

by bill in chancery after the execution and sale at law.²⁶ Relief, where granted, is upon conditions, which vary according to the exigencies of particular situations.²⁷ In any event the attacking party must show an interest or equity of his own in the property sufficiently unincumbered, to render a resale of the property of likely benefit to him.²⁸

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EFFECT OF RENEWAL LEASE UPON TENANT'S RIGHT TO REMOVE FIXTURES—In the recent case of *Greenspan-Greenberger Co. v. The Goerke Company*,¹ the receiver of an insolvent corporation sought to sell the department store fixtures which had been installed by the corporation upon demised premises. The landlord objected to their sale and removal on the ground that the fixtures were in the store during the term of a prior lease to the tenant, and that when, at the expiration of that lease, the present lease was made, title to the fixtures was not reserved to the tenant and consequently passed to the landlord. The court held that title to the fixtures remained in the tenant.

In the relation of landlord and tenant the rigor of the law of fixtures is greatly relaxed in favor of the tenant. It is universally agreed that fixtures annexed to the realty by a tenant for trade purposes are removable by him during his term.² The basic reason for this result is the public policy favoring trade and the encouragement of industry. Considerable contrariety of opinion exists, however, as to when the tenant's right so to remove expires.

The authorities agree that where a tenant relinquishes possession at the expiration of his term without having removed the fixtures, title thereto passes to the landlord, and the tenant may not re-enter for the

²⁶ *Cummins v. Little*, *supra*, note (15); *Daly v. Ely*, *supra*, note (19); *Hecht v. Hoogmoed*, *supra*, note (2).

²⁷ In foreclosure sales, the applicant being the mortgagor, the condition may be to pay off the mortgage debt plus costs of the foreclosure and of the sale; *Campbell v. Gardner*, *supra*, note (9); *Hazard v. Hedges*, *supra*, note (9). However, the putting up of a bond to guarantee a specific bid, substantially larger than that for which the property was sold, though not large enough to satisfy the decree, has been considered sufficient, *New Jersey National Bank and Trust Co. v. Savemore Realty Co.*, *supra*, note (5); *Rowan v. Congdon*, *supra*, note (14). In sales in satisfaction of judgments not in foreclosure, payment of the principal debt and costs of sale has been required, *Kloopping v. Stellmacher*, *supra*, note (12); *Connolly v. Donohue*, *supra*, note (12).

²⁸ *C. and D. Corporation v. Griffithes*, *supra*, note (13); *Hodgson v. Farrell*, *supra*, note (19).

¹ 111 N.J.E. 249 (Ch. 1932).

² 26 C.J. 699; *Crane v. Grigham*, 11 N.J. Eq. 29 (Ch. 1855); *Burns v. Shaffer Co.*, 8 N.J. Misc. 118, 149 Atl. 66, (Sup. Ct. 1930).

purpose of removing them,³ although a few cases allow this right if exercised within a reasonable time after the expiration of the term.⁴ The difficult question arises where as in the *Goerke Company* case the tenant continues in possession under a renewal of the lease (as opposed to a mere extension of the first lease)⁵ without any express reservation of title in the new lease. In this situation the majority of the decisions hold that title to the fixtures passes to the landlord at the end of the first term.⁶

The majority rule is treated as a corollary to the original proposition that a tenant must remove his fixtures during his term. This result is sometimes justified on the theory of an irrebuttable presumption of a gift from the tenant to the landlord, but more frequently, on the equally fictional theory that the renewal lease in effect demises the fixtures as well as the realty and the tenant, by accepting the lease, is estopped to deny his landlord's title to them.

This reasoning and result are disputed by a militant and persuasive minority.⁷ These authorities point out that the common law rule for-

³ *Natural Autoforce Ventilator Co. v. Winslow*, 215 Mass. 462, 102 N.E. 705 (1913); *Stokoe v. Upton*, 40 Mich. 581, 29 Am. R. 560 (1879); *In re Starr St.* 73 Misc. 380, 131 N.Y. Supp. 71 (1911).

⁴ *Burk v. Hollis*, 98 Mass. 55, (1867); *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95 (1895).

⁵ Tenant has right to remove fixtures where there is an extension with no change in the terms of the lease. *Crandall Investment Co. v. Ulyatt*, 40 Cal. 35, 90 Pac. 59 (1907); *Baker v. McClurg*, 198 Ill. 28, 64 N.E. 701 (1902).

⁶ 26 C.J. 706, 708; 11 R.C.L. 1072; EWALL, FIXTURES, 174, 175; GIBBONS, FIXTURES, 43; GRADY, FIXTURES, 98; 2 TAYLOR, LANDLORD AND TENANT Par. 552; TYLER, FIXTURES, 437-439; 2 SMITH LEADING CASES (8 Am. Ed.) 214; *Wadman v. Burke*, 147 Cal. 351; 81 Pac. 1012 (1905) where there was a covenant in first lease that tenant should deliver up the premises at the end of term in the same condition. This type of covenant is considered strong evidence in favor of an implied gift; *Shephard v. Spaulding*, 4 Metc. 416 (Mass. Sup. 1842). Tenant surrendered to his landlord without removing fixtures. Held that he could not assert the right under a lease made several years afterwards; *Watriss v. Bank*, 124 Mass. 571, (Sup. Ct. 1878); *Chicago Sanitary District v. Cook*, 169 Ill. 184, 48 N.E. 461 (1897); *Longhran v. Ross*, 45 N.Y. 792 (Ct. of A. 1871); *Stephens v. Ely*, 162 N.Y. 79, 56 N.E. 499 (Ct. of A. 1900); *Lee v. Risdon*, 7 Taunt. 188, 129 Rep. 76 (1816); *Fitzherbert v. Shaw*, 1 H.Bl. 258, 126 Rep. 150 (1789); *Heap v. Barton*, 74 E.C.L. 273, 138 Rep. 909 (1852); *Thresher v. Water Works*, 2 Barn. & Co. 608, 107 Rep. 510 (1823); *Sharp v. Milligan*, 23 Bear 419, 53 Rep. 165 (1857); *Pooles Case*, 1 Salk. 368, 91 Rep. 320 (1875).

⁷ *Bergh v. Herring Hall-Marvin Safe Co.*, 70 C.C.A. 756, 136 Fed. 368 (1905); *Daly v. Simonson*, 126 Iowa, 716, 102 N.W. 780 (1905); *Ray v. Young*, 160 Iowa 613, 142 N.E. 393 (1913); *Thomas v. Gale*, 134 Ky. 330, 120 S.W. 290 (1909); *Sassen v. Haegle*, 125 Minn. 441, 147 N.W. 445 (1914); *Ogden v. Garrison*, 82 Neb. 30, 117 N.W. 714 (1908); *Ferguson v. O'Brien*, 81 At. 479 (N.H. 1906); *Blake McFall Co. v. Wilson*, 98 Oregon 626, 193 Pac. 902 (1920):

"In practice, this rule is a trap and snare for the unwary tenant, for in the every-day affairs of life most tenants making a new lease would assume and indeed so would most landlords, that fixtures which were the property of the tenant during the old lease would continue to be the property of the tenant under the new lease. In our view

feiting a tenant's fixtures upon the expiration of the leasehold was designed to insure to the landlord his return to a complete physical, as well as legal, possession of the premises. The emphasis at common law, they argue, was not upon the technical ending of a "term", but rather upon the termination of the tenant's, and the beginning of the landlord's, possession. This conclusion, it is pointed out, is supported by a line of cases holding that where a tenant rightfully holds over, he may, before surrendering possession, remove his trade fixtures notwithstanding the expiration of the original term.⁸ The reason assigned was that as the tenant was still in possession when he removed the fixtures, there was no justification in fact for a presumption that he intended to abandon them. The extension to a holdover tenant of the right to remove fixtures seems to be a reasonable basis for extending the rule to cover the tenant who remains in possession by virtue of a new lease.⁹ The soundness of the minority view which repudiates the theory of an irrebuttable presumption of a gift and seeks the actual intention of the parties is cogently expressed by Judge Cooley¹⁰ in the following terms:

the reasons which give support to the rule that the failure of a term tenant to remove his fixtures before the expiration of his term and the extinguishment of his right of possession are not present when the old lease is immediately followed by a new lease and the tenants possession actually and rightfully has been continuous and without interruption; and since the reasons for the rule do not exist the rule itself ought not to exist."

See also *Rady v. McCurdy*, 209 Pa. 306, 58 At. 558 (1904); *Wright v. MacDonnell*, 88 Tex. 140, 30 S.W. 907 (1895); *Second Nat'l. Bank v. Merrill*, 34 N.W. 514 (Wis. 1887).

⁸*Penton v. Robart*, 2 East. 88 (1801); *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939 (1894); *Fenimore v. White*, 78 Neb. 520, 111 N.W. 204 (1907); *Talbot v. Cruger*, 151 N.Y. 117, 45 N.E. 364 (Ct. of A. 1896).

⁹*Davis v. Moss*, 38 Pa. St. 346 (1861):

"If a tenant remain in possession after the expiration of his term and performs all the conditions of the lease it amounts to a renewal of the lease from year to year, and he would be entitled to remove fixtures during the year and this doctrine is perfectly reasonable and applicable to other tenancies as it is to those from year to year which are implied from mere permissive holding over."

¹⁰39 Mich. 150, 33 Am. Rep. 362 (1878); criticized adversely in *Carlin v. Ritter*, 68 Md. 478, 13 At. 370 (1888):

"We are not able to discover anything 'absurd' in the rule laid down by the other authorities. If it was the intention of the parties in this or any other similar case that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect, and it seems to us reasonable to infer from the absence of such a clause that it was their intention that this right should no longer continue. It is also a rational inference, if not a presumption, that the parties understood what they were doing and what would be the legal construction and effect of the instrument they were executing. It is also to be noted that this was the first written lease between the parties, and is not simply a renewal of an old one upon

"But why the right should be lost when the tenant instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures, in the first place, are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal, 'If you will be at the expense and trouble and incur the loss of removing your erections during the term and of afterwards bringing them back again, they will be yours; otherwise you will be deemed to abandon them to your landlord.'"

Prior to the *Goerke Company* case there appears to have been but one decision in New Jersey, *Gerbert v. Trustees of the Congregation of the Sons of Abraham*,¹¹ which approached the problem. There the tenant had erected a synagogue during the first term. The lease provided for a renewal upon notice from the tenant to the landlord. Notice was given in due time. There was no written renewal lease. The original lease, by its terms, provided that title to all improvements should pass to the landlord at the expiration of the original term or upon expiration of the renewal term. The original lease also contained an option to purchase the demised premises. During the second term, the landlord died. The tenant sought to exercise its option to buy, but a conveyance could not be made because it appeared that the deceased landlord had but a life estate. This action was then brought for breach of covenant to convey. The sole issue was whether the tenant could recover the value of the improvements. The court in passing upon this issue was compelled to discuss the question of ownership of the fixtures. The answer to that question, of course, was contained in the express covenant passing title to the landlord. Nevertheless the court, by way of *dictum*, added that "the old common law rule was that 'if a tenant, at the end of his term, renews his lease, and thereby acquires a new interest in the premises, his right to remove improvements is forfeited unless he takes the precaution to reserve such right in the renewal lease.'"

The court in the *Goerke Company* case concedes, with reluctance, that this state may be committed to the "harsh rule of the common law," but proceeds to distinguish in this regard between structural and store fixtures, a distinction which was not raised in the *Gerbert* case.

the same terms and conditions. We neither know of, nor can recognize any 'public policy' which ought to induce the courts to place a different construction or give a different effect to a lease between landlord and tenant from that given to other contracts between other parties or to set aside a well-settled rule or principle of law, in order to promote the interests of either party thereto."

¹¹ 59 N.J.L. 160, 35 At. 1121 (E. & A. 1896). See also *Torrey v. Burnett*, 38 N.J.L. 457, 20 Am. Rep. 421 (E. & A. 1875).

Most of the authorities adopting the majority rule do so without any discussion of the type of trade fixtures to which the rule applies, and presumably regard all such fixtures as being within its range. New York, however, has recognized the distinction and has excepted store fixtures from the operation of the rule.¹² The application of this distinction is fraught with an uncertainty that is generally disfavored in the field of property law. Nevertheless, the opinion squares more closely with the expectations of both the landlord and tenant and represents a desirable limitation upon the product of an outworn fiction of the common law. It is certainly to be hoped that if the *dictum* of the *Gerbert* case is clothed with the halo of *stare decisis* it will be further circumscribed by decisions written in the vein of the *Goerke Company* opinion. Perhaps the ideal solution would be legislation permitting the removal of all fixtures, where there will be no substantial injury to the freehold, notwithstanding a renewal lease silent as to that right.

REMOVABILITY OF CHATTELS SOLD UNDER CONDITIONAL SALE AND AFFIXED TO REALTY—The body of the common law dealing with the problem of fixtures seems presently possessed of little but historic significance when dealing with a chattel sold under a conditional sale.¹ The Uniform Conditional Sales Act² is said to have abrogated the earlier common law principles.³

The pertinent provisions of the act are sections 5 and 7.⁴ Section 5 governs in all cases except those covered by section 7, which is intended

¹² *Smusch v. Kohn*, 49 N. Y. Supp. 176, 22 Misc. 344 (Sup. Ct. 1898), criticizes *Loughran v. Ross* (*supra* note 6) saying:

"The decision was based upon technical grounds but is not a case whose principle should be extended and that it would be a dangerous doctrine to hold that the ordinary movable store fixtures of a tenant pass to his landlord by the mere act of renewing the term."

See also *Devin v. Dougherty*, 27 How. P. (N.Y.) 455, where the tenant had built an awning in front of his shop, and it was held that reservation of the right to remove was not necessary.

¹ *Bank of America National Ass'n v. LaReine Hotel Corp.*, 108 N. J. Eq. 567, 156 Atl. 28 (Ch. 1931).

² P. L. 1919, p. 462, 2 C.S. Supp. (1911-1924) 3129.

³ Case cited note 1 *supra*; *G.M.A.C. v. Smith*, 101 N.J.L. 154, 127 Atl. 179 (E&A 1925).

⁴ Section 5 reads, "Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale."

Section 7 reads, "If the goods are so affixed to realty, at the time of a conditional sale or subsequently as to become part thereof, and not to be severable wholly or in any portion without material injury to the freehold, the reservation