
Alphonse M. Squillante
THE LAW OF FIXTURES: COMMON LAW
AND THE UNIFORM COMMERCIAL CODE*

PART I: COMMON LAW OF FIXTURES**

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**INTRODUCTION**

To understand the law of fixtures, one must know its origins. The history of the law of fixtures involves several theories. English law follows the maxim *"quicquid plantatur solo, solo cedit"* (whatever is affixed to the earth goes to the earth), whereas American law uses several different tests to determine whether an object should be classified as a fixture. These tests are vague and subjective, and result in inconsistencies when applied to substantially similar fact patterns. It is, therefore, understandable that one commentator has observed that "[t]o attempt to discover an all-inclusive definition for a ‘fixture’ or to posit tests for fixtures in all circumstances is not a profitable undertaking."

The Uniform Commercial Code plays a significant part in American fixture law. Article 9 of the UCC establishes priorities among creditors based on different filing procedures to be followed for different categories of property. These categories are: goods which retain their chattel character entirely and do not become part of the real estate; ordinary building materials which do become an integral part of the real estate and do lose their chattel character;

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2. See infra notes 25-35 and accompanying text. See generally text accompanying notes 59-387 (discussing the predominant test for fixture status).

3. Compare Commercial Credit Corp. v. Gould, 275 Mass. 48, 175 N.E. 264 (1931) (holding a refrigeration system installed in apartment house is considered personalty not a fixture) with Commercial Credit Corp. v. Commonwealth Mortgage & Loan Co., 276 Mass. 335, 177 N.E. 88 (1931) (holding a similar refrigeration system in similar apartment is considered part of realty).


5. See Cosway, *Fixtures under the Uniform Commercial Code*, 21 Sw. L.J. 713 (1967). The idea of fixtures is one of the few areas of real property law to which the Uniform Commercial Code applies. *Id.*

and an intermediate class of property (fixtures) that becomes real property for certain purposes, but for which chattel financing is preserved.7 Thus, it is important to determine into which category a particular piece of property fits. Unfortunately, this determination is not easy, for the UCC has not eliminated the inconsistencies of the common law approach to fixtures. While the Code determines the outcome in fixture conflicts between secured creditors and real estate owners or encumbrancers,8 it does so without redefining the term fixture. Instead, it expressly leaves the definition of fixtures to state property law and its varied tests.9

This article surveys the treatment of fixtures in pre-code law and thereby provides a foundation on which present UCC provisions can be analyzed. It then analyzes the UCC provisions applicable to fixtures. The analysis found herein is intended to create a clear understanding of fixture law that will better enable both creditors and debtors to conduct their business transactions so as to minimize priority conflicts and litigation.

I. Definition of a Fixture

The concept of fixtures is familiar to everyone. A furnace, air conditioner, or light "fixture" retains its identity as that item, but it is generally regarded as part of the building. It fades into the woodwork, so to speak, and is considered not as part of equipment, appliances or furnishings, but simply as part of the building. Purchasers of homes consider such attached items to be part of the realty which is purchased.

The concept of a fixture class of property existed in Roman law. The definition was a subtle and complicated part of the law of accessio.10 Generally, objects put into use for permanent service in a house would pass into realty, while other objects, installed for temporary service, would not.11 English courts emphasized the element of physical attachment to realty in their definition of fixtures.12 They applied the Latin maxim "quicquid plantatur, solo, solo cedit," as a

9. "[G]oods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law." U.C.C. § 9-313(1)(a)(1978).
12. See, e.g., R. Brown, supra note 1, § 16.1, at 516.
rule of law.13 Thus, salt pans affixed to a brick floor with mortar passed with the reality.14 In emphasizing actual physical attachment, the English law also long recognized the concept of constructive annexation.15 Thus, a house key, although not attached to a house, was also held to be a fixture.16

American law has developed a variety of definitions and tests to distinguish fixtures from personal property. One definition provides that “a fixture is a former chattel which, while retaining its separate physical identity, is so connected with the reality that a disinterested observer would consider it a part thereof.”17 Another definition tells us that “[a] fixture is an article of personal property brought in and upon and annexed to real property, which retains its separate identity and becomes reality, but which under certain circumstances may become personalty again.”18 Still another provides, “[a] fixture can best be defined as a thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as a part of the land.”19

At common law, an item of personality so attached that it could not be removed without substantial injury to the freehold, became part of the reality.20 In this respect, American cases followed English law by emphasizing physical attachment.21 Other American cases have emphasized the injury to the fixture itself upon removal.22 Even after chattels become fixtures, they may regain their status as personal property by severance.23 Personality can retain that status as

13. Id.
15. 1 G.W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 58, at 198-99 (repl. ed.1980).
16. Id. at 198-99 & n.2.
17. See 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.1, at 3-4.
19. R. BROWN, supra note 1, §16, at 514.
21. See supra note 1 and accompanying text.
the result of an agreement by the parties to treat the items as such, when otherwise they would become fixtures.\textsuperscript{24}

The landmark case of \textit{Teaff v. Hewitt}\textsuperscript{25} in 1853 established a test for determining when personal property objects become fixtures.\textsuperscript{26} The case attempted to define, once and for all, what a fixture is and how to determine its status. The court established a three-pronged test:

1. Actual annexation to the realty, or something appurtenant thereto.
2. Appropriation to the use or purpose of that part of the realty with which it is connected.
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, the structure and mode of annexation, and the purpose or use for which the annexation has been made.\textsuperscript{27}

All three prongs were meant to be elemental to the creation of a fixture; but, originally, the annexation test was the most important. Most courts now view intent as the paramount criterion and use the other two prongs as indicators of intent.\textsuperscript{28}

While most states follow the \textit{Teaff} intention test to determine what is a fixture, some disagreement exists over application of the test. Ohio, for example, in applying the \textit{Teaff} test, is considered to be

\begin{thebibliography}{99}
\bibitem{25} 1 Ohio St. 511 (1853).
\bibitem{26} \textit{Id.} at 530.
\bibitem{27} \textit{Id.}
\bibitem{28} E.g., United States v. 52.67 Acres of Land, More or Less, 150 F. Supp. 347 (E.D. Ill. 1957) (federal courts have almost universally accepted intention test); Seatrain Terminals of Cal., Inc. v. County of Alameda, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578 (1978) (intent is crucial and overriding factor with the other two criteria only subsidiary ingredients relevant to intention); Merritt-Chapman & Scott Corp. v. Mauro, 171 Conn. 177, 368 A.2d 44 (1976) (intent is primary or essential test); Rollins Cablevue, Inc. v. McMahon, 361 A.2d 243, (Del. Super. Ct. 1976), aff'd, 382 A.2d 250 (1976) (controlling factor is intent); Grinde v. Tindall, 172 Mont. 199, 562 P.2d 818 (1977) (intent has most weight and is controlling factor); Bell v. City of Corbin City, 164 N.J. Super. 21, 395 A.2d 546 (App. Div. 1978) (intent is dominant factor); Far West Modular Home Sales, Inc. v. Proaps, 43 Or. App. 881, 604 P.2d 452 (1979) (paramount factor in determining fixture status is intent of objective annexor and other factors are used to infer intent); Fenlon v. Jaffee, 553 S.W.2d 422 (Tex. Civ. App. 1977) (intent is preeminent factor, while first and second factors are of value as evidence of intention).
\end{thebibliography}
a minority view state. Its application of the test yields only two classes of property: personalty and realty, with fixtures not a separate class, but merged into the realty.\(^{29}\) In Massachusetts, the common law doctrine of *Clary v. Owen*\(^ {30}\) determined vendor-mortgagee conflicts for a century before the UCC was adopted.\(^ {31}\) This approach also posits only two classes of property, asserting that fixtures are chattels which have been merged into, and are, realty.\(^ {29}\) In *Clary*, the existing real estate mortgagee acquired priority over a secured chattel creditor once the goods became part of the realty.\(^ {32}\) Thus, Ohio and Massachusetts both favor real estate creditors over chattel creditors. The harshness of the Ohio and Massachusetts rule, however, can be circumvented by a court, by simply maintaining that the article in question is classified as personalty, and is detachable from the realty.\(^ {33}\) Otherwise, the mortgagee would have a windfall.

The common law majority position, a position that the UCC eventually endorsed, was that there are three classifications of property: realty, fixtures and personalty.\(^ {35}\) The New Jersey "institutional test" was one common law test espousing this position.\(^ {36}\) In rejecting the Massachusetts test of *Clary v. Owen*, New Jersey held that the secured creditor's interest in goods which were added to real estate is superior to the mortgagee's interest.\(^ {37}\) The secured creditor's priority arose, however, only in cases where removal of the goods would not harm the freehold (or institution) to which they were affixed. If removal harmed the affixed goods, then the real estate mortgagee was harmed; and the test therefore would not allow removal. Thus, the rights of the mortgagee were superior to those of the secured

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30. 81 Mass. (15 Gray) 522 (1860).
31. *Id.*
32. *Id.* at 524-25.
33. *Id.* See Coogan, *supra* note 29, at 1207-08.
35. *See supra* notes 5, 7 and accompanying text.
Prior to its adoption of the UCC, Pennsylvania employed a peculiar doctrine, known as the "assembled industrial plant mortgage doctrine," which was first announced in Voorhis v. Freeman in 1841. Voorhis held that all machinery of a manufactory necessary for its operation as a going concern must pass as part of the freehold. Thus, empty beer kegs waiting to be refilled at a brewery were fixtures. It did not matter, under the doctrine, that the machinery could be removed without any injury to the building in which it was placed. If the doctrine had been limited to machinery in manufactories, it would not have had as wide an effect as it has had, but the Pennsylvania courts also applied the rule to other buildings, such as apartment houses, restaurants and offices.

One of the first statutory attempts to address the fixture problem in the context of secured transactions, was the Uniform Conditional Sales Act (UCSA). This Act was a predecessor of the UCC. The Act concerned the affixation of chattels to realty, and the priority rights of vendors and mortgagees therein. It was adopted in only twelve states, including New Jersey and Pennsylvania. The UCSA did not totally displace the common law develop-

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38. Coogan, supra note 29, at 1219.
40. Id. at 119-20.
46. Kleps, supra note 44, at 401-02.
47. Note, supra note 45, at 686 n.35.
ment of fixture law in the states that adopted it.49 Section 7 of the UCSA did, however, supplement the law. In general, the UCSA provided for the removal of fixtures from real estate by the vendor/secured creditor if the removal would not cause "material injury to the freehold."

This standard of removal without "material injury to the freehold" became the key test in determining fixture status in UCSA states. Most of the states that adopted the UCSA followed the intent of its drafters, and construed the phrase to mean removal causing actual physical injury to the land.51 But New Jersey courts, interpreting the phrase in light of their "institutional test," gave it a very broad meaning, so that the removal of articles essential to the functioning of the institution was an injury.52 "If the severance will prevent the structure from being used for the purposes for which it was intended, then the chattel is not removable without material injury to the freehold."53

The importance of classifying items as fixtures, through the use of such tests as those mentioned above, is that such a decision determines which of two or more conflicting interests in such items will prevail. Absent statutes, which generally determine priority rights in conflicts between heir and executor, grantor and grantee, mortgagee and secured party, or landlord and tenant, the question of who has superior rights in the items depends on whether they are personal property or fixtures. While "to brand a thing a fixture is not to determine the jural rights of all who may be interested in it,"54 some commentators think that the designation of an item as a fixture is a conclusion of rights, and not the result of a definitional analysis.55 One writer concludes that the courts analyze the relationship of the parties, the purpose of the transaction, the nature of the goods, and their relationship to the property, to determine whether the mortgagee or secured party prevails, and then labels the item fixture or per-

49. See id. at 402, 405 n.41.
50. UNIF. CONDITIONAL SALES ACT § 7 (1918). For a more complete quotation of the relevant provision see text accompanying note 95.
51. Kleps, supra note 44, at 405 n.41.
52. Id. at 405.
53. Id.
55. See, e.g., R. BROWN, supra note 1, § 16.1, at 515; Coogan, supra note 29, at 1220-21.
sonal property as a conclusion.66

Most commentators agree with Ray Andrews Brown when he says there is no single definition of fixtures, but that the issue is to find the rights of the parties in three distinct factual situations: (a) where the chattel owner attaches the item to his own land; (b) where the chattel owner annexes it to the land of another; and (c) where the annexor of the chattel does not own it.67

The majority of states now use some variation of the three prong Teaff test to determine fixture status.68 The relationships of the parties in the three situations suggested by Brown are elements of the intent prong of that test. The intent of the parties to create a fixture, or the lack of such intent, is in part determined by the relationship of the parties to each other. An examination of the elements of the three prong fixture status test, including the element of intent as influenced by party relationships, follows.

II. ELEMENTS OF FIXTURE STATUS

A. Overview

The annexation-adaptation-intent test first put forth in Teaff v. Hewitt69 is still used in most states;60 therefore, one might expect rather uniform case holdings on fixtures. An oft-quoted judge’s comment on fixture law puts to rest such misconceptions: “Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take.”61

There are many variables that may manifest themselves in the fact patterns of fixture cases. These variables can include the type of affixation (bolts, cement, glue, etc.), and the diverse terms of financing agreements, inter alia. The abundance of variables involved leads

56. Schroeder, Security Interests in Fixtures, 1975 ARIZ. ST. L.J. 319, 324. The U.C.C. removes the problem of this discretionary labeling. The Code assumes fixtures can be easily defined then goes on to subject them to its three prong “relationship” test. Id.

57. See R. Brown, supra note 1, § 16.1, at 515.

58. See supra notes 25-28 and accompanying text.

59. 1 Ohio St. 511 (1853).


to inconsistent results in the courts. If intent is inferred from the facts and circumstances of each case, then the result has been that in similar cases an item has been found to be "clearly" a fixture in one and "clearly" a chattel in another. One judge recognized that "[t]he rules established by our decisions upon the basis of which the claims of the parties must be adjusted are simple enough. The application thereof to particular cases is not so easy." Why is it that the decisions seem to go off in opposite directions? The cases do not appear to reflect arbitrary, inconsistent analysis, but, rather, are apparent attempts to do justice to parties with legitimate claims. As one commentator wrote, "[t]he precedents are thus very confusing [and] the decisions cannot be rationalized on any basis other than that they were jury verdicts." Annexation of the objects to the realty was once the sole criterion for designating a chattel as a fixture. Even now, annexation is not just another factor of the intent test. There must still be either physical or constructive annexation of goods for fixture status to arise; gravity is not enough. A permanent attachment is necessary before even massive, but movable objects, will be considered part of the realty. Adaptation to the use of the realty is also one of the three Teaff


64. See 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.12, at 51 & n.17.

65. See R. Brown, supra note 1, § 16.1, at 516.

66. See e.g., Titus v. Mabee, 25 Ill. 232 (1861); Pierce v. George, 108 Mass. 78 (1871).

67. United States v. Shelby County, 385 F. Supp. 1187, 1189 (W.D. Tenn. 1974) (holding a mobile home not permanently affixed); Cox v. State Farm Fire & Cas. Co., 240 Ark. 60, 398 S.W.2d 60 (1960) (holding stationary furniture which is not permanently attached to the house is not a fixture); M.P. Moller, Inc. v. Wilson, 8 Cal. 2d 31, 63 P.2d 818 (1936) (holding annexation by weight and gravity not a sufficient indication of intent to make an article a permanent fixture); Wetjen v. Williamson, 196 So. 2d 461 (Fla. Dist. Ct. App. 1967) (rejecting contention that unattached concrete bleacher seats at a race track were annexed to realty by force of gravity); Consolidated Gas, Elec. & Power Co. v. Ryan, 165 Md. 484, 169 A. 794 (1934) (to render a chattel a fixture, there must be actual or constructive annexation); Hanson v. Vose, 144 Minn. 264, 175 N.W. 113 (1919) (holding that unless the article is physically or constructively attached to the property, or is essential to another article which is attached, then it remains a chattel regardless of intent). Contra Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659 (1931) (holding a 14,000 pound lathe part of realty even though not attached and held down only by gravity).
criteria. It is especially important in cases where the item is adapted to the use of the realty so as to become necessary to that use, such that its removal would damage the freehold. This sounds similar to New Jersey's "institutional test," but because adaptation is only one of three elements of the Teaff test for fixtures, it is not determinative as it is in the institutional test for fixture status.

Today, intent is the crucial element in deciding whether or not something is a fixture. The most important factor in determining whether the annexor has the intent to make an item part of the realty or not appears to be the relationship of the parties. For example, while an owner-annexor is nearly always precluded from claiming that the affixed item is personalty, a tenant-annexor seldom is. A tenant adding fixtures to leased property to carry on a trade or business (so-called trade fixtures) almost never loses personal property rights in the trade fixtures.

68. For a discussion of the institutional test, see supra text accompanying notes 35-38.

70. See infra note 209 and accompanying text.
71. See infra note 218 and accompanying text.
Expressions of intention between two parties nearly always bind them, as in an agreement to treat an article as a chattel for financing purposes, even though its annexation would normally make it a fixture; however, such an agreement binds neither a bona fide purchaser of the Realty, who has no notice of an item's chattel status, nor a remainderman, who has no notice of the life tenant's agreement regarding the item. Agreements on the status of chattels, absent statute, usually are binding on a prior mortgagee of the property, but seldom are binding on a mortgagee who obtains a mortgage subsequent to the affixation of the chattel. The reader should be skeptical of some of the legal analysis courts use to classify items, because some courts simply make their classification on the basis of what they want the result to be, after weighing the equities. Considering the pre-Code common law, the Code's endorsement of state law definitions concerning fixtures may seem surprising; however, state law does not determine the priorities of the secured parties. The Code's provisions base priority on whether or not the Code filing requirements have been met, and the filing requirements are based on whether an item is a fixture. Thus, state case law determines into what category goods fit for filing purposes, while the UCC establishes uniform priorities based on that filing.

The following discussion concerns the elements of the test currently used in most state case law to determine whether goods have attained fixture status. Be aware that the Code demands proper fil-


ing for the creation of an effective security interest.\textsuperscript{77} Failure to file properly is fatal to the priority of a secured claim and may result in an order of priorities different from that contemplated by the parties.\textsuperscript{78} Accurate determination of the correct filing status of goods therefore becomes crucial to the creation of a priority security claim.

\textbf{B. Annexation to the Realty or Something Appurtenant Thereto}

Early fixture law declared that anything attached to the soil became part of the soil.\textsuperscript{79} Therefore, any physical annexation to the soil, or to a structure on the ground, was part of the real estate, would pass with a deed to the land, and was subject to any mortgage on the land.\textsuperscript{80} Essentially, if the chattel had been attached to reality, it became a fixture. Absent affixation, the early law would deny fixture status.\textsuperscript{81} Annexation usually implied actual annexation, but constructive annexation was also recognized.\textsuperscript{82}

Early in the development of fixture law, annexation was the determinative factor. An example of the great weight annexation was given is found in \textit{Blue v. Gunn}.\textsuperscript{83} In that case, the Supreme Court of Tennessee wrote that “annexation is the controlling element in the very definition of a fixture, and we find on examination that the overwhelming weight of authority in this country is that the physical annexation of a chattel to the reality is necessary, in order to render it a part of the reality.” \textsuperscript{84} Under the annexation test, the degree of annexation — whether the chattel was slightly or firmly attached — was also considered in determining whether a chattel became a fixture.\textsuperscript{85} Questioning the degree of affixation allowed the fact triers some flexibility in determining what was a fixture. Nonetheless, some sort of annexation was required.\textsuperscript{86}

One commentator has suggested that the strict annexation test

\begin{itemize}
\item[77.] \textit{Id.}
\item[78.] \textit{Id.}
\item[79.] See supra text accompanying notes 1, 9.
\item[80.] See R. Brown, supra note 1, § 16.2, at 519.
\item[81.] One commentator has written that “[t]he adherents of the annexation doctrine feared that if the requirement of physical attachment was removed completely, domestic animals on a farm, or other loose and unattached implements, traditionally not a ‘part of’ the reality could be considered fixtures.” Snitzer, \textit{Valuation and Condemnation Problems Involving Trade Fixtures}, 16 VILL. L. REV. 467, 469 (1971).
\item[82.] See infra notes 102-05 and accompanying text.
\item[83.] 114 Tenn. 414, 87 S.W. 408 (1905).
\item[84.] \textit{Id.} at 418, 87 S.W. at 409.
\item[85.] \textit{See id.}
\item[86.] \textit{See id.;} 1 G.W. Thompson, supra note 15, § 57, at 192.
\end{itemize}
"in one of the early decisions recognized the economic waste involved in dismantling a functioning economic unit . . . . [T]he economic fact is that it may be wasteful to allow the removal of valuable annexations from the land."87

This economic argument seems implicit in both the New Jersey institutional test88 and the Pennsylvania assembled industrial plant doctrine.89 Both of these state law concepts recognize that functioning economic units are cases of the whole being greater than the sum of the parts. This view is less persuasive in the current commercial climate than it was before. Modern techniques of manufacturing and production seem to rely less upon cumbersome economic units, and more upon skilled labor, working with more movable equipment. In addition, modern equipment is generally more movable and more interchangeable so that less economic waste is likely to occur from dismantling a given production unit. Such production units are now more physically and economically suited to reconstitution in different environments.

While the economic waste factor was probably a consideration in some decisions, and probably will continue to influence some courts, its importance seems to have diminished. Pure economic factors, such as lease agreements, cost of replacement factories as opposed to labor costs at current sites, and other such considerations often bear more weight than mere physical assembly and attachment. It would seem that the diminished importance of the strict annexation test may have paralleled the economic history of manufacturing; however, this analysis borders on speculation. It is also possible that the diminished status of the strict annexation test is a logical result of the development of a better fixture status test. In any event, annexation, once the entire fixture status determinant, is now merely one prong of a three prong test.90

An alternative to the strict annexation test, the "material injury test," probably developed to give the fact trier greater flexibility. Under the material injury approach it is possible to hold that an annexed chattel was not part of the realty to which it was attached, but rather was personalty, free of fixture or realty considerations. The material injury test provides that a chattel, attached in such a

88. See supra notes 35-38 and accompanying text.
89. See supra notes 39-43 and accompanying text.
90. See supra notes 25-27 and accompanying text.
manner to the reality that removal of the chattel would result in material injury to itself or to the reality, became part of the reality, and lost its chattel status.⁹¹

In *Mogul Producing & Refining Co. v. Southern Engine & Pump Co.*,⁹² the court held that gasoline pumps fastened to beds of concrete were not fixtures, but personalty.⁹³ The court reasoned that "the pumps could be removed easily without damage to the freehold."⁹⁴ The method and degree of annexation thus became important factors.

The Uniform Conditional Sales Act adopted the "material injury test" in section 7, and provided that a purchase money security interest in goods could defeat a pre-existing real estate mortgage except:

> If the goods are so affixed to reality, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property, as to any portion not so severable shall be void after the goods are so affixed . . . .⁹⁵

Thus, mill machinery, sold under a conditional sales contract, and attached only by bolts and screws, which could be removed without any injury to the mill, was held to have retained its status as personalty.⁹⁶

Other cases, following this test, have held that mirrors permanently attached to walls are fixtures, as are light fixtures, heaters, water tanks and Venetian blinds.⁹⁷

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⁹² A material injury does not necessarily mean physical injury, but may mean impairment of the use for which the property in question was intended. Material injury will be found to have occurred when removal of the article renders the remaining reality useless or lessens its practical value for the purpose for which it was used. *State Highway Comm'n. v. Empire Bldg. Material Co.*, 17 Or. App. 616, 523 P.2d 584 (1974).


⁹⁴ *Id. at 214.*

⁹⁵ *UNIF. CONDITIONAL SALES ACT* § 7 (1918). *See supra* notes 44-53 and accompanying text. The Uniform Conditional Sales Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1918. Kleps, *supra* note 44, at 401.

⁹⁶ *Meyer v. Pacific Machinery Co.*, 244 F. 730, 733 (9th Cir. 1917).

⁹⁷ *Strain v. Green*, 25 Wash. 2d 692, 172 P.2d 216 (1946). Permanency is not so much a matter of non-removability as it is of whether removal would leave the premises damaged or less than they were represented as being. *See, e.g., Paul v. First Nat'l Bank*, 52 Ohio Misc. 77, 369 N.E.2d 488 (1976). *See also* Seaintrain Terminals of Cal., Inc. v. County of Alameda, 83 Cal. App. 3d 69, 147 Cal. Rptr. 578 (1978) (permanent does not mean perpetual but fastened until worn out, purpose accomplished, or article superceded by another more suitable
The courts, however, began to create exceptions to these strict rules. Gravity, for example, has been held to provide sufficient attachment. A grain bin anchored to a concrete base and connected by ducts and wiring became an integral part of the grain elevator, and was considered a fixture not removable by the conditional seller against a bona fide purchaser. Statues have also been determined to be fixtures under such analysis.

Occasionally, an item that is completely unattached will be deemed to be a constructively annexed fixture where it is so adapted to the use of the property that a reasonable person would consider it integral to the reality. Temporarily detached items, such as storm doors and windows, are thus considered to be part of the reality. Building materials specially intended for use in the reality on which they rest may be constructively annexed to the reality, but materials fit for any building remain personalty.

Early English fixture law evidently recognized the constructive annexation doctrine. Cases are reported in which a house key passed with the freehold, and a mill stone severed from the mill remained part of the reality. Constructive annexation was one way for courts to weaken the strict annexation test. An extreme example of the doctrine of constructive annexation is Pennsylvania's assembled industrial plant doctrine, which considers all machinery in a plant to be constructively annexed to it.

Eventually, the strict annexation test, and the material injury test, were overruled in America. The first prong of the three-prong common law test, annexation, was thereafter given less weight, and the two remaining prongs of the test were weighed more heavily.
The Supreme Court wrote in 1914 that "[t]o hold that the mere fact of annexing the system to the freehold overrode the agreement that it [sprinkler system] should remain personalty and still belong to Holt [purchase money creditor] would be to give mystic importance to attachment by bolts and screws."\(^\text{107}\)

The Supreme Court of Florida in 1930 also enunciated the more modern trend of discounting the importance of annexation. In *Greenwald v. Graham*,\(^\text{108}\) the court noted that:

The general course of modern decisions, in both English and American courts, is against the common law doctrine that the mode of annexation is the criterion, whether slight and temporary, or immovable and permanent, and in favor of declaring all things to be fixtures which are attached to the realty with a view to the purposes for which it is held or employed.\(^\text{109}\)

This case foreshadowed the realization by the courts that the intent of the parties, and not the degree of annexation, should be the dominant consideration in determining fixture status.\(^\text{110}\) The annexation test alone did not always yield equitable results, even under the flexible "material injury" approach.

The doctrine of constructive annexation may have been the earliest judicial formulation regarding the importance of intent in determining the status of a good. The constructive annexation doctrine invokes the second element of the fixtures test - appropriation to use.\(^\text{111}\) Accordingly, a house key, although not "annexed," was a fixture, as was a mill stone, even though it was not attached to the mill,\(^\text{112}\) because these items were appropriated to use in their freeholds, and a reasonable person would expect such a use. Indeed, the parties intended these items to be used with the accompanying real estate because apart from their freeholds they would have little or no


\(^{108}\) Id. at 818, 130 So. 608 (1930).


\(^{111}\) Id.
value. As courts came to realize the importance of intent in determining the status of a chattel, intent emerged as the dominant element of the fixture status test.

Annexion is still one of the three considerations; today, however, the method of annexion usually raises either an inference as to the annexor's intent to make the item a permanent accession to the freehold, or it effects the burden of proof. One court has written that "[t]he present day tendency is to regard the manner of annexion taken by itself as of relatively small significance, and to give much weight to the adaptation of the machine to the use of the realty, considered in connection with the intention with which the annexation has been made." Another court, however, wrote that "the general rule is that whatever is attached to the realty, though but slightly, is prima facie a part thereof."

Fact triers have come to use a sliding scale in their determination of fixture status. Under the three-prong test, some annexion or constructive annexion of personalty is required. The more permanent the annexion, the less intent or appropriation to the use will have to be proved. The slighter the annexion, the stronger the proof of intent and appropriation needed to show that the personalty has turned into realty.

C. Adaptation or Appropriation to the Use of the Realty

The second prong of the three-prong test used to determine whether a chattel has become a fixture in a tripartite property state, or part of the realty in a minority state that has only two property classifications, is whether the chattel has been appropriated to the use or purpose of the realty to which it is annexed. This test is generally the least important of the three, or at least the one factor to which courts and commentators have given the least attention. In contrast, the annexion test was formerly the sole determinant of

113. 35 AM. JUR. 2D Fixtures § 6, at 704 (1967)(where an object is annexed in such a way as to induce a reasonable person to believe that it is a part of the realty, there is a prima facie presumption that it is a fixture).
116. See supra text accompanying note 27.
117. See 35 AM. JUR. 2D Fixtures § 6 (1967).
118. For a discussion of the property classifications, see supra text accompanying notes 29-35.
119. See supra text accompanying notes 25-27.
the issue, and the intention of the annexor is now regarded as the main factor to be considered. Adaptation, however, has usually been one of the factors from which to infer intention.

The Pennsylvania assembled industrial plant doctrine, which stresses adaptation of the use of the article to the use or purpose of the realty, has been viewed as using adaptation as the exclusive factor in determining whether a chattel is a fixture. The court in *Teaff v. Hewitt* wrote that:

There is another class of authorities in which it is laid down that the true test of a fixture is the adaptation of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it. . . . Some cases have gone so far as to make this the only test, and even dispense with actual or physical annexation.

The court rejected that line of authority because it relied exclusively on the adaptation test. In coming to that conclusion, the court used the argument that:

If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subject to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures. It would utterly confound the rule . . . .

At least one court, however, has recognized that "the primary distinction" between personalty and realty is "whether the property is devoted primarily to the business conducted on the premises, or whether it is devoted primarily to the use of the land upon which the business is conducted." This is in accordance with the adaptation

120. See supra notes 79-115 and accompanying text.
121. See infra notes 153-81 and accompanying text.
122. See supra notes 39-43 and accompanying text.
123. 1 Ohio St. 511 (1853).
124. Id. at 528-29 (citing Voorhis v. Freeman, 2 Watts & Serg. 114 (Pa. 1841) (emphasis in original)).
126. Wheeling-Pittsburgh Steel Corp. v. Jefferson County Bd. of Revision, 27 Ohio St.
test, which has been given great weight.

According to the adaptation test, a chattel becomes a fixture if the object is necessary or helpful in using the real estate for its intended purpose, if it is an integral part of the real estate and is indispensable to the enjoyment thereof, or if it creates a lack of utility of the realty if it is severed.\textsuperscript{127}

The nature of the real estate and what is necessary for its utilization are elemental in considering whether a chattel is so adapted to the realty as to become a part of it. In one of the earliest cases to use this adaptation analysis, salt pans affixed with mortar to the brick floor of a salt works were determined to be fixtures.\textsuperscript{128} The Court determined the nature of the realty to be a salt work, which required the building to contain the pans.\textsuperscript{129} Another court held that a pipe organ was necessary for the full utilization of a church, and was therefore a fixture.\textsuperscript{130} Theater seats were fixtures in a movie theater because they were necessary to the operation of the business,\textsuperscript{131} but chairs in a home would be personalty. Adaptation was an important factor in determining that a portable hogpen and a granary with a movable corncrib resting on skids were fixtures.\textsuperscript{132} All of these chattels were essential to the operation of a farm and adapted to the use of the property.\textsuperscript{133}

Current decisions consider adaptation of a chattel to the use to which the land is put as a factor in determining the annexor’s intent.\textsuperscript{134} Occasionally, adaptation may conclusively establish intent: a
walk-in cooler was so "patently" adapted to the use of a grocery store that it proved the owner-annexor's intent that it could pass by deed as a fixture.\textsuperscript{136} This decision seemingly enables the adaptation test to exclusively determine whether a chattel is a fixture; however, it is different from the situation discussed earlier in this section, where the court feared that an adaptation test as the "sole test of a fixture" would "utterly confound the rule."\textsuperscript{138} The difference is that in the walk-in cooler case the adaptation test generates an inference of the intention to create a permanent fixture, while in the previous case the adaptation of the item to the use of the realty, in and of itself, creates fixture status.

Several decisions use the adaptation test in dealing with kitchen appliances. Generally, the factual situation involves a stove or refrigerator, slightly affixed, in an apartment or rented building. In a forty-nine unit apartment building, the gas ranges were considered fixtures.\textsuperscript{137} Likewise, electric refrigerators in an apartment building were held to be fixtures.\textsuperscript{138} While one might believe that such items remain personalty, the courts reasoned that the nature of apartment buildings was to house tenants and, therefore, that the usual household conveniences necessary to attract such tenants should be permanent parts of the real estate.

The adaptation test, taken to extreme limits, has resulted in the Pennsylvania assembled industrial plant doctrine.\textsuperscript{139} The Pennsylvania
nia courts combined adaptation and constructive annexation to create this doctrine which deals with the machinery in a manufacturing plant. In the landmark case of Voorhis v. Freeman, the parties in conflict were the purchaser of a mill at a foreclosure sale and the creditor of the mortgagor, who had a security interest in some individual machinery inside the mill. The machinery was slightly annexed and could be removed without any harm to the mill or the machine. Nevertheless, the Supreme Court of Pennsylvania held that the 106 detachable iron rollers were included in the sale of the mill. The court stated that without different size rollers and duplicates, it would not be a complete mill. The essence of Voorhis is that "[w]hether 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 for a part of the freehold.

The theory behind Voorhis is that a factory is an entity encompassing many elements, and a mortgagee or buyer should receive that entity as a working enterprise, it should not be subject to having any of its machinery or equipment removed by secured creditors of the individual items. The effect of Voorhis is that no security interest in chattels which are used in a manufactory will obtain priority over a real estate interest. Otherwise, "[a] creditor might as well be allowed to sell the works of a clock, wheel by wheel." Additionally, a later decision made it clear that the assembled industrial plant doctrine recognizes "a public policy to encourage financing of industrial plants."

The assembled industrial plant doctrine is now followed in a number of jurisdictions. Furthermore, it has not been restricted to

(holding the “institutional doctrine” is adaptation to use of realty and applies to household fixtures as well as trade fixtures).

141. 2 Watts & Serg. 116 (Pa. 1841).
142. Id. at 116.
143. Id. at 118.
144. Id. at 120.
145. Id.
146. Id. at 119.
147. Id.
manufactories, but has been "applied to a private house, a multi-
story office building, a five-story apartment house, an ornamental 
iron works, a food wholesaler, a restaurant, a stone quarry, and was 
considered in the case of a church and a hotel." 150

While appropriation to use is the heart of the assembled indus-
trial plant doctrine, it must be reemphasized that appropriation is 
not the only factor influencing the doctrine. Standing alone, appro-
priation and annexation can cause some misunderstanding of the law 
relating to fixtures. Both elements must be combined with the ele-
ment of expressed or inferred intent. The policy behind the assem-
bled industrial plant doctrine is to protect buyers of the premises 
who intend to use the facility for the purpose to which the fixtures 
are suited. Without the element of intent, the appropriation test be-
comes meaningless, as illustrated by the "farm animals as fixtures of 
the farm" example. 151

Further, without the element of intent, the assembled industrial 
plant doctrine can become confused with the trade fixtures doc-
trine, 152 resulting in a seemingly irreconcilable conflict. Once intent 
of the parties is considered, however, the confusion is resolved. The 
reasonable man may readily discern, for example, that when the em-
ployer sells the garage, the garage mechanic has no intent to give up 
his tools or his tool bench, which contains the tools in special com-
partments and is anchored to reduce vibration, despite the fact that 
they are well appropriated to use in the garage.

The financing of industrial plants is a policy goal of the assem-
bled industrial plant doctrine. Financing would be sharply limited, or 
even absent, if financiers of chattels used in production stood to lose 
their interest or priority in the event that the equipment buyer's bus-
iness failed. Nevertheless, such a result is possible if the intent of the 
parties to remove the equipment upon termination of business is not 
considered. The equipment, whether considered as fixtures or realty 
depending on the jurisdiction, would remain in the plant, while the 
bankrupt buyer would be judgment proof against the creditor. Cut-
ting off the secured party from the collateral, while giving the build-
ing owner a windfall, would be one result of ignoring the intent of

760 (1946); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941); Scalzo v. 
Marsh, 13 Wis. 2d 126, 108 N.W.2d 163 (1961).

150. Leary, Financing New Machinery for Mortgaged Pennsylvania Industrial Plants, 4 

151. See supra note 125 and accompanying text.

152. See infra notes 330-79 and accompanying text.
the parties and considering only the appropriation element of the fixtures test. Fortunately, courts have considered the intent of the parties as the most important and most equitable method of determining fixture status. Inequitable results are uncommon when the intent of the parties is considered in fixtures cases.

D. Intention to Make the Chattel a Permanent Accession to the Freehold

The third prong of the Teaff test to determine fixture status, the intention of the annexor to permanently affix the good to the freehold, is today almost universally recognized as the crucial element in determining if a good has become a fixture. The intent test is more congruent with modern equitable principles of unjust enrichment and estoppel, and even in cases decided under the UCC, which purports to deemphasize the classification of an item as a fixture and emphasize priority perfecting, the intention test has sometimes been expressly followed.

The intention test was promulgated in Teaff v. Hewitt. In Teaff, machinery in a woolen factory, consisting of power looms and carding and spinning machines, was attached to the floor with cleats, yet removable without injury. The court determined that these items were intended to be chattel property rather than fixtures. The building, slightly affixed to the ground that housed the machinery, was not intended to be an accession to the freehold, but rather a removable chattel. On the other hand, a boiler and steam engine, bolted and firmly affixed to timbers on foundations erected for them, were fixtures. The Teaff court inferred the annexor's intention in all three situations from the method by which property was affixed to

153. For a discussion of the three-prong Teaff test, see supra text accompanying notes 25-27.
154. E.g., Wo Co. v. Benjamin Franklin Corp., 562 F.2d 1339 (1st Cir. 1977) (holding intent is preeminent under New Hampshire law); Rowlen v. Hermann, 129 Ill. App. 2d 45, 262 N.E.2d 739 (1970) (holding intention most important); Trans-Nebraska Corp. v. Cummings, Inc., 595 S.W.2d 922 (Tex. Civ. App. 1980) (holding intent of annexing party is preeminent factor); see also 1 G.W. THOMPSON, supra note 15, § 59, at 203 (modern rule emphasizes intention).
156. 1 Ohio St. 511 (1853). For a discussion of Teaff, see supra text accompanying notes 25-28.
157. 1 Ohio St. at 522-23.
158. Id. at 534-35.
159. Id. at 535.
160. Id. at 542.
the freehold. Although intention has become the dominant factor, the other two prongs of the test, annexation and adaptation of the chattel to the realty, can be useful by suggesting an intent to make the chattel a fixture. Usually a movable chattel, slightly affixed or not affixed, and usable anywhere, is not intended to be a fixture, even if adapted to the use of the realty. Thus, the fact that a mechanic's tools and equipment were not attached to the garage evidenced the intent that they were to remain the personal property of a mechanic. Barges on a landlocked lake were not attached to realty, and therefore were not intended to be fixtures requiring compensation under an eminent domain taking. Adaptation or appropriation of a chattel to the use of the realty can also be useful as an indication of the annexor's intention to make the chattel a part of the real estate.

At times, the parties' intent can differ from the result suggested by factors of adaptation and/or annexation, and, in such cases, intention is a better test of fixture status. The strict annexation test, for example, created an irrebuttable presumption that a chattel annexed to realty became realty. Today, proof of intent can be used to rebut a presumption that by annexing a chattel the parties desired to create a fixture. The admissibility of the annexor's intent can

161. Id. at 522-42. On this basis, commentators have argued that Teaff, while announcing the intention test, supports its decision through use of the strict annexation test. See, e.g., 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.3, at 18 (court "relied solely upon the permanent nature of their annexation to the building" in dealing with boiler and steam engine); Note, supra note 45, at 685 (Teaff intention test is "unpredictable, nonuniform" because it is based on subjective criteria).


164. United States v. 967,905 Acres of Land, More or Less, 447 F.2d 764 (8th Cir. 1971), cert. denied, 405 U.S. 974 (1972). But see Specialty Restaurants Corp. v. County of Los Angeles, 67 Cal. App. 3d 924, 934, 136 Cal. Rptr. 904, 910 (1977) (holding Queen Mary to be a fixture because it was securely fastened to a wharf so that great difficulty and expense would be required for its removal indicating "intended permanence").

165. See, e.g., McCorkle v. Robbins, 222 Wis. 12, 267 N.W. 295 (1936) (machinery adapted to bottling plant held intended as fixtures).

166. The test is, of course, not without its disadvantages. One disadvantage is that the test leads to inconsistent decisions, because the equities of cases produce unpredictable jury verdicts on substantially similar facts. See, e.g., Note, Toward A Satisfactory Fixture Definition For the Uniform Commercial Code, 55 CORNELL L. REV. 477, 479 (1970). The intention test "outcome depends primarily on a jury's unguided weighing of a number of facts . . . and the results are inconsistent and unpredictable." Id.

167. For a review of the annexation test, see supra text accompanying notes 79-82.

vitiate unjust decisions that a strict annexation test might produce. For example, a written contract providing that gin mill equipment should remain personalty was sufficient evidence of intention to cause a lower court to be overruled on a decision that, as a matter of law, the annexation of the equipment to the realty had created a fixture.169 Now parties can agree among themselves on whether an item which is to be attached to realty is to be treated as personalty or as realty. This allows greater flexibility in business planning.

At times, however, this approach is not followed. In Clayton v. Lienhard,170 for example, a sprinkler system installed in a large public garage was held to be realty, notwithstanding express contract provisions mandating that the system should remain personalty. The court in this instance disregarded the clear statement of the parties’ intention.171

Intention may be inferred not only from express provisions of written agreements between the parties, but also by reference to the terms of the agreement, the language used, the circumstances under which the agreement was made, and the purpose for making the agreement.172

Absent written agreements between the parties, the courts look not to the subjective intent of the parties, but rather to the objective and presumed intention of the hypothetical ordinary reasonable person.173 Application of this objective standard often leads to a presumption of chattel status for items installed by a lessee upon the landlord’s freehold, while identical items installed on the owner’s

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169. Id.
171. Id. at 435, 167 A. at 322.
173. Boothbay Harbor Condominiums, Inc. v. Department of Transp., 382 A.2d 848 (Me. 1978). See also R. BROWN, supra note 1, § 16.5, at 537; Bingham, Some Suggestions Concerning The Law of Fixtures, 7 COLUM. L. REV. 1, 16 n.1 & 17 (1907) (“the ‘reasonably presumable intent’ of the landowner is the criterion”).
property are presumed to be fixtures. The presumed intent concerning machinery of a manufactory, as between mortgagor and mortgagee, is that the machinery is realty. Intention is inferred in all other cases based on the first two prongs, annexation and adaptation, drawing on all the physical facts and surrounding circumstances of the case. Therefore, to change a chattel to a fixture requires both a positive act (affixation) and a clear intent for the item to be part of the realty; otherwise it remains a chattel.

The hypothetical ordinary reasonable person standard has been equated with the “objective manifestations of intention” standard so that a “disinterested observer” would consider the chattel a part of the realty. These objective manifest standards protect third parties and subsequent purchasers of property by not allowing the secret intent of the parties to control. Therefore, where the rights of an innocent third party become involved, that third party is entitled to view the intent of the original transacting parties as that intent would reasonably appear to such third parties. For example, if an innocent third party purchased realty and reasonably expected to receive the chattels attached to that realty, and the third party was without any notice of an agreement between the mortgagor/

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174. See Snitzer, supra note 81, at 471. A tenant presumably will take the chattel when the lease expires while the landowner will presumably keep the goods attached indefinitely. Id. 175. Id. This is consistent with the so-called assembled industrial plant doctrine, discussed supra at notes 140-51 and accompanying text.


In Taylor v. Willibey, 202 Okla. 254, 212 P.2d 453 (1949), the court cited to an existing Oklahoma statute that presumptively deemed any item to be realty when that item is permanently attached by means of cement, plaster, nails, bolts or screws. Cf. 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.4, at 23 (1952)(under the New Jersey test, “intent is determined not by the manner of annexation, the relation of the parties, or the nature of the article annexed; rather intention is determined by the participation of the chattel in the function to which the land is devoted”). For a discussion of the New Jersey test, see supra text accompanying notes 37-38.


179. 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.1, at 3-4.

180. Miles, supra note 54, at 72 (“the secret intent is not important”). See, e.g., Bangor-Hydro Elec. Co. v. Johnson, 226 A.2d 371 (Me. 1967) (intention is not secret intention but that shown by external facts); Marsh v. Spradling, 537 S.W.2d 402, 404 (Mo. 1976) (acts and conduct show intent, not secret intent).

seller and the mortgagee manifesting their intent that the attached chattels remain personalty, then the third party would be entitled to ownership of the chattels.\textsuperscript{182}

The chattels in this situation would be adjudicated fixtures because the intent of the parties is, as observed by a third party, for the chattels to pass with the realty. Only in this manner does the third party receive the benefit of the bargain. The third party gets what was purchased, including the fixtures. Protection for innocent mortgagors and mortgagees in these circumstances may also be obtained through compliance with Code filing procedures, which insure that third parties have actual or constructive notice of intent to preserve chattel status.

Commentators have noted that some courts seem to adopt the intent standard, but in reality courts often use the material injury test to determine whether the chattel is a part of the freehold or not.\textsuperscript{183} In such cases, the “material injury test” reasserts itself and the court finds that the chattels are fixtures, because to remove them would cause material harm to either the chattel or the freehold.\textsuperscript{184} In \textit{Dudzik v. Lewis},\textsuperscript{185} a controlling consideration was whether the removal of the buildings in question would cause substantial damage to the realty.\textsuperscript{186} The court believed that their removal would cause such damage, and held that the buildings were fixtures.\textsuperscript{187} Note well, however, that the use of the material injury test is often limited to special circumstances concerning trade fixtures.\textsuperscript{188}

Defining a fixture today requires consideration of annexation/affixation, adaption/appropriation, and intention, and the interaction among these three elements. The relevant intention might be defined as that which would be inferred by a reasonable person in light of (a) the nature of the article, (b) the relationship between the parties involved, and (c) the degree and purpose of annexation.\textsuperscript{189} The nature of the article is loosely associated with adaptation; the relation-

\textsuperscript{182} See, 35 Am. Jur. 2d Fixtures § 18 (1967).
\textsuperscript{183} Note, The Definition of Fixture in Article 9 of the U.C.C., 31 Case W. Res. 841, 850 (1981); Note, supra note 87, at 622-23 (“although courts often speak in terms of ‘objective intent,’ the underlying consideration is the amount of damage caused by removing the chattel”).
\textsuperscript{184} For a review of the material injury test, see supra text accompanying notes 91-96.
\textsuperscript{185} 175 Tenn. 246, 133 S.W.2d 496 (1939).
\textsuperscript{186} Id. at 251, 133 S.W.2d at 498.
\textsuperscript{187} Id.
\textsuperscript{188} For a discussion of trade fixtures, see infra text accompanying notes 330-78.
\textsuperscript{189} Teaff v. Hewitt, 1 Ohio St. 511, 530 (1853); Waldorf v. Elliot, 214 Or. 437, 443, 330 P.2d 355, 358 (1958).
ship of the parties to the transaction is an entirely new area that refers to presumptions based upon which category a party fits into; and annexation can refer to both evidence of intention and a requirement of fixture status.

1. Nature of the Article Affixed. — In analyzing whether a chattel has become a fixture, the nature of that chattel is one factor that courts use to determine whether the requisite intention to change the chattel to a fixture exists. In contrast to other aspects of the law of fixtures, there is a scarcity of discussion and analysis as to the significance of the nature of the article affixed. A reason for this absence may be that by saying that the nature of an article implies that it is a fixture, is to say that that item must be a fixture in and of itself. Such a statement seems improper because particular items have at times been held to be fixtures by one court, and chattels by another.

Nevertheless, analysis of the nature of the article affixed should be undertaken, because it can imply the annexor's intent to permanently attach the article to the freehold. The investigation of the nature of the article seems to involve a balancing test: is the good, by virtue of its nature, particularly well adapted to the specific realty on which it is found, or is it more like an ordinary chattel, equally useful almost anywhere? Some of the drafters of the revised Uniform Commercial Code article 9 refer to “hard” and “soft” fixtures. Soft fixtures include “readily removable office or factory machines fastened in such a way that [they] could be readily removed [and perfected] by an ordinary chattel filing.” Hard fixtures are all those items presumably more firmly affixed to the realty, which require a fixture filing for perfection. Analysis of the nature of the article affixed must include an investigation of whether the affixed item is naturally considered to be part of the building and “wrought into” it, as one court described heat and plumbing fixtures, or

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191. See supra notes 61-62 and accompanying text.
193. Id. See also U.C.C. § 9-313(4)(c) (1978).
whether the item retains its individual character, as do machinery and equipment. Such an analysis suggests that brick, mortar, wood, nails, and other building materials are part of the realty.196

Two commentators, who have investigated and written about the nature of a fixture, have found this factor to be important in several cases, although court opinions often do not explicitly state that their analysis is founded upon the nature of the article.197 Herbert Tiffany has written:

A consideration on which the cases usually lay great stress, in determining . . . a fixture . . . , is its character . . . it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted. 198

One writer has gone so far as to place the nature of the article on the same plane as the mode of annexation. George Thompson wrote:

The nature of the article and the uses to which it is to be put furnish very important evidence of the intention with which it is annexed to the freehold. It would seem that more depends upon its nature and character and its use as connected with the realty than upon the mode of annexation.199

Apparently, these commentators are suggesting that the nature of the chattel and the appropriation or adaptation of it to the use of the property, are synonymous tests. Courts also make the mistake of not distinguishing between the two criteria200 because the two tests are very similar. However, the “adaptability to the use of the realty to which it is attached” test relates to both the article’s nature and the property’s use, and to the relation of one to the other. The “nature of the article” test refers only to the article. Herbert Tiffany, one of only a very few commentators addressing the question of

196. The U.C.C. has conclusively adopted this analysis. See U.C.C. § 9-313(2) & Official Comment 3 (1978).
197. 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 610, at 571 (3d ed. 1939); 1 G.W. THOMPSON, supra note 15, § 62, at 220.
198. 2 H. TIFFANY, supra note 197, § 610, at 571.
199. 1 G.W. THOMPSON, supra note 15, § 62, at 220. Accord Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941) (emphasis placed on nature of article, while annexation receives only slight consideration and then only to deduce intention).
200. See, e.g., Peninsular Stove Co. v. Young, 247 Mich. 580, 582, 226 N.W. 225, 226 (1929) (“consideration must be given to the nature of the structure and the use to which it was to be put”).
whether the nature of the article can create a fixture, also discussed this distinction:

A distinction has however occasionally been asserted, in this connection, between the use to which the land is devoted by the construction of a building of a particular character, and the use to which the building itself is at the time devoted, with the result that when machinery in a factory building was adapted to but one class of manufacturers, while the building might be used for others as well, the machinery was not regarded as appropriated or adapted to the use to which the land was devoted, so as to be a part of the land.

Today, courts and commentators tend to avoid such niceties when discussing fixtures, by dealing with both tests together.

There are cases that rely solely on the nature of the article to determine whether the requisite intent to change a chattel into a fixture is present. An early case was Richardson v. Borden, in which the issue was whether a cotton-gin stand was a fixture. The court held that the annexor intended for the gin stand to be a fixture, writing that "reference must be had to the nature of the thing itself" and that the stand "was in its very nature adapted to the business for which the lands were used." Some of these cases turn on how the parties treat the item as an indication of whether the item's nature implies fixture status. Do the parties move it around whenever it is needed elsewhere, or is it permanently integrated into the structure? Customarily, portability or replacement of the item may prevent it from becoming a fixture.

One court considered whether the absence of the chattel from the property would be conspicuously wrong. In this instance ornamental statues, inter alia, were removed from their bases. The court concluded that "[t]he 'nature' of these items is that they were a part of the total elegance of Long Acres . . . , an integral part of this

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201. See supra notes 197-98 and accompanying text.
202. 2 H. TIFFANY, supra note 197, § 610, at 574.
203. 42 Miss. 71 (1868).
204. Id.
205. Id. at 75-76 (emphasis in original). Accord In re Slum Clearance v. United States, 332 Mich. 485, 494, 52 N.W.2d 195, 199 (1952) ("consideration must be given to the nature of the structure"). See also Nadien v. Bazata, 303 Mass. 496, 499, 22 N.E.2d 1, 2 (1939) (bowling alleys and racks are in their nature pure chattels); In re Speyer's Will, 35 N.Y.S.2d 705, 708 (Surr. Ct. 1942) (paintings and tapestries are intrinsically personalty).
206. Teaff v. Hewitt, 1 Ohio St. 511, 536 (1853).
sumptuous country estate” and held the statue to be a fixture.\textsuperscript{208}

The nature of the affixed article is an elusive, frequently mentioned, but seldom discussed quality. The lack of discussion may indicate that it is the fact trier’s visceral reaction, rather than a logical analysis, which is the source of the conclusion that items are chattels or fixtures.

2. Relationship of the Parties. — The relationship of the disputing parties is another factor from which an inference can be made about the intention of the annexor to create a fixture. Of the three factors used to infer intent, i.e., the nature of the article, the relationship of the parties, and the degree and purpose of annexation, the relationship of the parties is perhaps the most significant. Most commentators and courts have agreed that fixture status depends to a large extent on the relationship of the parties.\textsuperscript{209} Despite that agreement, analysis and conclusions based upon such a relationship are not always consistent among the various authorities. Classifying the relationship is not always unidimensional. Classes of relationships can be determined by reference to who owns the chattel being attached or to the realty to which it is attached, or by analyzing who is the person doing the attaching, or who financed the attached item.\textsuperscript{210}

There are two broad categories of party relationships generally recognized: ownership and divided ownership.\textsuperscript{211} Both situations must be looked at from the perspective of the party affixing the chattel to the realty. The ownership situation is one in which the annexor is attaching the chattel to the annexor’s own real estate. Included in this situation are vendor as annexor\textsuperscript{212} and mortgagor as annexor.\textsuperscript{213}

\textsuperscript{208} Id. at 84, 369 N.E.2d at 492.

\textsuperscript{209} See, e.g., United States v. Shelby County, 385 F. Supp. 1187, 1189 (W.D. Tenn. 1974); John P. Squire & Co. v. Portland, 106 Me. 234, 238, 76 A. 679, 681 (1909); Teaff v. Hewitt, 1 Ohio St. 511, 530 (1853); First Nat'l Bank v. Jacobs, 273 N.W.2d 743 (S.D. 1978);

\textsuperscript{210} 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.4, at 24 (common versus divided ownership of land and chattel); I G.W. THOMPSON, supra note 15, § 55, at 184; 2 H. TIFFANY, supra note 197, § 611, at 576.

\textsuperscript{211} Id. at 16.19, at 514-87. Brown divides his analysis into three parts. Part I includes situations where the annexor of the chattel owns both it and the land; part II involves situations in which the annexor of the chattel owns it but not the land to which it is annexed; and part III analyzes situations in which the “annexor of the chattel may not own the same.” Id. at 515.

\textsuperscript{212} For a discussion of real estate vendor as annexor, see infra text accompanying notes 219-42.

\textsuperscript{213} For a discussion of real estate mortgagor as annexor, see infra text accompanying notes 219-42.
In a divided ownership case, the annexor is attaching property to real estate that the annexor does not own. This includes lessee annexor\textsuperscript{214} and chattel mortgagee situations.\textsuperscript{218}

The relationship of the parties is often determinative of which doctrine of fixtures will be applied by the court. For example, in a case between a mortgagor who annexed an item to realty and the mortgagee, the strict annexation test will usually be followed;\textsuperscript{216} but as between a tenant who annexed an item, and the tenant's landlord, the intention test will favor the tenant.\textsuperscript{217}

a. \textit{Real Estate Vendor as Annexor}. — A landowner who has attached chattels to real estate and has subsequently conveyed that real estate creates a question of whether he has also conveyed the affixed chattels. In such a conveyance, whether the chattel has become a fixture is determinative of the question of who gets the good. If it is a fixture, the article passes with the land in the conveyance. If it is personality, the conveyor can remove it before the conveyee takes possession.

Whether the article is a fixture may be determined by examining the parties' relationship.\textsuperscript{218} As to an owner, there is a strong inference raised by adaptation and annexation of the article to the freehold, that an accession has occurred.\textsuperscript{219} This inference can rise to a presumption that the owner intends any improvement to his property to become a permanent part of the real estate. If the conveyor...
wishes to retain the chattel then the burden is on the owner to prove that he intended the item to keep its chattel status. The owner-vendor has the burden of disclosing to prospective purchasers that affixed chattels are to be excluded from the sale of the realty. If the owner fails to so disclose, the purchaser takes the affixed chattels.

In addition to the presumption of intent raised by owner-annexation, and the strong inference raised by adaptation and annexation, other considerations would also lead courts to conclude that an article has become a fixture. If the item is necessary for the realty to function in its current manner, then it is a fixture and passes with the conveyance. Thus, a home furnace was indispensible to the enjoyment of a home; and, a bona fide purchaser would expect that the owner intended the furnace as a permanent part of the realty. If a chattel is in a place created for it, or is part of an architectural design such that removal would create an unsightly appearance, then it is deemed to be permanently annexed to the realty. Accordingly, specially adapted lights placed around a pool, and bolted-down statues, easily removable, but whose absence created a barren appearance, were considered as fixtures passing with a conveyance of the real estate. The owner-annexor was required to compensate.
the vendor for their removal.\(^{227}\)

Other decisions which have dealt with the issue of the status of fixtures annexed by a vendor of real estate, have held that "[t]he rule differs in different relationships. It is broader and stricter as between vendor and vendee than as between landlord and tenant."\(^{228}\) Encompassed in this rule are conveyor's growing crops and trees, which pass to the conveyee upon sale of the land.\(^{229}\) Thus, the conveyor would be liable for their removal after the sale. Fences that are erected by an owner ordinarily pass to the buyer.\(^{230}\) Still, topsoil sitting on the owner's land, as high as a two-story house, was held to be personalty which did not pass with the land.\(^{231}\)

The rule which recognizes the special relationship of an owner of realty to articles attached by the owner thereto, and presumes that these articles become fixtures, does allow for that owner to remove articles upon the sale of the land by specifically exempting them.\(^{232}\) The burden is on the owner to prove that the intention was to keep the articles as chattels.\(^{233}\) The owner cannot argue that the attached article was not discussed or mentioned in the negotiations for the sale of the realty and thereby claim the articles remain personalty.\(^{234}\) The conveyor has an affirmative duty to disclose to the purchaser that the article is not a fixture, that it remains the seller's personal property.\(^{235}\) The owner cannot meet this burden by a show-
ing that the removal of the attached article did not cause any material injury to the freehold.\textsuperscript{236}

Some courts have held that for an owner to retain an attached article upon the sale of the realty, there must be an express written agreement between the owner and the buyer specifically reserving such right in the owner.\textsuperscript{237} For example, in \textit{Coffill v. Bach}, \textsuperscript{238} an agreement ancillary to a deed stated that one party had the right to buildings on the land, and could remove the buildings before the buyer took possession.

When parties such as a real estate seller and a chattel financier agree that a fixture may retain its chattel character, as in a chattel secured sale, the bona fide purchaser of the real estate, without notice of the agreement, will not be bound by the unexpressed (as to him) intent of those parties. Thus, a mortgagee, who became a bona fide purchaser of the home at a sheriff’s foreclosure sale, defeated the interest of a chattel conditional seller who had notice of the home mortgage, because the mortgagee-purchaser did not have notice of the conditional sale.\textsuperscript{239} In another case, an owner bought some wall-to-wall carpet that was attached to unfinished plywood subfloor by staples, stretched, and affixed to the walls with smoothing strips.\textsuperscript{240} The owner financed the purchase of the carpet with a chattel mortgage. The owner subsequently sold the house to a bona fide purchaser, who had no notice of the chattel mortgage.\textsuperscript{241} The court held that the purchaser took the carpet as a fixture over the chattel mortgagee’s claim on the carpet.\textsuperscript{242}

b. \textbf{Real Estate Mortgagor as Annexor.} — When a landowner has attached chattels to mortgaged real estate, the test for determining whether the items become fixtures, subject to a real estate mort-

\begin{footnotesize}
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\item \textsuperscript{236} \textit{In re} Lincoln Square Slum Clearance Project, 24 Misc. 2d 190, 201 N.Y.S.2d 443 (Sup. Ct. 1959).
\item \textsuperscript{237} Fleishel v. Jessup, 244 N.C. 451, 94 S.E.2d 308 (1956); Premonstratensian Fathers v. Badger Mut. Ins. Co., 46 Wis. 2d 362, 175 N.W.2d 237 (1970) (fixtures pass by transfer of deed unless specifically reserved in writing); Lafleur v. Foret, 213 So. 2d 147 (La. Ct. App. 1968) (clear contractual intent).
\item \textsuperscript{238} 159 Cal. App. 2d 163, 323 P.2d 873 (1958).
\item \textsuperscript{239} Holland Furnace Co. v. Trumbull Sav. & Loan Co., 135 Ohio St. 48, 19 N.E.2d 273 (1939). \textit{Contra} Holt v. Henley, 232 U.S. 637 (1914). In \textit{Holt}, the prior mortgagee did not lend money in reliance on a sprinkler system and was not a bona fide purchaser but had only the same interest as the mortgagor. The seller, even without registering the conditional sale, had a superior interest. \textit{Id}.
\item \textsuperscript{240} Merchants & Mechanics Fed. Sav. & Loan Ass’n v. Herald, 120 Ohio App. 115, 201 N.E.2d 237 (1964).
\item \textsuperscript{241} \textit{Id} at 118, 201 N.E.2d at 239.
\item \textsuperscript{242} \textit{Id} at 120, 201 N.E.2d at 240.
\end{itemize}
\end{footnotesize}
gage, is the same as the three-prong test to determine fixtures status: annexation, appropriation/adaptation, and intention. The law concerning chattels attached by a mortgagor to mortgaged realty, however, probably comes much closer to following an annexation test than any other contemporary part of the fixture law. Nevertheless, courts also emphasize and analyze the mortgagor's intention to create a fixture, which the courts infer from the relationship of the parties. The status of mortgagor is sufficient for courts to infer that the intention of the mortgagor who annexes chattels to property is to permanently affix the chattels. Another relationship implying intent arises when the real estate owner annexes chattels to land and, thereafter, sells the land to another party. The buyer, as a general rule, is held to have purchased the chattels with the realty because the status of the real estate owner-annexor implies his intention to make the chattels a permanent part of the realty as fixtures.

A mortgagor who annexes chattels to the mortgaged property soon discovers that courts infer that the mortgagor intended those


244. Virtually anything a landowner annexes to his land before or after mortgaging it will be subject to the mortgage, even if a prior mortgage includes no after-acquired property clause. See 35 AM. JUR. 2d Fixtures § 51 (1967). For a discussion of the annexation test, see supra text accompanying notes 79-115.

245. See supra notes 209-17 and accompanying text.


247. For a discussion of the importance of the relationship of the parties, see supra notes 178-97 and accompanying text.

248. Johnston v. Philadelphia Mortgage & Tel. Co., 129 Ala. 515, 30 So. 15 (1900); Western Maryland Dairy v. Maryland Wrecking & Equip. Co., 146 Md. 318, 126 A. 153 (1924); Hunt v. Mullamphy, 1 Mo. 508 (1825); Joiner v. Pound, 149 Neb. 321, 31 N.W.2d 100 (1948); Despatch Line Of Packets v. Bellamy Man. Co., 12 N.H. 205 (1841); Blake-McFall Co. v. Wilson, 98 Or. 626, 193 P. 902 (1920); Canning v. Owen, 22 R.I. 624, 48 A. 1033 (1901); Snuffer v. Spangler, 79 W. Va. 628, 92 S.E. 106 (1917). See supra notes 219-42 and accompanying text. But see Slater v. Dowd, 79 Ga. App. 272, 53 S.E.2d 598 (1949) (strict common law rule passes all fixtures to vendee, but in this case a tobacco barn stoker was held to be personalty because it was detached from the realty and used in the way one uses a lamp).
chattels to become fixtures. Similarly, the intention to create a fixture is presumed to exist when the landowner is a mortgagor. The mortgagor-annexor relationship to a mortgagee is more complex than a seller-annexor relationship to a purchaser of the realty because there are several types of mortgagees. There are real estate mortgagees who attain that status prior to the attachment, and those who become mortgagees subsequent to the attachment. There are also chattel mortgagees who may have become mortgagees prior or subsequent to the real estate mortgagee. The mortgage documents may also vary from case to case, containing after-acquired property clauses or express provisions to treat an attached item as personalty or realty.

The issue of whether a chattel has become a fixture as between an annexing mortgagor and a real property mortgagee, is treated substantially similarly to the same issue between an annexing seller and a buyer. The basic question still remains: has the chattel become a fixture, so that it is now part of the real estate and goes with the land upon sale to the buyer, or upon foreclosure, to the mortgagee? The basic presumption still remains: the law presumes that an annexing mortgagor intends for the chattel to become a fixture and pass with the real estate, enabling the mortgagee to take the fixture with the real property. There are, however, two distinctive fact patterns involving mortgagors and mortgagees that are sometimes analyzed differently by courts. The distinction is between the situation involving a mortgagor/annexor and a subsequent mortgagee, and the situation involving a mortgagor/annexor and a prior mortgagee. Some courts treat the two situations similarly whether or not the annexation occurs before or after the mortgage is executed.

250. See supra note 246.
251. These are discussed under the section “Third Party Rights.” See infra notes 456-85 and accompanying text.
252. See 1 G.W. THOMPSON, supra note 15, § 72, at 271.
253. See also Fuson v. Whitaker, 28 Tenn. App. 338, 341, 190 S.W.2d 305, 307 (1945) ("rule for determining what is a fixture is construed strongly against the mortgagor or vendor and in favor of the mortgagee or purchaser").
255. See R. BROWN, supra note 1, § 16.7, at 543.
256. See, e.g., Bond v. Coke, 71 N.C. 97 (1874); Metropolitan Life Ins. Co. v. Kimball, 163 Or. 31, 94 P.2d 1101 (1939); Adams, An Historical Perspective of the Mississippi Law Regarding Fixtures Prior to Introduction of the Uniform Commercial Code, 46 Miss. L.J.

http://scholarlycommons.law.hofstra.edu/hlr/vol15/iss2/2
These cases hold that virtually anything a landowner annexes to his
land, before or after mortgaging it, will be subject to the mortgage,
even if a prior mortgage includes no after-acquired property
clause.\textsuperscript{257} Other courts treat the two situations analytically differ-
ently, although the same result will often be reached by a court in
both cases.\textsuperscript{258} These other courts are correct to distinguish the two
situations, because there are subtle differences in the applicable law.

In the first distinctive fact pattern, that of a mortgagor-annexor
and a subsequent mortgagee, the chattel has been attached to the
freehold before the mortgage has been created. In this case, there is
the strongest presumption in favor of the mortgagee inferring that
the mortgagor's intent is to create a fixture by the attachment.\textsuperscript{259} It
is obvious that the mortgagee, the financier, when considering the
mortgagor's loan application, will look to the property as collateral
for the loan. When the mortgagee assesses the worth of the collat-
eral, any chattel present at the time of that assessment will be con-
sidered part of the property. The mortgagee will assume that the
affixed chattel is part of the realty. Decisional law supports that as-
sumption if there is no notice of contrary interests.\textsuperscript{260} In fact, the law
will pass the affixed chattel as a fixture, even if the subsequent mort-
gage agreement does not mention the article.\textsuperscript{261} This is analogous to

\textsuperscript{257} See supra note 256. See also Mallory v. Agee, 226 Ala. 596, 147 So. 881 (1932);
Bank, 150 Mass. 519, 23 N.E. 327 (1890); Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659
(1931); Mc Fadden v. Allen, 134 N.Y. 489, 32 N.E. 21 (1892); Muehling v. Muehling, 181
Pa. 483, 37 A. 527 (1897); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345
(1941); Parrish v. Southwest Wash. Prod. Credit Ass'n, 41 Wash. 2d 586, 250 P.2d 973
(1952); Butler v. Keller, 88 Wash. 3d 334, 153 P. 15 (1915).

\textsuperscript{258} See infra notes 259-70 and accompanying text.

\textsuperscript{259} See Hill v. Farmers & Mechanics Nat'l Bank, 97 U.S. 450 (1878); Stone v.
Suckle, 145 Ark. 387, 224 S.W. 735 (1920); Lesser v. Bridgeport-City Trust Co., 124 Conn.
59, 198 A. 252 (1938); Young v. Hatch, 99 Me. 465, 59 A. 950 (1905); Consolidated Gas,
Elec. Light & Power Co. v. Ryan, 165 Md. 484, 169 A. 794 (1934); Gar Wood Indus., Inc. v.
Colonial Homes, Inc., 305 Mass. 41, 24 N.E.2d 767 (1940); Frost v. Schinkel, 121 Neb. 784,
238 N.W. 659 (1931); Metropolitan Life Ins. Co. v. Kimball, 163 Or. 31, 94 P.2d 1101
(1939); First Nat'l Bank v. Reichen, 371 Pa. 463, 91 A.2d 277 (1952); Planter's Bank v.
Lumbus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876 (1925); Leisle v. Welfare Bldg. & Loan
Ass'n, 323 Wis. 440, 287 N.W. 739 (1939); 5 AMERICAN LAW OF PROPERTY, supra note 10, §
19.7, at 28-32.

\textsuperscript{260} See generally 1 G.W. THOMPSON, supra note 15, § 72, at 271, 274.

\textsuperscript{261} See, e.g., Mortgage Bond Co. v. Stephens, 181 Okla. 419, 74 P.2d 361 (1937). But
see Gas & Elec. Shop v. Corey-Scheffel Lumber Co., 227 Ky. 657, 13 S.W.2d 1009
(1929)(electric range, attached to the freehold, is not part of the realty; removal did not damage
freehold). See generally 1 G.W. THOMPSON, supra note 15, § 72, at 274-76 (giving exam-

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the situation where the seller has neglected to discuss with a buyer the status of a chattel attached to the freehold; there too, the article is a fixture and passes with the realty to the vendee.\footnote{262}

The policy reasons supporting this strong presumption of intent to create a fixture are based on several considerations. First, the law will not presume that the mortgagor-annexor intends to default on the loan and take the fixtures as personalty upon foreclosure.\footnote{263} The law instead presumes that the annexor will remain on the freehold to enjoy the use of the fixture.\footnote{264} Second, a subsequent mortgagee relies on the attached fixtures as part of the security in advancing a loan. The mortgagee is entitled to have the lien extend against all of the realty existing when the loan was made.\footnote{265}

The court must look to the mortgagor-annexor’s intent at one specific point in time. Decisional law consistently holds that it is not the annexor’s intent at the title of drafting the loan agreement, but rather the intention of the annexing owner at the time of annexation that determines whether an affixed chattel has become part of the realty.\footnote{266} These decisions give support to the theoretical basis for the presumption that mortgagor-annexed chattels are fixtures vis-a-vis a subsequent mortgagee. By looking at the mortgagor’s intent at the time of affixation, before any mortgage has attached, it would seem likely that the mortgagor attached the chattels with the expectation that they would be permanent attachments. The annexor, at that time, has no fear of loss by foreclosure. The subsequent creation of a mortgage lien should not enable the mortgagor to remove those fixtures against the mortgagee who relied on them as security for the loan.

There are two exceptions to this general rule of presumed intent. These exceptions consist of clear evidence either that the mortgagor intended the items to remain personalty at the time of attachment, or that the mortgagor and mortgagor by agreement have

\footnotesize{\begin{itemize}
\item \footnote{262} For a discussion of fixture status in the vendor-vendee relationship, see \textit{supra} note 222 and accompanying text.
\item \footnote{263} See \textit{5 American Law of Property}, \textit{supra} note 10, § 19.7, at 28-30; Comment, \textit{supra} note 256, at 366.
\item \footnote{264} See \textit{5 American Law of Property}, \textit{supra} note 10, § 19.7, at 28-30.
\item \footnote{265} See \textit{1 G.W. Thompson}, \textit{supra} note 15, § 72, at 274.
\end{itemize}}
declared that the attached items are to remain personalty. Thus, one court held that office and shop equipment, attached by duct work, bolts and wires, was personalty as to a subsequent mortgagee, because both the mortgagor and mortgagee considered the property personalty.

In the second distinctive fact pattern, that of a mortgagor-annexor and a prior mortgagee, the chattel has been attached to the freehold after the mortgage has been created. The mortgagee is often unaware of the attachment. Some courts have determined that the prior mortgagee has no claim to chattels attached to the realty subsequent to the mortgagee’s loan. The policy that these minority decisions adopt is that holding the attached chattel to be a fixture, subject to the mortgage, is to give the mortgagee additional, unbar- gained-for security for his loan. These courts believe that the mort- gagee would then receive a windfall, consisting of the fixture, upon foreclosure. The majority of courts, however, hold that the at- tached chattel becomes a fixture if the basic provisions of the three-prong test are met: annexation, adaptation, and intention. This is

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267. See infra note 268.
268. Kenneally v. Standard Elecs. Corp., 364 F.2d 642, 646 (8th Cir. 1966). Kenneally does not elaborate on exactly how the parties evidenced their agreement. In Horn v. Indianapolis National Bank, 125 Ind. 381, 25 N.E. 558 (1890), the owner annexed chattels to realty and subsequently mortgaged the property. The mortgage agreement expressly stated that it was subject to a document which specified that the items remained personalty. The Horn court held that the stated intention of the parties defeated the presumption that annexed chattels are fixtures vis-a-vis a subsequent mortgagee, writing:

It cannot be successfully denied that the factory and its equipments were treated by all the interested parties as personal property long prior to the time the appellee's mortgage was executed. The intention to fix upon the heading factory and its equipments the character of personalty had been fully and unequivo- cally manifested. We are not, therefore, dealing with a case where a purchase is made or a mortgage accepted where there is no notice of the character of the property, and appearances indicate that it is a part of the realty.

Id. at 389, 25 N.E. at 560-61. See also Russell v. Golden Rule Mining Co., 63 Ariz. 11, 159 P.2d 776 (1945).
269. Westmore Supply Co. v. Frum, 316 Ill. App. 306, 44 N.E.2d 949 (1942) (abstract only) (prior mortgagee of real estate has no claim to chattels subsequently annexed to realty); Union Bank v. Emerson, 15 Mass. 159 (1818) (holding similar to Frum).
270. See 1 G.W. THOMPSON, supra note 15, § 81, at 366; see also Adams, supra note 256, at 922.
especially true if the prior mortgagee has an after-acquired property provision in the mortgage agreement. 272

In the prior-mortgagee situation, the majority of courts presume that the mortgagor’s intention was to create a fixture. 273 The presumption in this instance is weaker than the presumption in the subsequent mortgagee situation; and there are more exceptions to the general rule. Disregarding the mortgagee’s knowledge or bargained-for security, applying the presumption of intention to this prior mortgagee situation is analytically correct because courts look to the intention of the annexor at the time of annexation. 274 Therefore, although the annexor is attaching the chattel to mortgaged property, the annexor cannot be presumed to anticipate defaulting on the mortgage. 275 The appropriate reaction to a post-loan affixation is a presumption that the annexor intended to create a fixture for the future and permanent enjoyment of his realty. Courts may, however, require stronger evidence of intention in prior mortgagee situations, rather than relying so heavily on annexation alone, which is often sufficient in subsequent mortgagee situations. 276

The general prior mortgagee rule of presumed intent to create a fixture is subject to three exceptions, two of which are also applicable to the subsequent mortgagee situation. The two exceptions applicable to both situations are, first, that the mortgagor and mortgagee may agree whether to treat the articles as fixtures, and, second, that the annexor’s intent, at the time of annexation, may be to keep the article’s chattel status intact. 277

The third exception, which receives much more consideration in the prior mortgagee situation than in the subsequent mortgagee situation, is whether the attached chattel can be removed without mate-

607 (Tex. 1985). An argument in favor of the majority rule is that it operates to deter the waste of resources and damage to business which removal of affixed chattels creates. 5 AMERICAN LAW OF PROPERTY, supra note 10, § 19.7, at 30.


273. See, e.g., Tifton Corp. v. Decatur Fed. Sav. & Loan Ass’n, 136 Ga. App. 710, 711, 222 S.E.2d 115, 117 (1975) (“[w]hatever is placed in a building subject to a mortgage, by a mortgagor ... becomes a part of the realty”).

274. See supra note 266 and accompanying text.

275. See supra notes 263-64 and accompanying text.

276. See supra note 244 and accompanying text.

277. For a discussion of exceptions to the presumed intent rule, see supra note 268 and accompanying text.
If the fixture can be removed without harm to the realty, courts are more willing to treat the article as a chattel that is not subject to the prior mortgagee's claim. Removability may, thus, be a deciding factor. Some courts hold that the mortgagee is bound by the terms of the agreement, which, of course, may not include any after-acquired property, if removal will not injure the freehold; but, otherwise, the fixture is subject to the mortgage. The concept of removability is based on the theory that the prior mortgagee did not make the loan relying on the chattel as security. Thus, if the chattel can be affixed and later removed without harming the realty, which is the mortgagee's bargained-for security, the prior mortgagee has not been harmed in any way. c. Lessee as Annexor (Tenant Fixtures). — The relationship of the parties in this situation involves divided ownership. When a lessee, or tenant, who is renting from a landlord, affixes a chattel to the leasehold the issue arises as to whether the attached chattel has become a fixture, so that the tenant cannot remove it from the landlord's property at the end of the tenant's term. The lessee-annexor situation involves three categories of fixtures: domestic or ornamental, agricultural, and trade. Together, these categories can be referred to as tenant fixtures.

i) Domestic Fixtures. — The bulk of the law common to all three areas of tenant fixtures can be discussed under the heading of domestic fixtures. The history of the law in this area is slightly more complicated than in other areas of fixture law. The English maxim

278. For a discussion of the material injury test, see supra notes 91-96 and accompanying text.
279. See, e.g., Intermountain Food Equip. Co. v. Waller, 86 Idaho 94, 383 P.2d 612 (1963) (prior real estate mortgagee cannot foreclose on subsequently attached property when removal of fixtures would not cause damage to the mortgagee's security, i.e., the realty).
280. See e.g., Home Owner's Loan Corp. v. Eyanson, 113 Ind. App. 52, 46 N.E.2d 711 (1943) (furnace merely sitting on floor so that its removal would not cause material injury to freehold not covered by prior mortgage); Taylor v. Townsend, 8 Mass. 411 (1812); Cooke v. Copper, 18 Or. 142, 22 P. 945 (1888).
281. Perhaps the most complex relationship involving mortgagees and mortgagors is a third situation involving a chattel mortgagee, a real estate mortgagee, and the annexor-mortgagor. This situation is discussed under "Third Party Rights." See infra notes 456-85 and accompanying text.
282. For a discussion of divided ownership situations, as opposed to common ownership situations, see supra notes 211-15 and accompanying text.
283. See 1 G.W. THOMPSON, supra note 15, § 77, at 315.
284. This paper analyzes each category independently, because there are differences in the law applicable to each of the categories. Some of the analysis, however, is applicable to all three categories.
"quicquid plantatur solo, solo cedit," which was strictly applied in common ownership situations, was relaxed in the divided ownership cases by the creation of exceptions. These exceptions became entangled and led to the complications in the law that are seen today.

Early American cases adopted the English law of fixtures until the mid-19th century. At that time, the three-prong test began to be used in America, particularly in the lessee-annexor situation: the chattel annexed to the lessor's property by the lessee became a fixture through annexation, appropriation, and the intention to make it a fixture. Under this approach, intention was, and is, inferred in law, depending on the mode of annexation, appropriation to use, and the relationship between the annexor and other interested parties.

Today, in the law of tenant fixtures, that inference of intent is contrary to the intention inferred in the common ownership cases involving seller and buyer, or mortgagor and mortgagee. Unlike the landowner in common ownership situations, a tenant in a divided ownership case is presumed to have no intent to make an addition to the landlord's leasehold. The tenant's items will be considered fixtures only if it plainly appears that they were intended to be accessions to the leasehold. The presumption is that the items placed on a lessor's realty by the tenant were placed there without any intention of increasing the value of the landlord's property. Therefore, the

285. For a discussion of this maxim, see supra note 1 and accompanying text.


287. See, e.g., Foote v. Gooch, 96 N.C. 265, 1 S.E. 525 (1887).


289. See Strickland v. Parker, 54 Me. 263, 265 (1866): There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgager and mortgagee . . . .

Id.

290. Id. For a discussion of the role of the relationship of the parties in determining fixture status, see supra notes 209-17 and accompanying text.

291. "[T]he presumption being prima facie that the tenant did not intend to enrich the fee, but intended to reserve the title of the article to himself, whereas in case the annexation is by the owner of the fee, a contrary presumption occurs." 2 H. TIFFANY, supra note 197, § 617, at 599.

lessee can remove them at will before the expiration of the lease. This distinction exists because the law favors the tenant in divided ownership situations, but favors the mortgagee and buyer in the common ownership cases.

Not all chattels annexed by tenants to the property of the landlord fall into the tenant fixtures exception to the general rule that annexation implies fixture status. For example, domestic fixtures are limited to articles affixed for the comfort, convenience, or esthetics of the tenant himself. Only these lessee-annexed domestic fixtures are removable by the tenant, or by one claiming through the tenant at the end of the lease term. If the lessee-annexed fixtures are essential and permanent to the freehold, improving the premises for whomever the occupant may be, then they are not domestic tenant fixtures, but removable fixtures which pass to the lessor's leasehold. Articles falling within the domestic fixtures category, affixed for the tenant's comfort and convenience, have included carpeting, bath tubs and sinks, chandeliers, a water closet in an office, and draperies. Articles excluded from this category, and which pass with the leasehold, have included awnings, a new room addition, and a wire fence.

Courts allow the lessee to remove the attached domestic fixtures


294. See, e.g., 1 G.W. THOMPSON, supra note 15, § 77, at 315; 35 AM. JUR. 2D Fixtures § 41 at 731 & n.16. See also Whitney v. Hahn, 18 Wash. 2d 198, 138 P.2d 669 (1943) (articles for tenant's own comfort and convenience are removable).

295. See R. BROWN, supra note 1, § 16.10, at 522 n.2; See also Stockton v. Tester, 273 S.W.2d 783 (Mo. Ct. App. 1954)(holding door and beef track became part of building and were not removable at end of tenancy).


297. See Frederick v. Smith, 147 Miss. 437, 111 So. 847 (1927).


299. See Hayford v. Wentworth, 97 Me. 347, 54 A. 940 (1903).


301. See City of Knoxville v. Hargis, 184 Tenn. 262, 198 S.W.2d 555 (1947).


because the tenant possesses only a temporary occupancy, and thus the tenant's fixtures are annexed only for the duration of the lease. The domestic fixtures remain personal property, and when the tenant vacates the premises, the fixtures, like other personal property, go with him. Given that the landlord did not pay for the tenant annexed fixtures, he does not own them. This theory allows the fixtures to be removed and taken by the vacating tenant, because to do otherwise would unjustly enrich the landlord at the tenant's expense.

The presumed intention of the tenant not to create a fixture is an exception to the general rule that annexation implies fixture status. There are also some exceptions to this exception. The first exception to the presumption of no intention to create a fixture occurs when the fixtures attached by the lessee are essential and permanent to the realty. These attached chattels become realty only if they become so integral a part of the existing structure that they cannot be removed without harming the freehold. Buildings constructed by the tenant upon the landlord's realty are often placed in this category, and pass to the landlord at the end of the lease term. An exception to this rule arises when the landlord and tenant have entered into a written agreement stating that the building will remain personaly.

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306. For a discussion of "essential and permanent" fixtures, see supra note 293 and accompanying text.

307. See supra note 295 and accompanying text. See also Fidelity Trust Co. v. State, 72 Idaho 137, 237 P.2d 1058 (1951) (tenant may remove unless item has become integral part of premises).

308. See, e.g., Nicholson v. Altona Corp., 320 F.2d 8 (3rd Cir. 1963) (common law rule is that building affixed to land by tenant becomes property of landowner); Century Elec. Co. v. Terminal R.R. Ass'n, 426 S.W.2d 58 (Mo. 1968) (in absence of lease provision to the contrary, traveling crane installed on leased premises became part of the realty); Pier 67, Inc. v. King County, 71 Wash. 2d 92, 426 P.2d 610, rev'd on other grounds, 78 Wash. 2d 483, 469 P.2d 902 (1967) (in absence of lease provision to the contrary, buildings permanently erected on real property become part of realty).

309. See, e.g., Kentucky Farm & Cattle Co. v. Williams, 140 F. Supp. 449 (E.D. Ky. 1956) (improvements treated as personality when such intention is clearly expressed in contract); White v. Webber-Workman Co., 591 P.2d 348 (Okla. Ct. App. 1979) (where there is a valid agreement, tenant retains permanent improvements and fixtures affixed to real estate).
The second exception to the presumption that a lessee does not intend domestic fixtures to become part of the realty concerns the material injury test.\(^{310}\) If the removal of the lessee-attached domestic fixtures will cause material injury to the landlord's realty, then the fixtures are deemed to be part of the realty.\(^{311}\) This rule is simple to apply: if the removal will not cause any injury, the tenant may remove the fixtures.\(^{312}\) If the removal of the fixtures will cause material injury to the realty, then the tenant cannot remove them.\(^{313}\)

A third situation, in which a lessee's annexed chattels will be presumed to become part of the landlord's realty, involves a subsequent purchaser who buys the landlord's realty in the bona fide belief that the domestic fixtures are part of the property.\(^{314}\)

A fourth exception to the rule of no presumed intent provides that at the end of the lease term, if the tenant's fixtures are not removed, then they go to the landowner.\(^{315}\) There are four exceptions to this general rule. First, the tenant has a reasonable time after the expiration of his term in which to remove the fixtures from the landlord's property.\(^{316}\) The old, strict rule that a tenant must remove all fixtures before the last minute of the term, and no later, has been abrogated by courts\(^{317}\) in favor of the more equitable "reasonable time doctrine." What is a reasonable time, however, is not universal.

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310. For a discussion of the material injury test, see supra notes 50-53 and accompanying text.


312. See Romich v. Kempner Bros. Realty Co., 192 Ark. 454, 92 S.W.2d 215 (1936) ( sprinkler system held removable as fixture where removal would not materially damage building). See also Illderton Oil Co. v. Riggs, 13 N.C. App. 547, 186 S.E.2d 691 (1972)(tenant has right to remove annexations if such removal does not cause material injury to freehold).


315. See, e.g., Carlin v. Ritter, 68 Md. 478, 13 A. 370 (1888); Cf. Fidelity Trust Co. v. State, 72 Idaho 137, 237 P.2d 1058 (1951); Biallas v. March, 305 Mich. 401, 9 N.W.2d 655 (1943). This is considered to be the general rule, See 1 G.W. THOMPSON, supra note 15, § 78.


sally agreed upon. Second, the tenant and lessor can agree to allow the tenant an extension of time in which to remove his fixtures. Third, if a lease agreement is terminated by the lessor prematurely or wrongly, the lessee is given a reasonable time after the termination of the lease in which to remove the fixtures. Fourth, if there are other factors beyond the control of the lessee which preclude the lessee from removing domestic fixtures from the leasehold, courts will allow the lessee more time in which to remove the fixtures.

ii) Agricultural Fixtures. — The second sub-category of tenant fixtures is agricultural fixtures. Agricultural fixtures are those erected by a tenant on his lessor's realty for agricultural purposes. Whereas domestic and trade fixtures were generally presumed to remain the tenant's personality, subject to removal before the end of the lease term, the common law concerning agricultural fixtures did not adhere to such a presumption. In the English case of *Elwes v. Maw*, Lord Ellenborough applied the strict annexation test and held that the agricultural tenant's beast-house, carpenter's shop, wagon house, fuel-house and brick wall, erected by the tenant during his term to assist him in his agricultural pursuits, were part of the landlord's realty. Although England still adheres to the rule that agricultural fixtures are not removable from the realty, on the policy ground that the rule prevents waste and economic loss, courts in America have rejected this doctrine. American courts have re-

318. Compare MeLeon v. Wells, 207 Ark. 303, 180 S.W.2d 325 (1944) (13 months reasonable) with Henderson v. Robbins, 126 Me. 284, 138 A. 68 (1937) (more than two months later is unreasonable). But see Revzen Business interiors, Inc. v. Carrane, 72 Ill. App. 3d 601, 391 N.E.2d 24 (1979) (when lease has no reasonable time provision, tenant must remove property before end of lease term).

319. See Beauchamp v. Bertig, 90 Ark. 351, 119 S.W. 75 (1909); Hughes v. Kershaw, 42 Colo. 210, 93 P. 1116 (1908); Morey v. Hoyt, 62 Conn. 542, 26 A. 127 (1893).

320. See, e.g., Grote v. Brown, 170 F.2d 747 (10th Cir. 1948); Cf. Hill v. Larcon Co., 131 F. Supp. 469 (W.D. Ark. 1955) (where lessee prematurely terminated lease he still had a reasonable period of time to remove a fixture).

321. *In re Site for Library*, 254 Minn. 358, 95 N.W.2d 112 (1959) (after condemnation, tenant may remove personally if lease expired naturally).

322. See 1 G.W. THOMPSON, supra note 15, § 70, at 261.

323. For a discussion of trade and domestic fixtures, see supra notes 285-321 and accompanying text.

324. 3 East 38 (K.B. 1802). See generally M. Ewell, supra note 11, at 110-27, 463 (discussion of law, with Elwes v. Maw reproduced).

325. See id. at 116 (quoting McCullough v. Irvine's Executors, 13 Penn. St. 438 (1850))(allowing tenant to remove agricultural fixtures would "convert realty into a solitary waste for the winds to moan over").

326. See, e.g., De Charette's Guardian v. Bank of Shelbyville, 218 Ky. 691, 291 S.W.
fused to apply one doctrine to domestic and trade fixtures and another doctrine to agricultural fixtures. Commentators also have generally rejected the English common law rule in this area.

Overall, the law in America governing agricultural fixtures coincides with the law concerning domestic and trade fixtures. Because most courts treat agricultural fixtures as trade fixtures, however, the agricultural category is a very small one, with not much case law. As a result of the smaller base of decisional authority, the area is less settled than other, more frequently litigated, issues. Nonetheless, the case law suggests that agricultural fixtures, erected by a tenant for agricultural purposes, should be removable by the tenant at the end of the term, just as domestic fixtures are.

iii) Trade Fixtures. — The third sub-category of tenant fixtures is trade fixtures. Trade fixtures were recognized in early English common law as the first exception to the strict annexation rule. Under the common law, if a tenant annexed goods to rented land, and those goods were to be used in the trade in which the tenant was engaged, the tenant could remove the annexed goods at the end of the lease term even though the goods were firmly attached to the soil.

Today, to qualify as a trade fixture, a chattel must be necessary to the operation of the annexing tenant’s trade or business for profit, added for the tenant’s use and not that of the freehold, and annexed with the sole purpose of enabling the tenant to conduct his business appropriately and effectively. Trade fixtures retain their chattel

1054 (1927) (holding cream separator and milling plant installed by tenant dairy farmer are removable by tenant).

327. See Harkness v. Sears, 26 Ala. 493 (1855); Holmes v. Tremper, 20 Johns. 28 (N.Y. 1822); Old Line Life Ins. Co. of Am. v. Hawn, 225 Wis. 627, 275 N.W. 542 (1937); see also Van Ness v. Pacard, 27 U.S. (2 Pet.) 137 (1829) (principles applied to trade fixtures should also apply to agricultural fixtures).

328. See, e.g., 2 H. TIFFANY, supra note 197, § 619 at 605 (“arbitrary and illogical”); R. BROWN, supra note 1, § 16.9 at 551 (preference for business over agriculture seems less likely today); see also I G. W. THOMPSON, supra note 15, § 70 (trade fixtures concept has been held applicable though there seems to be some disagreement in this area).

329. See supra note 327.

330. See 1 G. W. THOMPSON, supra note 15 § 77, at 314. For a discussion of the ramifications of divided as opposed to common ownership, see supra notes 211-15 and accompanying text.

331. See Adams, supra note 256, at 943. See also R. BROWN, supra note 1, § 16.8.

character, despite annexation by such means as bolts and vents,\textsuperscript{333} wiring, ducts, concrete slab bases,\textsuperscript{334} or even burial.\textsuperscript{335}

The test used to determine whether an attached chattel has become a trade fixture is the same three-prong test used to determine whether a chattel has become a "generic fixture:" first, annexation to realty, whether actual or constructive; second, adaptation or application to the use or purpose for which the realty is being used; and third, intention to make the article a permanent part of the freehold.\textsuperscript{336} As in the generic situation, intention is the preeminent factor considered to determine whether the attached chattel has become a trade fixture. The other two prongs are used as evidence of the intention.\textsuperscript{337} Intention is often inferred from the relationship of the parties.\textsuperscript{338} Thus, when the parties' relationship is that of landlord and tenant, as the trade fixture rule requires,\textsuperscript{339} the presumption is that the annexing tenant's intention is to create a trade fixture, removable at the end of the term, rather than to create an addition to the landlord's real estate.\textsuperscript{340}

The policy justification for the trade fixture rule is to encourage business and trade.\textsuperscript{341} The policy is based on the common sense recognition that tenants are unlikely to upgrade their surroundings if any improvements they make to benefit their businesses become gifts

\begin{itemize}
  \item \textsuperscript{333} White v. Cadwallader & Co., 299 S.W.2d 189 (Tex. Ct. App. 1957).
  \item \textsuperscript{334} Kenneally v. Standard Elecs. Corp., 364 F.2d 642 (8th Cir. 1966).
  \item \textsuperscript{335} Standard Oil Co. v. La Crosse Super Auto Serv., 217 Wis. 237, 258 N.W. 791 (1935) (gas tanks).
  \item \textsuperscript{336} See, e.g., Schnaible v. City of Bismarck, 275 N.W.2d 859, 863-64 (N.D. 1979). See also supra notes 25-28 and accompanying text.
  \item \textsuperscript{337} See B. Kreismaa & Co. v. First Arlington Nat'l Bank, 91 Ill. App. 3d 847, 415 N.E.2d 1070 (1980); Biallas v. March, 305 Mich. 401, 9 N.W.2d 655 (1943). See also supra note 28 and accompanying text.
  \item \textsuperscript{338} For an explanation of the role of the relationship of the parties when determining fixture status, see supra notes 209-17 and accompanying text.
  \item \textsuperscript{339} See, e.g., Abex Corp. v. Commissioner of Taxation, 295 Minn. 445, 207 N.W.2d 37 (1973) (trade fixtures doctrine applies only to landlord-tenant relationship); Cusack v. Prudential Ins. Co. of Am., 192 Okla. 218, 134 P.2d 984 (1943) (trade fixtures doctrine limited to landlord and tenant situations).
  \item \textsuperscript{340} See, e.g., Corning Bank v. Bank of Rector, 265 Ark. 68, 576 S.W.2d 949 (1979) (from nature of tenure, trade fixtures not presumed annexed with intent to make accession to landlord's real estate); Empire Bldg. Corp. v. Orput & Assocs. Inc., 32 Ill. App. 3d 839, 336 N.E.2d 82 (1975)(holding landlord must rebut presumption that annexed trade fixtures were intended for benefit of tenant and not to enrich realty).
  \item \textsuperscript{341} See, e.g., Chicago Title & Trust Co. v. Fox Theatres Corp., 164 F. Supp. 665, 671 (S.D.N.Y. 1958) (rule based on public policy to encourage trade and manufacture). This was the policy enunciated by one of the earliest English cases recognizing the trade fixtures doctrine. See Poole's Case, 91 Eng. Rep. 320 (1703). See also Carroll v. Britt, 227 S.C. 9, 16-17, 86 S.E.2d 612, 616 (1955) (policy for encouragement of trade and industry).
\end{itemize}
to the lessor. Other justifications are to encourage the use of land and to avoid unjust enrichment. It would be unfair for the landlord to benefit from his tenant's improvements, when the landlord paid nothing for the fixtures, and the tenant did not intend to create a permanent fixture on the landlord's freehold. 342

There are also two property theories advanced to justify the trade fixtures exception to the strict annexation rule. The first states that the trade fixtures become realty, but remain severable between the tenant and the landlord. 343 The severability of the fixture, in essence, gives it a chattel character. A second theory ignores questions of annexation altogether by simply maintaining that trade fixtures always remain the tenant's personal property for all purposes. 344

Trade fixtures, even those permanently affixed, are nearly always removable by the tenant. The size and shape of the trade fixture is usually immaterial. 345 For example, a garage auto hoist, sunk three to six feet into the ground and cemented in place, was determined to be a removable trade fixture rather than an accession that would have accrued to the owner. 346 Even a two-story building on a stone foundation, used as a place for storing carpentry tools, dairy equipment and milk, and used also as a dwelling for the tenant's family, was considered to be removable because it had been erected for the purpose of trade. 347 Summer rental cabins were also found to be removable trade fixtures, as between landlord and annexing tenant. 348 An annexed trade fixture, however, that cannot be removed from the landlord's property without causing substantial injury to the property is not considered a trade fixture, but rather an accession to the property. 349

342. See R. Brown, supra note 1, § 16.8, at 545.
343. 1 G.W. Thompson, supra note 15, § 77, at 315.
344. Id.
345. See 2 H. Tiffany, supra note 197, § 617, at 601.
348. See Tilchin v. Boucher, 328 Mich. 355, 43 N.W.2d 885 (1950). The tenant's right of removal, however, was not enforceable against bona fide purchasers of the land without notice. The tenant's remedy was limited to damages from the landlord. But see Appliance Buyers Credit Corp. v. Crivello, 43 Wis.2d 241, 168 N.W.2d 892 (1969) (trade fixtures removable by tenant even against third parties who have acquired an interest in the realty).
This limitation to the trade fixtures rule is based upon the presumption that the landlord and tenant would not have intended for a chattel to be removable if its removal would materially damage the realty. Therefore, trade fixtures are removable only if removal causes no material damage to the landlord’s leasehold; this phrase, though, is rather ambiguous. What, precisely, is material damage? For example, what if no damage is done to the freehold, but only to the fixture? One writer’s interpretation of material damage is that there must be no lasting injury to the strength or appearance of the building, and that the tenant must leave it fit for occupation by another tenant for similar use. It is fairly well settled law that removal is precluded if material injury would occur to the landlord’s freehold. Some courts allow removal of trade fixtures, even if removal would wreck the item, as long as there is no material injury to the realty. Thus, a Pennsylvania tenant was allowed to cut a tram rail system into pieces, remove it from a building, and sell it for scrap at considerably less than its in-place value.

How much damage constitutes material damage is another issue about which courts are uncertain. Questions concerning the nature and extent of the damage which removal would cause may be a significant factor in a court’s determination of whether an item is a chattel or a fixture. One court determined that a tenant, lessee of a tavern, who replaced a bar without the owner’s consent, under a lease providing that unauthorized alterations become the property of

351. See, e.g., Atkins Pickle Co. v. Burrough-Uerling-Brasuell Consulting Eng’rs, Inc., 271 Ark. 897, 611 S.W.2d 775 (1981) (prefabricated materials could be installed and removed without damage to real property); Wetjen v. Williamson, 196 So. 2d 461 (Fla. Dist. Ct. App. 1967) (unattached stadium seats, despite heavy weight, are trade fixtures, removable without damage to property); Antonowsky v. State, 14 Misc. 2d 689, 180 N.Y.S.2d 966 (Ct. Cl. 1958) (removal of trade fixtures contingent on removal without material injury to landlord’s premises). See also supra note 20 and accompanying text.
352. Miles, supra note 54, at 86.
353. See supra note 20 and accompanying text.
354. See, e.g., United States v. Certain Land, 357 F. Supp. 1382 (S.D.N.Y. 1972) (trade fixtures include those items removable without material injury to the realty but which are themselves materially damaged upon removal); Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659 (1931) (removal of gasoline pumps allowed if landlord’s property is not damaged). But see Della Corp. v. Diamond, 58 Del. 465, 210 A.2d 847 (1965) (carpeting which would be seriously damaged in course of removal held to be permanent fixture).
the lessor, "intended" for the new bar to become part of the building. The new bar, whose removal would damage the building by leaving twelve holes in the floor where water and electrical connections were made, became an accession. The damage in this instance, though, is minor when compared to what other courts have reasoned to be non-material damage. It seems likely, that the court believed the damage was that the removal of the bar would leave the tavern without any bar, and in worse shape than it was when the lease originated.

Items added to make a building itself more usable, or better adapted to the tenant's business, may not be removed. If the tenant's chattel is placed in a building for the sole purpose of aiding the tenant in his business, it is a removable trade fixture; but, if the article is so placed as to make the building itself better adapted or more useful to the tenant's "type of business," it is a nonremovable addition. This distinction between annexation of a chattel to the landlord's building for the sole purpose of aiding the tenant in conducting the tenant's business, and adaptation of the landlord's realty for the tenant's business use, facilitated by the affixed chattel, is often decisive in trade fixture cases. Adaptation to the use of the property

357. See id. at 179, 118 N.W.2d at 176-77.
359. Stockton v. Tester, 273 S.W.2d 783, 787 (Mo. Ct. App. 1954). See also Wheeling-Pittsburgh Steel Corp. v. Jefferson County Bd. of Revision, 27 Ohio St. 2d 45, 56 Ohio Op. 2d 25, 271 N.E.2d 861 (1971) (if chattel is devoted to tenant's business conducted on the premises, it is a trade fixture; but if devoted mainly to the use of the land, it is a fixture passing to the lessor).
360. See, e.g., Central Chrysler Plymouth, Inc. v. Holt, 266 N.W.2d 177 (Minn. 1978) (new doors or windows are improvements rather than trade fixtures); Ilderton Oil Co. v. Riggs, 13 N.C. App. 547, 186 S.E.2d 691 (1972) (structure erected to enable tenant to better enjoy land is fixture; but if erected for exercise of trade, structure belongs to tenant). Compare Greensburg Bank v. Dep't of Fin. Insts., 11 N.E.2d 1008 (Ind. App. 1938) (bank vault, burglar alarm and lockboxes are not placed in bank solely to enable bank to operate, but to convert building to a bank; thus, annexations are not trade fixtures) with President & Directors of the Manhattan Co. v. Mosler Safe Co., 252 App. Div. 863, 299 N.Y.S. 417 (1937) (bank vault and night depository installed by tenant are trade fixtures).
can prevent even trade fixtures from being removed. For example, where a tenant leasing a garage installed elevators, the elevators became realty because they were not uniquely adapted to a garage business, but were useful to the building in whatever capacity it might be used.\textsuperscript{361} When a tenant installed a beef tracking system from the ceiling of his leased meat locker plant, the doors and tracking from which beef was hung were deemed to be attached to make the building itself useful for, and adapted to, that kind of business, rather than to enable the tenant to carry on his business.\textsuperscript{362} Similarly, where a tenant built a tire factory, incorporating two brick walls already in existence, the building was considered an improvement of the land itself, rather than a trade fixture useful only to the tenant's business.\textsuperscript{363}

These cases present the issue of how to distinguish a chattel annexed to help a tenant carry on a trade or business from one annexed to render the building more usable, in itself, for that business. Must one then conclude from surveying these cases that because fire safety regulations require sprinkler systems in all restaurants, a tenant who adds one to leased premises loses the right to remove the system, in light of the fact that it was added to make the premises usable as a restaurant?\textsuperscript{364}

The intention of the parties, expressed in a lease agreement or otherwise, as to whether the tenant's addition is to remain the tenant's property, will usually control.\textsuperscript{366} An agreement between lessor and lessee that any additions to the realty made by the tenant are to be treated as trade fixtures, removable by the tenant, is binding.\textsuperscript{366} An agreement of this sort can even be enforceable against third parties in certain circumstances.\textsuperscript{367} Similarly, an agreement that trade fixtures annexed by the tenant shall become part of the landlord's realty is binding.\textsuperscript{368} Of course, these agreements should be in writing. Some courts, however, may not only impose a writing requirement, but may also require that the writing express this intention in

\textsuperscript{361} Frost v. Schinkel, 121 Neb. 784, 238 N.W. 659 (1931).
\textsuperscript{362} Stockton v. Tester, 273 S.W.2d 783 (Mo. Ct. App. 1954).
\textsuperscript{364} See Romich v. Kempner Bros. Realty Co., 192 Ark. 454, 92 S.W.2d 215 (1936) (holding that $8016.00 sprinkler system installed by tenant during lessor's foreclosure is trade fixture).
\textsuperscript{365} See supra note 24 and accompanying text.
\textsuperscript{367} Id. at 115, 41 S.E.2d at 295.
plain terms.369

Similar to the rule forbidding removal of items added to make a building more useful is the doctrine employed by Pennsylvanian courts. Pennsylvania recognizes the general rule regarding the removability of trade fixtures, but it limits the rule through application of the assembled industrial plant doctrine.370 Accordingly, if a tenant's trade fixtures are made part of a factory, a court may subject the trade fixtures to a mortgage on the premises, and pass them with the realty at a foreclosure sale.371

Generally, the law concerning time limitations on a tenant's removal of trade fixtures, vis-a-vis the end of the tenancy, is similar to that under domestic fixtures.372 Overall, tenant fixtures are removable during the lease and within a reasonable time after the expiration of the lease.373 A tenant who remains in possession after the expiration of a lease usually retains the right of removal.374 Fixtures left beyond a reasonable time after the expiration of the lease become the property of the lessor.375 If the tenant leaves before the expiration of the term, some courts permit a reasonable time to remove the fixtures, regardless of the default status of the rent. Other

369. See In re Mount Holly Paper Co., 110 F.2d 220 (3d Cir. 1940) (lease did not express intent that all property placed on leased premises was to become property of lessor; therefore, it could be removed) See also American Rolling Mill Co. v. Carol Mining Co., 282 Ky. 64, 137 S.W.2d 725 (1940) (finding implied intention to treat all annexations of tenant as trade fixtures); Cattie v. Joseph P. Cattie & Bros., Inc., 403 Pa. 161, 168 A.2d 313 (1961) (tenant is presumptively entitled to trade fixtures, and nothing short of clearest expression of agreement entitling landlord to trade fixtures will be recognized).

Regarding the policy that the trade fixtures exception is to be construed liberally in favor of the tenant, see, e.g., Blackwell Printing Co. v. Blackwell-Wielandy Co., 440 S.W.2d 433 (Mo. 1969); Old Line Life Ins. Co. of Am. v. Hawn, 225 Wis. 627, 275 N.W. 542 (1937). Only in a rare case containing strong facts should a court imply that the landlord and tenant agree to treat bona fide fixtures as realty.

370. See supra notes 39-43, 105 and accompanying text.

371. See Continental Bank & Trust Co. v. American Assembling Mach. Co., 350 Pa. 300, 38 A.2d 220 (1944). This was true even where the tenant annexed the equipment to the landlord's property after the mortgage was created, so that the mortgagee did not make the loan relying on the trade fixture as security. Id. But see United States v. Certain Parcels of Land, 250 F. Supp. 255 (E.D. Pa. 1966) (construing Pennsylvania law as treating trade fixtures in restaurant as property of tenant).

372. For a discussion of time rules pertaining to domestic fixtures, see supra notes 315-21 and accompanying text.


374. R. Brown, supra note 1, § 16.11, at 554. Some courts allow a forfeiture if the tenant stays under a new lease, negating removal rights granted in the original lease if a new landlord has no notice of the tenant's rights, but these courts are criticized. See 35 Am. Jur. 2d Fixtures § 44 (1967).

courts hold that the tenant has forfeited the trade fixtures to the lessor.\footnote{R. Brown, \textit{supra} note 1, \S\ 16.11, at 554.} There is no recognition of trade fixtures being "tacked" or "carried over" from one tenant to the next. If a tenant leaves his trade fixtures on the realty and the landlord rents the realty to a subsequent tenant, then the second tenant does not have the right to remove the fixtures from the landlord's property.\footnote{United Mut. Sav. Bank v. Riebli, 55 Wash. 2d 816, 350 P.2d 651 (1960), \textit{overruled on other grounds}, Washington Hydroculture, Inc. v. Payne, 96 Wash. 2d 322, 635 P.2d 138 (1981).}

The objectivity of a court's application of the definition of a fixture to the facts of a case is open to question. As one writer observes, fixture status is a conclusion: the court analyzes the relationship between the parties, the purpose(s) of their transaction(s), the nature of the goods, and, in a limited sense, the physical relationship of the goods to the realty to determine who prevails, and then classifies the item as either a fixture or chattel.\footnote{Schroeder, \textit{Security Interests in Fixtures}, 1975 \textit{Ariz. St. L.J.} 319, 324.} The classification may have less to do with the purpose, annexation, or adaptation of an item than it does with what the court sees as a just resolution of a conflict.

As to cases involving secured transactions in goods which become fixtures, the UCC tries to lessen the confusion by classifying the items, regardless of the results of the classification. Superiority of rights in the fixture is determined by whether the parties properly perfected their security interest.\footnote{U.C.C. \S\ 9-313 (1978).}

3. Degree and Purpose of Annexation. — The degree and purpose of annexation is the third factor from which to infer the intention of a party to make a permanent addition to the freehold.\footnote{Teaff v. Hewitt, 1 Ohio St. 511 (1853) states that "intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." \textit{Id.} at 530 (emphasis in original). \textit{See supra} note 27 and accompanying text.} At this point, the definition of a fixture begins to appear circular. Recall that \textit{Teaff} listed three criteria for a fixture: annexation to the realty, adaptation or appropriation to the use of the realty, and intent to make the chattel a fixture.\footnote{For the exact quote from \textit{Teaff}, \textit{see supra} text accompanying note 27.} Modern law has almost universally made the third criterion, the intention to make the chattel a fixture, the dominant test.\footnote{For a discussion of the predominance of the intent prong of the \textit{Teaff} test, see \textit{supra} notes 153-89 and accompanying text. \textit{See also} Pacific Metal Co. v. Northwestern Bank, 667 P.2d 958 (Mont. 1983) (character of the item and manner in which it is annexed are
priation, are used as factors from which to infer annexor's intent; but, according to Teaff, intention is also inferred from three other factors: the nature of the chattel that is affixed, the relationship of the parties to that chattel, and the degree and purpose of annexation. Intention, thus, appears to be a mixture of annexation and appropriation to the use, plus the nature of the article, the relationship of the parties, and the degree and purpose of annexation. Apparently, intention is really only a function of the other criteria.

Annexation can be viewed in two parts: degree and purpose. The degree of annexation is similar to the first criterion of Teaff: the annexation to the realty test. The purpose of annexation resembles the second criterion of Teaff: the adaptation or appropriation to the use of the realty test. Therefore, the same legal analysis applicable to those sections applies here. In fact, it can be argued that this third inference of intent adds nothing to the definition of a fixture that is not already there.

Nonetheless, this third factor should be noted, both to maintain analytic consistency, and because cases continue to rely on it. For instance, in T-V Transmission, Inc. v. County Board of Equalization, the court had to determine whether cable TV station connections, which consisted of wires running from the utility pole to the customer's house, were the personal property of the cable company, or fixtures attached to the subscriber's house. The court held that the cables were "annexed to the realty" and were "solely for the use of the occupants of that realty" and therefore belonged to the homeowner as fixtures.

III. EFFECT OF FIXTURES ON REAL ESTATE

A. Parol Evidence

The general rule is that chattels classified as fixtures pass to the buyer upon conveyance of the real estate. The chattels classified as

\[\text{factors of lesser weight than the intent of the parties)}\]

383. See supra note 162 and accompanying text. See also In re Estate of Horton, 606 S.W.2d 792 (Mo. Ct. App. 1980).


385. The last factor listed, the degree and purpose of annexation, and the first criterion, actual annexation or something appurtenant thereon, are both listed in Teaff. See supra note 27.


387. Id. at 367, 338 N.W.2d at 754.
fixtures become part of the realty and pass by deed from the seller to the buyer.\textsuperscript{88} The general rule may be inapplicable, though, if the parties agree that an affixed chattel is not to become a fixture, but is to remain personally, severable from the realty.\textsuperscript{89} A written agreement between the parties relating to the status of the chattel is enforceable.\textsuperscript{80} This is congruent with the definition of a fixture, which includes the "intention of the parties."\textsuperscript{81} Today the universal trend is to give effect to the intention of the parties, and there is no better way to do this than to follow their agreement as to how they wish to treat property.

An oral agreement between the parties, however, may not be given effect. The parol evidence rule disallows any parol exceptions to a deed if they would contradict or vary the terms of the deed.\textsuperscript{82} The Supreme Court of North Dakota has stated that "the parol evidence rule prohibits the varying or contradicting of a written contract by extrinsic evidence . . . generally, a parol exception of fixtures will not preclude the passing of fixtures with conveyance of the land."\textsuperscript{83} In that case, the court refused to allow the seller to introduce oral evidence that certain fixtures were not to pass to the buyer of a farm.\textsuperscript{84}

If the nature of an article is not fixed with certainty, or if there is fraud, mistake or accident, parol evidence might be used to show an absence of intent for the item to become a fixture and pass with the realty.\textsuperscript{85} Moreover, parol evidence is always admissible to attack


\textsuperscript{89} See, e.g., Dakota Harvestore Sys., Inc. v. South Dakota Dep't of Revenue, 331 N.W.2d 828 (S.D. 1983) (parties are free to agree whether silos anchored to concrete slabs are realty or personalty); Bolin v. Laderberg, 207 Va. 795, 153 S.E.2d 251 (1967) (parties can control both character and disposition of property by agreement). This agreement between parties, that an annexed article shall be regarded as personalty rather than realty, is known as "constructive severance." Blehm v. Ringer, 260 Or. 46, 488 P.2d 798 (1971).


\textsuperscript{81} See supra note 27 and accompanying text.

\textsuperscript{82} See 1 G.W. THOMPSON, supra note 15, at § 75.


\textsuperscript{84} Id. at 762.

\textsuperscript{85} See Horne v. Smith, 105 N.C. 322, 11 S.E. 373 (1890); Curran v. Curran, 67 S.D.
the very existence of the contract. One cannot by duress create a written contract containing a clause that states no duress was used in its creation and then hide behind the parol evidence rule to preclude the introduction of evidence of the duress.\textsuperscript{396}

In a more recent case, however, the Supreme Court of Alabama held:

\begin{quote}
[O]ne, holding the possession and the equitable title to land, can, by parol agreement with his vendee, reserve, in advance of executing a conveyance, fixtures existing on the subject land, thereby constituting them chattels with the right to remove them from the premises. Such personal property does not pass with a subsequent conveyance by deed of the property.\textsuperscript{397}
\end{quote}

This result contradicts the finding of the North Dakota Supreme Court.

A distinction must be made between agreements made between the seller and the buyer of the real estate, and agreements made between the seller of the chattel and the seller of the real estate. In the latter situation, a third-party buyer of the real estate will not be held to the terms of his seller's agreement with the chattel seller, if the buyer had no notice of that agreement.\textsuperscript{398} Therefore, if the buyer of real estate is without notice or knowledge that his seller has previously agreed with another that the fixtures are to remain personalty and severable from the realty, that agreement is not enforceable against the buyer.\textsuperscript{399} The buyer will take the realty and all the annexed fixtures in the conveyance free of any encumbrances on that personalty.

\begin{footnotes}
\item[396] N.W. 418 (1939).
\item[397] ZIMMER, 153 N.W.2d at 761.
\item[398] Groves v. Segars, 288 Ala. 376, 381, 261 So. 2d 389, 393 (1972). See also Nicholson v. Altona Corp., 320 F.2d 8 (3d Cir. 1963) (agreement may be express or implied); Lee-Moore Oil Co. v. Cleary, 295 N.C. 417, 245 S.E.2d 720 (1978) (agreement can be express or implied and need not be in writing).
\item[399] Appliance Buyers Credit Corp. v. Crivello, 168 N.W.2d 892 (Wis. 1969) (third party must have knowledge). Some states have codified these common law rules. Maine, for instance, has a statute that provides "[n]o agreement, that a building erected with the consent of the landowner by one not the owner of the land upon which it is erected shall be and remain personal property, shall be effectual against any person, except . . . persons having actual notice thereof. . . ." ME. REV. STAT. ANN. 33 § 455 (1978).
\end{footnotes}
B. Severance of Fixtures

Historically, annexation of personalty to realty has resulted in the creation of a fixture. The creation of a fixture transformed the personalty into a part of the realty. Conversely, the general rule is that severance of a fixture from realty transforms it back into personalty. But, like other rules concerning fixtures, this rule is not so simple, and the law governing severance is replete with exceptions and complicated regulations.

Severance can be accomplished either through actual physical severance of the fixture from realty or through constructive severance, which is analogous to constructive annexation. Constructive severance occurs in several circumstances. There is constructive severance when a building or other fixture is sold apart from the realty, when a chattel mortgage is created on a building or fixture, when, in a deed of the realty, an exception to the sale of the building or fixture is reserved, or, when in a deed of the realty, the building or fixture is separately sold.

A constructive severance must be supported by an intention to permanently sever the chattel at some time. Thus, an owner of real estate who conveyed the land by deed, and excepted buildings therefrom, reserving the right to remove the buildings from the realty within one year, was held to have constructively severed the buildings from the land and returned them to the status of personalty.

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400. For a discussion of the annexation prong of the Teaff test see supra notes 79-117 and accompanying text.
402. For an explanation of constructive annexation, see supra notes 103-05 and accompanying text.
403. See R. Brown, supra note 1, § 16.6(b), at 539.
404. See 1 G.W. Thompson, supra note 15, § 79, at 340. This intention to constructively sever must be made by both parties. Id. at 342.

This example raises an unresolved issue concerning the manifestation of the intent to sever. The issue is whether the sale of the fixtures is a sale of an interest in realty. A sale of realty is governed by the statute of frauds for realty, while a sale of goods is governed by the Uniform Commercial Code. Sections 2-107 and 2-201 of the U.C.C. require the application of the U.C.C.'s statute of frauds for the sale of goods when the seller is to remove the building or fixture. If the buyer is to sever, one writer has concluded, the implication of 2-107 is to make applicable the real estate statute of frauds. See R. Brown, supra note 1, § 16.6(b), at 540. The importance of this issue cannot be overstated. One writer has noted that "[i]there is a vast difference between the law that governs real estate transactions and the law of sales." T. Quinn, Uniform Commercial Code Commentary and Law Digest, § 2-107(A), at 2-35.
One consequence of a constructive severance is that the fixture is considered personalty belonging to the buyer. The buyer has the right to enter the realty and sever the fixture. He also has a cause of action in conversion against the seller if the seller wrongfully refuses to allow the buyer to use or sever the item from the realty, and against the seller or any other party if the fixture is wrongfully severed or removed. Of course, the same rights attach when the fixture has been actually severed from the land, as when the fixture is constructively severed. The action for conversion arises at the time of severance, and even if the fixture is subsequently reattached to other realty, the claim remains valid.

The general rule that fixtures, once annexed but now severed from realty, return to their previous status as personalty is modified when the rights of third parties are involved. A bona fide purchaser of land with no notice or knowledge usually takes all fixtures annexed to the realty, in spite of any agreements between the seller and a potential chattel buyer of the fixture. This is true if the fixture has not been severed at the time of the conveyance or the realty purchaser has no notice of the agreement. If the fixture has already been severed, or if the realty purchaser has notice of the agreement to sever and sell the fixture, or, most importantly, if the chattel buyer has perfected an interest with a fixture filing, then the realty purchaser should not also be able to take the fixtures actually or constructively severed.

(1978).

406. See Kolstad v. Ghidotty, 212 Cal. App. 2d 313, 28 Cal. Rptr. 123 (1963). In Kolstad the buyer purchased a sawmill from the seller but only leased the land upon which it rested for a term of years. Pursuant to the doctrine of constructive severance, the sawmill was considered the personal property of the buyer.


410. By definition, a bona fide purchaser takes without actual or constructive notice or knowledge of the personalty status of the fixture. Cf. Wilkins v. McCorkle, 112 Tenn. 688, 696, 80 S.W. 834, 835 (1904) (the expression bona fide purchasers is to be understood as the equivalent of purchasers without notice).

411. U.C.C. § 2-107(3) provides for third party rights to prevail. See also Greenwald v. Graham, 100 Fla. 818, 130 So. 608 (1930) (purchaser of fixture annexed to freehold takes subject to mortgage); Leawood Nat'l Bank v. City Nat'l Bank & Trust Co., 474 S.W.2d 641 (Mo. Ct. App. 1971) (mortgagee can recover in conversion when he has no notice of a severance provision in the mortgagor's contract for the purchase of fixtures which are subsequently annexed to the realty and then severed).

412. See, e.g., Groves v. Segars, 288 Ala. 376, 261 So. 2d 389 (1972) (notice to realty purchaser enables chattel buyer to take); Betz v. Verner, 46 N.J. Eq. 256, 19 A. 206 (1890) (once fixtures are severed by bona fide purchaser, mortgagee rights cannot be asserted against...
Conflicts which arise between real estate mortgagees and bona fide purchasers of actually or constructively severed fixtures present another issue obfuscating fixture law. As has been demonstrated, whether the mortgagee is a prior mortgagee or a subsequent mortgagee may be determinative in conflicts between mortgagee and mortgagor; but in the severance area, that distinction is valueless. In this instance, either of the mortgagees will prevail over a purchaser of the chattel because of the presumption that the mortgagor’s additions are deemed accessions to his freehold, and the mortgagee’s security in the realty cannot be defeated by the chattel buyer.

C. Eminent Domain

Eminent domain is the power of the sovereign to force a sale of private property so that the government can convert it to a public use. The power of eminent domain, which is inherent in the sovereign, is constitutionally limited by the fifth amendment, which provides that the government can take property only after paying “just compensation,” and then only for a “public use.”

The connection between eminent domain and the law of fixtures usually arises in the issue of what property passes to the government with the realty upon a taking through eminent domain. Fixtures are considered real estate and would pass to the government upon the taking by eminent domain. Non-fixtures are personal property, and the government would not have to purchase or pay for the personal property, nor for the cost of removing it from the land.

In one case, it was held that three large houseboats were not fixtures to be passed with the realty upon a taking of the realty through eminent domain. The government, operating through the

413. For a discussion of the mortgagor-mortgagee relationship, see supra notes 243-81 and accompanying text.
415. BLACK’S LAW DICTIONARY 470 (5th ed. 1979).
416. U.S. CONST. amend. V.
Forest Service of the U.S. Dept. of Agriculture, had taken a lake and the surrounding shoreline.420 The issue was whether the Forest Service had to pay the claimants for the boats as fixtures attached to the realty, or whether the claimants must remove the large houseboats from the landlocked lake at their own expense. The court held that the boats were not part of the realty but rather were the personal property of the claimants.421 Importantly, the court cited authority holding that in a federal case the federal court would look to the state’s fixture law, although it would “not necessarily accept ‘every local idiosyncrasy’ ” in the state’s fixture definition.422

Any taking of fixtures by eminent domain must be justly compensated.423 However, when the government, through eminent domain, condemns realty to which a tenant’s trade fixtures are attached, the trade fixtures are removable because they retain their personalty character.424 One court decision provided that the tenant was not entitled to any trade fixture compensation when the government condemned the land on which the tenant’s business was conducted, because the tenant’s trade fixtures remained the tenant’s removable property.425 In another instance,426 however, the tenant was granted just compensation for the taking of his trade fixture when the government condemned the underlying realty, because removal of the tenant’s trade fixture would have damaged the fixture. This was true even though removal of the fixture would not have damaged the realty being taken through eminent domain.427 Just compensation is held to be the trade fixture’s “sound market value as used equipment in place.”428 The value of realty taken under eminent domain is “the fair market value based on all uses to which such property may reasonably be put, including its highest and best use.”429

The value of a tenant’s remaining lease term, which has been terminated because of the taking of the underlying realty, is the fair mar-

420. 447 F.2d at 765-66.
421. Id. at 769. The court stated that the boats “cannot rationally or properly be characterized as real estate.” Id.
422. Id. at 768-69.
423. See supra note 416 and accompanying text.
424. The subject of trade fixtures’ removability by the annexing tenant is discussed in supra notes 330-79 and accompanying text.
427. Id. at 1385.
428. Id.
ket value of the unexpired term of the lease, less the rent which the
tenant would have had to pay had the lease continued.\(^430\)

Earlier in this article, the Pennsylvania assembled industrial
plant doctrine was discussed.\(^431\) Under this unique doctrine, all of
the machinery of a manufactory, whether or not fastened to the re-
alty ("fast or loose"), is considered to be fixtures and part of the
realty.\(^432\) In a taking of the Realty through an eminent domain ac-
tion, however, the assembled industrial plant doctrine is modified so
that only the unremovable fixtures (those firmly attached to the re-
alty, including machinery and equipment) are compensable as part
of the Realty.\(^433\) The removable fixtures are not compensable. This
segments the industrial assembled plant doctrine into removable and
non-removable trade fixtures, bringing it more closely in line with
the fixture law in the majority of states.\(^434\) Pennsylvania law has not
entirely foresaken the assembled industrial plant doctrine in eminent
domain proceedings, because if the removable trade fixtures would
not "constitute a comparable economic unit in a new location, then
all machinery, equipment and fixtures, whether loose or attached
... will be considered part of the Realty ..."\(^435\) As part of the
realty, the fixtures will be compensable under eminent domain pro-
ceedings.\(^436\)

D. Licensor, Trespasser, and Other Non-Landowner Annexors

As previously discussed, annexation of an article to Realty gener-
ally transforms the attached article into a fixture.\(^437\) The status of
the person accomplishing the annexation, or the relationship of the
parties, will often have an effect on how the annexation is treated.
For example, a mortgagor is presumed to create a fixture upon an-
exion, but a lessee creates only a removable fixture.\(^438\) Licensor,
trespassers, and other nonlandowner annexors are more similar to the trade fixtures/lessee situation, because in each of these instances, the annexor of the chattel owns the chattel, but not the land to which it is attached. These are considered to be divided ownership situations. 439

The first category of nonlandowning annexor is the licensee. "A license is permission given by the occupant of the land, the licensor, which allows the licensee to do some act on the land that otherwise would be a trespass." 440 This privilege to use the land is like an easement, but is dissimilar in that a license is revocable, while an easement is not. 441 A licensee may be given permission to erect buildings or annex fixtures on the realty, but would not be granted any estate, for a term of years or otherwise, in the realty. 442

Licensee-annexed fixtures on the licensor's property give rise to a presumption that the annexed fixtures remain the licensee's personal property and do not become part of the licensor's land. 443 The licensee or the licensee's estate can remove the fixtures at the revocation of the license, or when the licensee dies. 444 But, licensees can lose their right to remove fixtures as to bona fide purchasers without knowledge of their right. 445

In contrast to licensees, trespassers, the second category of nonlandowning annexors, have neither authority nor permission to build nor annex items to another's property. The presumption regarding trespasser's annexations is that they become realty belonging to the landowner. 446 Neither the trespassing annexor's intention, nor good faith, nor color of title changes this result. 447 There are some excep-

tions, however. If annexation is the result of a mutual mistake, or the landowner has knowledge of the trespassing annexor's mistake but doesn't object, the modern tendency is either to grant innocent improvers compensation equal to the market value of the fixtures, or to permit the trespassing annexor to remove the fixtures as personality. 448

If there is an express or implied agreement between the trespasser-annexor and the owner of the property, the trespasser's fixtures remains personality, and do not become part of the owner's freehold. 449

Another complication in the trespasser-annexor area occurs when the trespasser-annexor has the power of eminent domain over the realty in issue and, before exercising that power, has attached fixtures to the realty. 450 There is authority holding that without any prior condemnation of the property, the owner does not acquire title to the fixtures. 451 This is in accord with the majority rule that will only award to the owner of the realty, upon condemnation and taking, the value of the land without the fixtures attached by the condemnor. 452

A third category of nonlandowning annexors is the buyer under an executory contract of sale of land. Fixtures annexed by the buyer become part of the realty, and remain so even if the buyer neglects to perform part of the contract and does not receive title to the land. 453 In that event, the fixtures cannot be removed by the vendee.

On the other hand, if the seller repudiates the contract, the buyer may remove fixtures attached to the realty by the buyer. 454 The same applies if the buyer has paid most of the price, agrees to complete the contract, and does not impair the seller's security upon

448. Id. at 230.
450. For a general discussion of eminent domain, see supra notes 415-36 and accompanying text.
451. Nagel v. Texas Pipe Line Co., 336 S.W.2d 265 (Tex. Civ. App. 1961). In Nagel the court wrote that "[o]rdinarily, whatever a trespasser annexes to the land of another becomes the property of the owner of the land. There is, however, an exception to this rule. Where one with the right of condemnation, without consent of the owner or the condemnation, affixes improvements to the realty, the owner is not entitled to compensation for the improvements." Id. at 266-67(emphasis in original).
452. See R. Brown, supra note 1, § 16.15, at 570-71. To hold otherwise would cause the condemnor to pay twice: once when the fixtures are annexed and then again when the land is taken. Id. at 570-71.
453. 35 Am. Jur. 2D Fixtures § 56 at 744 (1967).
454. Id.
removal.  

E. Third Party Rights

A third situation concerning the annexation of fixtures occurs when the annexor of the chattel does not unconditionally own it. Affixation of a chattel by one who does not own it is a hybrid of a divided ownership case, in which the annexor attaches property to realty that he does not own. This third party rights category may be the most complex of the divided ownership transactions, but, because of the adoption of the Uniform Commercial Code, much of the inconsistent case law has been superseded. However, even under UCC § 9-313, the controlling section, the Code has not solved all third party rights problems, as will be seen in Part II of this article. This section of the article will analyze the common law.

The parties involved in this situation are a conditional chattel seller who holds a security interest in the affixed chattel, a real estate mortgagee, either prior to or subsequent to the chattel financier, and the annexor. The general rule is that when a person affixes his property or erects structures on land not owned by him, the additions become part of the realty. If there is no express or implied agreement between the parties regarding the affixed goods, the landowner takes title to the chattels. This situation is an offshoot of the annexation test. The original rationale, of the cases that allow title to pass to the landowner, was that the attached fixtures usually could not be removed from the realty without causing substantial injury thereto. In reality, however, absent any complicating factors, the

455. Id. at 744-45.
456. See supra note 57 and accompanying text.
457. For a discussion of such divided ownership situations, see supra notes 211-15 and accompanying text. See also supra notes 239-42 and accompanying text (specifically referring to third party chattel mortgagee versus real estate mortgagee priority disputes).
458. Part II of this article, entitled The UCC And Fixtures, will appear in volume 15:3 of the Hofstra Law Review.
459. See, e.g., Frank v. Schaff, 123 N.W.2d 827, 829 (N.D. 1963)(noting that owner of land may require annexor of property to remove affixed items); National Cold Storage Co. v. Boyland, 28 Misc. 2d 205, 207, 212 N.Y.S.2d 319, 321 (Sup. Ct. 1961) (finding exception to general rule, when “clear and explicit language [is] employed, indicating with precision that the builder retains the right of removal and remains the owner)(emphasis in original), rev'd on other grounds, 227 N.Y.S.2d 147 (1962).
460. See generally R. Brown, supra note 1, § 16 at 560.
461. For a discussion of the weight accorded the annexation test, see supra notes 79-115 and accompanying text.
secured party can remove his collateral upon default, provided that he reimburses any encumbrancer or owner who is not the debtor.  

A situation which complicates the general rule involves a chattel financier conditionally selling the chattel to the annexor, who attaches it to the landowner's property, or to a real estate mortgagee's property. In cases involving these parties, there are two contrary results, depending on the parties involved, even though only one article is involved. The article may be considered a chattel by the conditional seller and the buyer, but considered a fixture and part of the reality between the buyer who is also a mortgagor and the buyer's mortgagee. Likewise, the affixed article, as between the conditional seller of the article and the purchaser, may be considered personalty, but between the same seller and the owner of the reality, the article may be considered reality. The two parties to the conditional sales agreement can expressly agree to treat an item as personalty for the protection of the seller, even if the item is firmly annexed to reality. The agreement to treat the fixture as personalty will not, however, be binding on the owner of the land if he is not the buyer of the chattel, or the mortgagee.  

Of course, a mortgagee may permit title to a fixture to remain vested in the conditional seller. Without the consent of a mortgagee to an agreement by the annexor-buyer, specifying that a fixture is to remain the conditional seller's personalty, the mortgagee is not bound by the agreement. "It is not enough that the mortgagee have knowledge of the contract," one court wrote, "he must consent to the retention of the specific property as personalty."  

The preceding rules, when applied to disparate fact patterns, sometimes yield different results. For example, one result arises when there is a prior mortgage on reality, and the mortgagor annexes chattel-mortgaged goods to the reality. In a priority conflict between the chattel financier and the mortgagee, the chattel financier should

469. Appliance Buyers Credit Corp. v. Crivello, 168 N.W.2d 892, 898 (Wis. 1969).  
470. Corbett, 172 So. 2d at 258-59.
prevail if no material injury to the realty would result from removal and repossession of the goods.\textsuperscript{471} The Supreme Court of Idaho has declared that:

The law is generally well settled that where the removal of a fixture will not materially injure the premises, a seller retaining title to such property may assert his right against any prior mortgagee or vendor of the realty. And this is true regardless of notice to the prior mortgagee or vendor.\textsuperscript{472}

The theory behind this rule allowing a chattel financier to retain title over the attached fixture as personalty, against the prior mortgagee of the realty to which the fixture is annexed, is that the realty mortgage was granted prior to the fixture's annexation on the land, without reliance on the fixture's attachment. Thus, enforcing the chattel financier's lien cannot impair the mortgagee's security.\textsuperscript{473}

The rule that the chattel financier of fixtures has priority over prior mortgagees is also true if, rather than the security lien arising from the sale of the chattel, the security lien arises by operation of law. Thus, it has been held that a mechanic's lien and a materialman's lien are superior to a recorded mortgagee's deed, even though the mortgagee has priority over the supplier's materialman's lien.\textsuperscript{474}

Even an after-acquired property clause in a prior mortgage has been held not to defeat the conditional seller's interest in subsequently attached fixtures that are subject to a conditional sales agreement.\textsuperscript{475}

A situation slightly different from the "prior mortgage" fact

\textsuperscript{471} See, e.g., Slaton v. Parker Heating Co., 107 Ga. App. 649, 650, 131 S.E.2d 199, 201 (1963) (conditionally sold furnace remained personalty of seller even though annexed to realty on which there was a prior recorded security deed); Hartford Nat'l Bank and Trust Co. v. Godin, 137 Vt. 39, 398 A.2d 286 (1979) (security interest in mobile home has priority over prior real estate mortgagee of land on which home is attached, where mortgagee has made no subsequent good faith advances).


\textsuperscript{473} See 35 AM. JUR. 2D Fixtures § 67, at 752 (1967). See also 1 G.W. THOMPSON, supra note 15, § 71, at 263-64. It should be noted that the significant moment to determine priority between the security interest of the seller of the goods that become fixtures and the mortgagee of the realty is the time that the goods are affixed to the realty. House v. Long, 244 Ark. 718, 723, 426 S.W.2d 814, 818 (1968).


pattern produces a similar result. In this variant there is a prior mortgage, and the fixtures are annexed, after which a fixture mortgage is created. In this situation, one writer concludes that the holder of the chattel mortgage has priority over the prior real estate mortgagee.476

A second distinct fact pattern is a subsequent mortgage of the realty. Here, the annexation of chattel-mortgaged goods to realty occurs before the realty is mortgaged. The general rule is that the subsequent realty mortgagee takes the annexed fixtures, thereby cutting off the chattel mortgagee's claim, if the subsequent realty mortgagee has no notice of the chattel mortgagee.477 This is contrary to the result obtained when the realty mortgage predates the chattel mortgage.478 The reason for this rule is that the subsequent bona fide real estate mortgagee, who gives value and has no notice, relies on the fixtures attached to the realty, and advances their value with the value for the realty. The real estate mortgagee has priority over the chattel mortgagee because the realty mortgagee has no notice of the fixture's mortgaged status.479 The analysis and outcome are usually the same, if instead of a subsequent bona fide mortgagee of the realty, there is a subsequent bona fide purchaser, without notice, of the realty.480

When the factual situation, however, involves a subsequent bona fide purchaser or mortgagee of the realty with notice of the chattel mortgage, then the chattel mortgagee generally has priority over the real estate mortgagee.481 The chattel mortgagee's lien is enforceable whether the notice is constructive482 or actual.483

476. See 1 G.W. THOMPSON, supra note 15, § 17, at 264 & n.11.
477. See, e.g., Carter v. Straus-Frank Co., 297 S.W.2d 195 (Tex. Civ. App. 1956)(chattel mortgagee cannot assert his lien over lien of mortgagee of realty who was subsequent and had no notice); Metropolitan Sav. & Loan Ass’n v. Zuekle’s, Inc., 46 Wis. 2d 568, 572, 175 N.W.2d 634, 636 (1970) (realty mortgagee acquired superior lien in drapery and carpeting, as subsequent purchaser without notice, over conditional sale vendor of the drapes and carpet).
478. See supra notes 471-73 and accompanying text.
480. See Id. § 64, at 749 (similar policies underlie the rules holding prior chattel mortgagee claims ineffective against either subsequent mortgagees or purchasers, when either is without notice).
481. Grupp v. Margolis, 153 Cal. App. 2d 500, 314 P.2d 820 (1957). 1 G.W. THOMPSON, supra note 15, § 73, at 287, sets forth the theory behind this rule: “a subsequent purchaser or mortgagee of the realty, knowing at the time of his purchase or mortgage of the existence of a chattel mortgage upon the fixtures . . . may be regarded as having taken his deed or mortgage subject to such chattel mortgage or agreement.” Id.
The conflict between a realty mortgagee and a chattel mortgagee is analogous to the situation of a tenant who has affixed financed goods to his leasehold. The notice and reliance factors used in the preceding factual situations are also applicable herein. The seller retaining a security interest in a tenant fixture has the right to remove the fixture only if the tenant has such right. Otherwise, the landlord has received an accession to his realty.

Where the annexing tenant’s fixtures replace those of the landlord, there is a split of authority concerning whether the chattel mortgagee or the landlord has priority. 8

IV. REMEDIES FOR WRONGFUL REMOVAL OF FIXTURES

The party injured by wrongful removal or destruction of fixtures has a choice of remedies. These usually consist of either damages for losses caused by the wrongful removal, or an action in tort for conversion of the fixtures wrongfully removed or destroyed. Moreover, in a proper case, punitive damages or even attorney’s fees are recoverable. A party owning fixtures can obtain an injunction prohibiting another from wrongfully removing fixtures. Foreclosure is possible when fixtures attached to a mortgagee’s mortgaged property have been removed.

Damages against the party who has wrongfully removed the fixture are measured by the value of the fixture at the time of its removal. The measure is the value of the fixture at the time of severance, not the replacement cost of the wrongfully removed fixture.

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484. See Goldie v. Bauchet Properties, 15 Cal. 3d 307, 124 Cal. Rptr. 161, 540 P.2d 1 (1975) (chattel mortgagee’s rights against the lessor to machine sold to tenant who annexed it on the landlord’s premises are derivative and no greater than the lessee’s right against the lessee); Exchange Leasing Corp. v. Finster N. Aegen, Inc., 7 Ohio App. 2d 11, 218 N.E.2d 633 (1966) (landlord of apartment, through sale and leaseback, cannot vest another with greater interest than that of mortgagee).
491. Davis v. Jackson, 264 Md. 668, 287 A.2d 768 (1972). The replacement cost of severed fixtures, however, would have a bearing on the value of the fixtures at the time of their severance.
This measure of damages is similar to the recoverable value for the condemnation of trade fixtures in an eminent domain proceeding.492

The burden of proof in a suit for damages to recover for the wrongful removal of a fixture is on the party seeking to recover. The plaintiff must show that the removed item constituted a fixture, and that it was removed wrongfully by the party against whom recovery is sought, and he must prove the value of the fixture at the time of severance from the real estate.493 To prove that the chattel removed was a fixture requires the plaintiff to employ the three-pronged test used to classify a fixture: the intention of the parties, annexation, and appropriation to the use of the realty.494

The type of relief available to a party whose fixtures have been wrongfully removed often depends on the relationship of the parties. A mortgagee may be able to obtain damages for a loss suffered due to the impairment of the security interest in the mortgaged property upon the wrongful removal of fixtures therefrom.495 Also, a mortgagee or lienor may be able to get foreclosure relief, or have a court direct that the fixtures be returned, or that he be given priority upon any distribution of proceeds, if the property is sold at a judicial sale.496

A buyer of fixtures or of realty has a cause of action for damages or conversion against the seller, if the seller refuses to allow the buyer to take possession of the fixtures or wrongfully severs them from the realty.497 Of course, the buyer has the burden of proof in

492. For a discussion of fixture valuation in eminent domain proceedings, see supra notes 428-30 and accompanying text.
494. In First Federal Savings & Loan Association v. Stovall, 289 So. 2d 32 (Fla. Dist. Ct. App. 1974), the mortgagee could not recover for the value of a removed sink, cabinets, a hot water heater, and a range, because the kitchen improvements were not shown to have been intended to be permanently affixed fixtures. Id. All of the preceding discussion in this article concerning how to determine whether a fixture or personal property is involved is applicable in the suit to recover for wrongful removal, including presumptions based on the relations of the parties, Lee-Moore Oil Co. v. Cley, 33 N.C. App. 212, 234 S.E.2d 456 (1977)(presumed owner-vendor annexations are fixtures, vendee can recover damages for removal of fixtures by vendor), and intention shown by agreements to treat articles as personalty, Grinde v. Tindall, 172 Mont. 199, 562 P.2d 818 (1977).
A tenant whose trade fixtures have been wrongfully removed may sue to recover damages, or to replevy the goods, or may recover
for conversion. The landlord, of course, can likewise recover from
the tenant, if the tenant has wrongfully removed the landlord's fix-
tures. A landlord proceeding against a tenant need not prove a
decrease in the fair market value of the building because the fixture
was removed, but may recover damages equal to the value of the
fixture in-place. A lessee is also liable to the landlord for any dam-
ages caused by any assignee of the lease.

A chattel secured creditor should also be able to recover dam-
ages, or to replevy the fixtures, upon their wrongful removal. The
chattel mortgagee, however, must use care not to incur liability to a
real estate mortgagee for wrongful removal, if the chattel mortgagee
repossesses any fixtures. If the chattel mortgagee does wrongfully
remove (as to the realty mortgagee) fixtures from the realty, then
the realty mortgagee can recover from the chattel mortgagee. Such
recovery may include damages for the value of the fixture at the
time of removal, damages for trespass onto the realty mortgagee's
property when removing the fixture, and even damages for mental
distress caused by the wrongful removal. A chattel mortgagee,
therefore, would be wise to be extremely certain of having priority
rights before repossessing any fixtures upon mortgaged property.

In Part II of this article the relationship between the Uniform
Commercial Code and the law of fixtures is analyzed. The long
discussion of the common law of fixtures was necessary because the
Code, in defining fixtures in section 9-313, tells us only about priori-
ties of security interests in fixtures. Section 9-313 does not tell us what a fixture is except to state that personalty becomes a fixture when the goods "become so related to particular real estate that an interest in them arises under real estate law." Without the long discussion found in Part I, a secured party would be hard put to discover when those goods which he financed became so related to the real estate that his interest arises under real estate law. If the secured party does not know when that interest arises, he runs the risk of not complying with fixture perfection provisions of Article 9, thereby losing his priority over other competing creditors. Part II is meant to show how the Code, in section 9-313, treats financiers' goods that become fixtures.\textsuperscript{506}

\textsuperscript{506.} Part II of this article, entitled The UCC And Fixtures, will appear in volume 15:3 of the Hofstra Law Review.