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Condemnation Proceedings--Right of Tenant to Compensation for Fixtures Annexed to Condemned Land

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CONDEMNATION PROCEEDINGS—RIGHT OF TENANT TO COMPENSATION FOR FIXTURES ANNEXED TO CONDEMNED LAND.

What fixtures annexed by the tenant pass with the land as incident thereto is an important question to be determined in condemnation proceedings.[1] Chattels which as a matter of law retain the character of movables[2] remain personalty despite any agreement. Brick, stone, and plaster,[3] which become so merged with the land that they lose their identity, are realty notwithstanding an agreement to the contrary; third, those[4] so affixed that they may be either personalty or realty depending upon the relation or agreement of the parties. The discussion will be confined to the third class.

Upon this subject the authorities are apparently in conflict. By some decisions, articles annexed to the land and removable by the tenant, are regarded as personalty.[5] Others hold that they are fixtures and constitute part of the land until actually removed.[6] The latter appears to be the sounder view. By so considering the annexed articles, it seems only possible to justify the rule that a tenant loses the right to remove them by failing to do so during his term[7] or possession,[8] as a tenant does not forfeit the right to chattels left on the premises after expiration of lease;[9] neither could the right to them be lost by the taking of a new lease.[10]

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[1] Matter of the City of New York, 118 App. Div. 865, 103 N. Y. Supp. 908 (1st Dept. 1907), *aff'd*, 189 N. Y. 508, 81 N. E. 1162 (1907); Jackson v. State of New York, 213 N. Y. 34, 106 N. E. 758 (1914). *In re* Matter of the Mayor, etc., 39 App. Div. 589, 55 N. Y. Supp. 165 (1st Dept. 1899).

[2] Central Union Gas Co. v. Browning, 210 N. Y. 10, 103 N. E. 822 (1913); Cosgrove v. Troescher, 62 App. Div. 123, 70 N. Y. Supp. 764 (1st Dept. 1901).

[3] Voorhees v. McGuinnis, 48 N. Y. 278 (1872).

[4] Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459 (1914); Ford v. Cobb, 20 N. Y. 344 (1859); Tifft v. Horton, 53 N. Y. 377 (1873); Herzog v. Marx, 202 N. Y. 1, 94 N. E. 1063 (1911); DeBevoise v. Maple Ave. Construction Co., 228 N. Y. 496, 127 N. E. 487 (1920).

[5] Globe Marble Mills Co. v. Quinn, 76 N. Y. 23 (1879); Conde v. Lee, 55 App. Div. 401, 67 N. Y. Supp. 157 (4th Dept. 1900).

[6] Freeman v. Dawson, 110 U. S. 264, 4 Sup. Ct. 94 (1884); Carlin v. Ritter, 68 Md. 478, 16 Atl. 301 (1888); *In re* Matter of City of Buffalo, 17 N. Y. St. Rep. 371, 1 N. Y. Supp. 763 (1888). "The test in each is what is the character of the property of the tenant, although never to be removed, but such ownership does not make it personal property, although the right to removal may be exercised."

TIFFANY, LANDLORD AND TENANT (1st ed. 1912) §240 (a), "The logical ground on which the right of removal seems to be based is in favor of trade and to encourage industry. If it exists on the presumption of the tenant to subsequently remove the articles, there appears no more reason for such presumption not to apply to fixtures other than trade."

[7] Loughran v. Ross, 45 N. Y. 792 (1869).

[8] *Ibid.*

[9] *Supra* note 2.

[10] *Supra* note 2.

In a recent case,[11] the claimant, a tenant, leased the premises condemned as a meat market. Trade fixtures were affixed with the privilege of removal retained by the lessee. There was also a provision that the terms of the agreement were to be inoperative upon the taking of the property by public authorities. In this instance, property was appropriated a few months before the expiration of the lease. The Appellate Division decreed the rule which obtained between vendor and vendee applied; hence, the trade fixtures are real property according to the statute[12] and must be included within the award. Upon the appeal, the opinion was affirmed.

This decision is upheld by the law declared in a former case analogous in facts.[13] It is true that the fixtures assessed in other cases[14] were annexed to a structure built by the tenant for the purpose of trade. But, does it follow because the fixtures, which were peculiarly adapted to a trade conducted by the tenant, and annexed to the premises owned by the lessor, became personalty?

It is a settled rule of law that the lessor, with the consent of the lessee, may convey by deed a perfect title of the entire interest in the land including that of the tenant.[15] Between owner and the city, the rule of law which obtains between vendor and vendee is applicable.[16] The courts have not rigidly enforced this rule in the landlord and tenant relationship;[17] on the contrary, they have modified it to encourage trade.

In *Van Ness* v. *Placard,*[18] Story, *J.* enunciated: "The general rule of the common law is that whatever is once annexed to the freehold becomes part of it and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, was never inflexible and without exception. It was construed * * * more liberally between landlord and tenant. The more extensive exception to the rule has been of fixtures for the purposes of trade."

Observing the case from this viewpoint, notice *In re Matter of the City of New York (North River waterfront).*[19] The tenant erected a building and installed machinery for furtherance of trade. There was an option in the lease for the renewal of the term or the purchase of the property by the lessor. The city rejected the machinery as personal property. In an action to recover their value as

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[11] *In re* Matter of City of New York (Allen St.), 256 N. Y. 236, 176 N. E. 377 (1931).

[12] The Greater New York Charter §969 (4).

[13] *In re* Matter of the Application of the City of New York, 192 N. Y. 295, 84 N. E. 1105 (1908).

[14] Schuchardt v. Mayor, etc., 53 N. Y. 202 (1873); Matter of City of New York (Avenue A), 66 Misc. 488, 122 N. Y. Supp. 321 (1910); Matter of City of New York (Rockaway Blvd.), 201 App. Div. 862 (2d. Dept. 1924); Matter of Willcox, 142 App. Div. 680, 125 N. Y. Supp. 594 (1st Dept. 1911).

[15] Mott v. Palmer, 1 N. Y. 564 (1848).

[16] *Supra* note 14.

[17] Andrews v. Day Button Co., 132 N. Y. 348, 30 N. E. 831 (1892).

[18] 2 Pet. 137 (U. S. 1829).

[19] *Supra* note 1.

realty, *held,* such fixtures are real property. The judge remarked: "Assuming that if the landlord elected to purchase a building under the provision of the lease, it would not be required to pay for such property and the tenant be required to remove it; when the city condemns a property, it takes from the tenant the building of which this machinery is a part and it is only just that the tenant should be paid what the building as a whole is worth. What the tenant is entitled to is a fair market value of the property taken." [20]

The city does not receive an assignment of the landlord's rights;[21] it is a stranger to the agreement between landlord and tenant and places the lessee in the position of buyer towards seller, without his consent.[22]

Upon the vesting of the city's title, the lease ends notwithstanding an agreement to the contrary.[23] In assessing damages, the commissioner must first ascertain the value of the fee as if owned by one person, and then apportion that amount between or among all the estates and interests which such persons have in the property.[24] The value of the leasehold is included.[25] Where the lease expired, the claimant could not recover as he had no interest in the premises.[26] Under the term, he had enjoyed all to which he was entitled; but, in the instant case,[27] the leasehold was prematurely ended by the action of a paramount power. Between landlord and tenant only, it ceased to exist. By the provision terminating the lease, the tenant is deprived of an award for the remainder of the term which he otherwise would have had.[28]

The law does not leave the title to the appropriated land in suspense.[29] All rights and interests of the owner or owners in the *res* are extinguished and immediately vest in the city upon the notice of

[20] *In re* Bellevue Hospital Psychopathic Pavilion Site, 130 Misc. 774, 230 N. Y. Supp. 411 (1928).

[21] Matter of City of New York, *supra* note 1 at 868, N. Y. Supp. at 910. "The City is not the landlord and as against the tenant has not acquired the landlord's rights, but is taking this property against the wish of both the landlord and tenant."

[22] Jackson v. State of New York, *supra* note 1 at 35. "Power of the State is not so great, nor the plight of the citizen so helpless! Condemnation is an enforced sale and the State stands toward owner as buyer toward seller. On that basis the rights and duties of each must be determined." See also 1 NICHOLS, EMINENT DOMAIN (2d ed. 1917).

[23] Matter of City of New York (Delancey St.) 120 App. Div. 700, 105 N. Y. Supp. 779 (1st Dept. 1907); *In re* Block Bounded by Avenue A, *supra* notes 14 and 19; 2 LEWIS, EMINENT DOMAIN (3d ed. 1909) §719.

[24] Matter of Daly, 29 App. Div. 286, 287, 51 N. Y. Supp. 576 (1st Dept. 1898); Matter of City of New York, *supra* note 1; *In re* Matter of City of Buffalo, *supra* note 6.

[25] *Supra* note 24.

[26] Matter of Daly, *supra* note 24.

[27] *Supra* note 11.

[28] *Supra* note 24.

[29] Jackson v. State of New York, *supra* note 1 at 36.

appropriation proceedings.[30] Although trade fixtures are removable without substantial injury to the freehold, they are part of the land.[31] The city in availing itself of the right of eminent domain cannot reject them; it must pay for what it takes and not what it gets,[32] and the tenant is not obliged to remove them any more than he would the building if he were the owner.

The confusion in cases of this nature results from calling property real,[33] personalty. The common-law rule has not been changed.[34] Apparently the erroneous conception arose because of the courts, without discussion on the question, calling trade fixtures personal property,[35] thinking this necessarily follows because they are removable; or, although annexed to be part of the land, they will eventually become personalty by the exercise of the right of removal. Conceding that trade fixtures while annexed are personalty, as between landlord and tenant, nevertheless, the tenant would forfeit them by the failure to remove same during the term of his possession.[36] Again, there would be a transmutation of property from personalty to realty without any change in annexation.[37] The foregoing illustrations point out the illogical rule and the consequent difficulties. The sounder view would be that of other jurisdictions[38]—that trade fixtures while annexed are a part of the land until removed. This is logical and consistent with the rule invoked between city and tenant. If there is a transfer of such fixtures, they themselves are not trans-

[30] Jackson v. State of New York, *supra* note 1 at 36; *In re* Matter of City of Buffalo, *supra* note 6 at 376.

[31] *Supra* note 6.

[32] *In re* Matter of City of Buffalo, *supra* note 6 at 376. "As the fixtures now exist, they are real property, and so remain until severed from the building. This act the tenant is not bound to perform at the time the property is taken." *Supra* note 19.

[33] *Supra* note 6.

[34] In Omboy v. Jones, 19 N. Y. 234, 240 (1859) Judge Comstock declared: "The general maxim of the law is that whatever is fixed to the realty becomes part of it, and partakes of all its incidents and properties. This is the rule even in the relation of landlord and tenant. Many exceptions have been engrafted upon it, but the rule itself has not been lost sight of." See also TYLER, FIXTURES (1877).

Talbot v. Cruger, 151 N. Y. 117, 120, 45 N. E. 364 (1896): "The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy and being in the nature of a privilege, it must be exercised before the expiration of the term or before he quits possession."

[35] Globe Marble Mills Co. v. Quinn, *supra* note 5.

[36] *Supra* note 7.

[37] (Tenant had title to the fixtures. Before annexation they were personalty but after affixation became realty or part of the land.) In Riley v. Boston Water Power Co., 11 Cush. 11 (Mass. 1853), the judge, referring to standing trees and soil severed from the land, enumerated: "They cease to be real estate and become personalty. But the transmutation, while it changes the character of the property in this respect, does not change its ownership. It is *actual severance* that changes the property from real to personal." (Italics ours.)

[38] Sampson v. Camperdown Cotton Mills, 64 Fed. 939 (C. C. S. C. 1894); Freeman v. Dawson, *supra* note 6.

ferred but rather the right to remove them is.[39] Since the right to remove was lost by the act of the city, the tenant must be compensated for the interest he would otherwise have had.[40]

Although the tenant is legally and equitably entitled to compensation, a disregard of the distinction between personal and real property would simplify and clarify the problem. Why not regard all condemned property as merely property and not as personalty or realty? Why not settle all disputes in such matters on principles of equity and justice unhampered by such classification and thus remove uncertainty, confusion, and conflict?

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ENFORCEMENT OF AFFIRMATIVE COVENANTS IN PERSONAL SERVICE CONTRACTS BY PROHIBITORY INJUNCTION.

Decisions on pleas for injunctions to specifically enforce contracts of personal services are excellent examples of the discretionary power of a court of equity. When these services are unique, special or extraordinary on the part of the defendant, it is plain that the principle on which equity's jurisdiction rests is the same as that which applies to agreements for the purchase of lands, or of chattels having a unique character and value. The damages for the breach of such contracts cannot be estimated with any degree of certainty, and the employer cannot, by means of any compensation, purchase the same services in the labor market.[1] But at first equity refused to enforce any contracts, irrespective of the inadequacy of damages, if they involved a continuing breach. The courts took the position that contracts which required varied and continuous acts would not be specifically enforced, because a decree in such cases would entail a continuous supervision, by the officers of the court, of the acts done by the defendant pursuant to the decree.[2] Gradually, however, the

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[39] So. Baltimore Co. v. Muhlbach, 69 Md. 395, 16 Atl. 117 (1888); (sale of buildings erected by tenant is not an interest in land; not within Stat. of Frauds).

[40] *In re* Matter of Buffalo, *supra* note 6 at 376: "The City loses nothing; it simply forces the tenant to sell and steps into place and when it has extinguished both titles it has nothing but land, such property as the statute contemplates shall be taken."

[1] POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS (3d ed. 1926) §24.

[2] Beck v. Allison, 56 N. Y. 366 (1874); Standard Fashion Co. v. Siegel-Cooper, 157 N. Y. 60, 51 N. E. 408 (1898). POMEROY, *supra* note 1, §22: "As a general proposition, contracts which provide for the personal affirmative acts, or the personal services of the parties, are not specifically enforced in equity, not because the legal remedy of damages is always sufficiently certain and adequate, but because the courts do not possess the means and ability of enforcing their decrees, which would necessarily be very special, and of compelling the performance which constitutes the equitable remedy."