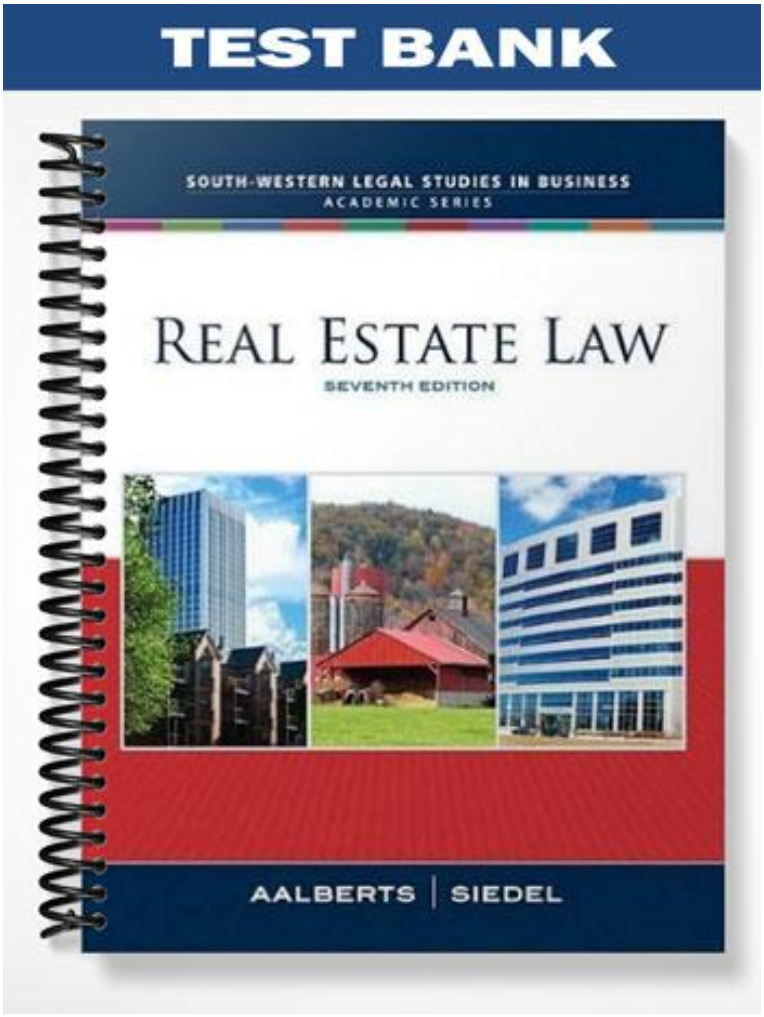
TEST BANK


SOUTH-WESTERN LEGAL STUDIES IN BUSINESS
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CHAPTER 2

THE NATURE OF PROPERTY

CHAPTER OUTLINE

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In Re Marriage of Graham, p. 48 (see Teaching Suggestion 1)

Problem 10

11. Real and Personal Property

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III. Fixtures

A. Fixture Tests

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Adamson v. Sims, p. 50

Problems 1, 2, 5, 7, 8

B. Fixture Disputes

1. Transfer of Real Estate

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4. Fixture Financing

Lewiston Bottled Gas v. Key Bank, p. 53

Problem 6,9

5. Wrongful or Mistaken Annexation

TEACHING SUGGESTIONS

1. *In Re Marriage of Graham* (I above) illustrates the approach used in most states and is considered to be a leading case. For a summary of other approaches, see Herring, *Dividing a Diploma in a Divorce, 70 A.B.A.J. 84 (1984).*

2. In conjunction with the "Ethical and Public Policy Issues" box on page 30, you may wish to refer to Louisiana's 1986 Revised Statute 9:121 et seq., which forbids the intentional destruction of cryo-preserved IVF embryos and declares that disputes between parties should be resolved in the "best interests" of the embryo. Unwanted embryos must be made available for "adoptive implantation." In effect, the statute is treating the embryo as a human and not as property or something in between property and life. The statute existed when the *Davis v. Davis* case was decided, but the Tennessee Supreme Court was not persuaded by it. You may also refer to Louisiana's civil law tradition that is based in part on Roman natural law. The civil law tends to be more moralistic than the common law.

3. Refer to objects in the classroom--such as blackboards, coat racks and desks--to illustrate the fixture tests. Also ask your students how they would decide the Sally/ Slim hypothetical on page 33. Students sometimes have difficulty with the notion of constructive annexation. Momentarily borrowing a student's keys can help cement this concept. For fixtures in general, you may also want to discuss what you would find in a normal moving van going cross-country with someone's entire household belongings. What you would typically find in a van would not be fixtures, but furniture such as couches, chairs, clothes etc. Conversely, you would not find usually find hot water heaters or large, decorative chandeliers.

4. For a comprehensive and easy-to-read review of the revisions of UCC Article 9 on secured transactions, including revisions relating to attachment and perfection of fixtures, see T. Anderson, M. Culhane and C. Wilson, *Attachment and Perfection of Security Interests Under Revised Article 9: A "Nuts and Bolts" Primer,* 9 American Bankruptcy Institute Law Review 179 (2001).

DISCUSSION OF ETHICAL AND PUBLIC POLICY ISSUES

On page 28 we present a discussion of the ethics and public policy implications of treating human body parts as property. If classified as property, a person could sell his valuable human organs and tissue such as a kidney, bone marrow etc., to the highest bidder. Of course, we are free to donate a kidney, other organs and tissue already. Selling unlike donating a kidney, however, presents special kinds of ethical and public policy problems. Generally, they are outlawed to prevent a needy person or someone prone to making uninformed or bad choices

from selling an organ that might later put the person in serious medical peril. Like many laws, it is aimed at protecting some persons from their own actions. A utilitarian might argue that selling a kidney is an efficient means of distributing a scarce resource. The seller would benefit from the money he receives in a free and open market, possibly regulated to prevent exploitation. In such a market he would be informed and would know the extent of the risks. The recipient would likely regain his health. In addition, the present black market in organ sales would dry up and the prices would likely drop because the supply would greatly increase. The downside is that if the organ seller does later suffer medically, he may need help, including receiving an organ. If he has no insurance and cannot afford to buy a kidney, he may become supported by the taxpayers and quite possibly die of medical complications. In weighing the pain versus the pleasure, selling an organ as property, particularly if it is regulated, might be moral outcome.

Does a person have a right to sell his kidney? Presently the answer is no, so he has no moral right either. Still, a person can make the argument that he has a right as a human being, regardless of man-made law, to do whatever he wants with his own body and that the government should not intervene in making a decision to sell his own organs or tissue.

From a public policy perspective would allowing the sale of organs, if all sellers and buyers would be subjected to the same procedures and outcomes, be fair and just? One controversy might surround those who are too poor to buy a kidney. Presently people on lists to receive donations are presumably treated the same regardless of income (although we do read stories of favoritism toward the wealthy and famous, such as the late baseball great Mickey Mantle). Under this scenario, only those with the necessary wealth or insurance (if coverage would be provided) would receive an organ. As part of your discussion, you may want to use the "Veil or Ignorance" device created by the eminent philosopher, John Rawls. Under it, everyone would be born into a world again but would not know if they will be rich or poor, healthy or unhealthy, man or woman etc. Under such a scheme, would you take the chance of being born poor and unhealthy and therefore not be able to receive a life saving kidney? Under the Veil of Ignorance, students start to see how resources might be distributed in a world that is not often fair and justice.

ANSWERS TO TEXT PROBLEMS

1. The funeral parlor organ is a fixture. Although it is difficult to determine intention on the basis of the facts given, the annexation test is met because of the size and weight of the organ. It is also probable that the adaptation test is met because funeral parlors are often designed to include organs as an integral part of the structure. See *Chapman v. Union Mutual Life Insurance Company,* 4 Ill. App. 29 (1879) and *Rogers v. Crowe,* 40 Mo. 91 (1867).

It cannot be determined conclusively whether or not Clyde's organ is a fixture. It is difficult to determine intention on the facts given. The annexation test would be met because, in addition to the size and weight of the organ, it was bolted to the floor. However it is unlikely that the adaptation test would be met, although this point is debatable.

See *Moller, Inc. v. Wilson,* 63 P.2d 818 (1936), where the court decided that an organ installed in a residence (but not physically attached) was not a fixture.

2. Nelson is entitled to the buildings.

The court in *Nelson v. Murton*, 277 N.W. 390 (1938), decided that buildings do not have to be attached to the ground and do not require foundations in order to be considered part of the realty. The court stressed the fact that Kloster's actions showed that he intended the buildings to become part of the real estate: (1) he never listed the buildings as personal property for tax purposes, and (2) he installed the structures intending them to be permanent. "The land was his and he lived there over thirteen years.... The house and the barn were as 'permanently resting' on the land as could be expected."

3. The Alaska Theater Company may remove the articles.

It is debatable whether the articles are fixtures. But, assuming that the articles are fixtures, they are trade fixtures and may be removed by the tenant if: (1) the removal does not cause substantial damage to the premises and (2) the removal is completed before termination of the tenancy. See *Ballard v. Alaska Theater Co*., 161 P.478 (1916).

4. Abner probably will be liable for the outhouse but not for the shed.

In analyzing this problem, three questions must be resolved. First, are the two structures fixtures? Both structures are attached to the real estate and meet the annexation test. The adaptation test is met because the structures are beneficial to the use and enjoyment of the property. It is difficult to determine whether the intention test has been met. On the one hand, a strong argument can be made that a tenant under a five-year lease would not intend the structures to become fixtures. But on the other hand, the structures are adapted to the use of the real estate and are annexed to the real estate. Although debatable, it is likely that both structures would be considered fixtures.

Second, is there a lease provision governing removal of the fixtures? We assume not, no such clause having been mentioned in the facts.

Third, may Abner remove the structures as trade fixtures? The structures are trade fixtures because Abner erected them in order to carry on his business (running the inn). He also removed the structures before termination of the lease. But was he able to remove them without substantial injury? He could remove the shed without substantial injury; the shed rested on concrete blocks and was merely nailed to another structure. Consequently, Abner is not liable for the shed.
Abner could not remove the outhouse without substantial injury since it was made of brick and rested on a concrete foundation. Therefore, it is likely that he would be liable for the outhouse. The fact that he restored the premises in this case makes no difference:

"The reason is founded in public policy and economics.... [The total [cost of removal] is all out of proportion to the value of the materials saved." C. Smith and R. Boyer, Survey of the Law of Property 232 (2nd ed. 1971).

5. The Otts will not win. The heating and cooling system is a fixture and therefore part of the real estate. Such a system would normally be annexed to the real estate and the adaptation test would

be met, especially since cooling systems are so important in Arizona. The intention test is also met because, as the court observed, "the intent of the parties in practically all home purchases presupposes the existence and inclusion of some type of cooling system." *Voight v. Ott*, 341 P.2d 923 (1959).

6. Friendly Appliance can recover the appliances. It is the intention of the parties, as represented by the security interest, that Friendly Appliance has the right to repossess the collateral on default. Friendly Appliance's failure to perfect its interest does not change this result because no third parties are involved.

7. Although debatable, it is likely that the mirrors would be considered personal property, which will pass to Harry. This was the holding in *Waltman v. Mayer*, 97 Pa. Super. 236 (1929): "They were not structural elements of the building or articles which ordinarily are part of the building in the sense that it becomes real property; they could be, as in fact they were, removed without damage or other interference with the real estate."

8. Although this case is a close call and could be decided either way, the court concluded that the company should win because there was no intention that the topsoil would become a permanent accession to the real estate. "The intent sought is not the subjective intent or undisclosed purpose of the annexer, but the intent manifested by his actions. The size of the pile of topsoil, approximating in height a two-story house, was objective evidence that the topsoil had been piled on the lot for purposes other than permanent affixation to it. The size of the pile was a sufficient basis for a determination that the topsoil remained personalty and so did not become a part of the realty conveyed to the defendants by the plaintiffs deed." See *Giulano Construction Company v. Simmons*, 162 A.2d 511 (1960).

9. The bank has prior rights to the furnace. Fancy Furnace Company failed to make its fixture filing within ten days after the furnace was installed. See A. Rabinowitz and S. Bernstein, *Fixtures, Filings and Real Estate Mortgages Under the 1972 Amendments to the* U. C. C, 5 Mich. R. Prop. Rev. 8 (April, 1978). (If the furnace is considered a replacement appliance, the bank *will* win because the company did not perfect its interest before the furnace was installed.) Note that most states, since 2001, have adopted the revised U.C.C. Article 9 that allows *twenty* days to make a fixture filing after a good becomes a fixture. However, even under the new law, Fancy Furnace is still a day late.

10. The Tennessee Supreme Court first discussed whether frozen embryos (which they carefully classified as preembryos) are protected under existing state and federal law. For example, under the state's law, there is no cause of action for wrongful death unless a viable fetus is first born alive. The court also discussed *Roe v. Wade*, the constitutional case that analyzes a women's right to privacy, including the right to an abortion under some circumstances and within certain time frames. Under state and federal law, a women and her doctor may abort the fetus after the first three months. After three months an abortion can still generally (although states are constantly testing the parameters of the rights in the second trimester) be performed at a facility regulated under law, but after 6 months, the fetus is viable and can only be aborted to save the life of the mother. Therefore, even a viable fetus is not accorded the same legal rights as a person.

The *Davis* case raised unique issues that were not previously addressed by courts. The court introduced ethical principles to help resolve the issue and discussed three positions articulated by ethicists concerning preembryos. On one extreme, the court stated, the preembryo is a person and accorded all rights of a human being. At the opposite extreme, the preembryo is simply human tissue with no limitations imposed. The middle view, and the one most ethicists hold, is that the preembryo is accorded greater rights than mere human tissue, but is not a person either. It is accorded greater respect than other tissue because it has the *potential* to become human someday and possesses a symbolic meaning to many. Still, a preembryo is not a person because it has not developed the features of "personhood" and is "not yet established as developmentally individual, and may never realize its biologic potential." The court concluded that preembryos are *neither* persons nor property, but occupy an interim category and therefore should be accorded special respect.

Junior, the husband, was awarded custody of the preembryos because his strong objections to fathering a child overrode the ex-wife's interests. This conclusion was reinforced by the fact that Mary Sue later changed her mind about becoming pregnant and wished only to have the preembryos donated. If she had decided to implant the preembryos, the decision might have been different. Thus, the issue of her bearing children and Junior being required to pay child support, became moot.

Under some deontological theories, such as W.D. Ross' prima facie theory, rights are not absolute and can be prioritized. In this case, Junior's right not to be a father outweighed that of his ex-wife's right to donate the preembryos.

You may wish to expand the discussion about the moral dangers of classifying persons as property. Throughout history, classifying certain subjugated persons, such as African-Americans in the Antebellum South, and Jews and Gypsies in Nazi Germany, meant that these people could be treated as somehow subhuman or even as property.

Legally and morally, property can be bought, sold, leased and destroyed, but humans, of course, cannot and should not. Ethicists argue that human beings have certain inherent rights under the natural law under which others may not kill, enslave and torture them. This is true regardless of how a government's law classifies them. The lesson of 6 million Jews and other ethnic groups being systematically exterminated, because they weren't by law "human" should be a very strong lesson as to the moral perils of such classifications.

ESSAY QUESTIONS

1. A well-known real estate expert, Sol M. Ejus, received the following letter from an elderly widow:

Dear Sol:

I have just signed a contract to sell my house. No mention was made in the contract of fixtures, whatever they are. I am now preparing to move and would like to take with me: (1) my furnace and (2) if I can't take the furnace, at least the burner from the furnace, which is not attached to the furnace and easily removable. These items mean a lot to me, as my fourth husband was cremated in the furnace. May I take these items with me? Why? Please answer in terms of traditional legal concepts, as I must explain this to my attorney, who is really stupid.

Addy Coelumn

How would you answer Addy's question? Why?

2. In question 1, if we assume that both the furnace and the burner are fixtures that cannot be removed, what type of document should be used to transfer them to the purchaser at the closing?. (For example, a bill of sale? A separate deed?)

3. American Telephone and Telegraph acquired an easement to erect and maintain telephone lines across Muller's property. Later A.T. & T. decided to abandon the lines and wanted to remove the poles and wires that it installed. Muller claimed that A.TA T. had no right of removal because the poles and wires were fixtures and part of the real estate. Is Muller correct? Why?

4. Joseph planted corn on land that he owned and later deeded the land to Helen without reserving the corn crop. When Helen sold the crop, Joseph sued her for the price she received. Who wins? Why?

5. Ralph leased a 500-acre cotton farm to Waldo for one year. Waldo planted cotton after taking possession but was unable to harvest it before the end of the year because of unusually wet weather. At the end of the lease, Ralph took possession of the property and refused to allow Waldo to harvest the crops. Is Waldo entitled to harvest the crops? Why?

TRUE-FALSE QUESTIONS

6. Real property can include not only the land but also the air space above the land. **TRUE**

7. Another word for real property is *chattel.* **FALSE**

8. An example of intangible personal property is a stock certificate. **TRUE**

9. The law governing commercial transactions is uniform in all states but Alaska. **FALSE**

10. The Uniform Commercial Code is the primary source of real property law. **FALSE**

11. The Uniform Commercial Code requires that the sale of goods must always be in writing to be enforceable. **FALSE**

12. The Uniform Commercial Code defines personal property as all things that are movable at

the time of identification to the contract for sale. **TRUE**

13. A fixture is transferred by means of a bill of sale. **FALSE**

14. Fixtures are taxed as personal property. **FALSE**

15. Both *fructus naturales* and *fructus industriales*, when unsevered, pass to the purchaser when real estate is sold. **TRUE**

16. As a general rule fixtures pass to the purchaser when real estate is sold. **TRUE**

17. If a contract of sale calls for timber to be cut and removed by the buyer, the contract is considered to be a sale of goods. **TRUE**

18. An article considered to be a tenant's fixture may be removed if the removal takes place within a reasonable time after termination of the tenancy. **FALSE**

19. A construction mortgage, unless the construction mortgagee agrees to a subordination, always has priority over security interests. **TRUE**

20. If Derek's house is built with George's bricks that were stolen by Ben, the builder, George's remedy against Derek would be damages for his loss. **TRUE**

MULTIPLE CHOICE QUESTIONS

(Answers in boldface are correct)

21. Real property includes:

    (a) land.

    (b) fixtures.

    (c) air space above the land.

    (d) all of the above.

22. The Uniform Commercial Code:

    (a) despite the name, does vary in content from state to state.

    (b) has been enacted in its entirety in all the states.

(c) covers the sale of both personal and real property

(d) has its origins in the English common law.

23 Marilyn orally agrees to sell her easy chair to Gretchen for $420. Dick orally agrees to sell a small, undeveloped plot of land for $420 to Chris. Under these circumstances:

(a) both contracts are unenforceable.

(b) both contracts are enforceable.

(c) Marilyn's agreement is enforceable, while Dick's is not.

(d) Dick's contract is enforceable, while Marilyn's is not.

24. A severance:

(a) occurs when personal property is transformed into real property.

(b) occurs when real property is transformed into personal property.

(c) occurs when a tenant fails to remove his trade fixtures before the expiration of the lease.

(d) occurs when personal property is annexed to real property.

25. The following items would probably meet the annexation test:

(a) a lawn mover.

(b) a five-ton boulder placed in front of a house for decorative purposes, but not physically attached to the real estate by cement or other devices.

(c) a bird house hanging from a tree limb.

(d) a garage door opener.

(e) two of the above. (b and d)

26. Clancy owned a farm that included a large apple orchard. In September, just before the apples were harvested, he sold the farm to Ned but the contract made no mention of the apple trees or apples.

(a) Ned owns both the trees and the apples.

(b) Ned owns the trees but not the apples.

(c) Ned owns the apples but not the trees.

(d) None of the above.

27. Erwin Paper Company purchased 750 acres of timber from Roscoe for $750,000. Erwin is to cut and remove the timber.

(a) This is a contract for the sale of goods and does not have to be in writing.

(b) This is a contract for the sale of real estate and must be in writing.

(c) This is a contract for the sale of *fructus industriales* and does not have to be in writing.

(d) None of the above.

28. Carlos rented an apartment in which he installed a new gas stove. The stove is:

(a) a fixture, which must remain in the apartment when the lease terminates.

(b) a trade fixture.

(c) a domestic fixture.

(d) an agricultural fixture.

(e) none of the above.

29. Dan owns a house that was mortgaged to First Bank. Dan purchases a central air conditioning unit in January 2005, from Bob's Appliances on credit and gives Bob's a security interest in the unit. In most states, in order to gain priority over First Bank, Bob's Appliances must:

(a) perfect by a fixture filing.

(b) perfect within 20 days after the unit is installed.

(c) notify First Bank in a letter of his security interest before the unit is installed.

(d) two of the above. (a and b)

(e) none of the above.

30. Most American courts apply three tests to determine whether a personal property has been transformed into a fixture. Which of the following is *not* one of these tests?

(a) Adaption.

(b) Annexation.

(c) Transfer.

(d) Intention.

ANSWERS TO INSTRUCTOR'S MANUAL QUESTIONS

ESSAY ANSWERS

1. Addy may not remove the furnace and the burner. The three fixture tests have been met for both items and therefore they go to the purchaser of the house. The most troublesome question is whether the burner meets the annexation test since it is not attached to the furnace and is easily removable. However, the burner is essential to the operation of the furnace, which is a fixture, and would be considered constructively annexed to the furnace.

2. No special document is needed. The furnace and burner, as fixtures, are part of the real estate and will pass automatically to the purchaser with the real estate deed.

3. Muller is not correct. After citing the three traditional fixture tests and noting the dominance of the intention test, the court observed that in determining intention, "the modem cases lay greatest stress on the character of the annexed property 'as related to the uses to which the land has been appropriated; it being regarded as a fixture only in case there is a correspondence between its character, and consequently its prospective use, and the use to which the land is devoted.' " Applying this test, the court concluded that "it seems clear that the poles and wires strung thereon by the plaintiff are not fixtures. They were placed on the property under the easement granted by defendant's predecessor in title. They are used 'in some employment distinct from that of the occupation of the real estate.'" See *American Telephone and Telegraph Company v. Muller*, 299 F. Supp. 157 (1968).

4. In most states, the crops pass to the buyer if they have not been severed at the time of conveyance. A few states, however, use a ”maturity" test. Under this test "ripened crops possess

the character of personalty, hence do not pass to the purchaser of the land." *Wood v. Wood*, 183 P.2d 889 (1947).

5. No. The doctrine of emblements does not apply because this was not a tenancy of an uncertain duration. See *Miller v. Gray*, 149 S.W.2d 582 (1941).