1894

Fixtures in the State of New York where the Annexation is made by Parties Having a Permanent Interest

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FIXTURES

in

THE STATE OF NEW YORK

WHERE THE ANNEXATION IS MADE

BY

PARTIES HAVING A PERMANENT INTEREST.

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Presented at Cornell University

for the Degree of

Bachelor of Laws

by

Isaac P. Smith.

-- o --

Ithaca, N. Y.

1894
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PREFACE.

We desired to treat the subject of Fixtures in New York, exhaustively, but the unexpectedly limited time at our disposal forced us to abandon that ambitious project. The matter, therefore, set forth on pp. 11 et seq., is the result of investigations which were confined solely to cases wherein the annexation was made by one having a permanent interest in the freehold.

Nor have we concerned ourselves with the consideration of the specific chattels which have been held to constitute a part of the realty; but we have endeavored, rather, to present compendiously the general state of the law, and to trace the progress of the development of a standard test; with a statement of what we conceive to be the present attitude of the courts on the subject.

"Speak your latent conviction, and it shall be the universal sense," said a very wise philosopher, --and if we have been over bold in our commentaries let this fault find its explanation, if not justification, in our entire sympathy with that sentiment.

Craigielea, May 30, 1894.
INTRODUCTORY AND HISTORICAL.

About the roots of that hoary maxim of antiquity "Quic-quad plantatur solo, solo cedit" there has sprung up a veritable wilderness of conflicting decisions made gloomy and noisome by a mischievous undergrowth of obiter dicta.

Replete with ambiguities and inconsistencies; beset at every point with difficulties of construction and the danger of false conclusions; the path of the venturesome traveller who has dared these depths, fairly bristles with obstacles, which, if known to him at the outset, would have caused him to pause in trembling dismay, hardy and strong and well equipped for stern encounter though he might be.

The dark shadows of many years growth deny to him the light of logic or equity, and each step reveals to him more fully the fact, that the way must be long and tedious and burdened with the weight of many days of patient investigation and faultless labor if he would clear a path which others may, in safety, follow.

It is vaguely stated by the authorities that the maxim, supra, upon which is predicated the modern law of fixtures, is "one of great antiquity;" and with this unsatisfactory statement we must content ourselves as the books do not afford us information as to the precise period when it was formulated.
The theory, however, of which that maxim is the essence seems first to find expression in Gaius, where we observe this provision;

"Moreover, that which any person has built on our land, even though he have built it for himself, becomes our property by natural law, because that which is added to the surface, attaches to the land." Bk. 2, Sec. 73.

This provision appears to have gained favor with the Romans, for it, with the two sections following, were incorporated into the Justinian compilations almost verbatim. I. 2. 1. 29.

At all events, the maxim in question, and which we conceive to have drawn its life from the above provision, became in some manner engrafted upon the English law; and, being a very fit concomitant of the Feudal system of land tenure, was carefully retained as a most wholesome principle, and, until the reign of Henry VII, was applied with all that unyielding narrowness of construction of which the English judiciary were masters.

The downfall of feudalism, however, caused many radical changes in England, and the courts, despite the accredited strictness of their adherence to precedent, were forced to recognize in a measure the changed condition of affairs. For
it soon became very evident that much land would lie waste and many estates go to ruin for lack of tenants, unless some step were taken looking to their protection.

In deference, therefore, to this necessity, the courts began a series of adjudications which relaxed the old rule to a certain extent in favor of tenants; they were permitted to remove certain species of chattels which they had erected at their own expense. Chattels annexed by the tenant for the purposes of trade or manufacture; implements used for agricultural purposes and some articles used for domestic ornament and convenience were admitted to the favor of the courts.

To the conditions under which these tentative efforts at reform were made, may, it is submitted, be traced much of the confusion which now exists in the law concerning fixtures.

The judiciary must have been swayed by three distinct influences; first, as men, they must have felt moved, by the spirit of improvement which was springing up vigorously all about them, to mitigate the rigorous rules of law which then obtained; but on the other hand, in their official capacity they felt the restraining influence of the established precedents; while lastly, it became early apparent that they must change the rule as to tenants as a matter of national expediency.
In consequence of this triangular battle which we think it fair to assume must have waged in the judicial mind decisions appeared whereby the necessary result was obtained; but at the cost of being so hedged about with a multiplicity of reasons and subtle distinctions, all looking to reconciliation with some impossible precedent, that subsequent courts find themselves at liberty to render decisions of almost any character and at the same time find, in the earlier cases, ample authority to sustain them.

It becomes still more apparent, that equitable impulse little played a part in thus practically overturning precedent, when we consider, that the comparative liberality which marked the adjudications of the courts when questions respecting the right to chattels arose between landlord and tenant and co-ordinate relations,—found no parallel in their attitude when the litigants bore to each other a different relation.

And we apprehend, that when we began to accumulate precedents of our own, the rule of "Quicquid plantatur solo, solo cedit" was applied with all its inherent inflexibility when the annexation was made by one having a permanent interest in the land. And, indeed, it has been said, that, "Notwithstanding the great change which has taken place in the habits and opin-
ions of society, this rule in favor of the freehold still remains unaltered; and it must be regarded as the general rule of law at the present day."

Amos and Ferrard on Fixtures. p. XXIV.
DISCUSSION OF THE WORD "FIXTURE".

Even a cursory consideration of any portion of the subject of Fixtures would naturally seem to involve, primarily, the careful inquiry as to the exact general definition of that term; but here again we are met by difficulties of such a character as to utterly defeat us in our quest; for we can fasten upon no precise combination of words sanctioned by authority, the application of which, would in every instance, determine the status, that is, the **legal** status, of a specific article which has been attached to reality.

A discussion *in extenso* and a comparison of the multi-form definitions which disgrace the pages of writer and judge alike, would be an undertaking of no small magnitude, and we must, therefore, confine ourselves chiefly to a few commentaries on the word itself as a scientific term.

It appears that the word "fixture" had originally no legal significance whatever, but was used in a popular sense, merely to indicate the physical attachment of a chattel to some part of the reality. The men, however, who loved classification and who longed to add something to the technical terminology of the times, regarded this peaceful state of affairs with great dissatisfaction, and finally plucked the word from its
inglorious but harmless obscurity and swung it aloft as a
great acquisition to legal nomenclature; whence it has spread
the shadows of lamentable confusion over many generations of
sorrowing posterity.

Indeed, the result should have been anticipated for it
was wellnigh inevitable. Always difficult as it is to reclaim
a word or phrase from popular usage, the task becomes still
more arduous if not quite impossible, when it is sought to im-
pose upon such a word a duty entirely foreign to its etymolog-
ical characteristics; and that such was the case with this
word we have ample authority. For example, Broom in his
Legal Maxims, p. 417, says; "In its correct sense the word in-
cludes such things only of a personal nature as have been an-
nexed to the reality and which may afterward be severed or re-
moved by the party who united them or his personal representa-
tives against the will of the freeholder."

Out of this conception of the word very readily grew
the terms "irremovable" and "Removable" fixtures;-- the one
a senseless tautology and the other a hideous solecism, for the
perpetration of which there is no logical excuse whatsoever.

Tyler in his work on Fixtures says; "The word is of an
ambiguous meaning and the writers and courts have used it with
various significations; but the word is always applied to
chattels affixed to, or used permanently in connection with, land". This statement is unquestionably true but seems to us to offer but small matter for congratulation, since we unhesitatingly assert and endorse the very obvious truth, that the use of the word was and is entirely unnecessary, and that its introduction into the category of legal terms is greatly to be regretted. Let us suppose, for example, that a mortgage is foreclosed and a dispute arises as to whether or no a certain engine shall be sold as part of the realty covered by the mortgage; the question really at issue is; Does this engine bear such relations to the freehold that it should be looked upon as inseparable therefrom, or is it to be regarded as mere personalty entirely without the scope of such mortgage? Now, while the distinctive term "fixture" is ordinarily employed to designate properly so circumstanced, it must be evident to anyone with a modicum of familiarity with law, that no specific term is requisite here to aid the court in determining whether the engine is to be considered realty or personalty. But the courts insist upon it, that, when personal property is so situated that for certain purposes and under certain circumstances, it may lose its character as such and become realty, a distinctive term is necessary to show that the article possesses, because of its peculiar situation, the capacity for
being both realty and personalty.

The chief reason that so much difficulty has been experienced by the courts in this country in handling the subject of Fixtures lies in the fact that they insist upon having a Law of Fixtures. There is no separate body of law which governs a class of property known as "fixtures"; the so called "Law of Fixtures" is concerned entirely with a harassing and never-answered interrogative; What constitutes a fixture? If, to use Broom's definition, a piece of property, personal in it nature, is a fixture,—then it is governed by the rules applicable to personalty; but if, on the other hand, it be not a fixture, then its legal status is coordinate with that of the realty.

To be sure many attempts have been made to produce tests, which, as matter of law, would be infallible; but the truth of the matter lies in the simple statement; that there is not and cannot be any such thing as the law of fixtures; because, by reason of the peculiar nature of the subject it is not within the possibilities of this, nor any other language, to formulate a rule, the application of which, will, in every conceivable instance determine what is or is not to be regarded as realty.
DEFINITION OF "FIXTURE" IN NEW YORK.

In this state the word fixture was used in the usual ambiguous manner in the earlier cases, but of late it has been uniformly employed in a sense which is in harmony with its etymology. For example, in Hoyle v. Plattsburgh R. R. Co. (51 Barb. 45) we find this expression; "And if 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"; and again, in Potter v. Cromwell (40 N.Y. 292) the following: "Under all the authorities, therefore, in this state as elsewhere, this mill was a fixture and passes with the land."

These and similar illustrations which might be adduced in support of our position, warrant us, we think, in formulating this definition of a fixture in this state: A fixture is an article or structure, originally personal in its nature, but which stands in such relation toward the freehold, as to become, in contemplation of law, an integral part of it; and passing with it under a conveyance.

A discussion of the peculiar circumstances which conduce to effect this transmutation in the eye of the law will occupy us presently.
EFFECT OF 2 R. S., 82, SEC. 6, subd. 4.

Prior to 1830 it was conceded that questions arising between heir and executor, mortgagor and mortgagee, vendor and vendee in respect to their rights in chattels, claimed to be a part of the realty, were governed by precisely the same rules. But in the Revised Statutes of that period there appeared a provision which has been preserved verbatim in each succeeding edition, and which merits some consideration.

The clause referred to was last year incorporated into the Code of Civil Procedure (Sec. 2712 subd. 4) and reads as follows: "Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support—shall be deemed assets and go to the executor or administrator."

This statute came up for construction for the first time in 1843, in House v. House (10 Paige 158) wherein Chancellor Walworth rendered the opinion of the court. The object of the statute was, plainly, to adopt the same rule between heir and executor as prevailed between landlord and tenant; but the Chancellor, while recognizing such intent on the part of the legislature says;

"It was impossible, however, to define in a short sen-
tence of three lines what was to be considered a part of the freehold itself, and what were mere fixtures or things annexed to the freehold for the purposes of trade or manufacture. We must, therefore, still go back to the common law and to the decisions of the courts for the purpose of ascertaining what is a substantial part of the freehold, and what is a mere fixture or thing annexed."

The property in question consisted of water-wheels, millstones, running gear and bolting apparatus of a flouring mill; and, consistently with his opinion, supra, he holds them to be part of the realty, though they were annexations for the "purposes of trade and manufacture" and despite the fact that they were not affixed to the wall of the mill so as to be in any way "essential to its support."

This statute, which the court thus practically refuses to enforce, must be generally looked upon as inoperative, and the decision, supra, as final and conclusive as between heir and executor; for, curiously enough, no subsequent case has been discovered wherein this statute has been urged on behalf of the executor. There have been several cases, however, wherein the statute has been raised in the interest of a vendor or mortgagor. In the case of Murdock v. Gifford (1 N. Y. 28)
an effort was made in the interest of the mortgagor to have the statute declared sufficiently elastic to embrace that analogous relation. Johnson Ch. J., however, decides the case, on the principle involved in the old case of Lawton v. Salmon (1 Hem. Bl. 259. n.); But while thus tacitly ignoring the statute so far as it might apply to the situation in hand, yet, in referring to Chancellor Walworth's remarks as to the impossibility of giving effect to the statute, he delivers the following dictum:

"These observations are certainly just; for it is quite obvious that the statute does not mean that the executor shall take everything not essential to the support of the walls of a building but only such things are spoken of as are not a constituent part of the freehold, or of the artificial structure erected on the land."

But in Ford v. Cobb (20 N. Y. 344) the next case in which an attempt was made to extend the scope of the statute, we find in the opinion of Denio J., this remark: "The reasoning of the Chancellor in House v. House, ante, is not altogether satisfactory to my mind: but as the judgment in that case may be said to have become a rule of property it should not be disturbed without the greatest consideration, and certainly not in a case like the present, which may be satisfactorily dis-
posed of on other grounds." But the facts in that case did not permit of disposition "on other grounds" unless the learned judge intended to imply a refusal to extend the operation of the statute.

In the next case which was that of Voorhees v. McGinnis (48 N. Y. 278) the court boldly throws off the veil of uncertainty and says: "The effect of this provision is discussed by Chancellor Walworth in Hoase v. House (ante).--it cannot, however, alter the law as to the relation of vendor and vendee, whatever may be its effect as between heir and executor."

Thus, while it is not at all certain that the courts would uphold Chancellor Walworth's ruling as to the statute if the question again came directly before them,—it may be regarded as absolutely settled, that whatever construction may in future be given to the statute it will not be extended to include any other relation than that of heir and executor.
EFFECT OF CHATTEL MORTGAGES.

The general proposition in respect to the rights of a mortgagee, is; that he is entitled to have his lien respected as to all that was realty when he accepted the security and also as to all accessions thereto; but this proposition is subject to qualification, and the qualifying element lies in conventions between the mortgagor and the vendor of personalty which is to be so annexed to the freehold as to become, under ordinary rules of law, a part thereof, and consequently subject to a mortgage covering the realty. Such conventions, generally take the form of chattel mortgages, and it may be here remarked that the purchaser of the realty, when the transaction occurs after the execution of the chattel mortgage stands in the same relative position as a mortgagee of the realty, and may therefore be considered at the same time.

In an action between a chattel mortgagee and a subsequent purchaser of the realty, salt kettles, set in stone arches so that they could not be removed with tearing out certain brick work, were held to retain their character as chattels (Ford v. Cobb, ante). This case seems to be authority for the general proposition that a chattel mortgage given
prior to the execution of a mortgage or deed of the realty, acts as a conservator of the personal character of the chattels covered thereby, and the purchaser or possible mortgagee is put upon his inquiry as to what he is to get for his purchase money or what security he is to obtain for his loan; for it was intimated in a dictum that the annexation was sufficient to cause the kettles to be declared fixtures had it not been for the intervention of the chattel mortgage.

But this very broad and sweeping proposition is also, very properly, made the subject of qualification, as appears in the case, before cited, of Voorhees v. McGinnis. That case would, at first blush, seem to be a tacit overruling of Ford v. Cobb; but upon more careful reading and a comparison with the later cases, we assume to say, that it merely modifies the rule there laid down.

The property in dispute in Voorhees v. McGinnis consisted of an engine and certain boilers; it was shown that there was no defined mental intent to make the annexation permanent but it was also true that the removal of the engine and boilers could not be accomplished without serious damage to the freehold. The court, per Hunt C., entirely ignored the case of Ford v. Cobb and decided that the engine and boilers became a
part of the realty despite the existence of the chattel mortgage; and the learned judge adduces a hypothetical case to illustrate the danger to be feared from a contrary holding. He says, in substance: If a mason puts brick into a house and is paid in full and it then transpires that the maker of the brick held a chattel mortgage thereon executed by the mason, it would be manifestly unjust to allow the chattel mortgagee to remove the brick; he is put to his action against the party who converted the brick into realty.

It will be observed that the hypothetical case presents a situation where the removal of the fixtures would result in more damage to the freehold than would such removal in the case at bar; and we therefore construe it to be an exaggerated exhibition of the reasoning whereby the decision in that case was reached. The peculiar nature, then, of this hypothetical illustration; the fact that the case of Ford v. Cobb is entirely ignored; and the further fact that both cases are recognized in later adjudications with no hint that they are considered as conflicting, lead us to the conclusion that a chattel mortgage avails its holder only when the exercise of his rights under it will not seriously injure the freehold. Indeed, the late case of Tyson v. Post (108 N. Y. 218) goes
still further and maintains that "by convention the owner of the land may reimpress the character of personalty on chattels, which by annexation to the land, have become fixtures according to the ordinary rule of law; provided only that they have not been so incorporated as to lose their identity and the re-conversion does not interfere with the rights of creditors or third persons."

Finally we would thus summarize the law in this connexion: A mortgagee is entitled to all that was realty at the time of the execution of a mortgage but as to subsequent accessions he has no rights, if there exists between the parties an agreement that a lien shall attach for their purchase price; but such lien will be of no avail, whatever; if the removal of such accession would injure the freehold; and a subsequent purchaser would of course, as regards this last point, stand in the same position as the mortgagee.
DEVELOPMENT OF STANDARD TEST.

The first case of note in this state which deals with the subject of fixtures is that of Walker v. Sherman (20 Wend. 686); wherein Cowen, J., in rendering the opinion of the court entered into an elaborate examination and discussion of all the old cases of importance. Though that litigation grew out of a partition between tenants in common, the same principles were applied as though the litigants had been vendor and vendee.

This case decided that certain machinery in a woolen factory was personalty, because it was not annexed to the reality. This decision entirely ignores a fact which was established in evidence and which should have caused an opposite conclusion to be reached; this important fact was, that the machinery in question had passed from one owner of the factory to another, for eleven years. But the learned judge says:

"I admit that some of the cases are quite too strict against the purchaser but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose, movable machinery, even where it the main agent or principal thing in prosecuting the business to which a freehold property is
adapted, being considered as part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must attached to it in some way." And he concludes his brilliantly logical and equitable disquisition by saying: "The general importance of the rule, however, which goes upon corporal annexation is so great that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases."

It certainly does seem surprising that this learned judge should have deemed it fitting to cling to a rule merely for the sake of expediency, when a previous case had shown him that the application of that identical rule might not only lead to results that were inequitable and illogical; but that it might also produce a state of affairs positively absurd. The case referred to is that of Miller v. Plumb (6 Cowen 665), where it was held that certain potash kettles actually attached to the freehold were a part thereof, while certain other kettles quite as necessary in the prosecution of the business were held to be personalty because they merely stood in the building without being in any way attached thereto.

During the twenty-five years immediately succeeding the
case of Walker v. Sherman, there crept into the cases certain dicta which could not be reconciled with its doctrine; for example, it was suggested that "intention enters into and makes an element of each case;" and it was further said, that the "circumstances were to be taken into account to show whether the erections were made for the permanent improvement of the freehold or for the temporary purposes of trade."

Furthermore it became apparent that the doctrine of Walker v. Sherman was not being applied by the courts except where it seemed that there was no escaping it; wherever it was possible they avoided its corrosive influence and based their decisions on the old cases.

In Bishop v. Bishop, (11 N. Y. 123) decided in 1854, the plaintiff, as executrix, sold to the defendant certain hop poles which were piled up on the farm and took his note. Afterward the farm was sold under a mortgage while the poles were still on the land. In an action on the note the defendant set up that the poles were fixtures and that there was a consequent failure of consideration; and the court so held, saying: "The root of the hop is perennial, continuing for a series of years. That the hop roots would pass to a purchaser of the real estate, that can be no doubt. The hop pole is
indispensable to the cultivation of the crop, Etc., etc."
continuing the reasoning on the lines laid down in the old case of Lawton v. Salmon, ante. Denio and Johnson JJ., dissented on the ground that there should be an actual annexation.

This decision plainly indicates the growing dissatisfaction with the old rule requiring an actual annexation and shows a disposition to view the matter more in the light of equity and common sense. And in the next case which came before the court, it placed itself on record with reference to this point in such a manner as to render exceedingly unlikely a future recurrence to that old fallacy as a final test.

The case was that of Snedeker v. Warring (12 N. Y. 170) and the chief point at issue was whether a certain granite statue, weighing three or four tons, but held in its place merely by its own weight, should be considered a fixture. Held that it should be so regarded. Parker, J., rendered the opinion, and in discussing the propriety of requiring an actual annexation, remarks that, "it would be absurd to claim that those colossal erections (the sphinxes) were still unadministered personal assets of the Ptolemies, merely because they are held in place by their own weight." "I apprehend" he continues, "the question whether the pyramids of Egypt or Cleopatra's Needle are real or personal property does not
depend upon an inquiry by the antiquarian whether they were originally made to adhere to their foundations with wafers, or sealing-wax, or a handful of cement." It may be noted, in passing, that this is the first case which appears in the books wherein a similar litigation was carried on over a statue.

The next important case which demands our attention in this connection is Potter v. Cromwell (40 N. Y. 292) and is valuable to us chiefly because it is the first case to state in definite form the tests which are now applied in determining the status of a chattel when used in conjunction with realty. For the criterion of a fixture therein set forth the court is indebted to the case of Teaff v. Hewitt (1 McCook (Ohio) 511). That criterion was accepted as satisfactory in Vorhees v. McGinnis, ante, and again in McRea v. Bank; and, in fact, none of the later cases appear inclined to cavil at it or to depart from it in any way. This criterion requires the union of three elements in a chattel, in order that it may constitute a fixture:


It is not necessary that there should be an actual annexation; mere juxtaposition will suffice, and the courts would
more clearly present their real meaning if they would use the word "accession" in place of "annexation".

The intention of the party is the prime test, and the first two elements, supra, are required merely as a means to an end. That is, if the conditions present are such as to indicate by inference an intent to make the chattel a permanent accession—and the adaptability of the chattel would be one of the conditions to be considered—then no other evidence need be forthcoming to make the article a fixture. And in support of this view we adduce the following words of Rappallo J., in McRea v. Bank (66 N. Y. 439): "The mode of annexation may, it is true, in the absence of other proof of intent, be controlling."

Thus, the courts of this state, have lifted themselves completely out of the depths into which they were thrust by the iniquitous doctrine promulgated in Walker v. Sherman, and have advanced step by step up the precipitous Mountain of Reform; not blazoning forth their progress as each foot crept noislessly past its mate, lest their intention be noted and defeated by the intervention of that conscienceless enemy of improvement, "Stare Decisis"; but holding themselves none the less firmly in each new position they give reason for
the hope that they may soon reach the summit. And when that happy end is compassed they will have ceased to constitute themselves judges, both of the law and of the facts, and will have made the question of fixtures one of fact alone for the jury under instructions from the court which shall embody the three elements, the presence of which they now deem to constitute the proper test.

Isaac P. Smith