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The Law of Fixtures with Special Reference to Questions Arising between Landlord and Tenant

L. Whitney Safford
Cornell Law School

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THE LAW OF FIXTURES WITH SPECIAL REFERENCE TO
QUESTIONS ARISING BETWEEN LANDLORD AND TENANT.

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BY

L. WHITNEY SAFFORD.

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CORNELL UNIVERSITY:

SCHOOL OF LAW.

1896.
THE LAW OF FIXTURES WITH SPECIAL REFERENCE TO QUESTIONS ARISING BETWEEN LANDLORD AND TENANT.

INTRODUCTION.

The law of fixtures has its origin in the exceptions to the rules of law that whatever is annexed to the freehold becomes part of the re-alty. The exceptions to this rule have grown so rapidly in number that it has been found necessary to arrange them into some sort of a system, and in this way the law of fixtures has been gradually built up. Chancellor Kent in volume 2 of his Commentaries at page 402 speaks of the above as follows: "The law of fixtures is in derogation 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 to almost render the right of removal of fixtures a general rule, instead of being an exception." It would seem from the above that Chancellor Kent recognized the existence of what are known as "removable fixtures" but their existence is not generally recognized by the courts as will be shown in chapter 1 of this treatise.
The subject is a broad one and in this brief work it will be impossible to dwell at length upon details and the many nice questions arising in connection therewith. It shall be the purpose of this work to treat of the general subject only so far as is necessary in order to ascertain the meaning of the term "fixtures" as generally recognized by the authorities. To this end part 1 shall be directed.

Part 2 will treat briefly of the more important questions which arise between landlord and tenant with respect to this subject.
PART 1.

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CHAPTER I.

WHAT CONSTITUTES FIXTURES.

A fixture is an article which was a chattel but which by being physically annexed or affixed to the realty by someone having an interest in the soil, becomes a part and parcel of it.

It is difficult to define the term "fixtures" and there is great confusion both in the text-books and in the decisions of the courts as to what is such an annexation of chattels to reality as to make them part of, and pass by conveyance of the freehold. The difficulty seems to be in giving a definition which will apply to all cases. As was well observed by Kent, J., in Strickland v Parker, 54 Me.263, "It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the reality. One thing is quite clear in the midst of all this darkness, and that is, that no general rule applicable to all cases and to
all relations of the parties can be extracted from the authorities."

The word has been used by so many writers in various senses and this ambiguity has so often been followed by the courts that the law on the subject has been greatly confused. Another element of uncertainty is the fact that so many exceptions have been allowed to modify the original idea of a fixture, that now each case must be decided rather upon the circumstances that surround it, than upon any general principle that can be evolved from the law.

Because of this multiplicity of exceptions, many writers and courts have thrown aside the definition as used in the earlier law on this subject, and adopted one whose import is almost opposite in meaning. Thus a fixture has been defined to mean a personal chattel annexed to the freehold, and which may be severed and removed by the party who has annexed it, against the will of the owner of the freehold,

Pickeral v Carson, 8 Ia. 544.
Sheen v Ritchie, 5 N. & N. 7. 175.
Halben v Rundor, 1 C. M. & R. 264.
Taylor's Landlord and Tenant, Sec. 544 Note 1.
There may be some propriety in this definition of the term when confined in its application to annexations made by a stranger to the land of another without his consent, or when confined in its application to the relation of landlord and tenant, or tenant for life or years and remainderman or reversioner, to which several of the elementary writers have chiefly confined their attention. But it does not express the accurate meaning in its general application. An article attached to the reality, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor, and not to the heir, on the death of the owner, and may be taken on execution and sold as other chattels. A removable fixture as
a term of general application is a solecism - a contradiction in words. There seems to be no good reason for classifying movable articles which may have become temporarily attached to land under any general denomination distinguishing them from other chattel property.

It is the ancient maxim of the law, that whatever becomes fixed to the realty, thereby becomes accessory to the freehold and partakes of all its legal incidents and properties and cannot be severed and removed without the consent of the owner. Quauidquid plantatur solo, solo cedit, is the ancient language in which the maxim has been expressed. The term fixture in its ordinary signification, is expressive of the act of annexation and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property, possessing the nature and incidents of chattels. This meaning of the term is sustained by the greater number of adjudicated cases.

Teaff v Hewitt, 1 D.S. 511.
2 Smith's Leading Cases, 114.
Potter v Conwell, 40 N. Y. 287.

Gaffield v Hapgood, 17 Pick. 192.

Christian v Dripps, 28 Pa. St. 271.

Hill on Fixtures 14.

Mr. Ewell in his treatise seems to doubt the soundness of the statement made by the judge in his opinion in "Teaff v Hewitt" and says "With reference to the objections to the use of the term in this sense, that "an article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property", and that "a removable fixture as a term of general application, is a solecism - a contradiction in words", it may be observed that, if the term is applied solely to articles once chattels, but which by being physically annexed or affixed to real estate, have become a part of and accessory to the freehold, the property of the owner of the land, there seems to be no need of any distinct legal term to distinguish them, as they at once become parcel of the realty, and subject to all the rules of law governing real estate in general, and stand in no more need of a separate nomenclature than turf, gravel, growing
trees, or other parts of the reality. And though removable fixtures retain to some extent some of the attributes and incidents of chattels, in other respects, during such annexation, they to some extent retain some of the incidents of reality, and it is precisely because of their mixed nature, partaking in part of the nature of reality and in part of that of personalty, that a distinct term may properly be used to distinguish such articles, on one hand, from property possessing all the attributes of reality, and on the other hand from mere chattels.

As to the contradiction in words involved in the use of the terms "removable fixtures", it may be observed that the word "fixture" necessarily means only something fixed or attached to another, as distinguished from a movable,—a status of fixation or annexation, and does not seem to imply that such annexation is not severable."

Eweli on Fixtures, 5.

Mr. Forard in his treatise on Page 11 makes a similar statement, adding,—It should, however, be observed that the term "fixtures" has been used by the courts, and amongst the text writers without much precision; and it is
difficult to determine in which of the above senses it is most frequently employed."
As to what are the tests by which to determine whether an article is a fixture or a mere chattel there has been, and still is, great confusion among the authorities. It has been held in many cases that the question of removing the chattel without injury to the freehold or to its self was important in deciding whether a certain article was a fixture or not.

In Swift v Thompson, 9 Conn. 63, where the machinery of a cotton manufactory consisted, partly, of implements in no way attached or secured to the building; partly, of spinning frames, nailed to the floor, to prevent their moving, but such frames were not otherwise attached to the building; and partly, of other machinery, to the parts of which iron plates were attached, through which wood-screws passed, fastening them into the floor, but by unscrewing such wood-screws, the machinery could be removed without injury to the building or to the machinery itself; it was held, that the whole of such machinery was personal property, Dagget, J.,
remarking, "Beyond a doubt these articles are in no respect real estate except as they are attached to the freehold. It is material here to observe, that an important part of the description is, that they were thus attached to the building to render them stable, but that they might be removed to any other part of the building, or to any other place, without any injury to the freehold. To operate successfully, they must be fixed, like clocks, and many other articles, which are clearly personal and movable. We resort, then, to the criterion established by the rules of the common law: could the property be removed without injury to the freehold? The case finds this fact. This then should satisfy us."

The above is also held in the following cases:

Farrar v Chauffetete, 5 Denio. (N.Y.) 527
Murdock v Gifford, 18 N. Y. 28.
Hunt v Mullanphy, 1 Mo. 508.
Bewick v Fletcher, 41 Mich. 625.
Lamphere v Lowe, 3 Neb. 131.
Fullam v Stearns, 30 Vt. 443.

Many cases hold that the intention of the party making the annexation is the chief element to be considered
in determining what are fixtures.

Thus in 53 Pa. St. 271, an action of trover to recover the value of two boilers, that case was that S conveyed to J.M.S. a piece of ground, on which was a steam-mill, and took a mortgage from him for a part of the purchase money. About two years after the boilers etc. in the mill being worn out and unfit for use, were removed, and H, by agreement with the wife of J.M.S., who was then in the army, had boilers belonging to himself put into the mill, under an agreement with her that he was to be paid $4.00 a month for their use, and have the right to remove them whenever he pleased. They could be removed without other injury than taking down the boiler wall, which was built of brick, and stood under a shed outside the mill.

They remained attached to the mill and continued to be used as a part of its motive power for about four years, when premises were sold by sheriff and repurchased by defendants, on a judgment against J.M.S. for unpaid purchase money due on said mortgage; it was held, that the boilers were personalty. Agnew, J., in his opinion, says: "When these boilers and their connections were built into the mill of
J.M.S., it is clear that it was with no intention on his part, or those who acted for him, to affix it to the realty as his property, or with an intention to make it his own by a wrongful conversion. They were placed there as the personal chattels of H, under a valid contract of hiring for their temporary use, and the right of removal being expressly reserved. How then can it be said that a chattel is converted into realty when it was neither the intention of the owner of the chattel nor that of the owner of the freehold to annex it? If it be considered as annexed, it must be purely on account of its physical attachment or because the mortgagee had acquired a lien upon it. The latter was not the fact, and the former we shall show is not the criterion of the law. Unquestionably the intention to annex, whether rightfully or wrongfully, is the true legal criterion."

The above is also hold by the following cases:-

Perkins v Swans, 42 Miss. 349.


Ottumna Co. v Hawley, 44 Ia. 57.

Jones v Ramsey, 3 Ill. App. 308.

4 Century Law Journal 22.

Hill v Wentworth, 26 Vt. 428.
It is on this principle that we find a class of cases holding that when one fixes his own chattel on the land of another, it is in legal effect a gift of it to the owner of the land.

Washburn v Sproat, 16 Mass 449.

Dooley v Crist, 25 Ill. 551.

Crippen v Morrison, 13 Mich. 35.


Also, that where the owner of the land wrongfully affixes the chattels of another, it is conversion of them into the reality, and by the change of their nature leaves the remedy of the owner only in damages.

Gibbons Fixtures, above cited.

Another class of cases hold that the true test of a fixture is the adaption of the article to the uses and purposes to which the reality is applied and no regard is had to the character of the annexation.

In Voorhis v Freeman, 2 W. & S. (Pa.) 119, it was held that machinery, which is a constituent part of the manufactory, to the purposes of which the building has been adapted, without which it would cease to be such manufactory,
is part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor, as well as debtor and execution creditor; but not between tenant and landlord, and remainderman. It was ruled, therefore, that a mortgage and sale of a lot and iron rooling-mill, with the buildings, apparatus, steam-engine, boilers, and bellows attached to the same, passed the entire set of rolls used in the mill, whether actually in place, or temporarily detached to make room for such as were; and that such rolls could not be seized and sold as chattels, on a fiero facias against the mortgagor. The above case was followed in Pyle v Pennock, 2 W. & S. (Pa.) 390, and the same criterion was recognized in Farrar v Stackpole, C No. 154.

The above holdings afford an ample illustration of the contradiction among the authorities. It is now held by the later authorities that in order to ascertain whether or not a particular thing is a fixture, it is necessary to apply certain rules that have been agreed upon by the courts in adjudicated cases, and if the article in question meet the requirements of the rules, it is decided to be a fixture.
The rules are three in number and as follows:

1. The article under consideration shall be actually annexed to the realty or to something appurtenant thereto.

2. It shall be appropriate to the use or purpose of that part of the realty with which it is connected.

3. It shall be intended by the party making the annexation to be a permanent accession to the freehold.

Scobell v Block, 32 Hun. 223.

Hence it will be seen that the term "fixture" is not predicative of anything which is not susceptible of physical annexation; thus, the name "What Cheer House", used by a tenant to designate a building used by him as a hotel, is not such a fixture that the landlord or his vendee of the premises, on the tenants surrendering the same, has a right to the continued use of the same to designate that hotel.

In 21 Cal. 443, where W leased a lot of land, on which he erected a building, in San Francisco, and used it as a hotel, to which he gave the name of "What Cheer House". Before the lease expired, he purchased an adjoining lot, upon which he erected a large building, and for a time occupied
both buildings as the "What Cheer House", the principal sign being removed to the one last built. He soon after surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Afterwards the defendant, having purchased the first mentioned lot and building, opened there a hotel, under the name of the "Original What Cheer House" — the word "original" being painted on the sign in small letters and in a manner calculated to deceive the public into the supposition that it was the same name. In an action by W. against the defendants, to restrain them from using the name "What Cheer House" for their hotel, it was held: that the name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, which a Court of Equity will protect against infringement; also held, that a tenant by giving a particular name to a building, as a sign of the hotel business for which he uses it, does not thereby make the name a "fixture" of the building, and the property of the landlord on the expiration of the lease.
As to what is a sufficient annexation to meet the requirements of rule 1, above stated, is a question which is not well settled among the authorities; but it may be generally stated that some degree of actual fixation is necessary.

The leading case in the United States upon this point is Walker v Sherman, 20 Wendell 633, where Cowen, J., in delivering the opinion said: "In order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm or lot etc. or in terms denoting a mill or factory etc. nothing of a nature personal in itself will pass unless it be brought within the denomination of a fixture by being in some way permanently, as least habitually, attached to the land or some building upon it". He then proceeded as follows "It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building etc."

Having determined as nearly as possible what a fixture is; and having noted the tests which are to be applied in determining whether an article, once personal in nature, has, because of its contact with real property, lost its identity as personal property and become a fixture, and con-
sequently a part of the realty, the work of part 1 of this treatise is completed. Here the writer will leave the general subject and proceed with part 2 which will treat briefly of the questions arising between landlord and tenant with regard to fixtures.
When the question arises between landlord and tenant for years and for life respectively, as to articles of personal nature affixed to the reality by such tenant during his term, a more liberal rule is followed. The general rule that everything permanently annexed to the soil becomes a part of the reality, and cannot be removed still holds good; the only question being what is meant by it! It is clear that the mere putting a chattel into the soil of another cannot alter the ownership of the chattel.

To apply the rule there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil. Since the tenant's interest in the land is temporary in character, and since it is not to be inferred that he intended to benefit the estate of the remaindeman or reversioner, the presumption is raised that he did not intend the annexation to be permanent but only to continue during his term; and for
this reason there are certain exceptions to the above rule, created in behalf of the tenant in respect to certain classes of fixtures.

The tenant is permitted to remove an article which falls within one of these classes, even though firmly affixed to the soil; provided such removal will not result in any permanent and material injury to the freehold, and provided also that the right of removing be exercised within the time prescribed by law. The above mentioned classes are three in number and as follows: (1) Trade fixtures; (2) Agricultural fixtures; and (3) Fixtures set up for the purpose of ornament or convenience, commonly known as domestic fixtures.

At first the common law rule was relaxed only in favor of trade fixtures, but the tendency of the law at the present day is to permit the tenant to remove all articles he may attach to the soil, which come under one of the above classes and which can be removed without permanent injury to the freehold.

The first question which would present itself would be, therefore, can the article in question be brought within
one of these classes. The answer to this question will depend largely upon the circumstances of each particular case, but we may formulate a general idea of what are included within these classes by noting their meaning and observing a few of the leading articles which have been held by different courts to come within their scope.

Trade fixtures are those erected by a tenant on leased premises for the purpose of carrying on a trade or manufactory.

They have been held to include buildings. Thus in Van Ness v Pacard, 2 Peter's (U.S.) 137, in rendering the opinion Story, J., says, "It has been suggested at the bar, that this exception in favor of trade has never been applied to cases like that before the Court, where a large house has been built and used in part as a family residence. But the question, whether removable or not does not depend upon the form or size of the building, whether it has a brick foundation, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for trade or not." The above is also held in the R.R. Co. v Deal, 90 N.C. 111.
Engines and machinery in a mill, though firmly affixed to the building, are, when so affixed by a tenant for years, for the purpose of carrying on a business of a personal nature, the personal property of such tenant.

Cook v Transportation Co., 1 Den. (N.Y.) 91.

McCalley v Connolly, 70 Cal. 3.

Wheller v Bodell, 40 Mich. 695.

Kelsey v Durkee, 33 Barb. (N.Y.) 410.

Dobschuetz v Holliday, 82 Ill. 371.

Shelves, counters and other articles placed in a building, by a tenant for life or years, for the purpose of fitting such building for use as a store, are the personal property of such tenant.


Josslyn v McCabe, 46 Wis. 591.

Gas-fixtures (so called) bought by a tenant for use in his business and screwed upon gas-pipes fastened to the ceiling, are not fixtures, but are the personal property of the tenant.

Lawrence v Kemp, 1 Duer 363.


Hays v Doane, 11 N. J. E. 84.
Agricultural fixtures are those that have been erected for the purposes of agriculture. These are not as fully recognized as trade fixtures but the tendency in the United States at the present time is to place them on the same footing.

Hop poles put on a farm by a tenant for his temporary use, with the intention of removing them, are removable as between him and his landlord and his landlord's grantee.

Wing v Grey, 36 Vt. 261.

Also a saw-mill and machinery; a cotton gin and press; and a grist mill, have, when erected by a lessee of a farm, been held to be removable and the property of the tenant.

Perkins v Swank, 43 Miss. 540.

Mc Jurken v Dupree, 44 Texas 500.

Growing plants and nursery trees set out by the tenant are personal property, as between lessor and lessee; but when the land is demised for a nursery, the lessee must remove the trees, before he surrenders possession, at the end of his term, or the title to them will vest in the owners of the reversion.
Domestic fixtures are annexations made by a tenant to the dwelling-house which he occupies to render his occupation more comfortable or more convenient. These are divided into two classes: Those erected for use, and those intended for ornamental purposes. At the present time they receive equal favors with trade fixtures but originally the latter received the preference.

Slate mantels which are hung upon hooks in false chimneys, are not fixtures, but personal property and as such belong to the tenant.

Cottrell v Griffin, 18 Weekly Dig. 270.

For a further discussion of this subject see the dissenting opinion of Johnson, J. in Snedeker v Warring, 12 N. Y. 170; also Taylor's "Landlord and Tenant" section 547.

Another question frequently arises regarding the period within which the tenant will be allowed to remove annexations made by him to the realty. The general rule may be stated as follows: If articles which a lessee has a right to remove while in possession of the premises, are left
until after such possession is surrendered, without agreement reserving to the lessee the right of removal, the lessor takes title to them as part of the realty.

Keogh v Daniell, 12 Wis. 164.
Josslynn v Mc Cabe, 46 Wis. 591.
Dostal v Mc Caddon, 35 Iowa 318.
Griffin v Ransdall, 71 Ind. 440.
Dingley v Buffum, 57 Me. 381.

This strict rule is not applied where the tenancy is uncertain in duration, as when it depends upon a contingency, or when the lessee is a tenant for life or at will, but in such case the law allows a reasonable time for the removal of such articles.

Watriss v Nat. Bank, 124 Mass. 571.
Lawton v Lawton, 3 Atk. 13.
Cooper v Johnson, 143 Mass. 108.

In Lewis v The Ocean Navigation and Pier Co., 125 N. Y. 341, it was held that a tenant having the right to remove articles placed by him upon the premises, has the same right so long as he remains in possession, and if he holds over after the termination of his lease and is thereupon
evicted by summary proceedings, if he claims, and is refused, the right to take such fixtures with him, he may maintain an action for their conversion.

If a tenant who has the right to remove articles erected by him on the demised premises, accepts a new lease, including the building, without any reservation, and enters upon a new term thereunder, the right of removal is at an end; though the actual possession has been continuous.

Talbot v Cruger, 81 Hun 504.
Longham v Ross, 45 N. Y. 732.
Hedderick v Smith, 103 Ind. 203.
Mo Ivor v Estabrook, 134 Mass. 550.

The landlord and tenant may stipulate as to the removal, of articles affixed to the realty, after the expiration of the term.

Where there is an agreement between parties as to what articles are fixtures the intent of the parties is to be given effect, and if the language is ambiguous, the practical interpretation of it by them is entitled to great weight.

The Matter of the Eureka Mower Co, 36 Hun 509.
If the lessor agrees to purchase the buildings erected by a tenant, there is an implied promise that the lessee shall have possession of the premises until the fixtures are paid for.

Van Rensselaer's Heirs v Penniman, 6 Wend. (N.Y.) 569.

An agreement between a landlord and tenant that a building thereon erected by the tenant shall remain personal property determines only the rights of the parties interested in the agreement at that date, and is not conclusive as to the relative rights of subsequent owners and tenants.

Talbot v Cruger, 81 Hun. 504.

The more important questions having been considered, for want of time the writer will be obliged to close this work here, although conscious that there yet remains a broad field for investigation.
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