Imperfections in Perfection of Ohio Fixture Liens

Sherman S. Hollander
Imperfections in Perfection of Ohio Fixture Liens

Sherman S. Hollander

OBJECTIVE: FIXTURE LAW UNIFORMITY

When the Uniform Commercial Code became effective in Ohio on July 1, 1962, it was already on the statute books of eighteen states. It since has been approved in several others. Presumably, it is on its way to achieving a condition of national uniformity. The merit of this purpose as an aid to commerce is inescapable. How closely the achievement will approach the objective, however, has yet to be determined in most areas of the law entered by the Code.

One major exception is the law of fixtures where its failure is already evident. Even a person as steeped in the Code as Peter F. Coogan has commented on its lack of success in achieving simplicity, clarity or uniformity. Perhaps those who drafted this monumental legal enterprise did not appreciate the scope of the problem which fixtures law represents. This subject is dealt with directly in only an insignificant part of the Uniform Commercial Code and obliquely in only a few other places. But the labors of Hercules may have been less awe-

---

1. The Uniform Commercial Code was enacted in the following eighteen states as of July 1, 1962:

<table>
<thead>
<tr>
<th>State</th>
<th>Effective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pa.</td>
<td>July 1, 1954; revised Jan. 1, 1960</td>
</tr>
<tr>
<td>Ky.</td>
<td>July 1, 1960</td>
</tr>
<tr>
<td>N. H.</td>
<td>July 1, 1961</td>
</tr>
<tr>
<td>Conn.</td>
<td>Oct. 1, 1961</td>
</tr>
<tr>
<td>N. M.</td>
<td>Jan. 1, 1962</td>
</tr>
<tr>
<td>Ohio</td>
<td>July 1, 1962</td>
</tr>
<tr>
<td>Ill.</td>
<td>July 1, 1962</td>
</tr>
<tr>
<td>Okla.</td>
<td>Jan. 1, 1963</td>
</tr>
<tr>
<td>N. J.</td>
<td>Jan. 1, 1963</td>
</tr>
<tr>
<td>Alaska</td>
<td>Jan. 1, 1963</td>
</tr>
<tr>
<td>Ga.</td>
<td>April 1, 1963</td>
</tr>
<tr>
<td>Ore.</td>
<td>Sept. 1, 1963</td>
</tr>
<tr>
<td>N. Y.</td>
<td>Sept. 27, 1964</td>
</tr>
</tbody>
</table>
some than the task of bringing uniformity to this segment of law.

The law of fixtures is inseparable from the law of real property. It is intertwined with the rights, duties, and obligations of lienholders and of persons with rights of ownership and possession of various kinds, capacities, and degrees. It is also affected by recording and notice statutes. Did the creators of the Uniform Commercial Code recognize the breadth of the implications of the area they had entered so casually? Perhaps they still do not. Apparently they relied on the theory that uniform statutory phraseology creates uniform law. Fixture law is a glaring example of the fallacy of this belief.

In Ohio, principles for determining when an item of personal property became so affixed to the land that it should henceforth be treated as part of it were established by early case law. The problem was reduced primarily to applying the rules to the state of facts at hand.8 The intrusions by the Uniform Commercial Code, however, are so inconsistent with prior Ohio law that a chaotic condition has been created in that which was previously clear.7 In fact, the intermixture of the new provisions with prior Ohio law has made a shambles of logical analysis in some important situations. These will be partly explored, but not solved. Curative legislation is mandatory8 to inject any degree of consistent order, clarity, or equity into this picture. Even then, uniformity cannot be expected.

2. The following additional states have enacted the Uniform Commercial Code:
   Calif. Effective Jan. 1965
   Ind. Effective July 1964
   Md. Effective Feb. 1964
   Mont. Effective Jan. 1965
   Tenn. Effective July 1964
   W. Va. Effective July 1964

Legislation for adoption of the Uniform Commercial Code was pending at the time of preparation of this article in the following additional states:
   Hawaii, Maine, Minnesota, Missouri, Nebraska, Texas, Washington, and Wisconsin.

3. Member of the Massachusetts Bar; Lecturer, Harvard Law School; LL.B., Western Reserve, 1939; LL.M., Harvard, 1942; member Ropes & Gray, Boston, Mass., and prolific writer of articles on the subject of chapter 9 of the Uniform Commercial Code.


5. Teaff v. Hewitt, 1 Ohio St. 511 (1853). This action was "for the appraisement and sale of certain mortgaged premises, to satisfy a claim of complainant against Hewitt, and also, to enjoin sundry judgment creditors of Hewitt from detaching certain alleged parts of the mortgaged premises, and selling the same on execution as chattel property." Id. at 512. The opinion squarely faced the issue, and has led this decision to be regarded as "the leading case on fixtures in America." 24 OHIO JUR. 2d Fixtures § 2 (1957).


8. Since drafting of this article the 105th General Assembly of Ohio has passed amendments to several code sections referred to herein. The amendments referred to in the Addenda at the end of this report become effective on October 8, 1963.
THE NEW OHIO FIXTURE LIEN LAW

The Detachable Fixture

The heart of the Uniform Commercial Code application to fixtures appears in section 1309.32 of the Ohio Revised Code (UCC § 9-313). Its opening paragraph is as follows:

(A) 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 sections 1309.01 to 1309.50, inclusive, of the Revised Code unless the structure remains personal property under applicable law. The law of this state other than Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code, determines whether and when other goods become fixtures. Chapters 1301., 1302., 1303., 1304., 1305., 1306., 1307., 1308., and 1309. of the Revised Code do not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

The implication of a basic change in legal theory is apparent from the opening sentence. Under pre-code law in Ohio, fixtures were clearly real estate. Therefore, there was no need to differentiate building materials by separation from fixtures. The distinction is necessary when materials incorporated into a structure are to be treated differently than goods constructed of such materials. Thus, lumber used to erect a house could have been the subject of a mechanics lien. But once installed in the structure, the lumber is part and parcel of the real property, and the lien rights to secure payment for it are for a lien on the real estate, not on the lumber alone.

Paragraph (A) commences with an exclusion from operation of the section. All of the listed items are building materials, although the words “building materials” do not appear. Whether “and the like” is sufficient to include all unlisted building materials may require extensive litigation. The exclusion is not meant to apply to all items of property composed of the materials listed or implied, or no fixture lien would be possible. Under the new law, it must be determined when an item installed in a structure is a material not entitled to be the subject of a fixture lien, and when it has been fabricated to a point which makes it the subject of such a lien. Thus, though metal work is excluded, the question arises as to whether plumbing pipes are treated differently. Would that creation be excluded from the lien if they have been assembled into a plumbing wall which is a functional unit? Would the result be different if the plumbing wall were assembled outside of the structure and

9. Ohio rejected the original uniform numbering system of the uniform act in order to employ consistent numbering with the Ohio Revised Code. Thus, UCC § 9-313(1) became Ohio Revised Code 1309.32(A), and other sub-provisions such as divisions (2), (3), (4), and (5) were changed to (B), (C), (D), and (E).
then inserted, than in a situation where the construction takes place within the structure? This result is possible because the materials might be free of fixture liens only if installed as materials.

The same question exists as to heating and air conditioning ducts, electrical conduit, precast units, and prefabricated structural items such as windows, door frames, and a vast and growing field of different components. So long as all such items as well as fixtures became real estate upon incorporation into the structure of the building, no need for differentiation arose. But the distinction made in the opening sentence of Ohio Revised Code, section 1309.32(A) (UCC § 9-313(1)) is necessitated by the different treatment fixtures will receive henceforth. 10

The second sentence of section 1309.32(A) (UCC § 9-313(1)) employs as its definition of the word fixture, “the law of this state.” Any possibility of uniformity is shattered at this point. Obviously, the law of Ohio cannot be uniform with Pennsylvania, Massachusetts, Kentucky, or other states in fixture law if fixture is a different word in each state. But even more important, the application of the fixture lien is totally inconsistent with the definition of a fixture under existing Ohio law. By the oversimplification of the fixture definition through adoption of a local meaning, the originators of the code have infected the new lien with a condition of schizophrenia.

The leading case of Teaff v. Hewitt11 has been simultaneously incorporated into the code and overruled by it. For over a century, Ohio has recognized two basic types of tangible property — real and personal. When a unit of personal property becomes a fixture, Ohio law has considered it real property.

A removable fixture as a term of general application, is a solecism — a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property.12

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it.13

But the fixture referred to in the rest of section 1309.32 (UCC § 9-313) is a new breed in Ohio. It is neither described nor defined, but the legal characteristics it is given are totally inconsistent with prior Ohio law.14 It was previously inherent in Ohio law that a fixture as part of

10. See Addenda to this article for recent changes.
11. Teaff v. Hewitt, 1 Ohio St. 511 (1853).
12. Id. at 524-25.
13. Id. at 527.
the real estate acquired all characteristics of real estate. Thus, the fixture ceased to have an individual life as such. Persons dealing with it were bound by notice of matters appearing in the chain of title to real estate in the records of the county.\textsuperscript{18} Persons dealing with the real estate in reliance on the record were protected against matters not in the county real estate records and of which they had no knowledge.\textsuperscript{18} These principles are at odds with the new fixture lien. Is the secured party wholly insulated from the recording laws? Can provisions within instruments of record be ignored by him? Would the same result apply if he has actual knowledge of them? Can a covenant in a lease or mortgage limit the right of a secured party to obtain a right ahead of the claimants of real estate interests of record? The pre-affixation security interest at least probably achieves this preferred position by the phraseology which authorizes it\textsuperscript{17} in Ohio Revised Code section 1309.32(B) (UCC § 9-313(2)): 

\begin{quote}
(B) 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 division (D) of this section.
\end{quote}

The super-priority authorized by Revised Code section 1309.32(B) is not limited to liens on fixtures (UCC § 9-102(2)) which add value to the property equal to their cost. It may even apply to a replacement fixture which supersedes a useable one, or to a fixture attached by a debtor with no apparent rights of record and even without any actual interest in the title to the real property. It cannot be argued that such a lien is needed to permit plant expansion, since detachable machinery is likely to be personalty in Ohio.\textsuperscript{18}

\textit{Creation of the Lien}

Identification of the person who can create this new lien appears in Ohio Revised Code section 1309.01 (A) (4) (UCC § 9-105(1) (d)) as follows:

\begin{quote}
(4) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in collateral, and includes the seller of accounts, contract rights, or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of sections 1309.01 to 1309.50, inclusive, of the Revised Code
\end{quote}

\textsuperscript{15} Holland Furnace Co. v. Trumbull Sav. & Loan Co., 135 Ohio St. 48, 19 N.E.2d 273 (1939).
\textsuperscript{17} See addenda to this article for recent changes.
\textsuperscript{18} Zangerle v. Republic Steel Corp., 144 Ohio St. 529, 60 N.E.2d 170 (1945); Standard Oil Co. v. Zangerle, 141 Ohio St. 505, 49 N.E.2d 406 (1943).
If the fixture is still at least an abridged version of its former self, it is at least partly identifiable as a segment of the real estate. But the lien upon it may be created by persons far different than can create any other form of lien on any other interest or right in the real estate. For this lien arises from the act of the debtor who had an interest in the collateral and then remains with the security after its affixture to the real estate. The owner of the real estate may be the debtor, but other persons as well may be qualified to create this security interest lien. Included are persons with rights in the land, such as lessors or even mere tenants, vendees not in possession whose interests may not be evident from examination of the records, persons with undisclosed equitable interests, and the like. The security interest is not limited to persons with rights in the land. It can also be created by others who would qualify as debtors with an interest in the collateral, but who never have any interest in the real property. Thus, the manufacturer, the wholesaler, the dealer, the installer, or the contractor who affixed the fixture might be able to create this lien.

**Super-Priority of the Fixture Lien**

The real breadth of the new fixture lien lies in the words which, with certain exceptions, give it priority over the claims of all persons who have an interest in the real estate. It is through these words in particular that the fixture and its lien acquire a new and different meaning even though the same statute refers to the law of the state for definition. For this provision to be operative, the goods must maintain a separate, separable life from the real property to which it is affixed. Thus, *Teaff v. Hewitt* is embraced and disembowelled, simultaneously.

One other critical word in section 1309.32(B) (UCC § 9-313(a) is “attaches.” Since the lien arises and achieves its priority by attachment, the position it acquires in relation to other liens may not be determined prior to a contest. The definition of “attachment” appears in Ohio Revised Code section 1309.15(A) (UCC § 9-204(1)):

(A) A security interest cannot attach until there is agreement, as defined in division (C) of section 1301.01 of the Revised Code, that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

Because none of the three basic requirements for attachment of a security interest is of record in a public document or filing of any kind, the time when any of these has taken place remains wholly within the knowledge of the parties. Since the lien is effective only after all three requirements have taken place, and since they may happen in any order,
priority can be claimed and not disproven until evidence is disclosed by legal action. The negotiation value of a claim which cannot be disproved without litigation is inescapable. The secrecy of it alone creates an unusual advantage for the secured party.

Section 1309.32(C) (UCC § 9-313(3)) permits a security interest to attach to goods after they become fixtures. Like the preceding paragraph, it allows the lien to arise by attachment and makes the same reference to exceptions as appear in division (D). Unlike paragraph (B), the post affixation lien has no priority over prior acquired liens or rights unless such rights are waived in its favor in writing.

Exceptions to Priority

The obvious unfairness of liens which are secret but superior was too great to leave untrammeled. The restrictions contained in division (D) are apparently designed to alleviate the greatest of the inequities which might otherwise arise under divisions (B) and (C). It provides as follows:

(D) The security interests described in division (B) and (C) of this section do not take priority over:

1. a subsequent purchaser for value of any interest in the real estate;

2. a creditor with a lien on the real estate subsequently obtained by judicial proceedings;

3. 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.19

Perfection and Secrecy

Here for the first time the recording step is brought into the picture, though the word used is perfect. Perfection gives priority over even the specified exceptions unless they arise prior to perfection and without knowledge of the interest. The novelty of the rights of the secured party as contrasted with those of other lienholders is apparent. Even after filing, priority of the security interest remains unsettled. Perfection is not recording alone, but requires the steps for attachment as well. Since the four steps may occur in any order, filing may be the first, last, or middle step. And since knowledge of the security interest on the part of another lien claimant is the equivalent of perfection to him, priority of the new lien cannot be fixed easily. If a dispute arises, the court must determine

19. Ohio Rev. Code § 1309.32(D) (UCC § 9-313(4)).
many facts not automatically apparent. Unlike traditional real property rights in Ohio, most of which are normally effective from filing, the security interest is almost entirely submerged. To determine the factors which affect it alone, the date of the agreement that it attaches, the date value is given, the date the debtor has rights in the collateral, the date of filing of the lien, and the date on which each other interested party first knew of the security interest must be considered. In addition, other factors which place the new lien in its proper status in relation to other liens must also be considered. The total of all these factors make the security interest fixture lien completely unsatisfactory to persons raised in an atmosphere of traditional real property rights, record interests and liens, and first in time, first in right theories.

Obscurities of Filing

Even when filed, this new fixture lien bears little similarity to other real property rights. The place of filing is defined in Ohio Revised Code section 1309.38(A)(2) (UCC § 9-401(1)(c)) as follows:

(2) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office where a mortgage on the real estate concerned would be filed or recorded . . . .

Though the office is specified, the place in that office remains obscure. But this is only one of a multitude of filing problems. The first question apparent in section 1309.38(A)(2) (UCC § 9-401(1)(c)) is raised by the words defining the application of this section. If the collateral is not intended to become a fixture at the time the security interest attaches, but later is affixed as one, then the filing specified is not the required one. The goods may have been of such a nature that filing with the Secretary of State would be sufficient filing for perfection. The lien thus achieved would remain effective when the goods would later be attached as a fixture by virtue of other provisions of Ohio Revised Code section 1309.38 (UCC § 9-401).

In Ohio, real estate mortgages are filed in the County Recorder's office. Because this office maintains numerous records, confusion exists. Among the problems which must be solved are: Should the instrument be filed with other security interest financing statements? Should it be filed in real estate mortgage records, either instead of, or in addition to the other location? Should it receive a separate recording place of its own? If placed with all other records of financing statements in the more busy counties, the excessive burden of inquiries by persons dealing in real estate could overwhelm this successor to the chattel lien depart-

20. Coogan, supra note 4, at 1330.
ment. This is another area where uniformity has not been achieved. In Pennsylvania, liens on chattels are filed with the prothonotary, and mortgages on real estate are filed in a different county office. Thus, no danger of mixing the new fixture lien with the voluminous filings affecting personalty exists as in Ohio.

Lien Circuity

As previously noted, a lien on a fixture is subject to the exceptions to its priority in section 1309.32(D) (UCC § 9-313(4)) only if the exceptions arise between attachment and perfection of the security interest. The exceptions do not exist in a vacuum, however. Each acquires its own priority and position in relation to other liens, rights in the land, and affixed appurtenances. Since the position acquired by each of the specified exceptions is precise, except for the relation to the fixture lien, the new lien puts the exception in an ambiguous priority position. The result is lien circuity. Some examples will disclose the dilemma which courts may face in trying to enforce liens.

Let us suppose that the owner of Blackacre Building, who already has a mortgage to a bank with a balance due of $100,000, decides to borrow an additional $20,000 to be secured by a second mortgage on the building. The mortgage is recorded, and the $20,000 fund will be disbursed as requested over a period of six months. The owner then orders a new elevator to replace the one presently in use, and it is installed at a cost of $25,000, subject to a security interest which is perfected, but only after disbursement of the second mortgage. The owner suddenly becomes insolvent at this point, having made no payments on any of the above amounts.

This is a relatively uninvolved situation, and its solution should not be difficult. The elevator is a fixture subject to a security interest which is ahead of the first mortgage and junior to the second mortgage. The rest of the real estate is subject to the mortgages only. Could a court partition the fixture from the building? If so, how? No procedures, criteria, or standards for such a partition are set forth in the Uniform Commercial Code. The first mortgagee might benefit if the fixture were appraised as it would be valued if a used separated component. A removed elevator would have comparatively little value, and the second mortgage would have first priority as to it. The secured party and the second mortgagee might prefer to see the elevator appraised at its new cost less depreciation, and separately valued as the proportion of the total sale price which that value bears to the value of the building without the elevator. Other alternatives would include appraising the building with

22. See Addenda to this article for recent changes.
and without the elevator, and appraising the elevator and the building each independently. Considering the worth of the building and the elevator separately, however, is a contradiction of the fixture concept. The value of the fixture lies in the combination with the real property and is inconsistent with separation of it.

Partition of real estate interests is made by express statutory procedure. The Uniform Commercial Code does not provide for a similar division of fixture and real property values. Yet the problems may be vastly more complicated when fixtures are treated as independent for lien purposes in regard to some liens, than where co-owners split up.

It is possible that a court might postpone deciding how to evaluate the securities subject to a lien until after their sale because it is possible the price realized might be sufficient to pay all lienholders. If it is inadequate to satisfy all liens, then the judge must face the prospect of resolving disputes with minimal legal guideposts as to (1) method of apportioning value between fixture security and real property security; (2) determination of time of attachment and time of perfection of security interest; and (3) the irreconcilable priority problem of second mortgagee ahead of secured party, secured party ahead of first mortgagee, and first mortgagee ahead of second mortgagee.

The situation becomes more complicated as other factors appear. If a purchaser for value without notice acquires his interest between attachment and perfection of the security interest, the problem is not analogous to that of an intervening lienholder. The only manner in which an owner can have a prior interest to a lienholder is if the lien is void as against him. But if claims are involved which are inferior to the "void" lien, but superior to the right of the new owner, then the problem which the court faces is even more difficult than the mortgage problem previously discussed.

Circuity of lien is in fact the antithesis of priority. Priority is the orderly, consecutive assignment of position to rights. Circuity of lien prohibits logical priority. While lien circuity is not new to the law, it is not a desirable condition at any time. Certainly, it is a strange condition to build into a model act designed to create uniform law. The presence of lien circuity in the code results from seeking to achieve an unnatural and illogical position for the fixture lien. Any value this adds to the fixture lien is not newly found equity, but is a subtraction from the rights of real property security holders. But it is possible that a court might recognize that the dilemma of fixture priority and circuity is insoluble, and that the fixture lien is not sufficiently coherent to be construed and enforced.

Other Problems of Enforcement

Additional confusion arises under the last sentence of section 1309.32 (D) (UCC § 9-313(4)), which is supposedly designed to preserve still one more preference for the fixture lien claimant. The full intent and meaning of this provision, however, is not immediately apparent. This does not automatically give the purchaser at a foreclosure sale a title free of fixture liens (provided he is not the foreclosing encumbrancer), but merely makes him a subsequent purchaser. The subsequent purchaser is only protected if he acquires his interest prior to perfection and without knowledge of the security interest. If the lien is perfected before sale, this provision is inoperative. Presumably the fixture lien is intended to survive the foreclosure sale even if it is perfected after the action is lis pendens, and in fact even after decree but before sale. However, this limited protection to a purchaser is also withheld from the encumbrancer who purchases at his own foreclosure sale. Why does additional discrimination exist against the real estate encumbrancer? The logic of thus discouraging the best qualified bidder is hard to understand. It seems to reflect the antagonistic attitude toward the real estate lien claimant which permeates the fixture lien provisions.

Presumably this last discussed provision is inapplicable if the secured party is a defendant in the foreclosure proceedings. Thus, it might be possible to have priority if the security interest is filed and indexed in such a manner that the searching of records in the chain of title ownership would disclose it, or if the foreclosing party knows of the fixture lien. In this circumstance, the fixture lien would be among those marshalled, and it is not reasonable to assume that it would then survive the sale, regardless of whom the purchaser might be. The few words of the code which raise the question thus further detract from clarity, simplicity, and from equitable treatment of the persons affected.

The enforcement of the fixture lien has been considered previously from the standpoint of actions initiated by the holders of other than the fixture lien. A new area of law is involved when the enforcement of the lien is commenced by the secured party. Section 1309.32(E) (UCC § 9-313(5)) provides:

(E) When under divisions (B) or (C) and (D) of this section 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 sections 1309.44 to 1309.50, inclusive, of the Revised Code, 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.
The prime requisite for removal of the fixture is that the secured party have priority over the claims of all persons with an interest in the real estate. This is more glibly said than proven. Even a pre-affixation lien may lack a position of priority if other rights accrued between attachment and perfection of the lien. Therefore, it would be wise for the secured party to examine the real estate records for this period. Whether this is sufficient may depend in part on how strictly the definition of "fixture" as real estate under Ohio law is construed. For the existence of other fixture liens might extinguish the right to proceed under the provisions of this paragraph. These might not be easily determinable because of the actual provisions designed to prefer fixture liens without the requirement for their clear disclosure within the chain of record title.

The requirement to reimburse is quite foggy. In fact, anyone employing the remedy of fixture removal may be doing so at his own peril. Since the word "must" seems to put the duty of reimbursement on the secured party, it would seem to follow that he must first determine the identities of all encumbrancers and owners, not merely those with rights superior to his own. At this point, nothing short of a full examination of the title would suffice to supply the information, and even it may fail to turn up rights evident from possession of the premises, rights of other fixture lienholders, rights of unrecorded mechanics lien claimants, and perhaps others. After discovering who the parties are to the best of his ability, the secured party is then required to reimburse or give adequate security to any (or each?) of them.24 May one of the real estate lien holders refuse permission because he has not been reimbursed, even though another or others have been? This problem was apparently overlooked in drafting the code. How much simpler it would have been if the secured party merely had to make the specified repairs!

Once the secured party determines he can remove the fixture, he may have spent much time in worthless exercise. In virtually every circumstance, the removed fixture will have significantly less value as a used component than as a part of the structure. The threat of removal may have some effect in pressuring lienholders to pay a debt of their debtors, but the mortgagee who calls the bluff of the fixture lienholder may induce second thoughts. Removal may deprive the security of much of its value.

Casual observation of the provisions of Ohio Revised Code section

---

24. This requirement has been revised by the 105th General Assembly by insertion of a requirement in Ohio Revised Code section 1309.32(E) that "the secured party shall give reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement." (Emphasis added.) Reasonable notice is not defined as to method, or period of time. Thus, one court might consider a phone call six hours prior to removal as reasonable, while another might consider thirty days or longer and written notice as a reasonable minimum. This new wording may have merely spelled out an implication of the original statute without eliminating its vagueness.
1309.44(D) (UCC § 9-501(4)) suggests it may offer the most obvious directions for enforcement of the fixture lien. Division (D) states:

If the security agreement covers both real and personal property, the secured party may proceed under sections 1309.44 to 1309.50, inclusive, of the Revised Code, as to the personal property or he may proceed as to both the real and the personal property in accordance with his rights and remedies in respect of the real property in which case the provisions of sections 1309.44 to 1309.50, inclusive, of the Revised Code, do not apply.

Whether this section is available to the claimant of a fixture lien may be determined by judicial interpretation of whether Ohio Revised Code section 1309.32 changes a fixture from its original definition as being real property into some more ambiguous state which is both real property and personal property. If the fixture is still real property, then the lien charging it alone does not cover real and personal property, though the security may be treated as real or personal property. Strict construction of this provision would extinguish any utility it might have for a fixture lien claimant unless his lien also covered additional pieces of personal property.

Suppose the preceding provision is applicable to enforcement of fixture liens. If the security interest is to be enforced as a lien on personal property, it must first qualify under section 1309.32(E) (UCC § 9-313(5)). If it cannot, then presumably the lien may only be enforced in accordance with the rights and remedies in respect to the real property. This would be true even though the lien is only on the fixture as a part of the structure and not on any other part of the real property. When the secured party initiates proceedings to foreclose this lien, he encounters the following problems: proving all the prerequisites of attachment and perfection to establish his priority; lien circuity; partitioning his interest; conflict with other fixture liens charged against the real estate; and such a jungle of legal uncertainty that the value of his enforcement right may be most difficult to appraise in advance. A foreclosure action involving complex litigation may be both costly and time consuming.

Third Parties and Lien Secrecy

A person dealing with real estate or liens upon it has been protected substantially against liens and rights not apparent from examination of the public records in the chain of title and inspection of the premises for rights thus made evident. In Ohio, even the latter have been gradually shrivelling, as witness the requirements by recent legislatures for land contracts to be recorded, and the fragmentation of the subdivision blan-

In relation to chattel liens, Peter F. Coogan describes the demands for notice of lien rights as a "400 year struggle... [in which] the parties favoring secrecy have, for the most part, been the losers." The new fixture lien provisions are a step backward in Ohio.

The pre-affixation fixture lien is *ahead of all prior interests,* with a few exceptions, upon its *attachment.* If it attaches to a chattel not intended to become a fixture, it may remain a fixture lien without any re-filing as such. In the absence of corrective legislation, the filing of a fixture lien in Ohio neither requires the name of the owner to appear in the record nor the recorder to index any reference to the owner. In fact, since the debtor may not have had any interest in the real estate, no title searcher could possibly know what names to search. (See Addenda.)

It is true that the filing requirements call for a description of the real estate. But even here the atmosphere has been fogged. If nothing more had been said, the common-law requirement of a description would compel sufficient definiteness to locate and identify the parcel intended with certainty so that no other might be confused with it. Ohio Revised Code section 1309.08 (UCC § 9-110) provides as follows:

> For the purposes of sections 1309.01 to 1309.50, inclusive, of the Revised Code, any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

The critical element in a description of real estate, regardless of length, is specificity. How can real estate be reasonably identified by a description which is *not specific?* Would an unspecific description of real estate mean anything? Would "my three houses in Blackacre Township" be sufficient? Would the street name, R.F.D. number, or address meet the test? Would "third house east of corner of Able and Baker street" suffice, considering that public records normally show parcels of real estate, but not structures on them?

If the security interest cannot be located by a mortgagee, prospective mortgagee, or prospective purchaser through an examination of the rec-
ords, then the lien is a secret transfer of security. "Let it [the transfer] be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud." 32

CONCLUSION

The new fixture lien provision was apparently designed to favor the holder with a preferred position. In seeking to achieve this result without excessively abusing the rights of others who have been deprived of protected positions, the security interest is given ambiguous characteristics. It was intended to be more powerful, valuable, versatile, and more easily enforced. But it may be none of these. The security interest in fixtures is vague as to its coverage, unclear as to priority, unclear as to enforcement procedure and effect, inequitable as to third parties with traditional rights in real estate, and lacking in uniformity. Even the courts are exposed to a whole new set of problems without sufficient guidelines, and in which many new elements require interpretation in each case that arises. In fact, many of the determinations will not serve as precedents of any value for future actions because the facts of each situation may be peculiar to the result. The ease of determining priority from the recording date accorded to most real estate liens is not even available because filing for record is only an incident of a series in which it may be the last or an earlier step toward achieving perfection.

Certainly real estate lenders and purchasers cannot be pleased with the Uniform Commercial Code fixture lien. Is the fixture lien secured party really benefited by these lien peculiarities? If the fixture lien received a priority from filing date over the entire real estate to which the goods are affixed; if it described the land with sufficient clarity that no dispute could arise; and if it were filed according to the name of the owner so that all the world could know and be charged with notice, would it really be a weaker lien? Certainly the enforcement of it would be infinitely easier and less costly. The courts and the legal profession might be better served by the added coherence. Even circuity of lien would be replaced with orderly sequence.

Should correction of the known defects in fixture liens await experience in more states? The logic of such a position is at best elusive. Why saddle increasing numbers of states with flaws which are already clearly apparent? Why await losses to innocent parties and endure withering of property and security rights by uncertainty? The fixture lien concept under the Uniform Commercial Code requires major surgery. It

32. Twyne's Case, 3 Coke 80b, 81a, 76 Eng. Rep. 809, 914 (K.B. 1601). Nearly five centuries after Lord Coke made his forceful attack against secret rights, the struggle for disclosure continues. The Uniform Commercial Code is a new battleground in this conflict.
requires correction of an attitude of preference for the lien of the secured party, clarity, simplicity, and an equitable relationship with holders of interests in or liens on real property.

ADDENDA

Since preparation of this article, the 105th General Assembly of Ohio has made significant revisions in the Ohio fixture lien law. Ohio Revised Code section 1309.32 (UCC § 9-313) was modified dramatically to extinguish the preferential position it had given the fixture lien. The modification states:

[The lien is] invalid against any person with an interest in the real estate at the time the security interest is perfected or at the time the goods are affixed to the real estate, whichever occurs later, who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures . . . .

By commencing fixture lien priority in relation to real property interests with time of perfection, the real estate lien has been restored to its pre-code position, and the doctrine of the Holland Furnace case\(^3\) has been re-established.

Section 1309.32(E) (UCC § 9-313(5)) was modified by expressly requiring the fixture lien claimant to give "reasonable notification of his intention to remove the collateral to all persons entitled to reimbursement."\(^4\) Since "reasonable" is not defined, the courts must determine its meaning in each case. Certainly greater clarity could have been achieved by specifying a standard for notice, such as notice in writing at least ten days prior to removal.

New requirements for disclosure of the name of the record owner or record lessee on a fixture lien financing statement and for indexing the document by that name have been added to Ohio Revised Code sections 1309.39 and 1309.40 (UCC §§ 9-401, 402). The secrecy inherent in the fixture lien under the uniform law as enacted in Ohio has thus been terminated. The fixture lien filing has also been transferred from the financing statement records to the real estate mortgage record, so the recorder will not have to be bothered by those interested in seeking information on only real property liens.

The Uniform Commercial Code failed to achieve fixture lien uniformity. The new Ohio variations remove any pretense of this. The

---

34. See note 28 supra.
inequities originally imposed on third parties with interests in real property by the Uniform Commercial Code have been largely alleviated, but the fixture lien claimant may still be in an uncertain legal position. Where the debtor has an interest in the real estate title his best security might be a real estate mortgage in lieu of the fixture lien, so that his lien enforcement would avoid the uncertainties of partitioning fixture from real estate value and of meeting complex requirements for detachment of his security.