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Real Property - Fixtures - Vendee's Right to Recover Value of Scales upon Land at Time of Conveyance

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Construing North Dakota's "public water" law[19] literally would imply that a determination of water as a mineral is unnecessary, as all water in North Dakota belongs to the public. However a recent District Court decision in North Dakota recognized a definite conflict between this construction and Sec. 47-01-13 of the Century Code which asserts that private ownership of land includes water.[21] The court reconciles the statutes by applying Sec. 47-01-13 as to rights that were vested prior to March 1, 1905, the date the "public water" law was enacted.[22]

J. D. SCHLOSSER.

REAL PROPERTY — FIXTURES — VENDEE'S RIGHT TO RECOVER VALUE OF SCALES UPON LAND AT TIME OF CONVEYANCE. — The plaintiff brought this action to recover the value of a set of platform scales that were on a ten acre tract of land purchased from the defendant. The trial court found the scales were a part of the realty and awarded plaintiff $500 as damages for the wrongful removal of the property. On appeal the Supreme Court *held,* one justice dissenting that where the scales were used in connection with a scale house containing indicating mechanism and the removal of the platform left the land burdened with a large, useless, concrete-lined excavation, the scales were a 'fixture' as between vendor and purchaser. *Hinton* v. *Bryant,* 339 S.W.2d 621 (Ark. 1960).

A fixture[1] is a possessory article which lies between real and personal property.[2] Whether it is a part of the realty or a mere chattel is generally a mixed question of law and fact which is usually determined by the jury.[3] The criteria applied to determine the position a chattel has assumed are annexation, adaption and the intention of the person affixing the article to the realty.[4]

Annexation is the physical attachment of an object to the land and can be either actual or constructive.[5] The general rule is, absent any agreement be-

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that it shall not mean oil and gas nor shall it mean coal which does not contain uranium, thorium or other fissionable metals or minerals in commercial quantities unless the mining of such coal is reasonably essential to production under the lease.

19. N.D. Cent. Code § 61-01-01.

20. Volkmann v. City of Crosby (N.D. Dist. 1960).

21. The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

22. N.D. Cent. Code § 61-01-01.

1. N.D. Cent. Code § 47-01-05, "Fixtures" defined. — A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

2. Rogers v. Prattville Mfg. Co. No. 1, 81 Ala. 483, 1 So. 643 (1887).

3. Neely v. State, 35 Ala. 315, 48 So.2d 563 (1950); First Nat. Bank v. Nativi, 115 Vt. 15, 49 A.2d 760 (1946).

4. Gray v. Krieger, 66 N.D. 115, 262 N.W. 343 (1935); Ozark v. Adams, 73 Ark. 227, 83 S.W. 920 (1904).

5. Doll v. Guthrie, 233 Ky. 77, 24 S.W.2d 947 (1930); United Pacific Ins. Co. v. Cann, 276 P.2d 858 (Cal. App. 1954), which holds that portions of equipment not attached to the land but which are used with and essential to the other portions attached to the land constitute a unit and are constructively annexed. Moller-Vandenboom Lumber Co. v. Boudreau, 231 Mo. App. 1127, 85 S.W.2d 141 (1935) stating that immovability of the object is not the sole test of whether it is or is not a fixture.

tween the grantor-grantee, all fixtures whether actually or constructively annexed to the property, pass with the conveyance of the realty.[6] Adaption refers to the purpose of the fixture in the use and occupancy of the land.[7]

The intention of the owner is construed to be the controlling element when determining what charter the chattel has assumed.[8] Intent may be inferred from the nature of the article,[9] or the relation and conduct of the party making the annexation, *i. e.*, mortgagor-mortgagee, vendor-vendee, landlord-tenant.[10] The intention of the party does not have to be that the annexation be forever, rather it may be continuous until the article is worn out, or the owners purpose has been accomplished.[11]

The absence of an agreement between the parties will allow a landowner to claim the fixtures in North Dakota.[12] The statute is construed liberally and it appears that anything constructively annexed to the realty will qualify as a fixture unless a different intent can be shown by the parties.

Damages may be recovered for the wrongful removal of a fixture from property. Consideration must be given to the actual damage sustained,[13] the value of the property before and after the removal,[14] the extent of depreciation, and the replacement cost of the fixture.[15] As a general test cannot be applied to every case, an evaluation of these tests will enable the court to determine what a reasonable value should be and aid them in giving judgment accordingly.

ROBERT D. HARTL.

TORTS — PRENATAL INJURY — RIGHT OF ACTION TO VARIABLE FETUS LATER BORN A MONGOLOID.* — An action was brought on behalf of a child, who allegedly was born mongoloid as a result of injuries received in an automobile collision when the child was a fetus of age one month. The Supreme Court of Pennsylvania *held,* one Justice dissenting, that the child did have a right of action against the defendant, those automobile allegedly negligently struck the

6. Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949) (except trade fixtures).

7. Knell v. Morris, 39 Cal.2d 388, 247 P.2d 352 (1952) stated that where innocent third parties are concerned it is the intent which governs. This however must be reasonably manifested by physical facts and outward appearances, rather than any express or implied intent of those making the annexation. Marty v. Champlin Refining Co., 240 Iowa 325, 36 N.W.2d 360 (1949).

8. Bank of Mulberry v. Hawkins, 178 Ark. 504, 10 S.W.2d 898 (1928); Banner Iron Works v. Aetna Iron Works, 143 Mo. App. 1, 122 S.W. 762 (1909) stating the principle criterion is the intention with which the owner of the land or building put the material into the building or on the land — whether his purpose was to make it permanently a part of the land or tenement. If this was his purpose when he made the annexation, then, though it is fastened to the freehold only slightly, and may be displaced without injury to the freehold, it usually will be treated as a fixture.

9. See *In re* Slum Clearance, City of Detroit, 332 Mich. 485, 52 N.W.2d 195 (1952); Strain v. Green, 25 Wash.2d 692, 172 P.2d 216 (1946).

10. Dermer v. Faunce, 191 Md. 495, 62 A.2d 304, *aff'd* 62 A.2d 582 (1948); see City of Phoenix v. Linsenmeyer, 78 Ariz. 378, 280 P.2d 698 (1955); Nelse Mortensen & Co. v. Treadwell, 217 F.2d 325 (9th Cir. 1954).

11. Pritchard Petroleum Co. v. Farmers Co-op., 117 Mont. 467, 161 P.2d 526 (1945).

12. Gussner v. Mandan Creamery & Produce Co., 78 N.D. 594, 51 N.W.2d 352 (1952).

13. Fine v. Beck, 140 Md. 317, 117 Atl. 754 (1922); McMohon v. City of Dubuque, 107 Iowa 62, 77 N.W. 517 (1898).

14. Dwight v. Elmira, C. & N. R.R., 132 N.Y. 199, 30 N.E. 398 (1892) recognizing two elements of damage: (1) The value of the articles after separation from the freehold; (2) damage to the realty, if any, caused by removal.

15. Slane v. Curtis, 41 Wyo. 402, 286 Pac. 372 (1930).

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