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Article 9

Fixtures - Must Chattel Be Annexed to Constitute a Fixture

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People v. *Smith,* 271 Mich. 553, 260 N.W. 911 (1935). See also: *State* v. *Smith,* 100 Iowa 1, 69 N.W. 269 (1896); *State* v. *Nikolich,* 137 Wash. 62, 241 Pac. 664 (1925); *Hornsby* v. *State,* 29 Ohio App. 495, 163 N.E. 923 (1928); *Scharman* v. *State,* 115 Neb. 109, 211 N.W. 613 (1926). In Arkansas the statutes provide that an accessory be treated as a principal and that he "may be indicted, arraigned, tried and punished, although the principal offender may not have been arrested and tried, or may have been pardoned or otherwise discharged." But it has been held that a lower court abused its discretion in trying the accessory before the principal. *Feaster* v. *State,* 175 Ark. 165, 299 S.W. 737 (1927). It was suggested in *State* v. *Bogue,* 52 Kans. 79, 34 Pac. 410 (1893) that the subsequent acquittal of a principal does not carry with it the conviction against the accessory. For a discussion of the Federal rules see: *Rooney* v. *United States,* 203 Fed. 928 (C.C.A. 9th, 1913); *United States* v. *Pyle* (S.D. Calif. 1921) 279 Fed. 290; *Dunn* v. *United States,* 284 U.S. 390, 52 Sup. Ct. 189, 76 L.Ed. 356 (1932).

LEROY J. GONRING.

Fixtures—Must Chattel Be Annexed to Constitute a Fixture.—Louis Shapiro mortgaged his apartment building, which was equipped with gas ranges, mechanical refrigerators, and rollaway beds, to the Welfare Building and Loan Association. Although the ranges and refrigerators were physically connected to the building, the rollaway beds were not. Shapiro later gave a bill of sale to the gas ranges, refrigerators, and rollaway beds to one Leisle; but before Leisle removed them the building and loan association foreclosed the mortgage. Leisle brought action against the Association alleging conversion. *Held*: the ranges and refrigerators and beds were part of the realty and passed with the realty to the Welfare Building and Loan Association. *Leisle* v. *Welfare Building and Loan Association* (Wis. 1939) 287 N.W. 739.

In determining the question as to when personal property becomes a fixture the majority of the courts today apply three tests. These three tests are: (1) actual physical annexation, (2) adaptation to the use of the realty, and (3) the intention of the parties. *Standard Oil Co.* v. *La Crosse Super Auto Service,* 217 Wis. 237, 258 N.W. 791 (1935). But by a survey of the decisions of the courts which apply these tests it is readily found that the first two criteria are used only in arriving at an understanding as to what the intention of the parties really was at the time of the annexation; and then this intention is used as the true basis for deciding the case. *Ottumwa Woolen Mill* v. *Hawley,* 44 Iowa 57, 24 Am. Rep. 719 (1876).

In the Standard Oil Case there was physical annexation—underground gasoline tanks and gasoline pumps—and they were adapted to the use of the realty—a gasoline station—and yet the court held that these tanks and pumps were not part of the realty but were still personalty because it was the intention of the parties that they were to be considered as such. The intention in this case was indicated by the terms of a lease which gave the Standard Oil Company the right to remove equipment following the termination of the lease.

Also, as shown in the principal case, if there is no annexation and yet it is the obvious intention of the parties that the property is to be considered as part of the realty, then the courts will hold that it is realty in deference to the original wishes of the parties. So today the major question to be decided has been narrowed down to the intention of the person making the annexation to make the chattel a permanent addition to the real estate; and it is only in deter-

mining this original intention that it becomes necessary to show actual physical annexation or the lack of it.

Where the mortgagee of a building elects to consider rollaway beds as personalty, as evidenced by the fact that he requested a chattel mortgage on them in addition to his mortgage on the realty, the court will consider his expressed intention and hold that the beds are chattels even though they are peculiarly adapted to the use of the realty. *Thuma* v. *Granada Hotel Corp.*, 269 Ill. App. 484 (1933). Thus, the question of adaptability is now also being regarded only as evidence as to the intention of the parties.

Rollaway beds are held to be part of the realty when it is the intention of the vendor of the realty that the beds are to be "dedicated to the realty." Thus, when the realty was an apartment building and the beds were adapted to the use of the premises, and the vendor waited for over a year after the sale of the building to assert his claim and then only after being vexed by a law-suit brought by the vendee against him, it was held that the obvious intention of the vendor was shown, and that the beds were part of the realty. *Doll* v. *Guthrie*, 233 Ky. 77, 24 S.W. (2d) 947 (1929). Also when a clause in the mortgage expressly states that rollaway beds, which are unattached to the realty, are to be covered by the mortgage, the beds will be deemed part of the realty because the mortgage shows that that is the actual intent of the parties. *First Mortgage Bond Co.* v. *London*, 259 Mich. 688, 244 N.W. 203 (1932).

But mere secret intention of one of the parties is not sufficient. The defendant in a foreclosure action, who had the secret intention that corn cribs on his property were to be considered as personal property, found the court ruling against him even though the cribs were not attached to the realty because the court decided that in this case the adaptability of the chattel to the use of the premises would be the major factor to consider in the absence of proof of expressed intention. *Cornell College* v. *Crain*, 211 Iowa 1343, 235 N.W. 731 (1931).

However, there may be situations in which factors other than the intention of the original parties become important, such as the natural equities of third parties, for example, where a mortgagee lends money on realty to which a conditional vendee has attached chattels not yet paid for. This problem is discussed in a note by Carl Luther, *The Law of Fixtures as Affected by the Relationship of the Litigants* (1939) 23 MARQ. L. REV. 136.

ROBERT P. HAMM.

Taxation—Privilege Dividend Tax.—Wisconsin imposed upon all corporations doing business in the state a "Privilege Dividend Tax" which taxed the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state. WIS. STATS. (1939) § 71.60(3). This section requires the corporation to deduct the amount of the tax from the dividend declared and pay it to the state.

The plaintiff is a Delaware corporation with its principal office in New York. It maintains no executive offices in Wisconsin. In 1937 the Wisconsin Tax Commission assessed a privileged dividend tax on that part of the dividend declared by the plaintiff in New York derived from income earned in Wisconsin during the years of 1934, 1935 and 1936. The plaintiff contended that the tax violated the Fourteenth Amendment in that it deprived the plaintiff corporation of its property without due process of law. The Supreme Court of the