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The Law of Fixtures as Affected by the Relationship of the Litigants

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THE LAW OF FIXTURES AS AFFECTED BY THE RELATIONSHIP OF THE LITIGANTS

A fixture is generally defined as a chattel which has by annexation to real estate become a part of such real estate in legal contemplation. Such a general definition, obviously, is of little value to the practitioner who is faced with the problem of determining whether a particular chattel has or has not become a fixture, since it leaves unanswered the vital question of whether "affixation" has taken place.

Three general, standardized tests have been invoked by the courts in determining whether affixation has occurred. These tests, almost universally employed in the several states, are set forth in the Wisconsin case of *Standard Oil* v. *La Crosse Super Auto Service*,[1] and are enumerated therein as: (1) actual physical annexation to the real estate. (2) application or adaptation to the use or purpose to which the realty is devoted. (3) an intention by the person making the annexation to make the chattel a permanent addition to the real estate.

It is the purpose of this note to illustrate the application of these tests by the courts to the relationships of landlord and tenant, conditional vendor and prior mortgagee of the land, conditional vendor and subsequent mortgagee of the land, and in taxation proceedings. In these relationships the query, "chattel or fixture?" is of vital importance to the parties.

Landlord v. Tenant

In disputes between landlord and tenant or those claiming under them the intention of the parties is given primary consideration, and often controls. Thus, in *Old Line Life Insurance Co.* v. *Hawn*[2] the court held that in the absence of any express stipulation to the contrary chattels installed by the tenant might be removed at the expiration of the lease. The tenant had placed stanchions, a hay carrier, drinking cups and pipes in the barn; had erected a tool shed and a brooder house on the land, and installed a pipeless furnace in the house. The mortgagee of the realty sought to halt removal of these articles, claiming that they were fixtures. The lower court sustained his contention. But on appeal all of the articles, even the pipeless furnace, were held to be the tenant's "trade fixtures", i.e., not fixtures at all in the legal sense, but chattels.[3] A dissenting opinion objected only to the inclusion of the pipeless furnace among the articles which

[1] 217 Wis. 327, 258 N.W. 791 (1935).
[2] 225 Wis. 627, 275 N.W. 542 (1937).
[3] To constitute any chattel that has been attached to the freehold a trade fixture, it is necessary that it be devoted to what is known in the law of fixtures as a trade purpose. Waverly Park Amusement Co. v. Michigan United Traction Co., 197 Mich. 92, 163 N.W. 917 (1917). Thus trade fixtures would be those adaptable only to the peculiar type of trade in which its installer engaged and not to general business purposes.

could be removed, since such removal injured the premises. But the majority held the trade fixture theory applicable to all chattels installed by a farm tenant, because of his presumed intention not to make such chattels a part of the realty.

In *Standard Oil Co.* v. *La Crosse Super Auto Service*[4] the court said that intention[5] was becoming the primary test, especially where trade fixtures were involved. In that case the only items involved were gasoline pumps installed on a concrete base and gasoline tanks placed underground beneath the concrete drive of the station. The Standard Oil Company had reserved in the lease the right to remove equipment within a thirty day period following termination of the lease. Removal was objected to on the grounds that the annexation of the chattels had made them a part of the reality. The finding of the lower court, allowing removal by the tenant, was affirmed on appeal.

When the tenant annexes a chattel, expresses his intention that it is not to become a fixture, and the landlord assents, such expressed intention controls. But when there is no intention expressed it must be gathered from all of the circumstances, and the factors of physical annexation to the land and the adaptability to the use of the land, given as separate criteria in the Wisconsin case, become in fact a part of the circumstances from which the intention of the annexing party must be determined. Accordingly, such physical annexation that removal will cause serious injury to the premises may become a controlling factor in determining whether a chattel has become a fixture. Thus, in *Northwestern Loan & Trust Co.* v. *Topp Oil & Supply Co.*[6] the removal of a filling station building and its equipment was denied the tenant who had annexed them to the land. The court found that the property could not easily be restored to its original condition, especially in view of the fact that a house had been razed to make room for the filling station.

In some landlord and tenant cases involving fixtures, statutes may change the usual application of the law of fixtures. The case of *Story Gold Dredging Co.* v. *Wilson*[7] held that a dredge placed on leased mining property for the mining of placer gold was not a trade fixture, as the tenant pleaded, but rather a part of the realty. The statute pro-

[4] 217 Wis. 237, 258 N.W. 791 (1935).

[5] Intention of the parties is determined either from expressed intention as found in documents such as chattel mortgages, and conditional sales agreements; or from the circumstances of the affair. The actions of the parties will be used in determination of intention as will various facts concerning the fixture itself. Express intention may be shown by written reservations or by stipulations in leases as to whether a chattel is to remain such or become a part of the realty. Where the parties assert conflicting intentions external and visible facts will determine.

[6] 211 Wis. 489, 248 N.W. 466 (1933).

[7] (Montana 1938) 76 P. (2d) 73.

vided that sluiceboxes, flumes, hose, pipes, railway tracks, blacksmith shops, mills and all other machinery or tools used in developing or working a mine were to be deemed affixed to the mine.[8]

CONDITIONAL VENDOR v. PRIOR MORTGAGEE

Disputes between conditional vendors and mortgagees require for their determination, besides the three standard tests for fixtures, a consideration of whether the chattel was relied on by the mortgagee as constituting a part of the security and the possibility of impairing the security or injuring the freehold by removal of the alleged fixture. In *Vorclone Corp.* v. *Larson*[9] the Wisconsin Supreme Court held that a conditional sales contract executed after the buyer had given a mortgage on the realty to which the goods were affixed was valid as against the mortgagee, even though not filed in accordance with Wisconsin statute,[10] since the chattel, a piece of laundry machinery, was not relied upon by the mortgagee as a part of the security. Moreover, it was readily removable from the premises and the mortgagee had notice of the vendor's claim at the time of sale and before the installation of the machinery.

In Wisconsin, it is of considerable importance whether the chattel is severable without material injury to the freehold or not. *People's Savings & Trust Co.* v. *Munsert*[11] held that equipment installed in a factory under a conditional sales agreement was removable without material injury to the freehold and thus the rights of the vendor were superior to those of a prior mortgagee. The equipment included an automatic fire extinguishing system, a veneer dryer and a veneer jointer. The first sentence of section seven of Chapter 122 of the Wisconsin Statutes[12] was held to apply in this instance. Thus, the

[8] Montana Revised Statutes § 6670.
[9] 217 Wis. 214, 257 N.W. 611 (1935).
[10] WIS. STAT. (1937) § 122.07.
[11] 212 Wis. 449, 250 N.W.385 (1933).
[12] WIS. STAT. (1937) § 122.07. "If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof together with a statement signed by the seller, briefly describing the realty and stating that the goods are or to be affixed thereto, shall be filed before such purchase in the office of the register of deeds of the county where such realty is located and also entered in the tract index, when kept. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof, but to be severable without material injury to the freehold, unless the conditional sale contract,

law of conditional sales and not of fixtures applied. Reservation of a property interest in the chattel by a conditional vendor, if the property is not severable without material injury to the freehold is allowed if all parties concerned agree to such reservation. Where the purchaser of the chattel is also owner of the realty, Section 122.07 is inapplicable.

The doctrine that a chattel which may be removed without material injury to the premises, is not a fixture, was upheld in *Provident Building & Loan Ass'n. of Passaic County* v. *William Day Sons Realty Co.*[13] In that case a boiler had been placed in a building, having been brought in through already existing doors. It was claimed that the boiler constituted a part of the premises, so as to be subject to a prior mortgage on the realty. The plaintiff's mortgage had been executed prior to the installation of the boiler, eliminating a plea of estoppel based on the mortgagee's reliance on the boiler as security for the loan. All that had to be done, outside of a few slight operations, such as removing connections, was to move the boiler through the door. The conditional vendor prevailed here, as no material injury resulted from removal of the chattel.[14]

In *Holland Furnace Co.* v. *Trumbull Savings & Loan Co.*,[15] mere attachment of a furnace by means of metallic sleeves was sufficient to make a fixture of the furnace, together with the fact that a heating plant was necessary to the utility of the house as well as the fact that mere filing of the conditional sales contract was not constructive notice to the mortgagee. The mortgagee was never informed of the fact that the furnace was installed in place of an old one and prevailed against the efforts of the furnace company to gain possession of the furnace upon foreclosure of the realty mortgage.

Bowling alleys requiring special foundations or special buildings are usually held to be so annexed to the freehold that a material injury would result to the premises by their removal.[16] This doctrine has been applied by the Wisconsin Supreme Court in the case of *Brunswick-Balke-Collender Co.* v. *Franzke-Schiffman Realty Co.*[17] In that case the court held that since a building was erected specially to accommodate the alleys, and since special foundations were required, material

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or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office of the register of deeds of the county where such realty is located, and also entered in the tract index, when kept."

[13] 122 N. J. E. 326, 194 Atl. 53 (1937).

[14] *Cf.* Omaha Loan & Building Assn. v. Bigelow, 133 Neb. 275, 274 N.W. 574 (1937), where a gas furnace was allowed to be removed by a conditional vendor because removal entailed no material injury to the premises.

[15] (Ohio 1939) 19 N.E. (2d) 273.

[16] 124 Conn. 59, 198 Atl. 252 (1938).

[17] 211 Wis. 659, 248 N.W 178 (1933).

injury would be done to the freehold by the removal of the alleys. Thus they were held a part of the realty and the seller's reservation of title under the Wisconsin statute[18] was void as against the mortgagee who had not consented to such reservation.

Conditional Vendor v. Subsequent Mortgagee

When a chattel is purchased on conditional sale and then attached to realty, the purchaser impliedly agrees that as between the parties to the sale the goods shall retain their personal character at least until paid for. Such agreement is upheld by the courts unless the affixation to the land is such as to cause the chattels to lose completely their character of personal property, e.g., where lumber becomes part of a building.

If a subsequent purchaser or mortgagee of the land buys with notice of the rights of the conditional vendor or prior mortgagee of a chattel which has been annexed to the land, the rights of the conditional vendor or prior mortgagee take precedence.[19] Some jurisdictions hold that constructive notice is given to a subsequent mortgagee by the filing of the conditional sale contract or the chattel mortgage.[20] Other jurisdictions hold that it is too much to expect the purchaser of the realty to search personal property records to ascertain if some encumbranced personal property has been affixed to the realty concerned.[21] In such jurisdictions constructive notice can be given only by recording the conditional sale or the chattel mortgage in the register provided for the recording of encumbrances on realty The Uniform Conditional Sales Act, which has been enacted in Wisconsin, requires such recording to give the conditional vendor of a chattel a lien superior to that of a subsequent mortgage of the land to which the chattel has been annexed.[22]

In all of the cases involving disputes between conditional vendors of chattels and mortgagees of the land to which such chattels have been annexed the courts give primary consideration to the natural equities between the parties. The other factors in determining whether a chattel has become a fixture, to wit, annexation, adaptation and intention, are given secondary consideration.

State v. Taxpayer

When the problem is whether a certain article shall be taxed as realty or personalty there are obviously no equities between parties to be considered. Even the intention of the person annexing the

[18] Wis. Stat. (1937) § 122.07
[19] Warner v. Kenning, 25 Minn. 173 (1879).
[20] Monarch Laundry Co. v. Westbrook, 109 Va. 382, 63 S.E. 1070 (1909).
[21] Tibbetts v. Horne, 65 N.H. 242, 23 Atl. 145 (1889).
[22] Wis. Stat. (1937) § 133.07, *Cf.* Brunswick-Balke-Collender Co. v. Franzke-Schiffman Realty Co., 211 Wis. 659, 248 N.W 178 (1933).

chattel to the land becomes important chiefly in so far as that intention must be presumed in view of the manner in which the chattel has been attached and its adaptation for use in combination with the land.

In *Southern California Tel. Co.* v. *State Board of Equalization*[23] an attempt was made by a telephone company to set aside the State Board of Equalization's assessment of central office equipment as improvements to the realty The company claimed that the equipment was personalty. Adaptation, plus the fact that the central exchange building was expressly designed and built for telephone purposes, caused the court to hold the equipment of the central offices a part of the realty. However, small switchboards placed in small leased offices in smaller towns were by their nature held to be personalty even though attached to the floor or walls by screws or bolts.

The intent of the legislature rather than that of the annexor may be decisive when the interpretation of a tax statute is involved. This was illustrated in a case involving the taxation of water pipes, which at common law were regarded as part of the realty for tax purposes. A statute had enumerated items to be taxed as personal property. Gas and water pipes were omitted. This omission was construed as an expression of legislative intent that such pipes were to be treated as realty.[24]

Obviously, there is always a statute at the root of every taxation problem, but often the statute is too general to furnish a standard for the solution of a specific problem. In *Town of Langdale* v. *Crocker Chair Co.*[25] a logging railroad constructed with leased rails on the taxpayer's land was levied upon as personal property. This was improper, the Wisconsin Supreme Court held, under a statute which provided that "buildings and improvements on leased land" were to be taxed as realty. The decision in terms was based on legislative intent, and was undoubtedly correct. But it implied rather than stated that "improvements" meant "fixtures" and that a railroad track is a fixture inasmuch as it is peculiarly adapted for use in combination with the land on which the rails are laid, and possesses no functional use except in such combination.

Although a chattel may clearly become a fixture at the moment of annexation, it still may be taxed as personalty during the interval, however short, between purchase and annexation. Thus, in *Fifteenth Street Investment Co.* v. *People*[26] materials used in the construction of elevators were held taxable under a use tax statute on personal property, although the elevators after installation were considered as a part of the realty.

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[23] (Cal. 1938) 82 P (2d) 422.
[24] 133 S.C. 383, 131 S.E. 37 (1925).
[25] 190 Wis. 226, 208 N.W 799 (1926).
[26] (Col. 1938) 81 P (2d) 764.