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## THE INTENTION TEST APPLIED TO TRADE-FIXTURES

The old general rule, that whatever is annexed to the realty loses its individual character and becomes part of the realty to which it is annexed, was given a broad exception in *Poole's Case*[1] in 1703. This case held that trade-fixtures affixed by a tenant were removable at any time during or upon the termination of the tenancy, and was based on the logical ground that allowing such removal favored trade and encouraged industry.[2] Subsequently the courts were inconsistent in resting their decisions as to what articles were removable trade-fixtures.[3] But in 1853, in *Teaff* v. *Hewitt*,[4] a test was created for distinguishing fixtures from removable articles, and the court said this test would apply to most factual situations.[5] The test there developed was the famous "intention" test which has been extensively accepted throughout this country and applied to trade-fixtures as well as general fixtures.[6] In that case, the owner of the realty annexed the articles a woolen mill and machinery, which were connected by bands, straps and easily detachable cleats. The test consists of three main factors for consideration; (1) actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of the realty to which it is connected; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the purpose for which the annexation has been made.

At first glance, it seems that the "intention" test would be easily applied to all factual situations and give good results. It cannot be denied that many cases using this test have arrived at good results. But this, perhaps, is to be credited to an acute sence of justice present in the minds of the courts rather than an infallible test. The great flexibility of the test allowed each court to give an equitable decree in each case, having at hand a test which could be twisted to suit their needs. This ambiguity is a great advantage and convenience at times, but would be unnecessary if a more definite test could be developed.

In a Washington case,[7] the tenant annexed trade-fixtures in the absence of any agreement. The "intention" test given in *Teaff v. Hewitt* was ostensibly applied to determine if the articles were trade-fixtures, yet the various articles therein discussed and determined to be trade-fixtures and removable were held to be such because the slight physical annexation indicated an intention to have the articles remain personalty. But past experience has shown that the use of fictions in the field of law is objectionable. And for the same reasons, a test allowing such circumlocution as shown here is, in the opinion of many, objectionable. It would

1. I Salk. 368, 91 Eng. Rep., Full Reprint 320 (1703).
2. Accord, Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374 (U. S. 1829).
3. Cases cellected and reviewed in Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634 (1853).
4. I Ohio St. 511, 59 Am. Dec. 634 (1853).
5. Id. at 530, 59 Am. Dec. at 645.
6. New York Life Ins. Co. v. Allison, 107 Fed. 179 (C. C. A. 2nd. 1901), cert. denied, 181 U. S. 618, 21 S. Ct. 923 (1901); Filley v. Christopher, 39 Wash. 22, 80 Pac. 834 (1905); Ballard v. Alaska Theater Co., 93 Wash. 655, 161 Pac. 478 (1916).
7. Ballard v. Alaska Theater Co., supra note 6.

seem more logical to attribute to a tenant the intention that is to his best interest. It may be reasonably presumed that the tenant intends to remove and carry away, at the termination of the lease, everything he has annexed to the property for his own use and benefit.

Of course, the intent of both parties can most easily be determined when there is an express agreement as to just what articles shall be trade-fixtures, and which ones shall remain as realty. The intent of the annexor has also been determined by interpretation of a clause in the lease agreement to the effect that the premises shall be returned in as good condition as when the tenant entered into possession. Two Wyoming cases have been decided on this basis. In one[8] the lessee contracted with a third party to use part of a building belonging to the lessor in constructing a new gasoline service station building, and the walls were incorporated into the new building, becoming an integral part of it. The court held that the new building was not removable as a trade-fixture because of the clause in the lease requiring the lessee to return the premises in "as good order and condition as when same were entered upon by said lessee." In the other[9] the articles in question were decided to be part of the realty, in accordance with an express agreement between the parties similar to the one above, and the lessee's successor in interest was held liable for violating the agreement when he removed the substituted doors, windows, and plate glass.

In the search for a test better than the ambiguous "intention" test, it is readily seen that the adaptability element is inadequate as a substitute, for to be a trade-fixture, it must be adaptable to the premises. This leaves only "accession," which is used in this article as meaning the manner by which a person acquires the absolute title to property which has been added to his own in a way that defeats removal without injury.

As is seen from the result reached in the Washington case cited above, the controlling factor for consideration is that of "accession" and not the intention of the annexing party. It has been held[10] that a tenant may not remove a trade-fixture if such removal would result in injury to the freehold, and the injury must be substantial and not inconsequential.[11] In determination of whether or not the freehold has been, or would be injured by the removal, the condition of the freehold at the time of the annexation is to be compared with the condition after the removal.[12] Cases have held an article may not be removed if such removal would result in injury to the fixture itself, either destruction or reduction into a mass of crude materials.[13]

8. Rosenblum v. Terry Carpenter Inc., 174 P. (2d) 142 (Wyo. 1946).
9. Slane v. Curtis, 39 Wyo. 1, 269 Pac. 31 (1928), appealed from retrial 41 Wyo. 402, 286 Pac. 372 (1930), rehearing denied, 41 Wyo. 417, 288 Pac. 12 (1930).
10. Friedlander v. Ryder, 30 Neb. 783, 47 N.W. 83 (1890); Chase v. New York Insulated Wire Co., 57 Ill. App. 205 (1894); Collamore v. Gillis, 149 Mass. 578, 22 N.E. 46, 14 Am. St. Rep. 460 (1889); Fortescue v. Bowler, 55 N. J. Eq. 741, 38 Atl. 445 (1897).
11. Ballard v. Alaska Theater Co., 93 Wash. 655, 161 Pac. 478 (1916).
12. Ballard v. Alaska Theater Co., supra note 11; Chase v. New York Insulated Wire Co., 57 Ill. App. 205 (1894).
13. Collamore v. Gillis, 149 Mass. 578, 22 N.E. 46, 14 Am. St. Rep. 460 (1889), dismantling a brick kiln; Rosenblum v. Terry Carpenter, Inc., 174 P. (2d) 142 (Wyo. 1946), disassembling a building; But disassembling a pipe organ for removal was allowed in Ballard v. Alaska Theater Co., 93 Wash. 655, 161 Pac. 478 (1916).

In a Wyoming action between a conditional vendor of a chattel affixed by the owner of the land and the mortgagee of the owner, it is said: "In the legion of cases which arise in connection with this branch of law, it may well be that the test suggested above [intention test] cannot be regarded as all inclusive."[14] This dicta seems to lead away from a strict following of the "intention" test. In another Wyoming case, the parties being the owner and mortgagee, the court said: "The general rule as to the right of a mortgagee to maintain an action to restrain the removal of fixtures is that he may maintain such an action when the removal would have the effect of impairing the security."[15] These cases seem to indicate that the Wyoming Supreme Court has repudiated the strict application of the intention test in cases involving general fixtures, when the relationship of the parties is other than that of landlord and tenant. The courts have almost always construed such controversies strongly for the tenant.[16]

In summary, the "intention" test is not the best test in a situation involving trade-fixtures between landlord and tenant, and "accession" seems to be better. There has been no decision handed down in Wyoming on trade-fixtures in the absence of an express agreement. The dicta in Wyoming cases involving other situations show a tendency to repudiate the strict application of the "intention" test, and it is possible that the "accession" test will be applied to cases of trade-fixtures between landlord and tenant.

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14. Holland Furnace Co. v. Bird, 45 Wyo. 471, 480, 21 P. (2d) 825, 828 (1935), brackets added.
15. Anderson v. Englehart, 18 Wyo. 409, 423, 108 Pac. 977, 979 (1910).
16. Van Ness v. Pacard, 2 Pet. 137, 7 L. Ed. 374 (U. S. 1829).