[WESSELS, Actg. A.J.A.]

recovery of a payment made at the demand of an official, who refuses to recognise my rights, unless I make the payment demanded of me, may very well be based upon the principles which underlie the rescinding of an act where, *arbitrio judicis*, the payment appears to have been involuntary and obtained under pressure. By adopting this course we do no violation to the principles of our law. A payment made on the demand of some person in authority and made in order to preserve or maintain a right, seems to me, on principle, to be as involuntary as a payment made under duress of goods.

I think, therefore, that the appeal must be dismissed.

Appeal accordingly dismissed with costs. (JUTA, A.J.A., *diss.*).

Appellant's Attorneys: *Bell & Hutton*, Grahamstown; Respondent's Attorney: *C. W. Whiteside*, Grahamstown.

MACDONALD, LTD., *Appellants*, v. RADIN, N.O., AND THE POTCHEFSTROOM DAIRIES & INDUSTRIES CO., LTD., *Respondents.*

(BLOEMFONTEIN.)

[1915. *February* 15, *May* 11. INNES, C.J., SOLOMON, J.A., JUTA, A.J.A., A. F. S. MAASDORP, Actg. A.J.A., and WESSELS, Actg. A.J.A.]

Fixture.—Machinery.—Sale on suspensive condition.—Erection on land of another.—Compensation for improvements.

The question whether an article originally movable has become immovable through annexation by human agency to realty depends upon the circumstances of each case. The elements chiefly to be considered are the nature of the particular article, the degree and manner of its annexation, and the intention of the person annexing it.

The respondents sold certain premises to J upon the terms that the purchase price should be paid in instalments and that upon failure of payment of any one instalment the sellers should have the right to cancel the sale and claim all improvements made by the purchaser as forfeited. Thereafter the appellants also sold to J. certain machinery under an agreement which stipulated that

appellants should erect the machinery upon the premises bought by J from the respondents, that J should pay the purchase price in instalments, that the machinery should remain the property of appellants until the whole purchase price had been paid, and that in case of failure to pay any of the instalments, or in case of insolvency on the part of J, appellants should be entitled to enter upon the premises and take possession of the machinery and remove it. The machinery so obtained by J was erected by appellants in terms of the agreement, and fastened down in part to beds of concrete and in part to the wall by bolts and nuts in such a way that it could be removed without injury to the premises. Subsequently on default of payment by J both the appellants and the respondents cancelled their agreements with him and J was thereafter declared insolvent. The appellants having demanded the return of the machinery.

Held (SOLOMON, J.A., and WESSELS, Actg. A.J.A., dissenting), that under all the circumstances of the case the machinery had not become a fixture but was the property of the appellants.

Per SOLOMON, J.A., and WESSELS, Actg. A.J.A., that the machinery had become a fixture, the property in which passed to the respondents as owners of the premises.

Per SOLOMON, J.A., that inasmuch as the machinery had been forfeited to the respondents under their contract with J they had not been enriched *sine causa*, and the appellants were accordingly not entitled to recover from them the value of the machinery as compensation for improvements.

The decision of the Transvaal Provincial Division in *Macdonald, Ltd.* v. *Radin, N.O., and The Potchefstroom Dairies and Industries Co., Ltd.*, reversed.

Appeal from a decision of the Transvaal Provincial Division (DE VILLIERS, J.P., and BRISTOWE, J.).

The appellant Company brought action against the respondents (1) Joseph Radin, in his capacity as trustee in the insolvent estate of one Jacobson, and (2) the Potchefstroom Dairies and Industries Co., Ltd., to obtain possession of certain plant, accessories and chemicals.

The appellants' declaration stated that on January 25th, 1912, one Jacobson and one Widman, trading together in partnership, purchased from the second respondent a certain erf, No. 210 in the township of Potchefstroom, for the sum of £2,400, payable in instalments upon condition that should the said Jacobson and Widman be in arrear with any of the instalments, the second respondents should have the right forthwith to cancel the deed of sale and forfeit all improvements made by the purchasers. Thereafter the said Widman retired from the partnership and the said Jacobson acquired all his interest under the deed of sale. On August 28th, 1912, the appellants, without knowledge of the terms of the agreement aforesaid, sold to Jacobson a certain 12½ ton

refrigerating machine with accessories and chemicals for £1,153, payable in instalments, it being a condition of the contract that appellants should erect the plant on the premises purchased by Jacobson from the second respondents, but that the ownership in the plant should remain in appellants until Jacobson should have paid the total amount of the purchase price. Appellants thereafter in terms of their obligations erected the plant on the premises. The said plant was so erected that it could be easily removed without injury or damage being done to the premises, and it in no way was or became a fixture but remained movable property, the *dominium* whereof was in appellants. Alternatively, if the plant was a fixture, the property of the second respondents had thereby been improved and increased in value by the sum of £1,153 at appellants' expense, and the appellants were entitled to claim that sum from the second respondents as compensation. The declaration proceeded to state that Jacobson failed to pay the instalments payable by him under his contracts with the appellants and the second respondents respectively, that these contracts were accordingly cancelled, and that on July 29th, 1913, Jacobson's estate was sequestrated and the first respondent appointed trustee. It stated, further, that on or about April 2nd, 1913, and at Johannesburg, the second respondents through their agents represented to the managing director of the appellant company that the second respondents recognised and acknowledged the appellant company to be the true owners of the plant by reason whereof appellants were induced to allow the plant to remain on the premises for a further period of one month, at the end of which period the plant was to be re-delivered to appellants, provided the same together with the premises had not been disposed of. The plant and premises were not disposed of during the month or at all, and the second respondents refused to recognise appellants as the owners of the plant or to allow them to enter on the premises and remove it, but claimed that the plant constituted a fixture and became forfeited to them when they cancelled their contract with Jacobson. The first respondent did not claim to be entitled to the ownership of the plant and was ready and willing to allow appellants to obtain re-delivery thereof. The second respondent had been in possession of the plant from May 2nd, 1913, and had been and were running the same for their own use and benefit, and deprived appellants of the use and benefit thereof, causing damage to appellants in the sum of £45 per month. The prayer was accordingly as against the first and second respondents for an order declaring that the plant, accessories and chemicals were the property of appellants, and as against the second respondents an order compelling them to allow appellants to enter on erf No. 210, Potchefstroom, and to remove the plant, accessories and chemicals, or alternatively to pay the sum of £1,153 as compensation, together with payment of the sum of £45 per month reckoned from May 2nd, 1913, to the date of delivery as and for damages and costs.

The second respondents in their plea admitted the sale by them of erf No. 210, but said that the sale was to a partnership consisting of Jacobson, Widman and one Katz. They further admitted the sale by appellants of the refrigerating plant and that appellants erected the plant upon the premises. They said, further, that appellants, when they sold and erected the plant, had full knowledge of the terms and conditions upon which erf No. 210 had been sold. They contended that the plant was after erection a fixture, the *dominium* whereof was in them, and denied that they were liable to pay compensation. They further denied that their agents had admitted that the plant was the property of the appellants, and said that the refrigerating machine and accessories were improvements made before the cancellation of the sale of January 25th, 1912, by the purchasers, and as such became forfeited to the second respondents.

For a further plea the second respondents said that prior to the erection of the plant by the appellants there existed certain old plant on the premises. The appellants, while erecting the new plant, dismantled the old plant and removed certain portions thereof from the premises and incorporated the new plant in the rent of the old plant. They, therefore, pleaded that as against them the appellants were not entitled to claim that the new plant was in a different position from the old or that they were owners of the new plant or entitled to remove the same. The appellants in their replication admitted that they had taken down and dismantled certain old plant as alleged, but otherwise joined issue.

The facts of this case are sufficiently stated in the following judgment of DE VILLIERS, J.P.

DE VILLIERS, J.P.: On the 25th January, 1912, the second defendants who are the registered owners of certain erf No. 210 situate in the township of Potchefstroom, entered into a deed of sale with one Jacobson and Widman, trading as

the Standard Fresh Milk Supply Co., by which they sold to the latter the erf together with the buildings thereon, a 3-ton refrigerating plant on the property and certain movables which need not be specified. Possession was to be given to the purchasers on the 1st March, and the purchase price of £2,400 was to be paid in instalments. It was provided by the agreement that in the event of any instalments not being paid punctually and regularly on the due dates thereof the sellers should have the right on giving fourteen days' notice in writing of their intention to cancel the deed of sale and to retake possession of everything sold and all payments, and improvements made by the purchasers were to be forfeited to the sellers without recourse to law. Thereafter by some arrangement between the partners to which the second defendants were not a party, Widman, together with one Katz who was a partner with Jacobson and Widman, stepped out of the Potchefstroom business and Jacobson continued to carry it on alone. On the 28th August, 1912, Jacobson entered into what is known as a hire-purchase agreement with the plaintiffs by which they agreed to supply him with a 12½ ton Hercules refrigerating machine complete for the sum of £1,153, and to erect the same for him on erf 210. It was provided in the agreement that the plant was not to become the property of Jacobson until all payments under the agreement had been made. Some time in 1913 Jacobson found himself in financial difficulties. He failed to perform his obligations under the agreement with the plaintiffs and with the second defendants, and it is common cause that the second defendants thereupon exercised their rights under the deed of sale and cancelled their contract with the Standard Fresh Milk Supply Co.

Jacobson's estate was sequestrated in July, 1913, and the dispute between the plaintiffs and the second defendants relates to the plant sold by the former to Jacobson and erected by them on erf 210. The first defendant, the trustee in the insolvent estate of Jacobson, lays no claim to the plant.

The first question that calls for decision is whether the plant in question is a fixture or not. It consists of a 12½ ton belt-driven, vertical machine, ammonia condenser, oil trap, receiver, an ice-making tank, containing 99 ice cans, together with piping for two cool chambers, etc. Under the agreement Jacobson was to construct the foundations for the machine and ice tank, the platform for the ammonia condenser and the insulation for the bottom, sides and ends of the ice-making tank. From an inspection of a somewhat similar machine at Shilling's Ice Factory at Pretoria it appears that the compressor itself is erected on a solid foundation of concrete and is held in position by bolts and nuts 3 in. to 3½ in. long embedded in the concrete to prevent it from rocking. It is so constructed as to be divisible into two parts, and the flywheel can similarly be taken away in halves. When the nuts are unscrewed the machine can be removed without injury to the concrete, the bolts remaining in the concrete in which they are embedded. The bolts were supplied by Jacobson. The condenser, whose function is to convert the ammonia gas into liquid ammonia through absorption of the heat by means of cold water, consists of two spiral coils of 1¼ in. piping suspended on stanchions and held on to the stanchions by hook bolts. By removal of the hook bolts the coils collapse, which enables them to be taken through the door. The stanchions themselves are fastened through flanges to wooded horizontal stringers like sleepers by means of what are known as coach screws. The flanges are fastened on to the stringers by four coach screws and the stanchion itself unscrews out of the flange. The flange is worth about two shillings. The stringers or sleepers rest at each end of a tank made of

concrete. The oil trap which is on the outside of the building is attached to the wall by bolts. It is an iron pipe about five feet long with wrought-iron heads, and can be removed by unscrewing two nuts, the bolts remaining in the wall. The ammonia receiver, which holds the liquid ammonia, rests on a foundation but is not fastened. A pipe connects the receiver with what is called an expansion header which regulates the flow of the liquid ammonia. It can similarly be removed by unscrewing some nuts. The ice tank which consists of ¼ in. steel plates rivetted together, rests on an insulating platform without any bolts. Insulating sides and ends are built up after the tank is in position, and boarding is put round the top of the tank. By cutting off the rivet heads the rivets can be removed, the tank collapsed and so taken out without disturbing the boarding. As the boarding is only a matter of a few shillings, however, a much easier and inexpensive method of taking out the tank would be to remove the boarding. The water-storage tank and the distilling apparatus are not fastened to anything. Pipes connecting the various portions of the machinery go through the walls, which are of brick, but the holes in the walls are several times the size of the pipes. In the cold rooms the coils are let into wooden stanchions which have notches for the reception of the pipes. So much for the machinery and the way it is fixed.

If our law be the same as the English law with regard to fixtures there can be no doubt as to the decision. For in the case of *Reynolds* v. *Ashby & Son* (1904) A.C. 466, it was held that machines, which were fixed practically in the same way as this, were fixtures and passed to the mortgagees in spite of the fact that they could be removed without injury to the building. In the case of *Olivier and Others* v. *Haarhof & Co.* (1906), T.S., p. 497, INNES, C.J., laid down the law as follow: "The conclusion to which I have come is that it is impossible to lay down one general rule; each case must depend on its own circumstances. The points chiefly to be considered are the nature and object of the structure, the way in which it is fixed, and the intention of the person who erected it. And of these the last point is in some respects the most important." This statement of the law, which has been followed in two subsequent cases, *The Victoria Falls Power Co., Ltd.* v. *Colonial Treasurer* (1909 T.S., p. 140) and *The Deputy Sheriff of Pretoria* v. *Haymann* (1909, T.S., p. 280) has its origin in Paul Voet's treatise *de natura bonorum mobilium et immobilium*. Now if we apply the principles laid down by Paul Voet in cap. 3, pars. 2 and 3, and cap. 4, pars 1 and 2, there can be no doubt that the machinery while by nature a movable, is an immovable under the present circumstances. He points out that species of mill (*molendium Dwanckmolen*) is an immovable, "for it is fixed to the soil by means of posts and earth, and it has been built in the position in which it is with the intention that it should remain there permanently" (*quod ea mente et intentionis ibidem aedificatur, ut ibi sit perpetuo.*) So also are windmills "for although for the most part they do not adhere to the soil yet they must be considered to be immovables because they are not easily removed." The same applies to wine and oil presses. Burge who in his Commentaries (vol. 2, sec. 1, pp. 6 *et seqq.*) mainly follows Paul Voet, points out that movables can become immovables (1) *rationis accessionis*, as when they are united or affixed to or let into the ground or otherwise annexed or attached to that which is immovable and (2) *rationis destinationis finis, eventus usus, relationis ad rem immobilem* (Paul Voet, c. 5, n. 1., p. 38). Although the machinery in question is fixed in such a manner that it can be removed practically without injury to the premises it must

in the present case be considered to be an immovable. Jacobson, it is true, bought it under a hire-purchase agreement, but we must assume that he intended to pay for it, and as he had bought the erf as well, there can be no doubt that he put it there *ut ibi sit perpetuo*. This is further borne out by the purposes for which the plant was to be used in connection with Jacobson's business.

The plant must therefore be considered as a fixture and the ownership in it passes according to well-known principles of law to the owner of the land. When once Jacobson had annexed the plant to the premises it became an improvement under the terms of his agreement with the second defendants and he could not any more remove it. And it makes no difference whether the ownership of the machinery was in him or not. For even if the plant had been his property, neither he nor his trustee would have an action against the second defendants for delivery or for compensation; the agreement between them makes that impossible. Are the plaintiffs then in a better position with reference to the second defendants? In my opinion they are not. The second defendants are protected against any such action by the express terms of their agreement with Jacobson and any remedy the plaintiffs have must be exercised against the person with whom they contracted. The maxim that no person should be enriched at the expense of another does not apply here, for this is not an enrichment *sine causa*, as all improvements were provided for in the agreement between Jacobson and the second defendants. The machinery was erected on behalf of Jacobson by the plaintiffs themselves, without notice to the second defendants of the agreement with Jacobson, and under these circumstances, although the result may be unfortunate for the plaintiffs, they have, in my opinion, no right to claim the machinery or compensation from the second defendants. The plaintiffs are not possessors and therefore the law as to *bona fide* and *mala fide* possession has no application. They must look for their remedy to the person with whom they contracted. The erf is registered in the name of the second defendants, and the plaintiffs must be taken by their actions in spite of the terms of their agreement with Jacobson to have voluntarily parted with the ownership of the plant to the second defendants. And although the result seems to be inequitable, to hold otherwise might be equally inequitable to the second defendants. For under their agreement with Jacobson they have become the owners of the plant, and to have to pay compensation to a third party for what already belongs to them by virtue of the agreement does not appear, as far as they are concerned, to be equitable. The maxim *mobilia non habent sequelam* applies and the case shows the fairness under the circumstances of the rule of the old Dutch law: "dat men zijn vertrouwen moet zoeken en verhaal daarvoor heeft waar (by wien) men het verloren heeft" Connick Liefstring Bezitrecht (p. 487).

With regard to the alleged acknowledgment by the second defendants of the right of the plaintiffs to the machinery, I merely wish to say that I see no reason for doubting the evidence given on the point either by Dr. Dyer or by Mr. van der Merwe. I have therefore come to the conclusion that the case for the plaintiffs must fail.

There will be judgment for the second defendants with costs.

The plaintiff company now appealed.

J. Stratford, K.C. (with him *R. F. McWilliam*), for the appellants: The first point turns on whether the Court will accept

evidence of intention whether a structure is or is not to be regarded as an immovable, and whether the contract may be taken into consideration. The English law is against the appellants, but the American law is in their favour. The doctrines laid down in *Hobson* v. *Gorringe* (1897, 1 Ch. 182) are opposed to Roman-Dutch law. See also *Holland* v. *Hodgson* (L.R. 7 C.P. 328). In *Reynolds* v. *Ashby & Son* (1904, A.C. 466) the judgment refers to a system of notice to preserve a right analogous to a right *in rem*.

The maxim *nemo dat quod non habet* is a sounder doctrine than *quicquid solo plantatur solo cedit*. The former doctrine is only overridden in three cases, viz., (1) sale by public auction, (2) sale by pawnbrokers under Statute, and (3) sale in execution. See *Voet* (6, 1, 7), *Matthaeus Paroemiae* (sec. 7).

As to American cases, see *Davis* v. *Bliss* (10 Lawyers Reps. N. S. 458); *Schellenberg* v. *Detroit Heating and Lighting Co.* (57 Lawyers Reps. O.S. 632); *Binkley* v. *Forkner* (3 Lawyers Reps. O.S. 33). In the note the law laid down is practically the same as in *Olivier* v. *Haarhof & Co.* (1906, T.S. 497). The facts in *Hendy* v. *Dinkerhoff* (40 Amer. Reps. 107) are almost indentical with those of the present case. See further *MacIntyre* v. *Johnston* (2 O.R. 202).

Intention is the paramount consideration. See *Olivier* v. *Haarhof & Co.* (*supra*); *Victoria Falls Power Co., Ltd.*, v. *Colonial Treasurer* (1909, T.S. 140); *Deputy Sheriff* v. *Heymann* (1909, T.S. 280); *Venter* v. *Graham & Muller* (23 S.C.R. 729); *Johnson & Co.* v. *Grand Hotel* (1907, O.R.C. 42). The fact that appellants fixed the machinery makes no difference. See further *Paul Voet Disquisitio Juridica de Natura Bonorum* (ch. 3, pars. 2 and 3, and ch. 4, pars. 1 and 2); *Burge. Colonial Law* (vol. II, p. 15).

Two principles are to be regarded. The person attempting to transfer *dominium* must possess both the *dominium* and the *animus transferendi*. See *De Beers Consolidated Mines* v. *London and S.A. Exploration Co.* (10 S.C.R. at p. 366); Donellus on *The Civil Law* (4, 3, 26).

The intention of the parties *aliunde* must be considered as much as the appearance of the structure. The English law in regard to a lessee is treated as an arbitrary exception, based on expediency. See Woodfall *Landlord and Tenant* (17th ed., p. 699).

As to the question whether the appellants are in a better position with reference to the second respondents the maxim "No one

may be enriched at the expense of another," finds its legal application in the *condictio sine causa*. If the second respondents have been enriched at appellants' expense they have been enriched without cause as regards the appellants.

The first respondent was in default.

B. A. Tindall (with him *A. S. van Hees*), for the second respondents: As to *Hobson* v. *Gorringe* (*supra*) and *Reynolds* v. *Ashby & Son* (*supra*), the English Courts have not disregarded the intention as an element, but a mere chance clause in a hire-purchase agreement does not affect the legal position. The ostensible intention of the parties must be looked to, *i.e.*, one which is patent to the world. This rule is fairer and protects third parties. The English decisions are consistent with the South African cases. The intention emphasised is whether the structure was to be there permanently, which must be discovered from the object of the structure, the nature of the business, the premises, and the manner in which it is used, and not any statement of intention. Statements of intention in a contract of this nature, if opposed to the patent intention, should not be regarded, because third parties must be protected. If the Court is entitled to regard the clause in the contract as evidencing intention it is not conclusive. Even the American cases do not go so far as to say that this consideration is conclusive. See *Binkley* v. *Forkner* (*supra*) at p. 35.

The South African Courts, in considering the question of intention, have held that it involved the inquiry whether the person who erected the machinery intended that it should be there permanently or for an indefinite period. See *Olivier* v. *Haarhof* (*supra*, at p. 501). See also *Cairncross* v. *Nortje* (21 S.C.R. 127); *Paul Voet*, *ibid* (ch. 4, sec. 2).

The case of a lessee is clear and is different. His intention to remove may be gathered from the nature of his tenure. The doctrine of *accessio* is opposed to the doctrine *nemo dat quod non habet*. See Justinian's *Institutes* (2, 1, 29); *Paul Voet*, *ibid* (ch. 4, sec. 1). The appellants are in the same position as the owners of the machinery in *Reynolds* v. *Ashby & Son* (*supra*), even if they did not know Jacobson was the owner of the ground. See *Reynolds* v. *Ashby & Son.* (1903, I.K.B. 87, at p. 98) where the Court did not regard the question of intention. The principle on which the English Courts proceeded is that what is attached

to the soil belongs to the soil. The doctrine applied in the English Courts is consistent with Paul *Voet* and the South African cases, and is not inconsistent with *Johnson & Co.* v. *Grand Hotel* (*supra*). The premises were destined for the purposes for which the machinery was required. Johnson's case was one between the seller and the liquidators of the buyers. The position of creditors in insolvency is often better than that of the insolvent. See *Harris* v. *Buissine's Trustees* (2 M. 105).

This is not a case between purchaser and seller, but a third party is concerned. See Maasdorp's *Institutes of Cape Law* (2nd ed., Vol. II., p. 4).

As to the American cases, the case of *Davis* v. *Bliss* (*supra*) was relied on as very similar. But see p. 461. The machinery becomes part of the building by the fact of its attachments to the realty. See *Binkley* v. *Forkner* (*supra*).

On the second question as to the appellants' position with reference to the second respondents, the only doctrine relied on is, no one may be enriched at the expense of another. See *Digest* (50, 17, 206, and 12, 6, 14). That doctrine does not give a ground of action. See *Windscheid* (Vol. II., sec. 421, note 1 on p. 531). To succeed, the appellants must bring the doctrine under the *condictio sine causa*, and that action could not be employed because there was a *causa* in this case. In *Hobson* v. *Gorringe* (*supra*) it was held that there was no remedy if the structure was a fixture. See also *Reynolds* v. *Ashby & Son* (*supra*).

Stratford, K.C., in reply: The issue is the question of proof of intention. The facts are the same as those in *Binkley* v. *Forkner*.

I am contending for the doctrine *quic quid solo plantatur solo cedit* as modified by the maxim "no one may be enriched at the expense of another." The case has not been pleaded, argued or decided on the doctrine of estoppel, but purely on the question whether the structure was a movable.

It has not been shown that under Roman law a person who is not the *dominus* of the material becomes the *dominus* of the structure erected on his land.

In *Reynolds* v. *Ashby & Son* (*supra*) the Factors Act applied. That Act provides that property sold under a hire-purchase system shall become part of the land to which it is attached.

Cur. adv. vult.

Postea (May 11).

INNES, C.J.: This appeal raises questions of considerable importance to dealers in machinery. The point at issue is whether certain refrigerating plant and appurtenances supplied by the plaintiff to a buyer under a suspensive contract and installed in a building purchased by, but not transferred to, the latter from the defendant, remains under all the circumstances of the transaction the property of the original vendor, or whether it devolves upon the defendant as owner of the buildings to which it has been attached. The relevant facts may be shortly stated. In January, 1912, the defendant company owned portion of an erf in Potchefstroom upon which there had been erected a dairy plant for pasteurising milk. The structure had apparently been built for the special purpose of accommodating the necessary machinery and affording the facilities required for carrying on the business. On January 25 the company sold the entire property with all the contents of the building to a syndicate, of which one Jacobson was a member, and the contractual rights of which he subsequently acquired. The purchase price was payable in instalments extending over four years; possession was to be given forthwith, but transfer only after satisfaction of a certain portion of the total liability. And it was specially provided that in the event of any default, the sellers should be entitled to cancel the sale, resume possession, and if necessary eject the purchasers; and that all payments and improvements already made should in that case be forfeited to the sellers. In March, 1912, the purchasers took possession, and for some ten months thereafter the instalments were duly met. With a view to improving the plant, Jacobson entered into communication with the plaintiff, and on August 25 a contract was concluded, in terms of which the company undertook to supply and erect a $12\frac{1}{2}$ ton refrigerating machine, with condenser, receiver, and other appurtenances, to be paid for in periodic instalments, the last of which was to fall due in June, 1914. It was specially stipulated that the plant should remain the property of the seller until all the payments had been made; and that, in case of default, the seller should have the right "to enter, with force, if necessary, and without liability for trespass or otherwise, the premises where the plant may or ought to be, and take possession of or remove the plant," any past payments to be retained in reimbursement of the expense of delivery, installation and removal. The refrigerating machinery thus obtained was installed in December, 1912. Jacob-

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son had previously pulled down three cold storage rooms and substituted larger ones. The new plant was actually placed *in situ* by the plaintiff in terms of the contract, but the concrete foundation on which portion of it rested, bolts inserted therein, and certain insulation work were made, supplied and performed respectively by Jacobson. As to the effect of this installation upon the old plant, the evidence is not as clear as it might be; but it would seem that a considerable portion was connected with the new machinery and utilised, part was superseded and left in its place, while one brine tank at least was taken out and scrapped; though whether it was removed from the premises is not apparent. An accurate description of the new machinery, and of the extent of its attachment to the building is given by the learned JUDGE-PRESIDENT. Part of it is held in position by long bolts and nuts, the former embedded in a solid concrete foundation; another part is attached to the wall also by bolts and nuts; pipes connecting the various portions pass through holes in the walls, and certain tanks and coiled piping are supported and fixed in manner described. The conclusion at which the trial Court arrived was that though thus attached to the building, the new plant could be taken to pieces and removed without injury to the premises. In regard to the re-instatement of the old plant no opinion was expressed; but the evidence of the engineers is to the effect that it could be replaced, connected up, and made ready for use at a cost variously estimated at from £25 to £75. With plant thus enlarged and improved Jacobson continued his dairying operations, but with no measure of success. Early in 1913 he made default in respect of machinery payments, and in April plaintiff terminated the contract and reclaimed the plant. The instalments for the property were also in arrear, and the defendant company thereupon cancelled the sale, asserted its rights, and took possession of the buildings and all improvements. In July, 1913, Jacobson's estate was sequestrated; his trustee has been joined as defendant, but makes no claim to the refrigerating machinery, the title to which is disputed between the two main parties to the action. It is claimed by the plaintiff company as being movable property, with the *dominium* in which it has never parted and which in law forms no portion of the building containing it. There is an alternative claim for compensation in respect of the increase in value of the

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landed property, in the event of an adverse finding on the first contention. The defendant maintains that the machinery became on erection a fixture, that the title passed to the owner of the land, and that it constitutes, therefore, an improvement for which no compensation is claimable. There is a further plea to the effect that, as against the defendant company, the plaintiff cannot claim that the new plant is in a different position from the old in respect of ownership or liability to removal. The Transvaal Provincial Division, though it found that the machinery in dispute could be removed without injury to the premises, held that it must be considered to be immovable property, because it had been installed by Jacobson with intent that it should permanently remain. That the owner of the land had in consequence become the owner of the plant and was entitled to retain it without compensation. Judgment was, therefore, entered for the Potchefstroom Dairies, and it is against that order that the plaintiff appeals.

It is neither contended nor even suggested that *dominium* in the machinery was at any time vested in Jacobson. The case for the respondent is that though (on the authority of *Quirk's Trustees* v. *Liddel's Assignees*, 3 J., p. 329, and other cases), the ownership remained in the plaintiff up to the time when the plant was attached to the building, yet it thereupon passed to the defendant by accession to the realty. And the result of the judgment is to establish the proposition that A may take the property of B, and give it to C, by annexing it to the building of the latter, even though the annexation be of such a character that it may be severed without injury either to the premises or to the thing attached.

The question whether an article, originally movable, has become immovable through annexation by human agency to realty is often one of some nicety. As was pointed out in *Olivier* v. *Haarhof* (T.S., 1906, p. 497) each case must depend on its own facts; but the elements to be considered are the nature of the particular article, the degree and manner of its annexation, and the intention of the person annexing it. The thing must be in its nature capable of acceding to realty, there must be some effective attachment (whether by mere weight or by physical connection) and there must be an intention that it should remain permanently

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attached. The importance of the first two factors is self-evident from the very nature of the inquiry. But the importance of intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty, or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute. But controversy generally arises where the separate identity of the article annexed is preserved, and when detachment can be effected with more or less ease. Indeed, it may happen (as has happened here) that the annexation is in itself consistent with the article either being, or not being, a portion of the realty; and it thus becomes necessary to examine with the greatest care the intention with which it was annexed. The authorities emphasise the necessity for the presence of an intention that the attachment should be permanent. The well-known passage from *Paul Voet* (C. 4, par. 3) has been quoted by the learned JUDGE-PRESIDENT, and I do not propose to repeat it. Others might be added. Burge, for example (vol. 2, p. 15), states that "movables affixed to land or buildings acquire the quality of immovables, by reason not alone of their being affixed, but of their being affixed with the intention of permanently remaining." But the intention required (in conjunction with annexation) to destroy the identity, to merge the title, or to transfer the *dominium* of movable property, must surely be the intention of the owner. It is difficult to see by what principle of our law the mental attitude of any third party could operate to effect so vital a change. Certainly, in *Olivier* v. *Haarhof*, and, so far as I am aware, in all other South African cases, the intention which was looked to was the intention of the owner. And Johannes Voet (*Ad. Pand.*, 1, 8, 14), in dealing with this matter, indicates the state of mind of the owner as the decisive factor. "But what are generally regarded as movables," he says, "may yet . . . by the intention and act of the owner, be regarded as movables, as far as concerns legal consequences . . . If what were formerly movables are joined to buildings not for temporary but for perpetual use, whether they are beams or columns or marble pieces, they begin to be part of the building, and thus to be immovable." And this is what one would expect, in view of

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the fundamental principle that (subject to a few specific exceptions) *dominium* cannot be transferred or altered, save by the intent of the *dominus*. Nor can any man, as a rule, confer a better title than he himself possesses. But it is argued that the acquisition or transfer of ownership by accession is an exception to the above. That is true; but only in certain cases and to a limited extent. Turning to the civil law as the fountain head of the doctrine, it will be found that the cases in which *dominium* could be transferred without the consenting mind of the owner, by artificial, as opposed to natural accession, were those where there had been union by a process of nature, or where one thing had been inseparably incorporated in another. Thus a plant uprooted by one not the owner, and re-planted elsewhere, would, after it had taken root, belong to the *dominus* of the new site, because it had become united by nature to the soil from whence it drew nourishment (Inst. 2, 1, 26). If a man inseparably interwove with his own vestment the purple of another the material thus incorporated acceded to the vestment (Inst. 2, 1, 26). The remedy of the owner was by an action of theft, and a *condictio* for the value; but he had lost his property. But it would seem that if, though interwoven, the purple was separable, then the owner, retaining his *dominium*, could bring an action *ad exhibendum* (Dig. 4, 7, 2). A house acceded to the soil in which it was built; but even in that case the ownership of the materials, if originally in different hands from the ownership of the soil, was governed in strict law by the state of mind of the *dominus*. A man who built with his own materials on ground which he knew to belong to another lost his property therein because he was deemed to have voluntarily parted with it. On the other hand, he who built upon his own ground with the material of another was considered the proprietor of the building; but the owner of the material retained his *dominium* therein, never having consented to relinquish it. He could not demand the material while the house remained intact, because a special law forbade the destruction of the building under such circumstances. But if the house was destroyed by some natural cause, he could vindicate his material. Otherwise his action was *de tigno injuncto* for double the value. (Inst. 2, 1, 29 and 30.) The law of Holland adopted these principles in regard to the incorporation of building material, save that the action *de tigno injuncto* fell into disuse, and relief was given by

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a general action for damages (see *Grotius* 2, 10, 7 and 8; *Voet* 41, 1, 24 and 47, 3, 2; *Groenewegen, de Leg. Ab. Ad. Instit.*, 2, 1, 29). The examples above given illustrate the limitation as well as the extent of the principles on which transfer of *dominium* by way of accession was effected without the intention or consent of the *dominus*. But outside the area of these and other similar exceptions, the operation of the general rules regulating change of ownership remains unaffected. So that movable property like the machinery in dispute, the identity of which has been fully preserved, which has not been physically incorporated in the realty, and which is separable from the building to which it has been attached, cannot be considered as part of the building unless the owner intended that it should remain permanently annexed. It is not necessary here to discuss the position which would arise if a purchaser or mortgagee had advanced money or been otherwise prejudiced on the faith of property attached to the realty but forming in law no part of it. That question does not now present itself. And the grounds on which such persons might be entitled to relief would not affect the general principle.

Turning to the facts before us, the machinery in dispute was placed in the building by Jacobson. The plaintiff company carried out the actual installation, but it was done under contract with Jacobson and for his account. He states that he intended to have it there permanently, and no doubt he hoped to pay for it; but he did not mean to prejudice the plaintiff's rights, because he adds: "I thought it belonged to Macdonald until paid for, and I never intended anything else." He, however, was not the owner, and therefore his intention one way or the other could not affect the *dominium*. Were it otherwise, the ownership of this property would be dependent upon the mental attitude of a man to whom it did not belong, and who did not intend to deprive the true owner of his rights. The annexation could only operate to transfer the *dominium* of the plant, if when it was put up the plaintiff intended that it should remain there permanently or authorised Jacobson to affix it with that intention. And the evidence does not show that. The attitude of Macdonald, the managing director, who controlled this transaction throughout, was perfectly consistent. He had no idea of parting with the right to remove his machinery if default was made in payment, and he intended that its attachment to the

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building should be subject to that right, which was quite inconsistent with placing it there permanently. Any other state of mind would have involved a renunciation of the benefits of his contract, which it is clear he never contemplated. Nor did he authorise Jacobson to attach the plant with any other intent, or in any way which would interfere with his ownership. The evidence was not directly pointed at that issue, but had the question been put there can be no reasonable doubt as to the answer; there is nothing in the record which would justify the view that Macdonald authorised any permanent annexation by Jacobson. I feel constrained, therefore, to differ from the trial Court on the question of whether on the facts the plant in question should be considered immovable property. And my dissent is based entirely upon the ground that Jacobson, not being the owner, his state of mind could not change the *dominium*. If he had been the owner, I should find myself in entire agreement with the clear and able reasons of the JUDGE-PRESIDENT. The Provincial Division gave no effect to the suspensive condition in the contract of sale, just as the English Courts have given no effect to the provisions of a hire-purchase agreement under somewhat similar circumstances. Some of those decisions, though not binding upon us, are, upon the face of them, strong authority for the view taken below, and reference should, therefore, be made to them. The English law agrees with our own in attaching importance to the intention or object with which the annexation is made, when it is necessary to decide whether a chattel has become portion of the realty to which it is attached. (See *Holland* v. *Hodgson*, 7 C.P., p. 334; and *Hellawell* v. *Eastwood*, 6 Exch., p. 322.) But an application of the law to varying facts over a long series of years has led to results which it is well nigh impossible to reconcile on any general ground of principle. And the decision has often been affected by the relation in which the disputants have happened to stand. Agricultural landlord and tenant, urban lessor and lessee, heir and executor, executor and remainderman, mortgagor and mortgagee—the controversies as to fixtures between these various classes have been apt to produce different results on similar facts, according as the law is more or less slow to interfere with the rights of one or other class. The leading case most in point here is *Hobson* v. *Gorringe* (1877, 1 Ch., p. 182). A gas engine

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had been let on the hire-purchase system, the property not to pass until the payment of all instalments, and the owner to have the right of removal on default. It was fixed to the land of the hirer by bolts and screws to prevent rocking, and it had a plate attached bearing the name of the owner. The hirer being in default the engine was claimed by the owner and also by a mortgagee who took his mortgage after the agreement and without notice of it. The Court of Appeal held that it was sufficiently annexed to the land to become a fixture, and that any intention to be inferred from the terms of the hiring agreement that it should remain a chattel did not prevent it from becoming a fixture; and that it passed, therefore, to the mortgagee as part of the freehold. That was a startling result, and it was arrived at in this way: By a series of decisions, from 1856 onward, it had been held that chattels affixed in similar fashion became portion of the freehold. This particular engine was, therefore, immovable property, and the only effect of the hire contract was that the owner, as between himself and the hirer, had the right to sever and remove in case of default. But that right was not an easement created by deed, nor was it conferred by a covenant running with the land, and therefore it imposed no legal obligation on the mortgagee. I have not consulted all the numerous early decisions, but *Mather* v. *Fraser* (2 K. and J., p. 536); *Holland* v. *Hodgson* (L.R., 7 C.P., p. 328); and others, were cases in which the person who annexed was the owner of the movable. No doubt *Hobson* v. *Gorringe* lays down what is now the English law, but I cannot think that our Courts would under similar circumstances have deprived the owner of the engine of his property. The decision was followed in *Reynolds* v. *Ashby & Son* (1904, A.C., p. 466), where machinery fastened down to a building in a similar manner to that which had been proved in this case, and which could be removed without injury to the premises, was held to pass to the mortgagee though it had been supplied by the owner to the lessee of the building on the hire-purchase system. The House of Lords relied on the earlier cases, but it is evident from some of the judgments that the resulting position was regarded with uneasiness. Lord MACNAGHTEN thus expressed himself: "That the law with regard to fixtures as between mortgagor and mortgagee is perfectly satisfactory, I should be sorry to affirm;

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but I am sure 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. *Fraser*."

There is weighty American authority opposed to *Reynolds* v. *Ashby*. But I do not propose to discuss the cases, because this appeal must be decided by an application of the principles of our own law, and they lead to the conclusion that the machinery here in dispute is not a portion of the building, but is the property of the plaintiff.

In the view which the trial Court took of the matter it was unnecessary to deal with the second plea. But I do not think that it really affects the legal position. The defendant company is not an innocent purchaser or mortgagee misled by the action of the plaintiff, nor has it been prejudiced, because the building will be restored to the same condition that it was in immediately before the installation of the new machinery. The plaintiff company will be entitled to remove its plant, but the *status quo ante* must be ensured. That is to say, the old plant which was taken out must be put back and all necessary connections made. And if any portion has been damaged or destroyed, then it must be repaired or replaced. MacDonald, Limited, if it takes away its property, must place the premises and the old plant which it disconnected or altered in exactly the same position in which it found them when the new machinery was brought in.

The declaration contains a claim for damages, to which I have not yet referred. There is no finding upon this part of the case, and it is quite impossible, upon the evidence before us, for this Court to arrive at any decision upon it. Upon that claim, therefore, an order of absolution from the instance should be entered.

The result is that, in my opinion, the appeal succeeds. The order of the Provincial Division should be set aside, and judgment entered for the plaintiff in terms of the first prayer of the declaration. As to (*a*) of the second prayer, the plaintiff must be declared entitled to enter on Erf 210, Potchefstroom, and remove the plant, accessories, and chemicals therein referred to, on condition that no damage be done to the premises and that the plant originally contained therein be restored and reinstated in the condition in which it was prior to the installation of the plaintiff's machinery. There should be absolution as to (*b*), and the costs here and below should be borne by the defendant company.

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SOLOMON, J.A.: On the 25th January, 1912, the respondent company entered into a deed of sale with Jacobson and Widman, trading as the Standard Fresh Milk Supply Co., by which it sold to the latter Erf No. 210, with the buildings thereon, a 3-ton refrigerating plant on the property, and certain movables, for the sum of £2,400. The purchase price was to be paid in instalments, and transfer was to be given on March 1st, 1915. It was a term of the contract that in the event of any instalment not being paid on the due date thereof the sellers should have the right, on giving 14 days' notice in writing of their intention, to cancel the deed of sale, and to retake possession of everything sold, and that all payments and improvements made by the purchasers were to be forfeited to the sellers without recourse to law. The buildings, which were of brick, had apparently been erected for the purpose of carrying on a dairy business on the premises. From the schedule to the deed of sale they appear to have consisted of an office, washing-room, main hall, receiving-room, engine-room, boiler-room, lift upstairs, and, outside, a stable and coach-room. The purchasers took possession of the premises on March 1st, and subsequently by arrangement between them Widman withdrew from the business, which thereafter was carried on by Jacobson alone. Not being satisfied with the refrigerating plant in the building, he, on August 28, 1912, entered into a hire-purchase contract with the plaintiff company under which it agreed to supply him with a 12½ ton refrigerating machine complete for the sum of £1,153, and to erect the same for him on the Erf No. 210. It was a term of the agreement that the plant was not to become the property of Jacobson until all the payments provided for had been fully made. The plant consisted of a 12½ ton refrigerating machine, with its ammonia condenser, oil trap, receiver, ice-tank, and the usual appurtenances. Jacobson was to construct the foundations for the machine and ice-tank, platform for the ammonia condenser, and insulation for the bottom, sides and ends of the ice-tank. In due course the greater part of the old plant was removed from the

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premises and the new plant was erected by the appellants, the compressor itself being fixed on a solid foundation of concrete by means of bolts and nuts 3 in. to 3½ in. long embedded in the concrete. Certain portions of the machinery, such as the ammonia receiver, the ice-tank, and the water-storage tank which are accessory to the compressor were not fixed in any way to the building, but rested on foundations or platforms. Pipes connecting the various parts of the machinery go through the walls, which are of brick, the holes in the walls being much larger than the pipes. It is unnecessary to describe in further detail the plant or its manner of attachment to the premises. This will appear from the judgment of the JUDGE-PRESIDENT in the Court below. One fact, however, is quite clear, viz., that the whole of the machinery could be removed without practically any injury to the buildings.

Unfortunately, not very long after the new plant had been installed, Jacobson fell into financial difficulties, with the result that he was unable to meet his obligations to either the appellant or the respondent company. It is common cause that thereupon, some time in 1913, the respondent company exercised its rights under the deed of January 25th, 1912, cancelled the sale and took possession of the property. Subsequently, on November 28th, 1913, the appellant company also cancelled the hire-purchase agreement which it had made with Jacobson, and brought an action against the respondent company claiming back the refrigerating plant. In the alternative there was a claim for the sum of £1,153, the purchase price of the plant, as compensation for the improvements effected upon the property by the appellant company. The defence to the action was that the plant was a fixture, and had become part of the immovable property, and that it could not, therefore, be recovered; and as regards the claim for compensation, that the improvements made by Jacobson had become forfeited to the respondent company under the provisions of the deed of sale. These being shortly the issues between the parties, the main question to be determined is whether the refrigerating plant erected on the premises was a fixture, so as to have become portion of the immovable property. And in regard to this question it will be convenient to consider first what the position would have been if Jacobson had been the owner of the premises and had purchased the

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plant outright and not under a hire-purchase agreement. Would the plant in that case, after erection, have become part of the immovable property? Now under English law there can be little doubt that this question would be answered in the affirmative. It is true that the decisions of the English Courts, as was pointed out by Lord LINDLEY in the latest case of *Reynolds* v. *Ashby & Son* (1904, A.C. 473), have not always been consistent. But "the great weight of authority," as was said by Lord JAMES in *Reynolds'* case, "is in favour of the view that these machines must be held to be affixed to the building so as to pass under the mortgage as being a portion of the factory." The machines there had been erected in a factory which was being used for a joinery business, and they were attached to the property in very much the same way as the refrigerating plant in the present case. They were placed in beds of concrete prepared for them, and each machine was fastened down to its concrete bed by bolts and nuts. By unscrewing the nuts each machine, although heavy, could be raised up and removed without injury to the building containing it and without injury to its concrete bed and to the bolts embedded in it." In his judgment Lord LINDLEY says: "The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. It is true that the machines could be removed, if necessary, but the concrete beds and bolts prepared for them negatived any idea of treating the machines when fixed as movable chattels." The circumstances of that case are, therefore, very similar to those with which we are here concerned, and if the principles of our law are the same as those of the English law on this subject, it would follow that, putting aside for the present the fact that the plant had been bought under a hire-purchase agreement, if Jacobson had been the owner of the premises, the plant would have become part of the immovable property. Now I am satisfied that there is no substantial difference between our law and the English law with regard to fixtures. This was pointed out by the present CHIEF JUSTICE in the case of *Olivier and Others* v. *Haarhof* (1906, T.S. p. 500), when, after stating what were the points chiefly to be considered in determining whether an article attached to the land was a fixture or not, he says: "The law of England appears to be the

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same." He then quotes from a judgment of Lord BLACKBURN in the case of *Holland* v. *Hodgson* (L.R., 7 C.P. 328) and remarks that "the language used might have been taken from Paul *Voet*." In further confirmation of this view, I desire to refer to one of the older decisions in the English Courts, where the principles of law are more fully discussed than in the more recent cases. In *Hellawell* v. *Eastwood* (6 Ex. 611), PARKE, B., delivering the considered judgment of the Exchequer Court, says: "The only question, therefore, is whether the machines when fixed were part of the freehold; and this is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can be easily removed, *integre, salve, et commode*, or not, without injury to itself or the fabric of the building; secondly, on the object and the purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, '*perpetui usus causa*, or in that of the Year Book, '*pour un profit del inheritance*,' or merely for a temporary purpose or the more complete enjoyment and use of it as a chattel." The actual decision upon the facts in that case has been since questioned, as was remarked by Lord LINDLEY in *Reynolds* v. *Ashby & Sons*, but the law laid down has been accepted in the later cases, and is substantially the same at that expressed by Lord BLACKBURN in *Holland* v. *Hodgson*, which was quoted in *Olivier* v. *Haarhof*. And if that be a correct statement of the English law on the subject, it is substantially the same as our law. Thus, in *Voet* 1, 8, 14, it is said: "And as regards the act of the owner, things which previously were movable if they have been affixed to buildings for the sake not of temporary but of permanent use, become part of the buildings and therefore immovable." In *Haarhof's* case the CHIEF JUSTICE sums up the position as follows: "The conclusion to which I have come is that it is impossible to lay down one general rule; each case must depend upon its own circumstances. The points chiefly to be considered are the nature and object of the structure, the way in which it is fixed, and the intention of the person who erected it. And of these the last point is in some respects the most important." The intention to be considered is

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as put by *Voet*, whether "the movables had been affixed to the buildings for the sake not of temporary but of permanent use," or, as it is expressed by Paul *Voet*, "that they should be there permanently." And it will be observed that the points emphasised by the CHIEF JUSTICE are practically the same as those set out by Baron PARKE in *Hellawell* v. *Eastwood*, for the "object of the structure and the intention of the person who erected it" are so closely related that to a great extent they overlap one another, so that in many cases the intention may be fairly deduced from the object and purpose of the annexation. On the other hand, the mode of annexation may sometimes be conclusive of the intention, as for example where a movable is so built in and incorporated into the building as to become part of the structure so that it cannot be disannexed without serious injury to the building itself. That, of course, is not the case here, but the question to be determined is whether according to the principles of our law, having in view the mode of attachment of the machinery and the purpose for which it had been erected, it must be taken to have become part of the immovable property on the ground that it had been annexed not for temporary but for permanent use. Now if Jacobson had been the owner of the erf and had bought the plant in the ordinary course and not under a hire-purchase contract, it would scarcely be open to question that the plant would have become part of the immovable property. The English cases are conclusive that in such circumstances the machinery must be held to have been annexed for permanent and not for temporary use. In the case of *Reynolds* v. *Ashby*, in the King's Bench Division, COLLINS, M.R., dealing with this aspect of the matter, says: "The fact that the person who affixed this machinery did so for the purpose of a manufactory on premises of which he was himself the owner for a term of 99 years affords no evidence in support of the view that the annexation was intended to be only temporary for the better use of the machines as mere chattels; on the contrary it is rather in favour of the view that the intention was that they should be attached to the factory and be used as part of it for the purposes of the business there carried on, as long as that business should be continued to be carried on." If, however, Jacobson had been a mere lessee for a short term of years, then the presumption would have been that the plant had been annexed for temporary and not for per-

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manent use. This is very clearly set forth by *Burge* (vol. 2, p. 15), as follows: "Movables affixed to land or buildings acquire the quality of immovables by reason not alone of their being affixed but of their being affixed with the intention of there permanently remaining. No such intention can be presumed when the person by whom they were affixed has only a temporary interest in the land or house. Movables, therefore, which would be immovable if affixed by the owner continue movable as between him and the tenant."

Thus far I have proceeded on the assumption that Jacobson was the owner of the erf and that he had bought the plant outright, and if those had been the facts I should have felt no difficulty in holding that the plant had become a fixture. Does it then make any difference that in the first place he had bought the erf under a deed of sale, which entitled the seller to cancel the contract and to retake possession of the property in case the instalments of the purchase price were not paid on due dates? In my opinion that fact cannot affect the legal position. For it is clear that at the time of the erection of the plant Jacobson contemplated that he would carry out the terms of his contract and that he would become the registered proprietor in due course. He was not, therefore, in the position of one who had a temporary interest in the property, but he regarded himself as the virtual owner. His intention, therefore, in annexing the plant would be precisely the same, as if he had been the actual owner, so that the legal position is not in any way affected by the special terms of the deed of sale.

Is it then affected by the fact that the plant was bought under a hire-purchase agreement, in terms of which it was not to become the property of Jacobson until all the payments provided for had been made? This is the circumstance which was mainly relied upon by the appellant's counsel in support of the contention that the plant had continued to be movable and had never become portion of the immovable property. And in considering this point it is desirable to bear in mind that the plant was annexed to the building by the appellant company itself. This is not the case, therefore, of the movable property of one person being affixed to the immovable property of another without the consent of the former. The circumstances are, therefore, very similar to those

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which were present in the case of *Reynolds* v. *Ashby & Son*, where the same question was raised as between mortgagor and mortgagee and was answered adversely to the appellant's contention, mainly on the authority of the earlier case of *Hobson* v. *Gorringe* (1897, 1 Ch. 182). On the other hand, we were referred to certain American decisions, in which the very opposite conclusion was arrived at. The case in which the facts were more analogous to the present than in any of the others is that of *Davis* v. *Bliss*, in the New York Court of Appeal, and reported in Lawyers' *Annotated Reports* (10 N.S., p. 458). And the real ground of the decision is thus stated in the judgment: "The agreement between the plaintiffs and Lyon, clearly and conclusively, as matter of law, indicated the intent of those parties that the engine should remain personal property until it was paid for." The agreement in question was a hire-purchase contract, in all essentials identical with the one made between the plaintiffs and Jacobson in the present case. Now, as has been already pointed out, the intention, which has to be regarded in determining whether machinery which has been annexed to buildings has become portion of the immovable property, is whether it was annexed by the owner of the premises for permanent and not merely for temporary use. And I find it somewhat difficult to see how that intention is affected by the fact that the plant was not bought out and out, but under a hire-purchase agreement. For a purchaser under such a contract has the same intention as any other purchaser, viz., to acquire the property as his own, and when he erects the plant, as in this instance, in buildings set apart for a special business, he does so intending presumably to use it for the purposes of that business so long as he continues to carry it on. His intention, therefore, would be exactly the same as if he had bought the plant out and out, assuming, of course, as we are bound to do, that the transaction was a *bona fide* one. Nor does the position seem to me to be affected by the fact that in the agreement was a clause providing that the plant should not become Jacobson's property until the purchase price had been paid. For that was a provision inserted for the protection of the seller, to enable him to reclaim his property in case of failure of payment of any of the instalments of the purchase price, and so long as the premises remained in the possession of Jacobson the plaintiff company was entitled in that event, under their contract, to enter upon

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the buildings for the purpose of disannexing and removing the plant. But that does not alter the fact that Jacobson contemplated becoming the owner of the plant in due course by paying the instalments of the purchase price, and that this was his state of mind when he erected the machinery in the building which he had purchased. And, after all, it is the intention of the purchaser with which we are concerned, and not that of the seller of the plant. However much the latter may have had in mind the fact that he was not parting with his property until it had been paid for, if in fact Jacobson did *bona fide* intend to pay the instalments as they fell due, then, in my opinion, when the plant was annexed to the premises for the purpose of the dairy business, it was placed there by him for permanent and not for temporary use, with the result that in law it thereupon became part of the immovable property. I cannot, therefore, agree with the contention that the hire-purchase agreement is conclusive proof that the plant remained movable property after its annexation until it was paid for. For the true test by our law is not whether on its erection the intention was that it should remain personal property, as it is put in the American case, but whether it was affixed for permanent and not merely for temporary use. And if it was it matters not what the parties to the contract might have thought regarding the nature of the property, for the law is decisive on the point, and impresses the plant with the character of immovable property. Moreover, in my opinion, the question of intention is one of fact, not of law, though in the American case it appears to have been treated rather as a matter of law. And being a question of fact, it is of some importance to observe that Jacobson himself, in his evidence, says: "I intended to have the plant there permanently." It is needless to say that the Court was not bound to believe his evidence on that point, but it appears to me to be borne out by all the circumstances of the case, and apparently it was accepted as trustworthy. On the whole, therefore, I am not satisfied that we should accept the American decision referred to as a safe guide in this case, especially as it is in direct conflict with the case of *Reynolds* v. *Ashby & Son* in the House of Lords.

But then the point is taken that the appellant company cannot be deprived of its property in the plant without an intention on

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its part to transfer the *dominium*, and that no such intention was present in this case. This is an argument which, so far as I can remember, was not pressed upon us in the appeal, but it is one which cannot be passed over in silence. And here it is important to bear in mind, as already pointed out, that this is not the case of the movable property of one person being affixed to the immovable property of another without the consent of the former. Whether in that event this argument would prevail is a question which does not now arise for consideration. It may be observed, however, in passing that a person may in law lose the ownership of property without any intention of parting with the *dominium* and even against his will, as, *e.g.*, in the well-known cases of prescription, accession and confusion. So also in the case of a lessee who has failed during his tenancy to remove buildings erected by him, the property passes to the owner of the land, but this was under the Placaat of 1658. In Justinian's *Institutes* (2, 1, 29) it is laid down that "when a man builds on his own soil with material belonging to another he is understood to be the owner of the building, for whatever is built on the soil goes with it." (This passage, I take it, refers to the case of a person using the materials of another without his consent.) "And yet he that was owner of the materials does not cease to be their owner," but he was prohibited by a law of the XII tables from pulling down the building in order to recover his property. If, however, for any reason the building fell down, then the owner of the materials may reclaim his property. From this it appears that though the building was regarded as the property of the owner of the soil, in some mysterious way the materials still remained the property of their owner. It seems clear, however, that this would not have been so if the owner of the materials had consented to their being used in the building. However, the case with which we are now concerned is an entirely different one. Here the movables of the appellant company were not incorporated in the building, but they were affixed to it by their owner. The appellant company, therefore, not only consented to the plant being annexed to the premises, but they knew perfectly well the manner in which and the purpose for which it was annexed. These are two of the most important elements to be considered in determining whether a movable has become a fixture or not, and if in addition we have the fact that the owner

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of the premises intended that the annexation should be for permanent and not for temporary use, the result in law is, in my opinion, that the movable becomes part of the immovable property. Nor do I think that this is affected by the fact that the owner of the chattel intended that it should not become the property of the owner of the building till it had been paid for, for the result is one which follows by operation of law. The appellant company must, in my opinion, accept the consequences which legally flow from its own act, whatever its intention may have been regarding the retention of the ownership. In the case of *Reynolds* v. *Ashby & Son*, this point is dealt with in two of the judgments which were delivered. Thus Lord JAMES said: "The machines were sold by the appellant for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed and so become part of the building." And Lord LINDLEY said: "In effect Holdway was authorised by the appellant to convert the chattels into fixtures subject to the right of the appellant to enter and retake them if Holdway did not pay for them." In the present case also the appellant company had the same right, and if that right had been exercised, while Jacobson was in possession, the plant would have been again converted into movable property. The right, however, was lost when Jacobson was deprived of possession by the respondent company, leaving to the appellant company merely the barren right of a personal claim against a man who had become insolvent.

On the whole case, therefore, I agree with the conclusion of the JUDGE-PRESIDENT in the Court below, following the decision of the House of Lords in *Reynolds* v. *Ashby & Son*, "that the plant must be considered a fixture and that the ownership in it passes according to well-known principles of law to the owner of the land, the respondent company."

But then the further question arises whether the appellant company is entitled to recover from the latter the sum of £1,153, the purchase price of the plant, as compensation for the improvement effected to the property by the erection of the machinery. This claim is based upon the well-known maxim of our law that no one should be enriched at the expense of another. But as is pointed out by the judgment of the JUDGE-PRESIDENT, this is not a case

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of the respondent company being enriched *sine causa*. For it was an express term of the contract with Jacobson that in the event of any of the instalments of the purchase price of the erf not being paid on the due date the sellers should be entitled to cancel the sale and that all improvements made by the purchasers should become forfeited in their favour. The respondent company has, therefore acquired the plant under its contract with Jacobson, and any claim that the appellant company may have must be exercised against the person with whom they contracted. It is unfortunate for them that he has become insolvent, but that fact cannot affect their legal rights.

On the whole case, therefore, I am of opinion that the appeal should be dismissed with costs.

JUTA, A.J.A., concurred with the CHIEF JUSTICE.

A. F. S. MAASDORP, Actg. A.J.A.: The main difficulty in the present case has reference to certain machinery situate upon the land of the second defendants and which is alleged to be permanently affixed to it, the question at issue between the parties being whether the ownership in such machinery is vested in the plaintiff company or in the second defendants. Now, omitting unnecessary details, the material facts in connection with this question are that on August 28, 1912, the plaintiffs sold the said machinery on the hire-purchase system to the insolvent Abel Harris Jacobson, who was at the time in occupation of the land of the second defendants under an agreement of sale—dated January 25, 1912—whereby he had to pay the purchase price in certain instalments and on the condition that in case he should be in arrear with any instalments the second defendants should have the right to cancel the sale and claim all improvements made by the purchaser as forfeited to them. On the other hand, the terms of the hire-purchase agreement between the plaintiff company and the said A. H. Jacobson were that the plaintiffs were to supply the said machinery and erect it on the land in question, and that it was to be paid for amongst other things by a number of promissory notes falling due at various dates—or in other words, the purchase price was payable in instalments as set forth in the promissory notes. It was further agreed that the machinery was to remain the property of the plaintiffs until

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the whole of the purchase price had been paid, and that in case of failure to pay any of the instalments or in case of bankruptcy or otherwise on the part of Jacobson, the plaintiffs were to be entitled to enter upon the premises and take possession of the machinery and remove the same. In the result Jacobson failed to pay any instalments, and consequently the plaintiffs cancelled the agreement in April, 1913; and on the other hand, Jacobson also failed to make due and proper payments to the second defendants, who also cancelled their agreement with him. A dispute has consequently arisen between the plaintiffs and the second defendants as to the ownership in the machinery, the latter maintaining that the machinery has been permanently affixed to the land and become part and parcel of the same and therefore their property; and the former that it has not been permanently affixed to the land, and has by virtue of their agreement with Jacobson never ceased to be their property.

The case is exactly similar to that of *Johnson & Co.* v. *The Grand Hotel and Theatre Company*, decided by the High Court of the Orange River Colony in 1907, and I may say at once that I have heard nothing in the present case to make me change the opinion as to the law expressed by me in that case. In the present case, as in that, the machinery in question may be taken to be of such a nature and affixed to the land in such a manner that, but for the agreement between the plaintiffs and the first defendant, it would have amounted to a fixture and formed part and parcel of the ground. At the same time the machinery is erected in such a way that it may easily be detached from the land without any injury to the land or buildings. Under these circumstances the question is whether the machinery has become part and parcel of the land and so the property of the second defendants in spite of the hire-purchase agreement between plaintiffs and Jacobson.

Now the law bearing on the subject has been laid down in a number of decisions, upon some of which the decision in the *Grand Hotel* case was expressly grounded. The latest of these decisions at that time was that given in the case of *Olivier and Others* v. *Haarhof and Others* (1906, T.S. 500), in which the present CHIEF JUSTICE laid down the law as follows: "The conclusion to which I come is that it is impossible to lay down one general rule; each

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case must depend upon its own circumstances. The points chiefly to be considered are the nature and object of the structure, the way in which it is fixed, and the intention of the person who erected it. And of these the last is in some respects the most important." The law as here laid down was adopted and reiterated in a later case by the same Judge, namely, in the case of the *Victoria Falls Power Company* v. *The Colonial Treasurer* (1909, T.S. 145), in the following words: "What is the position? The poles are firmly fixed, it is true, to the ground, to a depth of about 6 feet. But in ascertaining whether they constitute movable or immovable property, we must chiefly have regard to the intention of the person who put them there. Did he intend that they should remain there permanently, or were they to remain simply so long as they suited his purpose, and were they liable to be removed under certain contingencies which he contemplated? I think that is the test. It is what the Court laid down in *Olivier and Others* v. *Haarhof & Co.*" And then the CHIEF JUSTICE proceeded to read the passage above quoted, ending with the words: "And of these the last point (*i.e.*, the intention of the person making the erection) is in some respects the most important," and adding, "certainly the most important one in the present case. If it were not the intention that the poles should remain permanently where they were placed, then they ought not to be considered fixed property." Further on: "The contingency must have been present to the minds of those who erected the plant that they might at any time be ordered to be removed, or that they might remove it for their own convenience. That being so, the poles were not erected permanently, and they cannot for the purposes of this case be held to be portion of the soil, and as such fixed property." The law as here laid down was adopted and applied in the case of the *Deputy-Sheriff of Pretoria* v. *Heymann* (1909, T.S. 280), and also by the Free State Division in the *Grand Hotel* case, and to the judgment given by me in this latter case I entirely adhere, and it is therefore not necessary for me to refer to all the authorities there quoted. I may, however, give here a translation of an authority therein referred to, though not quoted *in extenso*, namely Paul *Voet's Disquisitio Juridica de Natura Bonorum Mobilium et Immobilium* (Cap. IV., par. 2), where he says: "Further amongst things immovable which are made such artificially is a windmill,

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whether it be a ban-mill or dwanck-molen (compulsory mill), as it is called in Dutch, or not." (For interpretation of the word "ban," see Maasdorp's *Grotius*, 3rd ed., pp. 44, 57 and 151, and the translator's note on pp. 44 and 151; Van Leeuwen's *Roomsch Holl. Recht*, B. 5, ch. 30, par. 9; and Kersteman's *Woorden Boek*, *sub voce* "molengelden"). "For it is fixed to the earth or soil by posts or piles sunk into the ground just like a house, because it is built there with the object and intention that it is to remain there permanently." But that this rule as regards intention is not without exception even with regard to houses is clear from an earlier part of the same paragraph of Paul *Voet*, where, after having stated that "amongst immovable things which are made such artificially or by the intervention of the labour of man are houses and buildings," he excepts from this rule houses which are capable of being moved (*domus exemptiles*), which can easily be transferred from one place to another.

Johannes *Voet* also lays great stress upon the intention with which the affixing is done. He says (1, 8, 14): "Further, even things which are ordinarily regarded as immovable are nevertheless held to be movable as regards legal consequences either on account of a special disposition on the part of the legislator or on account of the intention or act of the owner, and *vice versa* . . . And as regards the act of the owner, things which previously were movable if they have been affixed to buildings for the sake not of temporary but of permanent use, whether they be timbers or pillars or statues, become part of the building and therefore immovable. Nay, more, if they are detached (from a building) with the intention of their being replaced, the same must be said (that is, they continue to be immovable), nor can it be doubted that if buildings are pulled down with the intention of restoring them, the materials (broken down) must also be classed under immovables in so far as they are suitable to be used in the erection of the new building. The same must be laid down with respect to movables which by the express intention (*destinatio*) of a paterfamilias have been devoted to a particular place, such as a house or estate, for the purpose of perpetual use, so that they will remain for the purpose of such perpetual use, even though they are not intended to be physically attached to immovables, or though, having been intended to be so attached, they have nevertheless not yet been so attached, provided

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that they have been left with the object of their being attached to such buildings or estates." According to *Voet*, the younger, therefore the intention with which a movable is attached to or detached from immovable property is of supreme importance and overrides every other consideration as to the nature of the property or the mode of its attachment.

Applying the law thus laid down to the present case, we find that the machinery in question was actually erected on the premises by plaintiffs for and on behalf of Jacobson, but that this was done under a hire-purchase agreement entered into between them, whereby it was specially agreed that the machinery should continue to be the property of the plaintiffs until fully paid for, and that if Jacobson made default in the payment of any instalment (a contingency which actually happened) the plaintiffs should be entitled to cancel the agreement and take possession of the machinery. Now, surely, if intention is of any importance at all in considering whether the machinery became immovable by being erected on the premises, then the intention of both plaintiffs and Jacobson was to attach the machinery to the ground subject to the terms of the agreement, and from these terms neither of them was at liberty to subsequently recede without the consent of the other. It has been suggested that the plaintiffs, in erecting the machinery, were acting merely as the agent of Jacobson and that it was the intention of Jacobson and not that of plaintiffs that is to be looked to; but this is, to my mind, wholly erroneous, as it formed part of the agreement that the erection was to be done by plaintiffs. Now in making this erection the plaintiffs did so clearly with the intention that the machinery should remain their property, and that intention could not be altered by anything, any *arriere pensee* that was passing in the mind of Jacobson. The intention of each was merely part and parcel of the intention of the other and the intention of one could not take effect without the intention of the other. The two intentions had to be *ad idem*. If this is so, it is impossible, for me at any rate, to understand the suggestion that, notwithstanding the agreement, Jacobson by some, to me incomprehensible, mental process may have intended that the machinery should become permanently or indefinitely attached to the soil. Surely, under all the circumstances of the case, adopting and adapting the words of the judgment in the *Victoria Falls Power*

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case, we must take the intention of Jacobson, as well as that of the plaintiffs, to have been that the machinery should only remain in the building so long as Jacobson continued to pay the instalments, and so long as plaintiffs did not cancel the agreement upon his failure to do so. The contingency was present to the mind of both Jacobson and plaintiffs, that the former might fail to pay the instalments, or some of them, and that the plaintiffs might consequently cancel the agreement and take back the machinery. That being so, the machinery was not erected permanently, and it cannot therefore, for the purposes of this case, be held to be portion of the soil, and, as such, fixed property. I am, therefore, of opinion that the appeal should be allowed.

WESSELS, Actg. A.J.A.: It is unnecessary for me to discuss fully the questions which have been raised in this appeal, as they are carefully dealt with in the judgment of my colleagues. The view that the machinery in this case ought to be treated as a movable is to my mind supported by very strong arguments, but on the whole I think the better view is that the machinery in question should be regarded as an immovable. I am therefore more inclined to the view of Sir WILLIAM SOLOMON than to that of the majority of my colleagues. My reasons for adopting the latter view are briefly as follows: I think that we must first determine whether an object placed upon the land *prima facie* forms part of the land or not. If it is firmly built into the land so that it cannot be moved without breaking it away then it must be regarded as having been placed there permanently, and is therefore a fixture which passes with the land, whatever the contractual relationship may be between the owner of the land and the owner of the movable. Even if the owner of the movable contracts with the owner of the land that the object is to be regarded as a movable, it will lose its character of movable if firmly built to the land, and it will pass to the purchaser of the land notwithstanding the contract. Machinery, therefore, which is sold on the hire-purchase system, and built into the land by the purchaser, becomes part of the land. If, however, the movable is not actually built into the land, but is so affixed to the soil that it may be moved physically, then we must consider how it has been affixed, and whether the nature of its fixture shows that it was intended that the movable should form part of the land.

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Here the question arises whether the parties intended that the movable should remain permanently upon the land and serve for its use. This intention can often be gathered from the contractual relationship between the parties. If the relationship is landlord and tenant, the presumption is against a permanent destination. If the contract is one of purchase and sale, the presumption depends upon the nature of the article and the way it is fixed. If I sell to you a heavy piece of machinery, intended to form part of your factory, I cannot be heard to say that I did not intend it to have a permanent destination. I sell the movable with a knowledge of its destination, and I must therefore be held to have intended the article to become a permanent fixture. Does it make any difference if the contract is a hire-purchase contract? On the one hand, it may be said that in such a case the owner does not intend to part with his property until he is paid, and therefore he retains his *dominium* in the movable; but, on the other hand, he knows that its destination is for the permanent use of the owner of the land, and that it is to be incorporated into the machinery of his factory, and therefore he must intend it for the permanent use on the land. He expects to be paid for it, otherwise he would not sell, and therefore he cannot be said to have intended that the object should be only temporarily on the land. By allowing the movable to be so used the seller tacitly holds out to a purchaser of the land that the movable he sold is for the permanent use of the land. If, therefore, the movable is of such a nature that it can be brought upon land for its permanent use, and if the purchaser so affixes it as to be for permanent use, it seems to me that it becomes a fixture. It appears to me that this is the meaning of Paul *Voet*, where he says that a windmill—although for the greater part it does not adhere to the soil—yet because it cannot easily be moved, it must be regarded as an immovable, for it is put there with the object and intention that it should permanently remain there. It is the owner of the soil who intends that the mill shall be placed there permanently, and the man who erects the mill cannot make its destination less permanent and alter its character as a fixture by an agreement with the owner that it is to remain his property until paid for. It does not appear to me to be an adequate answer to say that the owner of the article did not intend to lose his *dominium* in the article. There are many ways in which a person may lose

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his *dominium*, even though he does not intend to do so. If I sell a cart I know that it cannot be affixed to the soil, but if I sell machinery I know that it may have a permanent destination, and I cannot be heard to say that I never intended it to become a fixture.

This view, which seems to me to be supported by Roman-Dutch authority, brings our law into conformity with the law of England —no small advantage where two countries are so intimately linked in the trade of machinery.

Appeal accordingly allowed with costs (SOLOMON, J.A., and WESSELS, Actg. A.J.A. *diss.*).

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