6-2021

Fixtures, mortgages and retention of title clauses

Alvin W-L See
Singapore Management University, alvinsee@smu.edu.sg

The published version of this article is available in the journal Conveyancer and Property Lawyer. See, A. (2021). Fixtures, mortgages and retention of title clauses. Conveyancer and Property Lawyer, 85, 167-182.

Fixtures, Mortgages and Retention of Title Clauses

Alvin W-L See[*]

Introduction

When supplying goods on credit, whether by way of sale or hire-purchase, it is common for suppliers to include in the agreement a retention of title clause. This would normally be sufficient to protect an unpaid supplier in the event of the recipient's insolvency. However, this safeguard is mostly ineffective where the goods have been affixed to the recipient's land so as to become fixtures. In many cases, the land would already have been encumbered by a mortgage with an after-acquired property clause, pursuant to which the mortgagee is entitled, upon the mortgagor's default, to sell the land together with any subsequently added fixtures for the recovery of the outstanding debt. The retention of title clause loses its bite because its subject matter, the goods as chattels, have ceased to exist. Therefore, in a competition between a supplier and a mortgagee, the dispute invariably boils down to whether the goods remain as chattels or have become fixtures. This brings the law on fixtures into the spotlight in a commercial context.

Originally premised on the Latin maxim *quicquid plantatur solo, solo cedit* (whatever is affixed to the ground becomes part of it), the doctrine of fixtures is now embodied in the two-stage test laid down by Blackburn J in *Holland v Hodgson*, which requires the consideration of both the degree and purpose of annexation.[1] This two-stage test is traceable to a series of judicial developments during the mid-1800s which resulted in the deviation of the doctrine from its original form in two important ways. First, an item affixed to the land can become a fixture even if it can be removed without causing injury to the land. Secondly, significantly greater emphasis is now placed on the purpose of annexation, which requires consideration of whether the affixed item serves to permanently improve the land. The net effect of these developments is that the law on fixtures underwent a significant expansion in scope, as items that are not irreversibly affixed to the land may now be found to be fixtures as long as they serve to permanently improve the land.

It is obvious how this expansion of the doctrine is an obstacle to the supplier's reliance on the retention of title clause. Most of these disputes involve valuable machinery or equipment, which are required to be affixed to the land for their

[*] Associate Professor of Law, Singapore Management University. I'm grateful to Catharine MacMillan, Tham Chee Ho, Yeo Tiong Min, Paul Lejot, Malcolm Merry, Kelvin Low, Yip Man, Carrie Ding, Zhang Wei and Edward Ti for their helpful comments on my earlier drafts. All errors are my own.

[1] *Holland v Hodgson* (1872) L.R. 7 C.P. 328.

proper operation. As such items have been routinely held to be fixtures since the mid-1800s, they fall outside of the scope of the retention of title clause and instead pass under the mortgage as part of the land. In a competition between a supplier and a mortgagee, the latter invariably wins. This was the outcome in the landmark case of *Hobson v Gorringe*.[2] When the issue again arose for consideration by the House of Lords in *Reynolds v Ashby & Son*, which involved very similar facts, the court upheld the earlier case, preferring to maintain the status quo to avoid disruption to established commercial practices.[3] However, both Earl of Halsbury LC and Lord Macnaghten expressed their dissatisfaction in having to arrive at this conclusion.[4] Indeed, it seems unfair that the mortgagee was allowed to gain a windfall at the supplier's expense. Recognising the problem, there have been subsequent judicial attempts to avoid the unfair outcome but with limited success due to the narrow scope of these solutions. Nonetheless, it is undeniable that this is a recognised problem awaiting a solution.[5] The modest goal of this article is to establish a compelling case for the reconsideration of the existing law.[6]

The following discussion proceeds in three parts. Focusing on the supplier's predicament, the next part explains why the intention to retain title is irrelevant in the characterisation of an affixed item as a chattel or a fixture, and why the supplier has no realistic way of protecting itself, even with the use of formal security devices. The source of the problem is the overly broad definition of a fixture, which led to the usurpation of the subject matter of the retention of title clause by the mortgage of land. The following part traces the root of this problem to a series of cases in the mid-1800s and explains the likely motivation for the expansion of the law on fixtures. By showing that the law on fixtures is neither abstract nor static, and may develop in response to commercial considerations, a foundation is laid for challenging the prevailing law by introducing other relevant considerations into the debate. Building upon this historical analysis, the final part argues that the original impetus for the doctrine's transformation, which was to allow lenders to take future assets as securities, has lost its relevance as the same outcome can now be achieved with the use of company charges and in a less overpowering manner. In light of this development, a straightforward solution to the supplier's predicament is to revert the law on fixtures to its originally narrow form. In short, an item affixed to the land does not become a fixture if it can be removed without injuring the land. Addressing the concern of the House of Lords in *Reynolds v Ashby & Son*, attempt is made to show why this solution will neither significantly prejudice the mortgagee nor unsettle other related aspects of commercial law and practice.

[2] *Hobson v Gorringe* [1897] 1 Ch. 182.

[3] *Reynolds v Ashby & Son* [1904] A.C. 466 HL.

[4] *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 470.

[5] For expressions of sympathy for the supplier, see also "Comments on cases" (1905) 118 L.T. 265, 266; "Mortgages of fixtures attached to freeholds" (1905) 40 L.J. 171, 172; H. N. Bennett and C. J. Davis, "Fixtures, purchase money security interests and dispositions of interests in land" (1994) 110 L.Q.R. 448.

[6] Although the issue has not been revisited by a UK court since 1904, it has arisen in more recent times for judicial consideration in other major Commonwealth jurisdictions. See generally D. Cooper, "Retaining Title to Fixtures" (1991) 6 Auckland U. L. Rev. 477; L. Griggs, "The doctrine of fixtures: questionable origin, debatable history, and a future that is past!" (2001) 9 A.P.L.J. 51.

The supplier's predicament

The irrelevance of intention to retain title

The landmark case, *Hobson v Gorringe*, concerned the supply of an 11-horsepower Stockport gas engine on a hire-purchase agreement.[7] The agreement expressly provided that title would not pass to the hirer until full payment had been made and that the supplier would be entitled, upon any default by the hirer, to retrieve the engine. The supplier was aware that the engine was to be used to drive the hirer's sawmill and therefore had to be affixed to the land. After delivery, the engine was secured onto a concrete bed by iron bolts and nuts to prevent it from rocking and shifting during operation. However, it could be removed without causing injury to the land. About ten months earlier, the land had been mortgaged to secure a debt, which was then still outstanding. When the hirer became insolvent, the mortgagee took possession of the land together with the engine. The Court of Appeal held that the engine became a fixture and therefore passed under the mortgage as part of the land.

Of interest here is the supplier's argument that the engine remained a chattel by reason of the retention of title clause. Reliance was placed on Blackburn J's statement in *Holland v Hodgson* that "an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue [as] a chattel".[8] This argument was rejected by the Court of Appeal. Smith LJ, delivering the judgment of the court, expressed doubt that such an intention was relevant to the characterisation of the engine as a chattel or a fixture. Instead, he understood Blackburn J as referring to circumstances that were "patent for all to see" as opposed to those that were "unknown to either a vendee or mortgagee in fee of land".[9] On the facts, however, the supplier's intention could not have been more clearly manifested. In addition to the express contractual term, the gas engine was delivered with an attached hire plate stating that the supplier was the owner. Despite the questionable treatment of the facts, the decision clearly laid down the proposition that an intention to retain title cannot prevent an item affixed to the land from being classified as a fixture.

At that time, however, the correctness of this proposition was subject to doubt in light of the earlier House of Lords decision in *McEntire v Crossley Brothers Ltd*.[10] While commercial lawyers would recognise this as the earliest judicial pronouncement on the efficacy of a retention of title clause, less attention has been paid to the fact that the case also concerned the affixation of machinery to land, thereby raising the same kind of concern as in *Hobson v Gorringe*. The dispute was over a 14-horsepower Otto gas engine, which was supplied to a cooper subject to the usual hire-purchase terms. When the cooper became bankrupt, the engine was seized by his assignee in bankruptcy. The House of Lords held that the supplier was entitled to recover the engine by virtue of the retention of title clause. However, as the report was silent on the degree to which the engine was affixed to the land,

[7] *Hobson v Gorringe* [1897] 1 Ch. 182.
[8] *Holland v Hodgson* (1872) L.R. 7 C.P. 328 at 335.
[9] *Hobson v Gorringe* [1897] 1 Ch. 182 at 193.
[10] *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 HL.

the principle to be derived from the case is not entirely clear. There are two possibilities: first, the retention of title clause was effective because the engine did not become a fixture; or secondly, the retention of title clause was effective notwithstanding that the engine became a fixture. As the old Crossley catalogues showed that their gas engines of that time period were mostly secured to the ground in roughly the same manner as described in *Hobson v Gorringe*, and assuming that the House of Lords was aware of the several earlier cases deciding that such an equipment becomes a fixture,[11] then the principle to be derived from *McEntire v Crossley Brothers Ltd* is that a retention of title clause has the effect of preventing the engine from becoming a fixture.[12]

Curiously, when the issue was revisited in *Reynolds v Ashby & Son*,[13] the House of Lords upheld *Hobson v Gorringe*[14] without addressing its earlier decision in *McEntire v Crossley Brothers Ltd*.[15] On roughly similar facts as those in *Hobson v Gorringe*, the court placed particular emphasis on the supplier's awareness that the machines were to be affixed to the hirer's land. As Lord Lindley explained:

> "The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels … The [supplier] knew that the factory was mortgaged, and ran the risk of the machines being claimed as fixtures. In effect, [the hirer] was authorized by the [supplier] to convert the chattels into fixtures, subject to the right of the [supplier] to enter and retake them if [the hirer] did not pay for them."[16]

One way of understanding this is that the supplier was taken to have waived the condition that title would pass to the hirer only upon full payment of the purchase price.[17] However, this is premised on the assumption that the affixation would not result in the machines becoming fixtures. Contrary to this, Lord Lindley stressed that the outcome would have been the same even without the relevant knowledge and authorisation. This was because, as a matter of law, the machines had ceased to be chattels upon their affixation to the land.[18] Therefore, the principle to be derived from *Reynolds v Ashby & Son* is that an intention to retain title is irrelevant in characterising an item as a chattel or a fixture. This was an implied departure from *McEntire v Crossley Brothers Ltd*.[19]

The issue of intention was revisited about a century later by the House of Lords on two other occasions. Although the contexts were different, the irrelevance of the supplier's intention was more thoroughly addressed and placed beyond doubt. In *Melluish v BMI (No.3) Ltd*, Lord Browne-Wilkinson, with whom the other judges concurred, treated *Hobson v Gorringe* as having laid down the following proposition:

[11] See below.
[12] The earlier cases referred to below did not involve a retention of title clause.
[13] *Reynolds v Ashby & Son* [1904] A.C. 466 HL.
[14] *Hobson v Gorringe* [1897] 1 Ch. 182.
[15] *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 HL.
[16] *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 HL at 475.
[17] Alternatively, as suggested in Earl of Halsbury LC's judgment, the authorisation contradicted the right of removal provided in the contract such that the term was regarded as non-existent: *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 470.
[18] *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 472 (Lord James); 475 (Lord Lindley).
[19] *McEntire v Crossley Brothers Ltd* [1895] A.C. 457 HL.

> "[T]he intention of the parties as to the ownership of the chattel fixed to the land is only material so far as such intention can be presumed from the degree and object of the annexation. The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil."[20]

One year later, this proposition was affirmed by the same court in *Elitestone Ltd v Morris*, where Lord Lloyd of Berwick added:

> "The subjective intention of the parties cannot affect the question whether the chattel has, in law, become part of the freehold, any more than the subjective intention of the parties can prevent what they have called a licence from taking effect as a tenancy, if that is what in law it is: see *Street v Mountford* [1985] A.C. 809."[21]

In other words, if the equipment has improved or maximised the use of the land, for example by enhancing its usefulness as a factory, it becomes a fixture regardless of any express intention that it should remain a chattel. Lord Lloyd's reference to *Street v Mountford* suggests a close analogy with the distinction between leases and licences. On a careful reading of that case, however, it is clear that Lord Templeman did not regard intention as irrelevant in determining whether an agreement created a lease or a licence. The proposition was simply that "[i]f the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence".[22] Intention is clearly relevant. The point is that, in the search for the objective intention, the court should focus not on the label but on the substance of the agreement.[23]

Nonetheless, *Street v Mountford* is helpful in shedding light, albeit indirectly, on why intention to retain title is irrelevant in the characterisation of an item as a chattel or a fixture. As leases and licences both arise from contracts, it is obviously relevant to ask which of the two interests was intended by the parties. The same can be said of a voluntary transfer, for example of a chattel, where it would be relevant to ask whether the owner did or did not intend for the title to pass. Conceptually, however, the finding that something has become a fixture does not entail the *passing* of title from the chattel owner to the landowner. Rather, the item loses its identity as a chattel and becomes part of the land. In this process, although the chattel owner loses title, the landowner does not gain any new title. The original title of the landowner simply extends to the now physically enlarged land. As this occurs by operation of law and not by voluntary transfer, we are necessarily dealing with a threshold question: at what point can we say that the affixed item has lost its identity as a chattel? This concept is best illustrated by the doctrine of fixture in its original form, where the emphasis was on the degree of annexation. The subsequent introduction of the purpose of annexation inquiry muddles the point as whether an affixed item serves to improve the land necessarily depends on how

[20] *Melluish v BMI (No.3) Ltd* [1996] A.C. 454 HL at 473; [1995] 3 W.L.R. 630.
[21] *Elitestone Ltd v Morris* [1997] 1 W.L.R. 687 HL at 693; [1997] 2 All E.R. 513.
[22] *Street v Mountford* [1985] A.C. 809 HL at 819; [1985] 2 W.L.R. 877.
[23] *Street v Mountford* [1985] 1 A.C. 809 HL at 826.

the land is being used, which in turn is determined by the landowner's intention. Even so, this is quite different from an intention relating to the characterisation of the affixed item as a chattel or as a fixture.

It is clear that the supplier's intention to retain title has been a distraction to the present debate. The truth is that the supplier would have encountered the same problem even before the purpose of annexation inquiry became relevant in defining a fixture.[24] With the distraction out of the way, the true obstacles to the supplier's claim can now be more clearly examined.

Solutions for the supplier?

Once an affixed item becomes a fixture, the retention of title clause loses its bite for a simple reason. Its subject matter, the item as a chattel, ceases to exist as it becomes amalgamated with the land. The same problem confronts a supplier who sells outright without relying on a retention of title clause but on the condition that the purchaser simultaneously grants a security interest over the supplied item, whether in the form of a bill of sale or a company charge. Like the retention of title clause, the efficacy of these formal security interests is similarly premised on the continued existence of the item as a chattel.

Recognising the problem, the courts have attempted to safeguard the supplier's interest through innovative means, specifically by focusing on the supplier's right to remove the supplied item from the purchaser's land.[25] Even if the land is mortgaged, so long as the removal is carried out when the purchaser is in possession, the supplier's right has been upheld against the mortgagee on the basis that the latter, in allowing the purchaser-borrower to remain in possession, can be taken to have implicitly consented to the removal.[26] However, the strength of the supplier's interest is only put to the test in a case where the mortgagee has taken possession of the land and refuses to allow the supplier to remove the fixture.[27] Traditionally, the right of removal is treated as a matter of contract between the supplier and the purchaser, and therefore not binding on the mortgagee, who is a third party.[28] However, in *Re Morrison, Jones & Taylor Ltd*, the Court of Appeal held that the supplier's right to enter the land and remove the affixed item amounted to an equitable interest in land which is capable of binding third parties.[29] In that case, the annexation of a fire sprinkler to the factory preceded the granting of a floating charge over the building. Applying the priority rules, the supplier's equitable interest prevailed over the floating charge for being first in time. The ingenuity of this solution is to locate the supplier's right in the land and not in the chattel. This avoids the problem of the supplied item losing its identity as a chattel upon its affixation to the land.

[24] See the cases discussed below.

[25] Upon severance, the fixture would revert to a chattel: *Gough v Wood & Co* [1894] 1 Q.B. 713.

[26] *Gough v Wood & Co* [1894] 1 Q.B. 713. cf. *Ellis v Glover & Hobson Ltd* [1908] 1 K.B. 388 (where the mortgage agreement expressly prohibited removal).

[27] Although the supplier's right of removal is analogous to a tenant's right to remove his or her fixtures, a tenant is in a better position simply because he or she is usually in possession of the land and hence can easily effect severance. For this reason, the literature on tenant's fixtures is of no significant assistance to the supplier.

[28] *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 475 (Lord Lindley); *Hobson v Gorringe* [1897] 1 Ch. 182 at 192; *Gough v Wood & Co* [1894] 1 Q.B. 713 at 722.

[29] *Re Morrison, Jones & Taylor Ltd* [1914] 1 Ch. 50; affirming *Re Samuel Allen & Sons* [1907] 1 Ch. 575. Although the court did not explicitly say so, this is akin to a *profit à prendre*.

However, there are significant limitations to this solution. Both Cozens-Hardy MR and Swinfen Eady LJ conceded that had the subsequently created security been a legal mortgage, and the mortgagee had no notice of the supplier's equitable interest, the legal mortgage would have prevailed.[30] Moreover, today, the question of priority cannot be answered without considering the relevant legislation.[31] Insofar as unregistered land is concerned, the supplier is unlikely to be able to gain priority because the possibility of the supplier's interest amounting to an equitable easement, and hence capable of being protected as a Class D(iii) land charge,[32] has been met with doubt.[33] In the case of registered land, however, the supplier may protect its interest against a subsequently created legal or registered mortgage by entering a notice on the charges register of the relevant land.[34]

But even focusing on registered land, where the safeguard afforded to the supplier appears to be stronger, it is important to appreciate that the issue of priority is not always as straightforward as it might appear to be. The truth is that the existing safeguard—the entering of a notice—would be ineffective in a vast number of cases: where the land is subject to an pre-existing mortgage. Even without explicitly setting out an after-acquired property clause, it has been recognised, as early as 1835, that a pre-existing mortgage of land is capable of capturing subsequently added fixtures.[35] In such cases, the mortgagee's interest in the subsequently added fixtures is treated as having arisen at the time the mortgage was created, not when the fixture was added. The simple explanation is that, although the mortgage appears to capture a *future* asset, conceptually it is more accurately understood as an instance of the land being enlarged by the subsequent addition. The subject matter of the mortgage has all along been the land, which existed at the very outset. In contrast, if the supplier's interest is not in the supplied item but in the land, then the earliest it can arise will be at the time of annexation, when the item becomes a fixture and hence part of the land. Applying the priority rules, the mortgage, being earlier in time, prevails. This is consistent[36] with the outcome in both *Hobson v Gorringe* and *Reynolds v Ashby & Son* where the mortgage of land preceded the annexation of the machines to the land. Importantly, the status of the supplier's interest cannot be elevated, even by the entering of a notice, because it serves only to preserve the priority of an unregistered interest vis-à-vis a *subsequently* registered disposition.[37]

In summary, the supplier faces insurmountable obstacles in the attempt to protect itself against the purchaser's non-payment and insolvency. One might suggest that suppliers should simply refrain from supplying goods on credit if it is known that the purchaser or hirer intends to affix them to their land. However, few would deny that the supply of goods on credit has an important place in commerce. Even

[30] *Re Morrison, Jones & Taylor Ltd* [1914] 1 Ch. 50 at 59–60.

[31] See A. G. Guest and J. Lever, "Hire-purchase, equipment leases and fixtures" (1963) 27 Conv. (N.S.) 30; G. McCormack, "Hire-purchase, reservation of title and fixtures" [1990] Conv. 275, 280–287; H. N. Bennett and C. J. Davis, "Fixtures, purchase money security interests and dispositions of interests in land" (1994) 110 L.Q.R. 448, 473–478.

[32] Land Charges Act 1972 s.2(5).

[33] *Poster v Slough Estates Ltd* [1969] 1 Ch. 495; [1968] 1 W.L.R. 1515 at 1520–1521; A. G. Guest and J. Lever, "Hire-purchase, equipment leases and fixtures" (1963) 27 Conv. (N.S.) 30 at 43; S. Bridge, E. Cooke and M. Dixon, *Megarry & Wade: The Law of Real Property*, 9th edn (London: Sweet & Maxwell, 2019), pp.1030–1031.

[34] Land Registration Act 2002 s.32(1).

[35] *Ex p. Belcher* (1835) 2 Mont. & Ayr. 160.

[36] In this respect, the priority rules applicable to both registered and unregistered land do not differ.

[37] Land Registration Act 2002 s.32(3).

without the relevant empirical data, it is reasonable to expect these obstacles to have some chilling effect. Rather than telling suppliers to accept and play within the existing rules, a more constructive response would be to examine if there are indeed compelling reasons for favouring the mortgagee at the supplier's expense. In this regard, a historical analysis of the cases sheds important light on the original motivation for expanding the law on fixtures and whether this motivation remains relevant today.

The doctrine's transformation

The doctrine of fixtures traces its roots to the principle of accession (*accessio*) under Roman law, pursuant to which a minor item that is inseparably incorporated into a principal item is subsumed within the latter.[38] The emphasis on inseparable incorporation applies whether or not the principal item was land.[39] Curiously, although the same account of *accessio* was adopted in Bracton's treatise of English law,[40] the applicable rules today clearly differ depending on whether the principal item is land or chattel.[41]

Insofar as the amalgamation of chattels is concerned, the minor item loses its identity only if it has become irreversibly mixed and processed into a new item.[42] Where, however, the minor item can be retrieved and reverted to its original form, it does not lose its original identity, even if the process involves significant effort. In *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd*, the plaintiff supplied the defendant with several diesel engines subject to a retention of title clause.[43] The engines themselves were not physically altered and could be disconnected from the generating sets. Although the detachment would have taken several hours for each engine, Staughton J held that the plaintiff had successfully retained title to the engines, which implied that they had never lost their identity as chattels. The plaintiff's knowledge that the engines were to be incorporated into diesel generating sets did not appear to be relevant. Despite its apparent inconsistency with *Hobson v Gorringe* and *Reynolds v Ashby & Son*, *Hendy Lennox* has never been doubted as good law.[44] The opposite outcomes can only be attributed to the different thresholds for finding that accession has occurred.

Interestingly, two centuries earlier, the law on fixtures was not so different from the general principle of accession. In the first treatise on this topic published in 1827, Amos and Ferard observed that "to constitute a fixture there must be a

[38] *Wake v Hall* (1883) 8 App. Cas. 195 HL at 206–207 (Lord Watson); *Elitestone Ltd v Morris* [1997] 1 W.L.R. 687 HL at 695 (Lord Clyde); | [1997] 2 All E.R. 513. See also M. Haley, "The law of fixtures: an unprincipled metamorphosis?" [1998] Conv. 137; P. Luther, "Fixtures and chattels: A question of more or less …" (2004) 24 O.J.L.S. 597, 598–600.

[39] e.g. the Romans illustrated the principle using various examples, such as building on land and writing on paper. See Gaius, *Institutes* 2, [73]–[78]; Justinian, *Institutes*, [2.1.29]–[2.1.34]; *Digest of Justinian*, [41.1.7] (Gaius).

[40] H. Bracton, *De Legibus et Confuetudinibus Angliæ (Of Laws and Customs of England)*, Vol.2pp.45–46. According to Blackstone, this formed the foundation of the common law of accession: W. Blackstone, *Commentaries on the Laws of England*, Book II (Oxford: Clarendon Press, 1773), p.404. See also F. W. Maitland (ed), *Selected Passages from the Works of Bracton and Azo* (London: Bernard Quaritch, 1895), pp.117–123.

[41] The two sets of rules are commonly dealt with in different books.

[42] See, e.g. *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25; [1979] 3 W.L.R. 672 (resin into chipboard); *Re Bond Worth* [1980] Ch. 228; [1979] 3 W.L.R. 629 (yarn into carpet); *Re Peachdart* [1984] Ch. 131; [1983] 3 W.L.R. 878 (leather into handbag).

[43] *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485; [1984] 2 All E.R. 152.

[44] See M. Bridge (ed), *Benjamin's Sale of Goods*, 10th edn (London: Sweet & Maxwell, 2017), pp.294–296; E. McKendrick (ed), *Sale of Goods* (Oxford: Informa Law, 2014), p.169.

complete annexation to the soil".[45] There was also no lack of cases where the equipment, although firmly affixed to the land, was held to remain a chattel because it could be removed without damaging the land.[46] The transformation of the doctrine of fixtures from narrow to broad is traceable to a series of underexplored cases beginning the 1840s. In *Ex p. Reynal*, one of the earliest of such cases, Mr Commissioner Holroyd held that several items affixed to the land, including a steam engine and a saw mill, were fixtures and therefore passed under the mortgage, even though the evidence showed that they could be removed without causing injury to the land.[47] As the purpose of annexation inquiry had yet to formally emerge in the cases of this period, this is better understood as a case where the degree of annexation required to find a fixture was relaxed.[48]

What the existing literature does not tell us is why the law on fixtures underwent this expansion in scope. In asking this question, it is reasonable to assume that, for the most part, the law does not change direction for no reason. The fact that almost all of the relevant cases concerned a dispute over a steam engine (among other industrial equipment) hints at a correlation between the legal development and the first Industrial Revolution.[49] Although the mechanisation of the manufacturing industry using the steam engine had become widespread at the turn of the nineteenth century,[50] by one estimation, the ratio of fixed to working capital saw a noticeable surge only after the 1830s, which led to a higher demand for credit.[51] One possibility, therefore, is that the transformation of the doctrine of fixtures was motivated by the desire to meet the financing needs of industrialists who were eager to capitalise on the economic growth. The goal was achieved by enlarging the category of assets that could be offered by borrowers, and taken by lenders, as security without affecting industrial operations.

Aside from land, the borrower's assets often consisted of valuable chattels such as industrial equipment and raw materials. However, the then primitive law of chattel mortgage saddled its users with several legal obstacles. In the first place, there were doubts as to whether a chattel mortgage could be validly created without the lender's taking possession of the chattel.[52] Even if this were possible,[53] there

[45] A. Amos and J. Ferard, *Treatise on the Law of Fixtures* (London: Joseph Butterworth and Son, 1827), p.5. See also S. G. Grady, *The Law of Fixtures, with reference to Real Property and Chattels of a Personal Nature* (London: Owen Richards, 1845), pp.5–8.

[46] *Davis v Jones* 106 E.R. 327; (1817) 2 Bar. & Ald. 165; *Trappes v Harter* 149 E.R. 712; (1833) 2 Cr. & M. 153. Similarly, in *Hubbard v Bagshaw* 58 E.R. 122; (1831) 4 Sim. 326, the steam engine was held to be a fixture as there was evidence that the complete removal of the steam engine and its attachments would damage and weaken the building.

[47] *Ex p. Reynal* (1841) 2 Mont. D. & De. G. 443. See also Ex p. Price (1842) 2 Mont. D. & De. G. 518.

[48] As recently as 1845, the courts decided this issue mainly by focusing on the degree of annexation. See, e.g. *Fisher v Dixon* 8 E.R. 1426; (1845) 12 Cl. & F. 312 at 325–326, where Lord Brougham said: "if a cider-mill be fixed to the soil … it is perfectly immaterial whether it is for the purpose of manufactory … It is a fixture on the soil, and it becomes part of the soil". See also discussion of the case by P. Luther, "Fixtures and chattels: A question of more or less …" (2004) 24 O.J.L.S. 597, 605.

[49] See *Ex p. Reynal* (1841) 2 Mont. D. & De. G. 443; *Ex p. Broadward* (1841) 1 Mont. D. & De. G. 631; *Ex p. Price* (1842) 2 Mont. D. & De. G. 518; *Mather v Fraser* 69 E.R. 895; (1856) 2 Kay & J. 536; *Walmsley v Milne* 141 E.R. 759; (1859) 7 C.B. (N.S.) 11; *Boyd v Shorrock* (1867) L.R. 5 Eq. 72; *Climie v Wood* (1868) L.R. 3 Ex. 257; *Longbottom v Berry* (1869) L.R. 5 Q.B. 123.

[50] P. Mantoux, *The Industrial Revolution in the Eighteenth Century* (London: Jonathan Cape, 1928), Pt II Chs 1–4; S. King and G. Timmins, *Making Sense of the Industrial Revolution: English Economy and Society 1700–1850* (Manchester: Manchester University Press, 2001), Ch.3.

[51] P. Deane, *The First Industrial Revolution*, 2nd edn (Cambridge: CUP, 1979), pp.168–171.

[52] *Clark v Crownshaw* 110 E.R. 295; (1832) 3 B. & Ad. 804; *Reeves v Capper* 132 E.R. 1057; (1838) 5 Bing. N.C. 136.

[53] *Ryall v Rowles* 27 E.R. 1074; (1749) 1 Ves. Sen. 348; *Ex p. Lloyd* (1834) 1 Mont. & A. 494; *Cookson v Swire* (1884) 9 App. Cas. 653.

was also the risk, in the event of the borrower's bankruptcy, of the chattel mortgage being voidable as a fraudulent conveyance[54] or for the chattel to pass to the borrower's assignee in bankruptcy under the doctrine of reputed ownership.[55] If the lender were to take possession of both equipment and raw materials, however, this would impede manufacturing, whose facilitation was the very purpose for which financing was sought. A mortgage of land is free from these problems. Possession of the land can remain with the borrower, and neither fraudulent conveyance nor reputed ownership has any relevance.[56] The expanded definition of a fixture allowed many industrial equipment to be mortgaged as part of the land, thereby circumventing the aforementioned legal obstacles and facilitating the raising of capital.

During the mid-1850s, the doctrine underwent further transformation. The turning point has often been attributed to the decision of Sir W Page Wood VC in *Mather v Fraser*.[57] Although the report was silent about the degree to which the equipment was affixed to the land, the vice chancellor was clearly inclined to find any industrial equipment attached to land—"whether by screws, solder or any other permanent means, or by being let into the soil"—to be a fixture.[58] In other words, any equipment affixed to land becomes a fixture even if it can be removed without being damaged or causing injury to the land.[59] Drawing on Lord Cottenham's minority view in *Fisher v Dixon*,[60] the vice chancellor explained that this was because such equipment served the purpose of enhancing the owner's use and enjoyment of the land.[61] This reasoning was subsequently fine-tuned in *Walmsley v Milne*.[62] In that case, the landowner erected an inn, a brewery, stables and other buildings, and supplied them with the necessary equipment, including a steam-engine, a boiler, a hay-cutter, a malt-mill and grinding-stones. They were all firmly installed in the buildings they served but could be removed without being damaged or injuring the buildings. For the first time outside the context of tenant's fixtures, the two-stage test that we are familiar with today was articulated and applied to justify a finding of the said items as fixtures.[63] Focusing on the purpose of annexation, Crowder J was satisfied that they were brought onto the land for its permanent improvement as they were necessary for the use of, or enhanced the usefulness of, the buildings to which they attached.[64] Thus, when the issue was revisited in *Holland v Hodgson* in 1872, Blackburn J did no more than to reiterate what has been regarded as settled law more than ten years earlier.

[54] Fraudulent Conveyances Act 1571 (13 Eliz. 1 c.5); *Twyne's Case* [1774] All E.R. Rep. 303; 76 E.R. 809.

[55] Bankrupts (England) Act 1825 (6 Geo 4 c.16) s.72.

[56] *Ryall v Rowles* (1749) 1 Ves. Sen. 348 (fraudulent conveyance); *Ex p. Belcher* (1835) 2 Mont. & Ayr. 160 (reputed ownership).

[57] *Mather v Fraser* (1856) 2 Kay. & J. 536. For that claim, see *Holland v Hodgson* (1872) L.R. 7 C.P. 328; P. Luther, "Fixtures and chattels: A question of more or less …" (2004) 24 O.J.L.S. 597, 612; S. Thomas, "Mortgages, fixtures, fittings and security over personal property" (2015) 66 N.I.L.Q. 343, 359–360.

[58] *Mather v Fraser* (1856) 2 Kay. & J. 536 at 548.

[59] A decade later, in *Boyd v Shorrock* (1867) L.R. 5 Eq. 72, the same judge held that certain looms were fixtures even though they "could readily be detached (by an ordinary labourer in about one minute)".

[60] *Fisher v Dixon* 8 E.R. 1426; (1845) 12 Cl. & F. 312 at 325–326.

[61] *Mather v Fraser* (1856) 2 K. & J. 536 at 548.

[62] *Walmsley v Milne* (1859) 7 C.B. (N.S.) 115.

[63] The two-stage test, which first appeared in *Hellawell v Eastwood* 155 E.R. 554; (1851) 6 Exch. 295 (concerning tenant's fixtures), was likely borrowed from the work of A. Amos and J. Ferard, *Treatise on the Law of Fixtures* (London: Joseph Butterworth and Son, 1827): P. Luther, "Fixtures and chattels: A question of more or less …" (2004) 24 O.J.L.S. 597, 611–615.

[64] *Walmsley v Milne* (1859) 7 C.B. (N.S.) 115 at 136–137. See also *Cullwick v Swindell* (1866) L.R. 3 Ex. 249; *Climie v Wood* (1868) L.R. 3 Ex. 257; *Longbottom v Berry* (1869) L.R. 5 Q.B. 123.

The finetuning of the doctrine of fixtures in *Mather v Fraser* and *Walmsley v Milne* provided a principled justification for the earlier decisions such as *Ex p. Reynal*. The classification of an item as fixture or chattel is now a mixed question of law and fact rather than a question of fact alone.[65] However, as there is no evidence to suggest that the scope of the doctrine had been expanded beyond what it already was following the decision in *Ex p. Reynal*, it is more accurate, at least for our present purpose, to trace the turning point to that earlier case. Nonetheless, the cases following *Mather v Fraser* provided more important clues as to the possible motivation for preferring a broad definition of a fixture.

The mortgage in *Mather v Fraser* was granted a month and a half after the enactment of the Bills of Sale Act 1854.[66] This gave rise to the question of whether the mortgage, which purported to capture any industrial equipment affixed to the land, amounted to a bill of sale which required the satisfaction of certain formality requirements. The vice chancellor, who answered in the negative, explained that the Act does not apply where the equipment was conveyed along with the land as a fixture and not separately as a chattel.[67] Although this appeared to be a simple matter of statutory interpretation, it is possible to infer a motivation behind this decision. While the Act introduced significant improvements to the law of chattel mortgage, it remained doubtful whether a bill of sale was capable of including future assets due to the formal requirement that a bill must be accompanied by an inventory listing the assets comprised in it.[68] In view of such uncertainty, the attractiveness of the more inclusive mortgage of land was all the more clear. The decision in *Mather v Fraser* preserved a line of cases, beginning with *Ex p. Reynal*, which stood for the proposition that an industrial equipment, although not irreversibly affixed to land, becomes a fixture and therefore passes under a pre-existing mortgage.[69] Unsurprisingly, several subsequent cases following *Mather v Fraser* all concerned pre-existing mortgages and subsequently added industrial equipment.[70] By the 1880s, it became clear that future assets cannot be included in a bill of sale, thereby confirming the commercial importance of the *Mather v Fraser*-line of cases.[71]

From the sheer number of cases in which the doctrine of fixtures was relied upon to sidestep the bills of sale regime, at least one scholar went so far as to observe a "judicial manipulation of the law on fixtures in order to take certain goods and transactions out of the aegis of the bills of sale regime".[72] However, as we have traced the transformation of the doctrine to the early 1840s, the better view is that the *Mather v Fraser*-line of cases merely provide an important clue from which the original motivation might be inferred. Although much of this is

[65] *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 471 (Lord James).
[66] Bills of Sale Act 1854 (17 & 18 Vic c.36).
[67] *Mather v Fraser* (1856) 2 Kay. & J. 536 at 558.
[68] Bills of Sale Act 1854 (17 & 18 Vic c.36) s.1.
[69] *Ex p. Reynal* (1841) 2 Mont. D. & De. G. 443; *Ex p. Broadward* (1841) 1 Mont. D. & De. G. 631; *Ex p. Cotton* (1842) 2 Mont. D. & De. G. 725. Although the proposition could potentially be traced to the even earlier case of *Ex p. Belcher* (1835) 2 Mont. & Ayr. 160, the report was unclear on the degree to which the items were affixed to the land.
[70] *Walmsley v Milne* (1859) 7 C.B. (N.S.) 115 at 134; *Holland v Hodgson* (1872) L.R. 7 C.P. 328 at 333; *Meux v Jacobs* (1875) L.R. 7 H.L. 481 HL.
[71] Bills of Sale Act 1878 (Amendment) Act 1882 (Vic 45 & 46 c.43) ss.4 and 5. See also *Thomas v Kelly* (1888) 13 App. Cas. 506 HL; reversing its earlier decision in *Holroyd v Marshall* 11 E.R. 999; (1862) 10 H.L.C. 191.
[72] S. Thomas, "Mortgages, fixtures, fittings and security over personal property" (2015) 66 N.I.L.Q. 343, 358.

admittedly guesswork, the various pieces of the puzzle seem to fall so neatly in place to at least justify a strong conjecture.

Challenging the status quo

The *Mather v Fraser*-line of cases have been accepted as laying down two propositions: (1) an equipment that is affixed to land becomes a fixture even if it can be removed without injuring the land; and (2) a mortgage of land is effective in capturing subsequently added fixtures. These have been so consistently applied as to acquire the status of settled law. In *Holland v Hodgson*, Blackburn J thus said of this line of cases:

> "These cases … shew that *Mather v Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong."[73]

This statement was made in 1872 without the benefit of considering the supplier's claim. However, when the issue was eventually presented before the House of Lords in *Reynolds v Ashby & Son*, this time with the supplier's case plainly laid on the table, the court echoed the view that it was too late to turn the tide.[74] Putting aside the substantive reasoning in that case,[75] Lord Macnaghten opined, with the concurrence of the other Law Lords, that:

> "much mischief would be created if there were a departure at this stage from the law, which has been looked upon as governing such transactions as this ever since the case of *Mather v Frazer*."[76]

However, it may be implied from this statement that the existing law is open to reconsideration if it can be shown that no significant prejudice will be caused to mortgagees. Whatever the original motivation(s) for expanding the definition of a fixture might be, the court has impliedly accepted that commercial considerations are relevant in the development of the law on fixtures.

What has clearly been missing from the existing literature is an examination of whether lenders continue to rely on a mortgage of land as the primary method of capturing after-acquired assets. In this regard, it is helpful to take cognisance of the parallel developments within the law of chattel security. The bills of sale regime

[73] *Holland v Hodgson* (1872) L.R. 7 C.P. 328 at 340.
[74] *Reynolds v Ashby & Son* [1904] A.C. 466 HL.
[75] See above.
[76] *Reynolds v Ashby & Son* [1904] A.C. 466 HL at 471. Whether the decision was influenced by the stronger position of commercial lenders is difficult to tell, because the relevant cases all involved private lenders. As the available evidence shows, commercial banks were mainly in the business of providing short term loans for the purpose of meeting working capital and cash flow requirements. By the most generous estimate, between 1888 and 1902, only about 15% of loans were granted by these banks specifically for fixed capital expenditures. See M. Collins and M. Baker, *Commercial Banks and Industrial Finance in England and Wales, 1860–1913* (Oxford: OUP, 2003), pp.190–194. See also P. Mathias, *The First Industrial Nation: The Economic History of Britain 1700–1914* (London: Routledge, 2001), pp.134–135; P. L. Cottrell, *Industrial Finance 1830–1914* (London: Methuen, 1980), Ch 7.

closed its doors on the after-acquired property clause to protect individual borrowers and the general body of creditors.[77] However, this did not sit well with the market demand for credit, particularly in the context of the manufacturing industry where the bulk of the borrowers' resources consist of circulating assets. In such cases, it was necessary to balance, on the one hand, the borrower's interest in the free disposal of the assets for the proper running of the business, and on the other hand, the lender's interest in capturing new assets without having to constantly ask for new security. As we have seen earlier, the courts have relied on the law on fixtures to avoid the bills of sale regime. However, a decade and a half after the decision in *Mather v Fraser*, the law applicable to corporate borrowers[78] developed in a different direction from the bills of sale regime, most notably with the recognition of floating charges.[79] As the floating charge gains popularity in modern trade due to its flexibility, the bills of sale regime fell into disuse.[80] According to one observation, "a trader who wishes to raise credit against a security over his plant or equipment is frequently asked to incorporate his business, whereupon the bank is able to provide the required finance against a floating charge".[81] As the floating charge has, to a great extent, plugged the gap that the fixture cases were meant to fill, it may be said that the motivation for expanding the definition of a fixture has since lost its relevance.

As we have seen above, insofar as subsequently added fixtures are concerned, the mortgage of land gives the lender an absolute advantage in any priority contest. Operating in an all-or-nothing fashion, there is simply no room to accommodate the interests of other creditors. As we have identified the problem to be the broad definition of a fixture, one possible solution is to narrow the definition to exclude items that can be removed without causing injury to the land. This would bring a significant number of industrial equipment outside the scope of the mortgage of land. A lender wishing to take such equipment as security, whether present or future, will have to do so through a fixed or floating charge. However, a chattel that has been supplied on retention of title terms falls outside of the security interest for the simple reason that the chattel does not belong to the borrower.

As to whether narrowing the definition of a fixture in the proposed manner would significantly prejudice existing lenders, it may be argued that no prudent lender would provide a loan exceeding the current value of the land, i.e. without taking into account items that might be subsequently added. A dispute over after-acquired assets is only likely to arise in an exceptional case of undervaluation or where the real property market has taken a significant dip. Even in such cases,

[77] H.C. Deb. 8 March 1882, Vol.267 cols 395–396. See also E. W. Fithian, *The Bills of Sale Acts, 1878 & 1882*, 2nd edn (London: Stevens & Sons, 1884), pp.7–9.

[78] Charges created by incorporated entities were exempted from the bills of sale legislation: Bills of Sale Act 1878 (Amendment) Act 1882 (Vic 45 & 46 c.43) s.17.

[79] *Re Panama, New Zealand and Australia Royal Mail Co* (1870) 5 Ch. App. 318; *Illingworth v Houldsworth* [1904] A.C. 355 HL. On the genesis of the floating charge, see generally R. R. Pennington, "The genesis of the floating charge" (1960) 23 M.L.R. 630, 634–638; R. Goode, "The Exodus of the Floating Charge" in D. Feldman and F. Meisel (eds), *Corporate and Commercial Law: Modern Developments* (London: Lloyd's of London Press, 2006), Ch 10; R. Gregory and P. Walton, "Fixed and floating charges—a revelation" [2001] L.M.C.L.Q. 123; J. Getzler, "The Role of Security over Future and Circulating Capital: Evidence from the British Economy circa 1850–1920" in J. Getzler and J. Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford: OUP, 2006), Ch.10.

[80] See M. G. Bridge, "Form, substance and innovation in personal property law" [1992] J.B.L. 1, 2–6; G. S. McBain, "Repealing the Bills of Sale Acts" [2011] J.B.L. 475.

[81] E. P. Ellinger, E. Lomnicka and C. V. M. Hare, *Ellinger's Modern Banking Law*, 5th edn (Oxford: OUP, 2011), p.839.

the exclusion of subsequently added assets from the mortgage of land would merely deprive the mortgagee of a windfall rather than subjecting it to any real loss. The bulk of the lender's security, as contemplated by the lender and borrower, would be in the land rather than in after-acquired assets. On the whole, it is submitted that the proposed solution is fairer and more balanced in the treatment of the two competing groups of creditors.

Turning our attention to the law on fixtures itself, the proposed solution will entail a rewinding of the law to its original form two centuries ago. A high degree of annexation would be required to find a fixture and the purpose of annexation inquiry will no longer be relevant. While this will result in the law on fixtures losing its acquired subtility, it is not obviously a bad thing as the purpose of annexation inquiry has been a source of much uncertainty.[82] Certainly, in suggesting any kind of major legal reform, one ought to be cautious of throwing the baby out with the bathwater. If anything, the development of the law on fixtures serves as a lesson on how a solution can sometimes lead to more problems. Far from being an isolated issue of land law, the definition of a fixture has significant implications on various aspects of property and commercial law. In the attempt to assist the supplier, it is important not to lose sight of how the proposed redefinition might affect other areas of commercial law and practice.

Interestingly, the developments within the law on fixtures appeared to have little impact on contracts for the sale of land. Although the Law of Property Act 1925 s.62 provides that every conveyance of land shall be deemed to include fixtures, the freedom to contract has clearly been preserved by the proviso that this is subject to any contrary intention expressed in the conveyance. In other words, vendors and purchasers are free to agree that certain affixed items, even though they are clearly fixtures, are to be excluded from the sale and therefore removable by the vendor. Today, items to be included in a sale of land would often be recorded in a detailed checklist. To the extent that some of the included items are not fixtures, they would simply pass as chattels. Governed by the law on the sale of goods, title would pass when it is intended to pass.[83] In other words, in the context of land sales, any dispute regarding the subject matter of the sale would be resolved entirely by reference to the contract between the parties.

Similarly, as the distinction between personalty and realty has been abolished for the purposes of inheritance, disputes between heirs and personal representatives over the classification of an affixed item would no longer arise today. Moreover, any potential dispute relating to inheritance can be avoided by a carefully drafted will. If a testator intends a piece of land and certain items thereon to be left to a specific beneficiary, those items should be clearly defined and specified in the will. There is also no reason why a testator cannot bequeath a piece of land and the fixtures thereon to separate beneficiaries.

In general, the proposal for the law on fixtures to revert to the position pre-*Ex p. Reynal* is unlikely to have any noticeable impact on most disputes arising from transactions involving only two parties, and it is likely to lead to the same outcome that the existing law does. The only expected ripple would be in the context of

[82] For the observation that the doctrine of fixtures has been applied without sufficient consistency, see also K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.38; S. Bridge, E. Cooke and M. Dixon, *Megarry & Wade: The Law of Real Property*, 9th edn (London: Sweet & Maxwell, 2019), pp.1024–1025.

[83] Sale of Goods Act 1979 ss.17 and 18.

mortgages where any ambiguity in the agreement is likely to favour the mortgagor given the narrowed definition of a fixture. However, this would encourage the parties to be more specific about which items are to be offered as securities and to make use of multiple devices—mortgage of land and company charges—if necessary, thus avoiding the kind of dispute that arose in *Botham v TSB Bank*.[84]

Viewed through the modern lens, the effect of the proposed solution is to flip the law on fixtures on its head. The effect will become more apparent as more advanced techniques for installation and detachment are developed such that practically nothing is irreversibly attached. A narrow doctrine of fixtures will require some getting used to. Indeed, it would be odd to now be told that doors and windows are not fixtures because they can be removed without injuring the land. Nonetheless, the problem is not new. One solution, employed since the 16th century, has simply been to create limited exceptions to the rule. Certain items, although not irreversibly attached, could be classified as fixtures based on the concept of constructive annexation.[85] Although this is similar to the modern purpose of annexation inquiry, it has been applied much more narrowly because it was premised on a specific policy concern: to preserve the physical integrity of the building. External doors and windows belong to this category because they are necessary for a house to be secure and weatherproof.[86] One might even extend the exception a little further to include items that are absolutely necessary to the basic occupation of the land, such as bathroom fittings, plumbing and electrical wiring.[87] Certainly, if one is truly concerned about the slippery slope of reintroducing the broad purpose of annexation inquiry, it is possible to do away with an exception altogether. This would simply require chattels to be dealt with under separate legal devices.

On the whole, although reverting the law on fixtures to how it was two centuries ago may seem to be overkill, its real-world implications, beyond the disputes between suppliers and lenders, are likely to be far less pronounced than one would imagine. If one is convinced that a more balanced treatment of suppliers and lenders is warranted, then the proposed solution certainly deserves consideration.

Conclusion

From the historical analysis of the law on fixtures, three important observations may be made. First, the definition of a fixture was expanded in the early 1840s to include industrial equipment which, although affixed to land, could be removed without injuring the land. This in turn broadened the reach of a mortgage of land, especially insofar as subsequently acquired equipment was concerned. Secondly, the expanded definition was likely in response to the financing needs of industrialists during the First Industrial Revolution and to plug the gap left by the then primitive law of chattel mortgage. Thirdly, as the parallel development within

[84] *Botham v TSB Bank* [1996] E.G. 149 (C.S.); (1997) 73 P. & C.R. D1, noted in M. Haley, "The law of fixtures: an unprincipled metamorphosis?" [1998] Conv. 137.

[85] A. Amos and J. Ferard, *Treatise on the Law of Fixtures* (London: Joseph Butterworth and Son, 1827), p.6; P. Luther, "Fixtures and chattels: A question of more or less …" (2004) 24 O.J.L.S. 597, 608–611.

[86] *Herlakenden's Case* (1589) 4 Co. Rep. 62. So do fences: *Ex p. Belcher* (1835) 2 Mont. & Ayr. 160. In contrast, interior doors have remained as chattels: *Cookes Case* (1581) Moo. K.B. 177.

[87] The eventual outcome, then, would not be very different from that produced by the existing law: see *Botham v TSB Bank* [1996] E.G. 149 (C.S.); (1997) 73 P. & C.R. D1.

the broader law of chattel security has since addressed the said gap, the original motivation for expanding the law on fixtures has lost its relevance. These observations help establish a prima facie case for reconsidering the broad definition of a fixture, which we have identified as the main obstacle to the supplier's ability to safeguard its interest.

This article proposes that the problem can be resolved by narrowing the definition of a fixture to exclude items that can be detached without injuring the land. Having retained their identity as chattels, such items remain within the ambit of the supplier's retention of title clause. To be sure, this is not to deny that there can be other solutions which might not require any adjustment to the definition of a fixture.[88] Whichever solution one prefers, it is important to pay attention to its impact on existing laws and established commercial practices. Having examined closely the respective positions of suppliers and lenders, it is submitted that the proposed solution will lead to a fairer and more balanced treatment of these two parties. Moreover, based on a preliminary assessment, its impact on other aspects of commercial law and practice is unlikely to be significant. If this is truly the crux of the matter, then ideally a more comprehensive survey would be required. As this is best achieved through formal consultations with the relevant stakeholders, the present topic is arguably a suitable law reform project to be pursued by the Law Commission.

[88] e.g. it has been argued that the supplier, being a purchase money financier, should be recognised as having a security interest that ranks ahead of the mortgagee: see H. N. Bennett and C. J. Davis, "Fixtures, purchase money security interests and dispositions of interests in land" (1994) 110 L.Q.R. 448. See also the American Law Institute's Uniform Commercial Code §9-334.