THINGS ATTACHED TO REALTY

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The purpose of this brief note is only to bring together in one place the several Commercial Code provisions governing things attached to realty. These "things" are identified in the code as timber, minerals or the like, structures and structural materials, growing crops, and "things" not already listed. The enumeration does not include the word "fixtures," because the code drafters have in one important instance not wished the operation of the code to be so limited. The sales article of the code regulates sales of "things attached to realty and capable of severance without material harm thereto."[1] At this point uinformity of legislation was thought to be more important than covering precisely whatever may be classified as fixtures in any given jurisdiction.[2] The article on secured transactions, on the other hand, makes provision for "fixtures."[3] It is "fixtures" that are usually involved in the financing situation—*e.g.*, furnaces, built in stoves, manufacturing equipment.

The most comprehensive section of the code is that governing sales of goods to be severed from realty.[4] That section provides that a present sale of timber, minerals and structures and structural materials cannot be had and that a contract to sell them is a contract for the sale of goods only if they are to be severed from the realty by the seller. Though the doctrine of constructive severance[5] has been limited, these things can be sold, of course, but such a sale, whether of minerals[6] below the ground or timber[7] or structures[8] attached to its surface is a sale of an interest in realty. That is, if what is involved is a *present sale.* The possibility exists, certainly, of an executory contract for a future sale of timber to be cut and identified to the contract at a later date.[9] Such a contract would not ordinarily affect the rights of subsequent purchasers of the land (carrying timber with it), though such a sale might be a breach of the contract to

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1. 109A-2-107 (2). Hereafter, commercial code citations will be given without the title designation, 109A.
2. UNIFORM COMMERCIAL CODE, 1958 OFFICIAL TEXT WITH COMMENTS, 2-107, Comment 2.
3. 9-313.
4. 2-107.
5. Clarke Brothers v. McNatt, 132 Ga. 610, 64 S.E. 795 (1909).
6. Georgia Peruvian Ochre Company v. Cherokee Ochre Company, 152 Ga. 150, 108 S.E. 609 (1921).
7. Baucom v. Pioneer Land Company, 148 Ga. 633, 97 S.E. 671 (1918).
8. Sawyer Coal & Ice Co. v. Kinnett-Odom Co., 192 Ga. 166, 39 S.E. 402 (1941).
9. 2-107 (1).

sell.[10] A contract for the sale of growing crops and other things that can be severed without material harm to the realty is a sale of goods in every case unless an interest in the land is sold with it. A present sale may be consummated by identification of the goods sold, even before severance.

Though there is no clear textural warrant for the notion in 2-107, the basic distinction that is drawn would appear to be between basic industrial raw material on the one hand[11] and agricultural produce and property in the hands of consumers on the other.[12] Minerals are clearly raw materials, but with regard to trees several points arising from the vocabulary of the trade require attention. We have to distinguish trees (timber), and the products made from them, from fruit or other products produced by them, *e.g.*, peaches, pecans, gum. The latter are produced by the growing tree; they are crops.[13] The former are trees, timber, whether they are destined to be cut for lumber or are a "crop" of pulpwood.[14] Once the trees are cut they are personalty, whether destined for one use or another.[15] In some conceivable cases the classification of structures and structural materials as industrial feels uncomfortable, but it is not believed to be outlandish, since they are otherwise so generally considered realty. The statute characterizing the raising of trees as an agricultural pursuit[16] causes no real difficulty here. In the first place it would appear to have been intended to regulate the status of workers—not subject to workmen's compensation,[17] etc.—rather than charaterize the trees;[18] but, secondly, and most important, it occurs in a context that clearly indicates that it refers to workers who produce what are clearly crops anyway, *i.e.* "fruits and products . . . crude gum (oleoresin) from a living tree."[19] In the clearest case of raising trees as trees rather than

10. For a full breadth discussion of timber transactions in Georgia, see 19 GA. B. J. 413-438 (1957).
11. 2-107 (1).
12. 2-107 (2).
13. See GA. CODE ANN. §85-1902 (1955 Rev.).
14. See Ingram & LeGrand Lumber Co. Inc. v. Bunn, 81 Ga. App. 97, 57 S.E.2d 865 (1950).
15. GA. CODE ANN. §85-105 (1955 Rev.).
16. GA. CODE ANN. §67-1107 (1957 Rev.) as amended, Ga. Laws 1939, p. 240.
17. Meadows v. Dixon, 61 Ga. App. 697, 7 S.E.2d 329 (1940). Just as an aside, one might note that the Court of Appeal had ruled in 1931 and 1932 that a turpentine operator was not a farmer within the meaning of the workmen's compensation act. In 1939 the legislature passed an act to provide that the original producers of turpentine products "shall be known and designated as farmers" (Laws 1939, p. 240, approved February 22, 1939). On February 15, 1940, the Court of Appeal affirmed a trial court's decision of July 15, 1939, holding that a turpentine worker was not a farmer, stating as its reason that "we will assume that the General Assembly was cognizant of the decisions of this court holding that one engaged in the turpentine business was not a farmer, and had it desired or intended that it be held otherwise it has had more than ample opportunity to pass an act so stating." Meadows v. Dixon, at page 699.
18. Collins v. Mills, 198 Ga. 18, 30 S.E.2d 866 (1944).
19. GA. CODE ANN. §67-1107 (1957 Rev.). Until 1933, crude gum was classified as realty until drawn from the tree. See the discussion in Meadows v. Dixon, *supra*.

for crops—the tree nursery situation—the trees were held to be realty.[20] It makes a good deal of difference with which category one is working if what one wants is to sell or finance things attached to realty without selling or encumbering the land.

The "sale" of what is here called industrial product could as fairly be characterized as a sale of a right of access over the land with a privilege to remove the identified product.[21] At the time of the contract a buyer is in a somewhat difficult position in that his intended purchase is still realty and will in the ordinary course of events be sold or encumbered along with the land. To protect the buyer against this danger the code provides that he may give binding notice of his rights to third parties by recording his contract as affecting an interest in land, in which event it must be executed as a land contract.[22] Should the buyer be financing his seller he must look to his contract/real property rules for any security he may feel is required. Though filing a financing statement in anticipation of severance is possible, a chattel security interest cannot be perfected until it has attached,[23] and, in the case of oil, gas, minerals and timber, it cannot attach until severance.[24] Structures and structural materials are generally excluded from the operation of the secured transactions article of the code.[25]

There are two possible exceptions to this rule against chattel security. These grow out of the use of the word "fixtures" in the secured transactions article and its avoidance in the sales article. Fixtures are goods,[26] and are explicity excepted from the exclusion of real property interests contained within the code.[27] Therefore, to the extent that structural materials may be classified as fixtures[28] they can be the subject of chattel financing arrangements. The more important possibility lies in the fact that the secured transactions article permits of using fixtures as collateral even if their removal would cause material harm to the realty.[29] But, as we have seen, such fixtures cannot be the subject of a present sale.

When we turn to the other category greater flexibility is evident. "Goods" are limited to movables except for unborn young of animals, growing crops and *other things* attached to realty.[30] As we have seen

20. Adcock v. Berry, 194 Ga. 243, 21 S.E.2d 605 (1942).
21. Compare Shippen Brothers Lumber Company v. Gates, 136 Ga. 37, 70 S.E. 672 (1910).
22. 2-107 (3).
23. 9-303 (1).
24. 9-204 (2) (b).
25. 9-313 (1). But, again, severance will result in a change of character. GA. CODE ANN. §85-105 (1955 Rev.).
26. 9-105 (1) (f).
27. 9-104 (j).
28. This is unlikely in view of the severability tests.
29. 9-313 (5).
30. 2-105 (1).

above "other things" are things other than crops and the "things" enumerated in 2-107 (1).[31] The would-be goods can be sold or encumbered without involving the land. This is true no matter who is to do the severing. At the time of contracting the buyer has a contract right to receive a quanity of "future" goods[32] to be taken from the land. He too can protect himself against subsequent claimants deriving claims through the real estate by recording his contract as an interest in land.[33] Whenever specific goods are identified as those contracted for the buyer gains a special property in them,[34] whether they have been severed from the land or not.[35] This gives him a more advantageous position with regard to remedies in the event of seller's failure to deliver. For example, in a proper case he may thereby gain a right to specific performance or to replevy the goods[36] or, if he has paid part of the price, he may be able to obtain the goods from a seller who has become insolvent.[37]

The buyer's special property is not a security interest, but if he is in the position of financing his seller he may acquire such an interest by complying with the secured transactions articles.[38] This would in most cases only require filing his contract as a financing statement.[39] The contract must, of course, have provided for the creation of such a security interest[40] and conform to the requirements of section 9-402.

When we turn to priorities, growing crops and "other things" go their separate ways. Security interests in growing crops have priority in the order of their filing[41] (or attachment[42]), except that the lender who makes advances to enable the debtor to produce a crop is given an advantage in respect of that crop. Such advances must have been made not more than three months before the crops come to exist as crops in order to qualify for the advantage, however.[43]

If the concern is security, rather than sales, the category "other things attached to realty" broadens out to fixtures, the limitation to those capable of severance without material harm to the realty drops away. The problem here derives from the possibility of conflict between security interests in the fixtures as potential (or former) chattels and security

31. See 2-107 (2) and 2-195, Comment 1.
32. See 2-105 (2) (c).
33. 2-107 (3).
34. 2-401 (1) and 2-501 (1).
35. 2-107 (2).
36. 2-716.
37. 2-502.
38. 1-201 (37).
39. See 9-302 (1) (c) and (d), for filing requirements.
40. 9-204 (1). If there is a continuing finance arrangement involving crops, note should be taken of the limitations in 9-204 (4) (a).
41. 9-312 (5) (a).
42. 9-312 (5) (b).
43. 9-312 (2).

interests in the fixtures as present parts of the real property. The first point that must be noted is that an interest in fixtures alone is invalid against a prior interest in the real estate unless the real property claimant has consented to the interest in the fixtures or has released his own claim to them.[44] This is a question of validity of the chattel claim, not of priority. In the absence of a prior lien holder, the fixture interest is superior to all other claims unless before it is perfected the realty is the subject of a purchase[45] or creditor's lien obtained through judicial proceedings by someone who does not know of the fixture interest.[46]

The transactions with which we have been concerned up to this point have been those involving things already a part of the realty. Lest the preceding paragraph mislead, it must be noted here that the rules are quite different if fixtures are to be affixed to the realty after the security interest has attached. In that case the chattel interest is perfectly good as against a prior real estate interest,[47] and, if it is perfected by filing before a sale to or lien through judicial proceedings favoring one who has no knowledge of the interest, it is prior to any interest in the realty except to the extent a prior lienholder has made or contracted for subsequent advances without notice, in fact or of record.[48] Whether or not such an advance or contract must occur after the affixation of the chattel is, unfortunately, an open question under the code. Mr. Coogan, of the Boston Bar, raises the question this way.[49] Suppose Bank has a mortgage on a supermarket but has paid out only half of the sum contracted for. Thereafter, supplier sells supermarket a new refrigeration system on conditional sales arrangement. Since the security interest in the new fixture attaches before affixation the real estate mortgage is subordinate to the conditional sale as far as that fixture is concerned. Let us assume that the financing statement has been filed after the mortgage was executed and before the goods were shipped for installation. But, then the bank makes the further advance that had been contracted for before the affixation of the chattel interest. Under the possible (but erroneous) interpretation of the code,[50] the bank, which could not have relied on the presence of the new equipment at the time it contracted to

44. 9-313 (3).
45. "Purchase includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property." 1-201 (32).
46. 9-313 (4). The third situation, discussed below, would apply here too if the consenting real estate lien holder is not found to have subordinated any claim that may arise from advances he surely knew at the time of consenting that he would later have to make.
47. 9-313 (2).
48. 9-313 (4).
49. 75 HARV. L. REV. 1319, 1330-1351.
50. More particularly, the use of "subsequent advances" in 9-313 (4) (c).

advance funds, gains priority over the chattel interest which was paramount when the goods were installed. Clearly, the bank should have this protection only if it has made advances or contracted for further advances in the period, if any, after affixation and before perfection of the chattel interest. It is only in that interval that the bank can have suffered a detriment because of failure of the seller to give notice. If the bank has contracted during that period, it is protected as to subsequent advances even though they are made after perfection of the chattel interest—so long as the bank is bound to make them.

It is often said that one of the virtues of the code is the breaking away from old conceptual patterns and dealing with lump concepts, transactional patterns. In spite of this, most of the written comment on the code has been limited to one or another of its articles—sales, secured transactions, etc. The thought behind this piece was that it might be of some value to look instead to the code provisions that refer to this distinctive property-type without attention to the boundaries of the compartments into which the code is divided.