Volume 65
Issue 2 *Dickinson Law Review - Volume 65, 1960-1961*

1-1-1961

Semantic Shrubbery in the Tax Official's Infield: Ambiguous Exemptions

Richard H. Wagner

ARTICLES

SEMANTIC SHRUBBERY IN THE TAX OFFICIAL'S INFIELD: AMBIGUOUS EXEMPTIONS

BY RICHARD H. WAGNER*

The debate on the nature and scope of tax exemptions to be granted Pennsylvania industrial enterprises may soon shift from the judicial to the legislative forum. Among the issues to be decided is whether the reasons originally considered sufficient to justify tax exemptions for "manufacturers" will furnish equal justification for granting exemptions: (1) to establishments in the business of performing services for manufacturers—for instance, electroplaters, metal heat treaters and scrap yards, and (2) to other firms not considered to be manufacturers or servicing manufacturers such as establishments which process and package human food and animal feed (fruit and vegetable canners, meat packers, grain mills, etc.), and commercial enterprises, such as laundries and cleaning and dyeing establishments, which serve the general public.[1]

* Professor of Law, Dickinson School of Law, 1946-1958, Assistant Attorney General, Chief Counsel, Bureau of Sales and Use Tax, Pennsylvania Department of Revenue. The views expressed herein are those of the author and do not necessarily represent those of the Commonwealth.

1. Pennsylvania's Capital Stock Tax Act (on domestic corporations) and Franchise Tax Act (on foreign corporations) contain provisions for the exemption of corporations engaged in "manufacturing." Dormant for a period, these exemptions became effective again for 1958 and later years. Similar exemptions appear in local mercantile license and general business taxes. The courts have held that to qualify as a manufacturer, a person must be in the business of making something, i.e., transforming materials into a new and different product. See Rosenbluth, *Pennsylvania Business Taxes,* 36 A.L.I. PROCEEDINGS (1959). The Sales and Use Tax Act defines the word "manufacturing" as "The performance of manufacturing, fabricating, compounding, processing or other operations, engaged in as a business, which place any personal property in a form, composition or character different from that in which it is acquired": PA. STAT. ANN. tit. 72, § 3403-2(c) (1956). The industries mentioned in the text have contended that they should be exempt because their operations made significant changes in personal property. However, the Bureau of Sales and Use Tax has interpreted this provision as a legislative expression of the familiar transformation test applied by the courts. The Court of Common Pleas of Dauphin County, sitting as the Commonwealth Court, upheld the Bureau's interpretation in Commonwealth v. Donovan Co., No. 155, Commonwealth Ct. Pa., Dec. 2, 1960. The Court stated: "If the manufacturing exemption is construed as the taxpayer urges here, the Commonwealth could not collect tax from any business which performs any work upon personal property. It is safe to assume that the revenues derived from the tax under such an interpretation would be seriously reduced. We cannot believe the Legislature intended such an interpretation." (The business of the company in this case was heat treating metal objects to increase their hardness.)

In addition to the general exemption on property purchased for resale in its original form or as a component of other property to be sold, the Selective Sales and

That the basic issues in this debate cannot be resolved satisfactorily through the determination of such relatively narrow issues, as the meaning of questioned language in existing statutes or the tax status of this or that particular establishment, is apparent from the arguments advanced in pending appeals and recent discussions of this subject.[2]

These arguments, being extra-legal in nature, are not within the normal area of judicial review. What answer shall be given to proposals that exemptions should be granted to job-creating businesses, especially in "depressed areas" (also referred to as "excess labor-markets"), in order to encourage the economic growth of such areas? What consideration should be given to the argument that the unfavorable competitive position of a local industry calls for tax advantages to place it on a par with out-of-state competitors? In considering an industry's claim for exemption from one tax, what weight should be given to the fact that it has received or not received other tax exemptions? Where should the line be drawn (if any distinction shall be made) between "industrial" and "commercial" enterprises in granting tax relief? If reasons are found for granting tax relief to certain business activities, should the relief be total or partial? And always, there is the overriding question—where shall the tax burden be shifted to raise revenues for education and other requisite public expenditures if exemptions are granted or enlarged with respect to certain classes of taxpayers? Clearly, questions such as these are best debated in the legislative halls rather than in courtrooms.

When the facts basic to these arguments have been analyzed, weighed, decided, and implemented by legislation, it is to be hoped that the public, together with state and local officials charged with the duty of administering tax laws, will be given these decisions in the form of legislation which employs

---

Use Tax Act also contains exemptions for mine and quarry operators, refineries, publishers, printers, firms building, rebuilding and repairing ships, farmers, dairies, persons engaged in horticulture and floriculture, public utilities, radio and television stations, charitable organizations, religious organizations, non-profit educational institutions, volunteer firemen's organizations, the United States, the Commonwealth of Pennsylvania and its instrumentalities and political subdivisions. The Act also exempts the purchase of property to be used in research having as its objective the production of a new or improved product or utility service, or method of producing same.

Under specific statutory provisions, corporations organized for laundering and for the processing and curing of meats were formerly granted exemption from capital stock tax. See PA. LAWS 1913, No. 431; PA. LAWS 1929, No. 284; and PA. LAWS 1937, No. 55.

2. See *Debate: Selective Sales and Use Tax—The Manufacturing Exemption,* 64 D.L.R. 383 (1960). The debate is not confined to sales and use taxes. The same arguments are made with respect to other taxes. (No opinion is expressed by the attorneys for the Bureau as to whether the legislature should grant new exemptions or enlarge or restrict existing exemptions; these are questions of policy for the law makers. All counsel for the Bureau would do is point out that where the broadening of tax relief is undertaken by straining the interpretation of laws or the use of ambiguous language, the lines between taxable subjects and exempt subjects become so blurred it is impracticable to determine where they lie, with consequent weakening of enforcement and lack of uniformity in the application of the tax.)

definitive, understandable language—clear, candid statements of who and what is taxed, and who and what is exempt from tax.

In amending or revising these exemptions it may be anticipated that proponents of broader business exemptions, in view of the above mentioned arguments, will ask the legislature to rewrite the present "manufacturing" exemption as "industrial" exemptions comparable to those appearing in our realty tax laws.[3] It is the purpose of this article to point out the ambiguities present in, and the controversies which may be expected from, the use of such terms as "industry," "industrial establishment," etc., if such exemptive substitutions are made.[4] Attention will also be focused on the correlative problems concealed in the words "machinery" and "equipment" in tax exemption provisions by reviewing the use of these terms in local realty tax laws and their corresponding effect.

Prior to 1953, Pennsylvania's realty tax laws provided with regard to industrial property that the tax should apply to everything that goes to make up the plant. In other words, the taxable real estate included not only land, buildings and other structures, fixtures and permanently installed improvements in the form of machinery and equipment, but also everything else comprising the plant, whether fixed or loose. This was the combined result of historically broad tax statutes and a judicial rule known as the "assembled industrial plant doctrine." Thus, the relevant act as long ago as 1844 provided:

> All real estate, to wit: houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries and ferries, wharves and other real estate, not exempt by law from taxation . . . shall be valued and assessed . . . for all state and county purposes.[5]

The General County Assessment Law enacted in 1933 and the Fourth to Eighth Class County Assessment Law of 1943 provided for the taxation of realty in language practically the same as that of the Act of 1844.[6] The

3. Similar requests for enlargement of the "farming" exemption can be expected from persons engaged in the breeding and raising of game animals, birds and fish, race horses, and fur bearing animals.

4. For other examples of ambiguous provisions, see Garfinkle, *Categorical Definition of Tangible Personal Property*, 62 D.L.R. 1 (1958); Moore, *The "Home Rule" Tax Act—A Solution or Challenge*, 97 U. PA. L. REV. 811 (1949); and Brabson, *Analysis of Sales and Use Tax Exemptions—With Comments as to Uniform Application*, 9 VAND. L. REV. 294, 311-15 (1956).

5. PA. LAWS 1844, No. 318.

6. PA. STAT. ANN. tit. 72, § 5020-201 (1933) (General County Assessment Law); PA. STAT. ANN. tit. 72, § 5453.201 (1943) (Fourth to Eighth Class County Assessment Law). Assessment of real estate is made at the county level and such assessments are made either annually or triennially by the county assessing officials. Real estate tax statements are issued by the various local tax collectors to the registered owner of the

Pennsylvania Supreme Court held that the legislature, by using this language, had adopted the "assembled industrial plant doctrine" under which everything comprising an industrial plant, "whether fast or loose" or otherwise in the nature of a chattel used in the plant, is considered real estate.[7]

The assembled industrial plant doctrine had its origin in the field of mortgage law. If a person who had borrowed money secured by a mortgage on his plant were free to sell or encumber his movable machinery or equipment without the consent of the mortgagee, it was recognized that this would jeopardize the value of the mortgage. The courts observed that it would be neither realistic nor practicable to treat things installed in an industrial plant as personal property merely because they could be removed and this, in conjunction with the desire to protect mortgages in the field of industrial financing and the broad statutory provisions with regard to realty taxes, evidently accounted for the all-inclusive rule.[8]

In the 1953 legislative session, substantial changes were made in the laws relative to local realty taxes upon industrial properties. For the apparent purpose of eliminating from local realty taxes those things in industrial plants which are in the nature of personal property,[9] two bills were introduced and finally enacted which provided as follows:

---

realty. Such statements usually show the assessment, effective rate of tax for county, borough, city or town and school purposes individually and the total tax due.

Actual application of the realty tax laws was another thing. It has been far from uniform.

7. Patterson v. Delaware County, 70 Pa. 381 (1872).

8. See Voorhis v. Freeman, 2 W. & S. 116 (Pa. 1841); Patterson v. Delaware County, 70 Pa. 381 (1872); Medical Tower Corp. v. Otis Elevator Co., 104 F.2d 133 (3d Cir. 1939); United Laundries, Inc. v. Board of Property Assessment, 359 Pa. 195, 58 A.2d 833 (1948).

The superior court did not agree that the assembled industrial plant doctrine had any application in the field of taxation. In its decision in the United Laundries case, the superior court (affirming the decision of the Common Pleas Court of Allegheny County) stated: "As far as the so-called 'assembled industrial plant doctrine' is concerned, the decisions of our appellate courts have applied that doctrine in cases involving the ownership of real estate or liens thereon. . . . It has never been extended to tax assessments of real estate. . . . There is no such thing as taxation by implication." United Laundries, Inc. v. Board of Property Assessment, 161 Pa. Super. 412, 415, 54 A.2d 912, 914 (1947) [*rev.* 359 Pa. 195, 58 A.2d 833 (1948)].

Statutes affecting the taxation of property in the cities of Philadelphia and Pittsburgh made exceptions to this inclusive rule. "Machinery and tools used in manufacturing" were excluded from realty tax in Philadelphia: PA. STAT. ANN. tit. 53, § 15976 (1915). "Machinery of all kinds" was exempted from tax in Pittsburgh: PA. STAT. ANN. tit. 53, § 23104 (1911).

9. See LEGISLATIVE JOURNAL of 1953 Session, pages 1872 and 2568. Action on these bills took place on May 5, 13, June 10, 16, 24 and July 6, 1953 and remarks by the legislators appear on pages 1666-1670, 1870-1872, 2381-2383, 2567-2573, 2804-2829 of the JOURNAL for 1953.

It was suggested during the legislative discussion that the items removed from realty tax by this provision could be taxed as personal property by local governments under the so-called Tax Anything Act of 1947, PA. STAT. ANN. tit. 53, §§ 6851-7 (1947). But since this act bars a local tax on anything which is subject to a state tax, and since

> *Machinery,* tools, appliances, and other *equipment contained* in any mill, mine, manufactory or *industrial establishment* shall *not be included or considered* in determining the value of such mill, mine, manufactory or *industrial establishment.*[10] (Emphasis added.)

What did the legislature exclude from tax by its use of the words *"machinery and equipment contained in any industrial establishment"?* This troublesome question is divided into two parts: (1) Who is entitled to this exemption; that is, what types of business enterprise come within the term "industrial establishment"? (2) What property is excluded by the words "machinery" and "equipment"? The winds of controversy blow through these issues but evoke few answers reassuring to revenue collecting agencies. No definitions or practical standards for solving these problems were furnished in the amendatory acts, nor do dictionaries resolve the doubts. It is evident that the total effect of these amendments is to remove a great undefined amount of property value from taxation—much more than actually was contemplated.[11] The difficulties stem from the language and interpretation placed on "industrial establishment" and "machinery and equipment."

---

the capital stock tax on domestic corporations and the corporate net income tax on foreign corporations have been held to be property taxes [Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79 (1940)], such a tax would appear to be invalid with regard to incorporated businesses subject to these taxes: Peoples Natural Gas Co. v. Pittsburgh, 317 Pa. 1, 175 Atl. 691 (1934). Such invalidity would possibly also extend to unincorporated businesses because of the uniformity clause: Lawrence Twp. School District case, 362 Pa. 377, 67 A.2d 372 (1949).

The Tax Anything Act of 1947 also provides that the "aggregate amount of all taxes . . . imposed by . . . any political subdivision under this section shall not exceed the amount equal to the product obtained by multiplying the latest total assessed valuation of real estate in such political subdivisions . . . by" a specified millage: PA. STAT. ANN. tit. 53, § 6851 (1947).

10. PA. STAT. ANN. tit. 72, § 5020-201 (1953) amending the General County Assessment Law of 1933; and PA. STAT. ANN. tit. 72, § 5453.201 (1953) amending the Fourth to Eighth Class County Assessment Law of 1943. PA. STAT. ANN. tit. 72, §§ 5020-201 and 5453.201 (1957) also contained provisions to postpone the effect of the above mentioned provisions to 1956. In 1957, the General County Assessment Law was further amended: PA. STAT. ANN. tit. 72, § 5020-201 (1957), which postponed the exclusion for counties of the second class to 1958 and made it effective only on a 20% basis for that year. Each year thereafter the exemption is increased another 20% until 1962 at which time full exemption from the tax takes effect. (Actually, this was done by leaving the 1953 exemptive provision in the Act, and by adding thereafter a provision imposing tax on 80% of the value of machinery and equipment for the year 1958, on 60% for 1959, etc., reducing to zero in 1962.) See the Act for more details.

11. See M. P. Acee Co., Inc. v. Allegheny County, 18 Pa. D. & C.2d 449 (1958), where it appears that some firms have refrained from taking full advantage of the amendments. (In this case, a suit to compel the allowance of tax exemptions was brought by the named plaintiff allegedly on behalf of more than 5000 other owners of industrial plants, but not including some of the larger property owners. The mandatory nature rather than the scope of the exemption was litigated and the court found "crystal clear" the effect of the legislation to abolish the tax on machinery and equipment with "no discretion in this regard within the jurisdiction of the [county] board.")

INDUSTRIAL ESTABLISHMENT

The ambiguity of the term "industrial establishment" is illustrated in cases dealing with the scope of the term "industrial plant." The term "industry" or "industrial" is used in more than one sense. Sometimes the term is used broadly to refer to any branch of business for gain or profit. Used in this sense, it would include not only productive enterprises such as manufactories but also commercial establishments for the sale of property or services and such establishments as bowling lanes, "health salons," eating places and amusement parks. Again, the term is employed in a more restrictive sense which, although broader than the term "manufacturing," does not include all businesses of the type often described as "commercial" under other laws such as zoning ordinances. In a case dealing with a tax imposition provision in 1951, the supreme court considered establishments "such as theatres, cab companies, service stations, automobile repair companies, restaurants, stores, office buildings, hotels, beauty shops, banks and self-service laundries." These, the court indicated were not in its opinion "industrial plants":

> Therefore, the fact that the businesses to which plaintiff referred are sometimes generically called 'industries' is irrelevant to the issue here raised. The question is whether their establishments are *industrial plants.*
>
> The answer to that question is self-evident. By no stretch of imagination could a bank building, a hotel, a theatre or any of the other *business establishments* referred to by plaintiff be considered an *industrial plant.* It is true that we sometimes speak of 'the movie industry', 'the hotel industry' or 'the banking industry', but that is merely a loose use of language to convey the idea that the particular business is a sizeable one. In spite of that colloquialism, we do not speak of the buildings housing such businesses as *'industrial plants'*. . . .[12] (Emphasis added.)

It is noteworthy that the court, in referring to the enterprises which it considered not to be "industrial plants" referred to them as "business establishments" and that the 1953 exemptive amendments to the realty tax laws employ the term *"establishment"* rather than *"plant."*[13] Did the draftsmen select the word "establishment" rather than "plant" with the thought that industry in the broad sense of any place of business would thereby be entitled to the benefits of the 1953 exemptions?

The supreme court has applied the terms "industrial" and "industrial

12. North Side Laundry Co. v. Allegheny County Board of Assessment, 366 Pa. 636, 639, 79 A.2d 419, 421 (1951) discussed in 14 U. PITT. L. REV. 261 (1952).

13. In Todd v. Gernert, 223 Pa. 103, 105, 72 Atl. 249 (1909), the court stated: "That word [plant] is to be given its ordinary sense of property owned or used in carrying on some trade or business. Men speak daily of the plant of a foundry, factory, mill or railroad, but the term has not yet been applied to a row of dwellings where the business carried on is housekeeping."

plant" to service enterprises performing work for the general public which the court itself has described as "commercial" enterprises. Thus, the court has held that "commercial laundries" are "industrial plants," and the same has been held with respect to rug cleaners.[14] At the time these cases were decided, commercial laundries objected to being called "industrial plants" because under the former realty tax act and the assembled industrial plant rule this meant that everything inside the plant, even loose equipment, was considered taxable realty. However, under the acts of 1953, all commercial and business taxpayers have an incentive for being classed as "industrial establishments" because this now means they can claim that almost everything contained within their establishments is exempt. Thus, cases which held that certain establishments were within the industrial plant concept when the effect of the rule was to impose tax are now usable as precedents where the effect of the rule is the exact opposite, *viz.*, to exempt from tax.

The superior court did not regard commercial laundries as coming within the meaning of the term "industrial plant." In its opinion in *United Laundries, Inc.*, the court stated: "The 'assembled industrial plant doctrine' has been applied in all our cases to a manufacturing industry only. A laundry is not such."[15]

Actually there have been many cases in which the supreme court has applied the industrial plant concept in a much broader sense. For example, in *Land Title Bank and Trust Company v. Stout*,[16] the court, in considering the application of the assembled plant rule to a five-story apartment building in which elevators had been installed, held as follows:

> Thus, in the case of manufacturing plants we have pointed out that it is the machinery and equipment which convert the four walls of the factory building into a valuable industrial property. If these were to be taken away, little would remain of the mortgagee's security.
>
> The rule has been applied not only to manufacturing establishments, but to other industrial operations such as *coal mines* . . . *stone quarries* . . . a *street railway*. . . .
>
> * * * *
>
> In a case closely analogous to the one now before us, *Medical Tower Corp. v. Otis Elevator Co.*, 104 F.2d 133, the Circuit Court of Appeals for the Third Circuit held that elevators in an *office building* must be considered part of the freehold. . . .
>
> It seems clear to us that the mortgage now held by the plaintiff

14. United Laundries, Inc. v. Board of Assessment, 359 Pa. 195, 58 A.2d 833 (1948); North Side Laundry Co. v. Allegheny County Board of Property Assessment, 366 Pa. 636, 79 A.2d 419 (1951).

15. 161 Pa. Super. 412, 416, 54 A.2d 912, 914 (1947) [*rev.* 359 Pa. 195, 58 A.2d 833 (1948)].

16. 339 Pa. 302, 14 A.2d 282 (1940).

> trustee was intended to encumber the *apartment house as an operating establishment,* . . . Not only is this established by the express language of the mortgage itself, but the court below has found that 'the four elevators installed by petitioner are an integral and essential part of the *operating plant of Cliveden Hall as an apartment building*' . . . With this conclusion we are in complete accord.[17] (Emphasis added.)

In *Penn-Lehigh Corporation Appeal,*[18] the owner of a building, adaptable as a "light industrial manufactory" but containing bowling lanes, contended that the lanes could not be taxed as realty under the Fourth to Eighth Class County Assessment Law as amended in 1953, effective in 1956. Counsel for both sides had stipulated that the county had *not assessed* the property under the assembled industrial doctrine and in this case the court remarked that the assessment could not have been *sustained* under that doctrine, "because a bowling lane could not be considered to be an industrial plant." However, on the finding of the lower court that there was no physical attachment of the alleys to the building and that they could be removed without any physical damage to the alleys themselves or to the building in which they were located, the superior court held that the lanes were personal property and not taxable as realty, without any debate as to the status of the property as an "industrial establishment" under the *exemptive* provisions of 1953.[19]

Although dicta in the *North Side Laundry Case, supra,* indicated that the court would not consider a hotel an "industrial plant," the court in its opinion in that case thrust the meaning of the term into orbit with the remark that it could "do no better than to define an industrial plant as that type of establishment which the ordinary man thinks of as such."[20] As a general statement of what the term "industrial plant" includes, this may be of some use to those called upon for advice or decisions insofar as they may be dealing with business activities which clearly fall within these words. However, "industrial plant" and "industrial establishment" are, as the cases show, flexible terms and the "ordinary man" test furnishes no practical guidance for ascertaining their periphery and for determining the status of cases in this area. The answer in any questioned case would depend upon the specialized knowledge of the "ordinary man" to whom the question was put, and whether he has been exposed to court decisions that have been made in other cases regarding the use of the term, not to mention his attitude regard-

17. 339 Pa. 302, 307, 14 A.2d 282, 284 (1940).
18. 191 Pa. Super. 649, 159 A.2d 56 (1960).
19. *Ibid.*
20. 366 Pa. 636, 640, 79 A.2d 419, 421 (1951). Hotels, it may be remarked, have claimed exemption from sales and use taxes on their purchases on the ground that they must charge tax on occupancy of their rooms. Laundries have made the same claim since the rendition of laundry service was made taxable in 1959.

ing the financial consequences of his answer. As Judge Guffey for the lower court and Judge Woodside for the superior court stated in commenting upon the opinion of the "ordinary man" on this subject: "It would seem that the ordinary man would think of a newspaper as an industrial plant, *especially if* one were to *tell him* that a laundry or a carpet cleaning company are such for the purpose here being considered."[21] (Emphasis added.)

We will leave the reader to complete this phase of the subject by referring to his own dictionary, volumes of "Words and Phrases," and experiences for the meaning of "industry," "plant" and "establishment." Let him then decide whether he knows where to draw the lines, if such lines shall be drawn, around "industrial establishments," "business establishments," and "commercial establishments." Does he know of any business premises the owner of which cannot claim entitlement to this exemption and at least create controversies which it would take years to settle—unless the bedevilled tax officials eliminate these controversies by interpreting "industrial establishment" to please all industrial owners, that is to exempt all places of business?[22]

In conclusion, the moral for statute draftsmen considering the extension of exemptions to classes larger than those presently circumscribed and defined by judicial precedents might be: Terms such as "industrial operations," "industrial processing" or "industrial services," without specific administrable limitations, may result in the enactment of a "tax-nothing law" in the area of business activities, not to mention the chaos they create in tax observance and enforcement.

---

21. Messenger Publishing Co. v. Allegheny County Board of Property Assessment, 183 Pa. Super. 407, 409, 132 A.2d 768, 769 (1957). The "ordinary" man's conclusions would also depend (or at least in the 1940's would have depended) on whether he was acting under instructions from the Superior Court or the Supreme Court. In Golle v. Charleroi Saving and Trust Co., 20 Wash. County 169 (Pa. 1940), the rule was applied to a theater where the fans, lights, curtains, projectors, etc. were held part of the real estate under the assembled plant doctrine.

22. In some localities, no attempts apparently have been made to draw such lines and no reference materials seem to be in use except books on valuations which fail to observe any distinction between industrial and commercial establishments, but rather lump all property into two classes: (1) Residential, and (2) Commercial (the latter being considered synonymous with "industrial").

> Property is assessable at fair market value under the law. However, it is probably fair to say that very few countries fix assessments at 100% of market value, but the percentage of market value represented by assessments varies widely throughout the State. The State Tax Equalization Board has made studies of the relation between assessments and market values on a county-wide basis which statistics show wide variances among the counties. Such statistics are based on sales of real estate generally and no attempt is made to classify separately residential, commercial and industrial properties or to distinguish between urban, suburban and rural districts within the county. Rosenbluth, *Pennsylvania Business Taxes, supra* note 1.

MACHINERY AND EQUIPMENT

The second question, or set of questions, presented under the 1953 amendments relate to the exemptive phrase *"machinery and equipment contained in"* the establishment. Did the legislature, by this language, relieve from realty taxes not only loose and removable items (formerly taxed as realty only by application of the assembled industrial plant doctrine[23]), or does this provision also remove from realty taxes things that are so affixed or constructed as not to be removable from the business premises in any practical sense? Does this provision mean that building improvements such as elevators, plumbing fixtures, and heating and air-conditioning equipment shall be excluded in determining the tax on industrial establishments? Does it prohibit the taxation of structures, other than buildings, used in industrial establishments?[24]

If one undertook to answer these questions according to the rules generally applied by the Pennsylvania courts (where the assembled plant doctrine has not been invoked) for the purpose of distinguishing those things which become realty from those which remain personal property, the determinations would be made as follows:

23. This principle was stated in Pennsylvania in Voorhis v. Freeman, 2 W. & S. at 119: "Whether fast or loose, therefore, all the machinery of a manufactory which is *necessary to constitute* it, and without which it would not be a manufactory at all, must pass as part of the freehold." This rule was more recently expressed in Titus v. Poland Coal Co., 275 Pa. 431, 119 Atl. 540 (1923) to the effect that a chattel placed in an industrial establishment for permanent use, and necessary to the operation of the plant becomes a fixture, and as such a part of the real estate although not physically attached thereto; in other words, if the article whether fast or loose, be *indispensable in carrying on the specific business,* it *becomes a part of the realty.* See also First National Bank of Mt. Carmel v. Reichmeder, 371 Pa. 463, 469, 91 A.2d 277, 279 (1952) in which it is stated to the same effect: "all essential parts of an industrial plant are to be regarded as real estate . . . passing to the mortgagee of the realty even though not specifically mentioned in the descriptive clause of the mortgage. . . ."

24. Perhaps the full significance of this provision can best be explained by listing at this point some general designations of the industrial property involved:

1. Land.
2. The "shells" of buildings, *i.e.,* the foundation, floor, walls and roof.
3. Building fixtures, such as space heating and air-conditioning equipment, elevators, escalators, and plumbing and lighting equipment, etc.
4. Structures other than buildings, including bins, bridges, grain elevators, fences, furnaces, ovens, silos, stacks, tanks, towers, etc.
5. Business equipment installed and affixed to the premises so as not to be removable in any practical sense of the term.
6. Things which although installed and more or less securely attached for operational use could, practically speaking, be removed without material injury to them or the remaining realty.
7. Things installed upon the premises with little or no attachment thereto and, if necessary, movable; *e.g.,* lathes and drill presses.
8. Appliances, furniture, tools and similar loose or portable items used in the establishment.

Except for the structures mentioned in item 4, no attempt is made to describe specific types of materials or equipment going to make up industrial establishments ranging from laundries to steel plants, etc.

(1) If the property is loose—like desks, plug-in or ready hook-up appliances, or tools—it is personal property.

(2) If the property is a building or structure, or if it is something that is "so annexed that it cannot be removed without destruction or material injury to the thing itself or to the remaining realty, it is realty even in the face of an expressed intention that it should be considered personalty."[25]

(3) If, although connected to the realty it remains identifiable, and is removable without destroying or materially injuring it or the remaining realty, it may be considered "part of the realty or remain personalty depending upon the intention of the parties at the time of the annexation; in this class fall such chattels as boilers and machinery affixed for the use of an owner or tenant but readily removable."[26]

These are rules which the courts have applied where the issue of realty versus personalty has been resolved without invoking the assembled plant doctrine, or some equivalent rule which practically dispenses with all tests

25. Clayton v. Lienhard, 312 Pa. 433, 436, 167 Atl. 321, 322 (1933).

26. *Id.* at 437, 167 Atl. at 322. For the evolution of the law on this subject and tests of annexation, adaptation, and intention which the courts have applied, see Kratovil, *Fixtures and the Real Estate Mortgagee,* 97 U. PA. L. REV. 181-6 (1948):

> The fact of *physical annexation* to the land furnishes such an obvious and understandable link with the realty that courts have clung with great tenacity to the annexation requirement. Even in early times, however, the rule was not without its exceptions. As long ago as 1522 it was held that if a man has a mill and the miller takes the millstone out of the mill in order to make it grind the better, although it is actually severed from the mill yet it remains parcel thereof as if it had always been lying upon the other stone, and accordingly it will pass by a lease or conveyance of the mill . . . in a landmark decision *(Voorhis v. Freeman, 2 W. & S. 116 (Pa. 1841))* it was held that detachable rolls in a rolling mill passed to a real estate mortgagee with the land . . . Despite occasional setbacks *(Teaff v. Hewitt, 1 Ohio St. 511 (1853)),* this view had obtained a clear ascendancy before the turn of the century and is now all but hornbook. *In an overwhelming majority of the modern decisions, machinery indispensable to the functioning of an industrial plant is deemed a fixture passing to the real estate mortgagee.* Where the *adaptation factor* characteristic of the industrial case is strong, courts dispense with the annexation requirement altogether . . . However, some courts seem reluctant to allow further encroachments on the annexation test . . . as a result of the New York decisions, *it is a universal practice in that state to include a chattel mortgage clause in each real estate mortgage, which of itself is proof that the decisions fail to meet the community's needs.* A significant development of modern times is the position of pre-eminence achieved by the *intention test.* Indeed, adaptation and mode of annexation are now frequently regarded as not separate tests at all, but as circumstances throwing light on the question of intention. . . It has often been said that intention, as the word is used in decisions employing the intention test, is not the secret intention of the annexor. *The test is an objective one, and intention is determined from the nature of the article, relation of the parties, adaptation, mode of annexation and all the surrounding circumstances.* This exclusion of secret intent, it is plain, is intended primarily for the benefit of third parties . . . *in view of the confusion in the cases as to what articles are to be deemed fixtures, for the mortgagee to place reliance on the mortgage alone as covering all necessary articles installed in the building is to run a very real and wholly unnecessary risk.* (Emphasis added.)

For the divergence of Ohio and Pennsylvania cases with respect to the test of adaptation to business purposes, see note 46, *infra.*

other than adaptation and treats as industrial real estate everything placed thereon whether fast or loose. [If one were to ask the "ordinary man" what he thinks is meant by "machinery" and "equipment," his answers probably would approximate those reached under these general rules, especially *if* (as the supreme court suggested) one were to tell him how those tests have been used in other cases.]

Those presumably are the rules that were applied in the case of *United Laundries v. Board of Property Assessment*,[27] where the superior court stated:

> The appellant's position is that the assessment (lot $9,800; building $40,000; machinery and equipment $52,240) is sustainable under the phrase 'all other real estate' because of the so-called 'assembled industrial plant doctrine' . . . in other words, the appellant contends that the character of the machinery in question is changed, for tax assessment purposes, from personal property to real estate; for obviously if it remains personal property it is not subject to real estate assessment.[28]

The superior court then held that the "judgment of the court of common pleas was correct" in deleting the 52,240 dollars worth of machinery from the 102,040 dollars assessment because it was personal property, and dismissed the appeal of the county tax agency. (On appeal, the supreme court ruled that the "assembled plant doctrine" applied and everything was taxable as realty.[29])

---

27. 161 Pa. Super. 412, 54 A.2d 912 (1947).

28. *Id.* at 414, 54 A.2d at 912. These rules or classes are set forth in Clayton v. Lienhard, 312 Pa. 433, 167 Atl. 321 (1933) (mechanics lien on garage prevailed over bailment lease of sprinkler system because it could not be removed without material injury to the building); and Penn-Lehigh Corporation Appeal, 191 Pa. Super. 649, 159 A.2d 56 (1960) (bowling lanes held not subject to realty tax because removable and parties treated them as personal property). The industrial plant doctrine seems to have "had little vitality where the security device (competing with the realty mortgage) was a bailment lease. . . The reason . . . may be due to the peculiar favored status of that form of security device in Pennsylvania—there would seem to be nothing else which would justify different treatment for bailment leases": Robinson, McGough, and Schienholtz, *The Effect of the Uniform Commercial Code on the Pennsylvania Industrial Plant Doctrine,* 16 U. PITT. L. REV. 261 (1955). The U.C.C. has no effect upon the question considered herein. See also American Laundry Machine Co. v. Miners Trust Co., 307 Pa. 395, 161 Atl. 306 (1932); Royal Store Fixture v. Patton, 183 Pa. Super. 249, 130 A.2d 271 (1957); and the dissent of the two justices in United Laundries v. Board of Property Assessment, 359 Pa. 195, 202, 58 A.2d 833, 836 (1948): "I would affirm the unanimous decision of the Superior Court in the opinion by Judge Arnold. . . The machinery and equipment of a commercial laundry and of a carpet cleaning company, *not affixed to the land,* were taxed as part of the real estate. . . . This machinery and equipment, which is personal property, did not form part of [the realty]. . . ."

29. "Thus . . . we have pointed out that it is the machinery and equipment which convert the four walls of the factory building into a valuable industrial property. If these were to be taken away, little would remain of the mortgagee's security." Land Title Bank and Trust Company v. Stoudt, 339 Pa. 302, 307, 14 A.2d 282, 284 (1940).

See also notes 8 and 22. Apparently no statistics have been compiled on the dollar

However, an entirely different approach to the 1953 amendments is taken by claimants for exemption who contend that the terms machinery and equipment must be interpreted to relieve from realty taxation things installed in an industrial establishment regardless of their removability or character as personal property or real property. *Their concept of the exemptive provision is that it excludes from tax not only machinery and equipment which is personal property (and which formerly was taxed as realty only by application of the assembled plant doctrine), but also equipment which has become realty, and structures other than buildings used in industrial operations.* Literally applied, this would mean that in the field of industrial property there is very little that can be considered taxable under the 1953 provisions except the empty shells of buildings and the land upon which they stand. The proponents of this theory rely upon the case of *Gulf Oil Corporation v. City of Philadelphia.*[30]

The question in the *Gulf* case was "whether or not certain tanks of appellant's oil refinery used in the course of its refining operations are within the provisions of the Act of June 3, 1915, P.L. 787 which exempts from taxation 'machinery . . . used in manufacturing'."[31] The debate in this case centered around the functional question whether the tanks were merely storage receptacles or whether sufficient processes occurred within the tanks to qualify them as "machinery." There was evidence that certain processes *did* occur within the tanks, and since the refining of oil products is considered to be a "manufacturing" operation, the court ruled that the tanks fell within the phrase "machinery used in manufacturing." The court did not seem to be concerned with the manner in which the tanks were installed and no mention was made of their removability. However, in holding that they were exempt "machinery" the court stated:

> There is an analogy between the problem before us and the problem whether a certain machine is a part of the freehold. The criterion of physical attachment has long been rejected in the solution of that problem. Chief Justice Gibson in *Voorhis v. Freeman,* 2 W. & S. 116, 37 Am. Dec. 490, said in 1841 that in 'the old criterion' of

amounts or ratios of exempt machinery and equipment in relation to other property. Because of variations throughout the state between assessed valuations and actual market values, it would be difficult to paint a composite state picture in dollar amounts. However, it would be interesting and informative to see figures on local dollar amounts in these categories.

30. 357 Pa. 101, 53 A.2d 250 (1947).

31. *Id.* at 102, 53 A.2d at 250. The act in question reads as follows: "In cities of the first class, the assessment of real estate for taxation, the machinery and tools used in manufacturing in any mill or manufactory shall not be considered or included in determining the value of real estate. . . ." PA. STAT. ANN. tit. 53, § 15976 (1915).

See also note 8 for the exemption of machinery in the City of Pittsburgh. *Note that the 1953 exemption applicable to the other taxing districts of the Commonwealth are broader. They exempt "equipment" as well as machinery, and do not require any functional test.*

> 'physical attachment' which 'was adapted to fixtures and dwellings before England had become a manufacturing country' there was 'want of adaptation to the business and improvements of the age' and that the true test was whether the machinery 'was palpably an integrant part of a manufactory or a mill', i.e. 'was necessary to constitute it and without which it would not be a manufactory at all'. See also *Defense Plant Corporation Tax Assessment Case,* 350 Pa. 520, 39 A. 2d 713. . . .[32]

What "analogy" did the court find between the *Voorhis* case and the *Defense Plant* case, and the issue before it in the *Gulf* case? The *Voorhis* and *Defense Plant* cases both involved the application of the "assembled plant doctrine," the first for purposes of a plant mortgage, the second for tax purposes. Any inference that because certain industrial personal property was treated as if it were realty under the "assembled plant doctrine," property which clearly is realty should be considered personal property in the absence of the assembled plant doctrine, would be a *non sequitur.* It is true, of course, that the assembled plant cases avoid any test of removability, since the rule on which they rest dispenses with any test of annexation in holding everything in the plant to be realty. If for tax purposes, the Act of 1915[33] had defined "personal property" to include certain items of industrial realty, there would have been an analogy between such a fictional rule and the assembled plant doctrine, *viz.,* disregard of the annexation-removability test. This was not done, however. Nor does the opinion in the *Gulf* case state whether the tanks in question were considered personalty or realty. It is not clear from the opinion, therefore, what the court had in mind in the statement quoted above.

The phase of the *Gulf* case principally relied upon for the theory that an exemption of "machinery" includes items of real estate as well as personalty appears in dicta in the court's opinion. The court stated:

> Much of the machinery today has only passive or motionless functions to perform in manufacturing. For example, in the manufacturing of metal from iron ore, the blast furnace in which smelting takes place is composed of a fire brick lining encased in a steel shell. The ore is reduced to iron by chemical reaction in which certain gasses permeate the molten iron. This chemical reaction is a process and is expressed in a chemical formula . . . The blast furnace in which this process takes place is clearly a part of the machinery of iron manufacture.
>
> It is as logical to hold that the storage tanks in which take place physical and chemical processes[2] necessary to the refining of oil, are machinery as it is to hold that the smelters used in making metal are machinery.[34]

32. *Id.* at 108, 53 A.2d at 253.
33. PA. STAT. ANN. tit. 53, § 15976 (1915).
34. 357 Pa. 101, 109, 53 A.2d 250, 254 (1947).

> [Court footnote 2: "The court below found an analogy between the tanks in question and a silo, the implication being that a silo is no part of the machinery of a manufactory and, therefore, tanks are not . . . . the silo used in fodder making is just as much a part of the machinery of silage making as milk pans and churns are a part of the machinery of butter making".]

From this it is argued that since blast furnaces and silos are large structures which anyone who has seen them would consider real estate, the case stands for the proposition that the exemption of "machinery" covers real estate as well as chattels; in other words, that the only question implied in the word "machinery" is a functional question—the contributory role which property must play in industrial operations to qualify as "machinery." Since the Acts of 1953[35] exempt "equipment" as well as "machinery," and do not specify that it be "industrial" in use but only that it be *"contained in"* any industrial establishment, it is argued that not even a functional test is involved in the word "equipment." *In short, that everything, including structures, is "equipment," execpt perhaps the walls and roof of a building.*[36]

The theory of the *Gulf* case, although not fully explained is interestingly sidelighted in another opinion of the Supreme Court of Pennsylvania, written three years later, which suggests that the result in the *Gulf* case was reached on the theory that the tanks in that case were personal property. This was a zoning case, *Humphreys v. Stuart Realty Corporation,*[37] in which the question was whether certain oil storage tanks, which were "either laid in shallow pits surrounded by a dirt embankment or . . . entirely covered by 2 or 3 feet of earth . . . not attached to any foundation or supports" were "structures" within the meaning of the zoning ordinance. In holding that they were "no more structures . . . than would be cans, casks, vats, tuns or other types of containers," the court referred to the decision in the *Gulf* case, stating:

> While a term used in one statute may not call for the same construction as the same term in another, it is at least of interest in this connection to note that storage tanks—*unless perhaps attached to concrete foundations or otherwise bolted into the ground*—are almost invariably held in cases involving tax statutes to constitute nothing more than part of the *apparatus and equipment of the business;* if installed merely for the benefit of the industry conducted on the premises and of no particular benefit to the land if the industry were removed they are regarded as *personal property* in the nature of appliances or machinery. Gulf Oil Corporation v. City of Philadelphia, 357 Pa. 101. . . .[38] (Emphasis added.)

35. See statutes cited note 6, *supra.*

36. See also note 58, *infra,* for the argument that even these are exempt equipment.

37. 364 Pa. 616, 73 A.2d 407 (1950).

38. *Id.* at 622, 73 A.2d at 410.

In the Humphreys case the court distinguished the facts before it from a New Jersey case where it appeared that the tanks were set in concrete bases, firmly affixed or

Clearly this view of the case differentiates between machinery and equipment on one hand, and on the other, structures. It also indicates that in determining whether something is realty or personalty, in the absence of the assembled plant doctrine, removability is one of the facts to be considered. In this respect, the theory of the case is consistent with certain Ohio tax cases. Thus, in *Zangerle v. Republic Steel Corporation,*[39] and *Roseville Pottery, Inc. v. County Board of Revision of Muskingum County,*[40] where the question was whether certain items in manufacturing plants were im-

---

anchored to the ground and with auxiliary piping likewise rigidly fixed upon or under the ground [so] it might well be that they should be viewed as partaking of the status of realty. *Id.* at 621, 73 A.2d at 410.

The court also cited Foley v. Pittsburgh-Demoines Co., 363 Pa. 1, 68 A.2d 518 (1949) (which cites the Ohio "machinery cases," see notes 39 and 40, *infra*) for the statement that: "if installed merely for the benefit of the industry . . . and of no particular benefit to the land if the industry were removed they (tanks) are regarded as personal property. . . ." The treatment of *adaptation to the particular business* as a reason for not regarding equipment to be part of the real estate seems to be peculiar to the Ohio cases. See note 47, *infra.*

39. 144 Ohio St. 529, 60 N.E.2d 170 (1945). In this case the court stated:

> The items in question involve machinery and equipment of various sizes and various weights ranging from 750 pounds to almost 950 tons . . . practically all the machines are especially designed to produce the products of the mill and are not adaptable for any other purpose. . . Some of the items are not attached to anything but simply rest on the floor. Some are not attached but are supported by members of a building—for instance, cranes. Some of the items are attached to other pieces of equipment which they serve. All the items that are attached, except certain ones (such as wiring), are bolted for the purpose of keeping them in place and preventing vibration incident to their operation . . . all machines and motors are assembled at the manufacturer's plant and if they are not too large to meet shipping requirements they are shipped assembled as units to the corporation's plant. Others are disassembled sufficiently for shipping purposes and then reassembled at the corporation's plant. The parts of a machine that have to be disassembled are bolted together by bolts with removable nuts. All items that are attached, together with the bed plates, are *removable without injury to the items or to the building.* Most of the items are equipped with lugs so that after the nuts are unscrewed from the bolts they may be more easily lifted from the bolts and removed. When a plant is dismantled the bolts remain in the building. *Items similar to those here involved have often been removed and sold. Some of the items in dispute have since been removed from the taxing district.* (Emphasis added.)

Id. at —, 60 N.E.2d at 172. Three justices dissented. They would have reversed the Board of Tax Appeals and held the subject items to be realty.

40. 149 Ohio St. 89, 77 N.E.2d 608 (1948). The court stated:

> "The tunnel kiln belonging to Roseville is about 245 feet long, about 10 feet wide and about 10 feet high. The six tunnel kilns belonging to Mosaic are from 265 feet to 340 feet long, about 11 feet wide and 7 feet high. . . 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 a 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. . . ." (Emhasis added.)

Id. at —, 77 N.E.2d at 610. Two justices dissented. They would have reversed the Board of Tax Appeals and held the subject items to be realty.

provements on land and taxable at one hundred per cent of their value or personal property and taxable at fifty per cent of their value the court considered whether the items (machines in the first case and kilns in the latter) were removable. It having been found from the evidence that they were removable, the court in both cases affirmed the decisions that the items were taxable as personal property rather than realty.

Will the Supreme Court of Pennsylvania hold that the 1953 exemption of "machinery and equipment contained in any industrial establishment" exempts from tax that which is real estate under all realistic concepts as well as personal items only considered realty under the assembled plant rule? As a question of statutory interpretation, the answer appears doubtful in view of the rule that exemptive provisions shall be narrowly construed.[41] However, there is a more potent reason for a restrictive interpretation of the exemption, and this may have had something to do with the oblique treatment of the question in the *Gulf* case. This is the rule that the legislature cannot constitutionally set up its own classes of *real estate* for exemption from tax. This rule is the result of article IX, section 2 of the Constitution of Pennsylvania which prohibits the exemption of property other than that enumerated in article IX, section 1, which provides, in part:

> [The] general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, institutions of purely public charity, and real and personal property owned, occupied, and used by any branch, post, or camp of honorably discharged soldiers, sailors, and marines. . . .

Article IX, section 2, which actually operates only as a restriction with regard to real property, provides: "All laws exempting property from taxation, other than the property above enumerated, shall be void." Thus, once real property is selected as the subject of a property tax, none may be exempted therefrom unless it is the kind of property enumerated in article IX, section 1.[42]

41. Provisions exempting persons and property from taxation shall be strictly construed: PA. STAT. ANN. tit. 46, § 558 (1937) (Uniform Statutory Construction Act). "It is well settled that where the taxpayer or his property is within the general language of the statute imposing the tax, all provisions relied upon to establish an exemption from the tax are to be strictly construed against the claim for exemption": Commonwealth v. McCarthy, 332 Pa. 465, 468, 3 A.2d 267, 269 (1938). "The approach to the solution of this question should be made in the light of the well-known principle that language which provides exemptions from the general imposition of a tax must be strictly construed": Fidelity-Philadelphia Trust Company v. Hines, 337 Pa. 48, 53, 10 A.2d 553, 555 (1940). Christley v. Butler County, 37 Pa. Super. 32 (1908).

42. See Commonwealth v. Dauphin County, 335 Pa. 177, 6 A.2d 870 (1939); Clearfield Bituminous Coal Corp. v. Thomas, 336 Pa. 572, 9 A.2d 727 (1939); Ogontz School Tax Exemption Case, 361 Pa. 284, 65 A.2d 150 (1949); Hill School Tax Exemption Case, 370 Pa. 21, 87 A.2d 259 (1952); and Pittsburgh v. Phelan, 11 Pa. Dist. 572 (1901).

Although there is no fixed minimum class insofar as the taxation and exemption of personal property are concerned, and although real estate may be classified for purposes of applying different tax rates, realty may not be subclassified for exemption purposes.[43] From this it would follow that any interpretation of the exemptive terms "machinery" or "equipment" to include real estate should be rejected in favor of an interpretation which would include only personal property and, therefore, conform to the constitutional limitations.[44]

Assuming that the words "machinery and equipment" are construed to encompass only those things which are personal property, how broadly are the test rules to be applied in holding certain things to be personal property rather than real estate? As to buildings and other structures, it would seem that any realistic application of the tests mentioned herein would rule out their exemption on the theory that they are personal property. However, if the annexation-removability test were construed to permit everything to be treated as personal property that *conceivably could be removed from the premises,* the end result would be nearly the same as construing "machinery and equipment" to include realty. As Chief Justice Gibson said in the landmark case of *Voorhis v. Freeman:*[45]

> It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and caution be taken to pieces and re-

---

The classification of real estate for the purpose of applying different tax rates is permissible: Jermyn v. Scranton, 212 Pa. 598, 62 Atl. 29 (1905). See also Moore v. Pittsburgh School District, 338 Pa. 466, 13 A.2d 29 (1940), holding it immaterial that a different rate might apply to property of the same class, located however, in different taxing districts, and Poor District case (No. 1), 329 Pa. 390, 197 Atl. 334 (1938). In regard to property of public utilities, see State Tax Equalization Bd. of Pa., Tax Exempt Real Property: 1957 County Assessed Valuations at 42 wherein it is stated: "It is is interesting to note that neither Constitutional nor statutory provisions exempt real property of public utilities from local taxes. The traditional practice of exempting public utility property from local taxes in Pennsylvania dates back to an early decision of the Supreme Court of Pennsylvania in 1825. Pennsylvania is the only state which exempts real property of public utilities from local taxation."

43. See Newhouse, *Constitutional Uniformity and Equality in State Taxation,* MICH. LEGAL STUDIES 465-471 (1959), and an article by Carchi *Constitutional Limitations on The Exemption of Real Property,* 11 OHIO ST. L.J. 153 (1950).

44. Where a reasonable interpretation can be adopted which will save the constitutionality of a statute, resolution or ordinance, it is the court's duty to adopt it: Allentown School District Mercantile Tax Case, 370 Pa. 161, 87 A.2d 4 (1952); Coe *et al.* v. Duffield, 185 Pa. Super. 532, 138 A.2d 303 (1958).

Of course, someone is bound to contend that no constitutional question would be presented if the legislature defined as "personal property" that which it desires to exempt. Assuming that the legislature may exclude from realty taxes any machinery and equipment which is personal in nature, exempting that which is "real estate" under all realistic concepts and established principles of law is another matter. The Legislature can write artificial definitions of words for purely *legislative* purposes, but when the question is whether *constitutional* requirements have been met, realities rather than fictions must be considered.

45. 2 W. & S. 116 (Pa. 1841).

> moved in the same way, and the greater or less facility with which it could be done would be too vague a thing to serve for a test. It would allow the stones, hoppers, bolts, meal-chests, screens, scales, weights, elevators, hopper-boys, and running gears of a grist mill, as well as the hammers and bellows of a forge, and parts of many other buildings erected for manufactories, to be put into the class of personal property when it would be palpably absurd to consider them as such. . . The rule of physical annexation would . . . produce the most absurd consequences by stripping houses of their window-shutters and doors and farms of the houses themselves. . . .[46] [More than a quarter of a century before adoption of the constitutional provisions above mentioned.]

It was for this very reason that our courts resorted to the adaptation test and established the assembled industrial plant doctrine. If the broad claims made for tax exemption under the 1953 amendments were granted, it would represent the adoption of what might be termed a "Disassembled Industrial Plant Doctrine for Tax Purposes: Whether loose or fast, if it is adapted to the particular operations conducted in the establishment, and if it can be disconnected or taken apart and hauled away, it is personal property." Decisions in Ohio have moved in this direction, although not with the result of totally exempting machinery from taxation.[47] In Pennsylvania,

---

46. *Id.* at 118.

47. It should be noted that Ohio's law on fixtures has followed a different course from that established in Pennsylvania. Commencing with Teaff v. Hewitt, 1 Ohio St. 511 (1853) where manufacturing machinery in a woolen mill connected only by belts and straps with the motive power was held not part of the real estate, Ohio seems to have regarded the adaption of machinery to the purposes of a particular business as a reason for treating it as *personalty. (This is the exact opposite of the way the adaptation test has been applied in Pennsylvania.)* On the other hand, if the equipment relates to the building or the premises generally and is not limited to a particular business, the Ohio courts have treated it as realty. Thus, in Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N.E. 493 (1887) machinery supplying the motive power to operational machinery was held part of the *realty although removable without material injury.* However, steam boiler equipment firmly affixed to the land was held personal property where it was specially constructed to produce steam for the particular business and not usable to produce power for other businesses. See also Zangerle v. Standard Oil Co. of Ohio, 144 Ohio St. 506, 60 N.E.2d 52 (1945). Contrast this with the Pennsylvania cases cited in note 23, *supra* (assembled plant doctrine) and note 28 (where the assembled plant doctrine was not applied). See also note 26, 5 Powell, *Real Property,* § 660 (1949), and Holden, *Classification of Property,* 11 OHIO ST. L.J. 153 (1950).

In First National Bank of Mt. Carmel v. Reichder, 371 Pa. 463, 467, 91 A.2d 277, 278 (1952) the supreme court stated:

> A fixture in a manufactory, mill or colliery may have no adaptation to many other kinds of business. Although not attached, yet, if it be designed for the convenience of trade on the premises, and be so used, or subject to be called into use at any time, it becomes a fixture. If the article is indispensible in carrying on the specific business, it becomes a part of the realty.

It should also be noted that the Ohio tax cases involve the *taxation* of machinery and equipment on 50% of its value if it is personal property, as compared with 100% of the value of realty. Personal property consisting of industrial machinery is also taxed at a lower rate than other personal property in Ohio. The Constitution of Ohio, as amended in 1931, permits the sub-classification of personal property.

however, the courts have not held attached equipment to be personalty merely because it is removable. Rather, the "removability of items without material injury to themselves or to the remaining realty" means that they may be considered "either personalty or realty, depending upon the intention of the parties at the time of annexation,"—the "parties" usually being the vendor of equipment sold under a financing agreement authorizing its removal in the event of default, and the purchaser who owns the premises on which it is installed.[48] Thus, in *Penn-Lehigh Corp. Appeal,*[49] where bowling lanes were held not taxable as realty, the court observed that bowling lanes may be sawed into three parts, removed, and put together again elsewhere. This fact, it was held, brought them within the "third classification" and since the parties had stated in a financing agreement that title was to be retained by the seller until full payment had been made, they were treated as personal property and not subject to realty tax.[50]

The opinion in the *Penn-Lehigh* case makes no reference to whether or not the purchase price of the lanes had been paid prior to the tax period in question. Apparently this would not have made any difference since the courts usually have considered the intention of the parties only at the time of annexation.[51] What logical bearing does such contractual intent have on whether property should be considered realty or personalty for tax purposes? If a person engages someone to raze his house at some future date, this does not make the house a chattel before it has been torn down. Why then should private agreements regarding the removability of fixtures affect their character for tax purposes?[52]

---

48. See cases cited in note 27, *supra.*

49. 191 Pa. Super. 649, 159 A.2d 56 (1960).

50. This raised the question as to whether the use of bowling lanes for games is taxable as a license to use personal property. In this connection, see Section 2(j) of the Selective Sales and Use Tax Act: PA. STAT. ANN. tit. 72, § 3403-2(j) (1956). Also see Horsham Township v. Horsham Key Bowling, Inc., 17 Pa. D. & C.2d 627 (1958) where bowling lanes were held not taxable by a second class township as an amusement because the tax was based on the charge for the game rather than on an admission charge; and Prudential Insurance Co. v. Kaplan, 330 Pa. 33, 198 Atl. 68 (1938) where an agreement between the landlord and the tenant that bowling lanes installed by the latter might be removed at the end of the term was held to permit their removal upon foreclosure of a mortgage on the premises.

51. In re Ginsburg, 255 F.2d 358 (3d Cir. 1958). See also Royal Stone Fixture Co. v. Patten, 183 Pa. Super. 249, 130 A.2d 271 (1958), where the court said:

> As a general rule, parties as between themselves, may in their dealings with chattels annexed to or used in connection with realty, fix on them whatever character, as realty or personalty, on which they may agree . . . and the law will enforce such understanding whenever the rights of third parties will not be prejudiced. *Id.* at 255, 130 A.2d at 274.

But in United States v. 15.3 Acres of Land in the City of Scranton, 154 F. Supp. 770 (M.D. Pa. 1957), the court held that where an article attached to real estate is so affixed as to become fairly and substantially a part of the realty, its character as personal property will not be preserved even by special agreement.

52. In Clayton v. Lienhard, 312 Pa. 443, 167 Atl. 321 (1933) the court remarked:

> Contract cannot make a chattel realty, nor realty a chattel . . . In my opinion,

The legislature recognized, in enacting the Uniform Commercial Code that rules regulating the rights of parties in their private commercial transactions are subject to qualification where public laws are in issue. In section 2-401 regarding the passage of title in sales of goods, it is stated in the Code Comment: "This section, however, in no way intends to indicate which line of interpretation should be followed in cases where the applicability of 'public' regulation depends upon a 'sale' or upon location of title without further definition."[53] It is difficult to understand why the court in the *Penn-Lehigh* bowling lane case decided the tax question on the subjective intent expressed in a private agreement. Did the court stop to consider the practical implications of its ruling on the duties of tax assessors? It might profitably have referred to an early decision of the superior court recently cited by a common pleas court: "Obviously, for practical reasons, assessors could not be required to delve into the strictly private transactions between parties and try to uncover leasehold or other interests in order to determine who should be assessed. This was pointed out in Gutherie v. Pittsburgh Dry Goods Co., 47 Pa. Superior Ct. 384."[54]

On the other hand, it is not difficult to understand why "experts" in the intricacies of this subject endeavor to reap every advantage which the present state of the law offers to escape taxes. It is not surprising, for example, that shopping centers, freezing plants, etc., should contend that before evaluating their premises for realty tax, air conditioning and heating or freezing equipment must be wholly excluded from consideration. If cases involving rights of removal under financing agreements and leases are precedents for what may be considered personal property in tax cases, a "disassembled plant doctrine" will soon become a reality, for on this theory a case can be found for "converting" almost anything into personalty. In *339-41 Market Store Corp. v. Darling Stores,*[55] the court held that "any chattel such as the air-conditioning unit, [a 3000 pound unit with ducts from the basement to the storeroom] not having been made part of the demised premises and being readily removable therefrom without the destruction of the chattel and without *non-compensable* damage to the premises, *remains personalty and, therefore the property of the installing tenant."*[56] (Emphasis added.) Of course, what the court really meant was that the tenant, who bought and paid

---

all fixtures whilst attached to the freehold are, for the time being, a part of the realty. No contract can change their nature. It is true there may be a contract allowing someone to take them off . . . But a contract that something may be converted into personalty at a future day, does not make it so from the time of the contract. *Id.* at 438, 167 Atl. at 323.

This rule should be followed in tax cases.

53. PA. STAT. ANN. tit. 12A, § 2-401 (1953) (comment).

54. Guerrin v. Pelham Electric Corp., 2 Pa. D. & C.2d 802, 805 (1954).

55. 355 Pa. 312, 49 A.2d 686 (1946).

56. *Id.* at 318, 49 A.2d at 688.

for the unit and its installation, was entitled to remove it *upon compensating the landlord for any injury to the realty* and, therefore, the court would theorize that "it remained personalty" as a legal basis for this decision. Can local tax assessors, even with legal assistance, be expected to cope with theories as fissionable as these and find a stable basis for taxation?

"Machinery and equipment"—innocent sounding words! Who would ever have suspected what lay beneath their surface? That they imported into the field of realty taxation all of the complexities, fictions and confusion of the law of fixtures: Personalty or realty? Permanently annexed or removable? Removable with or without injury? What was the intention of the parties? Are there any secret agreements? Adapted to the business or to the premises? What are the proper tests? Are they valid? How shall they be applied? (This subject has been described as "the chaos of fixture law."[57]) These questions confront local government officials responsible for administration of our realty tax laws.[58] Entangled with the ambiguities of the term "industrial establishment" they place public officials in the position of a baseball team whose infield has been planted with shrubbery.[59] Taxes

57. See Kratovil, *Fixtures and the Real Estate Mortgagee, supra* note 26.

58. Similar questions are presented under the Selective Sales and Use Tax Act, which exempts a manufacturer's, farmer's, public utility's, etc. (see note 1, *supra.*) purchase of property to be used directly in operations. Although the exemptive provisions state that they do not cover the purchase of equipment and supplies "to be used in the construction of real estate," the words "other than machinery and equipment, or parts or foundations therefor that may be affixed to such real estate" immediately follow this provision, as an exception to the real estate exception. This, it is contended, opens the exemptions to almost everything except the walls and roofs of buildings—and partial exemption is even claimed for these in certain situations. For example, it is contended that the walls of a building housing heavy operating machinery are part of the exempt "foundation" of the machinery, and that roof ventilators, louvers, stacks, etc., are "equipment used directly" in operations.

Further questions have been raised under the sales tax law as to whether these exemptions may be shifted to a construction contractor so that he may purchase materials without tax where he proposes to use them in the performance of a construction contract for an exempt enterprise. Alternatively, it is argued that a construction contractor may use the "resale exemption" in purchasing materials to construct a silo, etc., on the theory that the construction of the silo is a "sale of *personal property,* viz., machinery for silage making." *But the opposite theory is argued when repairs are made upon machinery and equipment.* The sales tax law imposes tax upon the service of *repairing personal property.* When repairs are made to any industrial machinery and equipment, it is contended that the machinery and equipment are *real estate,* and, hence, that the repair services are not taxable.

59. See Hancock, *Pennsylvania Local Government,* PA. STAT. ANN. tit. 53 (1957) wherein it is stated at 51-2:

> In Pennsylvania, as in most other states, local government relies heavily on the property tax as its main source of revenue. The county administers the machinery that determines the basis of this tax. In recent years the State has instituted far-reaching changes in this machinery because of evidence that great inequality existed throughout the State in the application of this tax. . . Because state school subsidies to school districts are partially based on assessments, it was recognized that inequality in assessments produced inequality in financial support of the school system. . . In some counties the assessments were as low as 15% of the market value on land, in other counties it was 55%. Upon closer

can be neither fairly nor honestly—not to mention effectively—administered under such vague, subjective and controversial rules. How and why was this "shrubbery" planted in these tax laws?

CONCLUSION

A comparison of the originally stated objectives of the 1953 amendments with the claims for exemption which have been asserted and allowed thereunder indicates that few, if any, members of the legislature were apprised of what, it would seem, must have been known to legal draftsmen of the provision, *viz.*, that its exemptive effect is much greater than the language suggests, and that the provision is so laden with doubt and controversy as to produce, indirectly, even broader tax relief through uncertain and weakened enforcement. The achievement of tax exemption by obfuscation is not new; this technique has been employed for some time in sales and use taxes to the detriment of expected revenues, orderly and fair enforcement, and intelligible judicial review. In one state it has led to the observation that:

> [C]ourts have been entangled for years in an effort to apply a statute which seems more vague and indefinite with each interpretation, [and in another that the] statutory language granting the exemptions was conceived over a substantial period of time, and is based upon such incongruous premises that the courts . . . have been plagued with . . . cases asking for clarification of the exemption. . . .[60]

It is no credit to our learned profession that this technique has crept into Pennsylvania. It is particularly lamentable that it should have invaded the important but neglected and already confused field of local realty taxes.

A better grasp of how the impact of this provision has been obscured in the local realty tax scene may, perhaps, be reached by reviewing briefly some general materials on the subject:

> The real estate tax is the single most important source of local government revenues. . . Assessment, which can be defined as setting a value on a thing for the purpose of taxing it, is the backbone of the real and personal property taxes. . . There is no State agency that has any oversight of the specific assessment procedures of the counties. If there is no State agency responsible for uniformity within the county or city, who then is responsible? The

---

analysis of the situation in each county it was found that the extremes were even greater. . . A state-wide committee was provided to recommend the type of system to be adopted so that uniformity would result. . . By 1955, however, it was found that only six counties had completed mapping, 9 had established property record cards, 8 had installed ownership cards and 9 had reassessed. Consequently, legislation was approved that extended the adoption of these assessment procedures until January 1, 1958. . . .

60. Brabson, *Analysis of Sales and Use Tax Exemptions—With Comments as to More Uniform Application*, 9 VAND. L. R. 294, 311-315 (1956).

> answer is not hard to find. In general and in brief, county or city commissioners and/or certain of their appointees are responsible for establishing a uniform system of assessments and for the overall operation of the assessment system. . . (Another State agency should be mentioned if only to dispel any possible misconception of its function—the State Tax Equalization Board. . . Its concern . . . is not with the assessment function as such, but rather with a grant-in-aid program of the State. Of course, in the process of collecting data the Equalization Board may discover some peculiarities of the assessment systems of counties resulting in lack of uniformity *within* counties.)
>
> Local assessors, especially if elected, serve many masters. They must please the electorate. (An informed electorate will be the least unhappy, in the aggregate, if no favorites are played.) He must please the tax levying bodies for whom he is making assessments. He must please the central county assessment office which sets the rules and regulations under which he must operate. For all of this he is reimbursed at a *per diem* rate by the county and, in some instances, by the political subdivision(s) in which he assesses . . . The minimum qualifications of the elected local assessors are the ability to garner a plurality of votes and a willingness to subscribe to the oath pledging diligence in the performance of the assessor's duties under such rules and regulations as are established according to law. . . .
>
> It is impossible to say that one part of the assessment process is more important than another. But unless reliable information is gathered in an orderly way, other parts of the process, no matter how efficiently run, cannot correct the errors and inequities which would result from shoddy information gathering. . . .[61]

It should also be noted that:

> Each year. . . . organizations concerned with taxes and assessments throughout the Commonwealth are requesting more information on exempt property for their various conferences, publications and legislative proposals. . . . Inasmuch as tax exempt real property produces no tax revenue, there has been less attention and concern paid to exempt assessment records and procedures, generally, as compared to taxable assessments. In numerous instances, assessing

61. Vanderzell, Assessor's Handbook 1-15 (1959). (This handbook was prepared and issued by the Bureau of Municipal Affairs, Department of Internal Affairs, Commonwealth of Pennsylvania, in cooperation with the Municipal Assessors' Association of Pennsylvania.)

Salaried workers in assessment activities are also poorly paid in relation to the discretionary nature and difficulty of their duties; a prime example of where cheap government proves to be the most costly. In many instances county officials have engaged independent firms of appraisers to make valuations for tax purposes. Where exclusions or exemptions are asserted, this necessarily involves passing upon what is taxable and non-taxable. The exercise of such functions presents intriguing questions of conflict of interests where the same persons are also engaged in private appraisal work for concerns claiming exemptions and seeking lower valuations under the tax laws.

> policies and procedures for exempt property have been left largely to the initiative of individual locally-elected assessors . . . As a result, there has been a widespread lack of uniformity as to policies, procedures, records, and values, for exempt real property. Numerous exempt properties were not listed at all on the assessment records of various counties . . . Improvement in exempt property assessment procedures and records is anticipated as a result of the various county reassessment programs in process throughout the Commonwealth. . . . In some reassessment programs, there are indications that exempt property is not being given the same consideration as taxable real property. Some counties give priority to taxable property with the expectation of eventually applying the new procedures to exempt property at a later date. A number of the counties, according to present indications, will not complete their reassessment programs until sometime after 1961 . . . This lack of uniformity in policies and procedures of the various reassessment programs will tend to complicate future state-wide valuation comparisons.[62]

The compilation of data from which valuation comparisons can be made is enormously complicated by the "machinery and equipment" exemption. Moreover, the ambiguity of the provision has caused such vagueness in the concept of the exemption that it will be impracticable to isolate and evaluate its effect under current law and procedures. This is because local assessors, proceeding generally on the theory that "machinery and equipment" is regarded as *personal property* completely eliminate it on this basis from all valuations, both for tax assessment purposes and for purposes of such listings and valuations as are made of exempt real estate.

Only in a few areas have valuations been made of machinery and equipment. Consequently, statistical reports of tax exempt real estate in the Commonwealth do not even purport to show the nature or value of the property being eliminated from taxation under this provision, although potentially it probably comprises the largest class of property relieved from realty taxes.[63] And it *is realty,* not just personal property for which the exemption

62. State Tax Equalization Bd. of Pa., Tax Exempt Real Property: 1957 County Assessed Valuations 2-10 (1958). It is stated at 7:

"The assessment laws for the various counties vary as to the letter of the law whether values shall be determined for exempt real property."

63. The latest state-wide report of tax exempt real estate lists 13 categories, comprising "19% of the combined total exempt and taxable assessments of approximately $15.3 billion." "Machinery and equipment" is not one of these, and the effect of this exemption is not being accounted for anywhere. It is interesting to note that of the exempt assessments for 1957, "four ownership groups accounted for over half of the state-total exempt assessments: school districts (15%), municipal governments (14%), religious organizations (14%), and public utilities (12%)." These figures are, of course, understatements because of the previously mentioned sketchy reporting of exempt realty: *Id.* at 9.

What valuations would the "machinery and equipment" exemption show, assuming figures were available? It is the writer's own estimate that it would be between 30%

progressively is being claimed and allowed *under this provision!* In an opinion filed November 29, 1960, a common pleas court held that the "machinery and equipment" exemption excludes from local realty taxes that which is real estate, *i.e. things* constructed and so affixed as not to be removable in any practical sense of the term. Moreover, the court held that qualification for tax relief does not require showing that the property in question actually is being used in the industrial activity.[64] From this it can be argued that there is indeed no functional test for obtaining the exemption (the court called it "exclusion") and that such things as air-conditioning, heating and plumbing equipment must be eliminated in assessing all industrial establishments. In note 24 of this article, the writer has listed eight categories of property, all of which the Supreme Court of Pennsylvania regarded as taxable real estate prior to the 1953 amendments. If the removability and intent tests stated in *Clayton v. Leinhard*[65] were applied, the first five and part of the sixth would be taxable. If the rule sought by exemption claimants and evidently upheld in the recent case applies, only the first two—land and the bare shells of buildings—may be taxed; everything else in the field of industrial real estate will be eliminated from taxation as "machinery and equipment." Is this what the legislature desires?

Can the legislature, on the other hand, expect local tax officials to apply such subjective and uncertain tests as removability and the intent of the parties in arriving at what is taxable and non-taxable in business properties? Assuming neither of these solutions is considered satisfactory, a possible solution would be to provide tax relief for all industrial property, estate, including land and buildings, whose owners or users the legislature considered entitled to favored treatment, and to provide for such relief in the form of a lower tax rate in relation to the rate set for other property.[66] This should, at once, dispel the enormously complicated and administratively costly and impracticable task of distinguishing between "machinery and equipment" and other property, and it would present to the public, and to its servants responsible for budget and revenue estimating and planning, an intelligible picture of what is going on.

---

and 50% of the value of industrial real estate, whatever that value may be. In some instances, depending upon the nature of the business, the value of the machinery and equipment certainly comprises more than half the total value of the premises if the broad interpretation considered herein is applied.

64. Appeal of Borough of Aliquippa—Tax of Jones & Laughlin Steel Company, June, 1959, No. 349, Beaver County, Pa., Nov. 29, 1960.

65. 312 Pa. 433, 167 Atl. 321 (1933).

66. There are legislative precedents for this in Pennsylvania: PA. STAT. ANN. tit. 53, § 25900 (1897); PA. STAT. ANN. tit. 53, § 25894 (1931). This would place the favored treatment of industrial realty on safe constitutional ground, a position which the current exemptive provisions, as previously observed, do not enjoy. See also Honnestad, *Local Taxation in Pennsylvania,* PA. STAT. ANN. tit. 72 (§§ 3421-5480) 187-198 (1950).

At the same time, the legislature should settle the question whether it meant, by the use of the term "industrial establishment," to grant local realty tax relief to all business establishments. If so, the word "business" should be substituted for "industrial" to remove this doubt. If favored treatment is not to be allowed to all business activities, some limitations on "industrial" are in order. Should the relief be limited to "manufacturers"—those who, by the application of capital, skill and labor, "transform materials into a new and different product"? Shall it include those firms which perform service activities for manufacturers? Shall it also include firms engaged in canning fruit and vegetables, cutting and packaging meat, bottling soft drinks? None of these firms has been held to be exempt from tax as a "manufacturer" under other taxing provisions in the Commonwealth, but this does not mean that they should not be considered if such relief is to be granted to anyone. And what of laundries, restaurants, hotels and places of amusement? All retail and wholesale establishments? Here one reaches the point of all business activities.

The shrubbery which has sprouted from the 1953 amendments obscuring the administration of local taxes for public education and other essential public services should be trimmed from the law. Surely we have awakened in this decade to a greater sense of public responsibility than the accomplishment of tax exemptions by obfuscation and legal administrative trickery and should now be willing to face the issues of taxation and tax exemption squarely on their merits. Public education is at stake here in more ways than one; local education depends upon local tax support, but beyond this, an understanding of local tax issues is basic to the better education we all need in the problems and functions of our local government. This is possible only if we can start from a basis of candor and information in our laws and their administration.