STATE OF OKLAHOMA,)
) ss. IN THE SUPERIOR COURT THEREOF.
SEMINOLE COUNTY.)

Seminole Refining Company,
a corporation, Plaintiff,

vs.

No. 1029.

Seminole Supply Company,
a corporation, V. V. Criswell,
County Treasurer of Seminole
County, Oklahoma, and C. F.
Aldridge, Sheriff of Seminole
County, Oklahoma, Defendants.

BRIEF OF PLAINTIFF

This cause comes on for hearing upon the restraining order heretofore granted by the court, restraining and enjoining the defendant, Seminole Supply Company, a corporation, from going upon the premises of plaintiff for the purpose of dismantlingand removing certain property for which a bill of sale was issued to said defendant by the Sheriff of Seminole County, Oklahoma, the admitted facts being as follows:

The plaintiff is the owner of a certain tract of real estate upon which is situated an oil blending plant, or refinery, consisting of buildings and structures, in and upon which are affixed boilers, engines, tanks, pumps, and other and various items of equipment useful and necessary in the process of refining and blending crude petroelum into its various finished products. There are also pipes and pipe lines both underground and above ground, connecting the various tanks and containers, towers and trestles supporting the tanks and containers. There is on said premises a residence house, connected by pipes for gas and water, and by wires with an electric lighting plant used to furnish current to supply lights for the said refinery and also the residence house. There is a water well with the pipes and pump to furnish water for the plant and the house located on said premises, and a water tank on a tower used as

a supply tank. On or about the 27th day of September, 1932, V. V. Criswell, as County Treasurer of Seminole County, Oklahoma, issued a certain alias tax warrant against the property of this plaintiff, and the sheriff, C. F. Aldridge, pursuant thereto levied upon the refinery plaint of plaintiff and advertised same by publication in the Seminole Morning News on the 29th day of September and the 6th day of October, 1932, and on the 10th day of October, 1932, sold said property together with the oil in storage and a number of drums or steel barrels, part of which were empty and part filled, to the Seminole Supply Company, one of the defendants herein, for the sum of $175.00.

It is the contention of the plaintiff, that the part of the property sold by the sheriff, which constituted the permanent oil refining plant, that is the boilers, engines, tanks, pipes etc., being firmly and permanently annexed to the real estate are a part of the realty, and the the proceedings of the sheriff are irregular and the sale had thereunder void, for the reason that said property has not been advertised and sold as required by law. Plaintiff has tendered into court the sum of $179.50, being the amount of the said alias tax warrant.

We recognize the duty imposed by law upon the County Treasurer and upon the Sheriff relative to the issuing of tax warrants and the collection of taxes thereunder. However, we believe that the officers are bound by the procedure prescribed by law and that if they proceed in any other manner than that set out in the statutes, that said proceedings are irregular and a sale under such irregular procedure should be set aside upon application of the agrieved party.

Section 12730 C. S. 1931, sets out the procedure which the sheriff must follow in levying upon property under an alias tax warrant, and among other things, says:

> "The County Treasurer shall, after the first warrants have been returned, issue alias warrants to the sheriff of his county, or to the sheriff of any other county wherein any property of the delinquent tax payer may be found, for the delinquent personal taxes, and it shall be the duty of the officer receiving such alias tax warrant to levy upon any property, real or personal, of the delinquent tax payer and to advertise and sell the same as upon execution".

The statutes of this state are very clear upon the procedure of the

sheriff in levying upon property under an execution, and from the above section we take it that it was the intent of the legislature that the same procedure should be followed in the matter of tax sales. Section 445 C. S. 1931, requires that goods and chattels be levied upon and sold before real property, and reads as follows:

> "The officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall endorse on the writ of execution, "No goods", and forthwith levy the writ of execution upon the lands and tenements of the deb or which may be liable to satisfy the judgment; and if any of the lands and tenements of the debtor which may be liable shall be incumbered by mortgage or any other lien or liens such lands and tenements may be levied upon and appraised and sold, subject to such lien or liens, which shall be stated in the appraisement."

Section 448 C. S. 1931, relates to the sale of personal property under execution, and preseribed the necessary notice, reading as follows:

> "The officer who levies upon goods and chattels, by virtue of an execution issued by a court of record, before he roceeds to sell the same shall cause public notice to be given of the time and place of sale, for at least ten days before the day of sale. The notice shall be given by advertisement, published in some newspaper printed in the county or, in case no newspaper be printed therein, by setting up advertisements in five public places in the county. Two advertisements shall be put up in the township where the sale is to be held; and where goods and chattels levied upon cannot be sold for want of bidders, the officer making such return shall annex to the execution a true and perfect inventory of such goods and chattels, and the plaintiff in such execution may thereupon sue out another writ of execution, directing the sale of the property levied upon as aforesaid; but such goods and chattels shall not be sold, unless the time and place of sale be advertised as hereinbefore provided."

Section 450 C. S. 1931 relates to the sale of real property under execution
execution, providing for appraisement, and section 453 requires that real estate must be sold for two thirds of its appraised value, said sections reading as follows:

> Section 450.
> "If Execution be levied upon lands and tenements, the officer levying such execution shall call an inquest of three disinterested householders, who shall be resident within the county where the lands taken in execution are situate, and administer to them an oath, impartially to appraise the property so levied upon, upon actual view; and such householders shall forthwith return to said officer, under their hands, an estimate of the real value of said property."

> Section 453.
> "If, upon such return as aforesaid, it appear, by the inquisition, that two thirds of the appraised value of said lands and tenements, so levied upon is sufficient to satisfy the

exe execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no such property shall be sold for less than two-thirds of the value returned by the inquest; and nothing in this section contained shall, in any wise, extend to affect the sale of lands by the state, but all lands, the property of individuals indebted to the state for any debt or taxes, or in any other manner, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws in such cases made and provided."

We believe these statutes are clear and unambiguous, and the duty of the sheriff is clearly set out therein. It seems to be imperative that thirty days notice be given before real property can be sold. In this case only ten days notice was given. Therefore, we say that if all of the property so advertised and sold was personal property, the proceedings of the sheriff were regular, but if any part of the property was realty then the procedure was irregular, for the reasons that personalty must be sold first and cannot be combined in a sale with realty, whereas this sale was in one lot, and that no proper notice of the sale of real property was given. There is no question in this case but that the oil contained in the tanks, and the drums are personal property, but we do contend that the permanent improvements attempted to be sold were fixtures, and in determining this question we turn first to the statutes of this state; in Section 12331 C. S. 1931 we find a definition of real property:

> "Real property for the purpose of taxation shall be construed to mean the land itself, and all buildings, structures and improvements or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in any way appertaining, and all mines, minerals, quarries and trees on or under the same".

We also find that our legislature has defined for us fixtures and appurtenances. Section 11725 C. S. 1931 reads as follows:

> A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air or heat, from or across the land of another, sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine."

Section 11724, defining fixtures is as follows:

> A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent by means of cement, plaster, nails, bolts or screws."

The courts of this country have put forth a great deal of effort in clarifying the question of fixtures and have prescribed certain tests for the determination of this question. The general rule is that property which would ordinarily be regarded as personalty becomes realty when (1) it is actually annexed to the real estate or something appurtenant thereto, (2) Is appropriate to the use or purpose of that part of the realty to which it is annexed; (3) The intention in making the annexation is to make the article a permanent accession to the freehold, such intention being inferred from the nature of the article annexed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. The Supreme Court of Oklahoma has followed this general rule and in the case of Ellerick v. Reed, 113 Okla. 195, 240 Pac 1045, said:

> "The rule in determining whether machinery is a fixture or a chattel, remains chattels or becomes fixtures is as follows: First by determining whether the machinery has been actually annexed to the realty, or something appurtenant to the realty; Second, whether the machinery is applicable to the use or purpose to which that part of the realty to which it is connected is appropriated; thirdk the intention of the party making the annexation to make a permanent annexation to the freehold."

Applying these tests to the case at bar we find that a part of this property meets all the requirements set out by the statutes and the decisions of the courts. The permanent structure of the refinery plant, the electric lighting system, and the water system, are all actually and permanently annexed to the realty and the buildings appurtenant thereto; they are all applicable to the use to which the realty has been appropriated, namely an oil refinery, and the intention of the party making the annexation to make a permanent improvement is evident from the fact that the property annexed is owned by the owner of the land, and from the permanency with which said fixtures were attached to the land and buildings thereon.

The Supreme Court of this state has gone further than simply laying down a rule to follow in determining the question of fixtures, and in the case of Great Western Manufacturing Company v. Bathgate, _____ Okla. _____, _____ Pac. _____, held that when chattels are attached as a permanent improvement of the estate by the owner thereof

they become a part of the realty, and in the body of the opinion quotes with approval from the case of Voorhis v. Freemen, 37 Am. Dec. 490 as follows:

> "The criterion of a fixture in a mansion house or dwelling is actual and permanent fastening to the freehold, but this is not the criterion of a fixture in a manufactory or a mill. Machinery which is a constituent part of the manufactory to the purpose of which the building has been adopted, without which it would cease to be such manufactory, is a part of the freehold, though it be not actually fastened to it; and this criterion has a place in questions between vendor and vendee, heir and executor as well as debtor and execution creditor."

In the case of Etchen v. Ferguson 50 Okla 280, 159 Pac 306 our Supreme Court said:

> "Articles affixed to land in fact, although only slightly, are prima facie realty."

and in the same case held further:

> "A thing is to be deemed to be affixed to the land when it is permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts or screws."

It seems very clear that under the statutes of this state and the holdings of our Supreme Court, a part of the property for which the sheriff executed a bill of sale had acquired the character of fixtures and become a part of the realty, long prior to the issuance of the alias tax warrant, and prior to the time same was assessed. If and when articles ordinarily considered as personal property, become fixtures, we think it is elementary that they they will so remain until there is a severance from the realty, either actual or constructive. There is no contention in the case at bar that there has been any actual severance, so we must consider the rules relative to constructive severance.

There is a diversity of opinion among the courts of the country in the various jurisdictions, as to the effect of a chattel mortgage given on fixtures, some of them holding that the giving of such a lien will not have the effect of a constructive severance. It is generally held that a constructive severance maybe effected by a sale of the fixtures. But we have never found any authority which would imply a severance, where that intent was not obviously apparent. The only act by anyone connected with the plaintiff, which could possibly

be interpreted as a severance, is the fact that an assessment sheet was signed by U. V. Darland, Secretary of the corporation, upon which the valuation of the property was listed in a place ordinarily used for assessment of personal property. However, there was no provision on that sheet for the assessment of real property, and the property was listed under the heading most nearly applicable. We cannot interpret into that assessment sheet a positive purpose to sever these fixtures from the realty. If such an assessment is a severance of the fixtures sold by the sheriff, it is also a severance of the buildings upon the land, but the buildings were exempted from this sale. It occurs to us that the buildings are as much a part of the plant as the electric lighting system, and that the equipment for refining oil is probably more essential to the purpose to which this land is appropriated than that bare walls and roofs of the buildings, and yet we are confronted with the assertion by the defendant that this plaintiff has severed the most essential part of its property by reason of an incorrect assessment, but that the part which is not essential retains its character of fixtures.

The defendants have urged that the plaintiff is estopped to claim the property sold by the sheriff as a part of the realty, because of this assessment as personal property, which could easily be construed as a mutual mistake by both the assessor and the secretary of the corporation. We think the point not well taken. Only occasionally has the doctrine of estoppel been applied to preclude one from claiming as a part of realty articles annexed thereto, and only in cases where there is a clearly expressed intent by the one estopped to consider such property as personalty and only in cases where it would be inequitable to allow such person to retain his property as realty. Where one has misled another to his prejudice, and there is present the element of bad faith, the courts have held the guilty party estopped, but in the case of a mistake in judgment or where one is ignorant of his rights, the courts have held there is no estoppel. In the case of Christian v. Dripps, 28 Pa. 271, the court held that where one had attached certain articles as personalty did not estop him from claiming them as fixtures pertaining to real estate, and in commenting upon the

situation the court said:

> "The seizure by the constable of the lathes upon the attachment, can in nowise affect the question of property. Even if the constable acted under the direct instructions of the plaintiff, it would only tend to prove that the plaintiff was uncertain whether the lathes were real or personal property. A mistake in this respect would not prejudice his legal rights; for neither the principle of estoppel, nor the doctrine of election, applies to a case like the present. It would be a harsh rule that would take away a man's property for error in judgment upon a legal question of so difficult solution as that which relates to the law of fixtures."

It has also been held that one is not estopped from claiming a structure as part of the realty as against a purchaser at an execution sale thereof as personalty, by reason of his bidding for it at such sale or his failure to notify other bidders of his claim. McAuliffe v. Mann 37 Mich. 539. That an estoppel in the matter of fixtures does not apply in the absence of bad faith is clearly indicated by the following holding:

> "But that a plaintiff in an execution directed the sheriff to levy on the real estate, and stated that the machinery thereon belonged to another, and said to another after the sale, that he had purchased the real estate but not the machinery, was held not to estop him from claiming the machinery under his purchase at the sheriff's sale, if the direction and declarations were made in ignorance of his rights."
> Harlan v. Harlan, 15 Pa 507, 53 Am. Dec. 612

In the case at bar we can see no reason for applying the doctrine of estoppel. The plaintiff has paid into court the amount of the taxes, and the county is amply protected. The purchaser at said sale could not have been misled by the erroneous assessment for he was not a party to that transaction, and we can find no trace of any bad faith on the part of this plaintiff, which is a present element in every case we have read where one is held estopped to claim articles as part of realty.

Furthermore, we think it is well settled law that the secretary of a corporation, in the absence of express authority, cannot bind the corporation by any act affecting the property of the corporation. The secretary cannot mortgage the property of the corporation, nor sell it without express authority, and we have found no general powers vested in the secretary of a corporation which would permit him to bind his company by such an act as would have the effect of severing fixtures from the freehold. In the case of Green v. C. R. I. & P. R. Co, 8 Kan App 611

56 Pac. 136, the secretary of a corporation had attempted to pass title to a lathe, by a bill of sale. The lathe was so heavy as to require no fastening and was an essential part of a manufacturing plant, and the Supreme Court of Kansas held that such lathe was a part of the realty and that such bill of sale was ineffectual to change the character of the property from realty to personalty. If the Secretary of a corporation cannot change the character of corporate property by a deliverate attempt so to do, surely he could not change the character of such property by such an act as signing an assessment sheet.

We therefore reach the conclusion that a part of the property sold by the sheriff had acquired the character of real property; that there was no act of severance on the part of the corporation and said property retained its character of real property; that both realty and personalty were sold by the sheriff in one lot, contrary to the statutes relating to the sale of property under execution; that the notice of sale was not sufficient for the sale of real property; and that the sale is therefore irregular and void and the pruchaser acquired no rights in said property and should be enjoined from removing same or any part thereof.

Respectfully submitted,

_____

Attorney for Plaintiff.

12605 Col 1931

I #1029 Seminole Refining Co vs. Seminole Supply Co et al-Superior Court Remedy

Lewis & Spelling on Injunctions syas:

P 422-Sec 201. "To authorize injunction to restrain the collection of taxes on the ground of illegality, it is necessary to show not only the absence of legal remedy, but either that the property is exempt from taxation or the levy is without legality, or the persons imposing it are authorized or have proceeded fraudulently."

In Nile Irr Dist v. English et al(1915) 60 Colo 406-153 Pac 760 it is said:

"In a suit to enjoin the collection of a tax, equity requires complete, clear and distinct allegations of issuable facts, and it must definitely appear by proper averments, that great and irreparable injury will result, either because of a multiplicity of suits or otherwise." ~~1 Thornton on Tax Sec #666~~

II Under Judicial Sale, former Owner has the Same Rights as under Voluntary Sale.

"The rule as between vendor and vendee is applicable to an instance where the premises are sold under judicial or other like process; and the right of the former owner and purchaser at such sale are determined exactly the same as if the former owner had himself sold the premises to the purchaser under the enforced sale."
1 Thornton Law of Oil & Gas #646

III Property Classified for Taxation.

Legislative Declaration disclosed in Statute.

"Section 9583 C O S 1921 is a legislative declaration of what shall be included as personal property subject to taxation." B'd Com'rs vs Ryan, Treas.(1924) Okla. 232 P 834

3 Cooley on Taxation says:

P.2145 "#1065. Assessment as real or personal property. It is customary to classify property for taxation as real and personal and to assess the two classes on somewhat different principles. The classification is commonly made on common-law distinctions; but this is not necessarily the case, and it will frequently be found that the enumeration of property in statutes as real or personal for the purposes of taxation differs considerably from what it would be for other purposes in the same state. The legislature has the power to make any kind of property personalty for the purposes of taxation, though it is real estate by the common law and for all other purposes and vice versa."

IV Fixtures.

In 2 Kent's Commentaries it is said(12th ed):

#343."But heirlooms are a class of property distinct from fixtures; and in modern times for the encouragement of trade and manufactures, and as between landlord and tenant, many things are treated as personal property which seem, in a very considerable degree, to be attached to the freehold. The law of fixtures is in derogation of the original rule of common law which subjected every thing affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation so as almost to render the right of removal of fixtures a general rule instead of being an exception. The general rule, which appears to be the result of the cases is that things which the tenant has affixed to the freehold for the purpose of trade or manufactures, may be removed, when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels."

Statutory definition.

"#8397. Fixtures defined. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees vines or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings or permanently attached to what is permanent as by means of cement, plaster, nails, bolts or screws."

#8555 When a person affixes his property to the land of another without any agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require or permit the former to remove it: Provided that a tenant may remove from the demised premises at any time during the continuance of his term any thing affixed thereto for the purpose of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing has by the manner in which it is affixed become an integral part of the premises

Trade Fixtures.

In Mills & Willingham on Oil & Gas it is said:
P 253. "#164. Removal of equipment.- Even in the absence of stipulation upon the subject, personal property placed upon the lease by the lessee for the purpose of effectuating the object of the lease, are trade fixtures and may be removed by him during the term or within a reasonable time thereafter. Even a trespasser, who has gone upon the land for the purpose of drilling a well does not forfeit the drilling equipment placed thereon. The rule is this stated by the Supreme Court of West Virginia in Gailand vs Hickman, supra:

'The object in placing the machinery or fixtures on the ground was to enable the lessee to develop the leased premises. It was for the benefit of the lessee and not to enhance the value of the land by permanent improvements thereon. Engines, derricks, oil tanks, casing and pipes of the character described above, are not placed on farms as farming implements or to be used in connection with agriculture. The chief test by which to determine whether an article is a fixture, is to inquire whether the party annexing it intended it to beapermanent accession to the freehold.'

In Honeyman et al vs Thomas(1894) 25 Ore 539, 36 Pac 636 it is said

"A derrick used in a stone quarry, capable of removal from one point to another, as required, is not a fixture subject to a lien for material and labor furnished in its construction, though fastened by means of a post set in the ground and guy ropes attached to the rock by anchor bolts, if its removal would not injure the realty."

V

OKLAHOMA CASES.

In Western Nat Bk v. Gerson(1910) 27 Ok 280, 117 Pac 205 the court in an opinion by Kane J. held certain bank fixtures attached to the floor by iron braces and screws were attached permanently to what was a permanent part of the land.

In Tolle v Vandenburg(1915) 44 Ok 780, 146 Pac 212, in an opinion by Rittenhouse C. the court held that "one round galvanized iron portable grain bin, ten feet in diameter and eight feet high with metal top" resting on loose brick and sand was not attached to the realty and was not a fixture under #6592 1910 Code(

In Etchen v Ferguson(1916) 59 Ok 280, 159 Pac 306 in an opinion by Mathews C the court held an uncompleted two story brick building -the walls being two stories high and no floors being laid no roof and no inside work completed- to be a part of the real estate. The action was one to foreclose a lien on the building as personal property.

In Travis v Dickey, Treas.(1924) 96 Ok 256, 222 Pac 526, in an opinion by Harrison J. the court held that"oil tank cars" were personal property and tax-able atthe domicile of the owner.

In Continental Gin Co v Sims(1924) 103Ok 193,229 Pac 818, in an opinion by Logsdon C the court held that in a foreclosure action by the Bank of Krebs on notes and real estate mortgage on certain gin machinery the gin machinery was a part of the real estate and not personal property subject to a mechanic's lien.

In Hinkle v Bass Furniture & Carpet Co(1926) 117 Ok 208, 246 Pac 228, in an opinion by Maxey, C. the court held certain alterations made in a building by a lessee consisting of shelving, rooms and tubing nailed and fastened to the walls of the building became a part of the building and constituted fixtures under the statute,#8397.

In Nicholson v People's Nat Bk (1926) 119 Ok 114, 249 Pac 336 in an opinion by Ray C the court held that a growing crop of peaches, still on the trees, constituted real property.

VI Manner of Assessment.

In Ledoux et al vs. La Bee Treas.(1897) 83 Fed 761 the head note states:

"Certain property in South Dakota belonging to a corporation in the hands of a feceiver was annually listed by the company or by its receiver as personal property, and was so assessed. In a suit by the receiver to restrain the sale of property of the corporation for the payment of delinquent taxes, HELD that, even assuming the property to be in fact realty, the facts furnished no basis for an attack on the validity of the assessment."

The property consisted of two tin mills and certain buildings located on land the title to which was still in the United States, upon which final proof of title had not been made.