Classification of Property as Real or Personal for Ohio Property Taxes: An Appraisal

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Is (1) refinery equipment including structures rising 100 feet in the air, or (2) steel making equipment including a continuous rolling mill weighing 900 tons, or (3) a pottery tunnel kiln 340 feet long, 11 feet wide and 7 feet high, or (4) a theatre building or other similar special purpose building, personal property for Ohio tax purposes? Affirmative answers to the first three questions have been given by the Supreme Court of Ohio, in *Zangerle v. Standard Oil Company*,[1] *Standard Oil Company v. Zangerle*,[2] *Zangerle v. Republic Steel Corporation*,[3] and *Roseville Pottery, Inc.* v. *County Board of Revision of Muskingum County et al.*[4] A negative answer is indicated to the fourth question both from the background of the foregoing decisions and from the constitutional and statutory provisions upon which classification of property for tax purposes must depend. *Cf. Reed v. County Board of Revision*.[5]

In the *Standard Oil, Republic Steel* and *Roseville Pottery* decisions, the various items of property involved were held to be personal property and within the classification "engines, machinery, tools and implements" of Section 5388, General Code, and therefore taxable at 50 per cent of true value. These four decisions all took place between 1945 and 1948 and were the first cases to reach the Supreme Court for an authoritative exposition of the amendment of Article XII, Section 2 of the Ohio Constitution effective in 1931 and the personal property tax law providing for classification of certain property for taxation passed by the legislature the same year.

Since these decisions a lively speculation has arisen as to the effect which they might have upon the tax structure of the taxing units of the state. On the one hand they have brought hope to certain heavy industries that the full benefits of classification might be extended to all industry. This they believe was the purpose and intent of the constitutional and legislative changes

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1 144 Ohio St. 506, 60 N.E. 2d 52 (1945).

2 144 Ohio St. 523, 60 N.E. 2d 59 (1945).

3 144 Ohio St. 529, 60 N.E. 2d 170 (1945).

4 149 Ohio St. 89, 77 N.E. 2d 608 (1948).

5 152 Ohio St. 207, 88 N.E. 2d 701 (1949).

in 1931. On the other hand, the decisions have caused great concern to local taxing officials lest not only industrial structures in the nature of "engines, machinery, tools and implements" but commercial special purpose structures such as theatres, hotels, grandstands and office buildings might not also secure the benefits of classification under the law as interpreted in these decisions. These fears led to several proposals during the recent session of the legislature for statutory changes which would have substantially limited the classification provisions of the 1931 enactment. It is believed that a careful analysis of the constitutional and statutory provisions as construed and applied by the supreme court in its decisions referred to will show that the fears of the local taxing officials are without foundation.

It is the purpose of this article to appraise the classification problem, considering first the background of the classification law and, second, the legal theory adopted by the supreme court in its decisions construing and applying that law in the cases referred to above, and, third, the present state of the law.

History and Purpose of Classification of Property for Tax Purposes

As pointed out by the Supreme Court of Ohio in *Zangerle v. The Standard Oil Company of Ohio*,[6] prior to 1931 it was immaterial for Ohio tax purposes whether property was classified as real or personal. From 1852 to January 1, 1931, the taxation of Ohio property was governed by the "uniform rule." Immediately prior to its amendment, this rule was set forth in Article XII, Section 2 of the Ohio Constitution in the following words:

> Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money * * *.

As early as 1925, the Ohio General Assembly recognized that tax laws enacted pursuant to this rule were difficult to administer, imposed inequitable tax burdens on certain taxpayers, and placed Ohio businessmen and farmers at a competitive disadvantage with persons similarly engaged in neighboring states. Therefore, by Amended Senate Joint Resolution Number 29 of 1925, the legislature authorized the appointment of a joint committee to investigate and study the laws of Ohio and other states with a view to determining the best and most equitable methods of taxation and to recommend needed legislation to carry such methods into effect. The chairman of this committee was Chester C. Bolton, and its vice-chairman and secretary was Robert A. Taft. In 1926, the committee

[6] 144 Ohio St. 506, 511, 60 N.E. 2d 52, 55 (1945).

filed a report consisting of some 270 pages in which the tax laws of the State of Ohio and other states were examined. The report gave extended consideration to the problems of taxation and revenue confronting Ohio and to the overall economy of the state. The joint committee in its report concluded that the constitutional requirement of complete uniformity in taxation prevented any adequate reform of taxation in Ohio and therefore recommended its repeal.

The Committee devoted a large portion of its report to pointing out the defects and disadvantages of the uniform rule, stating, among other things, as follows:

> 4. The uniform rule puts Ohio at a very serious disadvantage as compared with states not having this limitation.
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> In these days of free interchange of goods between all parts of the country there is much competition between industries located in different states. This applies to the products of agriculture as well as manufacturing. If one state has a tax system which is less favorable to agriculture, manufacturing, and to business in general than the tax systems of surrounding and competing states, the state is suffering under a distinct handicap. Ohio is in such a position. Certain nearby states which have great industrial and agricultural development have tax systems which are notably more favorable and equitable to these vital activities.[7]

Upon receipt of this report, the legislature proposed[8] a constitutional amendment of Section 2 of Article XII of the Constitution. This proposed amendment was submitted to the people and adopted by them at the election of 1929, the schedule to the amendment providing that it should become effective January 1, 1931. This amendment removed the constitutional direction to tax the various kinds of property theretofore included under the uniform rule and replaced it with the following language. "Land and improvements thereon shall be taxed by uniform rule according to value."

It should be noted that, whereas this section of the Constitution had previously required the taxation *inter alia* of "real property," by uniform rule, the amendment required only that "land and improvements thereon" be taxed by uniform rule. The constitutional provision as thus amended left it open to the legislature to prescribe the manner in which property other than "land and improvements thereon" should be taxed.

Thereafter, a Special Joint Taxation Committee was appointed

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[7] Report of the Joint Legislative Committee on Economy and Taxation, Eighty-Sixth General Assembly, p. 140.

[8] 113 OHIO LAWS 790 (1929).

with Robert A. Taft as Chairman, under the provisions of Senate Joint Resolution Number 7. This committee drafted an act completely revising the system of taxation in Ohio and reported it to the Eighty-Ninth General Assembly in 1931, which passed it at the same session.[9] In the field of property taxes, the following changes among others were made:

> 1. All tangible property not used in business with the exception of boats, aircraft, and domestic animals was removed from the General Property Duplicate. Domestic equipment and furniture found in every home as well as personal effects including jewelry were thereby left untaxed.
> 2. Intangible property such as stocks, bonds, and credits were taken off the General Property Duplicate and taxed at low flat rates.
> 3. Licensed motor vehicles were removed from the General Property Duplicate and subjected instead to a graduated license tax.
> 4. Engines, machinery, tools, and implements used in manufacturing and mining were to be assessed at 50% of true value.
> 5. Engines, machinery, tools, implements, and domestic animals used in agriculture were to be assessed at 50% of true value.
> 6. Raw material, work in process and finished inventory of manufacturers in the county of manufacture and agricultural products were to be assessed at 50% of true value.
> 7. All other tangible personal property was to be listed at 70% of true value excepting that of certain public utilities which was to be listed at 100%.

The first three of these changes were particularly designed for the relief of the individual taxpayer with respect to burdensome taxation of non-business property which had made liars out of most taxpayers and martyrs of the few who honestly returned such property. The substantial measure of relief thus afforded individuals appears to be a fair *quid pro quo* for the balance of the changes designed for business and farming and to remove the considerable disadvantage of these groups in comparison with other states.

The favorable tax provisions thus made for business and farming were designed, in the long run, to increase the total tax revenue[10] of the state through attracting to Ohio industries which might otherwise locate elsewhere, as well as encouraging expansion

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[9] 114 OHIO LAWS 714 (1931).

[10] Statistics supplied by the Division of Research on Statistics of the Department of Taxation indicate that the total value of tangible personal property listed for taxation in 1933 was $710,303,773. In 1948 the tax duplicate of tangible personal property had increased to $2,597,768,847.

of the industries already in the state. As pointed out by the supreme court:

> * * * the General Assembly has in its classification given a lower rate to the machinery and implements of manufacturing concerns than it has placed on other personal property. This shows an obvious intention to favor manufacturing concerns, in the taxation of their property, in order to make Ohio an attractive state for new business which, in the long run, will result in more taxes because of more property, as well as furnishing greater opportunities in this state for both business and labor.[11]

The Legal Basis of the Decisions

When the legislature enacted the personal property tax law in 1931 it left to the tax administration and to the courts the determination of what would be "improvements" on land and what would be personal property. Following enactment of the law the Tax Commission, which was charged with the assessment of personal property, prepared a number of rules classifying various articles of property as between improvements on land and personal property. These rules were intended for the guidance of local assessing officials whose duty it was to assess "land and improvements thereon." They were likewise intended for the guidance of taxpayers who were required to report personal property for taxation under the new law. These rules with a few modifications were repromulgated by the Tax Commissioner following reorganization of the old Tax Commission in 1939. Except as modified by court decisions, these rules are still in effect. With the assessment of land and improvements remaining in the county auditors and the assessment of personal property in the hands of the Tax Commissioner, controversies arose between the Tax Commissioner and some of the county auditors as to how certain property should be classified. Similarly, some of the industrial taxpayers were not satisfied with the classification rule as it applied to them. This led to litigation which resulted in the supreme court decisions herein discussed.

The first case, *Zangerle v. Standard Oil Company*,[12] concerned machinery and equipment, including tanks, used in an oil refinery. In describing such equipment the Court said:[13]

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[11] Roseville Pottery, Inc. v. County Board of Revision of Muskingum County et al., 149 Ohio St. 89, 98, 77 N. E. 2d 608, 613 (1948).

[12] NOTE 6, *Supra.*

[13] 144 Ohio St. 506, 509, 60 N.E. 2d 52, 54 (1945). In general, this machinery and equipment may be described roughly as follows: "Tools, instruments; meters; motors, turbines; engines; generators; ovens; dryers; scales; condensers;

> It is undisputed that this machinery and equipment are used as a part of a continuous refining process; that they are unique in character, being specially designed for the oil-refining business and are useless for any other business or industry; and that these refining structures are ponderous in size, of iron, steel, brick and concrete construction, and firmly and stably annexed to concrete foundations by foundation bolts.

The taxpayer owned the land and buildings to which the equipment was affixed. It was held that the property in question was not "land and improvements thereon" and should be assessed at 50% of its true value under Section 5388, General Code.

The law of the case as stated in syllabus 6 follows:

> Machinery installed on land for the benefit of an industry located thereon, which, if the industry itself was removed would be of no particular benefit to the naked land, cannot be considered for tax purposes an improvement on land, but personal property.

Hart, J., speaking for the majority, proceeded to ascertain the meaning of "land and improvements thereon" by drawing upon the Ohio law of fixtures. The court said in substance that in construing "improvements" on land, it could rely on *Teaff v. Hewitt*,[13a] which adopted the combined application of three requisites as the criterion of a fixture: (1) actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of the realty with which it is connected; and (3) intention of the party making the annexation to make the article a permanent accession to the freehold.[14]

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condenser boxes; coolers; exchangers; bubble towers; fractionating towers; compressors; stills; reflux, soaking, stripping and receiving drums; pumps and accessories; tanks and accessories; cranes and crane runways; hoists and conveyors; and, with certain exceptions, water treating plants complete; pipe still unit and accessories complete, including process water-cooling towers; continuous crude and coke stills and accessories complete; agitators and acid plant complete; steam-still units and accessories complete; gas absorption plant complete; cracking units and accessories complete; water-pumping station complete; boilers, plants and accessories complete; and reducing stills and accessories complete * * * ". 144 Ohio St. 506, 510, 60 N.E. 2d 52, 54 (1945).

The following were conceded by the Oil Company to be realty and consequently were not involved in this case: "Buildings, including built-in heating, ventilating, plumbing, sprinkling, lighting, sanitary and drinking water systems; foundations for all units; brick and concrete stacks and chimneys; embankments and fills; fire banks and fire walls; retaining walls and other brick and concrete walls; paving and driveways; bridges and tunnels; railroad tracks, switches and trestles; fences; pits, cisterns, culverts, masonry, underground flues and water wells; drain, sewers and plumbing; and other such like property permanently attached to the land." See 144 Ohio St. 506, 508-9, 60 N.E. 2d 52, 54 (1945).

[13a] 1 Ohio St. 511 (1853).

[14] 144 Ohio St. 506, 513, 60 N.E. 2d 52, 56 (1945).

In applying these tests, the court held that only a slight annexation was necessary to satisfy the first test. Of more importance was the test of appropriation. As to this, Ohio precedents established the rule that articles which were annexed to the land to carry on a particular business, but which were not suitable for other businesses or designed for the use of the land itself, were appropriated to the business rather than the land. Only articles annexed to the premises as accessory to the land without regard to the particular business carried on became subservient to the realty and acquired its character. The test of intention was to be inferred from a variety of factors.[15]

While all three requirements of annexation, appropriation and intention must be met to find that a chattel has become part of the real estate, it is apparent from the cases that the test of appropriation is controlling in the case of manufacturing equipment as sufficient annexation normally exists. In the case of special purpose manufacturing equipment the requirement of appropriation to the land is not met and intention becomes immaterial. In the case of general motive power equipment, where the test of appropriation is met, an intention to affix permanently will ordinarily be inferred.

The second case, *The Standard Oil Co. v. Zangerle*,[16] concerned the machinery and equipment of two steam boiler plants and two water treating plants in the same oil refineries. Again, of course, the taxpayer owned the land and buildings to which the chattels were affixed. The boiler plants were used to supply motive power for operating pumps and to supply steam used in the refining process. The water plants were used solely for treating water to be converted into steam. Although firmly affixed to the realty, it was found that these items were used primarily in producing steam required in the process of distillation and only incidentally for supplying motive power. Further, the boilers were designed particularly for this purpose. They operated at low steam pressure and did not contain the super heating equipment usual in steam boilers which are designed for power purposes. They could not be used economically except in a refinery or similar industry.

The court again applied the three tests of *Teaff v. Hewitt* and found that this equipment was not "land and improvements thereon." Its annexation to the land clearly appeared but it was just as clear that the equipment was appropriated to the use of a particular business for it could not be used on the land for carrying on any other type of business. For this reason it was to be distinguished from motive power equipment found to be real property in *Case*

[15] 144 Ohio St. 506, 519, 60 N.E. 2d 52, 58 (1945).
[16] 144 Ohio St. 523, 60 N.E. 2d 59 (1945).

Manufacturing Co. v. Garven,[17] or said to be real property in *Teaff v. Hewitt*.[18]

Here the court found that the owner's intention that the property be personalty was "clearly evidenced by the special design of the boiler houses in question and the purpose and use for which the annexation was made and to which all such machinery and equipment are devoted."[19] Thus again the court considered the appropriation test of paramount importance.

The third case was *Zangerle v. Republic Steel Corporation*.[20] Here again the taxpayer owned the land and buildings to which the equipment in question was affixed. The property included was the processing machinery and equipment located in its hot and cold strip mills. As described by the court,[21]

> The corporation is engaged in converting steel in the form of slabs into hot roll sheets and plates and cold roll finished sheets and strips. The items in question involve machinery and equipment of various sizes and various weights ranging from 750 pounds to almost 950 tons. They were designed to produce the above products and many of the items are directly related to each other to effect continuous operation. The machines of the production line are interconnected so as to insure a continuous flow of product. Most of the units, depending on their size, are supported by foundations which were specially designed therefor. These consist of concrete blocks, piers or bearing walls of varying mass, size and elevation. The foundation blocks, piers and walls for the heavy equipment are generally built on concrete foundation mats which are supported by piling, while lighter equipment is supported by or rests on the floor. Practically all the machines are especially designed to produce the products of the mill and are not adapted for any other purpose.

It was held that all of this equipment including the mats and equipment foundations, was not "land and improvements thereon" and was properly taxed as personal property.

Turner, J., speaking for the majority, reiterated the court's adoption of the three tests laid down in *Teaff v. Hewitt* in ascertaining the meaning of "improvements to land." Additional light was thrown on the test of appropriation. The court pointed out that fulfillment of this test requires that the chattel be something that may be used by succeeding users of the land, saying:[22]

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[17] 45 Ohio St. 289, 13 N.E. 49 (1887).

[18] 1 Ohio St. 511, 542 (1853). This equipment was not before the court because no appeal had been taken from the portion of the lower court decree involving it.

[19] 144 Ohio St. 523, 528, 60 N.E. 2d 59, 62 (1945).

[20] 144 Ohio St. 529, 60 N.E. 2d 170 (1945).

[21] 144 Ohio St. 529, 531, 60 N.E. 2d 170, 172 (1945).

[22] 144 Ohio St. 529, 552, 60 N.E. 2d 170, 181 (1945).

> We are of the opinion that the foregoing excerpt from the finding and order of the board of revision does not justify a finding that the machinery in question was made accessory to the land—something which could readily be used by a succeeding tenant.

This view was adopted in the holding on mats and foundations:[23]

> The record discloses that to prevent vibration and to keep the machinery in true alignment, it is fastened to the floor and in many instances concrete mats or foundations are placed under the heavy machines. Such mats or foundations are not building foundations and according to our understanding of the record in this case may not be considered as improvements to the land. Indeed, were the steel plant abandoned such mats would constitute encumbrances rather than improvements.

As to the test of intention, the holding that mats and foundations were not improvements lays to rest any theory that the mode of attachment alone may raise the inference that the party affixing the chattel intended to annex it permanently to the land.[24] Obviously these foundations could not be removed without destruction.

Further, the court indicated by dictum that no inference could be raised from the fact that the person affixing the chattel was a tenant rather than a landowner when it said,[25]

> If the property be improvements on *land owned by the* manufacturer, similar property must be held to be improvements on land when erected on the land of another, otherwise we would be confronted with a purposeful discrimination contrary to the Federal Constitution.

The principle of law governing classification of property for tax purposes is stated in syllabus 7 as follows:

> The general principle to be kept in view in determining whether what was once a chattel has become a fixture is the distinction between the business which is carried on in or upon the premises, and the premises. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business which may be of a temporary duration, be-

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[23] 144 Ohio St. 529, 554, 60 N.E. 2d 170, 181 (1945).

[24] *Cf.* Teaff v. Hewitt. In Zangerle v. Standard Oil Company, *supra,* counsel for the company conceded that foundations were real property thus avoiding the question in that case.

[25] 144 Ohio St. 529, 535, 60 N.E. 2d 170, 173 (1945).

> come subservient to the realty and acquire and retain its legal character. (Statement of Judge White in *Fortman v. Goepper,* 14 Ohio St., 558, 567, approved and followed.)

In *Roseville Pottery, Inc. v. County Board of Revision of Muskingum County*[26] and the accompanying *Mosaic Tile* case decided in the same opinion, the court was given the opportunity three years later to reappraise the position taken in the three cases set forth above. Again the taxpayer owned the land upon which the property in question was affixed.

The principal items before the court were tunnel kilns used by the taxpayers in the manufacture of decorated art ware, floor tile, wall tile, and bathroom accessories. The Roseville kiln was about 245 feet long, 10 feet wide and about 10 feet high. The six kilns belonging to Mosaic ranged from 265 feet to 340 feet long, and were about 11 feet wide and 7 feet high. As described by the court,[27]

> The kilns stand on cement slabs in solid connection with the floors of the buildings in which the kilns are located. They are built with outsides of either common brick or metal, about four inches thick, and next to the brick or metal, in each kiln, is an insulating layer followed by another layer of refractory material. The kilns are held together by steel buck stays. In the concrete slab, upon which each kiln rests, are laid narrow-gauge tracks. The molded damp clay is loaded on cars which are pushed on these tracks through the kilns. The pushing is accomplished by an hydraulic ram which pushes one car and, after the car is in the kiln a certain distance, pushes another behind it, and so on in a continuous operation. In this way, the ware which is being manufactured is preheated, fired and cooled. Glazed ware goes through the kiln twice * * *.
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> All the kilns were designed by engineers for specific ceramic manufacture and cannot be used in other industries or for the manufacture of different ceramic ware unless changed entirely in design. They can be knocked down and moved to other locations and the records recite several instances where similar kilns have been so handled. Trade papers advertise kilns of this sort for sale and removal. The tracks in the kiln can be removed, although the cement slab, left after moving a kiln, is demolished by the removal of the tracks.

It will be noted that this equipment differs primarily from that before the court in the preceding three cases in that it was constructed principally of masonry rather than steel.

Again the court held that the property in question was not "land or improvements thereon." The court, as before, adopted the three

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[26] Note 4, *Supra.*

[27] 149 Ohio St. 89, 91, 77 N.E. 2d 608, 610 (1948).

tests laid down in *Teaff v. Hewitt.*[28] There was unquestioned affixation to freehold and the kilns could not be removed except by knocking them down and sacrificing the outer shell of common brick. Here again, however, the court stressed the importance of the appropriation test in determining the classification of the property. Since the kilns were placed on the land only for the purpose of carrying on the ceramic business and would not be useful in any other business, they were not accessory to the use of the real estate as such and were therefore not appropriated to the real estate.

The case has a further significance in that in a supplementary brief the county argued that there was no constitutional question involved but rather a question of statutory construction. Section 5322, General Code, made taxable as real property "not only the land itself, * * * but also, unless otherwise specified, all buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto * * * ." It was argued that the kilns were either buildings or structures; that they were not within the description "all engines and machinery of every description, used or designed to be used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purposes owned or used by such manufacturer" required by Sections 5386 and 5388, General Code, to be listed for taxation as personal property; and that, therefore, not being "otherwise specified" they were taxable as real property. The court disagreed with this contention and held that they were "implements used in manufacturing." The law of the case as regards this point is stated in syllabus 2 as follows:

> Such tunnel kilns are implements used in manufacturing, within the meaning of Section 5388, General Code, which requires the listing and assessing of such implements, etc., at 50 per cent of their true value, and are, thereby, otherwise specified within the meaning of Section 5322, General Code, which provides that, unless otherwise specified, all structures, etc., on lands are real property.

A careful study of these cases indicates that the court realized that for the purposes of taxation it was faced with a different problem than the determination of the rights of private parties in or to property. In taxation matters it was essential that there be enunciated a rule or principle which could be objectively applied to produce a uniform result with as little attention to collateral facts as possible. If the intention of private parties were to be accepted as the principal test for taxation, it would obviously open the door to evasion and discriminatory treatment within the classes intended to

[28] 1 Ohio St. 511 (1853).

be uniformly benefited. Moreover, the tax assessor could not be charged with the burden of examining private agreements or circumstances of tenure or otherwise, evidencing the intention of the parties as to the nature of the property affixed to the land. The classification of property for taxation could not depend upon the intention of the taxpayer without introducing utter confusion into the tax structure and its administration. Nor could such classification depend upon the manner and mode of affixation if the objective of the classified personal property tax law were to be realized.

Having the remedial objectives of the law in mind, it becomes clear why the court placed emphasis upon the appropriation test, subordinating matters of affixation, ready removability or intention of the party making the affixation. In no other way could the court have applied the criterion of *Teaff v. Hewitt* to produce a principle which could be uniformly applied to determine the classification of property for taxation. The court, therefore, adopted an intrinsically practical test which does not depart from the fundamentals of the earlier cases but which emphasizes that as to industrial property, the question is whether the article annexed was accessory to the particular business carried on rather than to the land itself. This principle obviously embraces all of the productive facilities of industry and agriculture thus carrying out the intention of Section 5388, General Code, which specifies that the benefits of taxation at 50% of true value shall include the engines, machinery, tools and implements of manufacturers, refiners, processors and farmers.

In order to evaluate these decisions it will be helpful to examine the guides available to the supreme court in arriving at the conclusions reached. The first guide was the statutory history which has been summarized in the earlier pages hereof.[29]

The second guide was set forth in the change made in the Constitution itself. As pointed out above, Article XII, Section 2, which had provided that "Laws shall be passed, taxing by uniform rule * * * real and personal property according to its true value in money * * * " was changed to provide that "Lands and improvements thereon shall be taxed by uniform rule according to value." A purpose must have motivated the change in terms used. "Land and improvements thereon" was obviously intended to be more restrictive than the broad term "real property." It seems natural that the word "improvements" was used in the sense of something added to benefit the land on which it was located. The language adopted in the constitutional amendment is significant, in view of the purposes of the constitutional amendment to enable the favoring of manufactures and farmers; the long line of decisions in this state

[29] See third page of this article.

making the decisive test whether the manufacturing equipment annexed was of general benefit to the land and the very broad language of Section 5322 as it existed for many years. It aptly indicates an intention to require uniformity only with respect to things annexed to the land which are of general and permanent benefit to it. In fact, "improvement" may be definitive of a physical benefit whereas the accessory doctrine is dependent upon the relationship of the use of the annexed property. At least Judge Turner in the *Republic Steel* case considered that the massive concrete foundation mat underlying a continuous strip steel rolling mill which could not be removed without damaging the land if the industry abandoned the site was actually a detriment rather than an *improvement* to the land. In any event, the court decided as set forth in the second syllabus of the *Republic Steel* case:

> 2. The term 'improvements' in the sentence found in Section 2 of Article XII of the Constitution reading 'Land and improvements thereon shall be taxed by uniform rule according to value' contemplates something which creates a permanent benefit to the land.

The definition of "improvements" by the court is in line with the well settled meaning of the word used in connection with lands. In American Jurisprudence,[29a] it is stated: "Generally speaking, the word 'improvement' may be said to include everything that enhances the value of premises permanently for general uses."

In Arkansas, there is a provision in the Constitution, Article XII, Section 3, which exempts homesteads up to a certain value from sale on execution but with the proviso that there shall be no exemption from execution for the payment of obligations contracted, among other things, for improvements on homesteads. In *Greenwood & Son v. Maddox & Toms*,[30] the Arkansas Supreme Court held that a steam engine and machinery were not improvements within the meaning of the Constitution, saying that:

> Supplies for the purpose of carrying on a trade or business, and which were not furnished directly as betterments to the realty, although they may be placed upon the homestead, are not such as is contemplated by law as advanced for the erection of and as improvements thereon.

In *Williamson v. Jones*, the question of the meaning of improvements on land arose with reference to the right of a trespasser to set off improvements erected by him in an action against him for waste by the true owner. The court said that:[31] "An allowable improvement

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[29a] 27 AM. JUR. 260.

[30] 27 Ark. 648 (1872).

[31] 43 W. Va. 562, 27 S.E. 411 (1897).

must be that which adds to—enhances the value of—the land permanently for general uses; * * * ." To the same effect are *Cullop v. Leonard,* [32] *Eagle Oil Corp. v. Cohassett Oil Corp. et al,* [33] *City of Victoria v. Victoria County,* [34] *Proctor v. Maine Central R.R. Co.,* [35] *Lake Whatcom Logging Co. v. Calvert.* [36]

The third guide available to the supreme court in arriving at its decisions was the statutory framework of property taxation. As stated above, a principal consideration in the amendment of the Constitution which permitted a departure from uniformity in the taxation of property other than land and improvements was the objective of affording a more favorable tax climate for industry and farming. The statutory changes made subsequent to the constitutional amendment obviously considered this purpose paramount.

Section 5322, General Code, which defined "real property" and "land" included within those terms "all buildings, structures, improvements, and fixtures of whatever kind thereon," *unless otherwise specified.* This section was retained in its previous form but the legislature then "otherwise specified" with respect to the property intended to be specially treated taxwise, by enacting Sections 5386 and 5388. These sections make up a part of the listing provisions under the personal property law. Section 5386 required that:

> * * * A manufacturer shall also list all engines and machinery of every description used, or designed to be used, in refining or manufacturing, and all tools and implements of every kind used, or designed to be used, for such purpose, owned or used by such manufacturer.

Continuing in Section 5388, General Code, the legislature, after providing that personal property used in business should be listed and assessed at 70% of the true value thereof, provided that "All engines, machinery, tools and implements of a manufacturer * * * and all engines, machinery, tools, implements and domestic animals used in agriculture * * * " except such as "may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation," should be listed and assessed at 50% of the true value thereof.

In the *Standard Oil* and *Republic Steel* cases the court did not feel it necessary to make any distinction between the enumerated kinds of property but in the *Pottery* cases the court concluded that

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[32] 97 Va. 256, 33 S. E. 611 (1899).
[33] 263 Mich. 371, 248 N.W. 840 (1933).
[34] 103 Texas 477, 129 S.E. 593 (1910).
[35] 101 Me. 459, 64 Atl. 839 (1906).
[36] 33 Wash. 126, 73 Pac. 1128 (1903).

the kilns were properly to be regarded as "implements" of the business. In any event the cases make it clear that to be "otherwise specified" the items of property must fall within one of the enumerated kinds,—engines, machinery, tools or implements.

The fourth guide which the court had was the case law which had developed over the preceding 100 years as to what was legally to be regarded as improvements on land.

The state of the law existing at the time of the adoption of the constitutional amendment and the enactment of the legislation involved was, of course, of prime importance in reaching a true understanding of what the people and the legislature did as expressed in these changes in the fundamental and statutory law. It should be emphasized that prior to the amendment the distinction between real and personal property was of no importance in taxation hence there were no cases available in the tax field. Only cases involving the law of fixtures were available for this purpose.

In *Teaff v. Hewitt*,[37] the leading case in Ohio on the law of fixtues, Chief Justice Bartley laid down the following criterion of a fixture:

> 1st. Actual annexation to the realty, or something appurtenant thereto.
>
> 2nd. Appropriation to the use or purpose of that part of the realty with which it is connected.
>
> 3rd. The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the *nature* of the article affixed, the *relation* and *situation* of *the party* making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.
>
> Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term fixture; no occasion for denominating an article a fixture at one period of time, which with the same annexation would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee which under like circumstance would not be such as between landlord and tenant; * * *.

The observations of Chief Justice Bartley in the last paragraph quoted above are obviously general in nature and must be taken as such. The case did not involve a matter of taxation, with which the court was concerned in the recent cases, but was a controversy as to whether a mortgage of real property covered certain manufacturing machinery which had been levied on by judgment creditors of the mortgagor. For tax purposes uniformity of application of principle is paramount and intention of private parties cannot control the

[37] 1 Ohio St. 511 (1853).

incidence of the tax. In litigation between private parties, intention may be decisive as to whether an article affixed to realty becomes a part of it. Agreements between the parties as well as estoppel have been the bases of decisions and in the proper type of case where the affixation was by a tenant, an inference may arise from the relation of the parties, as a tenant is less likely to intend to affix a chattel permanently to the land than is a landowner. The court in the recent cases, being concerned with principles susceptible of uniform application in the field of taxation, had no occasion to adopt any part of the intention test which might be dependent upon private agreement or relation of the parties.

Fortman v. Goepper[38] involved the question of whether a large copper kettle installed in a brewery was real or personal property. Although the kettle was so large that it had to be put in position in separate pieces and would have to be taken apart to remove it, the court held it to be personal, saying:[39]

> The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character.

Wagner v. Cleveland and Toledo Railroad Co. [40] held that the railroad which had only an easement across the land had the right to remove stone piers upon which it had erected a bridge, as against the owner of the fee.

Case Manufacturing Company v. Garven[41] was concerned with whether certain machinery and equipment purchased and affixed as a part of a flour mill remained personal property or became part of the realty. Two types of equipment were involved which are distinguished by the court in the following quotation from the opinion:

> The machinery furnishing the motive power is generally more closely annexed to the freehold, and of a more permanent nature, as the power furnished by it may be

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[38] 14 Ohio St. 558 (1863).

[39] *Supra*, Note 38, at p. 567.

[40] 22 Ohio St. 563 (1872).

[41] 45 Ohio St. 289, 299, 13 N.E. 493, 496 (1887).

> adapted to the propulsion of the machinery of a variety of mills without any substantial change in the motive power itself or in the building other than by substituting one kind of machinery for another; whilst the machinery that is propelled, has more of the general character of personalty, is not as a rule so closely annexed to the freehold, and may be removed, and frequently is, from one mill to another, as any other article of personalty; and is more properly 'accessory to the business' carried on upon the realty than to the realty itself.

Of course, these cases do not constitute all of the case law on fixtures in Ohio but they did set a uniform and consistent pattern of fixture law as concerned industrial property. Each of the cases was founded upon the criterion expressed in *Teaff v. Hewitt* and over the period of years made clear the importance of the appropriation test. Running throughout these cases is the principle more recently expressed in the fourth syllabus of *Zangerle v. Standard Oil Company*[42] as follows:

> 4. The decisive test of appropriation is whether the chattel under consideration in any case is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted.

A reading of the cases cited beginning with *Teaff v. Hewitt,* all prior to the constitutional and statutory changes, shows clearly that in considering chattels affixed to land by industry:

> (a) The mode of annexation alone will not determine the character of the property annexed although some form of annexation is necessary to create a fixture.
> (b) The general principle to be kept in mind, underlying all questions of fixture law is the distinction between the business which is carried on, in or upon the land, and the land itself. The business is personal in nature whereas the land is real estate. Those articles which are merely accessory to the particular business which have been put upon the premises for the purpose of that business are not accessory to the real estate but retain their personal nature. By the same token articles which are placed upon the premises as accessory to it rather than for the benefit of the particular business carried on thereon, and which may continue to benefit the premises if the present business is removed, become subservient to the realty and acquire its legal character. This is the test of appropriation.
> (c) The intention of the party making the annexation is to be determined from the nature of the article annexed rather than the mode of annexation, the relation and situation of the party making the annexation and the purpose for which

[42] 144 Ohio St. 506 (1945).

it is made. As between private parties, intention may be determined by specific agreement or by estoppel.

These principles derived from the case law, were in entire harmony with the purpose of the legislation to provide special tax treatment to industrial and farming property used in business.

Present State of the Law

In the recent cases the court had before it not only the historical background of discriminatory taxation against industry and agriculture, which brought about the constitutional amendment but a well directed implementation of the purpose at which the amendment had been aimed in the legislative provisions granting limited tax advantages to those kinds of property of industry and agriculture which had focused the necessity for relief. To this was added the repeated examination of the principles of fixture law over the past 100 years.

It was not surprising to find the supreme court reiterating the principles of these decisions in the recent decisions dealing with annexations of articles of industrial property. The only innovation necessary to adapt these principles to the determination of classification of property for tax purposes was the elimination of any consideration of private agreements which obviously could not be binding upon the state and this deletion must necessarily be assumed though the court has not yet been called upon to determine the question.

In the present state of the law it seems clear that not all industrial structures and equipment may be classified as personal property and taxed at 50% of true value. To qualify for such a tax status such items of property must (1) be specifically designed or suited to a particular business carried on upon the premises and not suited to other businesses which might utilize the premises in the event of abandonment of the present business, and (2) be one of the kinds of property specified in Section 5388, General Code, *viz.*: engines, machinery, tools or implements.

This being true, it is equally clear that buildings which are defined in Section 5322 as real property are not to be accorded classification advantages since they are not "otherwise specified" in Section 5388 or in any other section of the code.

The same conclusion seems inevitable in the case of certain machinery such as steam boilers and electric generators designed for general production of power and suitable to a variety of businesses which might utilize the premises to which they are annexed. This distinction has been consistently made in the case law and was observed in the *Standard Oil, Republic Steel* and *Pottery* cases, all

of which rely on the fixture cases referred to above in determining the meaning of "improvements" in the constitutional provision.

That the supreme court is alert to the limits intended by the people and prescribed by the legislature in the field of classification of property for taxation appears from the recent decision in *Reed v. County Board of Revision*[43] in which the court held that cottages erected by a lessee on land owned by the state were "buildings" and as such were not "otherwise specified" in the code, and consequently to be taxed as real property.

Before these decisions there was considerable confusion in the thinking of both laymen and lawyers as to whether affixation of an article to the land or building was not sufficient alone to make the article taxable as real estate. Many are the cases and varied are the decisions of the different courts as to whether affixation with nails or with screws or with bolts or with cleats or even weight alone is not sufficient to constitute the article real property. Some cases consider size alone sufficient to determine the question, while others go off on the materials of which the article was constructed. Still other cases are determined by the extent of injury either to the freehold or to the article itself in its removal. The court brushes aside as incidental all of these circumstances and holds that the function of the thing annexed or the purpose in making the annexation, frequently referred to as "appropriation," is the determining test. This test is simple, clear, and easy of application and may be summarized thus:

The business of manufacture itself is personal in character as distinguished from the use of the land as such. Consequently, an article designed for and appropriated to the particular manufacturing business carried on in or upon the premises is personal in its nature, whereas articles which have been annexed to the premises as accessory to *it*, whatever business is there carried on and not peculiarly for the benefit of the present business, becomes subservient to the realty and acquires and retains *its* legal character. This test is but the application of common sense to the law as it has developed over the past 100 years. The court recognizes that only in such a way could equality and uniformity be achieved in the taxation of property of manufacturers. It recognizes that one manufacturer may utilize only light portable machinery and implements in his manufacturing process while another may be obliged to employ huge and ponderous machinery and implements; or that the machines or implements of one might be constructed of metal and those of another of necessity might be constructed of masonry or ceramics. Some require physical attachment to the building or land to hold them in

[43] 152 Ohio St. 207, 88 N.E. 2d 701 (1949).

place or they could not be operated; others do not. To treat one manufacturer differently from another because of any of these fortuitous circumstances would be unjustifiable discrimination which never could have been intended, if indeed it could be done validly. The supreme court decisions merely recognize that all implements specially designed for a particular business, whether manufacturing, refining or farming, regardless of size, shape, construction or affixation, and regardless of materials used, must be given similar treatment in their taxation.