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ing the risk of a loss, but the risk of a discovery. As pointed out above, this is hardly the full measure of what the employer intends to pay for.

Several remedies have been suggested in this field.²² However, these remedies serve only to give the insured cumulative liability and as seen above, he must have, not only separate coverage for each year, but a longer time in which to make discovery, in order to be completely covered. This desired coverage could be obtained, in the case of bank employees by the Commissioner of Banks, in so far as he is required to approve the form of the bond.²³ However, in the case of the ordinary employer, legislative action would be required in the form of a "stand-ard fidelity bond."

J. T. RENDLEMAN.

Landlord and Tenant—Trade Fixtures—Right of Lessee of Deceased Life Tenant to Remove

In *Haywood v. Briggs*,¹ the North Carolina Supreme Court held that the lessees of a deceased life tenant did not have the right as against the remaindermen to remove from the leased land two large tobacco warehouses erected thereon by the lessees pursuant to the terms of the lease which provided that all improvements, fixtures and property placed thereon were to remain the property of the lessees and were to be removable at the termination of said lease, but in which lease the remaindermen had not joined. The lessees based their claim to the right of removal on the right of a tenant to remove trade fixtures; and no claim was made on the basis of the right reserved in said lease which admittedly was not binding on the remaindermen, but which clearly indicated the intent of the parties thereto. In consideration of the uncertainty of the estate of the lessor, bond was given by the lessor to protect the peaceful possession of the lessees for the term; which bond was to become of full force and effect if the lessees were ousted during the term by reason of the death of the lessor or for any reason not the fault of the lessees. However, if the bond were enforced, the improvements were to become the property of the lessor. Although it was seven months after the death of the lessor when the right of removal was sought to be invoked, the lessees without having reached an agreement with the remaindermen were still in possession, having retained the use of the warehouses for a complete tobacco season.

Although it is somewhat difficult to conceive of large warehouses as

²² Note (1928) 27 MICH. L. REV. 442 suggests legislative action to prohibit use of aggregate liability clause; also suggests practical solution of bonding with a different surety each year to secure cumulative liability.

²³ N. C. GEN. STAT. (1943) §53-90.

¹ *Haywood v. Briggs et al.*, 227 N. C. 108, 41 S. E. (2d) 289 (1947).

removable fixtures,² yet the authorities seem to agree that the character of the structure, the size thereof, the material of which constructed, and the manner of attachment to the land are not to be considered in ascertaining whether it be a trade fixture.³ If it be placed on the land with the intent that it be for the purpose of trade, manufacture,⁴ or mixed trade and agriculture⁵ and that it should not become a part of the land,⁶

² Buildings which have been held removable: *Van Ness v. Pacard*, 2 Pet. (U. S.) 137 (1829) (two story building); *Kleinschmidt v. Brown*, 28 F. Supp. 86 (E. D. Ark. 1939) (C. C. C. Camp houses); *In re Montello Brick Works*, 163 Fed. 624 (E. D. Pa. 1908) (large factory and brick kilns); *Brown v. Reno Electric L. & P. Co.*, 55 Fed. 229 (C. C. Nev. 1893) (generating plant and building); *R. Barcraft & Sons v. Cullen*, 217 Cal. 708, 20 P. (2d) 665 (1933) (steel filling station); *Murr v. Coon*, 87 Cal. App. 478, 262 Pac. 768 (1927) (filling station); *Earle v. Kelly*, 21 Cal. App. 480, 132 Pac. 262 (1913) (livery stable); *Security L. & T. Co. v. Willimette Steam M. L. & M. Co.*, 99 Cal., 636, 34 Pac. 321 (1893) (office building); *Rare Metals M. & M. Co. v. Western Colo. Power Co.*, 73 Colo. 30, 213 Pac. 124 (1923) (large mill and reduction plant buildings); *Updegraff v. Lensem*, 15 Colo. App. 297, 62 Pac. 342 (1900) (mining shaft house); *Texas Co. v. Cason*, — Ga. App. —, 193 S. E. 898 (1937) (steel filling station); *Armour & Co. v. Block*, 147 Ga. 639, 95 S. E. 228 (1918) (large commercial smoke house); *Ray v. Young*, 160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947 (1913) (garage and repair shed); *Union Terminal Co. v. Wilmar & S. F. R.*, 116 Iowa 392, 90 N. W. 92 (1903) (large railroad repair shop); *Lawson v. Southern Fire Ins. Co.*, 137 Kan. 591, 21 P. (2d) 387 (1933) (large airplane hangar); *Farmer v. Golden Rule Oil Co.*, 130 Kan. 803, 287 Pac. 706 (1930) (filling station); *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254 (1833) (saw mill building); *Smith v. Whitney*, 147 Mass. 479, 18 N. E. 229 (1888) (engine house); *Ottney v. Taylor*, 308 Mich. 252, 13 N. W. (2d) 280 (1944) (filling station); *Biallas v. March*, 305 Mich. 401, 9 N. W. (2d) 655 (1943) (large dance hall); *Cameron v. Oakland County G. & O. Co.*, 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936) (filling station); *Waldaner v. Parks*, 141 Miss. 617, 106 So. 881 (1926) (stable and barn); *Zeigler v. Lexington C. & O. Co.*, 105 Miss. 820, 63 So. 220 (1913) (storage shed); *Idalia Realty & Dev. Co. v. Norman*, — Mo. App. —, 183 S. W. 348 (1916) (saw mill buildings); *King v. Morris*, 74 N. J. L. 810, 86 Atl. 162, 14 L. R. A. (N. S.) 439 (1913) (factory building); *Firth v. Rowe*, 53 N. J. Eq. 520, 32 Atl. 1064 (1895) (livery stable); *Interstate Lien Corp. v. Schmidt*, 180 Misc. 910, 44 N. Y. S. (2d) 709 (1943) (service station); *Carters' Wharf v. Valvoline Oil Co.*, 204 App. Div. 840, 196 N. Y. S. 815 (1922) (garage and two sheds); *Dubois v. Kelly*, 10 Barb. (N. Y.) 496 (1851) (storehouse and sheds for tavern); *Western N. C. R. v. Deal*, 90 N. C. 110 (1884) (railroad depot); *Wittenmeyer v. Board of Education*, 10 Ohio C. C. 119, 6 Ohio C. D. 258 (1895) (school building); *White's Appeal*, 10 Pa. 252 (1849) (engine house); *Couch v. Welsh*, 24 Utah 36, 66 Pac. 600 (1901) (boarding house); *Snow v. Snow*, 86 Vt. 58, 83 Atl. 269 (1912) (machine shop); *Welsh v. McDonald*, 64 Wash. 108, 116 Pac. 589 (1911) (saw mill buildings); *Shields v. Hanson*, 201 Wis. 349, 230 N. W. 51 (1930) (filling station); *Dougan v. H. J. Grell Co.*, 174 Wis. 17, 182 N. W. 350 (1921) (butter and cheese factory building).

³ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137 (1829); *Cameron v. Oakland County G. & O. Co.*, 277 Mich. 442, 269 N. W. 227, 107 A. L. R. 1142 (1936); *Western N. C. R. v. Deal*, 90 N. C. 110 (1884); *McClintock & I. Co. v. Aetna Explosive Co.*, 260 Pa. 191, 103 Atl. 622, Ann. Cas. 1918E 1078 (1918).

⁴ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137 (1829); *Ray v. Young*, 160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947 (1913); *Cameron v. Oakland County Oil & Gas Co.*, cited *supra* note 3; *Western N. C. R. v. Deal*, cited *supra* note 3; see *Belvin v. Paper Co.*, 123 N. C. 138, 31 S. E. 655 (1898); *Overman v. Sasser*, 107 N. C. 432, 12 S. E. 64 (1890); *Pemberton v. King*, 13 N. C. 376 (1884).

⁵ *Overman v. Sasser*, 107 N. C. 423, 12 S. E. 64 (1890); see *Van Ness v. Pacard*, 2 Pet. (U. S.) 137 (1829); *Western N. C. R. v. Deal*, cited *supra* note 3. Not agricultural alone: *McCullough v. Irvine*, 13 Pa. 438 (1850); *Elwes v. Mawe*, 3 East 38, 102 Eng. Rep. 510; see *Overman v. Sasser*, *supra*. *Contra*: *Waldauer v. Parks*, 141 Miss. 617, 106 So. 881 (1926).

⁶ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137 (1829); *Western N. C. R. v.*

and that it be designed for such purpose;⁷ it is a trade fixture and removable by the annexing party during the term of his right to possession,⁸ if such removal will not substantially injure the freehold.⁹

This rule is liberally and frequently invoked in favor of a tenant against his landlord,¹⁰ allowing the removal by the tenant of trade fixtures placed on the land by the tenant. It seems never to be invoked in favor of the personal representative of the owner of the land against said owner's heirs,¹¹ since the owner,¹² vendee,¹³ or mortgagor¹⁴ of the land seems conclusively presumed to intend that the annexation be a permanent improvement thereof. As between the personal representative or lessee of a tenant for life and the remaindermen, the rule has been invoked to allow the removal of trade fixtures by the personal representative¹⁵ or lessee.¹⁶ However, the decisions pertaining to this relationship of the parties are neither numerous nor in accord,¹⁷ each case being decided on its own facts with the courts looking more closely (but in favor of the personal representative or lessee)¹⁸ to those elements

Deal, cited *supra* note 3; Cameron v. Oakland County G. & O. Co., cited *supra* note 3; Standard Oil Co. v. LaCrosse Auto Service, 217 Wis. 237, 258 N. W. 791, 99 A. L. R. 60 (1935); see Overman v. Sasser, cited *supra* note 5; Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890); Moore v. Vallentine, 77 N. C. 188 (1877).

⁷ Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Cameron v. Oakland County G. & O. Co., cited *supra* note 3; see Western N. C. R. R. v. Deal, cited *supra* note 3.

⁸ Hughes v. Kershaw, 42 Colo. 210, 93 Pac. 1116, 15 L. R. A. (N. S.) 723 (1908); Bedlow v. N. Y. Floating Drydock Co., 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629 (1889); Causey v. Orton, 171 N. C. 375, 88 S. E. 513 (1916); Pemberton v. King, 13 N. C. 376 (1828); see Spring v. Refining Co., 205 N. C. 444, 171 S. E. 635 (1933); Western N. C. R. R. v. Deal, cited *supra* note 3.

⁹ Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Ray v. Young, 160 Iowa 613, 142 N. W. 393, 42 L. R. A. (N. S.) 947, Ann. Cas. 1915D 258 (1913); Frost v. Schenkel, 121 Neb. 784, 238 N. W. 659 77 A. L. R. 1381 (1931); Pennington v. Black, 261 Ky. 728, 88 S. W. (2d) 969 (1935); Olympia Lodge v. Keller, 142 Wash. 93, 252 Pac. 121 (1927). In general see 22 AM. JUR. FIXTURES §61; 36 C. J. S. FIXTURES §38; I MORDECAI'S LAW LECTURES (2d ed. 1916) 475; TIFFANY, REAL PROPERTY (3d ed. 1939) §617; AMOS AND FERARD, FIXTURES (2d ed. 1855) 123.

¹⁰ Causey v. Orton, cited *supra* note 8; Overman v. Sasser, cited *supra* note 5; Western N. C. R. R. v. Deal, cited *supra* note 3; Pemberton v. King, cited *supra* note 8; see note 2 *supra*.

¹¹ See Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Johnson v. Wiseman, 4 Met. (Ky.) 357, 83 Am. Dec. 475 (1863); Overman v. Sasser, cited *supra* note 5; Kittredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393 (1826).

¹² Jenkins v. Floyd, 199 N. C. 470, 154 S. E. 733 (1930); Best v. Hardy, 123 N. C. 226, 31 S. E. 391 (1899); Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890); Bond v. Coke, 71 N. C. 97 (1890); see Overman v. Sasser, cited *supra* note 5.

¹³ Moore v. Vallentine, 77 N. C. 188 (1872).

¹⁴ Brown v. N. C. Joint Stock Land Bank, 213 N. C. 594, 191 S. E. 141 (1938); Foote v. Gooch, 96 N. C. 265, 1 S. E. 525 (1887).

¹⁵ Overman v. Sasser, cited *supra* note 5.

¹⁶ Ray v. Young, cited *supra* note 9.

¹⁷ Allowing removal: Ray v. Young, cited *supra* note 9; Overman v. Sasser, cited *supra* note 5. Denying removal: White v. Arndt, 1 Whart. (Pa.) 91 (1836); Cannon v. Hare, 1 Tenn. Ch. 22 (1872).

¹⁸ Overman v. Sasser, cited *supra* note 5; see Van Ness v. Pacard, 2 Pet. (U. S.) 137 (1829); Elwes v. Mawe, 3 East 38, 102 Eng. Rep. 510.

which would deny removal—i.e., the use of the erection for trade purposes, the exercise of the right of removal during the term, and the resulting damage to the freehold occasioned by the removal thereof. The instant case falls within this class, and the scope of this note is limited thereto.

It is clear that if the fixture be other than for the purpose of trade, the right of removal, therefore, depending solely on the right to remove reserved in the contract with the life tenant, would not be enforceable against the remaindermen who have not joined in the contract.¹⁹ In the instant case the court,²⁰ conceding that the buildings in question could under the above rules be regarded as trade fixtures, said that the right of removal existing in such event would have to be exercised during the term and before the death of the lessor, and was not now enforceable against the remaindermen who by the operation of the law of property were entitled as of the death of the tenant for life to the land and all annexations which had become a part thereof. The previous North Carolina decisions, however, would seem to indicate that trade fixtures do not in contemplation of law become a part of the realty but remain the personal property of the annexing party, and would not, therefore, pass with the land.²¹

The only previous case in the aforesaid class, *Overman v. Sasser*,²² granted to the personal representative of a deceased life tenant by curtesy a reasonable time after the termination of the estate to remove trade fixtures placed on the land by the life tenant. The court further indicated²³ that the right to remove within a reasonable time existed whenever the duration of the particular estate or the term of a lease was uncertain and not fixed. The authorities elsewhere which deny the lessee of a life tenant the right to remove within a reasonable time trade fixtures put upon the land by the lessee, do so on the basis that the lessee has no greater rights than the lessor life tenant who does not have the right of removal through his personal representative.²⁴ It would seem to follow, applying such reasoning, that where the tenant for life through his personal representative has the right to remove trade fixtures within a reasonable time after the termination of the estate, such right would

¹⁹ *Demby v. Parse*, 53 Ark. 526, 14 S. W. 899 (1890) (dwelling house); *Hafflick v. Stober*, 11 Ohio St. 482 (1860) (agricultural fixtures); *Jones v. Shuffin*, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848 (1898) (rental building).

²⁰ *Haywood v. Briggs et al.*, 227 N. C. 108, 111, 41 S. E. (2d) 289, 292 (1947).

²¹ *Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253 (1896); see *Spring v. Refining Co.*, 205 N. C. 444, 171 S. E. 635 (1933); *Belvin v. Paper Co.*, 123 N. C. 138, 31 S. E. 655 (1898); *Western N. C. R. R. v. Deal*, cited *supra* note 3; *Moore v. Vallentine*, cited *supra* note 13. *Contra: Ex parte Makepeace*, 31 N. C. 91 (1848) (within meaning of tax act); *Pemberton v. King*, cited *supra* note 8 (part of realty until severed).

²² *Overman v. Sasser*, cited *supra* note 5.

²³ *Id.* at 437, 12 S. E. at 66.

²⁴ *White v. Arndt*, cited *supra* note 17; *Cannon v. Hare*, cited *supra* note 17.

be granted a lessee who, by contract binding upon the tenant for life and his estate, has the rights of the lessor.

The nature and size of the trade fixtures in the instant case, and the acts of the lessees in retaining possession and use of the warehouse for the next complete tobacco season following the death of their lessor and in providing for a remedy through the lessor's bond conditioned upon the exact contingency which occurred, undoubtedly had their effect upon the decision. Whether the absence of these elements would have altered the result would be mere speculation.

The impact of the instant case upon the previous existing law is difficult to ascertain since the court did not discuss the former case of *Overman v. Sasser*.²⁵ It is clear, however, that the court did not hold that the warehouses in question were not trade fixtures. The result would seem to be that the personal representative of a tenant for life has as against the remaindermen the right to remove trade fixtures placed on the land by the tenant for life within a reasonable time after the termination of the life estate;²⁶ but the lessee of such tenant for life has as against the remaindermen the right to remove trade fixtures placed on the land by the lessee only during the term of the lease.²⁷

LOUIS J. POISSON, JR.

Taxation—Capital Gains and Losses—Sale of Life Interest in Testamentary Trust

Testator's will set up a trust fund of \$100,000, the income of which was to be paid to his son, *A*, for life, and upon *A*'s death without issue, to *A*'s wife, *B*, for her life, and upon her death the residue was to go to the testator's wife, *C*, and to his other son, *D*, thus terminating the trust. The testator died in 1926 and his widow died in 1935. *A* died without issue in 1937. His widow, *B*, found his assets insufficient to pay the debts of his estate. She had only corporate stock which was then unsaleable at a fair market price. Testator's will and codicil contained provisions which clearly indicated that he did not desire the life beneficiaries to dispose of their interests. To end "extended family litigation" and to obtain the necessary funds, *B* petitioned the New Jersey Court of Chancery to end the trust. In the petition, she stipulated that she would release all interest in the trust and consent to its termination in consideration of a payment to her of \$55,000 by *D*, the remainderman, and his promise to purchase her stock for a specified amount. (The stock purchase does not otherwise figure in the case.) The parties consented and the court so decreed. In her 1940 income tax return, *B* re-

²⁵ *Overman v. Sasser*, cited *supra* note 5.

²⁶ *Id.*

²⁷ *Haywood v. Briggs et al.*, cited *supra* note 20.