixture security interests to which he takes subject. So long as there is no reasonably clear method of determining what becomes a nonremovable part of the realty (*A*), what remains personal property (*B*), and what becomes a fixture (*C*), a real estate purchaser may be defeated in his reasonable expectation that, in the absence of any filing on the record, he obtained unencumbered title to the furnace or any other similar item on his vendor's premises. Real estate interests were in fact the first to object to section 9-313 as a whole, primarily because of its ambiguity (though later, their objections were directed more specifically against section 9-313(2) which enables a fixture-secured party to remove fixtures added by him, as against the protests of an earlier real estate mortgagee⁴⁰).

The problem of redrafting the Code's fixture sections is not merely a matter of making the changes necessary to distinguish between different types of goods and altering the troublesome sentence which permits the states to follow their pre-Code law. There is an underlying conflict as to what the substantive rules of fixture security law should be. Some real-estate-minded counsel have suggested that other states should follow Ohio's lead in reversing the policy of the Code's most essential fixture priority provision—section 9-313(2).⁴¹ Ohio's new Code fixture provisions (like the Massachusetts fixture statute⁴² repealed by the Code) give an earlier real estate mortgagee an absolute veto power over his debtor's ability to finance the purchase of a new fixture through a fixture purchase money transaction. If the conditional vendor does not obtain the earlier mortgagee's consent to a fixture purchase money interest, he loses his collateral and contributes a windfall to the mortgagee. Under the Ohio version of the Code, all fixture interests, whether they attached before or after affixation, can be protected only against future purchasers of interests in the real estate. While theoretically the debtor can obtain the prior real estate

⁴⁰ See pp. 1212-13 *infra*.

⁴¹ See p. 1214 *infra*.

⁴² Mass. Acts & Resolves 1937, ch. 245, at 281, as amended, Mass. Acts & Resolves 1943, ch. 52, at 46, as amended, Mass. Acts & Resolves 1956, ch. 160, at 89.

mortgagee's consent or obtain the purchase price through a junior encumbrance upon the realty as a whole, the earlier real estate mortgagee has the practical power to force financing through his existing mortgage or not at all.

An Ohio professor⁴³ who disapproved of the Ohio amendment has suggested a position that strikes a compromise of sorts between the Code and the Ohio policy. Under this approach the debtor is allowed to purchase fixtures on secured credit without consent of an earlier realty mortgagee (but with notice required); however, the conditional vendor does not have the right to remove his fixture on the debtor's default, but must be satisfied with a lien corresponding more nearly to the traditional "mechanic's lien."⁴⁴

There is agreement among members of the fixture drafting committee that the basic policy underlying the Code's fixture provisions is preferable both to the Ohio and to the "mechanic's lien" alternatives, and this view seems to be shared by most students of the problem. Perhaps it is for this reason that there is a body of opinion that prefers section 9-313 in its present form to any modified version. The argument is that the Code's fixture philosophy and mechanics fit fairly well into the existing fixture law of the states which adhere to the "majority"⁴⁵ view as to fixtures, and it is hoped that courts of the states which follow the "minority" view will reach the result which was envisaged by the draftsmen of section 9-313, whether or not their intention was expressed as well as it might have been.

This approach is not wholly inconsistent with the view this writer has expressed elsewhere⁴⁶ (and is restated here at a later point⁴⁷) that a court which is intent upon finding the meaning of section 9-313 can do so in spite of the muddled language of that section. The line which determines what is and what is not a Code fixture has much in common

⁴³ Professor Shanker first expressed his thoughts on Code fixture problems in *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).

⁴⁴ *Id.* at 803-05.

⁴⁵ This writer would find it difficult to classify into a majority or minority any states whose fixture law he has had occasion to probe at any length. New Jersey and Massachusetts, for example, started out on diametrically opposite paths. *Campbell v. Roddy*, 44 N.J. Eq. 244, 14 Atl. 279 (Ct. Err. & App. 1888), is often cited for the proposition that the conditional vendor's rights are superior to those of an earlier real estate mortgagee, while *Clary v. Owen*, 81 Mass. (15 Gray) 522 (1860), is often cited as the source of the conservative view that the earlier real estate mortgagee has the superior interest. But the reasoning of *Smyth Sales Corp. v. Norfolk Bldg. & Loan Ass'n*, 116 N.J.L. 293, 184 Atl. 204 (Ct. Err. & App. 1936) sounds curiously similar to *General Heat & Appliance Co. v. Goodwin*, 316 Mass. 3, 54 N.E.2d 676 (1942). Labels are notoriously unreliable as a means of predicting what a court will hold on a fixture question.

⁴⁶ See 2 SECURED TRANSACTIONS § 16.07.

⁴⁷ See pp. 1222-25 *infra*.

with the description by a Vermont farmer of the broken-down fence around his cow pasture: "It will let the cow know when she has come to the end of the pasture, *if she wants to know*." A perusal of the many attempts at solving the difficult problem of determining when and what goods may or may not be removed by an unpaid conditional vendor may raise legitimate doubts as to whether all of the courts will sufficiently "want to know" where the line is.⁴⁸ There ought to be a better way for courts—and more important, for practicing lawyers—to ascertain the category into which his transaction falls. No court will decide what a particular provision of section 9-313 means until a case involving that point comes before it, perhaps a decade or two hence;⁴⁹ in the meantime, practitioners will be called on thousands of times to guess what a court in the applicable state will hold.⁵⁰

Each of the members of the sponsors' subcommittee on fixtures has independently arrived at the conclusion that while the basic concepts of section 9-313 are workable and desirable, some improvement is called for in the language. These points need not be rehashed here.⁵¹

It is this writer's thesis that in addition to making certain clarifying changes in the language of section 9-313, we must continue to seek a solution better than that offered either by the Code or by its predecessor, the UCSA, in enabling a conditional vendor or his counsel to determine which of the three sets of rules listed previously is applicable to a contemplated transaction. The principal drafting problem is essentially this: (x) Is it possible—or even desirable—to define the term "fixture" in article nine or to otherwise circumscribe in article nine the area over which the fixture filing rules of section 9-401 and the removal rules of section 9-313(5)⁵² are to control without reference to some "other law" of each adopting state; or (y) On the contrary, should we leave section 9-313 as it is and hope that

⁴⁸ More pressing is the question as to whether a court with a backlog of untried automobile cases has as much time as has the cow to determine where the line was intended to be drawn.

⁴⁹ For example, Massachusetts conditional vendors did not learn until almost twenty years later that a statute dealing with conditional sales of certain goods wrought into the real estate, first enacted in 1912, protected only against future mortgagees. See *Greene v. Lampert*, 274 Mass. 386, 174 N.E. 669 (1931); *Waverly Co-operative Bank v. Haner*, 273 Mass. 477, 173 N.E. 699 (1930).

⁵⁰ Some rules of law only indirectly influence choice of one's conduct. *A* did not stand in front of *B*'s boiler because he thought that if it should explode the jury would find *B* liable; nor did *B* neglect to sufficiently maintain that boiler because he thought the jury would reach the opposite conclusion. But in commercial transactions each of the parties frequently has the choice of refusing to proceed, and the rules must enable the parties to choose intelligently.

⁵¹ See 2 SECURED TRANSACTIONS 1681-1817; Gilmore, *supra* note 7; Kripke, *supra* note 7; and Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 BOSTON COLLEGE INDUSTRIAL & COMMERCIAL L. REV. 61 (1964).

⁵² The priorities under subsection (5) are of course governed by subsections (2), (3), and (4), and these in turn tie in with the filing rules of § 9-401(1)(b).

practitioners and judges will determine that its face was intended to be turned towards the new set of rules and the underlying philosophy embodied in section 9-313 as a whole rather than towards some pre-Code law?

When the UCSA was drafted, some commercially important states (including New York and Ohio) required filing for most conditional sales and other states equally important, including California, Illinois and Massachusetts, did not. It could have been argued that the latter states had decided against filing on the basis of social policy, and it could not be said that the nonfiling rule had worked too badly. The draftsmen of the UCSA apparently felt no need to preserve the two differing systems, and for the sake of uniformity imposed the filing requirement. Had the decision been to leave each state to its prior law, the departure from uniformity would at least have been made on an intelligent basis.

However, in determining whether and when goods became subject to fixture filing rules, the draftsmen adopted a filing requirement but somehow felt a need to adhere to the pre-uniform law of each state. Here there was no intelligible point of departure. When later the draftsmen of the Code faced these same problems they adopted a compromise on filing rules—filing was generally required, but the non-filing exemption continued on a uniform basis for certain noncommercial transactions.⁵³ On the determination of when the fixture filing rules apply, the Code followed the UCSA's example in leaving the question to the varying historical answers found in the individual adopting states.⁵⁴ Apparently they thought that fixture law was too closely related to realty law to enable a uniform act to override past history.⁵⁵ Hindsight now questions the soundness of an approach which tied the Code to the history of fixtures in each adopting state for two principal reasons: (1) Relying on states' historical definition of fixtures relinquishes any hope for uniformity in fixture law of the kind that has been established for most aspects of chattel financing; and (2) A great many states have no rational basis for determining for security purposes what is and what is not a fixture upon which a uniform act can build, even in a nonuniform fashion.⁵⁶ While it has been suggested that every state has some law which determines when

⁵³ UNIFORM COMMERCIAL CODE § 9-302(1)(c), (d). Filing is never excused for fixtures.

⁵⁴ 2A UNIFORM LAWS ANNOTATED 99 (1924).

⁵⁵ *Ibid.*

⁵⁶ Kripke, *supra* note 7, at 62; 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, 794 (1964); see discussion in part II *infra*.

goods have become a part of the realty,⁵⁷ and that this law would help delineate the category the Code calls fixtures, non-Code law is unfortunately vague as to when goods used in close association with certain realty fully retain their character as chattels and when they become part of the realty.⁵⁸

As long as the draftsmen of uniform acts tried to be faithful to traditional concepts, as in the Uniform Chattel Mortgage Act,⁵⁹ and the UCSA,⁶⁰ they obtained almost no adoptions for the first act, and few for the second. The Uniform Trust Receipts Act (UTRA) was less tied to the past, and far more widely adopted.⁶¹ The great strength of article nine is derived largely from the willingness of its draftsmen to discard much long-established chattel security law which had no support but history and to cast its rules along logical and functional lines. Much of the nonfixture law proved to be sound and is carried over into article nine; the senseless portions have been dropped. Also dropped were many sensible and fully intelligible rules of particular states which had to give way because they were in conflict with what seemed on balance to be the better rule for uniform adoption. The same policy must now be pursued with the Code's fixture provisions.

In the brief survey of pre-Code fixture law of selected states which follows, we shall, among other things, examine the various questions posed above, including the question as to whether a modification can be made in fixture law which does not necessarily change some aspects of the law of real estate.

II. DISCUSSION

A. Pennsylvania's Experience With Fixture Statutes

It is quite natural that the first questions concerning interpretations of section 9-313 should have come from the first state to have adopted the Code, and it is equally fitting that those questions should

⁵⁷ Goods incorporated into real estate which is not a structure are not excluded under the first sentence of subsection (1) and hence, apparently, are removable fixtures or even chattels. This makes some sense: for example an oil tank sunk into the ground can be removed with damage only to the ground.

⁵⁸ See discussion at pp. 1197-1220 *infra*.

⁵⁹ For the text of the act see NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM LAWS ANN. REP. 419 (1926). The Uniform Chattel Mortgage Act was adopted only by Indiana. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 266, 271 (1963).

⁶⁰ The UCSA was adopted only in approximately a dozen states. See 2 UNIFORM LAWS ANNOTATED 7 (Supp. 1964). The breakdown of its fixture section was demonstrated at any early date by Kleps, *Uniformity Versus Uniform Legislation: Conditional Sale of Fixtures*, 24 CORNELL L.Q. 394 (1939).

⁶¹ The UTRA was promulgated later than either of the other two uniform security acts. Its acceptance was far wider. It was enacted in about forty states. See 9C UNIFORM LAWS ANNOTATED 146 (Supp. 1964).

have been raised in a soft voice. Pennsylvanians have been so proud of having taken the plunge into the Code on faith while doubting Thomases remained on the shore that their criticism of the Code on any point has been muted. Moreover, the questions that were raised did not lead to a demand for change in the Code's fixture provisions;⁶² but this should not be taken as an indication that everything has run smoothly in Pennsylvania. A brief outline of the state's peculiar history of fixture security interest is necessary for a complete understanding of the problem.

Prior to 1915 Pennsylvania had no conditional sales act and conditional sales were not allowed under the common law;⁶³ nor did it have any general chattel mortgage act.⁶⁴ In most cases a non-statutory bailment lease probably filled the gap left by the absence of a conditional sales act.⁶⁵ In 1915 the legislature passed a statute which provided for the recording of conditional sales of property attached or to be attached to real property or chattels real. The most interesting part of the statute was the second sentence of section 3, which says that:

goods or chattels shall not, by reason of their being attached to any real property or chattels real, become an accession thereto; but shall be treated as severable, and subject to removal as against the conditional vendee, . . . and also as against all other persons having any interest in or liens against such real property or chattels real, upon the tender of a sufficient bond to all such persons holding prior interests or liens against the same, conditioned for repairing all damage caused by such severance and removal.⁶⁶

⁶² The two most important articles on Pennsylvania fixture law did not call for changes in the language of the Code in order to deal with the Pennsylvania problem. See Leary, *Financing New Machinery for Mortgaged Pennsylvania Industrial Plants*, 4 VILL. L. REV. 498 (1959); Robinson, McGough & Scheinholtz, *The Effect of the Uniform Commercial Code on the Pennsylvania Industrial Plant Doctrine*, 16 U. PITT. L. REV. 89 (1955).

⁶³ See Leary, *supra* note 62, at 510-11.

⁶⁴ The first chattel mortgage act was passed in 1945. Pa. Laws 1945, No. 434, at 1358. See Robinson, McGough & Scheinholtz, *supra* note 62, at nn.35, 36.

⁶⁵ See Montgomery, *The Pennsylvania Bailment Lease*, 79 U. PA. L. REV. 920 (1931). As pointed out by HONNOLD, SALES AND SALES FINANCING 419 (1954), the bailment lease was continued even after Pennsylvania adopted the UCSA.

⁶⁶ Pa. Laws 1915, No. 386, § 3, at 867. See *Ridgway Dynamo & Engine Co. v. Werder*, 287 Pa. 358, 135 Atl. 216 (1926), which gave priority to a conditional vendor of mining equipment who had fully complied with the requirements of the 1915 act over claims of a real estate mortgagee protected by an after-acquired-property clause. The mortgagee had argued that, upon installation, the equipment had become part of the real estate. See also *Anchor Concrete Mach. Co. v. Pennsylvania Brick & Tile Co.*, 292 Pa. 86, 140 Atl. 766 (1928), in which the court held that the conditional vendor's failure to comply with the requirements of the 1915 act precluded replevin of the goods from a purchaser who took title from the conditional vendee without knowledge of the conditional vendor's interest. *Accord, In re Jacob F. Thaler & Co.*, 1 F.2d 461 (W.D. Pa. 1924); *In re Uille-Light Hosiery Co.*, 13 Berks 247 (U.S. Dist. Ct., E.D. Pa. 1921) (opinion of referee).

This language bears a resemblance to Canadian fixture legislation which can be traced back to 1897.⁶⁷

In 1923 some changes were made in the act⁶⁸ which, among other things, combined the 1915 requirement that the remover pay the cost of repairing the realty with the "material injury to the freehold" test of section 7 of the UCSA (which Pennsylvania did not adopt until two years later).

In 1925 the Pennsylvania legislature enacted its own version of the UCSA and also further modified the 1915 act.⁶⁹ Much of the 1915-1925 conditional sales law was reversed by excluding from the definition of *goods* "machinery attached or to be attached to real estate" ⁷⁰ Two years later an amendment to the act remedied some of the damage done by the 1925 act by excising the exemption for machinery, and also by repealing the most recent version of the modified 1915 act.⁷¹ These changes left Pennsylvania with a version of the UCSA which was not the uniform act but which included some of that act's ambiguities.

The 1915 act (like the 1935 act which was later patterned after it) made no bow to any general law of Pennsylvania as to what was a fixture, but stated directly in no uncertain terms: Goods attached to realty may be removed by an unpaid conditional vendor, but the remover must file under certain circumstances and must make good any damage to the realty caused by removal. Neither the standard version of section 7 of the UCSA nor any of the Pennsylvania versions in effect between 1923 and 1935 were so clear cut. While it is possible to cite sentences from the Commentaries of UCSA's draftsman which

⁶⁷ After the English courts decided against the chattel interests in *Hobson v. Gorringe*, [1897] 1 Ch. 182 (1896), some Canadians feared that their previous case law upholding the right of a conditional vendor to remove his fixtures might be reversed. Ontario adopted legislation, Ontario Statutes 1897, 60 Vic., ch. 14 §80: "Should any goods or chattels subject to the provisions of this [conditional sales] Act be affixed to any realty such goods and chattels shall notwithstanding remain so subject"

The present Ontario Conditional Sales Act, REV. STAT. ONT. ch. 61, §10(1) (1960), provides: "Subject to [a duty to file] where the goods, other than building material, have been affixed to realty, they remain subject to the rights of the seller as fully as they were before being so affixed . . ." The exclusion of building materials is discussed at pp. 1226-27 *infra*.

⁶⁸ Pa. Laws 1923, No. 91, §2, at 118:

As against a prior mortgage or other prior incumbrancer of the realty, who has not assented to the reservation of priority in the chattels, if any of the chattels are so attached to the realty as not to be severable without material injury to the freehold, the reservation of property so attached shall be void . . . unless such injury can be completely repaired . . . and the seller . . . tenders . . . sufficient bond conditioned for the immediate making of such repair.

⁶⁹ The Uniform Act was Pa. Laws 1925, No. 325, at 603; a modification of the 1915 and 1923 acts was Pa. Laws 1925, No. 395, at 722.

⁷⁰ Pa. Laws 1925, No. 325, §1, at 604. See Leary, *supra* note 62, at 518-21.

⁷¹ Pa. Laws 1927, No. 470, at 979.

indicate that he was thinking of a rather wide category of goods which could be removed,⁷² it is also possible to cite support for the proposition that the act was intended to perpetuate the common-law limitations on the right to remove an item which had become part of the realty.⁷³

The Pennsylvania Supreme Court and the federal courts interpreting Pennsylvania law held that certain goods which quite clearly could have been removed under the 1915 act were nonremovable under the 1927 act. In reaching this conclusion the courts had to find the Pennsylvania common law of fixtures which the UCSA "perpetuated," as well as to interpret the key phrase of the 1927 act, "material injury to the freehold."⁷⁴ In doing so the courts overlooked the 1915 act and its own cases in the nearest possible area, *i.e.*, Pennsylvania's bailment leases,⁷⁵ and went back almost a century to a case having little to do with the contest before them, *Voorhis v. Freeman*.⁷⁶ This case, which was the source of the industrial plant mortgage doctrine held: "Whether fast or loose, . . . all the machinery of a manufactory which is necessary to constitute it and without which it would not be a manufactory at all, must pass as part of the freehold."⁷⁷ The *Voorhis* rationale supplied the basis for the decision in *Central Lithograph Co. v. Eatmor Chocolate Co.*,⁷⁸ where the state supreme court held that chocolate and candy-making machinery were not severable from the freehold even though removal would not have resulted in material injury to the building itself and any damage could

⁷² 2A UNIFORM LAWS ANNOTATED ¶ 66, at 98-99 (1924) (Bogert's Commentaries on Conditional Sales).

⁷³ "[The act] is intended to perpetuate this common law doctrine that there are limits to the powers of the seller and buyer with respect to reservation of title to fixtures conditionally sold." *Id.* at 99. In any event, the Pennsylvania Supreme Court and the federal courts interpreting Pennsylvania fixture law have been sufficiently spanked for their failure to see what the legislature may have intended. See, *e.g.*, Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1362-63 (1963); Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964). In defense of the courts, it must be admitted that they understood and followed the English language when clearly used by the 1915 and 1935 draftsmen.

⁷⁴ Pa. Laws 1927, No. 470, § 7, at 979.

⁷⁵ See Leary, *supra* note 62, at 518-21.

⁷⁶ 2 W. & S. 116, 37 Am. Dec. 490 (Pa. 1841). The decision is in the best free-flowing style of Chief Judge Gibson. It is worth noting that the court in *Voorhis* indicated that the decision was not intended to settle the issue of whether goods were chattels or realty in other contexts, such as between lessor and lessee. *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 Atl. 540 (1923) applied *Voorhis* to a trespass action. *But see Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17 (1899); *National Bank v. North*, 160 Pa. 303, 28 Atl. 694 (1894), which seem to qualify the *Voorhis* rule by looking for the intention of the parties. However, the intention test was rejected in *Holland Furnace Co. v. Suzik*, 118 Pa. Super. 405, 180 Atl. 38 (1935), although it is significant that the plaintiff in this case did not file as required by the UCSA. The court was willing to extend the *Voorhis* rule to a furnace in a private dwelling even though the furnace might be separated without physical damage.

⁷⁷ 2 W. & S. at 119, 37 Am. Dec. at 493.

⁷⁸ 316 Pa. 300, 175 Atl. 697 (1934).

have been repaired at a small cost.⁷⁹ The court followed *Commonwealth Trust Co. v. Harkins*⁸⁰ (which in turn had followed *Voorhis*),

in which we considered all our preceding cases . . . [and] laid down the broad principle that all machinery in a manufacturing plant, necessary for its operation as a complete going concern, is part of the freehold and bound by a lien of a mortgage thereon, and that it matters not when the machinery is installed, whether before or after the giving of the mortgage.⁸¹

Furthermore, the court advised conditional vendors to do what most fixture security acts are intended to excuse them from doing: to get the consent of existing real estate mortgagees.⁸²

Pennsylvania amended its own nonuniform version of the UCSA in 1935, and did so in a manner which, from all appearances, almost settled the fixture problem it had faced for so many years.⁸³ This section obviously borrowed from the 1915 act, but it seems to have no counterpart in the law of other states.

Section 7. Fixtures. . . .

Goods to be affixed to realty shall not become a part of the said realty, . . . or of any operating plant of which they may form a part, but shall be treated as severable and subject to removal as against the conditional vendee, . . . and, also, as against any mortgagee, encumbrancer, owner, purchaser or other person having any interest in or liens against such real property . . . if, prior to the said affixing or attach-

⁷⁹ The damage to the building caused by removal could have been repaired for \$125. *Id.* at 303, 175 Atl. at 698.

⁸⁰ 312 Pa. 402, 167 Atl. 278 (1933). The contest in this case was between a mortgagee of the realty and a receiver in bankruptcy representing creditors without a security interest in the industrial machinery. The court rendered judgment in favor of the mortgagee. The lack of security interest in the hands of the creditors severely weakens the precedent value of the case in the *Eatmor* situation. The same weakness exists in the *Voorhis* case.

⁸¹ *Central Lithograph Co. v. Eatmor Chocolate Co.*, 316 Pa. 300, 304-05, 175 Atl. 697, 699 (1934).

⁸² *Id.* at 309, 175 Atl. at 700-01. In *Clayton v. Leinhard*, 312 Pa. 433, 167 Atl. 321 (1933), the court held that an automatic sprinkler system which could not be removed without material physical damage to both the freehold and to itself could be removed by the holder of a mechanics lien despite the fact that it was realty. In *Medical Tower Corp. v. Otis Elevator Co.*, 104 F.2d 133 (3d Cir. 1939), the court denied removal of an elevator subject to a conditional sales contract. Although there would not have been material damage to the freehold, the *Voorhis* and *Eatmor* rule precluded removal because the elevator was an integral part of the apartment building operation. The seller apparently failed to comply with the recording provision of the act, but the court did not consider this fact material. *But see M. P. Moller, Inc. v. Mainker*, 314 Pa. 314, 171 Atl. 476 (1934), where the court permitted removal of an organ from a theater because it was not essential to the operation of the theater and the mortgagee had knowledge of the lease agreement (the court indicated that, in absence of actual notice, implied notice by correct filing under the 1927 Act would have produced the same result).

⁸³ Pa. Laws 1935, No. 239, at 658.

ing of the goods to the realty, the conditional sale contract or copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall have been filed . . . [in] the county in which the said realty is situate: Provided, however, if an owner or prior encumbrancer of the said realty shall demand a bond to protect him against loss, resulting from damage which may be caused to the land or to the physical structure of the building or other improvements to which such goods are attached by the removal of the said goods conditionally sold, the conditional seller or his successor in interest shall deliver to the said owner or prior encumbrancer a good and sufficient bond, conditioned for the immediate making of such repairs, said bond to be in a sum equal to the cost of making the said repairs, before commencing the detachment or removal of the said goods⁸⁴

The unique 1935 Pennsylvania version of UCSA's section 7, like the 1915 act before it, contemplates only two classes of collateral, both of which are removable—chattels, with no fixture filing, and fixtures, subject to the requirements of that act. The 1935 act provides a clear statement that any goods can be removed if the proper procedures are followed. However, practically, it imposes an economic test. Removal will be unprofitable if the "loss, resulting from damage which may be caused to the land or to the physical structure of the building or other improvements to which such goods are attached by the removal of said goods conditionally sold" ⁸⁵ will amount to more than the value of the goods removed. The question of what goods can be severed was thus divorced from Pennsylvania's fixture case law and the industrial plant mortgage doctrine which originated in *Voorhis v. Freeman*. Under the 1935 act it was immaterial that the goods had become part of the real estate for some other purposes, or that an earlier real estate mortgagee would acquire an interest prior to that of the debtor *once the conditional vendor had been paid*. The danger, encountered in a number of cases, that the affixed goods had become nonremovable parts of the realty ⁸⁶ would seem to have been effectively eliminated.⁸⁷ If *Central Lithograph Co. v. Eatmor Chocolate Co.* represented the pre-existing realty law, it is difficult to avoid a con-

⁸⁴ Pa. Laws 1935, No. 239, at 660.

⁸⁵ *Ibid.*

⁸⁶ See, e.g., *Central Lithograph Co. v. Eatmor Chocolate Co.*, 316 Pa. 300, 175 Atl. 697 (1934).

⁸⁷ *In words* the statute is perhaps less clear in deciding whether a filing is required in the fixture record, as distinguished from a filing in the chattel records, but the implication is clear enough. The act applied only to goods "affixed" or, "fast," in Chief Judge Gibson's language and this could hardly include goods which were "loose." 2 W. & S. 116, 119, 37 Am. Dec. 490, 493 (1841).

clusion that the 1935 act, like the 1915 act before it, changed not only chattel law but also real estate law.

When Pennsylvania's Code came into effect in 1954, section 9-313 read as follows:

- (1) When under other rules of law goods are so affixed or related to the realty as to be a part thereof, a security interest in such goods which attaches before they become part of the realty takes priority as to such goods over the claims of all persons who have an interest in the realty except
 - (a) a subsequent purchaser for value of any interest in the realty; or
 - (b) a subsequent judgment creditor with a lien on the realty; or
 - (c) a prior encumbrancer of the realty to the extent that he makes subsequent advances

provided that the purchaser or lien creditor becomes such or the prior encumbrancer makes such advances without knowledge the security interest and before its perfection

- (2) When under subsection (1) a secured party has a priority over the claims of all persons who have an interest in the realty he may on default subject to the provisions of Part 5 remove his collateral from the realty but he must reimburse any encumbrancer or owner of the realty who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution of value of the realty caused by absence of the goods or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.⁸⁸

Some comparisons between this earlier version of section 9-313 and the Pennsylvania fixture statute of 1935 are of more than passing interest. Apparently, only the Code and Pennsylvania's statutes (culminating in the 1935 version) substituted a requirement that the remover pay damages caused by removal of a fixture for a flat denial of the right to remove when material injury to the realty would result. This part of section 9-313 must have been taken from the act it replaced in Pennsylvania. The priorities are also similar. The 1935 amendment required filing within ten days to protect even against a holder of an earlier real estate mortgage, while section 9-313 required

⁸⁸ Pa. Laws 1953, No. 1, § 9-313, at 167.

filing only to protect against those who subsequently acquired interests in the realty. However, since the right to remove under the former section 9-313 (as under the present section 9-313) is dependent on the secured party's having, at the time of removal, priority against subsequent as well as earlier acquired realty interests, no fixture-secured party could count on a right to remove unless he filed. However, an essential difference was created by the first sentence of the earlier section 9-313(1): "When *under other rules of law* goods are so affixed or related to the realty as to be a part thereof . . ." ⁸⁹

Unlike the 1915 and 1935 Pennsylvania statutes, section 9-313 directs the reader to look elsewhere to determine when its rules apply, and it reintroduces the question as to whether "loose goods related to the realty" in a manner which does not constitute affixation are subject to fixture filing rules. It is not surprising that Pennsylvania lawyers had some difficulty in predicting how their highest court would interpret the Code.⁹⁰ It would seem reasonable to read section 9-313's first sentence as though it merely incorporates the conditional sales fixture law which was in effect until the Code was enacted—the 1935 Pennsylvania version of UCSA section 7. However, the "part of the

⁸⁹ Pa. Laws 1953, No. 1, §9-313(1), at 167. (Emphasis added.)

⁹⁰ See Robinson, McGough & Scheinholtz, *supra* note 62. In lawyer-like fashion the writers review Pennsylvania's peculiar chattel security history in their search for some law which will answer the question to which the Code gives no answer: What are the "other rules of law" which determine when "goods are so affixed or related to the realty as to be a part thereof?" This discussion of "other law" includes only passing references to the 1935 amendment to the so-called UCSA, which, for reasons submitted below, would seem to be the logical starting point, and were it not for the "part of the realty" language, the only logical reference.

Leary, *supra* note 62, also reviews the Pennsylvania history at length as well as in some depth. While he devotes greater attention to the 1935 amendment of the so-called UCSA, it is still a very small part of the total article. Leary suggests that the rule might be found in Clayton v. Lienhard, 312 Pa. 433, 167 Atl. 321 (1933). This writer finds that suggestion very difficult to follow because the Clayton case involved a mechanic's lien, not a conditional sale. Furthermore, the word fixture is not used in the Code sense, and is defined on a level of abstraction which makes it difficult to apply.

Robinson, McGough & Scheinholtz, *supra* note 62, at 97-98, also state:

It should be noted, however, that where an industrial mortgage has been executed prior to the effective date of the Act (July 1, 1954), the mortgagee's rights will remain unaffected by the Act. Any abridgement of these rights would be an impairment of the mortgagee's contractual rights based on the law as it existed at the time of the execution of the mortgage and would, consequently, be unconstitutional.

It should be added that if there were a constitutional point arising out of the removal of goods added under a conditional sale contract to a plant subject to an industrial plant mortgage in existence on the effective date of the Code, the same problem arose under Pennsylvania's 1915 fixture-conditional sales legislation as well as under the 1935 legislation. This point is also challenged by another Pennsylvania lawyer, Leary, *supra* note 62, at 529-30 n.121.

Finally it is worth noting that the constitutional argument can cut both ways. Section 9-313 decreased the rights of the conditional vendor and correspondingly increased rights of realty holders by making not removable under any circumstances certain goods ("goods incorporated into a structure") which could have been removed by one who filed under the 1935 act and performed his duty to repair.

realty" language presents difficulties with this interpretation. The 1935 act was clear:

Goods to be affixed to realty *shall not become a part of said realty*, or of the freehold to which they are attached or are to be attached, *or of any operating plant* of which they may form a part, but shall be treated as severable and subject to removal . . . if . . . [a proper filing is made].⁹¹

In spirit and objective section 9-313 seems to be a child of Pennsylvania's 1935 fixture legislation, but the words of the two statutes simply do not mesh. However, they must be made compatible in order to make any sense at all out of the Code. If section 9-313 incorporates some Pennsylvania fixture law other than that of the 1935 act, it must go outside conditional sales fixture law to law involving landlord and tenant, or real estate grantor and grantee. This presents an alarming possibility to lawyers, who can rightfully cite the case of *First National Bank v. Reichneder*⁹² as an example of Pennsylvania courts tendency to favor real estate interests. The case held that beer kegs had been caught by a real estate mortgage which described the realty only by metes and bounds, and not only did not mention beer kegs but did not mention a brewery. The actual holding of the case can be explained in terms of the chattel mortgage statute then in effect, and the case should have no bearing on the interpretation of section 9-313; but it does indicate the court's inclination to return to the industrial plant mortgage doctrine in cases where the statute is unclear.⁹³ Therefore it stands as an ominous symbol to the conditional vendor.

Where the state had by a series of trials and errors finally separated out its conditional sales law of fixtures from the law determining when goods otherwise become part of the realty or of an operating plant, it seems unreasonable to assume that its legislature abandoned the fruits of that experience without being more explicit.⁹⁴ If one spends enough time on the Pennsylvania cases and the Code, he can come up with a pretty firm conclusion that section 9-313 was not intended to revoke the progress that culminated in the 1935 amendment to the Pennsylvania version of the UCSA, but it should be less

⁹¹ Pa. Laws 1935, No. 239, at 658. (Emphasis added.)

⁹² 371 Pa. 463, 91 A.2d 277 (1952).

⁹³ The industrial plant mortgage doctrine was pointedly rejected by the legislature so far as conditional sales are concerned when it passed the 1915 act and again when it enacted the 1935 amendment.

⁹⁴ The rule as to the rare post-affixation security interest in fixtures, § 9-313(3), is not necessarily different from that which would prevail under the industrial plant mortgage doctrine.

difficult for both lawyers and courts to determine what section 9-313 means.⁹⁵

The previous discussion has been confined to the text of section 9-313 as it was originally adopted in Pennsylvania in 1954. In 1959 Pennsylvania followed the national sponsors' suggestions and revised section 9-313.⁹⁶ The amended text left open all of the questions which had previously perplexed careful lawyers in Pennsylvania, and it may have added to them; but that is getting ahead of our story, since the amended form was adopted first by Massachusetts.

B. The Experience in Massachusetts

If the Pennsylvania legislature took the Code on faith, and the Pennsylvania bar was apologetic in criticizing its language, their example was not followed in Massachusetts, the second state to adopt the Code. In Massachusetts the Code was adopted only after a long fight in the legislature. After enactment, its local sponsors, including this writer, were pressed by respected members of the real estate bar for an explanation of the Code's fixture provisions. What kind of collateral added to the real estate is removable without the consent of a prior real estate mortgagee, and what can be removed only with his consent? What are these "fixtures" the Code speaks of? Where does one file for what collateral?⁹⁷ The Code that was adopted in Massachusetts included the revised version of section 9-313.⁹⁸ It will

⁹⁵ It has been argued that while § 9-313(5) changes the industrial plant doctrine in making fixtures removable against an earlier real estate mortgagee, it serves to require a filing in the fixture records for anything which under that doctrine could be held a part of the realty. But if the removal rules of § 9-313(5) take away the meat of the coconut, is there any sense in having a fixture filing in order to preserve the shell? If the Code's § 9-313 is to be uniform in application, an out of state conditional vendor should not be expected to know that a filing for beer kegs (or other "loose" collateral) should be made in the fixture records.

⁹⁶ The change was made in the 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 290-91 (1957). In the 1954-1956 studies of the New York Law Revision Commission, the phrase "part of the realty" was mildly criticized as being indefinite. See NEW YORK LAW REVISION COMMISSION REPORT 48, 478 (1956). On the assumption that the term "fixture" had a more fixed meaning than "part of the realty," with little significance being attached to their change, the Article Nine Subcommittee adopted the term "fixture." They also rewrote the section almost in its entirety. The 1956 recommendations state only that it was changed "for clarity."

⁹⁷ Fixture filings were better integrated into the realty records by a new section, 9-409, added by Mass. Acts & Resolves 1960, ch. 379, at 275-76.

⁹⁸ Priority of Security Interest in Fixtures

(1) The rules of the section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real

be noted that, unlike the earlier version, this new section uses the term "fixtures." The use of this word gave the bar adequate cause for concern. Massachusetts had not adopted the UCSA and its single statute dealing with fixture-like items disavowed the test of whether an item in the named classes of goods was or was not a fixture at common law. The term "fixture" had not often been used by Massachusetts courts in the Code sense.⁹⁹ If the court's conclusion was that the goods were removable, they were called personalty; if nonremovable, they were called real estate. When the term "fixture" was used, it was likely to be used in the Ohio sense of an item which had become a nonremovable part of the realty.

For almost a century prior to adoption of the Code, Massachusetts courts adhered to the doctrine of *Clary v. Owen*,¹⁰⁰ which held that once goods became a part of the realty, an existing real estate mortgagee acquired rights in them superior to the rights of one who had a security interest in the goods. However, in practice, the case could not be relied upon, because the supreme judicial court upheld findings

estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) 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.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

UNIFORM COMMERCIAL CODE § 9-313.

⁹⁹ See MASS. ANN. LAWS, ch. 184, § 13 (Supp. 1964), discussed at text accompanying note 103 *infra*. The term "fixture" does not appear in *General Heat & Appliance Co. v. Goodwin*, 316 Mass. 3, 54 N.E.2d 676 (1942), a leading case on the question of whether a furnace is removable.

¹⁰⁰ 81 Mass. (15 Gray) 522 (1860). Compare *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N.E. 327 (1890) (often looked upon as the leading case favoring real estate interests), with *Holt v. Henley*, 232 U.S. 637 (1914), and *Campbell v. Roddy*, 44 N.J. Eq. 244, 14 Atl. 279 (Ct. Err. & App. 1888).

of fact that in a particular instance goods remained personal property and hence were freely removable, even though they were attached in such a way that some states would have called them fixtures.¹⁰¹ The tendency in fixture law to avoid too harsh a result by characterizing the goods as personalty in the guise of a fact finding is not confined to Massachusetts and illustrates the error of drafting a statute from a class standpoint, whether the class be real estate mortgagees¹⁰² or conditional vendors.

In 1912 the Massachusetts legislature adopted its first and only statute (subsequently amended from time to time) relating to conditional sales of fixtures. The original statute reads as follows:

No conditional sale of heating apparatus, plumbing goods, ranges or other personal property which are afterward wrought into or attached to real estate shall be valid as against any mortgagee, purchaser or grantee of such real estate, unless within ten days after the making of the contract of conditional sale, such contract, or a memorandum thereof signed by both parties thereto, is recorded in the clerk's office of the city or town in which the real estate is situated.¹⁰³

The 1912 statute is of great interest and reflects the unpredictability so characteristic of the fixture field, even in a state which appeared to follow a definite doctrine.¹⁰⁴ It is not unnatural to read the 1912 Massachusetts statute as though its purpose was the same as that of the 1915 Pennsylvania statute discussed previously¹⁰⁵ or the later UCSA¹⁰⁶—to provide a mechanism by which (x) a conditional vendor could retain as against holders of all interests in the realty his right to remove fixtures added by him and (y) to warn a future purchaser of an interest in the realty of the existence of the conditional vendor's interest.

¹⁰¹ See Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1355 (1963); cf. 5 AMERICAN LAW OF PROPERTY § 19.12, at 51 nn.16 & 17 (Casner ed. 1952). "The precedents are thus very confusing. . . . [as they] cannot be rationalized on any basis other than that they were jury verdicts."

¹⁰² See text accompanying note 129 *infra* for Ohio's change in Code fixture priorities.

Professor Niles said of the Massachusetts doctrine: "The chief objection to the minority view is that it works so harshly in certain cases that a jury may avoid its rigor by solemnly declaring that heavy and firmly affixed objects are not fixtures at all." 5 AMERICAN LAW OF PROPERTY § 19.12, at 50-51 (Casner ed. 1952).

¹⁰³ Mass. Acts & Resolves 1912, ch. 271.

¹⁰⁴ The legislature from time to time added to the list of goods covered by the statute, but it also showed its awareness of the vagaries of fixture law by adding in 1918, at the end of the list of covered items the words "whether they are fixtures at common law or not." Mass. Acts & Resolves 1918, ch. 257, § 382.

¹⁰⁵ See pp. 1198-99 *supra*.

¹⁰⁶ See text of UCSA § 7 in its "uniform" version, note 154 *infra*.

At an early date the court decided that "or other personal property" following the list of specific goods covered by the statute referred only to goods *ejusdem generis*, and not to all fixtures.¹⁰⁷ Nor was statutory filing necessary as to all goods of the enumerated classes to protect the conditional vendor against future purchasers of the realty. Furnaces, for example, are heating equipment, but a furnace may not have lost its character as ordinary personal property. It may not have been "wrought in" or have become part of the realty, which was a question to be determined under "other law"—which meant that it was primarily a matter for the finder of the facts.¹⁰⁸ Finally, almost two decades after its adoption, the court decided that the statute did not alter the doctrine of *Clary v. Owen*¹⁰⁹ so far as prior real estate mortgagees were concerned and that filing thus gave protection only against subsequent mortgagees and purchasers.¹¹⁰

When the limited scope of the statute, as judicially interpreted, was combined with the fact-finding of what goods are subject to its provisions, the statute served little practical purpose and instead resulted in substantial uncertainty. The subsequent purchaser of real estate ran the risk that what he thought had become an irremovable part of the real estate had remained personal property, and hence was removable even though the real estate record did not provide him with notice.¹¹¹ The problems of relying upon fact-finding reached a high point in two cases decided in the same year, involving the same type of collateral (refrigeration systems), sold by the same conditional vendor in the same city, and affixed in the same manner to two apartment houses in adjoining neighborhoods. In neither case did the conditional vendor file. In one case the supreme court upheld a finding that the system had not become part of the realty and could be removed;¹¹² in the other, the same high court upheld the opposite finding.¹¹³ The court said:

The bald physical facts . . . [in the two cases] do not differ in essential particulars . . . The difference between . . . [the two] cases . . . consists in diverse inferences drawn

¹⁰⁷ *Crown Shade & Screen Co. v. Karlburg*, 332 Mass. 229, 124 N.E.2d 238 (1955); *Babcock Davis Corp. v. Paine*, 240 Mass. 438, 134 N.E. 342 (1922).

¹⁰⁸ See *Gardner v. Buckley & Scott, Inc.*, 280 Mass. 106, 181 N.E. 802 (1932). The court held that while oil burners are "heating and plumbing equipment" for which the statute required a filing, no filing was necessary if the goods remained personalty.

¹⁰⁹ See text accompanying note 100 *supra*.

¹¹⁰ *Waverly Co-operative Bank v. Haney*, 273 Mass. 477, 173 N.E. 699 (1930).

¹¹¹ *Gardner v. Buckley & Scott, Inc.*, 280 Mass. 106, 181 N.E. 802 (1932).

¹¹² *Commercial Credit Corp. v. Gould*, 275 Mass. 48, 175 N.E. 264 (1931).

¹¹³ *Commercial Credit Corp. v. Commonwealth Mortgage & Loan Co.*, 276 Mass. 335, 177 N.E. 88 (1931).

by the trial judges in those cases as to the intent of the parties in installing the refrigerating system Whatever inconsistencies may appear . . . [rest] wholly upon different findings of essential facts and not resting in any degree upon different rules of law The governing principles of law are the same; the conclusion as to the facts may vary. . . .¹¹⁴

Real estate mortgagees could rightly object to the number of cases in which, with no filing or recording, conditional vendors convinced a judge or jury that furnaces, oil burners, and built-in refrigeration systems had never become part of the realty and hence were removable without a fixture filing.¹¹⁵

However, the pendulum began to swing and in a later case¹¹⁶ the court itself suggested that the primary purpose of the Massachusetts fixture statute was not to protect the conditional vendor who had filed, but to protect the earlier real estate mortgagee against cases like *Henry N. Clarke Co. v. Skelton*,¹¹⁷ which held that a furnace was properly found to have remained personal property. While it can be said that the later cases were more likely to favor the real estate interests, the basis upon which they were decided hardly encouraged predictability. In *General Heat & Appliance Co. v. Goodwin*,¹¹⁸ the court distinguished a line of cases holding that fixture-like items had remained personalty on the basis that the action had been at law, while *General Heat* was in equity. Needless to say, lawyers who must make a prediction before the completion of a secured transaction are not pleased by such distinctions.

¹¹⁴ *Id.* at 340-41, 177 N.E. at 90-91.

¹¹⁵ The result of this state of the law is to make impossible any uniformity of decision or predictability of result in this wide field of constantly recurring identical factual situations. Each case depends on the reaction of the particular judge or jury and as a result this class of cases involving property rights is as uncertain and speculative as cases of tort.

LANDLORD'S FIXTURES, 17 MASS. L.Q. (1932) (final part, p. 5).

¹¹⁶ *Gar Wood Indus., Inc. v. Colonial Homes, Inc.*, 305 Mass. 41, 24 N.E.2d 767 (1940).

¹¹⁷ 208 Mass. 284, 94 N.E. 399 (1911).

¹¹⁸ 316 Mass. 3, 54 N.E.2d 676 (1944). Apart from MASS. ANN. LAWS, ch. 184, § 13 (Supp. 1964), Massachusetts courts had no occasion to decide what is a fixture as between conditional vendors and holders of interests in the realty to which conditionally sold goods were affixed. If goods retained their character as personalty they were removable without any filing, even if the goods were part of the class covered by the statute. Apart from this statute, goods became absorbed into the real estate whether, to use the Code's terms, they became fixtures or became incorporated into a structure. Only if goods were of the enumerated classes and had become realty was filing required, and then it protected only against subsequent purchasers (including mortgagees). This case and more particularly the case of *Menard v. Courchaine*, 278 Mass. 7, 179 N.E. 167 (1931), reminds us that the reasoning upon which the New Jersey "institutional doctrine" is based is not by any means confined to the UCSA cases in that state.

The previous discussion suggests that this is not the type of question which should be left for decision *after the fact* to courts, and particularly not to juries. No doubt, the parties could operate under any one of a number of different sets of rules if only the rule were reasonably ascertainable at the time the transaction was entered into. Reliance upon a vague law of "fixtures," at least in a state like Massachusetts, provides no adequate basis for a new uniform statute. The one pre-Code statute which governed conditional sales of goods attached to the realty was of course repealed; its disavowal of the common-law fixture test is of no help.

In Pennsylvania a critic of the Code could fairly state that the Code's section 9-313 had muddied up waters which, after a century of unusual stirring, had fairly well settled in 1935. It is clear that Massachusetts had no settled fixture law for the Code to disturb; there the sin was one of omission—failure to correct a long-standing defect. The same is true, it is submitted, of the next state we look at—Ohio.

C. The Ohio Answer and Commentators Thereon

A century ago Ohio provided fixture law with the famous case of *Teaff v. Hewitt*,¹¹⁹ which attempted to define, once and for all and for all purposes, what is and what is not a fixture. The court used fixture in a way which differs from its Code use:

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it.¹²⁰

A removable fixture as a term of general application, is a solecism—a contradiction in words.¹²¹

The court saw no necessity for use of any term (as the Code uses the term "fixture") to describe a part of the realty which is removable only under certain circumstances.

There does not appear to be any necessity or propriety in classifying moveable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property¹²²

¹¹⁹ 1 Ohio St. 511 (1853). One reading Judge Bartley's language would assume that the court would find all the property in question to be realty; but that is not the holding. This led to a remark by a leading authority on fixtures: "The manner in which the test was stated and applied was so unsatisfactory, . . . that little uniformity of decision has resulted from its use." 5 AMERICAN LAW OF PROPERTY § 19.3, at 19 (Casner ed. 1952).

¹²⁰ *Teaff v. Hewitt*, 1 Ohio St. 511, 527 (1853).

¹²¹ *Id.* at 524.

¹²² *Id.* at 524-25.

One can sympathize, as does this author, with the problem faced by an Ohio counsel in working with section 9-313 before the act was amended at the instigation of the Ohio real estate bar (particularly the savings and loan interests). In an article begun before and finished after the 1963 amendment was enacted, Mr. Sherman Hollander pointed up the problem from the viewpoint of a title company counsel:

The leading case of *Teaff v. Hewitt* has been simultaneously incorporated into the Code and overruled by it. For over a century, Ohio has recognized two basic types of tangible property—real and personal. When a unit of personal property becomes a fixture, Ohio law has considered it real property.¹²³

It is clear from subsection (5) that section 9-313 refers to the kind of a fixture which is removable by a fixture secured party with the proper priority. Since Ohio had no case law as well as no statutes which allowed removal by a conditional vendor who had followed a prescribed mechanism applicable to goods affixed in a certain way, the courts of Ohio (and at a much earlier time, its lawyers) will have to look elsewhere for a classification of the kind of fixture to which the Code refers. Where will they look? Probably not to Massachusetts.¹²⁴ To New York, with its "inherent chattels" doctrine?¹²⁵ To Pennsylvania, with its industrial plant mortgage doctrine?¹²⁶ If to Pennsylvania, to which period of its history?¹²⁷

One can appreciate Mr. Hollander's problem concerning what a Code fixture is in Ohio, but as to his worry about the earlier real estate mortgagee who thought that a new furnace would fall completely under his earlier mortgage, we can be less sympathetic. The essential difficulty with Hollander's position is that he assumes that the earlier real estate mortgagee should get an interest in a fixture superior to the interest which has attached to the goods before they became affixed to the land. This view disregards the difference between the interest obtained by an earlier real estate mortgage in goods fully incorporated

¹²³ Hollander, *Imperfections in Perfection of Ohio Fixture Liens*, 14 W. RES. L. REV. 683, 686 (1963). See also 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); Zangerle, *What Are Fixtures in Ohio?—A Criticism of the Supreme Court Opinions in the Standard Oil Cases*, 33 OHIO OP. 142 (1946); *Fixtures—Purchaser at Judicial Sale—Rights of Conditional Vendor of Chattel and Prior Mortgagee of Realty*, 14 OHIO OP. 164 (1939) (discussion of the *Holland Furnace* case); Comment, 6 OHIO ST. L.J. 219 (1940) (discussion of *Holland Furnace* and *XXth Century Furnace* cases).

¹²⁴ See pp. 1206-11 *supra*.

¹²⁵ See pp. 1219-20 *infra*.

¹²⁶ The *Teaff* court rejected the *Voorhis* doctrine, discussed at pp. 1200-01 *supra*, 1 OHIO ST. 511, 529 (1853).

¹²⁷ See pp. 1197-1206 *supra*.

into the structure (such as bricks in a chimney), and the goods the Code calls fixtures. Section 9-313(2) applied the purchase money concept only to the latter class of goods. The essential concept of a purchase money security interest (whether in fixtures or any other collateral) is that it survives even when the goods have become a part of a larger body of collateral.¹²⁸ As to fixtures the real estate mortgagee can claim only whatever interest the debtor has at the time of affixation or any interest that the debtor subsequently acquires. However, the view urged by Mr. Hollander prevailed so far as prior interests in the realty are concerned, and Ohio reversed the basic priority rule of section 9-313(2). Effective October 8, 1963, Ohio changed its counterpart of subsection (2) of section 9-313 to read:

A fixture [including a pre-affixation] security interest is invalid against any person with an interest in the real estate at the time the security interest in the goods is perfected or at the time the goods are affixed to the real estate, whichever occurs later, who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures
. . . .¹²⁹

Its proponents claim that this change restored the law as established by *Holland Furnace Co. v. Trumbull Saw. & Loan Co.*,¹³⁰ but this is disputed by another Ohio authority¹³¹ who contends that it goes further than the opinion in that case, which dealt with the rights of a subsequent purchaser of the real estate (who happened also to be a prior mortgagee). In any event, it is now clear that in Ohio if the item has become a fixture, the debtor can purchase it under a conditional sales agreement only if he gets the prior approval of his real estate mortgagee.¹³²

A saving grace is that Ohio, consistent with its adhesion to *Teaff v. Hewitt*, treats "detachable machinery" as chattels.¹³³ This tendency takes much of the sting out of the Ohio legislation. The class of goods which remain personalty (in which therefore it is possible to get a security interest ahead of the prior real estate mortgagee even without

¹²⁸ See *Holt v. Henley*, 232 U.S. 637 (1914).

¹²⁹ OHIO REV. CODE ANN. § 1309.32(B) (Page Supp. 1964).

¹³⁰ 135 Ohio St. 48, 19 N.E.2d 273 (1939).

¹³¹ 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, 789 (1964).

¹³² OHIO REV. CODE ANN. § 1309.32(B) (Page Supp. 1964).

¹³³ "It cannot be argued that such a lien is needed to permit plant expansion, since detachable machinery is likely to be personalty in Ohio." Hollander, *supra* note 123, at 637. The author cites *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 60 N.E.2d 170 (1945), among other cases. However, the decision of the court in the *Zangerle* case is questioned by Zangerle, *supra* note 123.

a fixture filing) fortunately is larger than it is in some states. It could well be that the classes of goods "likely to be personalty in Ohio"¹³⁴ may be further expanded to get around the harsh results of the new fixture section.¹³⁵ While this tempers the conditional vendor's sorrow, it may add to the sorrows of future real estate purchasers (including mortgagees who make future advances) because they will get no notice of the existence of security interests in some goods so affixed as to be considered fixtures (and therefore subject to fixture filing requirements) in some other states. As in Massachusetts, the fact finder in a judicial proceeding may simply determine that the goods in question never ceased to be chattels.¹³⁶ Such a holding would penalize a subsequent purchaser of the realty who thought he was getting the item in question free and clear because there was no filing which gave him notice to the contrary; it would penalize both the earlier and the subsequent realty interest because the conditional vendor would be under no duty to repair the damage caused by removal even though the act that appears to cover the matter imposes such a duty.

The desirability of the Ohio amendment has been discussed by Mr. Thomas A. Pfeiler, Assistant Counsel, United States Savings and Loan League, who presented for adoption in other states a draft based on the Ohio result.¹³⁷ While Ohio may live with the 1963 amendment, either that amendment or the Pfeiler suggestion would be a serious detriment to financing new equipment in many other states. Under subsection (2) of Mr. Pfeiler's proposed section 9-313, a pre-affixation security interest in fixtures would take priority over pre-existing interests of the real estate only if and to the extent that the holders thereof agree to that priority.

The chief mischief of the Ohio amendment and the Pfeiler proposal is of course that they subordinate a fixture security interest which has attached prior to affixation (which in practical terms means a purchase money interest) to an already existing interest in the realty. For centuries the principal purpose of fixture law has been to prescribe

¹³⁴ Hollander, *supra* note 123, at 687.

¹³⁵ Compare Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L.Q. 66, 92 n.158 (1934) as to the results in practice of the comparable doctrine, which theoretically protected real estate mortgagees in Massachusetts.

¹³⁶ *Ibid.* Cf. 5 AMERICAN LAW OF PROPERTY § 19.12, at 50-52 (Casner ed. 1952).

¹³⁷ Pfeiler, *Uniform Commercial Code—Adverse Effect on Real Estate Mortgages*, 29 LEGAL BULLETIN U.S. SAVINGS & LOAN LEAGUE 201, 207 (1963). See generally, Blackburn, *Mortgages to Secure Future Advances*, 21 Mo. L. REV. 209 (1956). It is easy to overestimate the amount of protection given to a financier who makes advances relying upon the effect of a future advance clause in the mortgage in a state which has a future advance statute. The financier will be disappointed if he has entered into this transaction without checking the statute to see what has happened between the time his mortgage, with its future advance clause, was given and the time the future advance is actually made.

the rules under which goods which become part of the realty for some purposes may be detached by some person who had an interest in them apart from an interest in the land. Any part of the realty can be severed with consent of all holders of realty interests; fixture security law prescribes the circumstances under which fixtures can be removed by an unpaid conditional vendor *notwithstanding objections* from persons with interests in the realty. Therefore, one can almost say that with regard to the prior realty interest, Ohio at present has no fixture law at all.

D. California's Action and Its Reasons

As we have seen, California joined Ohio in refusing to accept the sponsors' version of section 9-313,¹³⁸ but unlike Ohio, it left priority problems to be governed by existing realty law with no help or hindrance from section 9-313. Studies of the Code by various groups in California all arrived at the same recommendation as to fixtures: Do not adopt section 9-313. The California Bankers Association concluded:

The law of fixtures is in a confused state in California. To superimpose additional rules on the existing law would only add to the confusion. . . . [A]n exhaustive independent study should be made of the whole subject of fixtures before adopting any additional legislation. . . .¹³⁹

The state bar committee agreed.¹⁴⁰

When Professors Warren and Marsh were asked by the senate committee to analyze the various proposals for amendments to the Code, they too agreed with the recommendations above and spelled out the reasons more fully:

The scheme of this Section of the Code is that the law of the State outside of the Code determines whether an object is a "fixture" and this Section of the Code then supplies the legal conclusion flowing from this classification. Any such bifurcation of the existing law of fixtures is impossible, since what the Code treats as two separate processes of judgment are all one under existing law. In other words, what the Code asks the judge to do is to decide in the abstract under "existing law" whether an object is a "fixture", and the Code will then tell him whether, for example, a subsequent mortgagee of the land will prevail over the owner

¹³⁸ See p. 1186 *supra*.

¹³⁹ SENATE FACT FINDING COMMITTEE ON JUDICIARY, SIXTH PROGRESS REPORT TO THE LEGISLATURE 417-18 (1961) [hereinafter cited as SIXTH PROGRESS REPORT].

¹⁴⁰ SIXTH PROGRESS REPORT 400.

of an interest in the object apart from the land. But under the only existing law that there is, an answer to the first question answers the second also; and the answer might very well be different if the legal problem presented was different.

It would probably be a great advance in the law if the law of fixtures could be codified and separated into two distinct problems: A factual classification of an object as a "fixture", which is recognized as something different both from "realty" and "personalty"; and, secondly, a statement of the legal results in various circumstances which follow from such a classification. It is impossible, however, to do only half of this job without making a greater mess than there was before. We agree with the criticism that this Section would only "add to the confusion" of the California law of fixtures (which is not unique in that regard).¹⁴¹

It is difficult to find fault with the above analysis by Professors Marsh and Warren. However, Professor Shanker¹⁴² and Mr. Kripke¹⁴³ have argued that every state has some law as to when goods become part of the realty even though it may not deal with the power of removal, which would then be conferred under section 9-313(5). The difficulty with this argument is that it merely substitutes one vague term for another. For Code purposes it is necessary to divide goods which become part of the realty into those which are never removable under chattel security law, "goods incorporated . . .," and what the Code calls fixtures. An additional difficulty is that some courts use fixture, as do Ohio and apparently California, to mean something which is no longer removable except with the consent of all realty interests existing at the time of removal. The courts have employed the word "fixture" or the phrase "part of the realty" in order to settle a particular controversy and hence, as the California professors point out, the answer will vary with the nature of the question. The Supreme Court of Ohio, for example, intimated that its decision in *Holland Furnace Co. v. Trumbull Saw. & Loan Co.*¹⁴⁴ might have been different had there been a means by which the furnace company could have filed its conditional sale contract in the real estate records.¹⁴⁵ Therefore, once the Code with its notice provisions is in effect, the

¹⁴¹ SIXTH PROGRESS REPORT 578.

¹⁴² 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, 794 n.31 (1964).

¹⁴³ Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 64 (1964).

¹⁴⁴ 135 Ohio St. 43, 19 N.E.2d 273 (1939).

¹⁴⁵ *Id.* at 55-56, 19 N.E.2d at 276.

reasons for considering an item of goods nonremovable at common law may no longer exist, and the common-law fixture classification will make little sense.

Prior to considering the Code, California had not adopted the UCSA; nor did it have any fixture statute of its own. However, California courts had developed two sets of rules relating to fixtures.¹⁴⁶ In 1920 the California Supreme Court, in *Oakland Bank of Sav. v. California Pressed Brick Co.*,¹⁴⁷ decided that a conditional sale of a fixture was invalid against a subsequent purchaser of the realty unless filed in the real estate records. The reasoning was that while a conditional sale of chattels need not be recorded in California (except in the unusual case where a special statute so required) this exemption ceased to apply when the chattel became part of the realty, and at that moment the realty filing requirements became applicable. However, even the conditional vendor of a fixture who complied with this rule might get no protection. In *Dauch v. Ginsburg*¹⁴⁸ a construction mortgagee was held to have rights to plumbing fixtures which were superior to the rights of a conditional vendor despite the fact that the goods could have been removed without material damage to the realty. Even though the *Dauch* case involved a construction mortgagee, it seems to be accepted as standing for the broad proposition that the test of the vendor's right to remove the fixture is whether the security of the prior mortgagee will be injured by its removal.¹⁴⁹ This case, and a number which followed it (applying this standard to radiators¹⁵⁰ and elevators¹⁵¹), appear to rest on a principle which is quite similar to the New Jersey "institutional doctrine."¹⁵² If the court finds that the functioning of the building would be impaired by removal of the fixture, then it follows inexorably that the security of the prior mortgagee will be injured. It is readily apparent that, since the ability of a conditional vendor to remove was based on lack of damage to the prior real estate mortgagee's security position, section 9-313(5)'s permission to remove notwithstanding damage to the realty or economic loss to the earlier mortgagee would have resulted

¹⁴⁶ Practically all important California fixture cases are discussed in Horowitz, *The Law of Fixtures in California—A Critical Analysis*, 26 So. CAL. L. REV. 21 (1952).

¹⁴⁷ 183 Cal. 295, 191 Pac. 524 (1920).

¹⁴⁸ 214 Cal. 540, 6 P.2d 952 (1931).

¹⁴⁹ See Horowitz, *supra* note 146, at 52 n.66.

¹⁵⁰ *Hammel Radiator Corp. v. Mortgage Guarantee Co.*, 129 Cal. App. 468, 18 P.2d 993 (Dist. Ct. App. 1933).

¹⁵¹ *Broadway Improvement & Inv. Co. v. Tumansky*, 2 Cal. 2d 465, 41 P.2d 553 (1935).

¹⁵² See p. 1219 *infra*.

in a material change in California fixture law—and that includes real estate law as well as chattel security law.

Practice under the non-Code fixture law of California and under the Ohio version of section 9-313 will be basically the same. Nothing less than a waiver by the earlier real estate holder will protect the conditional vendor's right to remove, and in either state filing in the real estate records will protect only against subsequent realty interests. My own quick review of California cases indicates that, as in Ohio, the range of items which are held nonremovable is not very broad.¹⁵³

E. Two Other States—New Jersey and New York

The criticism might fairly be made that the fixture laws we have examined so far represent the law only in states which follow some "minority" view as to fixtures. We might, then, look to two states which could be said to represent the "majority" view, if such a characterization can fairly be made. Of the states analyzed in this article, only New Jersey and New York adopted UCSA's section 7 in anything like its original form,¹⁵⁴ but, as we shall see, there was not even uniformity between these two states. New Jersey's aberrations were the result of a court decision which resurrected a scrap of pre-UCSA law, while New York's were the result of legislative adaptation in addition to court decisions. Nevertheless if there is such a thing as a "majority" view in fixture security law, we may look for it in these two states.

New Jersey was among the leading states in rejecting the Massachusetts view expressed in *Clary v. Owen*.¹⁵⁵ In the leading case of

¹⁵³ Naturally there will be differences as to what items the courts of each state will consider as having retained their character as personal property.

¹⁵⁴ Section 7 of the official Uniform Conditional Sales Act reads as follows:

If the goods are so affixed to realty, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty.

¹⁵⁵ 81 Mass. (15 Gray) 522 (1860); see p. 1207 *supra*.

Campbell v. Roddy,¹⁵⁶ the court held that the conditional vendor's interest in goods added by him is superior to the interest of one who had a real estate mortgage on the property to which these goods became affixed. The case went on, however, to say that one reason for holding that the conditional vendor's rights were superior was that the security of the earlier real estate mortgagee would not be impaired by the removal of the fixture.¹⁵⁷ This reasoning came into full bloom in the "institutional doctrine" cases of the 1930's,¹⁵⁸ in which cases New Jersey courts held that oil burners and built-in refrigeration units became nonremovable parts of the realty, without regard to fixture filing, where removal would injure the "institution" which they served—typically an apartment house. If the "institution" were injured there would also be an injury to the realty mortgagee's security. These cases under section 7 of the UCSA however cannot be reconciled with New York decisions under what was basically the same statute. Subsection (5) of section 9-313 seems clearly to reject the "institutional doctrine" by allowing the fixture secured party with a proper priority to remove upon payment of physical damages, notwithstanding economic loss to the remaining realty.¹⁵⁹ However, subsection (1) of section 9-313 seems to say that one looks to the earlier fixture law of New Jersey to determine when the rules of subsection (5) apply. It seems obvious that there will be considerable confusion until this inconsistency is resolved.¹⁶⁰

The law of New York perhaps goes as far as any in allowing the unpaid conditional vendor to remove his collateral over objections by the real estate interests. New York courts accepted neither the in-

¹⁵⁶ 44 N.J. Eq. 244, 14 Atl. 279 (Ct. Err. & App. 1888).

¹⁵⁷ *Id.* at 251, 14 Atl. at 283.

¹⁵⁸ The New Jersey cases held that certain fixture-like items fell within the language of the first sentence of the UCSA § 7. See, e.g., *Russ Distrib. Corp. v. Lichtman*, 111 N.J.L. 21, 166 Atl. 513 (Ct. Err. & App. 1933); *Domestic Elec. Co. v. Mezzaluna*, 109 N.J.L. 574, 162 Atl. 722 (Ct. Err. & App. 1932). Once this was decided, the question of whether a fixture filing was made was immaterial since no UCSA security interest survived in such goods. Compare the exclusion of incorporated goods in Code § 9-313(1). For perhaps the best discussion of the New Jersey cases, see the study by Professor Farnham, *The Conditional Sale of Fixtures in New York*, in NEW YORK LAW REVISION COMMISSION REPORT 679 (1942).

¹⁵⁹ It is not without interest that one would have to search a long time to find the kind of domestic refrigeration found so essential to apartment house living in *Russ Distrib. Corp. v. Lichtman*, *supra* note 158. It apparently was of the same type as the system over which two Massachusetts fact-finders disagreed in the *Commercial Credit* cases discussed at pp. 1209-10 *supra*.

¹⁶⁰ These two provisions have produced some interesting comments in the New Jersey Study Comment annotations to N.J. STAT. ANN. § 12A:9-313 (1962). The annotator states that the institutional doctrine cases are still material in determining what is affixed, though § 9-313(5) removes the restriction on the secured party's right to remove. In this watered-down form the doctrine is harmless, but also meaningless. New Jersey cases seemingly never went beyond goods somehow affixed; they did not include beer kegs or loose tools necessary for the operation conducted in the institution.

dustrial plant mortgage approach of Pennsylvania nor the institutional doctrine of New Jersey.¹⁶¹ Instead, the courts went so far as to permit the removal of all of the parts of an elevator in a building except the shafts which were bolted to the building walls.¹⁶² In 1942 one commentator found that the only goods a conditional vendor with the proper priority could not remove were hinges in a door.¹⁶³ In addition New York developed the "inherent chattels" doctrine which, briefly stated, is that some chattels, even though affixed to the realty, remain removable notwithstanding failure to file security interests in them in the manner required for fixtures. In *Madfes v. Beverly Dev. Corp.*,¹⁶⁴ the New York court retained, after adoption of the UCSA, the "inherent chattels" doctrine. One outstanding authority on fixtures maintained that this decision abolished all hope of any real uniformity among the states under section 7 of the UCSA since, in New York, the conditional vendor would often be protected even if he failed to file as required by section 7.¹⁶⁵ Presumably, the Code likewise would incorporate this peculiar aspect of New York's fixture law, thus giving no protection in the form of a filing to future purchasers of the real estate who might reasonably expect they had purchased certain classes of goods along with the realty.

III. CONCLUSION

The Code has a series of provisions which relate to fixtures. Most of the provisions are basically sound in conception, but the Code does not tell us when the provisions become operative or, in other words, what is considered a fixture. It is painfully clear from the previous discussion that the Code cannot successfully prescribe the application of its fixture provisions by referring to non-Code law. There are several reasons for this:

(1) The term fixtures is used principally in common law not to describe a class of property, but rather to express a conclusion that the rights of one party in an item of property are superior to the

¹⁶¹ See Farnham, *supra* note 158.

¹⁶² *Harvard Financial Corp. v. Greenblatt Constr. Co.*, 261 N.Y. 169, 184 N.E. 748 (1933).

¹⁶³ Farnham, *supra* note 158, at 681 & n.8.

¹⁶⁴ 251 N.Y. 12, 166 N.E. 787 (1929).

¹⁶⁵ Niles, *supra* note 135, at 97 n.181 (1934):

The language [of §7 of the UCSA] should be broad enough to include apartment house refrigeration systems, mail chutes, gas stoves in apartment houses, *etc.*, but the New York courts have read into the section their old test and definition of fixture, and hence the purpose of the section has been largely defeated.

rights of another party. Frequently the conclusion, and hence the resulting definition of fixture, is derived from a situation where the issues were quite different from those which arise from a conditional sale of fixtures under the Code (for example, whether rights of a lessor are subordinate to those of a lessee or whether the rights of a mortgagee or other grantee are superior to those of a grantor, or vice versa). A decision which made perfectly good sense when the court was construing a contract between the parties may make no sense at all where a third party conditional vendor is concerned.¹⁶⁶ In some states the term "fixture" is used very little or not at all in the Code sense, and a broader question is posed as to whether or not the item in question has or has not become "part of the realty." A statement that it has become part of the realty is likewise a conclusion that the rights of one who claims the item as part of the realty are superior to the rights of one who claims under chattel law. Further, characterization of an item as "part of the realty" leaves unanswered the question of whether the item has been incorporated into a structure, and hence is never removable under chattel security law, or whether it is only "affixed" and removable by a secured party who qualifies under subsection (5) of section 9-313.

(2) In many states, adoption of the Code makes drastic changes in the circumstances under which goods which are affixed to the real estate can be removed by a secured party. These changes are based upon policy considerations, and are crucial in determining the relative priority of the parties. These considerations must not be defeated by reference to a definition of fixtures produced under different policy objectives.

(3) There is no possibility of achieving a reasonably uniform operation of article nine if we must rely upon the inconsistent (or worse, so far as conditional sales are concerned, nonexistent) fixture law of the individual states.¹⁶⁷ A corollary of this is that a reasonable degree of uniformity brings a reasonable degree of consistency, presently lacking, both within and between states.

Even though the word fixture is not formally defined in the Code, the most obvious place to look in order to determine its proper use

¹⁶⁶ See *Colton v. Michigan Lafayette Bldg. Co.*, 267 Mich. 122, 255 N.W. 433 (1934), in which the court reached the conclusion that elevator operator uniforms were fixtures. The holding makes sense in light of the contract between the parties that the court was interpreting, but it would be monstrous to hold that an out-of-state conditional vendor of clothing is charged with notice that a security interest in elevator operator uniforms can be protected only by a filing in the realty records.

¹⁶⁷ It is worth noting that business equipment and consumer goods are the only fixtures that present a classification problem.

is section 9-313 itself. Like other article nine terms used to describe classes of collateral, the term "fixture" is likely to answer the question "when" rather than the question "what."¹⁶⁸ Lumber, *when* held for sale, is part of the owner's inventory. However, it ceases to be inventory, and in fact can no longer serve as collateral under any Code security interest *when* it is "incorporated into a structure." If and *when* converted into a table and sold, it becomes "equipment"¹⁶⁹ of a business debtor who uses it as collateral, or "consumer goods"¹⁷⁰ if bought for family use. The classification of a particular item determines which of the Code's alternative rules apply. The Code generally draws reasonably clear lines as to when goods fall into one category or the other, but the line becomes less clear when, for example, lumber is made into a removable panel in a place of business or a home and is affixed to the wall. The difficulty lies in describing the circumstances "whether and when"¹⁷¹ this occurs.

This writer has suggested previously that a court which is interested could interpret the fixture provisions in accord with the intent of the draftsmen.¹⁷² To reach a sensible result, one could begin with the operative provisions of subsection (5) and read all other provisions in the light of the purpose of this subsection. All parts of section 9-313 other than subsection (5) merely help to tell when its removal rights become operative. Fixtures, under this approach, refer to a class of goods which are affixed to the realty (but not incorporated into a real estate structure thereon), and can be removed even when removal results in material injury—either physical or economic—to the freehold (and consequently to persons having an interest therein). Subsection (5) merely places on the remover a duty to obtain the proper section 9-313 priority and to repair any physical damage caused by removal. Thus subsection (5), when coupled with subsection (2) (dealing with the priority of the conditional vendor against existing real estate mortgagees), reverses the pre-Code rule in some states that the rights of an existing real estate mortgagee were superior to those of a conditional vendor¹⁷³ even if the vendor had made a fixture

¹⁶⁸ The one good thing that can be said about the second sentence of § 9-313(1) is that it recognizes this fact of life.

¹⁶⁹ UNIFORM COMMERCIAL CODE § 9-109(2).

¹⁷⁰ UNIFORM COMMERCIAL CODE § 9-109(1).

¹⁷¹ UNIFORM COMMERCIAL CODE § 9-313(1).

¹⁷² Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer*, 38 IND. L.J. 535 (1963). The article is reproduced in expanded form under the same title in 2 SECURED TRANSACTIONS, ch. 16.

¹⁷³ *Clary v. Owen*, 81 Mass. (15 Gray) 522 (1860). See p. 1207 *supra*.

filing.¹⁷⁴ These subsections reverse much pre-Code law as to what goods can be removed by whom, and against whom.¹⁷⁵

The first sentence of subsection (1) is a limitation on the general removal rights granted by subsection (5): "The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists" The sentence might conceivably have been made part of subsection (5), but it is probably better placed where it is,¹⁷⁶ because it better warns a conditional vendor that there are circumstances under which no chattel security interest survives.¹⁷⁷ Chattel secured parties are forced to accept the fact that social utility limits their rights to reclaim goods which have generally lost their identity as fully as those described in this sentence. Furthermore, this sentence is helpful in its implication, reinforced by reference to "other goods" in the succeeding sentence, that goods incorporated into a structure are the only goods which cannot be removed, either unconditionally as chattels or under the conditions specified in subsection (5). The class of nonremovable goods described in subsection (1) is much narrower than those which the UCSA made nonremovable because their removal would cause material injury to the freehold.¹⁷⁸

In most cases, goods which are made nonremovable by this first sentence of subsection (1) would, as a practical matter, be made nonremovable by the duty imposed under subsection (5) to repair the

¹⁷⁴ *Waverly Co-op Bank v. Haner*, 273 Mass. 477, 173 N.E. 699 (1930).

¹⁷⁵ In addition to Massachusetts, see notes 173-174, *supra*, these subsections reverse what may remain of the industrial plant mortgage doctrine of Pennsylvania. See pp. 1200-01 *supra*. They also reverse the pre-Code rule of New Jersey that a conditional vendor could not remove as against a prior real estate mortgagee any goods which have become part of the realty, including equipment necessary for the comfort of tenants, or goods whose removal would result in loss of security to the earlier real estate mortgagee. See p. 1219 *supra*.

¹⁷⁶ If this sentence were in subsection (5), it would not prevent creation of a fixture interest in bricks in a chimney, but would prevent their removal. How such a security interest could be enforced is not clear. Presumably it would have some effect in establishing priority to proceeds from the sale of the collateral as a whole, or in a Chapter X bankruptcy reorganization. It is not too unreasonable to give an existing real estate mortgagee a veto over the addition of goods so incorporated as a condition to the right of severance.

¹⁷⁷ It can be argued that the second sentence of subsection (1) also serves as a warning to the conditional vendor as well as acting as a limitation on the removal rights under subsection (5). However, there is a significant difference between the two sentences. The first sentence lists the goods to which it applies while the second sentence refers us to state law, which in many instances does not exist for determining what is and what is not a fixture in the Code sense of the term. The essential point is that if the second sentence is read as a limitation on the rest of the fixture rules the result would be to completely nullify the rules themselves, and therefore, at least in some states, there would have been no purpose in adopting this part of the Code.

¹⁷⁸ See note 154 *supra*.

physical damage caused by removal. In this sense, it can be argued that the first sentence of subsection (1) is unnecessary. However, the sentence is important because it takes cognizance of the social utility in leaving the structure intact rather than relying only on the economic test of removal. Part of the usefulness of possessing a fixture interest is the threat to remove; that threat may be too unfair when it comes to removing aluminum siding on a house.¹⁷⁹

Since the third sentence of subsection (1) is closely related to the sentence just discussed, we may jump over the second for the moment. The third sentence says: "This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate." While a careless reading of this sentence might lead to some erroneous conclusions, the sentence itself is strictly correct—it speaks not of the *priority* of a fixture encumbrance, but rather of its *creation*. If under pre-Code real estate law a furnace installed in a house benefits an earlier real estate mortgage, that mortgage likewise attaches to the furnace after passage of the Code, but under subsection (2) of section 9-313 the real estate interest is subordinate to the interest of a conditional vendor. If the debtor has a forty percent equity in the furnace, that forty percent equity, and not one hundred percent, initially falls under the real estate mortgage. As the purchase price is paid, the real estate mortgagee's junior interest gradually increases until eventually it becomes the only security interest in the furnace.¹⁸⁰ Section 9-313 necessarily changes those cases which say that under the state's real estate law certain chattels (other than those covered by the first sentence of subsection (1)), though sold under a conditional sales contract, become a nonremovable part of the realty, and thus feed an earlier real estate mortgage at the expense of the unpaid conditional vendor. Therefore, the real estate interest in the new item may be less than it would have been under the pre-Code law of some states.

This brings us to the second sentence of section 9-313(1) which reads: "The law of this state other than . . . [the Code] determines whether and when other goods [i.e., other than goods incorporated into a structure] become fixtures." This sentence is probably the source of most of the confusion as to when the Code's fixture provisions apply. However, if it is analyzed in context, one can make some sense out of this example of bad drafting. It should be inter-

¹⁷⁹ Cf. *American Home Improvement Co. v. MacIver*, 201 A.2d 886 (N.H. 1964), in which the court held a security agreement on siding unconscionable and therefore invalid under the Code's § 2-302(1).

¹⁸⁰ If the secured debt was increased after affixation, the part representing the increase would be subordinate to the realty interests. UNIFORM COMMERCIAL CODE § 9-313(3).

preted as though it read: *Except as otherwise provided in this section 9-313, [T]he law of this state other than this Act determines whether and when other goods become fixtures. Only if construed in this manner would it be consistent with the aims and policies of section 9-313 as a whole.*¹⁸¹ It would be senseless to interpret the second sentence (or the third) of subsection (1) as a restriction on all the other provisions of section 9-313.¹⁸² On the other hand, with the proper qualifications the use of the term "fixtures" in the second sentence of subsection (1) and again in subsections (2) and (3) may even help delineate the boundary between fixtures and ordinary chattels, because indefinite as the term is, its connotation of physical *affixation* gives some help in deciding when it is necessary to file for fixtures.

While the preceding analysis demonstrates that the Code can be read in a way which will not emasculate it, practitioners cannot be assured that courts will reach the interpretation argued for above. There seems to be no doubt that section 9-313 should be revised in order to insure proper and consistent results. The most obvious place to begin any effort to amend section 9-313 is the sentence that has caused the most difficulty, the second sentence of subsection (1), which sends us to non-Code law to determine when the Code's fixture provisions apply. This sentence must be deleted. Instead there should be substituted a reasonably workable definition of fixtures.

It is possible to establish a foundation by defining fixtures in their most minimal sense of something which is physically affixed to the realty, but not incorporated therein in the manner referred to in subsection (1). Beyond that it is difficult, if not impossible, to state any valid positive definition. Definitions may be negative as well as positive; section 9-106 defines the important term "general intangibles" by exclusion of other categories, and section 9-109 defines "equipment" partly by exclusion and partly by inclusion. It is possible, in this same manner, to define fixtures as those items which are affixed but are neither incorporated into the structure nor straight chattels. In order for such a classification to function properly it would be necessary to draft tight and careful definitions for the two categories of nonfixtures. In doing so there is much merit in following as much of the present section 9-313 scheme as we can, particularly because it has been adopted by about forty jurisdictions. Furthermore, section

¹⁸¹ In some states the concept of a fixture may be expanded by the provisions of § 9-313(4) and § 9-401(1) which, for the first time, will provide in that state a mechanism by which notice of a fixture security interest can be given in the realty records to future realty purchasers.

¹⁸² See note 177 *supra*.

9-313's defects are curable without disturbing its essential concepts, which are sounder than those of the other statutes discussed.¹⁸³

There is no evidence that section 9-313 was influenced by the fixture provisions of the current Canadian counterpart of our UCSA, but it so happens that the strengths of the two acts tend to complement each other. The Canadian act¹⁸⁴ excludes from its coverage "building materials," a term rather fully defined in subsection 2(d), and at a later point goes on to set out the terms on which a pre-affixation security interest in fixtures can be preserved after affixation. We might well redraft subsection (1) of section 9-313, recasting some of the Canadian language to fit those concepts of section 9-313 which are sound. Subsection (1) might then read as follows:

9-313. Security Interests in Fixtures.

(1) The following rules govern the application of this Article to goods associated with particular real estate.

(a) Neither the fixture rules nor any other rules of this Article shall apply to goods after they have become building materials, and no security interest in them can thereafter exist under this Article. Fixture rules include those of this section 9-313 and the fixture filing rules of Part 4 of this Article.

The term building materials includes goods that have become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some part of the building and thereby cause substantial damage to the building apart from the value of the goods removed, but the term does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping or uncoupling, or some other method of disconnection, and does not include equipment or consumer goods installed in a building for use in the carrying on of an industry or activity where the only substantial damage, apart from the value of the equipment or consumer goods removed, that would necessarily be caused to the building in removing the equipment or consumer goods therefrom is that arising from the removal or destruction of the bed or casting on or in which the item is set and the making or enlargement of an

¹⁸³ The 1915 and 1935 Pennsylvania Acts, discussed at pp. 1198-1205 *supra*, seem to have worked reasonably well, but it seems highly artificial to deny that something affixed has become part of the realty at least for some purposes.

¹⁸⁴ *An Act Respecting Conditional Sales of Goods*, in 37 PROCEEDINGS OF ANN. CONFERENCE COMM. ON UNIFORMITY OF LEGISLATION (1955). Special note should be given to §§ 2(c), 2(d), and § 14. Also of interest is the narrower statute applicable only to banks, CAN. REV. STAT. c. 12, § 88 (1952). The writer is greatly indebted to Professor Jacob Ziegel, College of Law, University of Saskatchewan, for the opportunity of reading a chapter on fixtures in his forthcoming book on Canadian chattel security law.

opening in the walls of the building sufficient for the removal from the building. Building includes a structure, erection, or mine, erected or constructed on or in land.

The Canadian act helps us no further, but the third sentence of what is presently section 9-313(1) of the Code would continue to be useful as the last sentence in new subdivision (a).

This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate,

with the addition of a new clause:

but the priorities established by this section shall control where applicable.

Subdivisions (b) and (c) would then outline the categories of chattels and fixtures respectively.

(b) The fixture rules do not apply to any collateral other than equipment or consumer goods, nor to equipment or consumer goods not physically affixed to the realty, nor to such goods physically attached *only* by electrical cords or temporary water connections, nor do they apply to equipment physically attached *only* for a purpose such as reducing noise or vibration, or holding the equipment in place. Security interests in such collateral are covered by sections of Article 9 other than the fixture rules.

(c) The fixture provisions of this Article apply to equipment and consumer goods which relate to the functioning of the building, for whatever purpose it may be used (as distinguished from the functioning of particular activities conducted therein), including goods used for plumbing, heating, air conditioning, refrigeration, sprinkling systems and other equipment and consumer goods which are customarily physically affixed to the real estate, not including building materials referred to in subdivision (a) nor goods attached only for the purposes set forth in subdivision (b). Notwithstanding the provisions of paragraphs (a) and (b), such fixture rules apply to portable buildings other than those required to be registered or licensed in connection with motor vehicle laws.

These proposed rules eliminate most questions as to whether any security interest can be retained and should enable a secured party to determine whether Code fixture rules or nonfixture rules apply in the great bulk of the cases; no pretense should be made that they

eliminate all fixture questions, or the occasional need for both fixture and nonfixture filings on the same collateral.

The proposed amendment can be criticized because, among other things, it would hold that an electric stove or refrigerator is a freely removable chattel, but a gas stove or refrigerator can be removed only on compliance with the fixture provisions of subsection (5).¹⁸⁵ This seemingly incongruous result is the natural consequence of a classification which relies in part upon the method and purpose of attachment. However, the alternatives are even less promising, for they would hold that an electric space heater attached only by a cord is a fixture or, on the contrary, that a gas hot air heater is a chattel.¹⁸⁶ Furthermore, the attachment of a modern electric stove is likely not to be limited to an electric wire but rather to be built in to counters or walls—it is likely to be *affixed*. Any approach, whether based upon method of attachment or functioning relationship with the realty, will provide seemingly incongruous results. The test of success will be the ease of predictability and the minimization of such inconsistencies.¹⁸⁷

The language taken with some modification from the Canadian act makes fairly clear what is not a fixture because it is affixed too much (“building materials incorporated . . . into a building”), and the new subdivision (b) tells us what is not a fixture because it is not sufficiently affixed (remains a chattel). Subdivision (c) supplements both by establishing a class called “fixtures” which includes equipment and consumer goods not covered by subdivisions (a) and (b). It also includes an enumerated list of fixtures so that there will be a more specific understanding of its intent. While grey areas will continue to exist after this revision, there seems no doubt that they will be much smaller than before.

One might still ask whether a modern building elevator is incorporated into a building or merely affixed thereto.¹⁸⁸ From the conditional vendor’s point of view the amount involved may justify a demand that the debtor obtain for him a severance agreement executed and filed under real estate law. Of course a severance agreement cannot always be obtained, and even if it can, the debtor is forced to finance in a manner that is acceptable to the realty interests. On the other

¹⁸⁵ Assuming, of course, that each had only the minimum attachment to the realty.

¹⁸⁶ As a matter of policy it may be more appropriate to modify §§ 9-302(1) (c) and (d) in order to exempt low price (for instance, up to \$1,000) purchase security interests in fixtures for farm equipment and consumer goods.

¹⁸⁷ It is not difficult, for example, to distinguish between a portable dishwasher or clothes washer attached temporarily by a hose which can be disconnected by any amateur and a gas stove or a kitchen sink.

¹⁸⁸ Compare *Harvard Financial Corp. v. Greenblatt Constr. Co.*, 261 N.Y. 169, 184 N.E. 748 (1933), with *Medical Tower Corp. v. Otis Elevator Co.*, 104 F.2d 133 (3d Cir. 1939).

hand, perhaps items such as elevators, which are likely to cause the most confusion, should be dealt with specifically in the Code on a state-by-state basis. By dealing with particular problems in this way, the Code will notify all parties, resident and nonresident, of their rights before they commit themselves to a business transaction. Practically, this approach would also make the proposed changes more acceptable to real estate interests. While complete uniformity is sacrificed to the extent that these items are treated differently by the states, the advantages are that each particular case would be far clearer, the state-by-state variations more explicit, and the general result more uniform than our present treatment, which has been rejected in two important commercial states.¹⁸⁹

While it is clear under the proposed amendment that a fixture interest can be preserved in heating, plumbing, and air conditioning equipment, it is also clear that such equipment comes with the building unless a fixture filing gives notice to the contrary. The courts will no longer have to make the all-or-nothing choice that is inherent in a straight personal property-real property dichotomy, and therefore they will be much more inclined to hold that the conditional vendor could have protected himself by a fixture filing against a subsequent real estate interest, and that by not taking advantage of this privilege he has lost his priority rights.¹⁹⁰

¹⁸⁹ See pp. 1212-13 *supra* (Ohio); pp. 1215-16 *supra* (California).

¹⁹⁰ There have been legitimate complaints on the part of real estate interests that the Code's notice provisions are not quite satisfactory. The notice requirements and the definition of a fixture are related to the extent that greater certainty as to what constitutes a fixture will make the present notice provisions more meaningful. However, there seems to be at least one area in which the notice provisions could operate more effectively. We could adopt the Canadian requirement that the conditional vendor must notify the real estate interests prior to removing the fixture, and the real estate interests would then have the option of retaining the goods upon paying the amount owed by the defaulting debtor.