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Fixture Liens Under Chapter 9 of the Uniform Commercial Code in Florida

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FIXTURE LIENS UNDER CHAPTER 9 OF THE UNIFORM COMMERCIAL CODE IN FLORIDA

The enactment of chapter 679 of the Florida Statutes substantially changed the regulation of security interests in personal property and fixtures in Florida. This chapter now governs any transaction intended to create a security interest in personal property or fixtures[1] and abolishes for practical purposes many of the traditional distinctions that formerly existed among chattel mortgages, conditional sales agreements, and other lien or title retention contracts.[2] Distinctions are no longer based on formal lines, but rather on functional purposes, regardless of nomenclature.[3] The Code uses the term "security interest" to refer to any interest in personal property or fixtures that secures payment or performance of an obligation.[4] Since the provisions of chapter 679 governing rights, obligations, and remedies apply regardless of where title lies,[5] former distinctions are in many cases unnecessary.[6]

While it is now much simpler to create and file a security interest, the new method is not without problems. This fact is especially true in the area of fixture liens. This note deals with security interests in fixtures and specifically with the new Code provisions regarding the creation of the interest and the establishment of priorities among fixture security interests and other *real estate* interests.[7]

It is necessary to preface any discussion with a brief consideration of the current status of the fixture provisions in Florida. When the Code initially became effective in this state in January 1, 1967, the provisions were substantially those of the 1962 Official Text.[8] However, effective July 1, 1967, Florida Statutes, section 679.9-313 (section 9-313 of the Code) was radically altered.[9] As a result, Florida and two other states have adopted a minority position substantially different from other Code jurisdictions. Both Florida and Ohio[10] have almost identical statutory provisions, while California simply deleted section 9313 from its enactment.[11] Therefore, it is necessary to examine both the majority position, which governed in Florida for six months, and the present Florida position.

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1. FLA. STAT. §679.9-102 (1967).
2. UNIFORM COMMERCIAL CODE §9-101, Comment 1 (1962).
3. *Id.*
4. FLA. STAT. §671.1-201 (37) (1967).
5. FLA. STAT. §679.9-202 (1967).
6. Although for tax purposes, for instance, location of title may be important.
7. It is beyond the scope of this note to deal with priorities among competing *security interests* in the same collateral. This is covered primarily by FLA. STAT. §§679.9-301, -312 (1967).
8. *Compare* FLA. STAT. §679.9-313 (1967) *with* UNIFORM COMMERCIAL CODE §9-313.
9. Fla. Laws 67-264 (1967).
10. OHIO REV. CODE §1309.32 (Anderson Supp. 1967).
11. CAL. COMM. CODE §9313 (Deering 1963) notes that UNIFORM COMMERCIAL CODE §9-313 was not included in the statute enacting the Code in California.

DEFINITION OF A FIXTURE UNDER FLORIDA LAW

The initial determination to be made, of course, is whether the collateral in question is a fixture. Under section 679.9-313,[12] which sets out the priority of security interests in fixtures, the section's provisions are inapplicable "to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like . . ."[13] – construction materials generally. Other than this preliminary exclusion, non-Code Florida law determines if and when goods become fixtures.[14] Since there is no statutory definition in Florida, the definition becomes a matter of case law.

In *Commercial Finance Co. v. Brooksville Hotel Co.*,[15] the Florida supreme court stated that determination of whether a chattel had become a fixture was based upon three requirements. The first requirement was annexation to the realty, either actual or constructive; secondly, adaptation or application to the use or purpose of that part of the realty to which the chattel was attached; and finally, the intention of the party making the annexation that the chattel be a permanent accession to the realty.[16]

In *Commercial Finance*, a hotel company had entered into a conditional sales contract to purchase a commercial refrigeration unit of the "walk-in" freezer type. It was subsequently installed, with the necessary wiring and pipes, by being built into the walls. By the agreement, the dealer retained title until the purchase price was paid. Further, the creditor reserved the right to repossess, and the contract stipulated that the unit was to remain personalty. Commercial Finance Co., assignee of the dealer's contract, obtained a repossession order upon the buyer's default of payment, and the hotel company sought an injunction against removal. The hotel company alleged that by its affixation, the refrigerator had lost its character as personalty and had become a fixture, and consequently was not subject to repossession. This contention was rejected on appeal. Since the agreement stipulated that the unit was to remain personal property, the chattel failed to meet the third test – intent to make a permanent accession to the freehold. Because title was not in the owner of the freehold and he had agreed as to the personal character of the goods, the court reasoned that it could not have been his intent to make the unit a permanent part of the freehold.[17] Therefore, even though goods become so attached to realty as to become "fixtures" under an older common law "mode of annexation" doctrine, as between the parties and others with notice there might be agreement that they were to remain personalty, and the courts would not override the freedom so to contract. The court further stated that in inferring intent, four factors were to be considered: (a) the nature of the article annexed; (b) the relation of the party making the

12. FLA. STAT. §679.9-313 (1967).
13. FLA. STAT. §679.9-313 (1) (1967).
14. *Id.*
15. 98 Fla. 410, 123 So. 814 (1929).
16. *Id.* at 816
17. *Id.*

annexation; (c) the structure and mode of annexation; and (d) the purpose or use for which the annexation had been made.[18]

A year later, in the case of *Greenwald v. Graham*,[19] the supreme court reached substantially the same conclusion and applied the three-fold test, but without referring to its earlier decision. In both cases, the court acknowledged its decision to be in accordance with the more modern English and American decisions and against the older common law "mode of annexation" doctrine.[20] In addition, both cases quoted from an 1894 case, *Seedhouse v. Broward*,[21] which stated that "[i]n establishing the fact whether a given thing is or is not a fixture upon land, the intention of the owner in placing it here [*sic*], [is] to be gathered from his declarations, and from the character, relations and purposes of the property is an important element, sometimes of controlling importance."[22] It was this common ground upon which both the *Greenwald and Commercial Finance* decisions were based.

In *Greenwald*, the title to fixtures and furniture in question was in the owner of the freehold. He had severed and sold certain electrical switches, boxes, and interior ornaments, as well as the box office, from a theater building on the property four days before a foreclosure sale. As between the mortgagee and the purchaser of the goods in question, the disputed question was the character of the articles as fixtures. The court reasoned that the owner intended the fixtures placed in the walls of the theater to become permanent accessions to the freehold and ruled they were subject to the prior mortgage. The furniture and interior ornaments, on the other hand, were not. The question, however, was initially one of intent. Once the intent of the owner was established, the annexed fixture became subject to the prior realty mortgage, even though not specifically mentioned in the mortgage instrument.[23]

In both cases, the intent of the owner was a controlling factor. However, this statement gives rise to a caveat. An agreement between the owner and other parties involved in the affixation of chattels to realty, may not be effective against mortgagees or subsequent purchasers of the realty without notice of the agreement. This general rule was stated in *Burbridge v. Therrell*.[24] Involved there was a light frame cottage, which the owner of the cottage and the owner-mortgagor of the land agreed was to remain personalty. The court announced that subsequent purchasers or mortgagees, without notice of an agreement that an annexation should not become a fixture were not bound by the agreement, being entitled to the property as apparently forming part of the land.[25] Notice, of course, estopped such an assertion. A building or other fixture actually or constructively annexed became part of the mortgage security. However, the annexation might be such that the

18. *Id.*
19. 100 Fla. 818, 130 So. 608 (1930).
20. *Id.* at 610; Commercial Fin. Co. v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814, 816 (1929).
21. 34 Fla. 509, 16 So. 425 (1894).
22. *Id.* at 429-30.
23. 100 Fla. 818, 130 So. 608, 610-11 (1930).
24. 110 Fla. 6, 148 So. 204 (1933).
25. *Id.* at 207.

building did not become a part of the realty *ab initio*. If it might be inferred from the character of the structure or from the circumstances of its erection that it was not intended to remain permanently on the property, then it might be considered a severable erection. The consideration seemed primarily to be whether the building had become annexed. If there were apparent annexation from the beginning, the building could not be severed, notwithstanding an agreement to the contrary. Unlike the previous cases, the intent of the parties here was not necessarily the determining factor since a third party mortgagee was involved. While a mortgagor could place a movable structure on his property, he needed to be careful that the structure was not considered annexed without his mortgagee's consent and hence might possibly impair the mortgagee's security in the realty. In *Burbridge*, the court ruled that a building was prima facie assumed to be an accession.[26] In addition, a foreclosure sale terminated the rights of the mortgagor with whom the agreement had been made, and the parol agreement was not effective against the purchaser at the sale. It would seem that the only party who might ever be disadvantaged by a dubious annexation would be a subsequent taker under the mistaken belief that he was acquiring rights in the annexations. However, the court specifically stated that the annexations inured to the benefit of a prior mortgagee as well – as an increased security for his debt.[27] The key was annexation.

The issue of the prior mortgagee had actually been decided earlier in *Seedhouse v. Broward*.[28] If the property in question had been annexed to the land in such a manner as to stamp it with the attributes of a fixture, it made no difference that it was placed upon the land subsequent to the mortgage. As between the mortgagor and the mortgagee and persons with notice, the fixture was subject to the mortgage.[29] The problem in *Seedhouse* was whether the equipment was so placed as to stamp it with fixture qualities. It was at this point that the court raised the *intent* criterion as controlling.[30] In this case, the mortgagee of the real property had assumed the equipment was to be a fixture. The real property was not of sufficient value to cover the amount of the loan, which had allegedly been made to cover the cost of the machinery. The court remanded the case to the trial court to allow the plaintiff-mortgagee to prove an alleged contemporaneous agreement that the defendant-mortgagor intended to purchase the equipment with the loan money and annex the machinery to the property as fixtures. The court noted that proof of such agreement would not of its own force enlarge the mortgage to include things that were not in fixtures in law or fact, but would only show the *intent* with which the machinery was placed upon the property.[31]

There was a further pre-Code consideration regarding a party's right to remove collateral affixed to the realty. Even though an agreement existed that the article remain personalty, or the presumption of fixture could be

26. *Id.*
27. *Id.* at 206.
28. Seedhouse v. Broward, 34 Fla. 509, 16 So. 425 (1894).
29. *Id.* at 429.
30. *Id.* at 430.
31. *Id.*

overcome, the property could not be removed if it would result in substantial injury to the freehold. This doctrine was enunciated in Florida in *Standard Motors Finance Co., Inc. v. Central Farmer's Trust.*[32] The conflict was between the conditional seller of an interior sprinkling system and the mortgagee of the building. The system was installed within the walls subsequent to the perfection of the mortgage. The court concluded that the agreement that the collateral remain personal property should be given effect whenever possible. Although removal required tearing out certain floor boards and plaster, the court stated that such damage was repairable and held for the seller. Even elevators in a seventeen story building have been deemed removable without substantial damage and foreclosure allowed.[33]

However, the seller in *Interstate Trust and Banking v. Warren*[34] was not so fortunate. The facts were similar to those of *Standard Motors,* but the court denied plaintiff's right to complete repossession. In this case, removal of the piping would have caused irreparable damage to certain parts of the building. The creditor was only allowed to repossess the sprinkler heads and exterior feed tank.

The substantial damage referred to is physical damage, not the fact that such removal would render the building useless for the purpose intended – such as a production facility.[35] As will be seen, however, the Code has abolished the "substantial injury" doctrine. This change eliminated the rather incongruous situation that a chattel might not be deemed a fixture, yet be such an integral part of the realty that its removal would substantially destroy the property.

There is one further general exception to the rule that fixtures become part of the realty. Customarily "trade fixtures" installed by a lessee to conduct his business are removable at the termination of the lease.[36] The presumption is that the tenant placed the fixtures on the property to promote his own interests, not enrich the landlord.[37] Such things as air-conditioning units utilized by the lessee of a restaurant have been deemed trade fixtures and removal permitted.[38] The substantial injury doctrine applied, though, regardless of "trade-fixture" characterization.[39]

The questions that undoubtedly arise regarding the status of fixtures in Florida are not unique in this jurisdiction. In fact, an early and often cited American case stated:[40]

> It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on the subject of fixtures. . . . One thing is quite clear in the midst

32. 117 Fla. 217, 157 So. 520 (1934).
33. Wheat v. Otis Elevator Co., 23 F.2d 152 (5th Cir. 1927).
34. 69 F.2d 368 (5th Cir. 1934).
35. Meena v. Drousiotis, 146 Fla. 168, 200 So. 362 (1941).
36. Wetjen v. Williamson, 196 So. 2d 461 (1st D.C.A. Fla. 1967).
37. *Id.*
38. Ridgefield Investors, Inc. v. Holloway, 75 So. 2d 208 (Fla. 1954).
39. *Id.*
40. Strickland v. Parker, 54 Me. 263, 265 (1866).

> of the darkness; and that is, that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

Curiously, the present definition in Florida, as set out by the *Commercial Finance* case, appears to have first been enunciated in an early Ohio case, *Teaff v. Hewitt*,[41] where the three general criteria, as well as the four determinates of intent, are almost verbatim as reported in the Florida decision. Like Florida, Ohio enacted the Official Text provisions, lived with them for a short while, and amended them.[42]

The provisions of section 679.9-313 (1) provide that the initial determination of whether the Code section applies depends upon state law. Therefore, in Florida, the case law set out above will continue to govern the application of the Code provisions, despite the fact that the rules of law set out in those cases regarding priorities are no longer applicable. It is this rather anomalous situation that requires a basic understanding of the older common law before delving into the new Code provisions.

Operation of the Code

Under Florida Statutes, section 679.9-401 (1) (b), it is now possible to perfect a security interest in fixtures, or goods to become fixtures, by recording the lien in the office and in the record book where a mortgage on the real estate concerned would be recorded.[43] There is no requirement for an additional filing with the chattel records.[44] In Florida, of course, this filing would be with the real estate records kept by the circuit court clerk in the county where the realty is located.[45]

Provisions of the Official Text and Florida Between January and July 1967

Under the Official Text provisions, and in Florida, between January 1, 1967, and July 1, 1967, it is necessary to understand and distinguish two important terms: "attachment" and "perfection." Both refer to the operation of establishing a security interest under the Code. (As will be noted later, the new Florida provisions render "attachment," as an act in itself, unimportant in the area of fixture liens.) Under section 679.9-204,[46] a security interest under the Code cannot "attach" until the last of three events occurs: (1) there is agreement that it attach (meaning the bargain of the parties), (2) value is given, and (3) the debtor acquires rights in the collateral.[47] In order to "perfect," this interest it is necessary that a fourth step occur: a financing statement must be properly filed.[48] When the last of these four

41. 1 Ohio St. 511 (1853).
42. Law of May 18, 1961, §1309.32, 130 Laws of Ohio 13, 159 (amended 1963).
43. *See* 66 Op. Att'y Gen. Fla. 52 (1966).
44. Uniform Commercial Code §9-401, Comment 2; Op. Att'y Gen. Fla., supra note 43.
45. Fla. Stat. §28.22 (2) (1967).
46. Fla. Stat. §679.9-204 (1967).
47. *Id.* at §679.9-204 (1).
48. Fla. Stat. §679.9-302 (1) (1967).

events occurs, the security interest, in this case in a fixture, is perfected. Prior to the amendment in this state, lien priorities could have arisen merely by attachment in certain instances.[49] In determining the lien priorities in fixtures under the Official Text and the first Code provisions in Florida, the initial question was whether or not the security interest "attached" before or after the goods became affixed to the realty.

If the attachment came prior to affixation, Code section 9-313 (2) governed.[50] The fixture security interest had priority over claims of all parties with an existing interest in the realty, except as stated in subsection (4).[51] Only *attachment* prior to affixation was necessary to establish priority in all cases except three, dealt with by former section 679.9-313 (4). The three realty interests were those of (a) a subsequent purchaser for value, (b) a creditor with a subsequent lien obtained by judicial proceeding, or (c) a creditor of record who made a subsequent advance. Priority over these three interests required *perfection* prior to affixation.[52] If a party without knowledge of the security interests, and *prior* to its perfection, acted to put himself in one of three categories of subsection (4), then his interest would not be junior to the interest in the fixture.

Example One: *Attachment Prior To Affixation.* For example, a vendor agreed to sell goods and subsequently installed them such that they became fixtures. Vendee made a downpayment and signed a conditional sales agreement. At this point a security interest had attached prior to affixation and, under old section 679.9-313 (2), the vendor had established a senior lien on the soon-to-be fixture over all existing interests in the real estate. However, if one of the three contingencies of subsection (4) occurred, the vendor lost his priority over that creditor or subsequent purchaser. In order to be senior, the vendor must have *perfected* his security interest prior to the occurrence of the contingency. It would also be noted that a purchaser at a real estate foreclosure, other than the mortgagee himself, was a "subsequent purchaser" within the subsection (4) exception.

If the attachment came after the goods had been affixed to the realty, old section 679.9-313 (3) governed. The security interest was valid against all subsequently acquired interests in the realty, with the exception again of the three instances noted above. However, as to persons holding interests in the realty at the time of *attachment*, the security interest was invalid unless the party having the realty interest had either consented in writing to the security interest, or disclaimed an interest in the good as fixtures.

Example Two: *Attachment Subsequent To Affixation.* Altering example one somewhat, suppose the transaction was a cash sale and trade-in. *After* installation, the vendee borrowed from a lender who took what would have

49. FLA. STAT. §679.9-313 (2) (1965) (although not effective until Jan. 1, 1967, the Code was printed in the back of the 1965 Fla. Stat.).
50. *Id.*
51. FLA. STAT. §679.9-313 (4) (1965).
52. *Id.*

formerly been a chattel mortgage on the new fixture acquisition. At the time of attachment of the lien, the lender's priority was junior to any realty interest in the vendee's property. Unless he could secure a disclaimer of interest in the fixture or a consent to the security interest, the lender's security interest would remain junior. Furthermore, until the lender perfected his security interest, it would be subordinate to any interest acquired by parties described by subsection (4).

New Amendment Provisions in Florida Effective July 1967

By the provisions of the new amendment, sections 679.9-313 (2) - (5) were substantially altered. Presently, the establishment of senior fixture liens is dealt with exclusively by subsection 679.9-313 (2), while subsection (3) deals with recovery of security upon default.

The amendment made several significant changes in the former section 679.9-313. First, "attachment," no longer has any independent efficacy. As to the acts of the parties, the present requirements are that the lien be "perfected" not merely "attach."[53] Also significant is the fact that a distinction is no longer made between whether the establishment of the lien occurred before or after the physical affixation of the goods to the property. Under the new amendment, the significant point in time is when *both* affixation *and* perfection have occurred.[54] Regardless of which occurs first, the occurrence of the last of these two events establishes the benchmark for determining fixture lien seniority among the competing interests.

If the real estate interest is prior in time to both perfection and affixation, section 679.9-313 (2) (a) governs. In such cases the fixture lien would, by statute, be junior to the existing real estate interest. Without the intervention of the third party realty interest, the fixure lienor can never establish a senior lien on the goods as fixtures. However, the statute provides that by obtaining a written consent or a disclaimer of interest in the goods as fixtures, the vendor or creditor may establish a primary lien upon the secured property.

In effect, the new amendment merely requires visible evidence both at the site of the real estate and in the courthouse records. Thus, in examples one and two neither the vendor in example one, nor the lender in example two, can establish a primary security interest against a prior mortgagee or secured party. Only by the acquiesence of this prior interest holder can the security interest take a senior position.

On the other hand, in example one, if the vendor "perfects" his lien prior to affixation, then at the time his goods become physically annexed to the vendee's property, his priority is established. If at any subsequent time a mortgage is taken on the property the mortgagee would have only a second claim against the fixture. In the second example, where the lender took a security interest in a newly installed fixture, his lien would still be junior to any interest existing in the real estate; and until he *perfects* his security

53. FLA. STAT. §679.9-313 (2) (1967).
54. *Id.*

interest, his lien will be junior to any real estate interest arising between installation and perfection.

Obviously, the new amendment has wrought a substantial change in the establishment of fixture security interests. An unwitting reliance upon the substantive provisions of the Official Text or similar foreign state requirements, would in most cases result in no priority at all. Mere "attachment" without "perfection" is insufficient. Without the intervention of the holder of a prior interest in the real estate, the fixture security interest can never stand first in priority. Failure to meet these new requirements may well leave the secured party without compensation upon a default, a foreclosure by the real estate mortgagee, or a sale to a subsequent purchaser.

FILING

Under the Official Text provisions, the secured party should "attach" and "perfect" his lien prior to affixation. By present Florida law, prior attachment is of no importance any longer.[55] What is necessary is that the secured party be aware of any prior encumbrances upon the real estate before he takes his final step — whether it is the perfection of the lien or the affixation of the goods. Logically, the secured party would first examine the records, obtain any consents or disclaimers necessary, perfect by filing, and then install the goods. This procedure would avoid the unfortunate situation where the lienor affixes and later learns he cannot obtain a senior interest. Where this is not possible, the vendor should perfect his security interest as soon as possible after affixing the goods since an intervening real estate interest could defeat his lien priority. The perfection, of course, primarily involves filing a proper financing statement.

As previously mentioned, attachment may occur merely by agreement and affirmative acts between the debtor and the creditor. However, somewhat in the spirit of the real property recording statutes, perfecting requires a filing sufficient to give some notice to third parties who may subsequently acquire interests in the realty and hence in the fixtures. Generally what is filed is the financing statement,[56] although a copy of the security agreement may be sufficient as a financing statement if signed by both parties.[57] Under the statute, prior to its amendment effective July 1, 1967, a description of the property *sufficient to identify it was required* — no legal description of the land to which the fixture was attached was necessary.[58] Under the statutory scheme of the new section 679.9-402 (1), the name and address of the debtor, the name and address of the secured party, and the description of the goods affixed or to be affixed is required as before, but in addition there must be a legal description of the realty to which the affixation is made, and the name of the record owner or lessee of the realty must be indicated.[59]

55. FLA. STAT. §679.9-313 (1967).
56. FLA. STAT. §679.9-402 (1967).
57. *Id.* at §679.9-402 (1) (b).
58. FLA. STAT. §§679.9-402 (1), -110 (1965).
59. FLA. STAT. §679.9-402 (1967). FLA. STAT. §679.9-110 (1967) was also amended to conform with the legal description requirements where real estate is involved.

The completed statement is filed with the real property records in the office of the clerk of the circuit court in the county where the real property is located.[60] Regarding filing with the clerk, Florida enacted a special section to supplement the Code.[61] By this section, there is no requirement of oath, acknowledgement, or proof of execution. In addition, no document is deemed "filed" unless accepted and *recorded* by the filing officer.[62] Mere presentation for filing is insufficient where filing with the clerk is required.

Once filed, the statement is effective for five years, unless the maturity date is specified for a shorter period. If the document has a stated maturity there is a sixty day "grace period" at its expiration, after which its effectiveness lapses.[63] The security interest then becomes unperfected. However, the secured party may file a continuation statement to retain his perfected interest beyond the maturity date or statutory five-year limitation.[64] If the financing statement had a stated maturity date, the secured party may file a continuation statement within six months before maturation or sixty days after; otherwise he must file within six months of the five-year expiration date.[65] A continuation statement need only identify the original agreement by file number, state that the original statement is still effective, and be signed by the secured party.[66] Upon filing of the continuation statement, the perfected interest is extended for five years from the last effective day of the original. Timely filing of continuation statements may extend the security interest indefinitely.[67]

Having established a priority over all other creditors, the secured party is entitled to repossess upon default. The only requirement is that he reimburse any encumbrancer (who is not the debtor and who has not otherwise agreed) for the cost of repairing *physical* damage.[68] This reimbursement does not include damages resulting from diminution in real estate value caused by absence of the goods or necessity of replacement.[69] This provision is a complete reversal of the "substantial injury" doctrine previously applied in Florida. A fixture lienor might have been denied repossession of his fixture security because removal would have wrought a "substantial injury" to the real estate prior to the enactment of the Code. Now, however, the mortgagee can only require that the lienor post a damage bond to cover the cost of repairs necessitated by the removal of the fixture, and give reasonable notice of intent to remove.[70] He cannot thwart the removal by showing the structure would be destroyed by the taking. It is conceivable, (although doubtful) that

60. FLA. STAT. §679.9-401 (b) (1967).
61. FLA. STAT. §679.9-4011 (1967).
62. FLA. STAT. §§679.9-403 (1), -4011 (1967).
63. FLA. STAT. §679.9-403 (2) (1967).
64. FLA. STAT. §679.9-403 (3) (1967).
65. *Id.*
66. *Id.*
67. *Id.*
68. FLA. STAT. §679.9-313 (3) (1967).
69. *Id.*
70. *Id.*

an inexpensive structure could be razed to allow access to a valuable fixture, if the lienholder valued the fixture security more than the cost of the building.

Although the enactment of the Code provides some solutions to the conflicts that existed between interests in fixtures and realty, it is by no means a universal panacea. First, all of the foregoing is inapplicable if the goods in question are not deemed fixtures by the courts. One of the purposes of the Code is to facilitate commerce through custom, usage, and agreement,[71] but this is not necessarily a new purpose. Many of the pre-Code cases attempted to protect the creditor's rights in the goods by recognizing "title retention" agreements, looking to intent, or allowing removal in cases of no substantial injury. The Code does not alter the previously established legal definition of fixtures, but it is submitted that the Code will effect changes by allowing the establishment of a superior security interest in fixtures. For instance, goods often retained their character as personality until paid for, so that the vendor might maintain a chattel lien superior to the realty mortgagee. Since this treatment as personalty is no longer necessary, can it be said as a matter of law that the parties intended the goods to remain personalty until paid for, and then become fixtures? The effect of the Code would seem to weaken such argument before the courts.

Nevertheless, a classification problem still exists. Section 679.9-401 (2) provides that a good faith filing made in an improper place is effective regarding the collateral to the extent that it complies with the filing requirements. While at first glance, this would seem to vitiate the error of filing (with the chattel records) what was later determined to be a fixture, such is not the case. The good faith provisions only avoid striking out of a *whole* financing statement covering multiple types of collateral. For example, suppose a financing statement were filed that included goods that were deemed business equipment, as well as goods that were deemed fixtures. If the filing were made in the county clerk's office with the chattel records, and with the secretary of state's office, the statement would be sufficient to perfect as to those goods that were deemed business equipment. However, despite the seller's good faith belief that all the property included in the financing statement was business equipment (and hence properly filed), a subsequent determination that some of the goods were in fact fixtures would void that part of financing statement covering the fixtures, and his good faith belief would be of no avail in court.[72]

The subsection does make actual knowledge of the financing statement sufficient to put a third party on notice, however.[73] But the decisions have held that filing in an improper place does not meet the requirements of part IV of article 9, and *only* knowledge can vitiate such an error.[74] The solution of course is simple enough: if the classification is questionable, file with both fixtures and chattels. If the goods are deemed consumer goods or farm equip-

71. FLA. STAT. §671.1-102 (1967).

72. *In re* Baker (E.D. Wis. 1967), 4 P & F UCC REP. SERV. 723 (1967).

73. FLA. STAT. §679.9-401 (2) (1965).

74. *In re* Dumont-Airplane & Marine Institution, Inc., 203 F. Supp. 511 (S.D.N.Y. 1962); *In re* Lux's Superette, Inc., 206 F. Supp. 368 (E.D. Pa. 1962).

ment, filing is still with the clerk of the circuit court, though in different records;[75] if any other personal property such as business equipment, filing is with the secretary of state.[76] In any case, a prudent party seeking to secure will file both as a chattel and a fixture to protect his security interest, since it is a simple matter to file another copy of the financing statement. For even if both parties to the security agreement concede the goods are to remain personalty, the court may take an approach similar to *Burbridge*, and classify the goods as fixtures. In such a case, filing as a chattel will not protect the secured party. His interest will remain unperfected.

CONCLUSION

As it can be seen, the enactment of the Uniform Commercial Code in Florida wrought a complete change in the fixture lien provisions of this state's law. The subsequent amendment has, of course, sacrificed the interjurisdictional uniformity in this area that the Code sought to provide. In addition, part of the simplicity of establishing a superior lien upon goods to be affixed to the realty has all but vanished. Florida's new provisions definitely impose a greater burden upon the seller or potential lienor than do the Official Text provisions. The secured party must now file an extensive statement to maintain his priority over even a preexisting mortgagee, *and* obtain a disclaimer of consent.

However, the new fixture provisions are not without merit. Requiring the filing of a statement including the legal description and the record owner or lessee will facilitate the searching of titles and prevent misinformation among creditors, unintentional or otherwise. In a sense, while deviating from the uniformity of the Code, it provides a certain degree of uniformity in the real property filing. The average purchaser is not likely to think in terms of the previously discussed cases when he views his prospective purchase or security. He may very well assume that many of the appurtenances attached to the realty are in fact a part of the realty and dismiss any question as to their possibly being fixtures. Under the Official Text provisions, a search of the title might very well turn up nothing indicating a lien upon any part of the real estate or improvements, since street addresses in most cases bear no resemblance to legal descriptions. Likewise, the Official Text provides only for the name of the purchaser, who may easily be one other than the owner or the lessee. This provision renders the use of a grantor-grantee record book practically useless. Florida's amended provisions cure these ills. Whether these advantages outweigh the disadvantages created by the difficulty of perfecting remains to be seen and undoubtedly depends upon the critic's position in the security transaction.

Undoubtedly, the greatest problem, which exists and will continue to exist, is the problem of defining the term "fixture." Academically, the problem is not unduly difficult, but as a practical matter it is apparently monumental. Obviously, neither the Code nor Florida's amendment has made any attempt

75. FLA. STAT. §§679.9-401 (1) (a), (b) (1967).
76. FLA. STAT. §§679.9-401 (1) (c) (1967).