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# THE MARYLAND LAW OF FIXTURES

By SHALE D. STILLER\*

The law of fixtures is murky and obtuse. The Uniform Commercial Code, recently enacted in Maryland,<sup>1</sup> is intended to be neither murky nor obtuse. Although in many areas of commercial law, the Code has succeeded in cleansing the Augean stables, the law of fixtures remains only half-cleansed. This article will examine the Code's impact on the law of fixtures,<sup>2</sup> and will conclude with a brief discussion of certain non-Code aspects of fixtures in Maryland.<sup>3</sup>

Fixtures problems arise in many contexts. The vendor of real estate may contend against the vendee that the contract of sale was not intended to include an item such as a chandelier or an oil burner. The tenant who makes improvements to leased premises may contend that at the expiration of the lease term the improvements can be removed by him. The heir to real estate may have claims which conflict with those of the executor or the next-of-kin, who receive everything but the real estate.

The Uniform Commercial Code deals with the following type of problem: New heating equipment is installed in an apartment house. The apartment house is already subject to the usual form of real estate mortgage, and when the heating equipment is installed, it too is subject to a "lien" — a "security interest" held by the vendor of the heating equipment. The mortgagor eventually goes into bankruptcy, and the real estate mortgagee wants to foreclose upon the apartment house, including the heating equipment which, he contends, has become part of the real estate and thereby subject to his mortgage. The vendor of the heating equipment argues, however, that he certainly never intended his equipment to feed the security of the real estate mortgage, that he never would have installed the heating equipment unless he was assured of absolute priority in the event of the mortgagor's bankruptcy, and that he has a right to remove his heating equipment free from any claim of the real estate mortgagee. Thus, two persons — the holders of security interests in the real estate and in "fixtures" — claim that their respective security interests cover the same property.

In determining the priorities between these competing interests, pre-Code law varied throughout the United States. One approach favored the holder of the security interest in the heating equipment if he had followed the rules of state chattel security law in perfecting his

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1. MD. CODE ANN. art. 95B (Supp. 1964), effective February 1, 1964.

2. There are three excellent non-Maryland articles dealing with the Code's treatment of fixtures, all of which should be consulted by anyone with a problem in the field. Coogan, *Security Interests in Fixtures under the Uniform Commercial Code*, 75 HARV. L. REV. 1319 (1962), reprinted in 2 COOGAN, HOGAN, VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 1782 (1964); Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963); and Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44 (1964).

3. The best treatment of non-Code fixtures problems is 5 AMERICAN LAW OF PROPERTY §§ 19.1-14 (Casner ed. 1952).

interest.<sup>4</sup> Such an approach required that anyone searching the title to real estate would have to search not only the land records but also the chattel records to determine if the heaters, the air conditioners, and other items commonly known as fixtures "belonged" to the owner of the real estate. If the particular equities of the case demanded, however, that the real estate security interest not be subordinated, the courts generally following this rule would usually conclude that the particular chattel had become so merged with the real estate that it would be impossible to claim that the holder of the chattel security interest had anything "determinate" on which his interest could continue to attach. Another approach — often referred to as the so-called "Massachusetts rule" — compelled the opposite verbal result. *Quicquid plantatur solo, solo credit* — whatever is affixed to the soil belongs to the soil.<sup>5</sup> Under this rule, the slightest affixation would vitiate the chattel security interest. Yet, to avoid harsh results, the courts would merely pay lip service to the rule. For example, in one case it was held that something like a 5,600 pound engine was not a fixture and that the holder of a security interest in it would prevail over the mortgagee.

A third approach, reflected chiefly in section 7 of the Uniform Conditional Sales Act (enacted in only a dozen states), rejected the extremist verbal formulae of the first two approaches and tried to reach some accommodation between the interests of the real estate lenders and the chattel lenders. This accommodation often took the form of requiring the chattel lender to record his interest in the land records if the chattel would become a "fixture", whatever that was. There seemed to be general agreement that this kind of recording was necessary because it was not worth the nuisance to have real estate title examiners check both the land and chattel records. This accommodation further demanded, however, that despite recording, the chattel lender would have no right to remove his collateral if such removal would result in material injury to the freehold or if the collateral was necessary to the continuing functioning of the freehold.

It cannot be assumed that pre-Code Maryland law fell distinctly within any one of these approaches, for it is quite difficult to correlate into a consistent pattern the Maryland cases on the subject. All that can be said with any confidence is that whatever the Maryland law on the subject may once have been, it has conclusively been changed by the Code.

The earliest of the Maryland cases was *McKim v. Mason*.<sup>6</sup> This case involved a conflict between a mortgagee of land, improvements, machinery and fixtures, and a man who later sold to the mortgagor and installed, with brick and cement, heavy machines resting on foundations dug in the earth. The vendor of the machines did not reserve a security interest but relied solely on his mechanics' lien rights. The Chancellor and the Court of Appeals, both holding that the machines were fixtures,

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4. See *e.g.*, *Campbell v. Roddy*, 44 N.J. Eq. 244, 14 Atl. 279 (Ct. Err. & App. 1888), and *Tift v. Horton*, 53 N.Y. 377 (1873).

5. See *e.g.*, *Clary v. Owen*, 81 Mass. (15 Gray) 522 (1860).

6. 3 Md. Ch. 186 (1852), *aff'd sub nom.*, *Denmead v. Bank of Baltimore*, 9 Md. 179 (1856).

found in favor of the mortgagee because the mechanics' lien law expressly subordinated the lien of the materialman to the lien of prior mortgages.

The case, therefore, did not squarely present the kind of issue involved in the apartment house example, because the court decided it on the basis of a technical provision in the mechanics' lien law. By dictum, however, the Chancellor indicated that the holder of any type of subsequent security interest would be subordinated to a prior mortgagee of real estate and fixtures. The notion that the original mortgagee might not have contemplated or bargained for the additional security furnished by some third party was rejected. On the contrary, the Chancellor quoted an earlier remark of Chief Justice Shaw of Massachusetts:

"The expectation of such improvement and such increased value often enters into the consideration of the parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced."<sup>7</sup>

It is possible, however, to deprecate this language, not only because it was dictum, but also because the Chancellor said that the original mortgage document actually contemplated that improvements might feed the security of the mortgage. Without this factual nuance, one cannot predict whether the Chancellor would have gratuitously quoted Chief Justice Shaw's remark.

In any event, the case furnishes little solace for a businessman who furnishes consideration for the purchase of "fixtures". The borrower's problem of financing purchases of new equipment reaches an impasse if the borrower's prior mortgage will automatically blanket any new equipment, unless, of course, the holder of the prior mortgage expressly subordinates his lien to the security interest of the equipment vendor.

Elsewhere in the United States, however, the courts were beginning to develop a priority for the subsequent "purchase money" interest over the prior mortgage. This trend, brilliantly described in a recent article<sup>8</sup> by Professor Gilmore, began with cases involving railroads, which had executed mortgages containing after-acquired property clauses and then had found themselves unable to secure financing for new equipment because of the sweep of the after-acquired property clause. The Supreme Court of the United States stated the magic formula insulating the purchase money interest from the after-acquired property mortgage in the following words:

"A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he

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7. 3 Md. Ch. at 197.

8. Gilmore, *supra* note 2.

purchase property and give a mortgage for the purchase money, . . . no general lien impending over him . . . can displace such mortgage for purchase money.”<sup>9</sup>

At first, the Supreme Court applied this doctrine only to acquisitions of “loose property” such as rolling stock and not to parts of the permanent structure, such as rails, which were deemed to have become part of the freehold.<sup>10</sup> Since most non-railroad industrial establishments did not have property analogous to rolling stock, the Supreme Court, in 1914, extended the priority to purchase money interests in any type of collateral. *Holt v. Henley*<sup>11</sup> involved a question of priorities between a real estate mortgagee and the conditional seller of a sprinkling system which had been installed in the plant of the mortgagor. The system consisted of a fifty-thousand gallon tank on a steel tower bolted to a concrete foundation and of pipes which connected the tank with a mill. There was little doubt that the system constituted a fixture and was subject to the after-acquired property clause of the real estate mortgage. Mr. Justice Holmes said:

“To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws . . . ‘[T]he mortgagees take just such an interest in the property as the mortgagor acquired; no more no less’.”<sup>12</sup>

In *Detroit Steel Co. v. Sistrup*,<sup>13</sup> which involved brewing tanks surrounded by a bricked-up wall, and which was decided in the same year as *Holt*, Holmes went on to say that he would only subordinate the interest of the purchase-money creditor when the article was “to be incorporated into a structure in such a way that to remove it would destroy the other work, like bricks or beams in a building. . . .”<sup>14</sup> Brewing tanks not being like bricks or beams, the conditional seller was permitted to tear down the brick wall and remove the tanks, even though the brewery could not operate without the tanks.

These developments came to be accepted by most jurisdictions. However, the so-called “minority”, or Massachusetts rule, the New Jersey Institutional Doctrine, which denied the purchase money lender the right to remove his collateral if such removal would imperil the “integrity” of the enterprise or institution, and the Pennsylvania Industrial Plant Mortgage Doctrine, which subjected to the real estate mortgage all machinery, “fast or loose”, did not accept the general view of the Supreme Court.<sup>15</sup>

9. *United States v. New Orleans R.R.*, 79 U.S. (12 Wall.) 362, 365 (1871).

10. *Galveston R.R. v. Cowdrey*, 78 U.S. (11 Wall.), 459 (1871).

11. 232 U.S. 637 (1914).

12. 232 U.S. at 641.

13. 233 U.S. 712 (1914).

14. 233 U.S. at 717.

15. See *e.g.*, note 5, *supra*; *Russ Distrib. Corp. v. Lichtman*, 111 N.J.L. 21, 166 Atl. 513 (Ct. Err. & App. 1933); *Voorhis v. Freeman*, 2 W.&S. 116 (Pa. 1841).

Maryland, on the other hand, neither accepted nor rejected the Supreme Court's rationale but seemingly ignored it in a hodgepodge of ambiguous opinions. In *Bankers & Merchants' Credit Co v. Harlem Park Bldg. & Loan Ass'n*,<sup>16</sup> the owners of real estate gave a mortgage on their property to a building association. A year later, the owners contracted for the erection of a metal garage on the rear of their property, to be paid for in installments. The conditional vendor of the garage recorded a memorandum of the contract in the conditional sales records. A dispute arose over the application of the proceeds of a foreclosure sale by the building and loan association.

The Court of Appeals held that the interest of the conditional vendor of the garage was subordinate to the interest of the building and loan association. The court directed its analysis solely to the question of whether the garage was a "fixture" — if a fixture, it was subject to the real estate mortgage; if not a fixture, it was free from the real estate mortgage. The argument was made to the court that even if the garage were a fixture, the conditional vendor should prevail. The argument, however, was not forcefully pressed. The conditional vendor's brief merely cited a group of easily distinguishable Maryland cases and made no mention either of the Supreme Court decisions in *Holt* and *Detroit Steel* or of any theory of purchase money priority. The Court of Appeals, it should be noted, went out of its way not only to say that cases in other jurisdictions favoring the conditional vendor, including *Holt* and *Detroit Steel*, which had been referred to by the court in a previous Maryland case, "were not referred to with the view of adopting them in this jurisdiction," but also cited with approval the whole Massachusetts line of authority, despite the fact that the Massachusetts cases were not even mentioned in the building and loan association's brief.

With this momentum, it was not difficult for the Court of Appeals three years later to resolve a similar conflict in favor of a prior mortgagee of real estate against a subsequent chattel mortgagee of a hot water heating system, who had recorded his chattel mortgage in the chattel records. In *Heating & Plumbing Fin. Corp. v. Glyndon Perm. Bldg. Ass'n*,<sup>17</sup> the court merely discussed the question of whether the heating system was a fixture, assuming that if it were, the chattel mortgagee was out of court.

The same kind of analysis was again used in *Schofer v. Hoffman*,<sup>18</sup> where the court rejected an action in trover by the conditional vendor of an oil heater and water tank, which had been installed upon the direction of the lessees of the real property, against the owners of the real property. The ironic aspect of this case is that the Court of Appeals, in *Wurlitzer Co. v. Cohen*,<sup>19</sup> a case decided even before *Harlem Park*, indicated that the holder of the chattel security interest might be successful if the conditional vendee were a lessee, on the theory that the law usually granted a lessee of real estate, as against his lessor, a right to remove fixtures installed by the lessee. *Harlem Park* had distin-

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16. 160 Md. 230, 153 Atl. 64 (1931).

17. 167 Md. 222, 173 Atl. 198 (1934).

18. 182 Md. 270, 34 A.2d 350 (1943).

19. 156 Md. 368, 144 Atl. 641 (1929).

guished *Wurlitzer* on the ground that the latter involved a landlord-tenant situation. Even though this argument was raised in the *Schofer* case in the conditional vendor's brief, the Court of Appeals did not even allude to it in the opinion, believing that it was either irrelevant or unanswerable.

The *Wurlitzer* case contains probably the best opinion of the Court of Appeals on this whole subject.<sup>20</sup> *Wurlitzer* dealt with an organ purchased under a conditional sales contract by the lessee of a theater. When the tenant defaulted on the conditional sales agreement, the conditional vendor attempted to remove it, and the landlord objected. The court first determined that the organ was not a fixture, but then stated that even if it were a fixture, the lessor could not prevail. The court, citing *Holt* and *Detroit Steel*, approved the "modern equitable rule as distinguished from the so-called Massachusetts rule to the contrary"<sup>21</sup> on the ground that the lessee-conditional vendee never had title which he could give to his lessor or mortgagee. In *Harlem Park*, however, as we have seen, the court claimed that it really didn't mean, in *Wurlitzer*, to say that it approved of the "modern equitable rule". Giving the *Harlem Park* court the benefit of the doubt, perhaps all it was doing was applying a different rule in landlord-tenant cases. But *Harlem Park* and *Schofer* did not readily promote a clear-cut pattern on which Maryland lawyers could rely.

What effect does the Uniform Commercial Code have on this jumble?

Section 9-313,<sup>22</sup> is the only Code section dealing entirely with fixtures. The essence of section 9-313 is contained in subsection (5)

20. This may be attributable, in no small part, to the fact that Judges Oppenheimer and Markell — in their pre-judicial guise — were opposing counsel.

21. 156 Md. 368, 375-76, 144 Atl. 641, 644 (1929).

22. 8 MD. CODE ANN. art. 95B (Supp. 1964):

§ 9-313. Priority of Security Interests in Fixtures.

"(1) 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 under this subtitle unless the structure remains personal property under applicable law. The law of this State other than this article determines whether and when other goods become fixtures. This article 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 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

which, basically, gives to anyone with a security interest in a fixture a right to remove the fixture if he has priority over persons who have interests in the realty, as determined under subsections (2) and (4), or (3) and (4). If the party with the security interest in the fixture has priority, he may, on default by the debtor, remove the collateral irrespective of any injury to the realty caused by the removal, provided that he pays or gives security to the holder of any interest in the real estate (who is not the debtor) for the cost of repairing whatever injury to the real estate results from the removal. No reimbursement is required, however, for any diminution in the value of the real estate which is caused simply by the absence of the goods removed. Thus, if the holder of a security interest in the heating equipment for an apartment house removed his equipment, he would have to pay for any damage to the apartment (such as holes in the walls), but he would not have to pay for the substantially greater damage to the value of the apartment house that would be measured by the absence of heat from the building.

If, however, the holder of the security interest in the fixture does not have priority over the real estate mortgagee, he cannot remove his fixture upon foreclosure, unless the holder of the real estate mortgage consents. The rules contained in subsections (2), (3), and (4), summarized below, determine the priorities between fixture-secured parties and the holders of realty interests.

### 1. *Preaffixation Security Interests.*

Subsections (2) and (4) provide that a security interest which has attached to a chattel before it becomes a fixture, even if not perfected by filing, takes priority over all *existing* interests in the realty; it also takes priority over all realty interests arising after affixation except those claimed by persons who, without knowledge of the security interest and before it is perfected, become purchasers for value of interest in the real property, obtain a lien on the real estate, or make a contract for advances under a prior recorded realty mortgage. Thus, a fixture security interest which is perfected before the fixture is affixed to the realty comes ahead of all present and future realty interests; the

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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. It should be noted that when California adopted the Code, it refused to adopt this section, and Ohio, after living with it for a year, revised it substantially." See 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).



filing of a financing statement in the land records<sup>23</sup> before affixation will insulate the fixture-security interest from any attack. Since most security interests in fixtures which are perfected prior to affixation will be purchase money interests, it is apparent that the scope of the protection given by the Code to the person who furnishes funds for new equipment is very broad.

## 2. *Post-Affixation Security Interests.*

Subsection (3) deals with fixture-security interests which do not attach until after affixation. Such interests are invalid against anyone with an existing interest in the real estate. Thus, if the debtor has mortgaged all of his real estate, and the mortgage includes his heating equipment, a subsequent loan made by a third party on the security of the heating equipment would be subordinate to the interest of the real estate mortgagee because the heating equipment had been affixed before the new lender's interest had attached. The new lender's interest will, however, take priority over all subsequent interests in the realty except those in the same three classes which, under subsection (4) would also take priority over preaffixation security interests.

The above rules can best be understood by a few simple examples. Assume that General Electric sells an air conditioning system to the XYZ Department Store of Baltimore City pursuant to a conditional sales contract. The system is installed in such a manner that it becomes a fixture under Maryland law. Despite the fact that General Electric, in searching the records, discovered that the Second National Bank had already recorded a mortgage encumbering all the real estate and fixtures owned or thereafter acquired by XYZ, General Electric files a financing statement in the proper land records of Baltimore City before the air conditioning system is installed.

1. If XYZ defaults on its payments to General Electric, the latter may, under the Code, remove the air conditioning system upon payment for any damage to the real estate. The fact that the removal of the air conditioning system impaired the value of Second National's security in an amount far greater than the actual physical damage to the real estate is irrelevant (albeit the removal occurs during the middle of the summer season). Apparently, the same result will follow if General Electric had removed old air conditioning equipment when it installed

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23. The rules on filing in order to perfect a security interest in fixtures are as follows:

§ 9-401,

"(1) The proper place to file in order to perfect a security interest is as follows:  
(a) When the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where, and in the same records as, a mortgage on the real estate concerned would be indexed and filed or recorded."

§ 9-402,

"(1) When the financing statement covers . . . goods which are or are to become fixtures, the statement must (in addition to the general requisites of a financing statement) also contain a description of the real estate concerned. . . ."

the new equipment; Second National's remedy here would be an action for waste against XYZ.<sup>24</sup>

2. If XYZ sells or mortgages all of its assets *after* General Electric has perfected its interest in the air conditioning system, the subsequent purchaser or mortgagee is subordinate to General Electric because the subsequent purchaser or mortgagee had at least constructive notice of General Electric's security interest by virtue of the filing of General Electric's financing statement in the land records.

3. If General Electric did not file a financing statement, its security interest would not be perfected, but it would still have priority over Second National's mortgage. General Electric's security interest would be subordinate, however, to the interests of any subsequent bona fide mortgagees or purchasers who, could not, in searching the land records, discover the existence of General Electric's security interest.

4. If, however, General Electric sold the air conditioning system to XYZ on open credit, and after it had been installed, General Electric suddenly determined that it might be advisable to secure XYZ's debt by means of a chattel mortgage type of arrangement, the rules of 9-313(3) would demand that General Electric be subordinate to all preexisting interests in the real estate, even if General Electric subsequently filed a financing statement. The verbal rationale is that the real estate mortgage covers the fixture in the state in which it was affixed; if it were subject to a security interest, when it was affixed, section 9-313(2) subordinates the real estate interest; if, on the other hand, the air conditioning system were not subject to a security interest when it was affixed, section 9-313(3) subordinates the vendor of the fixture despite subsequent filing. Anyone who takes an interest in the property after the filing is, of course, subordinate to General Electric's security interest, regardless of whether affixation preceded or succeeded filing.

From the above analysis, it can be seen that the Code will reverse the results of the old Maryland cases. *Harlem Park, Heating & Plumbing Finance Corp.*, and *Schofer* would all have been decided differently under the Code even if the holder of the fixture security interests in those cases had not filed a financing statement. These cases all involved preaffixation fixture interests — *i.e.*, purchase money security interests in a fixture which attached before the fixture was affixed to the real estate. The one Maryland case involving a fixture interest which had "attached" before affixation, but whose result would not change under the Code, is *Abramson v. Penn.*<sup>25</sup> In this case, Penn sold to Redwood Garage, Inc., under a recorded conditional sales contract, ten gas steam radiators. The following year, Redwood Garage, Inc. sold to Abramson the real estate on which the radiators had been installed. When Redwood Garage, Inc. later defaulted on the conditional sales contract, Abramson contended that (a) Penn had no right to the radiators, the

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24. Gilmore and Kripke feel that, in addition, under some circumstances, Second National may also have an action against General Electric for removing the "trade-in" air conditioner. See Gilmore, *supra* note 2, at 1366-67 and Kripke, *supra* note 2, at 78-79. This possibility may impel General Electric to try to get Second National's waiver of any rights against General Electric.

25. 156 Md. 186, 143 Atl. 795 (1928).

radiators being fixtures which, Abramson contended, passed under the deed to the real estate, and (b) Abramson was not on notice of the conditional sales contract because the conditional sales recording statute was inapplicable to chattels which later became fixtures.

Although the court found that the radiators were not fixtures and therefore did not pass to Abramson under his deed, it did indicate, by dictum, that if the radiators had been fixtures, Abramson would not have been on notice of the conditional sales contract on the theory that realty men should not be charged with notice outside of the realty records.

“The obvious purpose of the statute was to protect the interests of vendors under conditional sales contracts, but not to permit them to entrap or defraud innocent purchasers of real property by inducing the illusory impression that goods and chattels integrated with real estate and apparently a part thereof are real property, when in fact they are not. And where the conditional sales vendor participates in, or consents to, such integration, he should not thereafter, as against the innocent purchaser of the realty, be heard to say that the goods and chattels are not what they appear to be.”<sup>26</sup>

The Uniform Commercial Code fully adopts the rationale of this dictum from *Abramson*. Under subsections (2) and (4) of section 9-313, Penn's security interest would be valid against all prior holders of realty interests, without the necessity of filing a financing statement; however, to protect himself against a subsequent purchaser such as Abramson, or from attack by the trustee in bankruptcy of Redwood Garage, Inc., Penn would be required to file a financing statement in the land records.

#### SOME PROBLEMS UNDER THE CODE

Despite their solution of many problems, the Code rules on fixtures do create new ones. One difficulty relates to the recording problem where the debtor giving the security interest is not the owner of the real estate, but is someone else, such as a lessee. A description of the real estate in the financing statement will be useless in a jurisdiction where only a grantor-grantee index is in use. The official version of the Code contains nothing comparable to section 9-402(6),<sup>27</sup> which is Maryland's attempt to solve the problem. In Baltimore City, where the block system is in use, the secured party of fixtures will list the block in which the real estate is located, so that anyone searching the land records should discover the existence of the financing statement. In the counties, however, where there is no block system, the owner's

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26. 156 Md. at 192, 143 Atl. at 797.

27. “If a statement relates to collateral which is goods which are or are to become fixtures, such statement must state conspicuously at its top ‘To Be Recorded in the Land Records’ and any such statement tendered for filing in Baltimore City or in any county where a block system is maintained for recording papers among the land records shall contain in the description of the real estate the house number and street, if there be any, or the block reference.”

chain of title will not reveal the financing statement in which his lessee was the debtor, and presumably anyone dealing with the owner does so at his peril, unless he ascertains whether any tenant has created a security interest.

The issue of tenant's fixtures raises an even more basic question: is section 9-313 applicable to the holder of a security interest in a tenant's fixtures, or is it applicable solely to the holder of a security interest in the fee owner's fixtures? Section 9-313 probably should apply where a long term lease is involved and the conflict is between the leasehold mortgagee and the conditional vendor of equipment. Where, however, the ordinary short-term lease is involved, should the holder of the fixture-security interest be required to file a financing statement to perfect his interest against a subsequent purchaser or mortgagee of the lessor? The answer is not clear on the face of the Code. Homer Kripke thinks that section 9-313 should not be applicable to the financing of fixtures of a short-term tenant.<sup>28</sup> He postulates that since the tenant, under the law of most states, has the right of removal as against the lessor or the lessor's mortgagee without the necessity of giving notice,<sup>29</sup> the tenant's conditional vendor should likewise not be required to give such notice. The Maryland law clearly gives a tenant the right to remove his fixtures,<sup>30</sup> so that Kripke's argument would be relevant in this State. If the conditional vendor does file, however, and the Code rules are applicable to his filing, it could be argued that he has rights which are greater than those of the tenant, by virtue of the fact that he can remove his fixtures even after the tenant had violated the lease by, for example, abandoning the premises. The problem of the proper manner of handling a security interest in tenant's fixtures becomes even more serious when one considers that if the Code does not require the conditional vendor to file, and the tenant becomes the owner of the premises by virtue of exercising an option-to-buy in the lease, the conditional vendor, who ordinarily does not receive notice of the exercise of the option, would then not have filed even as to the owner.

Another problem which the Code does not adequately answer is whether a materialman who sells equipment to a building contractor for installation on the owner's land, and who retains a security interest should be required to file a financing statement in the land records. The owner of the land is wholly unprotected under the Code, even if the security interest is unfiled, because the holder of the security interest does not have to file except for protection against the people listed in subsection (4) of section 9-313, of whom the owner of the real estate is not one. Even if filing were required, the owner would, in order to protect himself, be forced to search the land records during the course of construction — an undesirable and impractical alternative. Section

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28. Kripke, *Fixtures under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 66-69 (1964). See also Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code*, 6 B.C. IND. & COM. L. REV. 61, 62-65 (1964).

29. 5 AMERICAN LAW OF PROPERTY, §§ 19.10-11 (Casner ed. 1952) contradicts Kripke at this point, by stating that the lessor's mortgagee should be given notice, although as a practical matter the result will usually be the same under either approach because the tenant's possession constitutes actual notice to the lessor's mortgagee.

30. See text *infra*, at notes 43-49.

9-307(1) of the Code, which provides that buyers in the ordinary course of business take the purchased property free from even perfected security interests, is of no help to the owner because it is applicable only to purchasers of goods, and a building contract is not a contract for the "sale of goods". Kripke's suggestion is that the Code should be changed to eliminate the validity of security interests in collateral which the secured party knows is going to be installed in buildings owned by others. He feels that such secured parties already have ample protection under the mechanics' lien laws.<sup>31</sup>

#### WHAT ARE "FIXTURES"?

The venerable problem of defining "virtue" is no more difficult than the problem of defining a "fixture". The Supreme Court of Washington put it quite bodily:

"We will not undertake to write a treatise on the law of fixtures. Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take. . . . 'There is a wilderness of authority. . . . [Fixture cases] are so conflicting that it would be profitless . . . to review or harmonize them'."<sup>32</sup>

Ex-Chief Judge Brune, no more enamored of the problem, wrote

"The problem as to what do and what do not constitute fixtures is often a difficult one, and there is a considerable twilight zone."<sup>33</sup>

That these remarks are not exaggerated may perhaps be demonstrated by attempting to reconcile a Maine case holding that a log chain was a fixture and therefore to be dealt with as if it were real estate,<sup>34</sup> with a Massachusetts case holding a firmly attached 5,600 pound engine to be a personal property.<sup>35</sup>

This lack of a precise dividing line between personal property, fixtures, and real estate is not, unfortunately, remedied by the Code. Section 9-313 begins by forcefully denying the ability to obtain a security interest in "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work, and the like . . . unless the structure remains personal property under applicable law." The supplier of lumber cannot, for example, retain a security interest in the

31. There would appear to be nothing improper, under the Code as presently drafted, in having both a security interest and a mechanics lien on the same collateral. One other *supra* problem, not discussed in this article, but analyzed in the articles cited in note 2 *supra*, is the question of priorities between a construction lender and the holder of a security interest in fixtures. Another difficult problem is caused by the fact that the fixture filing rules are applicable when the financing statement covers goods which "are or are to become fixtures". If the secured party does not know where the debtor plans to affix the fixtures, the secured party will not have a description of the real estate and will not know the jurisdiction in whose land records a statement should be filed.

32. *Strain v. Green*, 25 Wash. 2d 692, 695, 172 P.2d 216, 218 (1946).

33. *Born v. Hammond*, 218 Md. 184, 190, 146 A.2d 44, 47 (1958).

34. *Farrar v. Stackpole*, 6 Me. 154 (1829).

35. *Carpenter v. Walker*, 140 Mass. 416, 5 N.E. 160 (1886).

lumber and remove the lumber if the owner defaults. As to lumber and the other types of goods referred to in the first sentence of section 9-313, the only secured protection is by means of the real estate mortgage or the mechanics' lien.

The draftsmen of the Code then hibernate and blandly state: "The law of this state other than this Act determines whether and when other goods become fixtures."

That portion of the Maryland law which defines the word "fixtures", emanates primarily from the so-called "leading case", *Dudley v. Hurst*,<sup>36</sup> which was a contest between the holder of an 1883 mortgage covering land, "buildings and improvements" and the holder of an 1885 mortgage covering only machinery. The question was whether the machinery constituted "fixtures", because if it did, it would have been covered by the prior mortgage. The Court of Appeals laid down the following rules, which, by endless repetition, have attained with the court the status of Holy Writ:

"The tests by which a fixture is determined are generally these:

1st. Annexation to the realty either actual or constructive.

2nd. Adaptation to the use of that part of the realty with which it is connected.

3rd. The intention of the party making the annexation, to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed. . . .

"Of these tests the most important is the question of intention. This is clearly shown by the fact that the law is very different between landlord and tenant and mortgagor and mortgagee, or what is the same, vendor and vendee. Many things being held as fixtures between vendor and vendee, which do not lose their character of personal chattels when the question is between landlord and tenant. . . .

"That where in the case of machinery the *principal part* becomes a fixture by actual annexation to the soil, such part of it as may not so physically annexed, but which if removed would leave the principal thing unfit for use, and would not of itself and standing alone be well adapted for general use elsewhere, is considered *constructively* annexed.

"Thus the key of a lock, the sail of a wind-mill, the leather belting of a saw-mill, although actually severed from the principal thing, and stored elsewhere, pass by constructive annexation. They must be such as go to complete the machinery which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use. . . .

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36. 67 Md. 44, 8 Atl. 901 (1887).

"In this case there are some articles not *actually annexed* to the soil, such as crates, capping machines and work tables, but are essentially necessary to the working of the principal machinery, and pass by constructive annexation. The main machinery would not be in working condition without them, and they are not adapted for general purposes."<sup>37</sup>

In making the above comments, the Court of Appeals placed Maryland in the mainstream of American law. English law had discarded "intention" as irrelevant in determining whether an item was a "fixture". English cases emphasized the nature of the object and the manner of its annexation rather than the intention of the affixor or the relation of the parties. (It is curious to note, however, that before the 16th Century, it was the English custom to take out the windows upon moving away from a house.)<sup>38</sup> The American rule, and the Maryland rule as exemplified in *Dudley's progeny*, does not completely ignore the nature of the object and the manner of its annexation, but considers these as merely helpful factors in determining the intention of the affixor which is the ultimate fact in determining the presence of a "fixture".<sup>39</sup>

Perhaps the greatest difficulty in understanding this area is a semantic one. To the uninitiated, the word "*fixture*" automatically connotes something which is "*fixed*" or "*affixed*" to the real estate. *Dudley* demonstrates, however, that even a key to a lock can be a fixture. The basic determination which must be made is whether the item in question is essential to the functioning of the property. *Dudley* pays lip service to the materialistic concept of "affixation" by suggesting that "affixation" includes not only "physical affixation" but also something called "constructive annexation", and that an object is constructively annexed if other objects used in connection with the real estate could not properly and efficiently function without the particular object in question.

The underlying policy behind these verbalistic gyrations is said to be the promotion of industrial development. A tenant who installs machinery, without which the real estate cannot profitably be operated, cannot realistically be expected to install the machinery if he will not be permitted to remove the machinery at the end of his term. Therefore, the courts will say, in the landlord-tenant context, either that his machinery is not a "fixture" or that, even if it is a "fixture", it can be removed from the premises by the tenant. The owner of real estate who

37. *Supra* note 36, at 47-48, 50-51, 8 Atl. at 902-03. The introductory portion of the quoted language is itself a quotation from *Teaff v. Hewitt*, 1 Ohio St. 511 (1853), the leading American case.

38. Coogan, "The Uniform Commercial Code and the Real Property Lawyer (Panel Discussion)", in *PROCEEDINGS OF ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW* 6, 10 (Aug. 1963).

39. See 5 *AMERICAN LAW OF PROPERTY*, §§ 19.1-4 (Casner ed. 1952). Even the "intention" test is not free from ambiguity. The courts, including the Court of Appeals of Maryland, have never made it plain whether the intention "is the unilateral intention of the annexor at the time of annexation, or the bilateral intention of the parties to some transaction relating to the chattel or to the land, and whether it is the actual intention, or the manifested intention, or the imputed intention. . . ." *Id.* at § 19.1.

installs machinery on his own land, however, does so for the good of the property, and his trustee in bankruptcy should not be able to dismember the plant by contending that the real estate mortgagee should be prevented from foreclosing on the machinery as well as the real estate.

The rules and the policy can be stated with great simplicity. There are few things less fruitful, however, than trying to state with simplicity a "reconciliation" of the judicial attempts to apply these rules to concrete situations, and this paper will afford no panacea to the lawyer who wants to know whether a specific item is or is not a fixture. Indeed, the word "fixture" has become charged with so many different levels of meaning that it would be a boon to the profession if the word were exorcised. Lawyers and judges alike have failed to realize that all too often they have used the concept of a "fixture" as both a premise and a conclusion; too little attention has been given to an analysis of the following type of question — "Is it a fixture because it can be removed, or can it be removed because it is a fixture?"

When the Uniform Commercial Code, in defining a fixture, retreats behind the shaky facade of Maryland law, it thereby subjects the Maryland lawyer to a rather ill-defined body of law. It is fair to assume that the above-quoted language from *Dudley* will dominate Maryland attempts to define a fixture, for purposes of applying section 9-313. It is also fair to assume that those Maryland cases which have dealt with the question of whether certain objects were subject to a real estate mortgage will be of major importance, because this is the very context in which Code problems will arise. Indeed, it would not be rash to state the "law of this State", referred to in section 9-313 for purposes of defining a "fixture", means *only* the Maryland law defining a fixture for purposes of determining whether the item in question is subject to a real estate mortgage (or deed), and that the landlord-tenant cases, or cases arising in other contexts, are wholly irrelevant.

Fortunately, the Maryland cases are not legion. In each case the court concluded either that the property in question was subject to the real estate mortgage and therefore deserved the label "fixture", or that the property in question was not subject to the real estate mortgage and therefore retained its status as "personal property". Each of the cases repeat many of the themes of the *Dudley* quotation, and if a halting summary must be offered, it is this: as against a real estate mortgagee, any machinery or other chattel will be considered to be a "fixture" and therefore within the ambit of the mortgage, unless (1) it can be removed with minimal injury to the premises, and (2) it can, after removal, be used in another business or building.<sup>40</sup>

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40. The kinds of items which have been held to be fixtures are illustrated in the following Maryland cases: *Schofer v. Hoffman*, 182 Md. 270, 34 A.2d 350 (1943) (oil heater and water tank); *Anderson v. Perpetual Bldg. & Loan Ass'n*, 172 Md. 94, 190 Atl. 747 (1937) (crane and drills were integral parts of the entire granite cutting system, and if removed, would render useless the other units; also the units not permanently affixed would not be well adapted for general use elsewhere); *Bankers & Merchants Credit Co. v. Harlem Park Bldg. & Loan Ass'n*, 160 Md. 230, 153 Atl. 64 (1931) (16 x 18 foot metal garage, supported by six steel columns, sunk into concrete piers to the depth of 14 inches, the piers being set to a depth of 3 feet); *Solter v. McMillan*, 147 Md. 580, 128 Atl. 356 (1925) (various rings and molds, which were part of



The absence of precision in definition will have one inevitable result. Cautious lenders, not anxious to take the risk of guessing wrong, will treat their security as both fixtures and personal property; they will file a financing statement covering the fixtures in the land records and a financing statement covering the same equipment, but describing it as a certain type of personal property, in the Regular Financing Statement Records.<sup>41</sup> Even a third type of filing is permissible, for the Code expressly permits the holder of a security interest in a fixture to perfect his interest by means of a regular real estate mortgage.<sup>42</sup> A further filing problem may exist if the secured party has some concern over whether the collateral is actually real estate (in the nature of lumber, bricks, etc.) and not a fixture at all, in which case, the Code would be inapplicable. Here the safest course will be either to obtain a real estate mortgage or to record in the land records a waiver from the holders of all existing interests in the real estate.

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machinery used to make tires; without the rings and molds the machinery couldn't turn out tires and couldn't be used by any other company; rings and molds were essential not merely to the mere physical movement of the machinery but also to the efficient working of the machinery); *Warren Mfg. Co. v. Mayor & City Council*, 119 Md. 188, 86 Atl. 502 (1913) (machinery in mills); *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901 (1887) (boiler placed upon a brick foundation in a boiler house built for that purpose; in order to remove the boiler, which weighed about 10,000 pounds, it would have been necessary to pull down the whole boiler house); *Kirwan v. Latour*, 5 Md. (1 H.&J.) 175 (1802) (pumps, cisterns, iron grating and door used in a distillery).

Among the cases finding that an item was not a fixture are: *Consolidated Gas Co. v. Ryan*, 165 Md. 484, 169 Atl. 794 (1934) (electric traveling crane which moved along rails attached to a building, used solely to pick up a load from one part of the building to carry it to another part of the building; crane could be removed without injury to the building at a cost of not more than \$150, it could be used for any business in any building in which it could be operated, and it was not actually annexed to the building); *Homesekers Realty Co. v. Silent Automatic Sales Corp.*, 163 Md. 541, 163 Atl. 841 (1933) (portable oil burner except for pipes and tubing; but if the oil burner were removed, the pipes and tubing could be kept if someone else ever wanted oil heat); *Wurlitzer Co. v. Cohen*, 156 Md. 368, 144 Atl. 641 (1929) (organ installed in a theater on a floor frame which had been nailed to the floor; the organ could have been removed without damaging the premises, it was not peculiarly adapted to the theater in question, because it could be used anywhere and could be replaced by any ordinary pipe organ of the same size); *Abramson v. Penn*, 156 Md. 186, 143 Atl. 795 (1928) (gas steam radiators, weighing about 600 pounds each, which could readily be removed without damage to the property; "the radiators were . . . ten separate heating appliances, having no more connection with the freehold than an ordinary gas heater, portable kitchen range, or heating stove, which are . . . not fixtures"; The court distinguished cases where pipes were readily removable but which were a necessary part of a heating plan which was itself part of the freehold).

41. Cautious lenders will also be certain that both financing statements are executed originals, and that one is not a photostatic copy of the other. See *In re Kane*, 55 Berks County L.J. 1, 7, 9 (Pa. 1962). The scattershot approach of double filing and even triple filing should seriously reduce lawyers' fees, because it will no longer be essential for the lawyer to spend hours of erudite research in determining whether a given item is a "fixture".

42. MD. CODE ANN. art. 95B, § 9-313(1) (Supp. 1964). If a real estate mortgage is used, the proper procedure upon default is not clear. Section 9-501(4) states that if a security agreement covers realty and personal property, the secured party may proceed under the real estate law as to both, or under the real estate law as to the realty and under the Code as to personal property. If the latter alternative is adopted, the Code is silent as to the manner in which the secured party would proceed as to fixtures, if fixtures were also part of the collateral.

## LANDLORD-TENANT

The Maryland cases dealing with conflicts between a tenant desirous of removing his fixtures and a landlord who wants the fixtures to remain are, as previously indicated, probably not relevant in determining whether an object is a "fixture" for purposes of applying section 9-313. The basic reason is that the usual rules of fixture law are not applicable in the "landlord-tenant" context.

The rationale of the different rule is stated as follows:

"The rigor of the common law rule that any article that had become a fixture was considered a part of the freehold has been gradually relaxed as between landlord and tenant, so that articles which have been affixed to the premises by a tenant for the purposes of trade, of domestic convenience, or of ornament, may be removed by him, although, strictly regarded, they have become fixtures, provided, however, that they can be removed without serious injury to the premises. . . .

"The intent with which an article is annexed to the land or used in association with it is likely to be different in those cases in which one has a temporary interest in land, as a tenant, and in those in which one has a permanent interest, as vendor and vendee, one under contract to sell and one under contract to buy, and mortgagor and mortgagee of the realty. In those instances in which the attachment to the land has been made by a permanent owner, the general presumption of law is that the fixtures have become part of the realty, because most structures erected upon land by its permanent owners are usually intended to be permanent. This presumption, however, may be overcome by direct evidence that such was not the intent of the party by whom the article was annexed, or by the stronger adverse presumption that may sometimes arise from the application of the *criteria* for determining whether the article annexed is realty or personalty."<sup>43</sup>

The leading fixture cases in Maryland in the landlord-tenant area are *Northern Central Ry. v. Canton Co.*,<sup>44</sup> *Thompson Scenic Ry. v. Young*,<sup>45</sup> and *Wurlitzer Co. v. Cohen*.<sup>46</sup> In the *Northern Central* case, Canton granted to Northern Central a license to build a railway track over Canton's property. When the license was later revoked, the question arose as to whether Northern Central could remove the rails and other materials which constituted part of the railway. "No matter how strongly attached to the soil or firmly imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them."<sup>47</sup>

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43. *Homeseekers Realty Co. v. Silent Automatic Sales Corp.*, 163 Md. 541, 546-47, 163 Atl. 841, 843 (1933).

44. 30 Md. 347 (1869).

45. 90 Md. 278, 44 Atl. 1024 (1899).

46. *Wurlitzer Co. v. Cohen*, 156 Md. 368, 144 Atl. 641 (1929).

47. 30 Md. at 352.

The court also referred to "another exception to the general rule"—

"structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder; and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty, or is to be treated as personal property."<sup>48</sup>

In *Thompson Scenic Ry. v. Young*, the lessor leased vacant land to Kuehn who intended to build a summer resort. Kuehn contracted with the plaintiff for the construction by the latter of a scenic railway, which consisted not only of a railway, but also of a pavilion and a foundation made of brick piers "the entire apparatus . . . was to be constructed in a firm and substantial manner." Plaintiff, however, retained the ownership and possession of the railway plant and the right to operate it, until it was paid for, when it would be delivered to Kuehn. Kuehn also was supposed to erect a casino, hotel and various amusement rooms, which would attract people to the railway. Kuehn became financially embarrassed, however, and plaintiff proceeded to remove, with the consent of Kuehn's receiver, its railway. At this point, the landlord attempted to enjoin the removal of the railway and to distrain upon it for rent. The court stated:

"The proposition that a tenant cannot remove from demised premises structures erected by him therein which are so attached to the freehold as to become part of it, is a familiar principle of common law.

"A well-recognized exception, however, to the general rule permits the tenant to remove during his term structures erected by him, designed for the purposes of trade, even though they be so firmly attached to the freehold that he would not otherwise have the right to remove them. . . . This exception in favor of trade fixtures has been held applicable in the cases we have cited to houses, steam engines, furnaces, railway tracks, cider mills and like structures. The real question in such cases is not so much the nature of the structure as the purpose for which it was intended."<sup>49</sup>

The court held that the tenant could remove, although the opinion apparently indicates that in the usual case, the landlord can distrain for rent. Finally, in *Wurlitzer*, the court held that an organ, installed in a theater in a floor frame which had been nailed to the floor, could be removed by the tenant.

The law of fixtures occupies one other interesting niche in the history of the warfare between landlords and tenants. If a tenant renewed his lease at common law, the fixtures which he installed in the

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48. 30 Md. at 353.

49. 90 Md. at 281-82, 44 Atl. at 1025.

original term were deemed to have been abandoned by him at the end of the original term, so that he could not remove them at the end of the renewal term. The only way a tenant could protect himself was by expressly reserving the right to remove his fixtures at the end of the renewal term. *Carlin v. Ritter*,<sup>50</sup> and *Bauernschmidt Brewing Co. v. McCorgan*,<sup>51</sup> revealed to two tenants, who failed to make the express reservation, all the rigors of the common law. In 1898, a benign legislature changed the common law rule by what is now Article 53, Section 38:

“The right of a tenant to remove fixtures erected by him under one demise or term shall not be lost or in any manner impaired by reason of his acceptance of a new lease of the same premises without any intermediate surrender of possession.”

The statute was applied in *Rasch v. Safe Deposit & Trust Co.*,<sup>52</sup> where a tenant was permitted to remove an elevator, where the only damage to the building was a few holes in the elevator shaft caused by withdrawal of bolts.

### Taxation

Tax law has refused to have any truck with the law of fixtures. In a case involving an attempt by a taxpayer to contend that fixtures were not subject to personal property taxation, the Court of Appeals said:

“But in Maryland . . . the doctrine of fixtures, as between vendor and vendee, lessor and lessee, mortgagor and mortgagee, though recognized here as to these parties, has never been imported into the law of taxation. We do not doubt that as between these, this machinery would be held to be part of the realty, but it by no means follows that it should be so held here.”<sup>53</sup>

In *Canton Co. v. Comptroller*,<sup>54</sup> the issue was the applicability of the sales tax law to rentals for bridge cranes located on an ore pier, which had been mounted on rails but which could not leave the pier. They were specially designed for that location and were not suitable for use elsewhere. The court said that:

“It may well be that if the question was whether they were subject to the terms of a mortgage, they could be regarded as constructively annexed to the real estate. . . . For present purposes, we would agree that they are an integral part of the pier operation, cannot be removed without dismantling by cutting the metal, and are not well adapted to general use elsewhere, if, indeed, they would be salable except for scrap.”<sup>55</sup>

50. 68 Md. 478, 13 Atl. 370 (1888).

51. 89 Md. 135, 42 Atl. 907 (1899).

52. 136 Md. 435, 111 Atl. 121 (1920).

53. *County Comm'rs of Anne Arundel County v. Baltimore Sugar Ref. Co.*, 99 Md. 481, 484, 58 Atl. 211, 212 (1904).

54. 231 Md. 294, 190 A.2d 92 (1963), *appeal dismissed*, 375 U.S. 58 (1963).

55. 231 Md. at 297, 190 A.2d at 93-94.

Nevertheless, the court felt that the sales tax law applied to all machinery and equipment without regard to the doctrine of constructive annexation.<sup>56</sup>

The United States Treasury Department, in the acknowledged wisdom with which it promulgates income tax regulations, has adopted the same approach, in stating that the law of fixtures will be without relevance in determining whether an item shall be subject to the investment credit.<sup>57</sup>

#### CONCLUSION

There can be little argument about the fact that the Uniform Commercial Code clarifies and solves in a sensible manner many of the "fixtures problems" which have existed in Maryland. The Code, however, is not perfect, not only because of defects in its internal workings, but also because of its unrealistic assumption that "state law" will afford a reliable definition of a "fixture". It is hoped that the Permanent Editorial Board, formed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws to recommend changes in and amendments to the Code, will consider solutions to the difficulties which render less than perfect the Code's treatment of fixtures.

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56. See also *Comptroller v. Kaiser Aluminum Corp.*, 223 Md. 384, 162 A.2d 886 (1960).

57. Treas. Reg. § 1.48-1(c) (1964) ("Conversely, property may be personal property for purposes of the investment credit even though under local law the property is considered to be a fixture and therefore real property.")