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History and Law of Trade Fixtures

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HISTORY AND LAW

OF

TRADE FIXTURES.

Frank Edgar Thomas.

Although volume upon volume of judicial decisions have been written upon the law of fixtures by the most brilliant men of the present, as well as the past century, yet the courts at the present time, are continually confused when called upon to decide questions involving this branch of the law. Ever since the question commenced to occupy the attention of the courts, attempts have been made to lay down some general rule whereby the facts of each case might be tested, thus materially assisting the practitioner in determining the question as to whether the particular thing actually formed a part of the realty or not. But, notwithstanding these efforts, no satisfactory rule has yet been devised, owing to the fact that the question, whether the subject matter of the litigation is or is not a fixture, presents so many different aspects for consideration; while the decisions thereof depend largely upon some peculiar circumstance of each case. However, for the encouragement of trade, manufactures and other laud-

able objects ,the law has constantly been,and will probably continue to be modified in favor of persons holding real property by a leashold estate. The term "fixtures"seems to have been used by legal writers,to supply a deficiency in their technical terminology,and has continually varied between its technical and popular use. Owing to this uncertainty in the use of the term, we have,therefore,many kinds of fixtures,and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant,a different thing between vendor and vendee,is one thing in the economy of trade,and another for the purpose of agriculture. The word fixture is of such an ambiguous meaning,and writers and courts have used it in so many different forms and with entirely different significations and meanings,that it is almost impossible at the present time,to give a correct and legal definition of the term. Originally,it denoted those movable things which had become immovable by connection with the freehold. But later on it commenced to signify those things,which,

although attached to the freehold,could under certain circumstances be removed. In its popular use,it meant affixed or fastened to the freehold,and in the early cases and many of the later ones,we find the popular definition of the term sweeping everything before it. I shall now endeavor to give a few of the definitions which are more commonly used by the legal authorities,and which are considered by them,and also by the courts to be as nearly correct as any that can possibly be given. Those which I have deemed it necessary to repeat are as follows:

"Fixtures are chattels or articles of personal nature,which have been affixed to the land. They must be permanently and habitually attached to it,or must be component parts of some erection,structure or machine, attached to the freehold,without which the erection, structure or machine would be imperfect and incomplete." 2 Abbott's New York Digest,2nd. Edition,pages 62o-62I.

"If the articles are essential to the use of the realty,have been applied exclusively to use in connection with it,are necessary for that purpose,and

without such or similar articles the realty would cease to be of value,then they may properly be considered as fixtures,and should pass with it." Plattsburg vs.Montreal R.R. Co.,5I Barbour 45.

"Chattels of a personal nature which have been attached to land are called fixtures. They are considered with reference to such inanimate things of a personal nature as have become affixed or annexed to the realty but which may be severed,disunited or removed by the party or his personal representative who has so affixed them without the consent of the owner of the freehold." 5I Law Library I5. Blackstone defines a fixture as"an article which,in itself personal property, has beem annexed,or has become accessory to real estate." He further states that in some cases,articles are held to have become real estate by reason of their annexation or connection with land,while in others they are deemed, notwithstanding such annexation,to still remain personal property. It will readily be seen from a comparison of the above definitions,that it is not only very difficult,

but that it is almost impossible at the present day, to define with any precision and accuracy what is necessary to make personal property fixtures. However, I think it may be safely said that the word "fixtures", although used so interchangeably, is always applied to chattels of a personal nature, which have either been affixed to or are permanently used in connection with land. A good story is told about Chancellor Kent to the effect that he, being addicted to talking over his cases with his wife, and having himself confessed that he sometimes took her opinion, told her one day, that he had been trying a troubelsome question, as to whether a certain cooking stove was a fixture. "Tell me", said the practical woman, "does it bake well?" "Yes, I believe so", was the reply. "Then", said Betsy, "It is a fixture or ought to be." It is perhaps unfortunate, both for the attorney and his client, that the strictness of the law of fixtures does not admit of such an easy solution. Instead of applying good Betsy Kent's simple test, the puzzled and overworked inquirer into the

law of fixtures,is obliged to grope in vain,amid the mass of cases,both old and new,in search of some correct and inherent guiding principle,some exact and comprehensive definition of fixtures,as distinguished from mere chattels. Much of the confusion and difficulty which we encounter when trying to formulate a correct definition which will apply in all cases,is owing to the fact that the exact legal definition is precisely opposed to the meaning commonly given to the word. The former signifying those chattels which can be removed from the realty, while the word "fixtures" signifies those chattels which cannot be removed. In examining into the history of the law of fixtures,we find that the general rule during the time of the early common law,was to the effect,that whatever was once actually annexed to the freehold could not afterwards be removed except by the person who was lawfully entitled to the inheritance. Although this was deemed to be a well settled principle of law,yet it was never considered to be inflexible and without exceptions. But,on the contrary,it has been so often

departed from,as to furnish practically no rule,by which we may be guided at the present day. As an instance of the unsettled use of the rule,it may be said that it was construed most strictly between executor and heir in favor of the latter. More liberally between tenant for life or in tail,and remainderman or reversioner,in favor of the former,and with much greater latitude between landlord and tenant. An exception of a much greater difference,and one which is by far the most important,the origin of which may be traced almost as far back as the rule itself,is that of fixtures erected for the purpose of trade; the rule having been so modified as authorize and allow the removal of many articles,which otherwise by being so affixed,would have been included under the definition of fixtures. Upon the ground of public policy,and to encourage trade and manufacture,fixtures which were erected to carry on such a business,were allowed to be removed by the tenant during his term, and were also deemed personality for many other purposes.

At the time when the common law existed

in all its grandeur and splendor,fees simple were not divided into such a multiplicity of seperate estates,in the same manner that we now find them to be,and personal property was scarcely known. In England,the power of the country was in the hands of the wealthy landowners, who cared but little for any interests but their own,and who did not hesitate to appropriate to their own use,all articles to which they could make any pretense of claim. It was,therefore,doubtless then true,that whenever any chattel was affixed to the freehold,it was,as the landlords expressed it,"intended",as a general thing,to make it a part of the realty. When,however,in the course of time,the influence of the English government began to be felt throughout the Universe,the trade and manufacture of its citizens increased,the erections and accessories became intrinsically much more valuable,and the tenants to whom they belonged,began to pay more attention to the preservation of their property in them,the idea of making such property a part

of the inheritance,ceased to be in fact,the real intention with which trade fixtures were annexed. Probably,at first,the different intentions with which these annexations were made,were expressly settled upon by agreement, and this method no doubt continued until the annexation of trade fixtures,ceased in fact to indicate an intention to pass the ownership of them to the landlord,and the courts,seeing this ceased to consider it so. They failed to apply the rule in those cases,because the so called reason for it no longer existed,and not because of any change of public policy relating to land owners and tenants. As other cases arose in which it was clearly shown that the acts of the parties did not indicate the intention so to bind the articles annexed,the presumption that it did exist,became weaker and less general. The common law as it existed in England,should not be taken in all respects to be the same in America. On the contrary,, those principles of common law that exist in the United states,or that ever did exist in this country,are far more favorable and liberal towards the tenant than the

English law ever was. This has often been declared not only by the "State" Courts,but also by those of "Federal" jurisdiction. While it is true,that our ancestors brought with them the general principles of the English common law,and claimed it as their birthright; yet it is equally true,that they brought with them and adopted only that portion that was applicable to their situation. When our forefathers landed at Plymouth, they found this country a vast wilderness,and as a natural consequence,one of the first thoughts which probably entered their minds,was concerning the manner in which they could cultivate the soil so as to make their new homes,not only as attractive as possible,but also as productive. In those days,the men of the soil as well as the public,had every motive to encourage the tenant to devote himself to agriculture,and to favor any and all agencies which would aid in this result. But,even in the good old Puritan days,when agriculture was the chief occupation of the settlers,and when America was still subject to the laws of England, no tenant could afford to erect costly and expensive fix-

tures if he thereby lost his whole interest in them, by the very act of erecting them. Hence the courts of this country, have repeatedly held, that the rigid common law rule in respect to fixtures, as it existed in England, never formed a part of the jurisprudence of any of the United States of America. The law of fixtures as it exists to-day, is entirely contrary to that of the common law, and was gradually introduced and established by the Judges who, in respect to this branch of the law, exercised a sort of legislative authority. Chancellor Kent tells us that "the law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold, to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures, a general rule instead of being an exception". 2 Kent's Comm., page 343. At first, the courts in their attempts to afford relief from the strictness of the ancient and harsh law, proceeded with much caution and hesitation, no doubt fearing that they

would make matters worse complicated instead of bettering them. As early as the reign of Hen.VII of England the citizens of that country commenced to see the harshness of the old rule, and to pray for some relief. Hence, an exception to the law respecting annexations to the freehold was recognized in the cases of "tenants", who were said to be at liberty to remove some species of articles, provided they erected them at their own expense, and on the demised premises. From reading some of the early English cases, I find that since the time of Queen Anne, it has been the recognized doctrine, as well as custom of the courts of England, that a relaxation should be allowed in favor of erections and utensils put up for trading and manufacturing purposes. Although many previous attempts had been made by the courts to settle this very much disputed and often litigated question, yet it appears that "Poole's" case, which was decided before Chief Justice Holt, in the year I703, was the first one that placed the case upon a distinct and satisfactory basis. Ever since the court saw fit to

render that decision,the right of the tenant during the term,to remove the trade fixtures which were erected by him,has been often and uniformly recognized as a well settled rule of law. As this case seems to be a leading one upon the subject of which I am discussing. I have taken the liberty to give a brief extract of the same. In this case,a tenant for years made an underlease of a house,to an undertenant,who was by trade a soap boiler, and,who for the convenience of said trade,put up vats, coppers,tables and partitions,and also paved the back part of the room. Sometime afterward,upon a "fieri facias" issued against the under tenant,the sheriff took up all these things and left the house stripped and in a ruinous condition,so that the first lessee was liable to make it good. Thereupon he brought a special action on the case against the sheriff and those who bought the goods,for the damage done to the house. Chief Justice Holt,in delivering the opinion,said,that during the term, the soap boiler might well remove the vats he set up in

relation to his trade,(and that he might do it by the common law,and not by virtue of any special custom) in favor of trade and to encourage industry. But that after his term,they became a gift in law to him in reversion,and are then not removable. I Salk. Rep.,368. Sometime after the decision of the Pooles case,when the law as laid down by Justice Holt had commenced to be universally accepted by the people,Lord Hardwicke in I743 decided a very inportant case which has been adopted in England,also in the United States,as one of the leading cases upon this branch of the law of fixtures. The material question in this case was whether a fire engine set up for the benefit of a colliery,by a tenant for life, should be considered as personal estate and go to his executors,or whether it was fastened to the freehold in such a manner as to belong to the remainder man. The Chancellor,in the course of his opinion,in which he decided that the fire engine should be considered as personality,said: "It is very well known,that little profit can be made of a coal mine without this engine,

and tenants for life would be discouraged in erecting them,if they must go from their representatives to a remainder man,when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me,and are a principal ingredient in my present opinion." 3 Atkyns Rep. I3. From a comparison of the opinions delivered in the two cases above cited,it will be seen that the reasons given upon which the privilege of removing trade fixtures was granted to the tenant,are those in favor of trade and to encourage industry. The same ground has also been stated in other cases arising in courts of equity and common law, between executors of a tenant for life and the remainder man,and also between executor and heirs. Although the reasons which I have just mentioned were doubtless the original and main grounds for allowing the exception in cases relating to trade fixtures,where the question arose between landlord and tenant,yet it does not at the present time,seem to be the only foundation upon which

this principle may be granted and satisfactorily vested. On the contrary, the rule as it now exists, may properly be said to be founded upon a variety of reasons, among which may be mentioned, the grounds of public policy, interest of the parties, relation of the parties to one another, and mode of annexation. With regard to the parties to the transaction, the privelege of removing trade fixtures is construed more liberally in favor of the tenant, in cases arising out of the ordinary relation of landlord and tenant, than in the cases arising between tenant for life or in tail and the remainder man or reversioner, or between the executor of a tenant in fee and the heir, in which last case there is the least relaxation. The question as to what particular articles erected by a tenant, to be used in connection with his trade, come within the protection of the law as being trade fixtures and hence capable of being severed by the tenant at the expiration of his term, often gives rise to a great variety of considerations as to the nature of the article, the purpose for which it is to be used, and the degree of annexation. The annexation

may be either actual or constructive. It is said to be actual when the chattel is actually attached to,or connected with the land. Constructive,when there is no such real attachment,but the articles though portable or easily removable,are commonly used in connection with the premises,and are properly appurtenant thereto. Furnaces,machinery &c. would be actual fixtures,while door-keys,removable shutters,doors and windows which are to be replaced,would be illustrations of constructive fixtures. Articles in themselves of a perfect chattel nature before the annexation has been made,and which are capable of being detached and used elswhere in connection with the realty,may be annexed to the realty. But the question whether the articles are or are not fixtures,must often be determined from the knowledge of the purpose designed in its erection or construction. Annexations of articles for the purpose of permanent improvement of,or use with the realty,renders them fixtures,where no different intention or purpose is manifested. Potter vs. Cromwell, 100 Amer Dec.,485. Articles so annexed may be of a

substantial and permanent nature,as buildings,which are more or less capable of removal and reconstruction,and which having been constructed upon the land,have hitherto had no existence as chattels,except in connection with the land whereon they stand. The size and weight of the article are wholly immaterial in their bearing on the question as to whether it is,in a legal sense, a fixture. Thus,a building erected by a tenant with a view to carry on his business of a dairyman and also as a residence for his family and servants engaged in the business,the residence of the family there being merely to enable them to carry on the trade more beneficially, may be removed by him during his term. Its size or material are not important. VanNess vs. Pacard 2 Peters 141.

There may however be annexations made by a tenant,occupying the premises for trade purposes,which are of so intimate and permanent a character,as to furnish at least satisfactory,if not almost positive evidence, that the annexations were intended to be permanent accessions to the realty,in which case,they would,of course,

be irremovable by said tenant. However, the intention will not always determine whether structures built upon land are real or personal property, but in cases of doubt, it will have a controlling influence. Keely vs. Austin, 46 Ill. 156.

Things which are in themselves chattels, may by construction or destination, be so annexed to the freehold as to be properly regarded as fixtures, or part and parcel of the realty. In such a case, if they are temporarily separated from the realty for convenience in making repairs, or otherwise, they still remain a part of, and pass by a conveyance of the realty, notwithstanding the severance. Wadleigh vs. Jannin, 77 Amer. Dec., 780. The intention to annex and not the character of physical attachment is the criterion by which to determine whether property annexed to the realty becomes a part thereof. An agreement that property attached to the realty shall be considered personal property, is controlling, and as against persons having notice of the agreement, the property will be regarded as personality, without regard to the

mode of its physical connection to the realty. Hill vs. Gerard,53 Pa. St. 271. A lessee,who,during the term, erects trade fixtures on the demised premises,and before the expiration of the term,accepts a new lease of the premises,to commence at the expiration of the first term, containing different terms and conditions,making no reference to the old lease,and reserving no right to him in such fixtures,and in which he sovenants to deliver up the premises at the end of the term,in as good condition as the same now are,cannot remove the fixtures after the expiration of the first term,although his occupation has been continuous. Waters vs. Nat. Bank of Camb,124 Mass 571. So also a person occupying land under an agreement with the owner to purchase it,but paying no rent,cannot remove either domestic or trade fixtures,since he pays no rent for the use of the premises, and may become the owner of the estate by fulfilling the contract of purchase. King vs. Johnson,7 Gray 239.

Respecting the injury done to the premises by

the removal of fixtures,the courts have laid down a well settled principle of law,that the premises must be left in as good condition as they were before the annexation. 77 Pa. St. 437. From an examination of the cases involving the annexations made by tenants for trade,it will be observed,that the trade carried on by a tenant may be of two kinds. It may be a trade unconnected with and independent of the land which he occupies,such as dying,brewing and the like,or it may be a trade derived from the land itself,and depending essentially on the peculiar produce of the land,as the getting and vending of coals from a colliery,or the manufacture of salt from salt springs and the like.

While the modern rule regards everything as a fixture which has been attached to the realty,with a view of assisting in the purposes for which the realty is employed,however slight or temporary the connection between them,yet,in ascertaining what are fixtures,the "object", the "effect",and the "mode of annexation" should receive the attention of the parties. Moreover,

the constantly increasing wants of man ,and the seemingly never ending discoveries and inventions of things of utility which are constantly being made,throw around us daily,new conditions and circumstances,which renders it necessary for us to critically examine each decision before accepting as the law of to-day,that which was the law at some former date.

As we advance in civilization,prosperity and intellectual ability,it is to be hoped that the improvements in this department of the law,which have been constantly made during the past century,will continue to proceed onward,until some uniform rule is established whereby justice may be done to all.