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FIXTURES AND THE UNIFORM COMMERCIAL CODE IN NEW MEXICO*

I

CHATTEL SECURITY v. REAL PROPERTY SECURITY

As the economy of New Mexico continues to expand, lawyers will be called upon to handle more and more problems dealing with secured financing. Some of these problems will no doubt involve competing claims between those holding security interests in personal property and those with such interests in real property. As one writer has suggested:

[W]henver a security interest is taken in essentially movable property which has become closely associated with particular land, there arises a potentiality for conflict—conflict between the holder of the security interest and holders of interests in real estate. And no one can say that the interest of one is less worthy than the interest of the other.¹

Elimination or restriction of either type of interest would not be desirable. Those lending on real estate security expect that certain items associated with the realty can be relied on as security when a mortgage is taken. In a like manner, it is commercially desirable to give a secured party lending on chattel security some kind of protection when his security interest is in goods likely to become "fixtures."²

A typical situation creating such a conflict is one where a security interest is taken in personal property to be installed in a house, *e.g.*, a heating unit. The real property mortgagee may well rely on the unit as a part of his security. Thus, the conflict.

The Uniform Commercial Code attempts to reconcile some of

* New Mexico's version of the Uniform Commercial Code, N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (1953), is based on the 1958 Official Text, promulgated jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

Except for citing N.M. Stat. Ann. § 50A-9-401 (1953) (See Part IV *infra*), all references to New Mexico's version of the Code, often designated UCC both in footnotes and text, will omit the full statutory citation. Citations to "Comments" are those accompanying the 1958 Official Text.

1. Coogan & Clovis, *The Uniform Commercial Code and Real Estate Law*, 38 Ind. L.J. 535, 562 (1963).

2. Without some guarantee or protection for the secured party, fixture financing would be greatly discouraged. This would be financially disastrous to businesses or individuals with limited capital.

these conflicting interests. At the same time the draftsmen of the Code sought to "simplify, clarify, and modernize the law governing commercial transactions"³ and, where such uniformity is commercially desirable,⁴ to "make uniform the law among the various jurisdictions."⁵ The extent to which these goals have been accomplished in respect to the conflict between security interests in personal property and security interests in real property will be examined in relation to New Mexico's version of the Code.

The provisions in the Code which specifically treat the conflict outlined above are found in section 9-313.⁶ Accepting the fact that there are some items that become so associated with the realty as to

3. UCC § 1-102(2) (a).

4. This limitation upon the goal of uniformity is not stated in the Code, but it is evident in the various alternatives left to the adopting states. An example of such a situation is found in the filing provisions of the Code. See UCC § 9-401; N.M. Stat. Ann. § 50A-9-401 (1953).

5. UCC § 1-102(2) (c).

6. UCC § 9-313:

(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 Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

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

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

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

- (a) a subsequent purchaser for value of any interest in the real estate; or
- (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
- (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may,

eliminate their further consideration as personalty, section 9-313 (1) provides that no chattel security interest will continue to exist in "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like."⁷ The section then turns to the more difficult problem of treating goods which retain dual characteristics of personal and real property. These goods, called "fixtures," are not defined in the Code. Section 9-313 (1) says: "The law of this state other than this Act determines whether and when other goods become fixtures."⁸ Uniformity as a goal is disregarded. New Mexico's courts are free to determine what constitutes a fixture.

II

WHAT IS A FIXTURE?

In turning to the law of New Mexico to determine "whether and when other goods become fixtures,"⁹ there is little in the way of authority. The few cases treating fixtures do so only in a general framework and do not provide the specificity desired by those who are in search of definite guidelines. With the lack of local authority, it is helpful to examine the law of other jurisdictions. Such examination reveals two distinct lines of authority in the United States dealing with the definition of fixtures.¹⁰ New Mexico is free to choose either or to develop its own unique approach.

The minority of jurisdictions, although referring to fixtures, recognize only two types of property. Property in these jurisdictions is treated as being either wholly real or wholly personal. When goods are found to be fixtures, they are considered to be real property and as such are not removable.¹¹ Commonly, this is referred to as the

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.

7. UCC § 9-313(1).

8. *Ibid.*

9. *Ibid.*

10. These lines of authority are the majority, or "New Jersey" rule, and the minority, or "Massachusetts" rule.

11. See *Clary v. Owens*, 81 Mass. 522 (1860), which is perhaps the leading case setting forth this doctrine; see also 5 American Law of Property § 19.12 (Casner ed. 1952).

"Massachusetts doctrine."¹² A statement of the doctrine is found in one of the leading American cases on fixtures, *Teaff v. Hewitt*:¹³

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

* * * *

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

In contrast to this approach, the majority, or "New Jersey" rule,¹⁴ recognizes fixtures as constituting a third type of property. Fixtures are neither completely real property nor wholly personal property; they constitute an intermediate class. Under this doctrine, fixtures are treated as being part of the realty, but, nevertheless, they can be severed from the real property. The basic test of severability is whether material injury will be inflicted upon the freehold.¹⁵

Even though there is an apparent gulf between the two approaches to fixtures, there is not much difference in the end result.¹⁶ That is, goods that are deemed fixtures in those states which allow severability are treated as non-fixtures in the minority states.¹⁷ The difference seems to be one of semantics—the minority states protect security interests in goods by saying they are not fixtures, while the majority states call the same goods fixtures but protect the security interests in the goods by allowing removal.

This difference in the use of definitions presents a pitfall to the unwary lawyer in attempting to apply the fixture provisions of the Code. In allowing each state to resort to non-Code law to determine "whether and when"¹⁸ goods become fixtures, the Code presents a dilemma.

The Code's treatment of fixtures adopts the idea that fixtures are an "intermediate" class of property and are thus severable. Thus, the Code is consistent with "New Jersey" rule states which have followed the same rationale even before the Code.¹⁹ In the minority

12. See Gilmore, *The Purchase Money Priority*, 76 Harv. L. Rev. 1333, 1355 (1963).

13. 1 Ohio St. 511, 525, 527 (1853).

14. *Campbell v. Roddy*, 44 N.J. Eq. 244, 14 Atl. 279 (1888). New York was also an early exponent of this approach; see *Tift v. Horton*, 53 N.Y. 377 (1873).

15. *Keil Motor Co. v. Home Owners Loan Corp.*, 43 Del. 322, 47 A.2d 164 (1941); see also UCC § 9-313, Comment 5.

16. Gilmore, *op. cit. supra* note 12, at 1394-95.

17. *Id.* at 1395.

18. UCC § 9-313(1), quoted in note 6 *supra*.

19. See note 14 *supra* and accompanying text.

jurisdictions, however, the situation is quite different. These states reject the concept of fixtures as an intermediate class, and thus reject also the Code approach to the problem. If, after adopting the Code, a minority jurisdiction follows its pre-Code definition of fixtures, a serious conflict would arise in applying the Code provision which allows the removal of fixtures.²⁰

The few New Mexico decisions relating to fixtures have not clearly spelled out whether the minority or majority rule would be followed. Some tendency points to the minority approach;²¹ but no definitive trend has been shown. Thus, New Mexico precedent should not prevent the adoption of the majority definition of fixtures.²² By such an adoption, New Mexico would avoid the inconsistencies which might arise when the Code, with its treatment of fixtures as an intermediate class of property, is applied to problems under a rule defining fixtures as wholly real property.

A rule announced before the turn of the century in *E. J. Post & Co. v. Miles*²³ has been relied upon in all the subsequent New Mexico cases dealing with fixtures. The language follows the approach used in *Teaff v. Hewitt*,²⁴ which is often cited for the "Massachusetts" or minority rule. The New Mexico court did not decide whether the item in question was a fixture, but it did enumerate three tests for the trial court's use in determining whether property is a fixture:

- (1) Real or constructive annexation of the article in question to the realty;
- (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; [and]

20. The minority jurisdictions classified as fixtures only those items which became a part of the realty. When the Code concept of removal based upon fixtures as an intermediate or special class of property is applied to the minority definition, confusion will result.

21. This tendency can only be found in the fact that the language quoted by the New Mexico Supreme Court in *E. J. Post & Co. v. Miles*, 7 N.M. 317, 34 Pac. 586 (1893), setting up a test for fixtures was originally pronounced by a court in a minority jurisdiction. See note 25 *infra* and accompanying text. This does not necessarily mean that New Mexico would have applied the test as rigidly as do the minority jurisdictions. Other than this, there is nothing to indicate what the court would do.

22. To adopt such an approach would require no departure from any prior rule or established pattern as there is none. It would greatly clarify the law and avoid many problems which will undoubtedly arise if the majority definition is not adopted.

23. 7 N.M. 317, 34 Pac. 586 (1893).

24. 1 Ohio St. 511 (1853); see note 13 *supra* and accompanying text.

- (3) the intention of the party making the annexation to make it permanent.²⁵

The court then cited a case holding a furnace to be a fixture²⁶ and another stating that whatever, as between vendor and vendee, passes by deed of the premises without special enumeration, is a fixture.²⁷

It would seem that the court intended the three tests to be conjunctive,²⁸ but a later New Mexico case and the prevailing tendency in other jurisdictions is to make the third test, that of intention, the controlling factor.²⁹ The New Mexico case, *Porter Lumber Co. v. Wade*,³⁰ held that even though the substructure of a bowling alley was nailed to the floor of the building, this was not determinative of its status as a fixture. The court went on to emphasize that there was nothing in the record to show that it was the intention of the lessees that the alley should become a part of the realty.

In New Mexico the burden of proof is upon the party who asserts that the personal property has become a part of the realty.³¹ In order to carry that burden, it is necessary not only to show the intention as indicated by the *Porter* case, but also some annexation and adaptation must be shown.³² As a practical matter, it would seem that if the annexation and adaptation can be established, the problem of showing the necessary intent would be lessened. In other words, the three elements of the test can vary, and as one element is shown to exist the burden of proving the other two is eased. Thus it would be very difficult to indicate what constitutes adequate annexation or appropriate adaptation to the real estate, or sufficient intent, except as they are inter-related.

The required annexation can be either constructive or real. Real annexation, sometimes called physical, has been found in some jurisdictions where there was very little if any attachment to the real estate.³³ In contrast to this is the situation of the *Porter* case where

25. *E.J. Post & Co. v. Miles*, 7 N.M. 317, 328, 34 Pac. 586, 589 (1893); see also *Brown*, *Personal Property* § 137 (2d ed. 1955).

26. *United States Nat'l Bank v. Bonacum*, 33 Neb. 820, 51 N.W. 233 (1892).

27. *Watts-Campbell Co. v. Yuengling*, 125 N.Y. 1, 25 N.E. 1060 (1890).

28. See *Zangerle v. Republic Steel Corp.*, 144 Ohio St. 529, 60 N.E.2d 170 (1945), where the court adhered to the view that each part of the test must be met.

29. See Niles, *The Intention Test in the Law of Fixtures*, 12 N.Y.U.L. Rev. 66 (1934).

30. 38 N.M. 333, 32 P.2d 819 (1934).

31. *Fairbanks v. Williams*, 25 N.M. 74, 177 Pac. 745 (1918).

32. The court in *Porter* implied by way of dictum that even though the intent test is the "chief test," it is not determinative of itself and must be supported by some compliance with the other tests.

33. *Doll v. Guthrie*, 233 Ky. 77, 24 S.W.2d 947 (1930); *Hall v. Dare*, 142 Wash. 222, 252 Pac. 926 (1927).

the bowling alley, though nailed to the floor of the building, was not sufficiently attached to meet the test. In fact only two New Mexico cases have found annexation,³⁴ and both of these involved houses attached by foundations to the realty. A case from another jurisdiction, cited by the court in the *Post* case, held that a furnace met the annexation test.³⁵

No New Mexico cases have considered a constructive annexation. Such an annexation includes goods which are not physically attached to the land, but which are adapted to the real estate in such a way that any reasonable person would consider them an integral part of the realty.³⁶

Close to annexation is the concept of appropriation, or adaptation, to the use of the realty.³⁷ Thus, in a New York case, theater chairs especially constructed to conform to the slope of the floor were adapted to the use of the realty and considered fixtures.³⁸ In a Missouri case, a pipe organ was regarded as an essential accessory to a church.³⁹ Taking a view that an item did not meet the adaptation test, a Pennsylvania court held that an electric dynamo and a steam engine in a factory building used to light a theater across the street, though definitely annexed, were not adapted to the use of the realty to which they were attached.⁴⁰ Once again, it is impossible to draw any definite line as to what is necessary to meet this test, since this would be dependent upon the strength of the proof of the other two factors.

The determination of what is sufficient intent will of necessity involve an objective approach. As already mentioned, annexation and adaptation of a chattel indicate some intent. Following the theory of objectivity of the intention rule, it has been held that the testimony of a landowner that he did not intend a permanent attachment and annexation to the real estate was ineffective to prevent the finding of a fixture.⁴¹ Thus, even though the intention test is considered the im-

34. *Taylor v. Shaw*, 48 N.M. 395, 151 P.2d 743 (1944); *Patterson v. Chaney*, 24 N.M. 156, 173 Pac. 859 (1918).

35. *United States Nat'l Bank v. Bonacum*, 33 Neb. 820, 51 N.W. 233 (1892).

36. *Metropolitan Life Ins. Co. v. Kimball*, 163 Ore. 31, 94 P.2d 1101 (1939); see also *Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201 (1829).

37. *Brown, op. cit. supra* note 25, at § 140.

38. *Pike v. Naylor Sec. Co.*, 140 Misc. 734, 251 N.Y. Supp. 659 (Sup. Ct. 1931).

39. *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299 (1867); *cf. Rudolph Wurlitzer Co. v. Cohen*, 156 Md. 368, 144 Atl. 641 (1929), holding that a pipe organ in a motion picture theater was not a fixture.

40. *Vail v. Weaver*, 132 Pa. 363, 19 Atl. 138 (1890).

41. *Martindale v. Bowers Beach Corp.*, 13 Del. Ch. 288, 118 Atl. 299 (1922).

portant and perhaps controlling test, it is so inseparably entwined with the objective demonstrations of annexation and adaptation that anything which goes to prove either of these two elements will help prove intention.

With this treatment of the definition of fixtures, it is evident that the area is somewhat nebulous and indefinite. In order to avoid confusion in dealing with fixtures under the Code, New Mexico courts should adopt the definition of the majority or "New Jersey" rule. Only in this way can a consistent pattern be developed in New Mexico without a change in section 9-313 either defining fixtures or specifically referring to the majority rule relating to the definition.

III

CODE TREATMENT OF PRIORITIES IN FIXTURES

Section 9-313 has adopted as its general approach what was the majority pre-Code rule. Under this rule the security interest in the chattel takes priority over antecedent interests in the real estate.⁴² The basic philosophy of the rule and of section 9-313 is that a person who has a security interest in fixtures should be assured of the right to remove the fixtures after default by the debtor, even over the protests of those holding interests in the realty.⁴³

Specifically, the Code sets up two categories. The first, embodied in section 9-313(2) and (4), treats priorities of what are called "pre-affixation security interests." Subsection (2) states that:

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).

The exceptions set forth in subsection (4) are:

- (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

42. See generally Coogan, *Security Interest in Fixtures Under the Uniform Commercial Code*, 75 Harv. L. Rev. 1319 (1962).

43. *Id.* at 1324.

To prevail over the chattel security interest, the three listed real estate interests must arise (1) before the real estate claimant learns of the chattel interest and (2) before perfection of the chattel interest.

The second category set up by section 9-313(3) permits a chattel security interest to be taken in goods after they have become fixtures. Briefly, this section provides that the security interest taken in goods after affixation is valid against all interest in the real estate subsequently acquired, subject to the exceptions of subsection (4).⁴⁴

Subsection (4) says that the priority granted in subsections (2) and (3) is lost if there is a subsequent taker of an interest in the real estate who takes without knowledge of the security interest and before it is perfected. Thus, if there is an unperfected security interest in the goods, it can be lost even if it attached to the goods before affixation if the real estate interest listed in subsection (4) arises before perfection and before knowledge. Some confusion exists concerning the meaning of the word "subsequent." It is possible to read subsections (2) and (4) to mean that the real estate interests mentioned in (4) can take priority if they arise subsequent to the attachment of the security interest and before the chattel is affixed.⁴⁵ This would provide a windfall for the holder of the real estate interest in that he would be given priority in an item upon which he placed no reliance when taking his interest in the property. The holder of the security interest in the personal property, which still might not be affixed to the real estate, would be defeated. Surely the draftsmen of the Code did not intend such a result. The proper interpretation should be that the real estate interest must arise subsequent to affixation as well as subsequent to attachment.

No such difficulty is encountered in applying the term "subsequent" as used in subsection (4) to the provisions in subsection (3). It is clear that a security interest attaching to a fixture after affixation is invalid as against a prior real estate interest. It would be valid as against subsequent interests in real estate except those specified in subsection (4) which are taken without knowledge and before perfection. No windfall is likely to arise under this provision. Any "subsequent" real estate interests would come after affixation under subsection (3) and probably would be given in reliance upon the fixture as part of the real property security.

44. See note 6 *supra*.

45. This is clearly not the interpretation desired by the draftsmen of the Code as it is contrary to the entire philosophy of Article 9.

Section 9-313 (5) provides that when a secured party has priority over the claims of all having an interest in the real estate, he may remove his collateral from the premises. He must, however, reimburse the owner or encumbrancer of the real estate for any physical injury to the realty.⁴⁶ This rule is contrary to the pre-Code rule in the minority states prohibiting removal of goods once they become fixtures.⁴⁷ Even the majority states refused to permit removal of the fixture if the removal would cause "material injury to the freehold."⁴⁸ Coupling the right of removal with the duty to reimburse for injury to the real estate is one of the Code's worthwhile contributions. Under pre-Code law, if the right to remove existed at all, it was absolute and imposed no duty in regard to reimbursement.⁴⁹ Pre-Code law also included a doctrine known as the "industrial plant mortgage" or "institutional" theory of fixtures.⁵⁰ Fixtures could not be removed even where they were not physically affixed and were easily removable. Material injury was found to exist because the operation of the plant depended upon these items and removal would shut down the plant.⁵¹ The Code has done away with these theories and requires only reimbursement for the actual physical damage done to the structure or real estate. However, the owner of the real estate interest is not left without protection. He can refuse permission to remove until the secured party gives security for the performance of the obligation to correct any physical injury to the real estate.

IV

SOME POSSIBLE DIFFICULTIES WITH SECTION 9-313

In addition to determining what constitutes a fixture, certain fixture problems internal to the Code should be examined. A few examples will illustrate the types of problems that might arise.

A. Ascertaining the Real Estate Involved

To perfect a security interest in a fixture, section 50A-9-401(1),

46. See note 6 *supra*.

47. See note 11 *supra* and accompanying text.

48. See note 15 *supra* and accompanying text.

49. See UCC § 9-313, Comment 5.

50. See 5 American Law of Property § 19.4 (Casner ed. 1952).

51. This is closely related to the doctrine of constructive annexation. See note 36 *supra* and accompanying text.

New Mexico Statutes Annotated,⁵² provides that the security agreement or financing statement be filed "in the office where a mortgage on the real estate concerned would be filed or recorded." In cases where the secured party knows the exact situs of the real property to which the chattel will be affixed, the provision causes little difficulty.⁵³ But where there is uncertainty concerning the specific use of the chattel and its final resting place, the secured party cannot know where to file. If the chattel is affixed before proper filing is completed, the party relying on the chattel security may lose his priority. The following hypothetical case illustrates this problem.

Facts: Debtor owns service stations throughout New Mexico. Vendor sells an air compressor to Debtor pursuant to a security agreement. The compressor is to be used as a spare to be installed in place of any one of many similar units which Debtor owns and which might break down. Once installed, the compressor will be considered a fixture.

Problem: Inasmuch as Vendor does not know ahead of time where the compressor will be installed, he must either rely upon Debtor to inform him before he installs the equipment, or he must file for every station. Filing in each county would not protect the security interest if Debtor were to acquire another station and use the compressor in the new station before Vendor has filed. The document filed must contain "a description of the real estate concerned."⁵⁴

Possible Solution: Under present Code provisions, it would seem that the only thing that could be done to protect Vendor's security interest would be to file for the compressor as an ordinary chattel. Section 50A-9-401(3)⁵⁵ provides that a filing continues effective even though a change occurs in the location of the collateral or its use. To make this section applicable, Vendor would have to argue that the meaning of the term "perfected" as found in section 9-313(4) means perfected in any manner permitted by the Code

52. N.M. Stat. Ann. § 50A-9-401(1) (1953).

UCC § 9-401, 1958 Official Text, proposed three alternative place of filing systems for consideration by adopting states. New Mexico rejected all of them and adopted its own. See Vernon, *The Uniform Commercial Code: Some New Mexico Problems and Proposed Legislative Solutions*, 3 Natural Resources J. 487 (1964).

53. UCC § 9-402(1) provides that the instrument filed to protect a security interest in fixtures must contain a description of the real estate involved.

54. *Ibid.*

55. N.M. Stat. Ann. § 50A-9-401(3) (1953).

New Mexico did not adopt UCC § 9-401 Alternative Subsection (3), 1958 Official Text.

and not just specific compliance with sections 50A-9-401(1) and 9-402(1). If these arguments are not accepted, it would seem that the very purpose of the Code's existence is foreclosed in this type of situation and that some statutory remedy is necessary.

B. Reimbursement for Damages to Realty Caused by Removal of Fixtures

Section 9-313(5) provides for reimbursement to the holder of the realty interest for any physical damage caused by the removal of a fixture by a secured party. No provision is made to compensate a party for any diminution in the value of the property brought about by removal.⁵⁶ The following hypothetical case illustrates this problem.

Facts: Mortgagee relies upon an "old" fixture in taking a mortgage upon the realty. Debtor later decides to trade the "old" fixture as the down payment for one of a newer vintage. Vendor accepts the trade and takes a purchase money security interest in the "new" fixture. Vendor then disposes of the "old" fixture. When Debtor defaults, Vendor removes the "new" fixture.

Problem: Assuming that Vendor had notice of the security interest in the "old" fixture, would he be liable for the diminution in value of the property caused by the removal of a fixture that might be essential for the best use of the property? If the "old" fixture is beyond retrieval, would Vendor merely be liable for the value of the old fixture itself or for the value it added to the property? The Code itself provides only for physical damages caused by removal.⁵⁷ These might be negligible when compared to the other detriments suffered by Mortgagee. Would Mortgagee have a claim upon the "new" fixture prior to that of Vendor?

Solution: Subsection (5) of section 9-313 provides only that persons having priority may remove fixtures. The "material injury"⁵⁸ test has been abandoned in favor of a rule allowing damages only to the extent of the physical injury caused by the removal. In the present situation the "old" fixture was removed by one not having priority, and therefore Mortgagee could argue that subsection (5) is not

56. If the removed fixture is essential to the operation of a business, or if it is an essential item in a home, the diminution in value could be much more serious than the physical damages caused by removal.

57. UCC § 9-313(5), quoted in note 6 *supra*.

58. See note 15 *supra*.

applicable allowing him to recover not only for physical damages caused by the removal of the "old" fixture, but also for the "material injury" inflicted upon the realty. Vendor would argue that subsection (5) is applicable and that he is liable only for the physical damage caused by removal of the "new" fixture. He would argue that the monetary value of the "old" fixture was negligible and that the "new" fixture prevented any material injury to the realty when the "old" fixture was removed. At the time the fixture in which Mortgagee had a security interest was removed, no diminution in value was brought about. In Vendor's eyes there were two separate transactions. He would admit his liability for the removal of the "old" fixture,⁵⁹ but would try to bring the "new" fixture under the Code as a separate transaction which would make him liable only for the physical injuries. He would thus avoid the more serious damage—that of diminution in the value of the realty. Of course, it is impossible to determine which argument the courts would accept, but in pre-Code times a similar situation was resolved by allowing the subordination of the purchase money interest to the real estate mortgage.⁶⁰

Variations: Some interesting variations can be made in the facts in order to complicate the problems raised. For example, suppose that Debtor removed the fixture himself and took it to Vendor alleging that it had never been affixed but had always been a chattel. In such a situation it would seem hard to contend that Vendor should subsequently be held for any more than physical damages caused by the removal of the "new" fixture. It would seem that Mortgagee's only recourse, unsatisfactory though it might be, would be against Debtor. If, however, Vendor had known that the "old" fixture brought in for trade by Debtor was a part of Mortgagee's security, would the fact that he had in no way participated in its removal free him from liability for diminution in value of the real estate upon his subsequent removal of the "new" fixture? These variations of the facts and the problem itself would suggest the need for a broader rule of damages other than that of physical injury to the freehold. Perhaps there is still merit in the "material injury" test.

59. The old fixture would likely be of little or no value in and of itself, and Vendor might be willing to pay this amount voluntarily to the interest holder so long as he would not be liable for diminution in value.

60. See *Roche v. Thurber*, 246 App. Div. 850, 285 N.Y. Supp. 82 (Sup. Ct. 1936), *aff'd mem.*, 272 N.Y. 582, 4 N.E.2d 814 (1936).

CONCLUSION

There are no easy solutions to some of the fixture problems raised by the Code, but a few things could be done to ease the burden. First, it would seem that a clarification of what is meant by the term "fixture" would avoid confusion. Although the term defies exact definition, a great improvement could be made by indicating that the pre-Code definition of fixtures as used by the majority states should be adhered to.⁶¹

A second recommendation is for lawyers to exercise caution when dealing with movable property which is in any way associated with real property. For example, it would be well for a lawyer to check both the real estate and chattel records in such situations.⁶² In New Mexico where these records are located in the same office, it should not be too difficult. It would perhaps be advisable to file with both the real estate and the chattel records if there is any possibility that a fixture problem would arise.⁶³

It is not likely that New Mexico will experience any great rash of cases involving fixture problems in the immediate future, but there will no doubt be a steady increase of such problems. Thus, it would be well for the New Mexico courts and lawyers to weigh carefully the effect their actions in interpreting the Code will have in the future. It is easier to correct any deficiencies at the outset than it would be after they become entrenched in the substantive law of the state.

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61. See note 14 *supra* and accompanying text.

62. A separate problem not treated in this article is that of filing. N.M. Stat. Ann. § 50A-9-401(1)(b) (1953) provides that filing for fixtures is to be made in the office where the real estate records are kept. In New Mexico, this happens to be the same office as for chattel records. It is therefore not entirely clear whether this means they are to be filed with the real estate records or merely in the same geographical location but with the chattel records. Of course, the safest route is to file fixtures agreements with both sets of records.

63. For a treatment of the filing provisions as related to New Mexico, see Vernon, *op. cit. supra* note 52.