

## NEW ENGLAND TELEPHONE AND TELEGRAPH Co. v. CITY OF FRANKLIN

SUPREME COURT OF NEW HAMPSHIRE, 1996  
141 N.H. 449, 685 A.2D 913

<http://caselaw.findlaw.com/scripts/getcase.pl?court=NH&vol=9611\netel&invol=1>

**FACTS** The plaintiffs, New England Telephone and Telegraph Company (NET), Merrimack County Telephone Company (MCT), and Contoocook Valley Telephone Company (CVT), are public utilities providing telecommunications services in New Hampshire. The plaintiffs com-

menced separate actions for abatement of real estate taxes against the City of Franklin and fifteen other municipalities. NET disputed the defendants' treatment of its communications equipment as real estate, thereby challenging their authority to tax its equipment. The communications

equipment at issue involves two basic categories: (1) distribution plant, which includes telephone poles, wires, and underground conduits and (2) central office equipment, consisting of frames, switches, and other power equipment. The superior court granted the plaintiffs' motion for summary judgment.

In support of the summary judgment motion, the plaintiffs submitted affidavits setting forth the following facts. All of the plaintiffs' poles, wires, and underground conduits located in the municipalities are placed either on public rights of way or on private property owned by third parties. Approximately 90 percent of the poles are located on public rights of way pursuant to licenses issued by the State or the municipalities. The remaining ten percent of the poles are placed on private property either by consent of the property owner or pursuant to an easement. The poles, wires, and underground conduits are installed in a manner that permits and facilitates their removal and relocation. Consequently, removal of that equipment is neither complicated nor time consuming, and does not harm the underlying land or change its usefulness. The plaintiffs remove and relocate their poles, wires, and underground conduits at the request of the State or the applicable private landowner or municipality. In obtaining the licenses, consents, or easements for their poles, wires, and underground conduits, the plaintiffs insist on maintaining ownership of that equipment and refuse any requests to make the equipment a permanent part of the realty. The plaintiffs' central office equipment, most of which is located in buildings owned by the plaintiffs, is both portable and designed to permit removal and relocation. The plaintiffs' practice and policy is to move pieces of central office equipment among buildings in response to changes in technology or system use. Although certain frames are bolted to the buildings, their removal is achieved without affecting the usefulness of the buildings or the frames themselves. When the plaintiffs ultimately vacate a building used as a central office, they remove all of their equipment and merely transfer the building "as a shell." The vacated building, though devoid of central office equipment, retains utility for other commercial or professional uses. The defendants did not dispute the specific facts set forth by the plaintiffs.

**DECISION** Judgment affirmed.

**OPINION** Horton, J. Accordingly, if the items of communications equipment "are real estate \*\*\*", they are taxable unless exempted by some other provision." [Citation.]

The defendants primarily argue that the superior court erred by refusing to characterize the communications equipment as fixtures and, therefore, by failing to treat the equipment as realty. "A chattel loses its character as per-

sonalty and becomes a fixture and part of the realty when there exists an actual or constructive annexation to the realty with the intention of making it a permanent accession to the freehold, and an appropriation or adaptation to the use or purpose of that part of the realty with which it is connected." [Citation.] A mixed question of law and fact, [citation] whether an item of property is properly classified as either personalty or a fixture turns on several factors, including: the item's nature and use; the intent of the party making the annexation; the degree and extent to which the item is specially adapted to the realty; the degree and extent of the item's annexation to the realty; and the relationship between the realty's owner and the person claiming the item. [Citations.] \*\*\*

In this case, the items of communications equipment did not constitute fixtures. Each of the relevant factors supports the superior court's holding that the property remained personalty. The poles, wires, and central office equipment, though placed in the ground or bolted to the buildings, were readily removable and transportable without affecting the utility of the underlying land, the buildings, or the equipment itself. Because removal of the equipment would not render the land or buildings "incomplete and unfit for use," and because the equipment could be "equally useful and adapted for general use elsewhere," the communications equipment did not constitute fixtures. [Citations.] In addition, the very nature of telephone poles and wires, as well as their use by the plaintiffs in connection with integrated telecommunications systems, belies the proposition that the equipment became a permanent and essential part of the underlying realty so as to pass by conveyance with it. [Citation.] Furthermore, the statute governing the licensing of telephone poles and wires on public ways specifically provides for their removal on ten days' notice and therefore establishes, as a matter of law, their impermanence. [Citation.] Finally, the defendants never challenged the plaintiffs' asserted intent to maintain the communications equipment as personalty.

The defendants' other arguments on the fixtures issue are not persuasive. First, the defendants' evidence concerning the installation, durability, and longevity of the distribution equipment failed to raise a genuine issue of material fact regarding the status of the property under our law of fixtures in light of the defendants' failure to contradict the specific facts in the plaintiffs' affidavits. [Citations.] Similarly, the defendants' conclusory assertions concerning the "permanent" nature of the communications equipment did not satisfy their burden in opposing the summary judgment motion. [Citation.] \*\*\*

**INTERPRETATION** A fixture is personal property so firmly attached to real property that an interest in it arises under real property.

**ETHICAL QUESTION** Did the court fairly decide this case? Explain.

**CRITICAL THINKING QUESTION** When should personal property become a fixture? What criteria should be used in the determination? Explain.